QUEEN MARY

UNIVERSITY OF LONDON

RETAIL INVESTOR PROTECTION IN THE HELLENIC LEGAL ORDER

UNDER THE LIGHT OF EU LAW

By

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THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS

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Abstract

This thesis seeks to examine the status of retail investors' protection in the Hellenic legal order, under the light of EU law; focusing on investment firm failure as a result of tort, it investigates whether the EU and Hellenic normative systems aim at and achieve effective protection of retail investors. It explores in particular the issue of *ex lege* liability of compensation schemes and the issue of non-contractual liability of supervisory authorities.

In case of intermediary failure the minimum protection is awarded by EU law in the form of *ex lege* compensation does not establish a coherent system, and the legal status of retail investors *vis-à-vis* depositors remains uncertain in many respects. The ECJ has denied application of the *acquis* on individual protection to depositors in *Peter Paul*, with regard to non-contractual liability of supervisors, but the application of its reasoning in the area of investment services is doubtful. The new EU finance law and architecture does not fundamentally affect these conclusions.

On the other hand, retail investor protection may validly be considered as an autonomous aim of finance law in the Hellenic legal order. Despite inefficiencies connected also to the structure of relevant EU rules transposed, and despite the incoherence of the various national rules on the liquidation of financial intermediaries and the operation of compensation schemes –in particular with regard to claim verification– yet effective protection of retail investors may *a priori* be achieved through the existing national judicial mechanism.

This dynamic is demonstrated by recent case-law on protection of retail investors in the context of *ex lege* compensation; yet it seems to lessen in the area of non-contractual liability of supervisors. Even though *ex lege* immunity of supervisors has been denied by case-law, the effectiveness of protection has been mitigated by the strict substantive criteria formulated.

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ABBREVIATIONS

Abbreviations (commonly in use)

AG	Advocate General
All ER	All England Law Reports
ASE	Athens Stock Exchange
BBRD	Bank Recovery and Resolution Directive (proposed)
BBRR	Bank Recovery and Resolution Regulation (proposed)
BCBS	Basle Committee on Banking Supervision
BIICL	British Institute of International and Comparative Law
BIS	Bank for International Settlements
BoD	Board of Directors
CBD	Consolidation Banking Directive: Directive 2000/12/EC
CCP	Common Commercial Policy
CDE	*Cahiers de Droit Européen*
CEBS	Committee of European Banking Supervisors
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors
CESR	Committee of European Securities Regulation
Cf	*Confer*
Ch	Chapter
CJEL.	*Columbia Journal of European Law*

CLJ	*Cambridge Law Journal*
CLP	*Current Legal Problems*
CMLRev.	*Common market Law Review*
COB	Conduct of Business
DGS	Deposit Guarantee Scheme
DGSD	Deposit Guarantee Schemes Directive: Directive 94/19/EC
EBL	*European Business Law*
EBLR	*European Business Law Review*
ECLR	*European Competition Law Review*
ECU	European Currency Unit
EEA	European Economic Area
EEC	European Economic Community
EC	European Communities
ECB	European Central Bank
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECR	European Court Reports
EFTA	European Free Trade Area
ELR	*European Law Review*
EMI	European Monetary Institute
EMS	European Monetary System
EMU	Economic and Monetary Union
EBA	European Banking Authority
EFSF	European Financial Stability Facility
EIOPA	European Insurance and Occupational Pensions Authority

EP	European Parliament
ESA	European Supervisory Authority
ESCB	European System of Central Banks
ESFS	European System of Financial Supervision
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
et al.	*et alii, et aliae, et alia*
e.g.	*exempli gratia*
etc.	*et cetera*
et seq.	*et sequens, et sequentia*
EU	European Union
FDIC	Federal Deposit Insurance Corporation (US)
FSA	Financial Services Authority (UK)
FSAP	Financial Services Action Plan
FSMA	Financial Services and Markets Act (UK)
FSB	Financial Stability Board
FSF	Financial Stability Forum
FSMA	Financial Services and Markets Act 2000 (UK)
G-7	Group of Seven
G-10	Group of Ten
G-20	Group of Twenty
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
IADI	International Association of Deposit Insurers
ibid.	*ibidem*

ICLQ	*International and Comparative Law Quarterly*
ICSD	Investor Compensation Scheme
ICSD	Investor Compensation Schemes Directive: Directive 97/9/EC
i.e.	*id est*
IFLR	*International Financial Law Review*
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
ISD	Investment Services Directive: Directive 93/22/EEC
JIBL	*Journal of International Banking Law*
JIBLR	*Journal of International Banking Law and Regulation*
JIBR	*Journal of International Banking Regulation*
JIEL	*Journal of International Economic Law*
JIFM	*Journal of International Financial Markets*
JIFRC	*Journal of International Financial Law and Compliance*
LOLR	Lender of Last Resort
MiFID	Markets in Financial Instruments Directive: Directive 2004/39/EC
MJ	*Maastricht Journal*
MLR	*Modern Law Review*
MS	Member State
n	note
NATO	North Atlantic Treaty Organization
nyr	not yet reported
OJ	Official Journal of the E(E)C
op. cit.	*opere citato*
OUP	Oxford University Press

p	page
para.	paragraph
SA	*Société Anonyme*
SEA	Single European Act
SEC	Securities and Exchange Commission (US)
SGP	Stability and Growth Pact
SRB	Single Resolution Board
SRM	Single Resolution Mechanism
TFEU	Treaty for the Functioning of the European Union
WTO	World Trade Organization
YEEL	*Yearbook of European Environmental Law*
YEL	*Yearbook of European Law*

Abbreviations (particular to the present study)

Courts, codes (legislation), legal persons

(all references to the Hellenic legal order)

Abbreviation	Complete text	In Greek
ADECH	Athens Derivatives Clearing House SA	*Εταιρεία Εκκαθάρισης Συναλλαγών Επί Παραγώγων ΑΕ* (ΕΤΕΣΕΠ ΑΕ)
AEDAK	Anonyme Etaireia Diaheirises Amoivaion Kefalaion = *Société Anonyme* for the Management of Mutual Funds	*Ανώνυμη Εταιρεία Διαχείρισης Αμοιβαίων Κεφαλαίων* (ΑΕΔΑΚ)
AELDE	Anonyme Etaireia Lepses kai Diavivases Entolon = *Société Anonyme* for the Receipt and Transmission of Orders	*Ανώνυμη Εταιρεία Λήψης και Διαβίβασης Εντολών* (ΑΕΛΔΕ)
AEED	Anonyme Etaireia Ependytikes Diamesolaves = *Société Anonyme* for Investment Services Intermediation	*Ανώνυμη Εταιρεία Επενδυτικής Διαμεσολάβησης* (ΑΕΕΔ)
AEPEY	Anonyme Etaireia Parohes Ependytikon Yphresion = *Société Anonyme* for the Provision of Investment Services	*Ανώνυμη Εταιρεία Παροχής Επενδυτικών Υπηρεσιών* (ΑΕΠΕΥ)
ALC	Act of Legislative Content	*Πράξη Νομοθετικού*

		Περιεχομένου
ACFI	Administrative Court of First Instance	
ACA	Administrative Court of Appeals	
BGG	Bulletin of the Government Gazette	*Φύλλον Εφημερίδος της Κυβερνήσεως* (*ΦΕΚ*)
CCA	Civil Court of Appeals	
CCFI	Civil Court of First Instance	
CL	Codified Law	
CompL	Compulsory Law	*Αναγκαστικός Νόμος*
CrimCA	Criminal Court of Appeals	
GG	Government Gazette	Official Journal of the Government in the Hellenic legal order / *Εφημερίς της Κυβερνήσεως*
HCC	Hellenic Civil Code	
HCAP	Hellenic Code of Administrative Procedure	
HComL	Hellenic Commercial Law	
HCrimC	Hellenic Criminal Code	
HCCP	Hellenic Code of Civil Procedure	
HCPP	Hellenic Code of Penal Procedure	
HCMC	Hellenic Capital Markets Commission	
HDGF	Hellenic Deposit Guarantee Fund	
HDIGF	Hellenic Deposit Investor Guarantee Fund	
HCon	Hellenic Constitution	
HIC	Hellenic Insolvency Code	
HPC	Hellenic Penal Code	
HSACJ	Hellenic Supreme	*Symvoulio tes Epikrateias*

	Administrative Court of Justice	(*Συμβούλιο της Επικρατείας*)
HSCCJ	Hellenic Supreme Civil Court of Justice	*Areios Pagos* (*Άρειος Πάγος*)
HSCrimCJ	Hellenic Supreme Criminal Court of Justice	*Areios Pagos* (*Άρειος Πάγος*)
HSSCJ	Hellenic Supreme Special Court of Justice	Anotato Eidiko Dikasterio, Ανώτατο Ειδικό Δικαστήριο
ILCC	Introductory Law to the Civil Code	*Εισαγωγικός Νόμος Αστικού Κώδικα*
JGF	Joint Guarantee Fund	Συνεγγυητικό Κεφάλαιο Εξασφάλισης Επενδυτικών Υπηρεσιών
LCS	Legal Council of the State	*Νομικό Συμβούλιο του Κράτους*
LD	Legislative Decree	*Νομοθετικό Διάταγμα*
MJ	Multi-Judge	
PD	Presidential Decree	
RD	Royal Decree	
SJ	Single-Judge	

Legal Journals (published in the Hellenic language)

<u>**Abbreviation**</u>	<u>**Complete title and translation in English language**</u>	<u>**Title in the Hellenic language**</u>
DEE	Dikaio Epiheireseon kai Etaireion = Business and Company Law	*Δίκαιο Επιχειρήσεων και Εταιριών* (ΔΕΕ)
EEurD	Elleneke Epitheorese Europaikou Dikaiou = Hellenic Review of European Law	*Ελληνική Επιθεώρηση Ευρωπαϊκού Δικαίου* (ΕΕΕυρΔ)

EEmpD	Epitheorese Emporikou Dikaiou = Commercial Law Review	Επιθεώρηση Εμπορικού Δικαίου (ΕΕμπΔ)
EllDik	Ellenike Dikaiosyne = Hellenic Justice	*Ελληνική Δικαιοσύνη* (ΕλλΔνη)
EphemDD	Ephemerida Demosiou Dikaiou = Public Law Journal	*Εφημερίδα Δημοσίου Δικαίου* (ΕφΔΔ)
EpiskED	Episkopese Emporikou Dikaiou = Commercial Law Survey	*Επισκόπηση Εμπορικού Δικαίου* (ΕπισκΕΔ)
ETrAxHrD	Epitheorese Trapezikou Axiografikou Hrematisteriakou Dikaiou = Banking Securities and Capital Markets Law Review	*Επιθεώρηση Τραπεζικού Αξιογραφικού και Χρηματιστηριακού Δικαίου* (ΕΤρΑξΧρΔ)
Harmen.	*Harmenopoulos*	*Αρμενόπουλος*
HreDik	Hrematisteriako Dikaio = Capital Markets Laaw	*Χρηματιστηριακό Δίκαιο* (ΧρηΔικ)
Hrid	Hronika Idiotikou Dikaiou = Private Law Chronicles	*Χρονικά Ιδιωτικού Δικαίου* (ΧρΙΔ)
Isocrates	Isocrates Law Database	«*Ισοκράτης*» Τράπεζα Νομικών Πληροφοριών
Nomos	Nomos Law Database	«*Νόμος*» Τράπεζα Νομικών Πληροφοριών
NoV	Nomiko Vema = Law Tribune	*Νομικό Βήμα* (ΝοΒ)

NOTE

References follow the Harvard citations system.

References to legal theory that has been published in the Hellenic language have been translated by us (except where otherwise noted) for the purposes of this study and are marked in the text for practical purposes by an asterisk [*] in their title.

Hellenic legislation has been translated into English by us (except where otherwise noted).

All omissions and errors in translation are ours only.

The terms “Hellas” and “Hellenic” have been preferred to “Greece” and “Greek” respectively.

The pronouns “he”/“him” are used throughout this study for practical reasons as equivalent to “she”/“her”.

This study refers to law as stated on March 31, 2014.

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INTRODUCTION

The question of retail investor protection in the Hellenic legal order, under the light of EU law, originated from a number of judicial decisions mostly of the last decade which have considered cases relating to financial intermediary failure, especially as a result of fraud and misappropriation of fundsIn these disputes, claimant retail investors invoked applicable national and EU law in order to be compensated, filing actions against the competent fund which had denied compensation (on the ground that their claims were not proved by the books and records of the failed intermediary, or did not relate to covered transactions) as well as against the competent supervisory authorities which they considered liable for breach of their obligation to exercise their duties effectively.

In proceeding to examining the legal regime of retail investor protection in the Hellenic legal order, under the light of EU law, it will be important to first take into account the sociopolitical and legal context of the question of research, in order then to define and delimitate it.

LEGAL AND HISTORICAL CONTEXT OF THE QUESTION OF RESEARCH

HELLENIC LEGAL TRADITION AND FOUNDATIONS, MAIN FEATURES OF THE HELLENIC LEGAL ORDER

The Hellenic Republic was recognised as an independent, sovereign State in 1830.[1] In the newly established Hellenic legal order were evident the influences of the Byzantine (Hellenistic-Roman) legal tradition, such as *Hexabiblos* by *Harmenopoulos*, contemporary French legal works, such as the Napoleonic Code of Commerce of 1807, and the German legal tradition of the *Pandectists*.[2]

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[1] The first Hellenic Constitutions which were adopted during the Hellenic War of Independence of 1821 - 1827 (Constitution of Epidaurus, 1822; Constitution of Argos, 1823; Constitution of Troizena, 1827) and were characterised by democratic and liberal ideas, aspired by the French *Déclaration des droits de l'Homme et du Citoyen* (1789. For a general overview, see ALIVIZATOS, N. (1979) *Les institutions politiques de la Grèce à travers les crises 1922 – 1974*, Paris; SPILIOTOPOULOS, E. and MAKRYDIMITRIS, A. (2001) *Administration publique en Grèce*, Athens. The new Hellenic State was recognised by the London Protocol of 3 February 1830. The first Constitution of the new Hellenic State was that of 1844, which provided for a regime of constitutional Monarchy in Hellas.

[2] In the first Hellenic Constitutions, as in the legal system operating in Hellas at the time, traditional notions of ancient Hellenic, as well as Hellenistic, Roman and Byzantine law, could be traced. Ancient Hellenic law included substantive as well as

The political and constitutional life of the Hellenic State has been unstable, until recent times.[3] Modern history is characterised by decades of political unsteadiness and wars. Following the end of World War II (1939 – 1945) during which Hellas was under occupation by the Axis forces (1941 – 1944), and the Hellenic Civil War (1945 – 1949), Hellas joined the European Recovery Program (ERP, also known as the "*Marshall Plan*")[4] and in 1952 the North-Atlantic Treaty Organization (NATO) established by the

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procedural rules (*e.g.* the lawmaking by *Lycurgus* of Sparta, 650 B.C., *Dracon* of Athens, 621 B.C., and *Solon* of Athens, 594 B.C.), recognising contractual freedom and a common commercial law; see YIANNOPOULOS, A. (2008), in KERAMEUS, K. and KOZYRIS, P. (ed.) *Introduction to Greek Law*, Kluwer Law International, Ant. N. Sakkoulas; BISCARDI, A. (1982) *Diritto Greco Antico*, Milano; De ROMILLY, J. (2002) *La loi dans la pensée grecque*, 2nd edition, Paris. Following the introduction of Roman law, the Hellenic (and Hellenistic which emerged from it) and the Roman legal systems coexisted, leading gradually to the development of a Hellenic-Roman law (*Ius Graeco-Romanum*), as presented *e.g.* in Emperor Justinian's *Novellae* of 6th century A.D. The legal tradition created was passed on to the Eastern Roman (Byzantine) Empire, where it was also taught in state law schools such as the Law School of Constantinople founded in 1045 A.D. by Emperor Constantine IX. Legal *compedia* and codifications of law were issued. The *Hexabiblos* by Harmenopoulos was issued in 1345 A.D. and was still used in areas of Hellas until 1945 (upon which time HCC was introduced). See YIANNOPOULOS, A., *op. cit.*, wherein further references.

[3] A new Constitution was introduced in 1864 following a revolution; it was revised in 1911 and replaced in 1927. Monarchy was abolished in 1927 but restored in 1935. See ALIVIZATOS, N., *op. cit.*

[4] The ERP was prepared and organised in 1948 by the Organisation for European Economic Co-operation (OEEC) established in the same year. In 1961 the Organisation for Economic Co-operation and Development (OECD) replaced OEEC. See www.oecd.org

North Atlantic Treaty (1949).[5] In the same year, a new Constitution was introduced, re-introducing constitutional Monarchy.

The Hellenic Republic became member of the Council of Europe and ratified ECHR and the First Additional Protocol in 1953.[6] Further, in 1961 an Association Agreement was concluded between the Hellenic Republic and EEC MSs. However, another military dictatorship, from 1967 to 1974, abolished democracy again, and was accompanied by violations of human rights and freedoms, and resulted *inter alia* in the suspension of many regulations of the Association Agreement and the exit of Hellas from the Council of Europe (1969). Following restoration of democracy,[7] Hellas adopted a new Constitution in 1975.[8]

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[5] See www.nato.int .

[6] Law 2329/1953, BGG vol. A no. 68.

[7] The fall of the 1967 – 1974 dictatorship in Hellas was accelerated by the military invasion in Cyprus in 1974; see United Nations General Assembly Resolution 3212 (XXIX) of 01.11.1974 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3212(XXIX)&Lang=E&Area=RESOLUTION; United Nations Security Council Resolution 365 of 13.12.1975 available at http://unscr.com/en/resolutions/365. Following the fall of the dictatorship, Hellas was re-admitted to the Council of Europe and applied for membership of the EEC in 1975.

[8] For a general overview, see HRYSOGONOS, K. (2003) *Constitutional Law*, Athens - Thesaloniki: Sakkoulas; MANITAKIS, A. (2004) *Hellenic Constitutional Law*, Athens - Thesaloniki: Sakkoulas; MAVRIAS, K. (2005) *Constitutional Law*, 4th edition, Athens - Komotini: Sakkoulas; PANTELIS, A. (2005) *Constitutional Law*, Athens : Sakkoulas; SPYROPOULOS, P. (1995) *Constitutional Law in Hellas*, The Hague - London - Boston : Kluwer Law International.

The Hellenic Republic became member of the EEC on 01.01.1981.[9] In 2001 it was accepted in the Euro-area and adopted the Euro as national currency, and undertook to observe *inter alia* the Stability and Growth Pact. In 2005 the Hellenic Parliament ratified the Treaty establishing a Constitution for Europe.[10]

The 1975 Hellenic Constitution aims at improving the separation of the executive, the legislature and the judicature, in particular with a view to enhance fundamental and individual rights' protection; it provides for certain constitutional rules which may not be amended or repealed,[11] and for an indirect horizontal control of constitutionality of law (in the assessment of whether any provision under examination is compatible with the Constitution) by all courts of law.[12]

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[9] Act of Accession ratified by Law 945/1979, BGG vol. A, no. 170. See CHRISTIANOS, V. (2008) 'Application of Community law in Greece', in KERAMEUS, K. and KOZYRIS, P. (ed.) *Introduction to Greek Law*, Kluwer Law International, Ant. N. Sakkoulas; KERAMEUS, K. and KREMLIS, G. (1988) 'The Application of Community Law in Greece 1981 - 1987', *CMLRev*, vol. 25, pp. 141 - 175; SKOURIS, V. (1985) 'Community Law in Hellenic Legislation and Court Practice. Basic Issues', *EEmpD*, vol. 5, pp. 3 - 15.

[10] Draft Treaty Establishing a European Constitution, http://european-convention.eu.int ; Ratified by Law 3341/2005, BGG vol. A no. 115.

[11] HCon, Article 110(1), providing that constitutional provisions are subject to amendment except for those that define the form of the regime, as presidential and parliamentary democracy, and the provisions on the respect and protection of human value, equality, freedom and the separation of powers, Article 2(1), Article 4(1), Article 4(4), Article 4(7), Article 5(1), Article 5(3), Article 13(1), and Article 26, respectively.

[12] HCon, Article 93(4). If provisions of laws are found unconstitutional, they may remain in force but they are not applied; HCon, Article 93(4). In cases of disagreement

The Hellenic State is organised according to the 1975 Constitution as a representative, parliamentary democracy (monarchy was abolished in 1974)[13] operating under the rule of law,[14] bound to protect and respect human rights,[15] and operating as a welfare State.[16]

Sovereignty of the people[17] and the parliamentary control system[18] entail that the legislative power is exercised only by the legislature while the executive (the President

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among the supreme courts of justice, the HSSCJ is competent to decide on substantive constitutionality and the interpretation of acts of Parliament, and to declare a statutory provision as null and void on the ground of unconstitutionality, its decision being binding *ex nunc* or *ex tunc* and *erga omnes;* HCon, Article 100; Law 345/1976. See DAGTOGLOU, P. (1989) 'The judicial review of constitutionality of laws', *European Review of Public Law*, pp. 309 - 328; SPILIOTOPOULOS, E. (1983) 'Judicial review of legislative acts in Greece', *Temple Law Quarterly*, vol. 56, pp. 463-502; STATHOPOULOS, M. (1991) 'Reviewing the Constitutionality of Laws', *European Review of Public Law*, pp. 87 - 123.

[13] HCon, Article 1.

[14] HCon, Article 1, Article 2, Articles 4 – 25, Article 26, Article 49, Article 50, Articles 84 – 87, Article 95 *e.a.*

[15] HCon, Article 2(1).

[16] HCon, Article 25 (1), providing that "*the rights of man as an individual and as a member of society and the principles of the welfare state and rule of law are guaranteed by the State*".

[17] HCon, Article 1(2).

[18] HCon, Article1, Articles 37 – 41.

of the Republic and the Government) may enact legal rules only upon formal statutory delegation.[19]

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[19] According to the HCon, the legislative power is exercised by the Parliament and the President of the Republic, who promulgates and publishes the acts of Parliament. Distinction is made between a "formal law" (*i.e.* a legal rule issued by the Parliament) and a "substantive law" (*i.e.* a rule issued by either the legislature or the executive, including all administrative authorities, which is legally binding and generally applicable, such as regulation). In certain cases legislative delegation is not allowed by the Constitution, as in the case of tax laws (HCon, Article 78). When the adoption of a formal law is not required, legislative delegation of power to the executive is allowed. Delegation is exercised by the executive in the form of regulatory acts issued by the Government and legal persons of public law. Relevant is the problematic of the constitutionality of delegating by law wide competences i.e. when legislative delegation is not special and specific as required by HCon, Article 43 (2) 2; see indicatively HSACJ (Plenary) 235/2012, *Isocrates*; HSACJ 4212/2013, *Isocrates*. Upon specific delegation by law or in case of framework laws, the President of the Republic may exercise delegated legislative power by issuing Presidential Decrees (PDs); HCon, Article 43 and Article 78(5); see indicatively HSACJ 2266/2013, *Isocrates*. Also, under specific strict conditions the President of the Republic may issue Acts of Legislative Content (ALC) even without prior legislative delegation in cases of emergent and unforeseen need, which are valid *ab initio* if ratified by the Parliament –if not submitted to the Parliament for ratification within the relevant time limit and not ratified they are valid only for the past; HCon, Article 44. In Hellenic administrative law, a legally binding decision of an administrative authority is considered an "administrative act", and which can be the object of administrative or judicial review. Hellenic administrative law is based on general principles of law as developed in particular by the HSACJ, such as the principle of legality (the rule of law) according to which all administrative action has to be in conformity with the higher in hierarchy rules of law, the principles of fair administration, of public interest, of impartiality, of proportionality (included also in HCon, Article 25 following the Constitutional Amendment of 2001), of the protection of legitimate expectations of the individual *e.a.* The influence in particular of the case-law produced by the French *Conseil d' Etat* is manifested in many developments in Hellenic administrative law theory and case-law. For a general overview see

However, the Head of the supreme courts of justice are designated by the Government.[20]

The right of access to justice is recognised as a fundamental right, while courts of law are organized in two main branches, civil and criminal justice on the one hand and administrative on the other.[21]

DAGTOGLOU, P. (2004) *General Administrative Law*, Athens-Komotini: Sakkoulas; GERONTAS, A., LYTRAS, S., PAVLOPOULOS, P., SIOUTI, G. and FLOGAITIS, S. (2004) *Administrative Law*, Athens – Komotini : Sakkoulas; SPILIOTOPOULOS, E. (2004) *Droit administratif hellénique*, 2nd edition, Athens-Brussels; SPILIOTOPOULOS, E. and MAKRYDIMITRIS, A. *op. cit.*

[20] HCon, Article 90(5). See also HSSCJ (Plenary) 114/2012, *NoV* (2012) 730.

[21] HCon, Article 20. Courts of justice in the Hellenic legal order are organised as administrative, civil and criminal; HCon, Article 93. Judges serve either in the administrative Courts or in the civil and criminal Courts (the civil and criminal branch of justice being interconnected, with judges sitting in civil Courts sitting also in criminal ones). The HSACJ has both advisory and judicial competence as a court of annulment; HCon, Article 94, Article 95; PD 18/1989. The lower administrative courts of justice (CCFI and ACA) have only judicial competences, which however may be either substantive, on points of law only, or both substantive and on points of law; they are competent for the adjudication of remedies against administrative acts, but also for certain pecuniary claims against the State and public legal persons, as in the case of actions for compensation on grounds of State liability in tort; see *e.g.* Law 1406/1983, Law 702/1977. The HSSCJ is competent to adjudicate final appeals on points of law only, in both civil and criminal cases. Lower civil and criminal Courts of justice are competent to decide on the substance of civil disputes and criminal law cases.

In our view, the overall structure of the Hellenic legal order is characterised by a co-existence of rules of different normative formation and legal origin, due to the influence historically exercised from various legal systems (such as mainly the Hellenic-Roman, the French and the German).

Further, the distinction of Hellenic law in two main areas, of public (mainly, constitutional, administrative and criminal) *vis-à-vis* private (mainly, civil, company and commercial) law, is perplexed *inter alia* by questions regarding the nature of rules as of public order, which may be taken into account by national courts *ex officio*, compulsive law (*ius cogens*) rules, which are not subject to contract, as well as the distinction between procuratory and inquisitorial systems of procedure and evidence, which is further complicated by the interrelation of civil, criminal and administrative law proceedings due to the normative structure of the Hellenic legal order. [22]

Relevant is the issue of stay of procedures and difference of prescriptive periods with regard to the nature of the claim and of the addressee of the claim.[23]

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[22] Administrative courts of law are bound by irrevocable decisions of criminal courts as to the culpability of criminally accused persons; HCAP Article 5(2). Acquittal of the accused by the criminal courts of law is not binding for administrative courts with regard to administrative law issues, where the illegal behaviour constitutes both a crime and an administrative infringement; see indicatively HSACJ 2067/2011 and HSACJ 3606/2004.

[23] In the Hellenic legal order, only claims (and not rights) are not subject to prescription; HCC Article 247. Relevant is the problematic on preemption, meaning a time fixed for the exercise of a right; HCC Article 279. The rules on preemption are of public order

Moreover, an important issue relating to access of individuals to justice is the precision of remedies, in particular with regard to their factual basis. Until recently relevant legislation and case-law were strict in this regard.[24]

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and are applied by courts of law *ex officio*; HCC Article 280. Prescription commences from the day a claim may be judicially pursued, as a general rule; HCC Article 251 *et seq.* Specific rules govern suspension, interruption, accrual of prescription and relevant issues; HCC Article 256 *et seq.*, Article 260 *et seq.*, Article 272 *et seq.*, respectively. Rules on prescription are *ius cogens*; HCC Article 277, Article 278. Prescription is interrupted in several ways, in practice by the filing of an action by the claimant; in order for the filing to be complete, process has also to be served; HCC Article 261, and HCCP Article 215. Hellenic law provides several prescriptive periods, depending on the nature of a claim: the general rule being the prescriptive period of twenty years, a shorter five-year prescription period is established for a number of civil law claims, including compensation on ground of liability for tort; HCC Article 249, Article 250. Further, short prescription periods are provided by specific rules. Such a rule provides that claims relevant to orders and transactions in securities between private parties have a one-year prescriptive period; the ensuing question is whether this short prescription encompasses not only contractual claims, but claims arising in tort as well. It has been rules that the prescription for claims based on capital markets contract according to Law 3632/1928 Article 15(6) is annual: HSCCJ (Plenary) 16/2008, *DEE* 11/2008; HSCCJ (Plenary) 28/2007, *DEE* 3/2007. Also, that the annual prescription of Law 3632/1928 Article 15 is not applicable on secondary transactions, such as the order to purchase or sell shares: HSCCJ 264/2009, *DEE* 2/2009; HSCCJ 1285/2012, *HreDik* 3/2012; HSCCJ 1928/2006, *HreDik* 2/2007; Athens CCA 3377/2004, *DEE* 11/2004; *contra* HSCCJ (Plenary) 16/2008, *DEE* 1/2009, ruling that the annual prescription of Law 3632/1928 Article 15 is applicable on main and secondary capital market transactions. *Cf.* Thessaly CCA 2855/2004, ruling that the annual prescription of Article 25(6) of Law 3632/1928 is applicable on both main and secondary transactions. When the claim is based on tort, the annual prescription is not applicable; HSCCJ 1376/2011, *HreDik* 3/2011; Athens CCA 4334/2011; Athens CCA 4525/2013, *EEmpD* (2004) p. 155.

[24] See indicatively GRYLLI, I. (2011) 'The Vagueness of the Factual Basis of a Lawsuit. An Approach to the Notion also on the Occasion of the Modifications Brought

In order to analyse the legal issues relating to retail investor protection in the Hellenic legal order Hellas under the light EU law, it is useful to first examine the context in which claims for compensation were brought by retail investors against compensation schemes and supervisory authorities.

HISTORICAL BACKGROUND TO THE QUESTION OF RESEARCH

In the 1990's the Athens Stock Exchange (ASE) saw rapid development especially in trading by retail investors. The "bubble effect" that was produced ended in end-1999, when stock prices in the ASE collapsed. During the same period, a few investment firm failures took place,[25] sometimes as a result of fraud and other torts committed against their clients.[26]

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by Law 3394/2011 to the [HCCP]*', *NoV*, vol. 59, no. 7, p. 1495; MAKRIDOU, K. (2007) *The Vague Lawsuit and the Possibility of Curing it**, Athens: Sakkoulas; RIGAS, V. (2011) 'The Instructing Function of the Court in Completion of the Vague Lawsuit, Arguments, Appeals, etc., according to Article 236 of the [HCCP], after its Modification by Law 3394/2011*', *NoV*, vol. 59, no. 8, p. 1793. See also HCtHR decision of 06.12.2011 in case *Anastasakis* v *Greece* (application 41959/08, nyr); HCtHR decision of 13.01.2011 in case *Evangelou* v *Greece* (application 44078/07, nyr); HCtHR decision of 15.10.2009 in case *Roumeliotis* v *Greece* (application 53361/07, nyr).

[25]An important study on the "Description and assessment of the national investor compensation schemes established in accordance with Directive 1997/9/EC" was concluded by OXERA Consulting Ltd in January 2005, on appointment by the

European Commission. This comparative study takes into account the transposition of ICSD in fifteen (15) EU Member States, including the Hellenic Republic, and analyses in particular aspects of the national system of investor protection relating to the structure and operating arrangements, the funding of schemes, and the risks covered in each national legal order. The definition of the notion of "investor" in each national legal order is also taken into account, as the type of investment services covered, the type of loss covered, and the relevant claim procedure. Overall, the report notes that in most Member States there had been little or no experience of investment firm failures (until April/May 2004), with the exception of the United Kingdom where in the period from 1999 to 2003 there had been 1.609 cases of firm failures (due to the participation also of investment advisors in the UK scheme and the coverage also of negligent investment advice and investment management by it). On the contrary, the report notes only 5 cases of investment firm failure in Hellas in the same period (1999 to 2003), while there have been no available data on the total claims, the highest number of claims for a failure, or the highest total payout for a failure in Hellas (*ibid*., p. 41). The report portrays the status of investor protection by national compensation schemes it analyses, as it was at the time of the relevant investigation, with regard to the aspects it mainly took into account following both a qualitative and a quantitative methodology (*infra*, note 86).

[26] In certain cases the failed investment firms were found to be operating as "*Ponzi*" schemes, and more generally as a result of fraud and embezzlement committed by persons controlling these firms against their clients; see *Tetractys and Astraia* and *Worldwide Investment Services* cases, *infra* Ch VII.2.2. The term "*Ponzi* scheme" refers to "[…] *an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors.*"; see SEC, at http://www.sec.gov/answers/ponzi.htm, where it is also noted that **"***Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk. In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors to create the false appearance that investors are profiting from a legitimate business*". "*Ponzi schemes*" are different to "*pyramid schemes*", as the latter fraudulent schemes usually require participants to make a payment and also act as distributors recruiting other participants to make payments and further act as distributors (*ibid.*).

Such cases gave rise to judicial disputes concerning retail investor protection in the Hellenic legal order, and retail investors invoked ISD[27] (then applicable) and ICSD[28] before the national courts, against the Hellenic ICS, the *Joint Guarantee Fund* (JGF), which had denied compensation when retail investor claims were not evidenced by the books and records kept by the failed investment firms.[29]

Furthermore, an new class of litigation also emerged from such investment firm failures in Hellas, as retail investors brought action not only against investment firms (and persons directing or controlling them) but also against the competent Hellenic supervisory authority, the *Hellenic Capital Markets Commission* (HCMC), for failure to effectively execute its supervisory duties, which they claimed had in turn resulted in investment firms operating practically uncontrolled, allowing for torts to be perpetrated against their clients, and which ultimately caused them financial damage.[30]

The Hellenic case-law that has emerged from such litigation, while still under formation, reveals not only the perplexity of interpretation and application of EU and

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More generally, with regard to "*Ponzi*" schemes, see FRANKEL, T. (2012) *The Ponzi Scheme Puzzle: A History and Analysis of Con Artists and Victims*, OUP.

[27] Directive 93/22/EEC [1993] OJ L194/27.

[28] Directive 97/9/EC [1997] OJ L84/22.

[29] *Infra*, Ch VI.1.2, VII.2.2.

[30] *Infra*, Ch VII.

Hellenic law in practice, but also leads to the question of the ultimate *ratio* and objectives of EU law in the area of financial markets, especially with regard to individual protection: a main defense raised by the HCMC against the actions for compensation by retail investors, is that it operates and exercises its supervisory and other competences exclusively in the public interest (enjoying thus *ex lege* immunity from all relevant actions for compensation) and that neither EU financial law nor Hellenic financial law confer justiciable rights to individual retail investors to seek redress in the form of compensation from the supervising authorities.

The relevant problematic has in the meantime been further complicated by the onset of the ongoing global financial and economic crisis; the latter has not only affected the Hellenic social and political life, economy and legal order, but has also brought fundamental changes to the foundations of EU financial architecture, which directly affect the analysis of the question under examination.

THE ONSET OF THE CURRENT ECONOMIC AND FINANCIAL CRISIS IN HELLAS

While it can be argued that the ASE crisis of 1999 had rather local causes and effects, the current economic and financial crisis (the Crisis) which reached Hellas ten years later has fundamentally affected it. The effect of the Crisis on the EU, the MSs of the Euro-area, and Hellas in particular, has been catalytic, not only on the economic and social level, but also in the institutional and legal.[31]

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[31] For an analysis of the causes and effects of the Crisis, see *inter alia* FSA (March 2009) *The Turner Review. A Regulatory Response to the Global Banking Crisis*, FSA, available at http://www.fsa.gov.uk/pubs/other/turner_review.pdf; US Department of the

Especially in the case of Hellas, serious structural problems of the State and the organisation of the economy, which had become threatening before the onset of the

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Treasury (2008) *Blueprint for a Modernized Financial Regulatory Structure*, available at http://www.treasury.gov/press-center/press-releases/Documents/Blueprint.pdf; US Department of the Treasury, "Financial Regulatory Reform. A New Foundation: Rebuilding Financial Supervision and Regulation, 2009, available at http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf; The 2012 *Liikanen Report*, available at http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf ; further on the *Liikanen Report*, *infra* Ch II.2.2. and n 464, 466, 469. According to the *Liikanen Report* analysis, the Crisis evolved through five interlinked phases (or "waves"), which can be summarized as follows: Wave 1: "subprime crisis phase" (mid-2007 to September 2008), in which investment portfolios collapsed. Wave 2: "systemic crisis phase" (as of September 2008), in which unprecedented state aid to the banking sector was required as liquidity evaporated. Wave 3: "economic crisis phase" (as of 2009), in which automatic stabilisers were connected to the recession and fiscal sustainability was imperilled through fiscal stimulus and state aid. Wave 4: "sovereign crisis phase" (as of 2010), in which bank-sovereign feedback loops raised significant challenges in the context of existing institutional EU framework. Wave 5: "crisis of confidence in Europe phase" (current). See also AVGOULEAS, E. (2009) 'The global financial crisis, behavioural finance and financial regulation: in search of a new orthodoxy', *Journal of Corporate Law Studies*, vol. 9, no. 1, April, pp. 23-59; AVGOULEAS, E. and ARNER, D. (2013) 'The Eurozone Debt Crisis and the European Banking Union: A Cautionary Tail of Failure and Reform', October, http://ssrn.com/abstract=2347937; BEALE, L. (2010) 'In the Wake of the Financial Crisis', *Wayne State University Law School Research Paper Series*, vol. 10-07, July, http://ssrn.com/abstract=1681577; COFFEE, J. (2009) 'What went wrong? An initial inquiry into the causes of the 2008 financial crisis', *Journal of Corporate Law Studies*, vol. 9, no. 1, April, pp. 1-22; WALKER, G.A. (2007) 'Credit crisis: regulatory and financial systems reform', *BJIBFL*, p. 568; *idem*, (2009) 'Credit contraction, financial collapse and global recession: pt 1', *BJIBFL*, p. 5 (including a useful timeline of the first stages of the Crisis at p. 10); *idem*, (2009) 'Credit crisis, Bretton Woods II and a new global response: pt 2', *BJIBFL*, pp. 77 - 81.

Crisis in Hellas, as public debt and deficit were escalating continuously, went out of control in late-2009.[32]

The Council had decided on 27.04.2009 that excessive deficit existed in Hellas. It then addressed recommendations to Hellas to correct that deficit by 2010 at the latest, in accordance with the Excessive Deficit Procedure Regulation.[33]

On 30.11.2009, the Council established, according to Article 126(8) TFEU, that Hellas had not taken effective action to correct excessive deficit, and on 16.02.2010 the Council gave notice to Hellas in accordance with Article 126(9) TFEU to take measures to correct the excessive deficit by 2012 at the latest, setting a time-limit of 15.10.2010 for effective action to be taken.[34] However, as stated in Council Decision of 10.05.2010,[35] worsening of economic forecasts for the Hellenic economy in 2010, as well as an upward revision of the Hellenic government deficit outcome for 2009, from an estimated 12,7 % of the GDP at the time of the Council Decision pursuant to TFEU Article 126(9) to 13,6 % of GDP according to the fiscal notification submitted by Hellas on 01.04.2010,[36] as well as financial market concerns, reflected what was acknowledged

[32] A list of academic articles and policy papers of 2010 – 2012 on the Crisis in Hellas is available at http://www.eliamep.gr/wp-content/uploads/2011/11/articles1.pdf .

[33] Regulation 1467/97 [1997] OJ L209/6.

[34] Parliamentary elections were held in Hellas on 04.10.2009; see http://www.nsd.uib.no/european_election_database/country/greece/

[35] Council Decision 2010/320/EU [2010] OJ L145/6.

by the Council to constitute an abrupt change in the economic scenario, amounting to "*unexpected adverse economic events with major unfavourable consequences for government finances*" in the sense of Article 5(2) of Regulation No 1467/97.[37] In the same Decision, the Council noted that "[…] [t]*here is an extremely urgent need for Greece to take decisive action, on an unprecedented scale, on its deficit and on other factors contributing to the increase in debt, in order to reverse the increase in the debt-to-GDP ratio and allow it to return as soon as possible to market financing*", adding that "[t] *the very severe deterioration of the financial situation of the Greek Government has led euro area* [MSs] *to decide to provide stability support to Greece, with a view to safeguarding the financial stability of the euro area as a whole, in conjunction with multilateral assistance provided by the International Monetary Fund*."[38]

Financial support by the Euro-area MSs, in the form of bilateral (interstate) loans coordinated by the Commission, was decided to be conditional on compliance by Hellas with the Council decision, which provided for a number of measures to be implemented by Hellas according to the timetable set therein. This support was combined with the

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[36] Council Decision 2010/320/EU of 10 May 2010 refers, in this regard, only to Eurostat news release 55/2010, of 22 April 2010.

[37] For this reason, the Council extended the time-limit for correction of the excessive deficit in Hellas by two years, to 2014.

[38] *Cf.* Council Decision 2010/486/EU [2010] OJ L241/12; Council Decision 2011/57/EU [2011] OJ L026/15, which was issued following the approval by Eurostat on 15.11.2010 of Hellenic Government revised deficit and debt statistics for the years 2006 – 2009 (the government deficit-to-GDP ratio for 2009 was revised from 13,6 % of GDP to 15,4 % of GDP, while the debt ratio was revised from 115,1 % of GDP to 126,8 % of GDP). See also Council Decision 2011/734/EU [2001] OJ L296/38, and Council Decision 2011/791/EU [2011] OJ L320/28.

financial support provided by the IMF, and a supervisory mechanism for the purposes of the financial programme implementation was established, constituting of the European Commission, the ECB and the IMF (also referred to in practice, as "*the Troika*").

The collapse of the Hellenic economy, the *de facto* bankruptcy of the State and the public sector, the rescue plans devised by the lending Euro-area States, the EU and the IMF, and the following developments, have been widely discussed on the economic, political and legal level, and are still under constant institutional, political and legal review.[39]

At the same time, on the EU and international level, important new initiatives on financial architecture have been proposed and a new European financial architecture has

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[39] The mechanism and instruments of financial assistance provided to the Hellenic Republic in this context falls out of the scope of the present research. For indicative relevant Hellenic case-law, see HSACJ (Plenary) 1283/2012, *NoV* (2012) 2060; HSACJ (Plenary) 1286/2012, *NoV* (2012) 2121. See also ECrHR decision of 07.05.2013 in *Ioanna Koufadaki and ADEDY* v *Greece*, NoV (2013) 1347. From Hellenic literature, see indicatively GERONTAS, A. (2010) 'The Memorandum and the Lawproducing Process*', *EphemDD*, p. 705; KATROUGALOS, G. (2010) 'Pacta sunt servanda*', *EphemDD*, vol. 2, p. 157; TZEMOS, V. (2012) 'The Binding Effect and the Justiciability of Fundamental Human Rights*', *NoV*, vol. 60, p. 32, wherein further references. See also STEPHANOU, C.A. and GORTSOS, C. (2012) 'Containing the Sovereign Crisis: European and Greek Responses', *ECEFIL Working Papers No. 4*; HARDOUVELIS, G. and GORTSOS, C. (ed.) (2011) *The International Crisis, the Crisis in the Euro-Area and the Hellenic Financial System*, Athens : Hellenic Bank Association; GORTSOS, C. and LIVADA, C. (2009) 'The current financial crisis: regulatory interventions on the international, european and national level', *HreDik*, vol. 1, p. 70.

arisen from the Crisis, with a view to overcome it and to avoid its recurring in the future.

This effort has once again brought to the fore the question of the reason to regulate and supervise the financial markets, and how this may relate to individual protection.

THE REASON TO REGULATE AND SUPERVISE THE FINANCIAL MARKET AND INDIVIDUAL PROTECTION

The reason to regulate (in a wide sense) financial markets has been contested by theory. Often, reference is made to the need to achieve market stability (protecting the market from systemic dangers), and individual participant protection, as *ratio* of financial law.[40]

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[40] For an overview, see indicatively BLAIR, M., WALKER, G.A. and PURVES, R. (ed.) (2009) *Financial Services Law*, 2nd edition, Oxford: OUP; CRANSTON, R. (1997) *Principles of Banking Law*, Oxford: Clarendon Press; DALE, R. and WOLFE, S. (1998) 'The structure of financial regulation', *Journal of Financial Regulation and Compliance*, vol. 6, no. 4, p. 1358; DASSESSE, M., STUART, I. and PENN, G. (1994) *EC Banking Law*, LLP; DAVIES, H. and GREEN, D. (2008) *Global Financial Regulation,* Cambridge, Polity Press; ELLINGER, E.P., LOMNICKA, E. and HOOLE R.J.A. (2002) *Modern Banking Law*, 3rd edition, Oxford: OUP; GARDENER, E. (1986) *UK Banking Supervision: Evolution, Practice and Issues*, London: Allen & Unwin; GOODHART, C., HARTMANN, P., LLEWELLYN, D., ROJAS-SUAREZ, L. and WEISBROD, S. (1998) *Financial Regulation - Why, How and Where Now?*, London: Routledge; LANOO, K. (2002) 'Supervising the European Financial System', *Financial Markets Group Special Paper No. 137*; LASTRA, R. M. (1996) *Central Banking and*

Regulation of financial markets through State intervention has thus been connected to "*public interest*" considerations.[41]

Intervention in the public interest has been criticized by "*public choice*" theory,[42] which has in turn influenced the development of new theories in favour of the need for State intervention (relevant to "public interest" notions).

According to these "revised"[43] public interest arguments,[44] the main reasons for regulating financial markets, investment firms and transactions, relate to controlling

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Banking Regulation, London: LSE, Financial Markets Group; *idem* (2006) *Legal Foundations of International Monetary Stability*, Oxford: OUP; LLEWELLYN, D. (1986) *The Regulation and Supervision of Financial Institutions*, London: Institute of Bankers; *idem* (1999) 'The Economic Rationale for Financial Regulation', *FSA Occasional Papers in Financial Regulation*; *idem* (6 - 7 July 2006) 'Institutional Structure of Financial Regulation and Supervision: The Basic Issues', World Bank Seminar - Aligning Supervisory Structures with Country Needs, Washington DC; WALKER, G.A. (2007) *European Banking Law - Policy and Programme Construction*, BIICL.

[41] See, for discussion, DAVIES, H. and GREEN, D., *op. cit.*; KAHN, A.E. (1989) *The Economics of Regulation - Principles and Institutions*; WALKER, G.A. (2007) *European Banking Law - Policy and Programme Construction*, *op. cit.*

[42] See POSNER, R.A. (1974) 'Theories of Economic Regulation', *Journal of Economics and Management Science*, vol. 5, p. 335; STIGLER, G. (1975) *The Citizen and the State: Essays on Regulation*, Chicago and London: University of Chicago Press.

[43] WALKER, G.A. (2007) *European Banking Law - Policy and Programme Construction*, *op. cit.*, p. 9, n. 22.

systemic risk, providing financial stability to the market, and to correcting information asymmetries in the market.[45]

The notion of "*systemic risk*" refers to the threat arguably presented to the financial system at large, in the event of a financial firm (traditionally a credit institution) collapse,[46] which may have serious repercussions to the whole market. This "*domino*

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[44] See GOODHART, C. (1989) *Money, Information and Uncertainty*, London: Macmillan; GOODHART, C., HARTMANN, P., LLEWELLYN, D., ROJAS-SUAREZ, L. and WEISBROD, *op. cit.*; BREYER, S. (1982) *Regulation and its Reform*, Cambridge Massachusets: Harvard University Press.

[45] See DAVIES, H. and GREEN, D., *op. cit.*, p. 15 *et seq.* Information asymmetry is regarded as inherent in the financial system, in that certain participants in the financial market will inevitably possess less or less important information on certain factors affecting the market than other participants. The issues arising from information asymmetry may have serious consequences for the retail participant (depositor or investor). Further objectives of financial law and regulation are identified by theory, such as consumer education, financial awareness, market competition, efficiency and innovation, combating financial crime; see, *indicatively,* WALKER G. A. (2007) *Financial Markets and Exchanges Law*, Oxford: OUP.

[46] Credit institutions have been regarded as the main source of systemic risk. They are, in general, understood as inherently unstable, due to liquidity risks relevant to maturity transformation, *i.e.* due to the fact that banks borrow short from depositors and lend on a medium to long-term basis, so that massive deposit withdrawals may lead to exhaustion of reserves. See, among many WALKER, G.A. (2007) *European Banking Law - Policy and Programme Construction*, British Institute for International and Comparative Law, *op. cit.*, Ch. 3 (n 61) and Ch. 6 (n 13). The Crisis has shown, as *e.g.* in the case of *Lehman Brothers* collapse, that (important) investment firms may also cause systemic danger, especially when the banking and investment services providers are closely interconnected; see for analysis in recent reports (*supra*, n 31). See also BRAITHWAITE, J.P. (2014) 'Law after Lehmans ', *LSE Legal Studies Working Papers*, vol. 11, pp. http://ssrn.com/abstract=2391148. Further, it has been considered that

effect", in which the failure of one financial institution leads to the failure of another, until the banking and payments system is led to collapse, has been fundamental for rescuing failing credits institutions by States (usually through some form of public funding).[47]

On the basis of the domino effect danger is the issue of trust by the public to the banking system in general, which may allegedly be affected by the failure of a credit institution. The size of a credit institution has also been traditionally a factor in not allowing it to fail, since repercussions to market stability are perceived as analogous to market share of the failing institution ("*too big to fail*" approach).[48]

In practice, foreseeing whether the failure of one credit institution, of systemic importance, may lead to distortion of the whole market is difficult.[49]

"*shadow banking*" (entities and activities involved in credit intermediation outside the regular banking system) may also represent a threat to market stability, depending on the size of relevant transactions: see FSB Report of 27.10.2011 "Shadow Banking: Strengthening Oversight and Regulation, available at http://www.financialstabilityboard.org/publications/r_111027a.pdf . See Commission Communication *Shadow Banking – Addressing New Sources of Risk in the Financial Sector*, COM(2013) 614 final, 09.04.2013.

[47] A classic presentation of this argument is found in BAGEHOT, W. (1873) *Lombard Street*, London: Henry S. King & Co. See also LASTRA, R.M. (1996) *Central Banking and Banking Regulation*, *op. cit.*

[48] See *e.g.* FSB (2010) 'Reducing the moral hazard posed by systemically important financial institutions', pp. FSB Report of 20.10.2010 "Reducing the moral hazard posed by systemic http://www.financialstabilityboard.org/publications/r_101111a.pdf.

It is held that the Crisis has shown *inter alia* that systemic risk to the financial sector may be caused not only by a "*bank run*" and deposit withdrawal, but also by lack of funds on interbank markets, withdrawal of credit on money markets, speculative attacks on bank share prices or other share price collapses; and that banking sector stability can be undermined by exposures in more volatile securities, derivatives *etc.*[50]

Systemic risk has only recently been defined in the EU legal order as "*a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy*",[51] with the statement that "*all types of financial intermediaries, markets and infrastructure may be potentially systemically important to some degree*".[52]

In the banking sector, systemic risk has until the Crisis been ultimately addressed by the "Lender of Last Resort" (LOLR) function usually held by the central bank of a State. State intervention to save a credit institution in distress, using public funds, has been

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[49] The protection of the financial market from systemic risk is connected to the notion of "*financial stability*"; see OSTERLOO, S. and De HAAN, J. (2004) 'Central Banks and Financial Stability: A Survey', *Journal of Financial Stability*, vol. 1, p. 257. It has been noted that defining financial stability is difficult; see GOODHART, C. (2004) 'Some New Directions for Financial Stability?', BIS, Per Jacobsson Foundation, Zurich.

[50] See WALKER, G.A. (2009) 'Credit crisis, Bretton Woods II and a new global response: pt 2', *op. cit.*, at p. 81.

[51] Regulation 1092/2010 [2010] OJ L331/1, Article 2 point (c). *Cf.* Directive 2013/36/EU Article 3 point 10.

[52] *Ibid.*

used as a last resort mechanism to avoid collapse of the financial sector; in such cases of "bail-out", the issue of "moral hazard" in saving credit institutions from collapse through public funds has been extensively discussed by theory, as well as by competent institutions.[53]

On the other hand, a comparable "moral hazard" issue is identified when providing support to depositors, as well as investors, in the event of a financial intermediary default, in the sense that the provision of such compensation by the State or by competent compensation schemes may discourage careful review of intermediaries by depositors and investors.[54]

The "bailing-out" of banks by use of public funds is opposed to the new, "bail-in" approach which demands strong private sector participation (including by depositors, as creditors) in the financial loss sustained to allow resolution of a failing credit institution.[55] While this new mechanism *a priori* concerns uninsured deposits (beyond the minimum coverage provided), this does not affect in our view the effect such a

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[53] See the FSB Report *supra* n 48.

[54] See for discussion WALKER, G.A. (2007) *European Banking Law - Policy and Programme Construction*, British Institute for International and Comparative Law, *op. cit.*, Ch 3, wherein further references. See also, THORTON, H. (1802) *An Enquiry into the Nature and Effects of the Paper Credit System of Great Britain*.

[55] *Infra*, Ch II.2.2. See also regarding recent application of a "bail-in" method in Cyprus: Council Decision 2013/236/EU [2013] OJ L141/32.

possibility (of removing the implicit State guarantee to depositor in general) may have to public confidence in the financial system and which supports market stability.

While the overall causes and effects of the Crisis, as discussed by financial law theory, are not within the scope of this study, its impact on the analysis of the reasons to regulate and supervise the financial markets needs to be taken into account, in order to consider the question of research.

THE QUESTION OF RESEARCH

The question of the present research focuses on the effectiveness of protection awarded by the Hellenic legal order to retail investors, in the event of financial intermediary failure, especially as a result of tortuous behaviour, under the light of EU law.

INVESTIGATING THE QUESTION OF RESEARCH

The case where a financial intermediary (for the purposes of this study, an investment firm or a credit institution also providing investment services) is unable to repay to a small, non-specialist investor (a "retail investor", as defined *infra*) money belonging to him and entrusted to the investment firm in connection to the provision of investment services, or to return to him instruments entrusted to the investment firm for the same

purpose, offers the opportunity to examine the effectiveness of the legal protection awarded to the retail investor in a specific, factual in a sense, context.

Thus, for the purposes of this study, the question of effectiveness arises and will be dealt with not *in abstracto*, when no specific difficulties have occurred, or on a purely theoretical level, but in a situation where prudential supervision has already failed, at least with regard to the specific retail investor who suffers financial loss. Setting the question of effectiveness of the available legal protection in this context allows for the analysis of applicable rules with a specific legal problem as starting point; in that sense, it is an *a posteriori* analysis.

Indeed, evaluating the effectiveness of protection *in abstracto* and *a priori* appears difficult and inconclusive, as the question then becomes unavoidably large and vague and the mechanism of legal protection offered by EU and national law cannot be examined as in operation and in detail –always in legal terms.

On the contrary, examining the mechanism of legal protection in operation on the basis of a specific claim provided by law (such as the award of compensation) allows for problems in the content, interpretation and application of law to be revealed, and for the actual results produced to be evaluated by reference to the stated objectives of law. Posing the question of effectiveness in this way further implies that the evaluation of the rules under examination will necessitate the exclusion of any presumptions as to their effectiveness, in order to avoid fallacies of presumption –otherwise the present exercise might amount to a *petitio principii.*[56]

Therefore, the question of research as presented will entail not only the examination of consistency of legal rules provided by an instrument with regard to legal rules provided by other instruments in a hierarchical system,[57] but also the examination of the inner consistency of legal instruments, as well as the interrelation of rules classified in different areas of law but which are in practice interconnected in the event of financial intermediary failure.

Indeed, a rule (whether of legislative, administrative or judicial origin) is not produced in vacuum and does not produce its effects in vacuum. It belongs to a group (if not a *corpus*) of rules the interrelation and interoperability of which has to be examined, in order to evaluate the effectiveness of the legal protection available to retail investors by the legal system *in toto*.

THE CHOICE OF THE HELLENIC LEGAL ORDER

The choice of the Hellenic legal order, as a parameter of the question of research, needs perhaps to be explained:

The EU legal order, as a system of rules of a supranational organisation, needs in certain aspects to be examined with regard to the national legal orders from which it has

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[56] Aristotle, *Prior Analytics II* xvi 64b28–65a26: see COOK, H.C.; TREDENNICK, H. (trans.) (2009) *Aristotle: Categories. On interpretation. Prior Analytics*, Loeb.

[57] See KELSEN, H. (2009) *Pure Theory of Law*, The Lawbook Exchange.

originated and to which it refers –especially when the subject-matter of examination is the effectiveness of rules concerning the protection of individuals, being subjects both of their national legal order and of the EU legal order.[58]

Secondary EU legislation produced in the form of Directives (which has been the norm in the case of financial law harmonisation instruments until the Crisis)[59] intrinsically takes (or has to take) into account the disparity of national legal orders. Conformity of national transposing measures is relevant to effectiveness, to the *effet utile* achieved by their application.[60]

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[58] See in general, BOULOUIS, B.J. (1993) *Droit institutionnel des Communautés Européennes*, 4th edition, Paris; DRUESNE, G. (1996) *Droit et Politiques de la Communauté et de l' Union européennes*, 5th edition, Paris: Presses Universitaires de France; HARTLEY, T.C. (1998) *The Foundations of European Community Law*, 4th edition, Oxford: OUP; Van RAEPENBUSCH, S (1998) *Droit institutionnel de l' Union et des Communautés européennes*, 2nd edition, Paris: De Boeck Universite; WEATHERILL, S. and BEAUMONT, P. (1999) *EU Law*, 3rd edition, London: Penguin. See also, indicatively, ECJ decision of 05.02.1963 in Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1; ECJ decision of 15.07.1964 in case 6/64, *Flaminio Costa v E.N.E.L.* [1964] ECR 347.

[59] See *infra* Ch II.1.

[60] Apart from cases where inconformity may be established in an unambiguous manner (as *e.g.* in case of non transfer of a Directive within the relevant time limit), determination of non-compliance by a MS due to ineffective transposition of a Directive may be a complex issue. Especially in the case of Directive conform interpretation, an in depth analysis of the rules of the national order is necessary in order to establish what form the Directive conform interpretation may take and whether and which *a priori* applicable national rules may have to not be applied. See indicatively ECJ decision of 10.04.1984 in Case 14/83, *Sabine von Colson and Elisabeth Kamann* v *Land*

Furthermore, the principle of subsidiarity necessitates that, in areas which do not fall within the exclusive competence of the EU, the EU has to act only if and in so far as the objectives of a proposed action cannot be sufficiently achieved by MSs, but can be better achieved on EU level.[61]

Such problematic is linked to effectiveness potentially achieved by acting on EU level by comparison to that potentially achieved by acting on national level.[62]

Thus, it appears that a research on the issue of effectiveness of legal rules that are connected to the transposition of a Directive may validly be undertaken with regard to any MS legal order, and may as well validly be undertaken with regard to a single MS legal order.

Nordrhein-Westfalen [1984] ECR 1891; ECJ decision of 14.07.1994 in Case C-91/92, *Faccini Dori* [1994] ECR I-3325, para. 26; ECJ decision of 16.12.1993 in Case C-334/92, *Wagner Miret* [1993] ECR I-6911, para. 20; ECJ decision of 18.12.1997 in Case C-129/96, *Inter-Environnement Wallonie ASBL* v *Région wallonne* [1997] ECR I-07411; ECJ decision of 27.06.2000 in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, para. 30. Also, for discussion of relevant issues, CRAIG, P. (2009) 'The legal effect of Directives: policy, rules and exceptions', *ELR*, vol. 34, no. 3, pp. 349-377; PAPARSENIOU, P. (2002) *Community Directives and Individuals' Rights**, Athens: Sakkoulas; TRIDIMAS, T. (1994) 'Horizontal effect of directives: a missed opportunity', *ELR*, vol. 19, no. 6, p. 621; *idem*, (2002) 'Black, white, and shades of grey: horizontality of Directives revisited', *YEL*, vol. 21, p. 327.

[61] TEU Article 5(1), (3).

[62] See *e.g.* relevant considerations in ECJ decision of 13.05.1997 in Case C-233/94 *Federal Republic of Germany v European Parliament and Council of the European Union* ECR [1997] I-2441, infra Ch IV.2.1.

Taking the above into account, the Hellenic legal order will be examined in this study neither as a characteristic European legal order, nor as a case-study (*paradigm*) of transposition of European finance law with regard to retail investor protection in the event of investment firm failure, nor as a consequence of the specific developments in Hellenic law as a result of the Crisis; it will be a component of the research question on its own merit, as the legal order of a MS.

DEFINING THE QUESTION OF RESEARCH

The wide context of finance law and the series of issues related directly or indirectly to the question of research necessitate defining the main terms used in this study, and at the same time delimitating its scope.

The following definitions and delimitations will apply (except if otherwise noted):

"*Bank*": the same as "credit institution".

"*Competent authority*": competent national financial market regulatory and supervisory authority.

"*Credit institution*": as defined by applicable EU law.

"*Embezzlement*": the same as misappropriation of funds.

"*European law*": law issued by the EEC, the EC, or the EU, as a general term. It will not refer to the legal order of the ECHR.

"*EU law*": law issued by the EEC, the EC, or the EU.

"*Financial law*": the law relating to the activities of credit institutions and investment firms and the relevant sectors.[63]

"*Financial market*": the banking and investment services sectors.

"*Financial services*": banking and investment services.

"*Financial intermediary*": an intermediary in the banking and/or investment services sector.

"*Fraud*": Used in a wide sense, as the behaviour of consciously misrepresenting reality to another person with a view to obtain some form of profit or benefit through such misrepresentation.[64]

"*Investment firm*": as defined by applicable EU law.

"*Investment firm collapse*": the same as investment firm default.

"*Investment firm default*": the situation in which an investment firm (including a credit institution providing investment services) is unable to return money and/or instruments belonging to investors in a definite way.

"*Investment firm failure*": the same as investment firm default.

"*Misappropriation of funds*": Used in a wide sense, usurpation of third party's assets.[65]

"*Regulation*": Used in a wide sense to denote rule-making, either by the legislature (in the EU, Council and European Parliament, or Commission

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[63] The law on insurance firms does not fall within the scope of this research; insurance firm failures and the relevant issues regarding client protection will not be examined.

[64] Not to be understood as the equivalent legal term and offence described by Hellenic law, or by any other legal order, except if specifically noted otherwise.

[65] *Cf.* "embezzlement".

following legislative delegation) or by the administration (including competent authorities) following legislative delegation (*stricto sensu* regulation).

"*Securities*": the same as investment (services) titles, instruments.

"*Tort*": in the general meaning of unlawful, delictuous behaviour.[66]

Defining "retail investor"

While it is necessary to choose a term to define, for the purposes of this study, the person who participates in the financial market as an investor without having special knowledge and/or experience of investment in financial markets and of financial market transactions, this task becomes complicated by the relevant and in some cases interchangeable terms that have been used by EU and national legislation (in English language). Such relevant definitions used by legislation include:

- "Retail client": Used in MiFID the term "retail client", as opposed to "professional client".[67]
- "Professional investor" and "institutional investors" were used in ISD.[68]
- "Small investor": while not defined in EU law, it appears in ICSD, and rather implies the non-professional and non-specialist investor.[69]

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[66] Does not refer to the identical English law legal term (except if otherwise noted).

[67] MiFID Preamble recital 31; Article 4(1) points 11 and 12; Annex II.

[68] References to the "professional nature" of the investor, to "professional investor" and to "institutional investor" appeared in ISD, although no definition of these terms was provided by it; See ISD Preamble recital 31; Article 11(1), (3), and Article 14(4).

[69] See ICSD, Preamble, recitals 4, 5, and 11.

- Other relevant terms may be used in various jurisdictions using the English language.[70]

Taking the above into account, the term "*retail investor*" will be preferred for the purposes of this study, and will be understood as not coinciding with any of the above terms, or any other similar term that may appear in other contexts, but to have a particular, functional meaning:

The term "retail investor" will be used in this study to signify an individual (natural or legal person) that has no professional capacity connected to participating in the financial market, and no relevant knowledge or experience in participating to the financial market as an investor (with a view to investing his own money or other assets for gain), and who has either entered into transactions in the financial market ("*stricto sensu* investor") or has deposited money or instruments with a financial intermediary with a view to entering into such transactions having concluded relevant contracts mandating financial intermediaries, even if transactions in financial instruments have not taken place ("*lato sensu* investor").[71]

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[70] For example, the term "sophisticated investor" as opposed to "non-sophisticated investor" is used in the FSMA and relevant English law and regulation.

[71] The *lato sensu* investor is further to be distinguished from the prospective investor or prospective client, who are persons intending to enter into transactions in the financial market but who have not necessarily proceeded to a relevant act (such as depositing money and/or instruments with a financial intermediary with a view to enter into transactions in the financial market); see relevant terminology in ISD and ICSD.

DELIMITING THE QUESTION OF RESEARCH

Legal protection awarded to the retail investor in the Hellenic legal order and under the light of EU law, as a subject of this study, will be understood to comprise protection provided by legislative, administrative instruments and judicial decisions in the Hellenic legal order.

While similar issues may arise relating to tortuous liability of EU competent authorities, in particular in the context of the new EU financial architecture and the increased powers of new EU financial markets authorities, this problematic relates rather to individual protection under EU law than in the Hellenic legal order and will not be in the focus of analysis.

Furthermore, protection offered in the context of extrajudicial procedures, whether compulsory or not, or in the context of mediation and alternative dispute resolution procedures will not be examined, and any relevant references will be in the margin of analysis of other issues.

The same applies to protection offered in the context of Hellenic law of obligations, including rules on pre-contractual or contractual obligations and relevant contractual clauses, and case-law. As noted, this study will focus on issues not directly linked to contracts and contractual liability, but rather on non-contractual liability.

Also, and for the same reason stated above, this research will not focus on the issue of retail investor protection from a consumer protection point of view, on a contractual or pre-contractual level (as when applying consumer protection rules, issues relating to generally applicable contract terms *etc.*). [72]

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[72] In the Hellenic legal order see Law 2251/1994 Article 1(1), BGG vol. A, no. 191 which states *inter alia* that "the rights and interests of consumers are under the protection of the State. On Hellenic consumer law see in general KARAKOSTAS, I. (2008) *Consumer Protection Law- L. 2251/1994 as in force after L. 3587/2007- Interpretation- Case-law- Practical Application**, Athens: Nomiki Bibliothiki. It has been supported that consumer protection does not constitute an aim of financial market regulation and supervision nor do competent authorities have relevant powers; see among many FLOROS, N. (2012) *The Liability of Supervisory Authorities in the Financial Sector**, Athens: Nomiki Bibliothiki, p. 113 - 123. For a general overview of the issue of investor as consumer, see indicatively ALEXANDRIDOU, E. (2001) 'The investor as a consumer', in MEGGLIDOU, S. (ed.) *Stock Market and Investors' Protection. The Hellenic Institutional Context and the European and International Economic Area. Minutes of Conference 9-10 June 2000**, Centre for International and European Economic Law; ANTONOPOULOU, F. (2003) 'The limits of the protection of the receiver of banking services in modern consumer law (the case of financial derivative products contracts, after decision 8032/2001 of the [MJ-CCFI of Athens]*', *EllDik*, p. 333; AVGITIDIS, D. (2001) 'The receiver of investment services as consumer', *EpiskED*, p. 287; CHRISTIANOS, V. (2002) 'Protection of the investor as consumer in Community law: from the prohibition of confidential information abuse to the prohibition of market abuse', in MAVROS, G. (ed.) *Société Anonyme and Capital Market - Investor Protection, 11th Panhellenic Conference of Commercial Law**; GOUSKOU, A. (1997) 'Issues relating to the legal protection of consumers - bank clients*', *DEE*, p. 660; KALAMBOUKA - GIANNOPOULOU, P. (2000) 'The protection of the consumer in the provision of financial services*', *DEE*, p. 12; KARAKOSTAS, I. (2003) 'The receiver of banking services as consumer', *Hrid*, p. 97.

Further, it will not focus on retail investor protection with regard to claims against the defaulting financial intermediary, the persons directing it, or any other responsible persons in connection to the intermediary (certain issues relevant to this problematic will be identified where necessary), except where necessary for its purposes.

In the same direction, issues relating in general to retail investor protection which are connected to financial damage incurred by the retail investor but not as a result of intermediary failure (such as *e.g.* issues connected to bad or wrong execution of orders, bad financial advice, breach of CoB rules by the intermediary *etc*.) will not be examined.

Furthermore, issues connected to protection of investors other than retail investors in case of intermediary failure will not be examined.

In the context described, this study will examine retail investor protection (in the form of compensation) specifically against the relevant compensation schemes (in the Hellenic legal order, the HDIGF and the JGF) and the competent authorities (in the Hellenic legal order, in particular the HCMC).

In this direction, the research will take into account developments on the greater international and EU level, attempting to follow and assess their dynamic, as exercised in the Hellenic legal order, and also take into account the particular features of the latter as interacting with law produced on EU level. The complicated special liquidation and insolvency national law issues, as intertwined with national law of EU origin (on the operation of compensation schemes) will be analysed, with particular attention to claim

verification and evidentiary matters, which are of central importance to retail investor protection especially in cases of intermediary failure as a result of tort.

However, while taking into account relevant law and developments, this study will not focus on EU authorities non-contractual liability as it is a matter relevant to the issue under investigation but not directly related to retail investor protection in the Hellenic legal order.

Finally, the issue of possible non-contractual liability of the HCMC regarding the supervision it exercises on the special liquidation organs and on the JFG will not be explored, as marginal, since there have been no relevant cases and arguments to our knowledge and, more importantly, the examination of non-contractual liability of the HCMC will focus on the regulation and supervision of intermediaries and the issues that emerge as a result of the failure of the latter.

CRITERIA

Retail investor protection in the Hellenic legal order, under the light also of EU law, will be assessed on the basis of the effectiveness of the available legal system as a whole.

First, it should be noted that the notion of effectiveness is widely used and understood on various levels and contexts by jurisdictions, while it also constitutes a general principle of EU law. [73]

The ECJ has recognized several principles of EU law binding on MSs,[74] imposing on MSs the obligation to observe them when implementing EU law.[75] National authorities

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[73] See, among many, ARNULL, A. (1990) *The General Principles of EEC Law and the Individual*, Leicester University Press; BERNITZ, U. and NERGELIUS, J. (ed.) (2005) *General Principles of European Community Law*, Lund University Press; BOULOUIS, B.J. (1993) *Droit institutionnel des Communautés Européennes*, 4th edition, Paris; GROUSSOT, X. (2005) *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europium*, Lund University Press; PAPADOPOULOU, R.E. (1996) *Principes Généraux du Droit et Droit Communautaire*, Bruylant; TRIDIMAS, T. (2007) *The General Principles of EU Law*, 3rd edition, Oxford University; USHER, J.A. (1998) *General Principles of EC Law*, Longmans. According to Professor Tridimas, "[…] *the term general principles may be reserved for fundamental propositions of law which underlie a legal system and from which concrete rules or outcomes may be derived*" (*op. cit.*; p. 1). Various classification systems of general principles of European law have been suggested by theory. For example, Professor Boulouis classifies principles as (a) general principles common to the law of MSs, (b) principles inherent in every organized legal system and (c) principles deriving from the nature of the Communities (*op. cit.*, p. 208 *et seq.*). Professor Papadopoulou distinguishes general principles as (a) axiomatic principles, (b) structural principles and (c) common principles (*op. cit.*, p. 8). Further, Professor Tridimas proposes a classification of principles as (a) principles which derive from the rule of law, and (b) systemic principles which underlie the constitutional structure of the Community and define the Community legal edifice. With regard to the principle of effectiveness, as well as the principle of State liability in damages for breach of European law, according to Professor Tridimas they have been developed by the Court "[…] *as an essential attribute to the new EU polity and were perceived in judicial reasoning as the meeting point between the principle of primacy and the fundamental right to judicial protection"* (*op. cit.*, p. 4 *et seq.*).

[74] See *e.g.* ECJ decision of 17.12.1970 in Case 11/70, *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Getreide* [1970] ECR 125.

may also be under a duty to apply general principles of national law; however, national authorities, when applying general principles of EU law, are bound to observe them as their content is specified by European law and not as they may be understood in national law.[76]

Thus, national authorities will be bound to observe two sets of general principles of law when implementing European law in the national legal order, *i.e.* general principles of national law as well as general principles of European law.

The European law general principle of effectiveness is connected to the rules of primacy and direct effect of European law, in that European law has to produce a useful effect (*effet utile*).[77]

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[75] See *e.g.* ECJ decision of 13.07.1989 in Case 5/88, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, which refers to national measures implementing a regulation; ECJ decision of 10.07.2003 in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Minister* [2003] ECR I-07411, which refers to national measures implementing a directive; ECJ decision of 04.07.2006 in Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-06057, which refers to national measures implementing a directive and takes into account existing national rules determining effectiveness of transposition.

[76] See TRIDIMAS, T. (2007), *op. cit.*, p. 38, wherein further references. The ECJ may refer to general principles of national law to be applied by national Courts: see *e.g.* ECJ decision of 23.03.2000 in Case C-373/97 *Dionysios Diamantis v Elliniko Dimosio (Greek State) and Organismos Ikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [2000] ECR I-1705.

The notion of effectiveness has progressed as the European legal order evolved, the case-law of the ECJ having an important role in its development; [78] it refers not only to the effective protection of rights emanating from the EU legal order, but more specifically to the effective invoking and enforcement of EU law in national courts, thus relating also to the fundamental right of judicial protection as also protected under the ECHR.[79]

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[77] See *e.g.* ECJ decision of 05.03.1996 in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* ECR [1996] I-1029, at para. 95.

[78] For a presentation of the historical evolution of the principle of effectiveness in EU law, see TRIDIMAS, T. (2007), *op. cit.*, p. 420 *et seq.*

[79] For a discussion on effective protection of rights in the EU legal order and of the interrelation between effective protection of rights and the general principles of EU law, see indicatively CURTIN, D. (1992) 'The Decentralised Enforcement of Community Law Rights. Judicial Snakes and Ladders', in CURTIN, D. and O'KEEFE, D. (ed.) *Constitutional Adjudication in European Community and National Law*, Butterworths; DOUGAN, M. (2004) *National Remedies Before the European Court of Justice*, Hart; LEWIS, C. (1996) *Remedies and the Enforcement of European Community Law*, Sweet & Maxwell; RUFFET, M. (1997) 'Rights and remedies in European Community law: a comparative view', *CMLRev*, vol. 34, p. 307; SZYSZCZAK, E. (1996) 'Making Europe more relevant to its citizens: effective judicial process', *ELR*, vol. 21, p. 351; TRIDIMAS, T. (2000) 'Enforcing Community Rights in National Courts: Some Recent Developments', in O'KEEFE, D.A. and BAVASSO, A. (ed.) *Judicial Review in European Union Law: Liber Amicorum in honour of Lord Slynn*, Kluwer; *idem* (2001) 'Judicial Review and the Community Judicature: Towards a New European Constitutionalism?', *Turku Law Journal*, vol. 3, pp. 119 - 129; Van GERVEN, W. (1995) 'Bridging the gap between Community and national laws: towards a principle of homogeneity in the field of legal remedies?', *CMLRev*, vol. 32, p. 679; *idem* (2000) 'Of

The principle of effectiveness is further connected to the principle of equivalence (or non-discrimination), which demands that rights emanating from European law are equally protected in the national legal order as domestic rights. The two principles are interrelated, as European law is integrated into the national law of remedies.[80] It is the obligation of "*Community loyalty*"[81] that has been considered by ECJ as posing an obligation to national authorities, including national Courts, to provide full and effective protection of EU rights;[82] this involves not only substantive rules but may also include national rules of procedure.[83]

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rights, remedies, and procedures', *CMLRev*, vol. 37, p. 501; WARD, A. (1995) 'Effective sanctions in EC law: a moving boundary in the division of competence', *ELR*, vol. 1, p. 205; WARD, A. (2007) *Judicial Review and the Rights of Private Parties in EU Law*, 2nd edition, Oxford: OUP.

[80] For discussion see TRIDIMAS, T. (2007), T*he General Principles of EU Law*, *op. cit.*, p. 423.

[81] TEU, Article 4(3).

[82] See *e.g.* ECJ decision of 19.11.1991 in Joined Cases C-6/90 and 9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* ECR [1991] I-5357, at para. 36.

[83] See *e.g.* ECJ decision of 25.07.1991 in Case C-208/90 *Theresa Emmott v Minister for Social Welfare and Attorney General* ECR [1991] I-04269; ECJ decision of 14.12.1995 in Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* ECR [1995] I-4599; ECJ decision of 02.12.1997 in Case C-188/95 *Fantask A/S and Others v Industriministeriet (Erhvervsministeriet)* ECR [1997] I-06783; ECJ decision of 14.12.1995 in Case C-430/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* ECR [1995] I-04705; ECJ decision of 16.05.2000 in Case C-78/98 *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank*

This research does not intend to explore in depth the complicated issues arising from the notion of effectiveness, as it has evolved through the case-law of the ECJ, and as it may be relevant to individual protection in the area of financial services.

Instead, for the purposes of this study the criterion of effectiveness will be understood in a wide sense as the condition of providing for the useful effect of EU law in practice.[84] In this approach, effectiveness is linked as an emanation of supremacy in practice to all applicable rules and principles of EU law, as a legal system; in this sense, specific issues relating to other general principles, such as legal certainty or proportionality, may be identified in the course of the examination of the subject-matter of this study, but

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plc ECR [2000] I-3201; ECJ decision of 01.12.1998 in Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* ECR [1998] I-07835. For discussion see BIONDI, A. (1999) 'The European Court of Justice and certain national procedural limitations: Not such a tough relationship', *CMLRev*, vol. 36, p. 1271; HIMSWORTH, C. (1997) 'Things fall apart: The harmonisation of Community judicial procedural protection revisited', *ELR*, vol. 22, p. 29; HOSKINS, M. (1996) 'Tilting the balance: supremacy and national procedural rules', *ELR*, vol. 21, pp. 365-377; KAKOURIS, K. (1997) 'Do the Member States possess judicial procedural autonomy?', *CMLRev*, vol. 34, p. 1389; LENEARTS, K. (2007) 'The rule of law and the coherence of the judicial system of the European Union', *CMLRev*, vol. 44, pp. 1625-1659; PRECHAL, S. (1998) 'Community Law in National Courts: The Lessons from Van Schijndel', *CMLRev*, vol. 35, pp. 681 - 706; Van GERVEN, W. (2000) 'Of rights, remedies, and procedures', *op. cit*.

[84] *Cf.* ECJ decision of 30.09.2003 in Case C-224/01 *Gerhard Köbler v Republik Österreich* ECR [2003] I-10239, at para. 33.

they will be understood as ultimately relating to the useful interpretation and application of EU law.

As noted, in order to proceed to this examination, it will first be necessary to identify the *ratio* and aim of applicable EU law, and its inner consistency, so as to examine in turn the effectiveness of Hellenic law with regard to its application.

Furthermore, it is useful to note, that while in the Hellenic legal order there is no general principle of effectiveness *per se*, effectiveness in the exercise of their duties by State and public authorities is used as a criterion in case-law for establishing whether they are liable in tort to compensate individuals.[85]

The application of effectiveness as a criterion for the evaluation of the question of research further relates to the methodology applied to treat it.

METHODOLOGY OF RESEARCH

The determination of research methods suitable for a specific research project depends not only on the nature of the research question but also on the nature of the available data, which ultimately determine the structuring of research.[86]

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[85] See *infra*, Ch VII.1.2.

[86] See PUNCH, K. (1998) *Introduction to Social Research Quantitative and Qualitative Approaches*, London: Sage Publishing, p. 19 *et seq.* The subject-matter of this study, as defined, is such that research could in principle be pursued according either to a

The research for this study has been carried out on the basis of official documentary sources issued by international organizations and *fora*, States, the EU and the Hellenic Republic. Legal and administrative documents are referred to, as officially published. Further, legal theory has been taken into account.

This research attempts to analyse its subject matter on a normative level, from a doctrinal point of view.[87]

It does not aspire to provide any definite understanding of its subject-matter, but only to make a contribution in the examination of the relevant issues raised.

"qualitative" or a "quantitative" research method; for the distinction, see BURNS, R. (1994) *Introduction to Research Methods*, 2nd edition, Melbourne: Longman, at p. 9. A quantitative analysis for the purposes of this study would necessitate access to all (or at least an important percentage of) relevant administrative decisions especially by the HCMC, and to decisions of the JGF or the HDIGF (which are not published), as well as decisions of the organs of special liquidation of investment firms and credit institutions (which are also not published), as well as relevant case-law (court decisions are not always reported in legal journals). Beyond the practical difficulties of such an endeavour, quantitative analysis would probably be more appropriate to research focusing on effectiveness understood from a sociology of law point of view rather than from a doctrinal law point of view. Thus, the present study follows a qualitative research method.

[87] In this direction, earlier law (not in force at the time of conducting this research) is important for the purposes of comparison and analysis as law in force, and so it will be taken into account where deemed necessary.

THESIS OUTLINE

This study is organized in three main Parts:

In Part A, analysis will focus on the preliminary issue of what is the purpose of EU finance law and how it relates to retail financial market participant protection. In Chapter I the development and objectives of finance law and the ratio of retail investor protection will be examined from an international perspective, before proceeding in Chapter II to the relevant discussion of the development and objectives of EU finance law. Part A will attempt to conclude in which degree and how effectively has retail investor been promoted from an economic consideration relating to market stability to an autonomous aim of the EU legal system.

Then, in Part B this study will examine how retail investor protection has been perceived and organized by the EU legal order in the event of intermediary failure: the delineation of minimum protection awarded by relevant compensation funds will be examined in Chapter III, before examining in Chapter IV how has the European law *acquis* on individual protection been interpreted by the ECJ to apply in the case of financial services, in particular with regard to tortuous liability of competent authorities, and whether the *Peter Paul* case-law may be considered as applicable in the field of investment services. Part B will attempt thus to define the limits of protection awarded by the EU legal order to retail investors in the event of intermediary failure as formed until the Crisis, and to assess what the effect of the new and emerging EU finance law may be on such delimitation.

Finally, in Part C this study will examine how EU rules interact with Hellenic law in case of intermediary failure, especially as a result of tort, taking into account not only

the national rules that transfer EU law in the Hellenic legal order but the other national rules as well, examining their operation in whole in order to assess their effectiveness with regard to retail investor protection. In this context, in Chapter V this study will examine the status of protection of retail investors as creditors, in general, in the context of the liquidation of financial intermediaries under Hellenic law; the regime of special liquidation of investment firms will be examined together with that of credit institutions (offering investment services) before taking into account also wider considerations relating to Hellenic insolvency law and the law on the liquidation of SAs in the Hellenic legal order. Then, the legal structure and operation of the relevant compensation funds will be examined in Chapter VI, also taking into account the distinction of schemes and applicable rules on the form of the financial intermediary (as investment firm or credit institution) and the consequences thereof. Finally, in Chapter VII this study will examine the issue of tortuous liability of competent authorities in the Hellenic legal order, taking into consideration the *acquis* on State and public authorities liability and the way it has affected the case-law on tortuous liability in particular of the HCMC, and the relevant criteria formulated.

Therefore, this will try to assess the effectiveness of protection awarded to retail investors in the Hellenic legal order, taking into account the aim and normative content of EU law, the transposition of EU law in the Hellenic legal order, and its interrelation with the rules of the national legal order as a whole.

Thus, it will attempt to identify and analyse causes and effects of the interaction of the two legal orders in the area of retail investor protection in the event of intermediary failure, and finally to note certain thoughts *de lege ferenda*.

PART A

THE DOUBLE AIM OF PROTECTING RETAIL INVESTORS AND THE STABILITY OF THE MARKET: FROM ECONOMIC EXTERNALITIES TO LEGAL RULES

CHAPTER I. DEVELOPMENT AND OBJECTIVES OF FINANCE LAW, AND THE *RATIO* OF RETAIL INVESTOR PROTECTION FROM AN INTERNATIONAL PERSPECTIVE

As stated in the Introduction, a preliminary question to be addressed is whether retail investor protection constitutes a valid, autonomous aim of EU law –in order to examine in turn whether it is pursued effectively in the EU legal order, whether it has been effectively transposed into the Hellenic legal order, and which rights may be conferred to individual retail investors.

As EU finance law is connected to initiatives and developments on the international level and is influenced by the work and recommendations of international organizations and *fora*, it will be first necessary to examine the issue at hand from an international perspective.

In this direction, it will be useful to examine international initiatives and developments as appeared until the Crisis, and then relevant initiatives and developments in the wake of the Crisis.

I.1 INTERNATIONAL INITIATIVES ON FINANCE LAW AND RETAIL INVESTOR PROTECTION UNTIL THE CRISIS

International finance law[88] is connected to the circulation of capital, as well as of services, on an international scale.[89]

Many important developments in international financial law have occurred following international financial crises, such as the Great Depression (1928),[90] the collapse of the Bretton Woods agreement (1973)[91] or the current Crisis.

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[88] The term international finance law strictly interpreted refers to legally binding provisions, as emanating from international, bilateral or multilateral, treaties. However, for the purposes of this study, important are developments on the international level which do not have legally binding effect, *i.e.* the work, proposals and recommendations of international organisations which are not legally binding ("*soft law*") but have been very influential to the development of EU and national laws.

[89] For the trends in "globalisation" of financial services see OBSFELD, M. and TAYLOR, A. (2002) 'Globalization and Capital Markets', *National Bureau of Economic Research Working Paper 8846*; DAVIES, H. and GREEN, D. (2008), *op. cit.,* p. 15 *et seq.*, and p. 59 *et seq.*; WALKER, G. (1996) 'The law of financial conglomerates - the next generation', *International Lawyer*, p. 57; *idem* (2006) *European Banking Law - Policy and Programme Construction*, BIICL.

[90] The Bank for International Settlements (BIS) was established in 1930 under Swiss law; see www.bis.org .

I.1.1 INTERNATIONAL INITIATIVES ON BANKING LAW

With regard to deposit insurance, the *Basel Committee on Banking Supervision* (BCBS)[92] has noted the importance of deposit guarantee systems for the protection of market stability.

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[91] For a discussion of the Bretton Woods Agreement of 1944, and of the world financial system that it organised, providing for the establishment of capital controls and fixed (and adjustable) currency exchange rates, and establishing the IMF, the International Bank for Reconstruction and Development and the GATT see CAVANAGH, J., WYSHAM, D. and ARRUDA, M. (1994) *Beyond Bretton Woods: Alternatives to the Global Economic Order*, Pluto Pr; FRASER, R. and LONG, C. (1992) *The World Financial System*, Longman Harlow; HOOKE, A.W. (1982) 'The International Monetary Fund - Its Evolution, Organisation and Activities', *IMF Pamplhet Series No. 37*; LASTRA, R. M. (2000) 'The International Monetary Fund in Historical Perspective', *JIEL*, vol. 3, p. 507. ; *idem* (2011) 'The Role of the IMF as a Global Financial Authority', *European Yearbook of International Economic Law*, vol. 2, May, http://www.ssrn/abstract=1617428; WILLIAMSON, J. (1977) *The Failure of World Monetary Reform 1971 - 1974*, New York University Press.

[92] BCBS was established in 1974 by G-10 as a Committee on Banking Regulations and Supervisory Practices (later renamed as BCBS) operating within the framework of BIS. Its establishment is connected to questions relating to the responsibility for banking supervision especially in cross-border transactions, following the collapse in 1974 of the *Bankhaus Herstatt Bank*; for an analysis see BCBS (2004) Bank Failures in Mature Economies, BCBS Working Paper No. 13, available at www.bis.org/publ/bcbs_wp13.pdf. In 1975 BCBS issued the *Concordat* which related to the responsibilities of home and host State supervisors. One of the main aims of BCBS is protection from systemic risk: In this direction, BCBS has proposed rules on capital adequacy of financial institutions. In 1988 BCSB issued the *First Basel Accord* on capital adequacy (referred to as *Basel I*) This Accord was amended in 1996 by the

BCBS initiatives are relevant to individual protection, especially in the form of depositor compensation (also referred to as deposit insurance) in case of bank collapses, in order to control systemic risk. BCBS has noted that "[…] [i]*n many countries, the framework for systemic protection includes a system of deposit insurance. Provided such a system is carefully designed to limit moral hazard, it can contribute to public confidence in the system and thus limit contagion from banks in distress* […]" [93]

Amendment to the Basel Capital Accord (referred to as *Market Risk Amendment*, which related to capital adequacy in case of certain market risks arising from banks' trading in certain financial instruments. These amendments proposed a capital adequacy methodology to be used by financial institutions (credit institutions, investment firms and others). The First Basel Accord was revised in 2004, after long consultations, by the *Second Basel Accord* (referred to as *Basel II*. Further, BCBS proposed the *Third Basel Accord* (*Basel III*) in December 2010, regarding capital requirements, which has been revised in June 2011; with regard to liquidity requirements, reform measures were proposed in January 2013. Basel III seeks to strengthen the regulation, supervision and risk management of the banking sector, mainly by proposing measures to enhance capital adequacy and to control excessive leveraging. See http://www.bis.org/bcbs/basel3.htm. With regard to supervisory standards to be applied worldwide, *Basel Committee* has elaborated the "*Core Principles of Banking Supervision*", adopted in 1997 and revised in 2006, available at http://www.bis.org/publ/bcbs129.htm. Further, BCBS published in 1999 a report on *Core Principles Methodology*, available at http://www.bis.org/publ/bcbs130.htm) which was also updated in 2006, as part of the Core Principles for Effective Banking Supervision review. Although the *Basel Accords* have legally non-binding character, they have exercised great influence on the formation and development of international financial law and regulation, and further to European financial law and regulation. See indicatively LASTRA, R. M. (2006) *Legal Foundations of International Monetary Stability*, Oxford: OUP; *idem* (2007) *The Reform of the International Financial Architecture*, Kluwer Law International.

In 1999, a *Study Group on Deposit Insurance* was established by the FSF. The findings of this study were the basis of the research undertaken by the *Working Group on Deposit Insurance* established next by FSF in 2000. The efforts of this Working Group led to a report on deposit insurance system to FSF in 2001 and to the creation of the *International Association of Deposit Insurers* (IADI) in 2002.[94]

I.1.2 INTERNATIONAL INITIATIVES ON INVESTMENT SERVICES LAW

Important to the development of international investment services law has been the work of the *International Organization of Securities Commissions* (IOSCO),[95] issuing proposals with a view *inter alia* to develop implement and promote "[…] *internationally recognized and consistent standards of regulation, oversight and enforcement in order to protect investors, maintain fair, efficient and transparent markets, and seek to address systemic risks*".[96]

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[93] BCSB *Core Principles for Effective Banking Supervision* (*supra* n 92) at para. 15.

[94] *IADI* (see www.iadi.org) was established under Swiss law as a non-profit organization and is seated in Basel. HDIGF has not yet joined IADI (last update 28.03.2014).

[95] IOSCO was established in 1983 as a "global cooperative body" (see http://www.iosco.org).

[96] See http://iosco.org/about. It is noted that investor protection aims do not appear in *IOSCO* members' objectives before 2009; see *e.g.* IOSCO (2009) Annual Report, at

In 1998, IOSCO issued a document on the "*Objectives and Principles of Securities Regulation*".[97] In this, IOSCO categorises thirty principles of investment services law, on the basis of three objectives, stated to be the protection of investors; ensuring that markets are fair, efficient and transparent; and the reduction of systemic risk.[98] *IOSCO* maintains that "[…] *these objectives form a basis for an effective system of securities regulation*.".[99]

According to *IOSCO*, "[i]*nvestors should be protected from misleading, manipulative or fraudulent practices, including insider trading, front running or trading ahead of customers and the misuse of clients assets*".[100] Beyond these issues, investor protection

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http://www.iosco.org/annual_report_2009/generalinformation1.html; IOSCO (2008) Annual Report at http://www.iosco.org/annual_report_2008/generalinformation1.html .

[97] At http://www.iosco.org/library/pubdocs/pdf/IOSCOPD82.pdf .

Cf. IOSCO (2003) *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation*, available at http://www.ebrd.com/downloads/legal/securities/IOSCOPD155.pdf With regard to investor protection see *inter alia* IOSCO Technical Committee (1993) *Protecting the Small Investor: Combating Transnational Retail Securities and Futures Fraud*; *idem* (1996) *Measures Available on a Cross-Border Basis to Protect Interests and Assets of Defrauded Investors*; idem (1996) *Client Asset Protection.*

[98] *Ibid.*

[99] *Ibid.*, p. 1.

[100] *Ibid.*, p. 6.

is significantly linked by *IOSCO* to market fairness, which is connected to disclosure and transparency issues.[101]

Investment services law should aim to control the danger of intermediary failure: IOSCO recognizes *inter alia* that "[m]*arket intermediaries should be required to comply with standards for internal organization and operational conduct that aim to protect the interests of clients, ensure proper management of risk, and under which management of the intermediary accepts primary responsibility for these matters*";[102] however, in case an intermediary failure is unavoidable, "[t]*here should be a procedure for dealing with the failure of a market intermediary in order to minimize damage and loss to investors and to contain systemic risk*".[103]

IOSCO recognizes that "[t]*he oversight of market intermediaries should primarily be directed to the areas where their capital, client money and public confidence may most be put at risk*".[104] Regulation of intermediaries as proposed by IOSCO covers entry criteria (licensing), capital and prudential requirements, ongoing supervision and discipline of intermediaries, and the consequences of default and financial failure, noting the importance of segregation and identification of assets in order *inter alia* to protect from defalcation, to facilitate transfer of positions in case of severe market

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[101] *Ibid.*, p. 7. *Cf. ibid.*, p. 24, with regard to regulation of issuers.

[102] *Ibid.*, 23rd Principle.

[103] *Ibid.*, 24th Principle.

[104] *Ibid.*, p. 33, wherein further references.

disruption, to prevent the use of clients assets for proprietary trading, and to assist in the orderly winding up if necessary.[105]

As far as investor protection *ex post facto* is concerned, *i.e.* when intermediary failure has occurred, IOSCO *Objectives and Principles of Securities Regulation* are limited in stating that "[t]*here must be effective and legally secure arrangements for default handling. This is a matter that extends beyond securities law to the insolvency provisions of a jurisdiction*".[106]

Further, regarding investor protection in case of intermediary failure, IOSCO states that "[i]*nvestors should have access to a neutral mechanism (such as Courts or other mechanisms of dispute resolution) or means of redress and compensation for improper behaviour*".[107] This reference does not appear to be excluding liability of regulators in tort; this approach is supported by the position that "[t]*he capacity of the regulator to act responsibly, fairly and effectively will be assisted by:* […] *adequate legal protection*

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[105] *Ibid*, pp. 33 – 39.

[106] *Ibid.*, p. 8. See also IOSCO notes on appropriate domestic legal framework, *ibid.*, Annexure 3.

[107] *Ibid.*, p. 7. The notion of "improper behaviour" is not defined by IOSCO; a question is raised as to whether "improper behaviour" refers only to the defaulting intermediary, or may also be understood as referring to other entities, even supervisory and regulatory authorities. In this regard, it is interesting to note that IOSCO refers to regulatory accountability (which is not equivalent to liability, though), stating *inter alia* that "[t]*he regulator should be* […] *accountable in the use of its powers and resources.* […] *Accountability implies: a regulator that operates independently of sectoral interests; a system of public accountability of the regulator; a system permitting judicial review of decisions of the regulator*" (*ibid., p. 11*).

for regulators and their staff acting in the bona fide discharge of their functions and powers".[108]

Thus, IOSCO seems to be proposing investor redress and compensation for "improper behaviour" on the one hand, and protection of regulators acting *in bona fide* on the other hand, without entering into further discussion of these issues.

The 2001 Joint Forum (BCBS, IOSCO, IAIS) Report "Core Principles – Cross-sectoral Comparison"

Relevant to the issue addressed here is the object of research conducted by the *Joint Forum*[109] operating under the aegis of BCBS, IOSCO and IAIS, on a cross-sectoral comparison of the Core Principles; the first such study, conducted by the *Joint Forum* before the current international Crisis erupted, was published in 2001 under the title "*Core Principles – Cross-sectoral Comparison*":[110]

In 1999 the *Joint Forum* was mandated by its parent organizations to compare core principles of financial law in the three sectors of banking, securities and insurance,

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[108] *ibid.*, p. 10.

[109] http://www.bis.org/bcbs/jointforum.htm

[110] Available at http://www.bis.org/publ/joint03.pdf . The second relevant study, which builds upon the first, was conducted in the wake of the Crisis and was published in January 2010 under the title "*Review on the Differentiated Nature and Scope of Financial Regulation – Key Issues and Recommendations*"; see *infra*, n 166.

"[…] *identifying common principles and understanding differences where they arise*".[111]

Such comparative research was regarded as beneficial in the assessment and implementation of core principles; the focus was on the issue of consistency of the various core principles as had been developed by the relevant international organisations, with a view to facilitating their implementation.[112]

Thus, it appears that an issue of certainty, predictability and effectiveness in implementation was at the origins of this *Joint Forum* research. The Core Principles issued by BCBS, IOSCO and IAIS were taken into account for the purposes of this *Joint Forum* survey.[113]

The *Joint Forum* took into account the historical background to the Core Principles, referring to the creation of the organisations that have issued the respective documents, and noted that despite the different backgrounds, the processes followed were similar in many respects,[114] and that following their issuing, Core Principles have been followed

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[111] *Ibid.*, p. 4, para. 13.

[112] *Ibid.*, p. 4, para. 12.

[113] *I.e.* The BCBS (1997) Core Principles for Effective Banking Supervision, and the relevant BCBS (1999) Core Principles Methodology; the IAIS (2000) Insurance Core Principles, and the relevant IAIS (2000) Core Principles Methodology; and the IOSCO (1998) Objectives and Principles of Securities Regulation. However, the methodologies were used only as a secondary source, and other documents fell out of its scope. See *ibid.*, p. 5, paras. 14 – 16.

by elaboration of compliance or self-assessment criteria issued by the relevant organisations.[115]

The *Joint Forum* noted that bank supervisors focus only on solvency issues, and thus on the supervised institutions (a factor which is reflected in the structure of the Core Principles for banks), while on the other hand securities supervisors supervise not only institutions (market intermediaries), but also collective investment schemes (both intermediaries and products), secondary markets, and disclosure by issuers.[116]

The *Joint Forum* also noted that "[…] *some of the similarities and differences among the core principles reflect, at least in part, intrinsic characteristics of the banking, insurance and securities sectors*";[117] without though defining the notion of "intrinsic characteristics". It does, however, observe that the boundaries between banking, insurance and securities sectors have been blurred, due also to the growth of financial conglomerates.[118]

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[114] *Ibid.*, p. 5.

[115] *Ibid.*, p. 6.

[116] *Ibid.*, p. 7, paras. 29 and 30.

[117] *Ibid.*, p. 8, para. 35.

[118] *Ibid.*, p. 8, para. 36.

The *Joint Forum* observed that one of the areas where the three sectors differ is the form of financial intermediation and risk transfer,[119] and that perhaps the most difficult issue to compare is risk identification and risk management among the three sectors.[120]

Analysing the "intrinsic differences" between banking, investment services and insurance sectors, the *Joint Forum* considered *inter alia* that while banking supervisors in many jurisdictions avoid or postpone public disclosure of banks' problems, in an effort to maintain public confidence in the banking system,[121] securities regulators on the other hand generally disclose enforcement actions, because "[…] *in the securities sectors, supervisory transparency and accountability are linked to the maintenance of confidence in the markets* […]".[122] Although no definition of supervisory transparency and accountability was provided by the *Joint Forum*, it was mentioned that transparency in the view of securities supervisors strengthens perceptions of supervisory predictability, and also that transparency contributes to supervisory accountability.[123]

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[119] *Ibid.*, p. 9, para. 37.

[120] *Ibid.*, p. 8, para. 33.

[121] *Ibid.*, p. 9, para. 41.

[122] *Ibid.*, p. 11, para. 52.

[123] *Ibid.* An indication as to how the notion of accountability is perceived by the *Joint Forum* is offered by its reference that "[…] *the core principles in all three sectors mention the need for supervisors to be accountable to the public for their supervisory actions. This is achieved in part by issuing annual reports to the public*"; *ibid.*, p. 14, para. 62. It is submitted, however, that in our opinion publishing of reports does not achieve *per se* accountability, although it certainly enhances transparency and allows for public scrutiny.

In addition, the *Joint Forum* identified four features, which it considered unique to the investment services sector: these are the existence and role of Self-Regulatory Organizations (SROs), the importance of full and fair disclosure by issuers, the responsibility of market surveillance (including monitoring by supervisors of trading in listed securities), and enforcement.[124] The reasoning of the *Joint Forum* as to the broad enforcement powers of supervisors is important, if somewhat laconic: "[i]*nvestors are vulnerable to misconduct by intermediaries. Securities violations also can occur both on and off the securities markets*".[125]

In attempting to explain this specificity, the perception of risk in the organisation of securities and banking regulation and supervision, as related to individual protection, comes to the fore. In this aspect, the *Joint Forum* is clear: it maintains that although "[…] *all three sets of core principles mention both customer (i.e. depositor, policyholder, investor) and systemic stability as key objectives*", IOSCO has a third (additional) objective: ensuring that markets are fair, efficient and transparent.[126]

According to the *Joint Forum*, IOSCO places equal weight on its three objectives. Further, the *Joint Forum* maintains that "[a]*lthough all three sectors regard systemic*

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[124] *Ibid.*, p. 12, para. 54.

[125] *Ibid*.

[126] *Ibid.*, p. 13, para. 58.

stability as an objective, the Basel core principles place greater emphasis on systemic stability and consider customer protection as a by-product of stability".[127]

Moreover, on the central issue of customer protection, the *Joint Forum* noted that "[c]*ustomer protection is not specifically addressed in the Basel core principles, except to the extent that depositor protection is cited as an objective of banking supervision*".[128] However, it is one of the three announced objectives of investment services law according to IOSCO and, as the *Joint Forum* observes, it includes segregation and protection of client assets that are held separate from investment firm funds.[129]

The *Joint Forum* concluded that "[t]*he comparison actually reveals a good deal more by way of similarity between the three sectors than initial appearances might suggest. On some important issues, the core principles have many common features, in respect of the supervisory system, the supervised entity, ongoing supervision and at least some aspects of prudential requirements* […] *Only in the area of markets and customers does it become difficult to establish such high-level common ground, and that is primarily because of the difference in the traditional scope of supervisory responsibility between the three sectors*".[130]

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[127] *Ibid.*, p. 14, para. 59.

[128] *Ibid.*, p. 21, para. 112.

[129] *Ibid.*, p. 21, para. 114.

[130] *Ibid.*, p. 22, para. 121.

On the other hand, the *Joint Forum* also found that there are some significant differences, "[…] *which emerge from the comparison of the core principles which are not readily explained either as differences of form or as intrinsic differences*". [131] It further noted that while these differences were discussed at length, there was no agreement as to their reasons, which it considered perhaps attributable to differences of choice of supervisory approach, objectives or underlying philosophy.[132] One of the areas where such difficult to explain differences appear is, according to the *Joint Forum*, safeguarding of client assets; as it mentions, "[…] *it is not clear what accounts for the differences in detail between Basel and IOSCO on this issue*". [133]

In the approach adopted before the Crisis, this difference, beyond being described as attributable to the "traditional" difference of supervisory responsibility between the banking and the investment sector, was left essentially unexplained.

As the Crisis set upon the economic order and financial architecture in particular in the US and the EU, the *ratio* of both banking and investment services law and their interrelation were reconsidered.

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[131] *Ibid.*, p. 23, para. 129.

[132] *Ibid.*

[133] *Ibid.*, p. 24, para. 129. The *Joint Forum* noted that BCSB places greater emphasis on systemic stability and IAIS on customer protection, while IOSCO places equal emphasis on investor protection, fair, transparent and efficient markets, and reduction of systemic risk.

I.2 INTERNATIONAL INITIATIVES ON FINANCE LAW AND RETAIL INVESTOR PROTECTION AFTER THE CRISIS

The Crisis has been a catalyst to financial law development on a global level, causing re-examination of the existing financial law from its foundations, re-assessing and re-designing its structure and mechanisms, the criteria of financial regulation, the content of applicable rules and the organisation and powers of competent authorities.[134]

Important developments have initiated from the work of international *fora* and organizations, which led to further developments in the EU and MSs legal orders. It is for that reason important to briefly examine developments on the international level on the wake of the Crisis.

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[134] See indicatively BLACK, J. (2010) 'Risk-based regulation: choices, practices and lessons learnt', in OECD *Risk and Regulatory Policy: Improving the Governance of Risk*, Paris: OECD; idem (2010) 'The role of risk in regulatory processes', in BALDWIN, R., CAVE, M. and LODGE, M. (ed.) *The Oxford Handbook of Regulation*, New York: Oxford University Press; LASTRA, R.M. and LOUIS, J.V. (2013) 'European Economic and Monetary Union: History, Trends and Prospects', *Yearbook of European Law*, pp. 1 - 150; WYMEERSCH, E., HOPT, K.J. and FERRANINI, G. (ed.) (2012) *Financial Regulation and Supervision: a Post-Crisis Analysis*, Oxford: Oxford University Press.

I.2.1 G-20 DECLARATIONS AND INITIATIVES

Some of the fundamental issues raised by the Crisis were addressed on political level at international conferences held mainly by the *G-20*,[135] the *G-10*, and the *G-7*.[136] The series of frequent meetings of the *G-20* on the matter, especially in the first years of the Crisis, have been accompanied by relevant Statements, Declarations and *Communiqués*, aiming at important financial regulation reform with a view to enhancing effectiveness of regulation and supervision.[137]

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[135] The *"Group of Twenty"* (*G-20*) is an international forum for cooperation on important economic and financial issues on a global level. Its first meeting took place on the 14th and 15th of November 2008, where its member-States discussed the Crisis and agreed to an action plan to control it. Its stated objectives include "*policy coordination between its members in order to achieve global economic stability, sustainable growth*"; "*promoting financial regulations that reduce risks and prevent future financial crises*"; "*modernising international financial architecture*". See www.g20.org .

[136] See http://www.imf.org/external/np/exr/facts/groups.htm#G7

[137] Initially, a *G-7* Finance Ministers and Central Bankers' meeting was held on 11 and 12 October 2008; its discussions were continued in the *G-20* summit held in Washington on 14 and 15 November 2008, called *New Bretton Woods* or *Bretton Woods II*, since the structure and operation of the international monetary and financial system were to be discussed again. Further G-20 summits were held in London on 2 April 2009 (see G-20 "Declaration on Strengthening the Financial System – London, 2 April 2009" available at

It is interesting to note, that in their Declaration of November 15, 2008 following the Washington Summit, *G-20* refer to the root causes of the Crisis mentioning *inter alia* that "[p]*olicy-makers, regulators and supervisors, in some advanced countries, did not adequately appreciate and address the risks building up in financial markets, keep pace with financial innovation, or take into account the systemic ramifications of domestic regulatory actions*".[138] Referring to common principles for reform of financial markets, G-20 notes that while "[…] *regulation is first and foremost the responsibility of national regulators who constitute the first line defense against market instability*", intensified international cooperation among regulators and strengthening standards and

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http://www.g20.org/Documents/Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf; see also G-20 "The Global Plan for Recovery and Reform, 2 April 2009", available at www.g20.org/Documents/final-communique.pdf), in Pittsurgh on 24 and 25 September 2009 (see G-20 "Leaders' Statement, The Pittsburgh Summit, September 24-25, 2009" available at http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf), in Toronto on 26 and 27 June 2010 (see G-20 "The G-20 Toronto Summit Declaration, June 26-27, 2010" available at http://www.g20.org/Documents/g20_declaration_en.pdf), in Seoul on 11 and 12 November 2010 (see G-20 "The G20 Seoul Summit Leaders' Declaration, November 11-12, 2010" available at http://www.g20.org/Documents2010/11/seoulsummit_declaration.pdf), in Cannes, November 4, 2011 (available as a draft at www.g20.org; in this summit, FSB was asked to prepare a report on the Legal Entity Identifier for Financial Markets project, which was published by FSB on 08.06.2012; available at http://www.financialstabilityboard.org/publications/r_120608.pdf), in Los Cabos, June 19, 2012 (available at www.g20.org), in St Petersburg, September 4-5, 2013 (available at https://www.g20.org/about_g20/past_summits/2013_st_petersburg), and programmed to take place in Brisbane, Queensland, on November 15 – 16, 2014.

[138] *Ibid.*, p. 1.

implementation are necessary.[139] Regarding the promotion of integrity in financial markets, G-20 announce their commitment to protect the integrity of the world's financial markets by several measures, including "*bolstering investor and consumer protection*".[140]

Further, an "*Action Plan to Implement Principles for Reform*" was agreed by the *G-20* at the Washington Summit.[141] Regarding the principle of enhancing sound resolution, *G-20* called for a review of "[t]*he differentiated nature of regulation on the banking, securities and insurance sectors and provide a report outlining the issue and making recommendations on needed improvements*".[142] It further noted that national and regional authorities should review resolution regimes and bankruptcy laws, to ensure that they permit an orderly wind-down of large complex cross-border financial institutions.[143] Also, regarding the principle of promoting integrity of financial markets, *G-20* asked as an immediate action to be taken by March 31, 2009, for national and regional authorities to "[…] *review business conduct rules to protect markets and investors, especially against market manipulation and fraud* […]".[144] Similarly, regarding the principle of reinforcing international cooperation, *G-20* asked for the

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[139] *Ibid.*, p. 2.

[140] *Ibid.*, p. 3.

[141] Annexed to the G-20 Declaration of November 15, 2008.

[142] *Ibid.*

[143] *Ibid.*

[144] *Ibid.*

collection of information on the status of convergence in regulatory practices in various areas, including deposit insurance.[145]

In the *Communiqué* of the London Summit of April 2, 2009, *G-20* stressed *inter alia* that [r]*egulators and supervisors must protect consumers and investors, support market discipline, avoid adverse impacts on other countries, reduce the scope of regulatory arbitrage, support competition and dynamism, and keep pace with innovation in the marketplace*". In their respective Declaration of 2 April 2009, the *G-20* decided that the FSF should be expanded having its mandate broadened and its institutional basis and capacity enhanced, being renamed as the *Financial Stability Board* (FSB), and should closely collaborate with the IMF, each complementing the other's role and mandate.[146]

I.2.2 FSB, BCSB AND IADI REPORTS AND PROPOSALS

On the basis of the above G-20 decision, FSB published on 25.09.2009 a Report to G-20 on "*Improving Financial Regulation*".[147] Among other issues, FSB stressed the need for effective and consistent implementation of financial law reforms in the national legal orders.[148]

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[145] *Ibid.*

[146] See FSB, "Re-establishment of the FSF as the Financial Stability Board", at www.financialstabilityboard.org/publications/r_090402.pdf .

[147] Available at www.financialstabilityboard.org/publications/r_090925.pdf

[148] *Ibid.*, para. 53, p. 13.

Further, BCBS and IADI published in 2009 the *Core Principles for Effective Deposit Insurance Systems*.[149] One of the positions advanced in this document is that, "*In order to be credible, and to avoid distortions that may result in moral hazard, a deposit insurance system needs to be part of a well-constructed financial system safety net, properly designed and well implemented. A financial safety net usually includes prudential regulation and supervision, a lender of last resort and deposit insurance. The distribution of powers and responsibilities between the financial safety-net participants is a matter of public policy choice and individual country circumstances*".[150]

According to this report by the BCBS and IADI, depositor protection appears rather as a prerequisite of systemic stability than as an autonomous aim of financial regulation;[151] despite the disparity in the various depositor protection regimes in the world there is a general implicit expectation of the public for banks to be rescued[152] (connected to the

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[149] This report has taken into account *inter alia* the BCBS (2006) *Core Principles for Effective Banking Supervision*, the FSF (2001) *Final Report of the Working Group on Deposit Insurance*, and the IADI (2005) *Key Conclusions of the APEC Policy Dialogue on Deposit Insurance and IADI Guidance Points*.

[150] See BCBS and IADI (2009) *Core Principles*, *op. cit.*, at para. 4.

[151] According to BCBS and IADI "[t]*he principal objectives for deposit insurance systems are to contribute to the stability of the financial system and protect depositors*"; *ibid.*, Principle 1 – Public Policy Objectives.

[152] Depositor protection may be classified as "explicit" *vs* "implicit", where explicit refers to a system of rules on depositor protection provided by law, and implicit refers to an expectation formulated by factors others than law: BCBS and IADI state that

economic and political risk of bank runs) yet the expectation of using public funds to save banks causes moral hazard.[153]

As BCBS and IADI published their *Core Principles for Effective Deposit Insurance Systems*,[154] FSB published in February 2012 a Peer Review Report on "*Thematic Review on Deposit Insurance Systems*"[155] which examines the adaptation of jurisdictions to deposit insurance as necessitated by the Crisis and forwards certain proposals to achieve effective protection of market stability and depositors.

Also, the FSB published an important report on the "*Key Attributes of Effective Resolution Regimes for Financial Institutions*".[156]

"[i]*mplicit deposit protection arises when the public, including depositors and perhaps other creditors, expect some form of protection in the event of a bank failure. This expectation usually arises because of the governments past behaviour or statements made by officials. Implicit protection is, by definition, never formally specified. There are no statutory rules regarding the eligibility of bank liabilities, the level of protection provided or the form which reimbursement will take. Funding is discretionary and often depends on the government's ability to access public funds.*"; *ibid*., p. 6, n 2.

[153] BCSB and IADI note in this regard that "[b]*lanket guarantees can have a number of adverse effects if retained too long, notably moral hazard.*"; *ibid.*

[154] *Supra*, n 149.

[155] Available at http://www.financialstabilityboard.org/publications/r_120208.pdf .

[156] The new proposed recovery and resolution regime is discussed *infra*, Ch III.2.3.

Furthermore, BCSB proceeded in June 2010 to publishing its updated Objectives and Principles of Securities Regulation,[157] which do not bring important changes to its 1998 Objectives and Principles with regard to investor protection.

The 2010 *Joint Forum* (BCBS, IOSCO, IAIS) Report "Review on the Differentiated Nature and Scope of Financial Regulation – Key Issues and Recommendations"

Mandated by the G-20, the *Joint Forum* of BCBS, IOSCO[158] and IAIS, published in January 2010 a "*Review on the Differentiated Nature and Scope of Financial Regulation – Key Issues and Recommendations*".[159] As the *Joint Forum* noted, the purpose of its Report was "*to help identify potential areas where systemic risks may not be fully captured in the current regulatory framework*"[160] and to make relevant recommendations.

One of the main areas on which the research by the *Joint Forum* focused were the key regulatory differences across the banking, insurance, and securities sectors.

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[157] Available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf .

[158] See also KARMEL, R. (2012) 'IOSCO's Response to the Financial Crisis', *Brooklyn Law School, Legal Studies Paper No. 268*, March, http://ssrn.com/abstract=2025115.

[159] Available at http://www.bis.org/publ/joint24.pdf .

[160] *Ibid.*, at p. 1.

One of the "Guiding Principles" used by the *Joint Forum* in its research is that "[s]*imilar activities, products, and markets should be subject to similar minimum supervision and regulation*".[161] Another such "Guiding Principle" referred to by the *Joint Forum* in the same context is that "[c]*onsistency in regulation across sectors is necessary; however, legitimate differences can exist across the three sectors*"[162] –the question then in whether differentiation of the protection awarded in the case above is legitimate; and according to which criteria.

The *Joint Forum* accepted that international financial law is sector-specific (banking, investment services and insurance), which explains the development of sector-specific regulatory standards (core principles) in each of these sectors.[163] This sector-specific approach entails dangers of regulatory gaps, which in turn may cause supervisory challenges and allow for regulatory arbitrage.[164] The *Joint Forum* research built on the premise that "[t]*he core principles reflect the main characteristics of the respective sector and the nature of the financial institutions supervised under each framework*",[165] and focused of an update of its relevant work in 2001.[166] According to the *Joint Forum*, despite the different format, content and language used, there are substantial

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[161] *Ibid.*, p. 4.

[162] *Ibid.*

[163] *Ibid.*, p. 3.

[164] *Ibid.*

[165] *Ibid.*, p. 5.

[166] *Supra*, n 110.

commonalities across sectors –a fact which also reveals the converging nature of business in the three sectors.[167] At the same time, there are differences among core principles, which always according to the *Joint Forum*, "[…] *reflect –at least in part– intrinsic characteristics of the banking, securities and insurance sectors*".[168]

Although certain differences may be objectively justified, according to the *Joint Forum* research, as related to the nature of the persons or business regulated, it is concluded that certain differences cannot be objectively justified.[169] One of the areas where regulatory differences are identified by the *Joint Forum* is "*the extent to which regulation of the different sectors deal with business conduct and consumer or investor protection*".[170]

Interim Concluding Remarks

Retail investor protection is understood, according to analysis elaborated by international financial organisations and *fora*, as part of the double aim of financial law, to protect financial market participants and (through also achieving their confidence in the financial system) the stability of the financial market.

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[167] Joint Forum (2010) *Review on the Differentiated Nature*, *op. cit.*, p. 5.

[168] *Ibid.*, pp. 5 and 25.

[169] *Ibid.*

[170] *Ibid.*, p. 6.

Although relevant considerations and criteria have been expressed through economic and financial research and analysis, on the basis mainly of the criterion of risk understood to be connected to the "intrinsic characteristics" of each sector and activity of the financial market, their expression in legal terms and rules has proven challenging.

Financial services (banking, investment and insurance) law has been differentiated per sector of financial activity on the basis of an unclearly defined criterion of risk which has been further reflected in an uncertain differentiation in the legal status and the level of protection of depositors *vis-à-vis* retail investors.

The Crisis has led to a re-assessment of perceptions as to the *ratio* and *modus operandi* of financial law, including the sources of systemic risk and the reasons as to the differentiation in the treatment of depositors *vis-à-vis* retail investors.

However, retail market participant protection appears to be still connected primarily to systemic stability considerations.

CHAPTER II. DEVELOPMENT AND OBJECTIVES OF EU FINANCE LAW, AND RETAIL INVESTOR PROTECTION

EU finance (banking and investment services) law is part of the greater system of rules that compose EU internal market law, and has to be examined and taken into account also in this perspective.

In this respect, EU finance law followed the difficulties faced in creating a single European market, as planned by the EEC Treaty in 1952,[171] from its initial stages to the

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[171] For an account of the evolution of EU finance law see indicatively LASTRA, R. and LOUIS, J.-V. (2013) 'European Economic and Monetary Union: History, Trends, and Prospects ', *YEL*, April, pp. 1-150; MOLLE, W. (1997) *The Economics of European Integration - Theory, Practice and Policy*, 3rd edition, London: Ashgate; TRIDIMAS, T. (2010) 'EU Financial Regulation: From Harmonisation to the Birth of EU Federal Financial Law', in BIRKINSHAW, P. and VARNEY, M. (ed.) *The European Union Legal Order after Lisbon*, Kluwer; *idem* (2011) 'EU Financial Regulation: Federalization, Crisis Management, and Law Reform', in CRAIG, P. and De BURCA, G. *The Evolution of EU Law*, 2nd edition, Oxford: OUP; WALKER, G.A. (2006) *European Banking Law - Policy and Programme Construction*, *op. cit.*; USHER, J.A. (2000) *The Law of Money and Financial Services in the EU*, 2nd edition, Oxford: OUP.

period introduced by the 1985 Commission White Paper[172] and the *Cassis* and *Keck* case-law and the mutual recognition mechanism.[173]

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[172] Commission (1985) *Completing the Internal Market – White Paper from the Commission to the European Council* COM(85) 310 final, 14 June 1985. This White Paper did not refer to the investment services market, but only to banking and insurance markets, in which inter-State provision of services was more developed at the time. It further refers to mutual recognition as a general principle which should be approved under certain conditions (*ibid.*, paras 58 *et seq.*).

[173] See in general ORTINO, M. (2007) 'The role and functioning of mutual recognition in the European market of financial services', *ICLQ*, p. 309. The principle of mutual recognition introduced by the 1985 White Paper had already been used (although not expressly referred to) in the ECJ decision of 20.02.1979 in Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649. For an analysis of the case, including consumer groups response to it, see WALKER G. A. (2006) European Banking Law – Policy and Programme Construction, *op. cit.* pp. 120 *et seq.*, wherein further references. The *Cassis* ruling was relevant to the ECJ decision of 11.07.1974 in Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837, relating to the notion of national measures having an equivalent effect to trade restrictions. For discussion of *Dassonville* and relevant case-law see WEATHERILL, S. and BEAUMONT, P. (1999) *EU Law*, *op. cit.*, p. 532 *et seq. Cassis* case-law was partly re-examined by the ECJ decision of 24.11.1993 in Cases C-267/91 and 268/91, *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-06097. For an analysis and discussion of this 'post-Keck' line of case law, see CHALMERS, D. (1994) 'Repackaging the internal market - the ramifications of the Keck judgment', *ELR*, p. 385; GROMLEY, L. (1994) 'Reasoning renounced? The remarkable judgment in Keck & Mithouard', *EBLR*, p. 63; JOLIET, R. (1995) 'The free circulation of goods: The Keck and Mithouard decision and the new directions in the case law', *CJEL*, vol. 1, p. 436; MADURO, M. P. (2002) 'Harmony and Dissonance in Free Movement', in ANDENAS, M. and ROTH, W.-H. (ed.) *Services and Free Movement in EU Law*, Oxford: OUP; WEATHERILL, S. (1996) 'After Keck: Some thoughts on how to clarify the clarification', *CMLRev*, vol. 33, p. 885.

With regard to the freedom of establishment and the freedom to provide services, the ECJ recognized the direct effect of the relevant Treaty provisions.[174] Establishment is to be distinguished from provision of services on the basis of 'periodicity, continuity and regularity' of the activity conducted.[175]

In the area of financial services, the principle of equivalence as expressed by the rule of mutual recognition entails that financial market participants are to be allowed to provide financial services in any MS, provided they had received authorisation in the MS of origin (home-MS) by the competent national authorities and according to national law which (correctly) incorporates requirements of EU law ("*passporting*").[176] Such authorisation entails that other MSs are unable to impose additional licensing requirements, as these would amount to measures having equivalent effect to restrictions and thus to protectionist measures, except where such (non-discriminatory with regard to nationality) restrictions relate to imperative national reasons in areas

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[174] See *e.g.* ECJ decision of 21.06.1974 in Case 2/74 *Reyners v Belgian State* ECR [1974] 631; ECJ decision of 03.12.1974 in Case 33/74 *Van Bisbergen v Bestuur van de Bedriifsvereniging voor de Metaalnijverheid* ECR [1974] 1299.

[175] See *e.g.* ECJ decision of 30.11.1995 in Case C-55/94, *Reinhard Gebhard v Consiglio dell' Ordine degli Avocati e Procuratori di Milano* ECR [1995] I-4165.

[176] See indicatively CREMONA, M. (1994) 'A European passport for investment services', *JBL*, p. 195; BIBLIOGRAPHY \l 1033 LOMNICKA, E. (2000) 'The home country control principle in the financial services Directives and case law', *EBLR*, p. 324.

where national laws have not been harmonised, or fall within the permitted by primary EU law derogations in areas where harmonisation has been achieved.

According to the philosophy of the Commission's 1985 White Paper approach, financial markets integration would be achieved on the basis of mutual recognition, minimum harmonisation as well as home-MS control, while host-MS control would be exercised in parallel with regard to CoB rules in the sake of public interest and general good considerations. Considering the effect of non-discriminatory national measures on the exercise of such freedoms, the ECJ developed relevant criteria which take into account the effects of the national restrictive measure and its possible justification under the "imperative reasons" doctrine announced in *Cassis* and the following formulation of *Keck* and *'post-Keck'* case law.[177]

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[177] see *e.g.* ECJ decision of 03.12.1974 in Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 01279; ECJ decision of 18.01.1979 in Joined Cases 110/78 to 111/78 *Ministère public and "Chambre syndicale des agents artistiques et impresarii de Belgique" ASBL v Willy van Wesemael and others* [1979] ECR 35; ECJ decision of 18.03.1980 in Case 62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* ECR [1980] 881; ECJ decision of 17.12.1981 in Case 279/80 *Criminal proceedings against Alfred John Webb* [1981] ECR 3305; ECJ decision of 25.07.1991 in Case C-76/90 *Manfred Säger v Dennemeyer & Co Ltd* [1990] ECR I-422; ECJ decision of 25.07.1991 in Case C-288/89 *Stichting collective Antennevoorziening Gouda and others v Commissariaat voor de Media* [1991] ECR I-4007; ECJ decision of 31.03.1993 in Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663. See also DASHWOOD, A. and WYATT, D. (ed.) (2011) *European Union Law*, Oxford: Hart Publishing, wherein further references.

It might be argued in this sense, that integration has evolved by adapting to national concerns revealed through “public interest” or “general good” considerations.[178]

Discrepancies in the integration of the European financial market through this process led to the 1997 European Financial Services Action Plan (FSAP)[179] and the 2000 “*Lamfalussy process*”.[180]

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[178] See evaluation of the home-MS principle in financial integration law by the ECJ in Case C-233/94, *Germany* v *European Parliament and Council* (*supra* n 62), at para. 64, and the relevant Opinion of AG Léger, points 126 – 129. The ECJ, concurring with the Advocate General, ruled that while this principle has been the guiding principle in the harmonization of the financial services sector, the Community authorities are entitled to depart from it if so deemed appropriate (as in the case of DGSD with regard to certain issues).

[179] Despite the new mutual recognition approach the completion of the single European financial market had not been achieved at the end of the 20th century, and the financial market remained fragmented. In an effort to address this issue, the Commission issued in 1997 a Communication to the European Council on an *Action Plan for the Single Market* (CSE(97) 1 final, 04 June 1997 and in 1998 a Communication on *Financial Services: Building a Framework for Action* (COM(1998) 625 final, 28 Oct. 1998 which were followed in 1999 by the Commission Communication of 11 May 1999 *Financial Service: Implementing the Framework for Financial Markets: Action Plan* (FSAP) (COM(1999) 232) which provided a framework for action and a timetable to achieve establishment of a single market in wholesale financial services, increasing investor protection and transparency in retail markets, and strengthening prudential supervision.

[180] In 2000, the Council appointed an expert Committee chaired by Baron A. Lamfalussy, to assess the progress of financial markets integration in the EU. The Committee issued an Initial Report in 2000 and in 2001 the Final Report of the Committee of Wise Men on the Regulation of the European Securities Markets (*Lamfalussy Report*). The *Lamfalussy Report* exercised criticism on the normative

The *Lamfalussy* process illustrates the lengthy effort of the EU institutions and of MSs to establish a single Market in the area of financial services, which has followed the historical evolution and the different stages of political development of the EU.[181]

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formation and implementation of measures to achieve the internal financial market, and proposed a series of measures to achieve the FSAP. The *Lamfalussy Report*, endorsed by the Stockholm Council and by the European Parliament in 2001, proposed the adoption of a new normative structure for achieving the internal financial market. Initially the *Lamfalussy Report* recommendations referred to the securities sector, but were subsequently extended also in the banking and insurance sector. The Report proposed as new normative structure (a) a principle-based legislation adopted on the basis of the co-decision procedure ("Level 1"), (b) implementing measures, adopted by the Commission under powers conferred by Level 1 measures, which is to be assisted by the Committee of European Securities Regulation (CESR) and the European Securities Committee (ESC) ("Level 2"), (c) enhanced cooperation between members of CESR in order to achieve implementation of Level 1 and Level 2 measures ("Level 3"), and (d) effective enforcement of compliance by the Commission ("Level 4"). See in general MOLONEY, N. (2003) 'II. The Lamfalussy legislative model: A new era for the EC securities and investment services regime', *ICLQ*, vol. 52, no. 2, pp. 509-520. The influence of the *Lamfalussy* Report has been important, in terms of legislative production. However, the division of responsibilities between home-MS and host-MS, according to the *Lamfalussy* process, raised concerns: see *e.g.* CESR (2007) *The Passport under MiFID*; Commission (2007) *Supervision of Branches under MiFID*.

[181] With regard to market integration achieved in the EU before the Crisis, see *inter alia* Commission Staff Working Document, "Financial Integration Monitor 2006", SEC(2006) 1057, 26.07.2006; Commission, White Paper, "*Financial Services Policy 2005 – 2010*, COM(2005) 629 final, available at http://ec.europa.eu/internal_market/finances/docs/white_paper/white_paper_en.pdf .

During this process, the political and legal machinery of integration moved from maximum harmonisation to minimum harmonisation and mutual recognition, and then to a new effort towards focused maximum harmonisation and centralisation of institutional control.[182]

In order to examine the *ratio* of EU finance law in particular with regard to retail investor protection, and how it interrelated to depositor protection, it will be necessary to take into account certain main features of EU finance law as it developed until the Crisis, before proceeding to examining how it has been affected by the Crisis.

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[182] For an assessment of the *Lamfalussy* process, see EP Communication of 9 October 2008 with recommendations to the Commission (OJ C 9 E, 15.1.2010, p. 48). For an overview, see FERRAN, E. and GREEN, D. (2008) 'Are the Lamfalussy Regulatory Networks Working Successfully?', in Forum, E.P. *Joining-up Europe's Regulators*; LASTRA, R.M. (2003) 'Regulating European Securities Markets: Beyond the Lamfalussy Report', in ANDENAS, M. and AVGERINOS, Y. (ed.) *Financial Markets in Europe: Towards a Single Regulator?* The Hague: Kluwer International.

II.1 DEVELOPMENT OF EU FINANCE LAW UNTIL THE CRISIS, AND RETAIL INVESTOR PROTECTION

The development of EU finance law until the Crisis will be briefly examined, taking into account main features of the evolution of EU banking and investment services law, focusing mainly on ISD and MiFID, as they are closely related to retail investor protection issues, and on their transposition into the Hellenic legal order, as related to the issue under consideration.

II.1.1 DEVELOPMENT OF EU BANKING LAW UNTIL THE CRISIS

The EEC Treaty did not refer to the banking sector, except for providing that necessary measures had to be adopted on the basis of unanimity, and in line with the liberalisation of capital movements,[183] efforts were made to achieve approximation of national rules in the area of banking on the basis of general Treaty provisions on freedom of establishment and freedom to provide services.[184]

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[183] EEC Treaty Article 61.

[184] For an overview see DASSESSE, M., STUART, I. and PENN, G. (1994) *EC Banking Law*, LLP; ELLINGER, E.P., LOMNICKA, E. and HOOLEY, R.J.A. (2002) *Modern Banking Law*, 3rd edition, Oxford: OUP; THEIL, L. (1992) 'A review of the

Such important initiatives were reflected in the Banking Directives, providing the context for the operation of credit institutions in the EEC. The gradual liberalisation of capital movement permitted the first efforts to harmonize banking activities throughout the EEC. The First Banking Directive,[185] adopted in 1977, provided the basic rules for authorization of credit institutions, taking into account BCBS recommendations. The Second Banking Directive,[186] adopted in 1989, introduced principles of home-MS licensing and prudential supervision for credit institutions, thus implementing the EEC "*passporting*" regime.[187]

The definition of a credit institution in both the First and the Second Banking Directives is that of an institution "[…] *whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account*".[188]

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financial services directives', *JIBL*, p. 500; WALKER, G.A. (2006) *European Banking Law*, BIICL.

[185] Directive 77/780/EEC [1977] OJ L322/30.

[186] Directive 89/646/EEC [1989] OJ L386/1. Consolidated in Directive 2006/48/EC (recast) [2006] OJ L177/1. Repealed by Directive 2013/36/EU [2013] OJ L176/338.

[187] *Cf.* Commission Interpretative Communication (1997) *Freedom to provide services and the interests of the general good in the Second Banking Directive* (OJ 97/C 219/04. See also Dassesse, M. (1997) 'The European Commission's interpretative communication on freedom of services and the general good in the Second Banking Directive', *YIFEL*, p. 45.

[188] First Banking Directive, Article 1; Second Banking Directive, Article 1(1). Regarding deposit taking from the public see also ECJ decision of 11.02.1999 in Case

The First Banking Directive (applicable in the context of the case before the ECJ) did not expressly refer to depositor (consumer) protection as *ratio* for its adoption.[189]

The gradual regulation of the banking sector by harmonisation through the EEC was effected *inter alia* by the adoption of the Own Funds Directive,[190] the Solvency Ratio Directive,[191] both adopted in 1989, later the Large Exposures Directive,[192] adopted in

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C-366/97 *Criminal Proceedings against Massimo Romanelli and Paolo Romanelli* [1999] ECR I-00855.

[189] See ECJ decision of 09.07.1997 in Case C-222/95 *Société Civile Immobilière Parodi v Banque Albert de Bary* [1997] ECR 3899, where the ECJ examined the issue of additional authorisation to provide banking services in the host-MS taking into account consumer protection considerations; the ECJ took into account that it is necessary to protect consumers against the harm that they would suffer through banking transactions effected by institutions not complying with the requirements relating to solvency and whose managers do not have the necessary professional qualifications or integrity,[189] and accepted the existence of certain imperative reasons in the banking sector which related to the public interest that could justify measures adopted by the host-MS imposing additional authorisation requirements to credit institutions operating in its territory (ibid., paras. 25 – 26). Furthermore, the ECJ referred expressly to consumer protection issues which are connected to individual protection (such as contractual terms and conflicts of interest) rather than control of the systemic risk. For a critical review of *Parodi* see WALKER, G.A. (2006) *European Banking Law*, *op. cit.*, p. 176 .

[190] Directive 89/299/EEC [1989] OJ L124/16. Consolidated in Directive 2006/49/EC (recast) [2006] OJ L177/201. Repealed by Directive 2013/36/EU.

[191] Directive 89/647/EEC 1989] OJ L386/14. Consolidated in Directive 2006/49/EC, and repealed by Directive 2013/36/EU.

1992, and the Capital Adequacy Directive,[193] adopted in 1993, and then the Capital Adequacy II Directive,[194] adopted in 1998, which sought to harmonise prudential standards for credit institutions, in order to control systemic risk. The influence of the relevant BCBS proposals is noted. Consolidated supervision of banking groups was introduced by the First Consolidated Supervision Directive,[195] adopted in 1983, which was later replaced by the Second Consolidated Supervision Directive,[196] adopted in 1992. Further, another step on the difficult issue of supervising groups of financial companies was taken by the adoption in 2002 of the Financial Conglomerates Directive.[197]

While general EU law in the area of insolvency has been limited to an essential coordination of insolvency proceedings, in the context of judicial cooperation in civil

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[192] Directive 92/121/EEC [1992] OJ L29/1. Consolidated in Directive 2006/49/EC, and repealed by Directive 2013/36/EU.

[193] Directive 93/6/EEC [1993] OJ L141/1. Consolidated in Directive 2006/49/EC, and repealed by Directive 2013/36/EU.

[194] Directive 98/31/EC [1998] OJ L204/13. Consolidated in Directive 2006/49/EC, and repealed by Directive 2013/36/EU.

[195] Directive 83/350/EEC [1983] OJ L193/18.

[196] Council Directive 92/30/EEC [1992] OJ L 110/52.

197 Directive 2002/87/EC [2002] OJ L035/1. Amended by Directive 2013/36/EU. See also Judgment of the EFTA Court of 18 October 2010 in Case E-3/10 — *EFTA Surveillance Authority* v *The Republic of Iceland* (nyr).

matters,[198] minimum harmonization measures were introduced before the Crisis with regard to the reorganization and winding-up of credit institutions which should briefly be examined.

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[198] The main EU law instrument is the "*Insolvency Regulation*" (Council Regulation 1346/2000 [2000] OJ L160/1, which has

been updated a number of times through implementing Regulations with regard to the proceedings and persons falling within its field of application, the most recent being Council Regulation 583/2011 [2011] OJ L160/52. The Insolvency Regulation aims to achieve efficient and effective operation of cross-border insolvency proceedings, and to control forum shopping, which is a requirement to the proper functioning of the internal market (Regulation 1346/2000 Preamble recitals 2 and 4). As substantive bankruptcy laws widely differ among MSs, the Regulation does not introduce insolvency proceedings with universal scope in the EU (*ibid.*, recital 11); it enables the main insolvency proceedings to be opened in the MS where the debtor has the centre of his main interests (*ibid.*, recital 12, and Article 3) and provides for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which fall within its scope and of judgments handed down in direct connection with such insolvency proceedings (*ibid.*, recital 22, and Articles 16 – 26). Following the opening of main proceedings, secondary insolvency proceedings may be opened in another MS without the debtor's insolvency being examined in that other State (*ibid.*, Article 27). However, insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings, do not fall within the scope of application of Regulation 1346/2000 (*ibid.*, Article 1(2)). The law applicable to insolvency proceedings and their effects is the law of the MS within the territory of which such proceedings are opened (*ibid.*, Article 4. See also Article 5 regarding third parties' rights *in rem*). With regard to claim verification rules, Regulation 1346/2000 refers to applicable national law without providing more specific rules.

Winding-Up Directive

The insolvency of credit institutions, as a sectoral and important issue, was treated in the EU before the Crisis by the introduction of Directive 2001/24/EC,[199] an instrument of minimum harmonization in specific issues, aiming at mutual recognition of reorganisation and winding up procedures between MSs, while the application of (unharmonised) national law remained and remains the norm.

While the single-passport regime meant that supervision of a credit institution (and its branches) was provided by the competent authorities of the State where authorisation was granted, according to Directive 2000/12/EC, the same did not apply to reorganisation measures or open winding-up procedures.[200] In this context, mutual recognition of measures adopted by one MS with regard to the reorganization of a credit institution should be acceptable and effective in all MSs.[201] Furthermore, the principle

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[199] Directive 2001/24/EC [2001] OJ L125/15. Proposed to be amended; see COM(2012)0280 final. The original proposal of the Commission for the adoption of this Directive was issued in 1985 ([1998] OJ C356/55 and [1998] OJ C36/1, the opinion of the EESC on the proposal was issued in 1986 ([1986] OJ C263/13, while the opinion of the European Monetary Institute was issued in 1998 ([1998] OJ C332/13. The Directive entered into force on 04.04.2001 and the time limit for its transposition was 05.05.2004 (Directive 2001/24/EC, Articles 34 and 35). In the Hellenic legal order it was transferred by Law 3458/2006 (BGG vol. A, no. 94); see *infra* Ch V.1.2.

[200] Directive 2001/24/EC, Preamble, recitals 3 and 4.

of equal treatment between creditors entails that creditors in the host-MS must be able to exercise their rights to take action within the applicable time limit;[202] it also requires that the credit institution is wound up according to the principles of unity (*i.e.* that the competent administrative and judicial authorities of the home-MS have sole jurisdiction) and universality (*i.e.* that the decisions of said competent authorities of the home-MS are recognized and have legal effect in all other MSs without any formality).[203]

Winding-up proceedings are defined by the Directive as "*collective proceedings opened and monitored by the administrative or judicial authorities of a* [MS] *with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other, similar measure*",[204] governed by the substantive and procedural law of the home-MS (unless otherwise provided in the Directive).[205]

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[201] *Ibid.*, recitals 5 to 7.

[202] *Ibid.*, recital 12.

[203] *Ibid.*, recital 16.

[204] *Ibid.*, Directive 2001/24/EC Article 2.

[205] In particular, the law of the home-MS determines: "*(a)* […]*;(f) the claims which are to be lodged against the credit institution and the treatment of claims arising after the opening of winding-up proceedings;(g) the rules governing the lodging, verification and admission of claims*[…]"; *ibid.*, Directive 2001/24/EC Article 10(2).

While the above issues are left to national law, the Directive provides that any creditor who has his domicile, normal place of residence or head office in a MS other than the home-MS, including MSs' public authorities, shall have the right to lodge claims or to submit written observations relating to claims, further providing that the claims of creditors in other MSs than the home-MS shall be treated in the same way and accorded the same ranking as claims of an equivalent nature in the home-MS.[206]

Also, while the lodging, verification and admission of claims is governed by national law,[207] the Directive provides that a creditor "[…] *shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in re or reservation of title in respect of the claim and what assets are covered by his security*".[208]

Thus, it may be considered that the *corpus* of European banking legislation has historically sought to control systemic risk in the banking sector, while creating a level playing field for banks to compete, aiming to achieve a single European market for the banking sector.

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[206] *Ibid.*, Article 16 (1), (2).

[207] *Ibid.*, Article 10(2) (g).

[208] *Ibid.*, Article 16(3).

II.1.2 DEVELOPMENT OF EU INVESTMENT SERVICES LAW UNTIL THE CRISIS, AND RETAIL INVESTOR PROTECTION. THE INTRODUCTION OF ISD AND MIFID.

EU investment services law[209] states that its aim is dual: the protection of investors and the protection of financial markets.[210]

In the event of an investment firm failure, the damage sustained by the affected investors may also affect the financial market at large –if not as a signal causing systemic disturbances, at least as a factor causing distress to investors' confidence in the market.[211]

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[209] For an overview, see BLAIR, M., WALKER, G.A. and PURVES, R. (ed.) (2009) *Financial Services Law*, 2nd edition, Oxford: OUP; FERRAN, E. (2004) *Building an EU Securities Market*, Cambridge: Cambridge University Press; KERN, A. and MOLONEY, N. (ed.) (2011) *Law Reform and Financial Markets*, Elgar; TRIDIMAS, T. (2010) 'EU Financial Regulation: From Harmonisation to the Birth of EU Federal Financial Law', in BIRKINSHAW, P. and VARNEY, M. (ed.) *The European Union Legal Order after Lisbon*, Kluwer; *idem* (2011) 'EU Financial Regulation: Federalization, Crisis Management, and Law Reform', in CRAIG, P. and De BURCA, G. *The Evolution of EU Law*, 2nd edition, Oxford: OUP.

[210] See Communication from the Commission, "The application of conduct of business rules under Article 11 of the investment services directive (93/22/EEC, COM(2000)0722 final; MiFID, Preamble recitals 26, 31, 44, 61, 71.

[211] See *e.g.* DGSD, Preamble, recital 25.

Harmonisation of investment services law followed the model which had been used in the banking sector, applying the "*passporting*" regime to investment firms, to be prudentially regulated and supervised by their home-MS competent authorities.[212]

While the development of relevant secondary European financial legislation on free movement[213] is in general connected to investor protection considerations (since every measure protecting market transparency, efficiency and stability protects participants' legitimate interests), it is not directly connected to the issue of retail investor protection in the event of an investment firm failure. While an in depth examination of all relevant European law instruments falls out of the scope of this study,[214] it will be important to briefly examine certain features of ISD and MIFID, especially with regard to the notion of investment services and supervisory and competent authorities' responsibilities as may be relevant to an investment firm's failure.

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[212] See indicatively AVGERINOS, Y. (2003) *Regulating and Supervising Investment Services in the European Union*, New York: Palgrave Macmillan; DASSESSE, M. (1992) 'European Community financial regulation: investment services', *JIBL*, p. 41.

[213] For an overview see ANDENAS, M. and ROTH, W.-H. (2002) *Services and Free Movement in EU Law*, Oxford: OUP.

[214] Such development includes the introduction, as part of the FSAP, of the Markets Abuse Directive: Council Directive 2003/6 [2003] OJ L96/16; the Prospectus Directive: Council Directive 2003/71 [2003] OJ L345/31; the Transparency Directive: Council Directive 2004/109 [2004] OJ L390/38; and MiFID.

Investment Services Directive

ISD, adopted in 1992, built on the experience of harmonisation in the banking sector. Numerous references to investor protection are made in the preamble to ISD, which has to be taken into account in determining its *ratio*.[215]

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[215] The Preamble to ISD stated *inter alia* that "[…] *firms that provide the investment services covered by* [ISD] *must be subject to authorisation by their home Member States in order to protect investors and the stability of the financial system*" (Preamble, recital 2); that "[…] *it is necessary, for the protection of investors, to guarantee the internal supervision of every firm, either by means of two-man management or, where that is not required by* [ISD], *by other mechanisms that ensure an equivalent result*" (Preamble, recital 5); that "[…] *in order to protect investors an investor's ownership and other similar rights in respect of securities and his rights in respect of funds entrusted to a firm should in particular be protected by being kept distinct from those of the firm*" (Preamble, recital 29); that "[…] *one of the objectives of* [ISD] *is to protect investors*; […] *it is therefore appropriate to take account of the different requirements for protection of various categories of investors and of their levels of professional expertise*" (Preamble, recital 32); and that "[…] *with the two-fold aim of protecting investors and ensuring the smooth operation of the markets in transferable securities, it is necessary to ensure that transparency of transactions is achieved and that the rules laid down for that purpose in* [ISD] *for regulated markets apply both to investment firms and to credit institutions when they operate on the market*" (Preamble, recital 42). See also, however, ECJ decision of 21.11.2002 in Case C-356/00, *Antonio Testa and Lido Lazzeri* v *Commissione Nazionale per la Società e la Borsa (Consob)* [2002] ECR I-10797, paras. 3 and 33.

ISD defined an investment firm as "[…] *any legal person the regular occupation or business of which is the provision of investment services for third parties on a professional basis*".[216]

Thus, the ISD definition of an investment firm for the purpose of its application was based on a functional criterion, according to which a firm fell within its field of application if it wished to provide at least one of the investment services listed in Section A of the Annex to ISD, in which case it had to achieve specific licensing for the specific investment service to be provided.

ISD provided for certain obligations of national competent authorities as conditions for providing authorisation to investment firms, which has to specify the investment services they are licensed to provide:[217] national competent authorities had to verify *inter alia* that an investment firm had sufficient initial capital in accordance with the rules of CAD[218] having regard to the nature of the investment service in question, and that the direction of the investment firm's business is decided by at least two persons (the "*four eye rule*") who are of sufficiently good repute and are sufficiently experienced.[219] The latter requirement being very broad, it was left to national

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[216] ISD, Article 1(2). Investment services were defined as "*any of the services listed in Section A of the Annex relating to any of the instruments listed in Section B of the Annex that are provided for a third party*": *ibid.,* Article 1(1).

[217] *Ibid.,* Article 3(1).

[218] *Supra*, n 193.

[219] ISD Article 3(3).

supervisory authorities to regulate on the conditions for this crucial criterion, of "*fit and proper*" management of an investment firm, to be satisfied.

ISD provided certain further obligations that investment firms had to comply with, on an ongoing basis, and under the supervision of competent national authorities. Such prudential requirement were relevant to administrative and accounting procedures, control and safeguard arrangements for electronic data processing, internal control mechanisms, safeguarding ownership rights of investors especially in the event of the investment firm's insolvency, prevention of use of investors' instruments by the investment firm for its own account, record keeping of transactions executed, and conflict of interest avoidance.[220]

Furthermore, ISD introduced a specific supervisory regime with regard to Conduct of Business (CoB) rules, which departed from the principle of home-MS regulation and supervision of investment firms and provided that both the home-MS and the host-MS were competent for issuing and enforcement of CoB rules.[221] The introduction of this rule may be regarded as relevant to the *Cassis* rule of host-State competence where national rules adopted in the general good are applicable. The reasoning of such supervisory competence allocation is connected to general good (protection of investors) considerations of the MS where services were provided.[222]

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[220] *Ibid.*, Article 10.

[221] See in general ANDENAS, M. (1994) 'Rules of conduct and the principle of subsidiarity', *Company Lawyer*, p. 60; WOUTERS, J. (1993) 'Rules of conduct, foreign investment firms and the ECJ's case-law on services', *Company Lawyer*, p. 194.

ISD provided that CoB rules should be applied taking into account of the professional nature of the person for whom the service is provided.[223] However, ISD did not provide any definition of such professional nature, nor did it provide any criteria under which a person might be characterised as professional for the purpose of CoB rules application.

The issue of conduct of business rules specifically in the area of financial services, and in the context of consumer protection as a public interest restriction on the free provision of services in the securities sector,[224] was examined by the ECJ in *Alpine Investments*.[225]

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[222] See 1997 Commission Interpretative Communication (*supra*, n 187).

[223] ISD Article 11(1).

[224] With regard to public interest concerns in the area of insurance, see ECJ decision of 04.12.1986 in Case 220/83 *Commission* v *French Republic* [1986] ECR 3663; ECJ decision of 04.12.1986 in Case 252/83 *Commission* v *Kingdom of Denmark* [1976] ECR 3713; ECJ decision of 04.12.1986 in Case 205/84 *Commission* v *Federal Republic of Germany* [1986] ECR 3755; ECJ decision of 04.12.1986 in Case 206/84 *Commission* v *Ireland* [1986] ECR 3817 (the "*Co-insurance Cases*"). While a discussion of this case-law is not within the scope of this study, it is interesting to note that the ECJ took into account, as a factor of the sensitivity of the insurance market with regard to consumer protection and public interest national rules, the nature of the service provided (uncertainty of the occurrence of events at the time of conclusion of the insurance contract) and the difficulty for consumers to foresee whether they would receive payment with regard to insurer's future financial position, as well as the great number of consumers such contracts concerned; *cf.* Case 220/83 (*supra*), at para. 30.

[225] See ECJ decision of 10.05.1995 in Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, [1995] 2 *CMLRev* 209. See ANDENAS, M. (1995)

The ECJ accepted that the need to protect the reputation of the financial markets and investors could constitute imperative reasons of public interest justifying certain restrictions (as in that case, of "*cold calling*").[226]

It is interesting to note in this regard that the protection of investors was taken into consideration by the ECJ mainly in the context of the protection of the trust of investors to the financial market; in that sense, the protection of the integrity of financial markets was at the centre of the notion of "market reputation" protection.[227]

While ISD was provided certain rules relevant to retail investor protection, it did not achieve full market integration.[228] ISD was replaced by MiFID, adopted in the context of the *Lamfalussy* process.

It is necessary to examine carefully certain aspects of MIFiD, which are important to this study.

'Investment Services: Cross Border Cold Calling and the Right to Provide Services', *Company Lawyer*, p. 249. See also HATZOPOULOS, V. (1995) 'Case C-384/93 Alpine Investments BV v Minister van Financiën, Judgment of 10 May 1999, NYR (1995)" 32 *CMLRev* 1427.

[226] *Alpine Investments*, para. 47.

[227] *Ibid.*, paras. 42-43.

[228] See also Commission Communication (2000) "Upgrading the Investment Services Directive" COM(2000) 729, 16.11.2000.

Markets in Financial Instruments Directive

The introduction of MiFID,[229] as ISD before it, aimed at protecting both the stability of the financial market and investors.[230] MiFID entered into force on 30.04.2004, providing for a transposition period which ended on 31.01.2007, *i.e.* a short time before the occurrence of the Crisis;[231] since its publication it has undergone several amendments.[232] By MiFID, EU financial law took a new dimension, in an effort "*to encompass the full range of investor oriented activities*";[233] many ISD provisions were amended by MiFID, new rules were introduced, and ISD was repealed.[234]

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[229] Directive 2004/39/EC [2004] OJ L145/1. See in general AUBRY, N. and McKEE, M. (2007) 'MiFID: Where did it come fro, where is it taking us', JIBLR, vol. 22, no. 4, pp. 177 – 186; CESR (2007) 'The Passport inder MiFID'.

[230] MiFID, Preamble, recitals 17, 31, 44, 71.

[231] MiFID Article 70.

[232] For a consolidated version of MiFID, see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004L0039:20110104:EN:HTML .

[233] MiFID, Preamble, recital 2.

[234] See in general AVGOULEAS, E. (2004) 'The new EC financial markets legislation and the emerging regime for capital markets', *YEL*, vol. 23, p. 321; ESME (2008) 'Differences between the Definitions of "Qualified Investor" in the Prospectus Directive and "Professional Client" and "Eligible Counterparty" in MiFID - Is Alignment Needed?'; FERRANINI, G. and WYMEERSCH, E. (ed.) (2006) *Investor Protection in Europe: Corporate Law Making, The MiFID and Beyond*, Oxford: OUP.

The field of application of MIFiD is wider of that of ISD:

Ratione materiae, it includes also investment advice as an investment service, taking into account "*the increasing dependence of investors on personal recommendations*".[235] Furthermore, commodities and other derivatives were introduced in the list of financial instruments, taking into account the need to regulate their trading in the financial market.[236]

Ratione personae it encompasses also regulated markets[237] and alternative trading systems (Multilateral Trading Facilities, MTFs).[238] Authorised credit institutions, when providing investment services to their clients, fall within the scope of application of MiFID, without need for further licensing under MiFID;[239] furthermore, investment firms providing investment services for which they are not licensed under MiFID, do not need additional authorisation for the provision of such services, if they provide them on a non-regular basis.[240]

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[235] MiFID, Preamble, recital 3.

[236] *Ibid.*, recital 4.

[237] MiFID, Articles 36 – 47. With regard to the criteria of MiFID regarding a regulated market, see ECJ judgment of 22.03.2012 in case C-248/11, *Criminal proceedings against Rareş Doralin Nilaş and Others* (nyr).

[238] MiFID, in particular Articles 14, 29, 30, 35.

[239] MiFID, Preamble, recital 18; Article 1.

[240] MiFID, Preamble, recital 19; Article 2.

With regard to the definition of investment firm and investment service, MiFID follows the same normative structure as ISD,[241] and is completed by implementing Directive 2006/73/EC.[242]

The normative system introduced by MiFID provides for more detailed conditions and procedures for authorisation of investment firms than ISD.[243] With regard to the "*fit and proper*" requirement regarding the persons who effectively direct the business of the investment firm, MiFID provides broad criteria, not different in essence from those provided by ISD: The "*four eye rule*" being a priori applicable, [244] MSs have to require that such persons are "[…] *of sufficiently good repute and sufficiently experience as to ensure the sound and prudent management of the investment firm*".[245] Further, the competent national authority has to refuse authorisation not only if it is not satisfied that the persons who will effectively direct the business of the investment firm are of sufficiently good repute or sufficiently experienced, but also "[…] *if there are objective*

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[241] See MiFID, Article 4.

[242] Commission Directive 2006/73/EC [2006] OJ L241/26. The time limit for the application in the national legal orders of the provisions transposing this Directive was 01.11.2007; *ibid.*, Article 53(2).

[243] MiFID, Chapter I.

[244] *Ibid.*, Article 9(4).

[245] *Ibid.*, Article 9(1).

and demonstrable grounds for believing that proposed changes to the management of the firm pose a threat to its sound and prudent management".[246]

Other organisational requirements are provided by MiFID for investment firms, the home-MS being responsible for achieving compliance. Such organisational requirements are set out by MiFID also on a general level; *inter alia* an investment firm "[…] *shall establish adequate policies and procedures sufficient to ensure compliance* […]",[247] "*shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest* […]",[248] "[…] *shall take reasonable steps to ensure continuity and regularity in the performance of investment services and activities* […]",[249] "[…] *shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems*",[250] "[…] *shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance* […]",[251] "[…] *shall* […] *make adequate*

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[246] *Ibid*., Article 9(3).

[247] *Ibid*., Article 13(2).

[248] *Ibid*., Article 13(3); Article 18. *Cf*. Directive 2006/73/EC Article 21.

[249] *Ibid*., Article 13(4).

[250] *Ibid*., Article 13(5).

[251] *Ibid*., Article 13(6). Directive 2006/73/EC provides with regard to record-keeping *inter alia* that MSs shall require investment firms to retain all records required under

arrangements so as to safeguard clients' ownership rights, especially in the event of the investment firm's insolvency […]”. [252]

Taking into account the above general context of MiFID rules on retail investor protection, as specified also by implementing Directive 2006/73/EC, it is useful to examine the rules provided by the latter with regard to safeguarding of clients assets, depositing of client financial instruments and depositing of client funds.

Furthermore, a licensed investment firm must comply at all times with the conditions for its initial authorisation[253] and MSs are under an obligation to ensure that national competent authorities monitor the activities of investment firms, in the context of on-going supervision.[254]

MiFID for at least five years. See Directive 2006/73/EC Article 51. See also MiFID Implementing Regulation 1287/2006 [2006] OJ L241/1. Moreover, Directive 2006/73/EC provides for MSs to require that investment firms, for the purposes of safeguarding clients’ rights in relation to financial instruments and funds belonging to them, shall *inter alia* keep such records and accounts as are necessary to enable them at any time and without delay to distinguish assets held for one client from assets held for any other client, and from their own assets, in order to protect clients’ assets from a number of risks, including misuse of the assets, fraud, poor administration, inadequate record-keeping or negligence (Directive 2006/73/EC Article 16).

[252] MiFID, Article 13(7), (8).

[253] MiFID, Article 16(1).

[254] *Ibid*., Article 17(1).

With regard to te level of investor protection,[255] MiFID proceeds to a differentiation of the status of protection by distinguishing investors in three categories: retail investors (clients), professional investors (clients), and counterparties.[256] MiFID defines as "client" any natural or legal person to whom an investment firm provides investment and/or ancillary services.[257] A "retail client" is defined as a client who is not a professional client,[258] and a "professional client" is one meeting the criteria laid down in Annex II of the Directive.[259] Professional clients are entities required to be authorised or regulated to operate in the financial markets and other institutional investors whose main activity is to invest in financial instruments.[260] These entities are defined *ex lege* as professional investors (clients). However, they are allowed to request non-professional treatment in order to enjoy a higher level of protection, and following a written agreement with the investment firm to that effect, in which the particular services or transactions to which it applies has to be specified.[261] Furthermore, MiFID provides for a particular sub-category of retail investors (clients), who although being categorised

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[255] Regarding market transparency and integrity protection, see MiFID, Articles 25 – 30.

[256] MiFID Preamble recital 31.

[257] *Ibid.*, Annex I(1) point 10.

[258] *Ibid.*, Annex I (1) point 12.

[259] *Ibid.*, Annex I(1) point 11.

[260] *Ibid.*, Annex II, Article I(1).

[261] *Ibid.*

according to the terms of the Directive as non-professional, may be treated as professional investors on request.[262] However, even if treated as professional investors, such persons may not be presumed to possess market knowledge and experience comparable to that of professional investors, and waiver of the protection afforded to them by CoB rules is conditional.[263]

In this way, despite providing for enhanced retail investors protection especially by CoB rules, and by reference to the ICSD regime,[264] MiFID allows for exceptions from this regime on a voluntary basis and according to a procedure taking place between the interested investor and the investment firm.

Directive 2006/73/EC, implementing MiFID, provides with regard to the level of protection awarded by MSs, that they "[…] *may retain or impose requirements additional to those in this Directive only in those exceptional cases where such requirements are objectively justified and proportionate so as to address specific risks to investor protection or to market integrity that are not adequately addressed by this Directive* […]",[265] and provided that either the specific risks are of particular importance in the circumstances of the market structure of that MS or the additional

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[262] *Ibid.*, Annex II, Article 2.

[263] *Ibid.*, Annex II, Article 2(2).

[264] *Ibid.*, Article 11.

[265] Directive 2006/73/EC Article 4(1).

requirement addresses risks that emerge or become evident after the date of the application of the Directive and are not otherwise regulated by EU law.[266]

With regard to CoB rules, MiFID provides for an obligation of MSs to require that in the provision of investment services, an investment firm acts "*honestly, fairly and professionally in accordance with the best interests of its clients* […],[267] complying in particular with relevant principles regarding fair, clear and not misleading transmission of information,[268] provision of appropriate information about the investment firm and its services, financial instruments and proposed investment strategies,[269] execution venues and costs and associated charges,[270] presented so as to enable clients to understand the nature and risks of the investment service envisaged and to take investment decisions on an informed basis.[271]

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[266] *Ibid.*

[267] MiFID, Article 19(1). *Cf.* Directive 2006/73/EC Article 26 regarding inducements.

[268] MiFID, Article 19(2). *Cf.* Directive 2006/73/EC Article 27.

[269] *Cf.* Directive 2006/73/EC Article 31.

[270] MiFID, Article 19(3). See also Directive 2006/73/EC, Articles 28, 29, 30, and 31.

[271] MiFID, Article 19. See also with regard to execution of orders "in the best interest" of the client, *ibid.*, Article 21.

Furthermore, the investment firm must keep a record of documents agreed with the client, and must provide the client with adequate reports on the service provided and the costs associated with it.[272]

More generally, regarding CoB rules, MiFID has attempted to resolve the problems that had emerged under the ISD regime, mainly by introducing the sole competence of home-MS on CoB rules; however, services provided by a branch of an investment firm still fall within the competence of the MS within the territory of which the services are provided.[273]

The rules on requirements regarding initial authorisation and on-going supervision of investment firms, as well as the CoB rules, provide a framework which is relevant to investor protection, although mostly in terms of *ex ante* protection (before the failure of an investment firm). However, it is also relevant to the question of supervisory liability in tort, since the initial authorisation and the on-going supervision of an investment firm by the competent authorities is closely related to retail investor protection considerations. In this context, it is useful to briefly examine the obligations of national competent authorities as provided by MiFID.

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[272] *Ibid.*, Article 19(8).

[273] See CESR (2007) *Recommendations for the implementation of the Directive 2004/39/EC and Statement on practical arrangements regarding the late transposition of MiFID*, available at http://www.esma.europa.eu/system/files/07_337b.pdf

MiFID provides that "[e]*ach* [MS] *shall designate the competent authorities which are to carry out each of the duties provided for in this Directive*".[274] There is no specific requirement as to the legal nature of competent authorities, beyond that they have to be public authorities, with the option of delegating tasks to other entities where permitted and under the conditions provided by MiFID.[275] The criterion set by MiFID, for MSs to allow such delegation, is connected to effectiveness: MSs have to require that competent authorities take all reasonable steps to ensure that the delegate has the capacity and resources to effectively execute the delegated tasks.[276]

MiFID provides that competent authorities have to be given with all-encompassing supervisory and investigatory powers, according to national law.[277] Regarding the powers that competent authorities must have, as a minimum, MiFID provides a list of competences, which relate to (a) collecting information (accessing documents,[278] demanding information from any person[279] including auditors,[280] carrying out of in-site inspections,[281] requiring existing telephone and data traffic records,[282] requiring auditors

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[274] MiFiD, Article 48(1).

[275] *Ibid.*, Article 48(2).

[276] *Ibid.*

[277] *Ibid.*, Article 50(1).

[278] *Ibid.*, Article 50(2) point (a).

[279] *Ibid.*, point (b)

[280] *Ibid.*, point (h).

[281] *Ibid.*, point (c).

to provide information, allowing auditors or experts to carry out verifications or investigations),[283] (b) taking provisional and permanent measures to control any illegal practice (requiring the cessation of any such practice,[284] requesting the temporary prohibition of professional activity[285] or the suspension of trading in a financial instruments,[286] or the removal of such instrument from trading),[287] (c) taking measures to protect pecuniary claims (requesting freezing and/or sequestration of assets),[288] (d) referring matters for criminal prosecution,[289] and (e) in general, adopting "[…] *any type of measure to ensure that investment firms and regulated matters continue to comply with legal requirements*".[290]

This minimum harmonisation approach of MiFID leaves unspecified how each competence is to exercised by national competent authorities, which has to be determined by national law with a view to achieve the aim of the Directive.

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[282] *Ibid.*, point (d).

[283] *Ibid.*, point (m).

[284] *Ibid.*, point (e).

[285] *Ibid.*, point (g).

[286] *Ibid.*, point (j).

[287] *Ibid.*, point (k).

[288] *Ibid.*, point (f).

[289] *Ibid.*, point (l).

[290] *Ibid.*, point (i).

Further rules are provided with regard to the powers of host-MS to take precautionary measures in order to control the illegal activity of an investment firm (or a regulated market or an MTF)[291] operating in their territory if despite having notified the competent authorities of the home-MS the investment firm fails to comply with its obligations, or where the measures taken by the competent authorities of the home-MS "prove inadequate".[292] Such action by the host-MS competent authorities is justified when the investment firm acts "*in a manner that is clearly prejudicial to the interests of host* [MS] *investors or the orderly functioning of the markets*"[293] and the host-MS must take "*all the appropriate measures needed in order to protect investors and the proper functioning of the markets*".[294]

The provisions of MiFID regarding the adoption of administrative measures and the imposition of administrative sanctions by MSs are also very broad;[295] MSs are called to ensure that such measures are effective, proportionate and dissuasive.[296]

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[291] *Ibid*, Article 62(1), (3).

[292] *Ibid*., Article 62(1), as amended by Directive 2010/78/EU [2010] OJ L331/120).

[293] *Ibid*.

[294] *Ibid.*

[295] *Ibid*., Article 51(1) – (3).

[296] *Ibid*., Article 51(1). See also ECJ decision of 30.05.2013 in Case C-604/11, *Genil 48 SL and Comercial Hostelera de Grandes Vinos SL* v *Bankinter SA and Banco Bilbao Vizcaya Argentaria SA* (nyr). The ECJ considered *inter alia* that, although Article 51 of MiFID provides for the imposition of administrative measures or sanctions against the

On the other hand, it is interesting to note that MiFID provides for *locus standi* of bodies (public bodies, consumer organizations and professional organizations), which may take action "*in the interest of consumers*"[297] before the national courts or competent administrative bodies "*to ensure that the national provisions for the implementation of* [MiFID] *are applied*".[298] While there is no reference as to the nature of the remedy or the claim such action may have, this provision connects the interests of consumers with application of national law implementing MiFID. And as it refers to national law to regulate this matter (not only on the procedural but also on the substantive level), it may entail, under the conditions provided by national law and case-law, that action may be brought by such bodies against competent authorities, for failure to exercise their duties according to national law implementing MiFID. This issue is connected to the wider problematic of supervisory authorities' liability under EU law, and relates to the question of whether national law may provide for such liability even if EU law does not.

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parties responsible for non-compliance with the provisions adopted pursuant to it, it does not state either that MSs must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing Article 19(4) and (5) of MiFID, or what those consequences might be; and that in the absence of EU legislation on the point, it is for the internal legal order of each MS to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness (para. 57 and case-law cited).

[297] The term "consumer" is not defined in MiFID. On the relevant problematic of the legal status of investors, see also MOLONEY, N. (2012) 'The investor model underlying the EU's investor protection regime: consumers or investors?', *European Business Organization Law Review*, vol. 13, no. 2, p. 169.

[298] MiFID, Article 52(2).

In the context of the changes brought to EU financial legislation by the onset of the Crisis, the Commission has proposed a new Directive, to replace MiFID.[299]

II.1.3 Transposition of ISD and MiFID into the Hellenic Legal Order

After Hellas became Member of the EEC, and before the transposition of ISD investment services were regulated mainly through Law 1806/1988,[300] according to which authorisation of investment firms was subject to certain capital requirements and licensing by the HCMC.[301] Following licensing, if the HCMC considered that conditions for granting of the license no longer existed, it had to submit a relevant recommendation to the competent Minister who was only competent to revoke the authorisation. Investor protection was not mentioned in Law 1806/1988.

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[299] COM(2011) 656.

[300] BGG vol. A, no. 207.

[301] Law 1806/1988 Article 4(1). According to the relevant provision, in order for such licensing to be granted, HCMC had to take into consideration "*such factors as the organisation, the technical and financial means of the company, the reliability and expertise of its directors, as well as the suitability of the shareholders, who own more than ten percent of the share capital, so as to ensure the efficient management of the company*".

Hellenic investment services law further developed by the introduction of Law 1969/1991[302] which provided rules on the setting-up, licensing and operation of Portfolio Investment Companies,[303] UCITS[304] and securities exchanges,[305] modifying and updating national legislation. HCMC was competent to grant and revoke authorisation of investment firms.[306]

ISD was incorporated in the Hellenic legal order by Law 2396/1996.[307] It is useful to briefly examine Law 2396/2996, not only for reasons of normative analysis, but also

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[302] BGG vol. A no. 167.

[303] Law 1969/1991, Articles 1 – 16.

[304] *Ibid.*, Articles 17 – 49.

[305] *Ibid.*, Articles 50 – 77.

[306] With regard to licensing of *Portfolio Investment Companies*, HCMC granted authorisation upon assessment of the "*organisation, technical and financial means of the company, reliability and expertise of directors, and the suitability of its founders, in order to ensure the sound management of the company*"; Law 1969/1991 Article 2(2). Authorisation could be revoked if at least one of the following conditions applied: (a) when the conditions for providing authorization were no longer satisfied, (b) when the company hindered in any way the control effected by the competent authority, or (c) when the company was infringing applicable law, HCMC decisions and regulations, or its statutes; Law 1969/1991 Article 15.

[307] BGG, vol. A, no 73. Articles 1 – 31 of Law 2396/1996 were repealed on 01.11.2007 by Article 85 of Law 3606/2007. For an overview see GORTSOS, C. (1996) 'EPEY [Investment Firms]. Operation and supervision*', DEE, p. 1026; POLITIS, E. (1998) 'Investment advice*', DEE, vol. 10, p. 933.

because it was the applicable law interpreted by case-law, in many cases relevant to the subject of this research.[308]

In general, Law 2396/1996 followed the normative structure and repeated to some extent the rules of ISD.

Core investment services were defined by Law 2396/1996 as: "*a. (i): the reception and transmission for the account of investors of orders for the conclusion of transactions on one or more of the following financial instruments: aa. transferable securities and units in collective investment undertakings.bb. money market instruments.cc. financial - futures contracts, including equivalent cash-settled instruments.dd. forward interest rate agreements (FRAs).ee. interest rate, currency and equity swaps. ff. options to acquire or dispose of any of the instruments listed above, including equivalent cash-settled instruments, and in particular currency and interest rate options. (ii) execution of those trades and orders, other than for own account. b. Dealing in any of the above instruments for own account. c. Managing portfolios of investments in accordance with mandates given by investors, where such portfolios include one or more of the instruments listed under a(i). d. Underwriting, total or partial, in respect of issues of any of the instruments listed under a(i) and/or placing such issues*."[309] Furthermore, non-core investment services included "*a. Safekeeping and administration in relation to one or more of the instruments listed under section a(i); b. safe custody services; c.*

[308] *Infra*, Ch VI.1 and VII.2.

[309] Law 2396/1996 Article 2(1). The translation of this provision of Law 2396/1996 from the original in the Hellenic language is not *verbatim* in order for certain terms and phrases to be more legible in English.

granting credits or loans to investors to allow them to carry out transactions in any of the instruments listed under paragraph 1 of this article, provided that the firm granting the loan or the credit is involved in the transactions […]*; d. offer of advice to enterprises regarding capital structure* […]; *e. underwriting services; offer of investment advice on one or several of the instruments listed under paragraph 1 a(i) of this article; g. foreign exchange services* […]".[310]

The scope of application of Law 2396/1996, with regard to rules and obligations of investment firms, the competence of regulatory and supervisory authorities, the provision of investment services by credit institutions, and capital adequacy of investment firms and credit institutions[311] encompasses both investment firms and credit institutions offering investment services.[312]

According to Law 2396/1996, "*the unconditional provision of investment services on a professional basis is only permitted to investment services firms, according to the provisions of the present law*",[313] *i.e.* it is only permitted to investment firms holding the relevant license and according to operation and CoB rules.[314]

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[310] Law 2396/1996 Article 2(2).

[311] Law 2396/1996, Articles 1 – 22, and 32.

[312] Law 2396/1996, Article 3(1), and Article 2(3), (4). Furthermore, special provisions referred to Securities Exchange Investment Firms ("*Anonymh Hrematisteriake Etaireia Parohes Ependytikon Yperesion*", AHEPEY), and Portfolio Management Investment Firms ("*Anonyme Etaireia Diaheirises Ependytikon Hartofylakion*", AEDEH): Law 2396/1996, Articles 23 – 31.

[313] Law 2396/1996, Article 4(1).

An important exception to the authorisation requirement concerned firms having as business only the receipt and transmission of transaction orders,[315] and not the provision of investment services in a strict sense.[316]

With regard to asset separation, Law 2396/1996 provided that (a) investment firms, except for credit institutions, "*are not allowed to use for their own account cash of their investors-clients that has come under their possession*", and (b) that investment firms "*are not allowed to use for their own account securities of their investors-clients that have come under their possession*".[317]

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[314] The Hellenic "Code of Deontology of Investment Firms", regulating CoB rules for investment firms (EPEYs but also ELDEs) in the Hellenic legal order, was issued on the basis of Article 7(1) of Law 2396/1996, by Ministerial Decision 12263/B. 500/11.04.1997, BGG vol. B, no. 340 / 24.04.1997. Replaced by the new Hellenic "Code of Behaviour of Investment Firms" (HCMC decision 1 / 452 / 01.11.2007, BGG vol. B, bo. 2136 / 01.11.2007).

[315] "*Société Anonyme for the Receipt and Transmission of Orders*" ("*Anonyme Etaireia Lepses kai Diavivases Entolon*", AELDE): Law 2396/1996, Article 3(1), ninth indent.

[316] For licensing regulation under Law 1806/1988 and Law 2396/1996 see HCMC decision 6161/86/15.10.1996, BGG vol. B, no. 1008. Repealed by HCMC decision 4/461/24.01.2008 (BGG vol. B, no. 283) regulating the licensing of AEPEYs. See also HCMC decision 5/461/24.01.2008 (BGG vol. B, no. 283) regulating the licensing of AELDEs.

[317] See HCMC decision 6162/86/15.10.1996 (BGG vol. B, no. 1008) on the data provided by EPEYs on the use of own and third parties' funds and titles; replaced by HCMC decision 1844/2001 (BGG, vol. B, no. 745). For the regulation of record keeping obligations by investment firms see HCMC decision 6160/15.10.1996 (BGG vol. B, no. 990), replaced by HCMC decision 3/356/26.10.2005 (BGG vol. B, no.

Law 2396/1996 also introduced a qualitative criterion, as to the classification of receivers of investment services, providing that in the implementation of CoB rules the level of knowledge regarding investment services, as related to the professional nature of the receiver or the services, has to be taken into account.[318] Further, that investment firms "*inform themselves of the financial situation, investment experience and objectives of their clients, as regards the services requested, in order to provide the appropriate investment advice*".[319]

Throughout Law 2396/1996, several references were made to the need to protect investors[320] or investors' interests[321] or to the obligation to act in their best interests,[322] although without explicit reference to their status as retail investors or not (subject to the qualitative criterion referred above). Moreover, reference was made to rules relevant to the protection of the "general interest",[323] which however was not defined.

1554); for the regulation of record keeping obligations by members of the Athens Derivatives Exchange and the ADECH, see HCMC decision 9763/1999 (BGG vol. B, no. 741) and HCMC decision 5/196/28.07/2000 (BGG vol. B, no. 1002), both replaced by HCMC decision 1/452/01.11.2007 (BGG vol. B, no. 2136).

[318] Law 2396/1996, Article 7(1).

[319] *Ibid*., Article 7(3), indent c.

[320] Law 2396/1996, Article 5, Article 18(1) indent (b), Article 24(4).

[321] Law 2396/1996, Article 12(3), (6); Article 14(3), Article 17(4), Article 21(3), Article 23(1), Article 24(1) indent (c), Article 30(4).

[322] Law 2396/1996, Article 7(3) indents (a) and (g).

[323] Law 2396/1996, Article 5(1); Article 13(2) indent (a) ; Article 17(1).

MiFID was transposed into the Hellenic legal order by Law 3606/2007.[324] Law 3606/2007 closely follows the rules provided by MiFID, proceeding to specifying rules on the national level in certain areas, and leaving many issues to be regulated by the HCMC.[325]

A "retail client" is defined by Law 3606/2007 as "*a client who is not a professional client*",[326] and a "professional client" is defined as "*a client who possesses the experience, knowledge and expertise to make his own investment decisions and properly assess the risks that he incurs and who meets the criteria laid down in Article 6*",[327] *i.e.* entities that "*should be regarded as professionals in all investment services and activities and financial instruments for the purposes of this law*" (such as credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and management of such schemes, pension funds and management companies of such funds, commodity and commodity

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[324] BGG vol. A, no. 195. An official translation of this law in English is available at the HCMC webpage (www.hcmc.gr/photos/Rules/files/L3606_eng.pdf), and at the HDIGF (www.teke.gr).

[325] For an overview, see indicatively GORTSOS, C., STAIKOURAS, P. and LIVADA, C. (2007) *The Institutional and Regulatory Framework of the Capital Market**, Athens: Hellenic Bank Association – Hellenic Banking Institute; TSIMPANOULIS, D, (2007) 'Farewell to finance law – the Impact of Directive 2004/39/EC 'on markets in Financial Instruments' in the Hellenic Capital Market Law*', *DEE*, vol. 1, p. 35.

[326] Law 3606/2007, Article 2, indent 6.

[327] *Ibid.*, Article 2, indent 7.

derivatives dealers, local enterprises, other institutional investors, large undertakings as specified therein, national and regional governments and public bodies that manage public debt, international and supranational institutions, *etc.*).[328]

Law 3606/2007, following MiFID, also introduces a category of "*clients who may be treated as professionals*", other than those falling within the definition of "*professional clients*", in the sense that such quasi-professional clients may be treated as professionals on the basis of certain criteria, which would mean that they would be allowed "*to waive some of the protection afforded by conduct of business rules*".[329]

The field of application of Law 3606/2007 encompasses investment firms,[330] regulated markets and market operators,[331] as well as specific forms of financial market

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[328] *Ibid.*, Article 6.

[329] For such a waiver to be allowed, at least two of the following criteria have to be met: (a) important size of transactions in a certain frequency, (b) important size of portfolio, (c) professional experience in the financial sector and relevant knowledge. If such criteria are met, and certain other procedural criteria are met (request of clients for waiver in writing, clear written warning by investment firm regarding waiving protection and investor compensation rights, written statement by clients that they are aware of the consequences), private individual investors could be treated as "professional clients"; *ibid*. See VELENTZAS, I. (2009) 'The classification of investors in the provision of investment services (after Law 3606/2007)*' *ETrAxHrD*, p. 385.

[330] "*Anonyme Etaireia Parohes Ependytikon Yphresion*", AEPEY.

[331] Law 3606/2007, Article 3(1).

intermediaries,[332] and –to a certain extent– credit institutions when providing investment services or performing investment activities,[333] as well as UCITS.[334]

Incorporating the relevant provisions of MiFID, investment services and activities according to Law 3606/2007 are enumerated (*numerus clausus*) as: (a) reception and transmission of orders (on behalf of clients, for transactions in financial instruments), (b) execution of orders on behalf of clients (acting to conclude agreements to act or sell financial instruments on behalf of clients), (c) dealing on own account, (d) portfolio management, (e) investment advice, (f) underwriting of financial instruments or placing of financial instruments on a firm commitment basis, (g) placing of financial

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[332] Such as an "*Anonymh Etaireia Ependytikes Diamesolaveses*", AEED, licensed to provide only reception and transmission of orders services as well as investment advice, and not any other investment services. AEEDs are also not allowed to hold clients' assets; *ibid*., Article 36(2). The conditions for the authorisation and organisation of AEEDs, as well as to the provisional suspension and the withdrawal of their authorisation are similar to those of AEPEYS; earlier legislation provided for AELDEs which were also allowed only to receive and transmit orders, but not to provide investment advice, nor to hold client's assets, and which were however not prudentially regulated and supervised by the HCMC; see *supra*, n 316. It is interesting to note that Law 3606/2007, further to providing for the competence of the HCMC to regulate and supervise AEEDs and to allowing provision of investment advice by AEEDs (perhaps thus legitimizing an existing practice), specifically delegated the HCMC to "[…] *determine the books and records kept and issued by AEEDs in relation to the investment services they provide, the content of mandatory entries in such books and records and any other technical matter and necessary detail*"; *ibid*., Article 40.

[333] Law 3606/2007, Article 3(2).

[334] "*Anonyme Etaireia Diaheirises Amoivaion Kefalaion*", AEDAK: Law 3606/2007, Article 3(3); Law 3283/2004, Article 4(2).

instruments without a firm commitment order, and (h) operation of Multilateral Trading Facilities (MTFs).[335] Furthermore, a number of ancillary services are defined.[336] Financial instruments are further defined according to MiFID, covering a wide range of instruments used in financial practice, including derivative contracts relating to commodities (under certain conditions), derivative instruments for the transfer of credit risk, as well as financial contracts for differences (CFDs).[337]

Further rules are provided governing in particular the authorisation and operating conditions of investment firms (AEPEYs),[338] the "protection of investors",[339] the "rights

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[335] Law 3606/2007, Article 4(1).

[336] *Ibid.*, Article 4(2).

[337] *Ibid.*, Article 5.

[338] *Ibid.*, Articles 9 – 24.

[339] *Ibid.*, Articles 25 – 30. The rules provided relate mostly to CoB obligations of investment firms, the provision of services through another investment firm, execution of orders "in the best interest" of the client, client handling rules, tied agents and transactions executed with eligible counterparties. They provide inter alia that "*AEPEYs must establish a record that includes the document or documents agreed between the firm and the client that set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the client.* […]"; Article 25(7). Also, that "[t]*he client must receive from the AEPEY adequate reports on the service provide to its clients.* […]"; Article 25(8). See in general KOULORIDAS, A. (2009) 'The Government Bond Market in Greece after MiFID: Issues that Occur Regarding Structure, Transparency, Liquidity and Effectiveness of Execution*' *HreDik*, vol. 2, p. 251; *idem* (2009) 'The Obligation of Best Execution of Orders by [Investment Firms] under Law 3606/2007: From the Theory of Efficient Markets to Alternative Places of Order Execution and the Notion of Best Execution' *DEE*, vol. 4, p. 414.

of investment firms",[340] as well as on the authorisation and operation of other intermediaries,[341] on regulated markets,[342] on market transparency and integrity,[343] on powers of cooperation between authorities,[344] and on international cooperation.[345]

Regarding the authorisation and operating conditions for investment firms (AEPEYs), Law 3606/2007 provides *inter alia* that "[…] *the* [HCMC] *shall not grant authorisation unless and until such time as it is fully satisfied that the applicant complies with all requirements* […]";[346] "*the founders or shareholders of the AEPEY shall provide all information necessary to enable the* [HCMC] *to satisfy itself that the AEPEY has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations* […]".[347]

Law 3606/2007 further states a number of requirements to be satisfied on an on-going basis by investment firms, relating to internal compliance procedures and organizational

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[340] *Ibid.*, Articles 31 – 35.

[341] *Ibid.*, Articles 36 – 40.

[342] *Ibid.*, Articles 41 – 48.

[343] *Ibid.*, Articles 49 – 58.

[344] *Ibid.*, Articles 59 – 64.

[345] *Ibid.*, Articles 65 – 70.

[346] *Ibid.*, Article 11(1).

[347] *Ibid.*, Article 11(2).

arrangements, conflicts of interests, continuity and regularity in the provision of services, risk assessment and avoidance procedures,[348] record keeping *"of all services and transactions undertaken by it which shall be sufficient to enable the* [HCMC] *to monitor compliance*",[349] and safeguarding of client assets "*especially in the event of insolvency".*[350] Furthermore, it provides that investment firms "[…] *shall not seize or confiscate its clients' assets, including but not limited to assets in the form of cash deposited in client bank accounts in the name of the* [investment] *firm or financial instruments, provided that such clients are the beneficiaries, according to the books kept by the firm and any other means of evidence*".[351] In particular with regard to means of evidence regarding clients' assets entrusted with the investment firm, Law 3606/2007 further provides that financial instruments which cannot be seized or confiscated by an AEPEY shall include those held by the AEPEY directly or indirectly in its name and on behalf of the client, "[…] *whose effective beneficiary is a client, according to the books kept by the firm and any other means of evidence, irrespective of whether or not such financial instruments are recorded in the register of the depository or other instrument recording system in the beneficiary client*".[352] Thus, Law 3606/2007 allows for any

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[348] *Ibid*., Article 12.

[349] *Ibid*., Article 12(7).

[350] *Ibid*., Article 12(8).

[351] *Ibid*., Article 12(10).

[352] *Ibid*., Article 12(11).

means of evidence to be used in order to achieve retail investor protection in a wider context (beyond protection in the event of intermediary failure).[353]

Regarding reporting of transactions and keeping of records, Law 3606/2007 provides specific rules, according to which "*AEPEYs shall keep at the disposal of the* [HCMC], *for at least five (5) years, the relevant data relating to all transactions in financial instruments which they have carried out, whether or own account or on behalf of a client* […]";[354] and that "AE*PEYs based in Greece or operat*[ing] *a branch in Greece and execut*[ing] *transactions in any financial instruments admitted to trading on a regulated market shall report details of such transactions to the* [HCMC] *as quickly as possible, and no later than the close of the working day. This obligation shall apply whether or not such transactions were carried out on a regulated market*".[355] It is further specified that such reports "[…] *shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution and the transaction prices and means of identifying the AEPEY concerned* […]".[356]

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[353] *Cf*. rules on permissible means of evidence in the context of special liquidation, liquidation and compensation schemes procedures in the Hellenic legal order; *infra*, Ch V and VI.

[354] Law 3606/2007, Article 40(1).

[355] *Ibid*., Article 40(2).

[356] *Ibid*., Article 40(4). From the interpretation of Articles 12 and 40 of Law 3606/2007, it emerges in our view that HCMC may have a central role in cases of disputes relating to ownership of assets held by an investment firm, taking into account that it has direct access to all pertinent information and that it regulates and supervises the special

The above operational and organisational requirements for investment firms or credit firms providing investment services are left to be specified by regulation issued by the HCMC.[357]

Prudential requirements regarding the persons directing an investment firm, its staff, and persons having a qualifying holding in it, Law 3606/2007 provides certain general rules, and again delegates the HCMC to specify such rules.[358]

In relation to persons directing investment firms, Law 3606/2007 requires that "[t]*he members of the board of directors of the AEPEY shall be of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management of the AEPEY*";[359] avoiding a formalistic approach, it specifies that HCMC may refuse authorisation (or reject proposed changes in management) if it is not satisfied that "[…] t*he persons who will effectively direct the AEPEY are of sufficiently good repute or sufficiently experienced, or if there are any objective and demonstrable grounds for believing that the management of the AEPEY pose a threat to its sound and prudent*

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liquidation of investment firms and the relevant procedure by compensation schemes (*infra* Ch V and VI).

[357] *Ibid*., Article 12(12). In the case of credit institutions providing investment services relevant regulation is issued by the *Bank of Greece*.

[358] *Ibid*., Articles 14, 16(7), 17(6). For constitutionality issues relating to the extent of delegation, see *supra* n 19.

[359] *Ibid*., Article 17(1).

management".[360] Further, Law 3606/2007 provides that the management of the investment firm must be undertaken by at least two persons of sufficiently good repute and of sufficient experience, who also hold professional competence certificates;[361] however, such certificates are to be issued by the HCMC according to criteria set by it,[362] so that ultimately "*fit and proper*" requirements are set and their fulfilment controlled only by the HCMC.

Further, rules are provided regarding AEPEY register, share capital, granting of authorisation procedure, trading process and finalization of transactions in an MTF, and financial statements (pursuant to International Accounting Standards) and the regular audit of AEPEYs.[363]

Thus, the content of Hellenic legislation on the authorisation and supervision of investment firms, initially and on an ongoing basis, generally reflects relevant EU law, initially ISD and now MiFID, following closely the content of EU instruments transposed into the national legal order.

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360 *Ibid*., Article 17(2).

361 *Ibid.*, Article 17(4).

362 *Ibid*., Article 14.

363 *Ibid*., Articles 9, 10, 11, 15 and 18, respectively.

Relevant legislation delegates authority on all critical issues to be specified and regulated in detail by the HCMC as the competent regulatory authority for investment firms.[364]

II.2 EFFECT OF THE CRISIS ON EU FINANCE LAW, AND RETAIL INVESTOR PROTECTION

Together with initiatives and efforts on the international level, by *fora* and organisations such as the World Bank, IMF, BCBS, IOSCO, and others, and by important new programmes by States with developed financial markets, as in particular the USA,[365]

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[364] See also, *infra* Ch VII.2.1.

[365] Although non-EU law is not within the scope of this research, a reference to developments in the USA following the Crisis is useful, due to their importance with regard to overall evolution of financial law after the Crisis. The US effort to respond to the Crisis has been particularly important, as it has involved a fundamental review of its financial architecture and reform of its financial law. Among the critical features of the US reform were the enhancement of the deposit insurance regime (see *infra*, note 507), the introduction of restrictions on proprietary trading by depositary banks and the separation of retail and investment banking. See in general US Department of the Treasury (2008), "*Blueprint for a Modernized Financial Regulatory Structure*"; Troubled Asset Relief Program (TARP), enacted following the (US) Emergency Economic Stabilization Act of 2008 (EESA; P.L. 110 – 343), also known as "*Paulson Plan*"; see also, WEBEL, B. (2013), "Troubled Asset Relief Program (TARP):

the EU has been undergoing fundamental changes to its financial architecture and law,

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Implementation and Status" Congressional Research Service, available at http://www.fas.org/sgp/crs/misc/R41427.pdf ; US Department of the Treasury (2009) "Financial Regulatory Reform. A New Foundation: Rebuilding Financial Supervision and Regulation" (also known as "*Obama Financial Reform Plan*"). With regard to the separation of retail and investment banking activities, initially the US Banking Act of 1933 (48 Stat. 162), known as "The Glass-Steagall Act", *inter alia* prohibited commercial banks from engaging in investment activities, and controlled affiliations between commercial banks and investment firms. The Glass-Steagall Act of 1933 was repealed by Financial Services Modernization Act of 1999 (P.L. 106 – 102, 113 Stat. 1338), also known as "*The Gramm – Leach – Bliley Act*". Following the Crisis, main elements of the "*Obama Plan*" was the consolidation of regulatory agencies and the creation of a new supervisory authority to control systemic risk, the comprehensive regulation of financial markets (including increased transparency of derivatives), consumer protection reforms (including a new consumer protection agency) and strengthened investor protection, tools for financial crises, including a resolution regime complementing the federal deposit insurance fund (FDIC) to allow for orderly winding down of failing institutions, and a series of measures to increase international standards and cooperation related to accounting issues and credit rating agencies. This was followed by the "*Dodd–Frank Wall Street Reform and Consumer Protection Act*" of 2010 (P. L. 101 – 203, H.R. 4173), available at http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf . The "Bank and Savings Association Holding Company and Depository Institution Regulatory Improvements Act" of 2010 (H.R. 4173, § 601), also known as "*Volcker Rule*", as part of the Dodd-Frank Act, aims to control speculative investments by banks (insured depositary institutions, companies controlling them and such company's affiliates and subsidiaries), banks not being permitted to own more than 3% of the total ownership interest in hedge funds or private equity funds, and being in such cases under disclosure obligations and conflict of interest tests (the "*Volcker Rule*" is expected to enter into force on April 1, 2014). The "*Volcker Rule*" proposes a different approach to "ring-fencing" than the "*Vickers Report*" in the UK; for the latter, see *infra* note 367. See also IMF, "Making banks safer: Can Volcker and Vickers do it?", IMF Working Paper, November 2011.

which are directly relevant to the issue under examination and have to be briefly addressed.

In is interesting for the purposes of this study to take into consideration the gradual development of EU initiatives in this area, how it has evolved and to which extent it has materialised into positive law.[366]

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[366] For an overview, see AVGOULEAS, E. (2009) 'The global financial crisis, behavioural finance and financial regulation: in search of a new orthodoxy', *Journal of Corporate Law Studies*, vol. 9, no. 1, April, pp. 23-59; FERRAN, E. (2012) 'Crisis-Driven EU Financial Regulatory Reform ', *Legal Studies Research Paper Series*, vol. 6, March , pp. http://ssrn.com/abstract=2028003; GORTSOS, C. and LIVADA, C. (2009) 'The current financial crisis: regulatory interventions on the international, european and national level*', *HreDik*, vol. 1, p. 70; HARDOUVELIS, G. and GORTSOS, C. (ed.) (2011) *The International Crisis, the Crisis in the Euro-Area and the Hellenic Financial System*'*: Hellenic Bank Association; MOLONEY, N. (2010) 'EU financial market regulation after the global financial crisis: "more Europe" or more risks?', *CMLRev*, vol. 47, no. 5, pp. 1317-1383; *idem* (2012) 'Supervision in the wake of the financial crisis: achieving effective 'law in action' - a challenge for the EU', in WYMEERSCH, E., HOPT, K.J. and FERRANINI, G. (ed.) *Financial Regulation and Supervision: a Post-Crisis Analysis*, Oxford: Oxford University Press; idem (2012) 'The legacy effects of the financial crisis on regulatory design in the EU', in FERRAN, E., HILL, J., MOLONEY, N. and COFFEE, J. (ed.) *The Regulatory Aftermath of the Global Financial Crisis*, Cambridge: Cambridge University Press; TRIDIMAS, T. (2011) 'EU Financial Regulation: Federalization, Crisis Management, and Law Reform', in CRAIG, P. and De BURCA, G. *The Evolution of EU Law*, 2nd edition, Oxford: OUP.

II.2.1 THE NEW EUROPEAN FINANCIAL ARCHITECTURE

Following the disruption of European economies and financial markets as a result of the Crisis and in order to establish an effective European system of supervision in the area of financial markets, the Commission mandated a group of experts (*de Larosière* High-Level Group of Experts) to submit proposals in this direction.[367]

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[367] During the same period, in the UK an Independent Commission on Banking chaired by Sir J. Vickers was mandated to investigate the causes of the Crisis and to propose measures for a reform of the regulation and supervision of the financial sector in the UK. In September 2010, the Vickers Commission issued a Paper outlining its preliminary views. In April 2011 it published its Interim Report, and in September 2011 its final report ("*the Vickers Report*"), available at http://www.parliament.uk/business/publications/research/briefing-papers/SN06171/the-independent-commission-on-banking-the-vickers-report-the-parliamentary-commission-on-banking-standards. The *Vickers Report* recommended the "ring fencing" of retail banking activities, differentiating between "mandated services" (services that only authorised banks would be allowed to provide, due to their systemic importance, such as deposit taking from and the provision of overdrafts to individuals and SMEs), "prohibited services" (services that retail, "ring-fenced" credit institutions should be prohibited to provide, such as any service that would result in a requirement to hold regulatory capital against market risk, or the purchase or origination of derivatives or other contracts which would result in a requirement to hold regulatory capital against counterparty credit risk), and "ancillary activities" (relating to non prohibited services provided by a "ring fenced" credit institution in order for its efficient operation, such as employing staff or procuring operational infrastructure). Many of the recommendations of the *Vickers Report* were endorsed in the (UK) Financial Services (Banking Reform) Act 2013.

The *de Larosière* Report

The *de Larosière* Group of Experts submitted a report in February 2009,[368] by which it presented its conclusions on the reasons of the Crisis and proposed thirty one (31) recommendations, in order for financial services supervision to be effective on a pan-EU level and to avoid future systemic crises.

In this direction, it recommended the strengthening of the supervisory framework, the reforming of the structure of supervision of the financial sector in EU by *inter alia* establishing a European System of Financial Supervisors consisting of three European Supervisory Authorities (one for the banking sector, one for the securities sector and one for the insurance and occupational pensions sector), and by creating a European Systemic Risk Council.[369]

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[368] Available at http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf

[369] During the same period, a Report on "*The Future of EU Regulation and Supervision*" was prepared by the European Union Committee of the (UK) House of Lords, published on 17.06.2009 and available at http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/106/106i.pdf

The European Supervisory Authorities, the European Systemic Risk Board and the European System of Financial Supervision

Following the *de Larosière* Report, the Commission presented its proposals on a new European financial supervisory architecture, by Communications of March 2009 [370] and May 2009.[371] The Commission proposed to transform the European supervisory committees[372] into European Supervisory Authorities (ESAs), becoming the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA); further to establish a European System of Financial Supervisors (ESFS), which would consist of national supervisors and the new European Supervisory Authorities (ESAs), working together. This system would allow for adequate supervision on a pan-European level, having also input on a micro-prudential level by national regulators. Also, the Commission proposed to establish a European Systemic Risk Board (ESRB) in order to monitor and assess dangers to financial stability emerging from macro-economic developments, and developments within the whole financial system. The Commission noted that "[e]*xperience of the financial crisis has exposed important failures in financial supervision, both in particular cases and in relation to the financial system as*

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[370] COM(2009) 114.

[371] COM (2009) 252 final, p. 2.

[372] *I.e.* the Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR).

a whole."[373] According to the Commission's proposals, the ESAs would contribute to "[...] *(i) improving the functioning of the internal market, including in particular a high, effective and consistent level of regulation and supervision, (ii) protecting depositors, investors, policyholders and other beneficiaries, (iii) ensuring the integrity, efficiency and orderly functioning of financial markets, (iv) safeguarding the stability of the financial system, and (v) strengthening international supervisory coordination. For this purpose, each ESA shall contribute to ensuring the coherent, efficient and effective application of the relevant Community law*". [374]

Thus, the need to enhance protection of individual market participants (including depositors and retail investors) was stated by the Commission as a parameter of the reasoning in establishing a new European financial architecture.

The European Systemic Risk Board (ESRB) was established in 2010 by Regulation 1092/2010,[375] in the context of the new system for macro-prudential oversight in the EU, as part of the European System of Financial Supervision (ESFS) also established by the same Regulation.

As stated in its Preamble of Regulation 1092/2010, "[g]*iven the integration of international financial markets and the contagion risk of financial crises, there is a need for a strong commitment on the part of the Union at the global level. The ESRB*

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[373] See COM(2009) 501 final, 23.09.2009.

[374] *Ibid.*, para. 6.1, p. 4.

[375] Regulation 1092/2010 [2010] OJ L331/1.

should […] *take on all the global responsibilities required in order to ensure that the voice of the Union is heard on issues relating to financial stability, in particular by cooperating closely with the International Monetary Fund (IMF) and the Financial Stability Board (FSB), which are expected to provide early warnings of macro-prudential risks at the global level, and the partners of the Group of Twenty (G-20)*”.[376]

Also, that “[t]*he ESRB should contribute, inter alia, towards implementing the recommendations of the IMF, the FSB and the Bank for International Settlements (BIS) to the G-20*”.[377]

The ESFS comprises of the ESRB, the EBA, the EIOPA, the ESMA, the Joint Committee of the ESAs,[378] and the competent or supervisory authorities of the MSs, as

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[376] *Ibid.*, Preamble, recital 7.

[377] *Ibid.*, Preamble, recital 8.

[378] For an overview see AVLONITIS, X. and PAPAIKONOMOU, V. (2011) 'The European Securities and Markets Authority', *HreDik*, vol. 1, p. 49; MOLONEY, N. (2011) 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market - A tale of two competences: part (2) rules in action', *European Business Organization Law Review*, vol. 12, no. 2, pp. 177-225; *idem* (2011) 'The European Securities and Markets Authority and institutional design for the EU financial market: a tale of two competences: part (1) rule-making', *European Business Organization Law Review*, vol. 12, no. 1, pp. 41-86; GORTSOS, C. (2011) ' The European Banking Authority within the "European System of Financial Supervision" ', *HreDik*, vol. 1, p. 56; *idem* (2013) 'The 'single supervisory mechanism': a major building block towards a European Banking Union (the full Europeanisation of the 'bank safety net')', *HreDik*, vol. 1, p. 5.

specified in applicable EU law;[379] it is responsible for the macro-prudential oversight of the financial system within the EU in order to contribute to the prevention or mitigation of systemic risk, *inter alia* by determining, collecting and analysing information, identifying and prioritising systemic risks, issuing warnings and recommendations for remedial action, issuing a confidential warning addressed to the Council under conditions specified and providing the Council with an assessment of the situation, cooperating closely with all other parties to the EFSF,[380] and coordinating its actions with those of international financial organisations, in particular the IMF and the FSB.[381]

With regard to the objectives of the EBA, established by Regulation 1093/2010,[382] it is stated that EBA should act with a view to "*improving the functioning of the internal market, in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all* [MSs] *and the different nature*

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[379] Regulation 1092/2010., Article 3(1).

[380] The EFSF contitues to support the Hellenic economy, while the ESM Treaty has been signed. Available at http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf. See also ECJ decision of 27.11.2012 in Case C-370/12, *Thomas Pringle v Governemt of Ireland, Ireland and The Attorney General* (nyr).

[381] Regulation 1092/2010, Article 3.

[382] Regulation 1093/2010 [2010] OJ L331/12. The EBA was established on 01.01.2011 (Article 82 of Regulation 1093/2010). Regulation 1093/2010 has been amended by Regulation 1022/2013 [2013] OJ L287/5, as regards the conferral of specific tasks on the ECB.

of financial institutions".[383] It is also stated *inter alia* that EBA "[…] *should protect public values such as the stability of the financial system, the transparency of markets and financial products, and the protection of depositors and investors*".[384] Regulation 1093/2010 provides that the EBA shall act with regard to both credit and financial institutions[385] and the competent authorities that supervise them, and that it will act in the fields of activities of credit institutions, financial conglomerates, investment firms, payment and e-money institutions in relation to matters not directly covered by said acts which delimitate its competence, including matters of corporate governance, auditing and financial reporting, in order to ensure the effective and consistent application of those acts.[386]

Regulation 1093/2010 further established ESFS,[387] providing that it shall comprise of ESRB,[388] EBA, EIOPA,[389] ESMA,[390] the Joint Committee of the ESAs,[391] and the competent authorities of MSs.[392]

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[383] Regulation 1093/2010, Preamble, recital 11.

[384] *Ibid.*

[385] According to Regulation 1093/2010, Article 4, "financial institutions" means "credit institutions" as defined in Article 4(1) of Directive 2006/48/EC, "investment firms" as defined in Article 3(1)(b) of Directive 2006/49/EC, and "financial conglomerates" as defined in Article 2(14) of Directive 2002/87/EC, save that, with regard to Directive 2005/60/EC, "financial institutions" means credit institutions and financial institutions as defined in Article 3(1) and (2) of that Directive.

[386] Regulation 1093/2010, Article 1(2), (3).

[387] *Ibid.*, Regulation 1093/2010 Article 2(1).

With regard to accountability of the ESRB, the EBA, the EIOPA, and the ESMA, it provides that they "[…] *shall be accountable to the European Parliament and the Council*".[393] It is also provided that the ECB shall be accountable to the European Parliament and to the Council with regard to the exercise of the supervisory tasks conferred on it by Regulation 1024/2013 in accordance with that Regulation.[394]

According to Regulation 1093/2010, "[t]*he objective of the* [EBA] *shall be to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses*",[395] and that in carrying out its tasks, the EBA "[…] *shall act independently,*

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[388] Regulation 1092/2010.

[389] Regulation 1094/2010.

[390] Regulation 1095/2010.

[391] Regulation 1094/2010 and Regulation 1095/2010.

[392] Regulation 1093/2010, Article 2(2).

[393] Regulation 1093/2010, Article 3. *Cf.* Preamble to the Regulation, where stated *inter alia* that the ESAs should be accountable to the EP and the Council (recital 10), *i.e.* on an institutional level; *cf. ibid.*, recital 31.

[394] Regulation 1093/2010, Article 3, as amended by Regulation 1022/2013 [2013] OJ L287/5.

[395] Regulation 1093/2010, Article 1(5).

objectively and in a non-discriminatory manner, in the interests of the Union as a whole".[396] It is also provided that "[t]*he* [EBA] *shall contribute to* […] *enhancing customer protection*".[397] Its tasks include *inter alia* contributing to the establishment of high-quality common regulatory and supervisory standards and practices, maintaining a European supervisory handbook, contributing to the consistent application of legally binding EU acts, preventing regulatory arbitrage, mediating and settling disagreements between competent authorities, ensuring effective and consistent supervision of financial institutions, ensuring a coherent functioning of colleges of supervisors and taking actions in emergency situations.[398] Among its tasks is stated "*to foster depositor and investor protection*",[399] and to "[…] *promote the consistent and coherent functioning of colleges of supervisors, the monitoring, assessment and measurement of systemic risk, the development and coordination of recovery and resolution plans, providing a high level of protection to depositors and investors throughout the Union and developing methods for the resolution of failing financial institutions and an assessment of the need for appropriate financing instruments* [...]".[400]

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[396] Regulation 1093/2010, Article 1(5), as amended by Regulation 1022/2013. In its initial form, the same indent provided that EBA "[…] *shall act independently and objectively and in the interest of the Union alone*". With regard to independence, see also Regulation 1093/2010, Articles 42, 46, 49, 52 and 59.

[397] Regulation 1093/2010, Article 1(5), indent (f).

[398] Regulation 1093/2010, Article 8(1), as amended by Regulation 1022/2013.

[399] *Ibid.*, Article 1(5), indent h.

[400] *Ibid.*, indent (i), as amended by Regulation 1022/2013.

The notion of "consumer protection" appears to be differentiated in the Regulation from the notions of depositor or investor protection. Indeed, the Regulation provides a specific provision regarding tasks of the EBA related to consumer protection and financial services.[401]

Further, Regulation 1093/2010 provides a detailed system of rules regarding the development of draft regulatory technical standards by the EBA, to be submitted to the Commission, where the European Parliament and the Council have delegated power to the Commission to adopt regulatory technical standards (TFEU Article 290);[402] further, it is provided that EBA may develop implementing technical standards by implementing acts (TFEU Article 291).[403]

Important powers are conferred on EBA with regard to initiating proceedings against competent authorities that appear to act in breach of EU law, "[…] *in particular by failing to ensure that a financial institution satisfies the requirements laid down* […]"[404] by applicable rules;[405] following a structured procedure, the EBA may adopt an individual decision addressed to a financial institutions requiring the necessary action to be taken (including cessation of any practice) upon failure of competent national

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[401] Regulation 1093/2010, Article 9.

[402] *Ibid.*, Articles 10 – 14.

[403] *Ibid.*, Article 15.

[404] *Ibid.*, Article 17(1).

[405] *Ibid.*, Article 17.

authorities to comply with EBA's decisions (formal opinion),[406] such an individual decision prevailing over any previous decision adopted by the national competent authorities on the same matter.[407]

By this system of monitoring and investigation, EBA is allowed, in close cooperation with the Commission, to achieve compliance by financial institutions with their obligations under EU law, in order to protect market stability and integrity. Should national competent authorities prove inefficient, the EBA may proceed to addressing directly applicable individual decisions to financial institutions (where allowed by applicable EU law), overriding possible national authorities decisions or objections on the same matter.[408] Rules on hearing of the addressee of the individual decisions issued by the EBA, on the reasoning and on the publication of such decisions are also provided.[409] Further, a system for settlement of disagreements between competent authorities in cross-border situations,[410] as well as a system for settlement of disagreements between competent authorities across sectors,[411] is provided.

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[406] *Ibid.*, Article 17(6).

[407] *Ibid.*, Article 17(7).

[408] In case of emergency the EBA has enhanced powers; see *ibid*., Regulation 1093/2010 Article 18.

[409] *Ibid.*, Article 39.

[410] *Ibid.*, Article 19.

[411] *Ibid.*, Article 20.

Control of systemic risk is fundamental to the aim of EBA;[412] among other competences, EBA may conduct an inquiry into a particular type of financial institution or type of product or type of conduct in order to assess potential threats to the stability of the financial system and make appropriate recommendations for action to the competent authorities concerned.[413] It is provided, that the financial institutions that may pose a systemic risk shall be subject to strengthened supervision, and where necessary, to recovery and resolution procedures.[414] In developing the criteria for the identification and measurement of systemic risk posed by financial institutions, the EBA shall take into account the criteria established by the FSB, the IMF, and the BIS.[415]

Furthermore, the EBA is competent to ensure the correct application of DGSD, with the aim of ensuring that national deposit guarantee schemes are adequately funded, and to provide "[…] *a high level of protection to all depositors in a harmonised framework throughout the Union, which leaves the stabilising safeguard role of mutual guarantee schemes intact, provided they comply with Union legislation*". [416]

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[412] *Ibid.*, Articles 22 – 24.

[413] *Ibid.*, Article 22(4).

[414] *Ibid.*, Articles 23(1), 25, 27.

[415] *Ibid.*, Article 23(2).

[416] *Ibid.*, Article 26(2).

A system of remedies is provided by Regulation 1093/2010, for filing appeals against EBA decisions,[417] and for bringing proceedings before the ECJ against its decisions (following the stage of appeal, where applicable).[418] *Locus standi* of individuals, natural or legal persons, is allowed upon condition of showing direct and individual concern.[419]

Furthermore, it appears that the EBA, which has been established to operate in the public interest, has not been awarded total immunity nor has it been exempted from non-contractual liability; according to Regulation 1093/2010, "[i]*n the case of non-contractual liability, the* [EBA] *shall, in accordance with the general principles common to the laws of the* [MSs]*, make good any damage caused by it or by its staff in the performance of their duties. The Court of Justice of the European Union shall have jurisdiction in any dispute over the remedying of such damage*".[420]

ESMA was also established in 2010, by Regulation 1095/2010,[421] having as objective (as in the case of EBA) the protection of public interest, "[…] *by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses*".[422]

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[417] *Ibid.*, Article 60.

[418] *Ibid.*, Article 61.

[419] *Ibid.*, Article 60(1).

[420] *Ibid.*, Article 69(1).

[421] Regulation 1095/2010 [2010] OJ L331/84.

[422] *Ibid.*, Article 1(5).

The normative structure of Regulation 1095/2010 establishing ESMA is identical to that of Regulation 1093/2010 establishing the EBA. Its normative content also follows *mutatis mutandis* that of Regulation 1093/2010.[423]

It emerges in our view, that EU law has taken a clear stance with regard to the eventuality of national competent authorities exercising their duties ineffectively and thus failing to protect the EU financial market –the ESAs are to take direct control of the situation and exercise directly if need be supervision and enforcement on individual investment firms. Beyond the sense of mistrust as to the efficiency –or to the willingness to exercised pressure on national investments firms– of national competent authorities that is caused by this development, institutional issues are raised relating to this new federalized normative structure.[424] Moreover, in our view, relating to non-contractual liability issues, it is possible that causality issues will become even more complicated and difficult to prove, especially for retail investors, since the factors of an eventual failure of a financial intermediary as related to regulatory and supervisory acts and omissions will be multiplied and causes may be further distanced from effects.

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[423] Therefore, and in order to avoid repetition, the comments made regarding Regulation 1093/2010 setting up EBA apply equally to Regulation 1095/2010 setting up ESMA.

[424] See indicatively, TRIDIMAS, T. (2011) 'EU Financial Regulation: Federalization, Crisis Management, and Law Reform', *op. cit.*, pp. 795 - 804.

II.2.2 Proposals for an New EU law on Bank Recovery and Resolution

Further, in order to address the concerns regarding systemic stability, the Commission sumbitted in mid-2010 a Communication to the European Parliament, the Council, the ECSC and the ECB, on "*Bank Resolution Funds*".[425] This Communication followed the G-20 meeting of September 2009 in Pittsburgh,[426] which had been politically supported by the EU,[427] that bank losses should not be covered by the taxpayers (as in traditional "*bail-outs*").

In this direction, the Commission proposed two complementary ways of treating credit institutions' failure: by the provision of better supervision, corporate governance, and

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[425] COM(2010) 254 final, 26.05.2010. See also the Council (ECOFIN) conclusions (17006/1/10) calling for an EU framework for crisis prevention, management and resolution, aiming at "[…] *preserving financial stability by protecting public and market confidence; putting prevention and preparation first; providing credible resolution tools; enabling fast and decisive action; reducing moral hazard and minimising to the fullest possible extent the overall costs to public funds, by ensuring fair burden sharing among the financial institutions' stakeholders; contributing to a smooth resolution of cross border groups; ensuring legal certainty; and, limiting distortions of competition*."

[426] *Supra*, n 137.

[427] See ECOFIN Council Conclusions of 18 May 2010.

regulation on the one hand, and by an appropriate mechanism for orderly and timely bank resolution should failure occur, on the other hand.[428]

In the latter case, the Commission supported through its Communication, "[...] *the establishment of ex ante resolution funds, funded by a levy on banks* [including investment firms for the purposes of its Communication] *to facilitate the resolution of failing banks in ways which avoid contagion, allow the bank to be wound down in an orderly manner and in a timeframe which avoids the "fire sale" of assets* ("*principe de prevoyance*")".[429] The Commission also recalled the "polluter pays" principle, noting that political support for its application also in the financial sector is growing, in the sense that those responsible for causing a crisis will (have to) pay for the relevant costs (without however clarifying how responsibility is to be defined and attributed).[430]

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[428] For an overview see indicatively BABIS, V. (2012) 'EU Recovery and Resolution Framework: Financial Assistance between Banking Group Members', University of Cambridge Faculty of Law Research Papers, vol. 15, June, http:ssrn.com/abstract=2091194; SCHILLIG, M. (2012) 'Bank Resolution Regimes in Europe I- Recovery and Resolution Planning, Early Intervention', April http://ssrn.com/abstract=2136101; idem (2012) 'Bank Resolution Regimes in Europe II-Resolution Tools and Powers'. August, http://ssrn.com/abstract=236084.

[429] COM(2010) 254 final, pp. 2 – 3.

[430] *Ibid.* In our view, the issue of "responsibility" for causing a financial crisis is very wide and may extend from a micro-analysis point of view of financial firms responsibility (as in the case of unfit management of systemic financial institutions) to creditor responsibility (as for example in the case of professional investors supporting high-risk portfolio management) to regulatory and supervisory authorities responsibility (as in the case of not duly exercising their powers) to political responsibility (for not acting in an effective way either as legislature or as public administration to protect the

The Commission further took into account moral hazard concerns, noting in particular that "[...] *this is a major concern which needs to be addressed by making it clear and unambiguous that shareholders (up to the value of their investment) and creditors (excluding depositors which are guaranteed by deposit guarantee schemes) must be the first to face the consequences of a bank failure and that resolution funds must not be used as an insurance against failure or to bail out failing banks, but rather to facilitate an orderly failure*".[431]

In this way, the Commission proposed in this Communication, (a) that bank resolution funds should be used in connection to (all) bank failures, the aim of financial law being not to avert bank failures (at any cost) but to control bank failures, and (b) that creditors are responsible to bear the consequences of a bank failure (depositors being protected up to the limit of applicable deposit guarantee). Thus, already in mid-2010 the Commission had proposed a change in the policy of implicit total deposit guarantee (entailing bank rescues by use of public funds), without entering into detailed analysis regarding the constant concern of financial law to protect the trust to the financial system.

According to the Commission, the bank resolution funds regime should be addressed on EU level, in the context of establishing wider integrated crisis management and supervisory arrangements, forming part of a range of measures to address the Crisis,

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market and participants). Each category of responsibility may be connected to a final negative result (a financial crisis) but the intensity of causality differs.

[431] *Ibid.*, p. 3.

focusing on prevention of bank failure but allowing for orderly bank failures irrespective of size.[432]

By its Communication of 20.10.2010 "*An EU Framework for Crisis Management in the Financial Sector*",[433] the Commission addressed a number of pertinent issues and proposed a European framework for controlling the Crisis.

Noting that EU MSs had committed at the time aid to rescuing banks amounting to around 30% of EU GDP (while the aid used amounted at the time to 13%), and that such public interventions also had a significant impact on the level playing field within the internal market, it referred to its two earlier Communications on crisis management and resolution,[434] and to a relevant report by the EP,[435] and taking into account the work of the FSB and the G-20, the Commission stated that "[t]*he overriding objective of a European resolution framework should be that ailing institutions of any type and size, and in particular systemically important institutions, can be allowed to fail without risk to financial stability whilst avoiding costs to taxpayers*".

With regard to the scope of such framework, the Commission explained that both credit institutions and systemically important investment firms should fall within it. According

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[432] This Commission initiative was followed by a Commission proposal in 2012 for a Bank Recovery and Resolution Directive; COM(2012) 280. See *infra*, n 443.

[433] COM(2010) 579 final, 20.10.2010.

[434] COM(2009) 561 and COM(2010) 254.

[435] European Parliament, A7-0000/2010, Committee on Economic and Monetary Affairs (the "*Ferreira Report*").

to the Commission, such a framework might present a realistic alternative to "bailing out" financial institutions. The Commission described three classes of measures in this direction: preparatory and preventative measures; early supervisory intervention; and resolution tools and powers.[436] According to the Commission's proposal, national DGSs may be a competent authority for resolution, under applicable national law (as well as the Ministry of Finance or the Central Bank), taking into account national arrangements.

According to the Commission, the general rule should be that failing credit institutions should be liquidated under ordinary insolvency proceedings (taking into account, however, that in general ordinary insolvency proceedings have not been applied to failing financial institutions and particularly those of systemic importance). When liquidation of a credit institution is not feasible (in the public interest and for reasons of financial stability), the Commission noted that winding down through resolution will be necessary.

Since such intervention mechanisms may entail interference with the rights of shareholders and creditors of financial institutions, the Commission proposed safeguards and mechanisms for compensation should be provided in this direction according to the "*no creditor worse off*" principle (*i.e.* that affected stakeholders should suffer no greater loss than they would have suffered if the institution had been wound up under the applicable insolvency regime).

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[436] Specifically with regard to early intervention measures, the Commission proposed *inter alia* the appointment of a special manager for a limited period of time to take over the management (or assist existing management) of an ailing financial institutions, noting however that such appointment "*should not imply a state guarantee or expose supervisors to liability for the actions of the special manager*".

The Commission further proposed oversight of the proposed crisis management framework by ESA (and ESMA where appropriate) and *ex ante* funding by deposit guarantee schemes. On the institutional level, the Commission expressed its preference for a single EU fund, in order to achieve an efficient EU resolution regime, and also for administrative liquidation proceedings rather than court-based procedures.[437]

Interesting comments were made to this Commission Communication by the European Economic and Social Committee (EESC). In its Opinion of 16.06.2011,[438] the EESC shared the view that the support of failing financial institutions at the costs of public finances and the level playing field within the internal market is no longer acceptable in the future and supported in principle the proposed comprehensive EU framework, recommending that the Commission renders compulsory for all MSs the IMF/World Bank Financial Sector Assessment Programmes as also proposed by the *De Larosière* Report.

It noted *inter alia* that the Commission's Communication proposes a crisis management framework for "*all cross-border and domestic credit institutions and some investment firms*" without clear definition of proposed application as to investment firms, encouraging the Commission also to assess whether the resolution tools and powers suggested its Communication would be sufficient to address adequately all specific problems related to the failure of an investment firm. With regard to "bail-in", EESC posed a series of questions as to the proportional allocation of losses and the criteria for

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[437] COM(2010) 579 final.

[438] [2011] OJ C248/101.

including creditors among contributors, asking when, and to what extent, one specific creditor is to be called to bear the losses, and whether there should be a distinction between "guilty" or "imprudent" creditors and others; and, on what basis, and under what circumstances, would the losses be covered by the whole banking industry.[439] Further the EESC expressed the hope that the options proposed by the Commission for financial institution resolution "[…] *would not be misused in political, economic and social emergencies but will be taken advantage of in order to ensure flexibility in adapting the national rules to the European legislation and promote effective coordination and cooperation of cross-border crisis management and resolution for all types of credit institutions irrespective of their size and interconnectedness*". With regard to the enhanced supervision proposed by the Commission, the EESC noted that "[…] *supervisors are required to introduce reinforced supervision, to assess and supervise recovery and resolution planning, to adopt preventive measures* […], *to intervene in the resolution of a firm in cooperation with, resolution authorities, etc. In practice, supervisors become super-managers of the institutions*".[440]

As the Crisis progressed and deepened, the Commission issued its Communication "A roadmap to stability and growth"[441] in which it noted that "[t]*he crisis threatens to become systemic*", emphasizing that "[a] *solution to break the vicious circle between doubts over the sustainability of sovereign debt, the stability of the banking system and the EU's growth prospects is more necessary than ever*", and proposed elements of such a solution. It considered strengthening the banking system as fundamental to this effort,

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[439] *Ibid*.

[440] *Ibid*.

[441] COM(2011) 669 final, 12.10.2011.

by means of bank recapitalisation. Among measures to this aim, the Commission proposed *inter alia* that "[b]*anks should first use private sources of capital, including through restructuring and conversion of debt to equity instruments*". Also, a new system of regulation for the financial sector (including reinforced rules on credit rating agencies, transparency and market conduct, market abuse, and a European framework on bank resolution), as well as the proposed Financial Transaction Tax (FAT).[442]

The proposed Bank Recovery and Resolution Directive

As a measure to further enhance the creation of a Banking Union, the Commission proposed in June 2012 a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms (the proposed Bank Recovery and Resolution Directive, BRRD),[443] the adoption of which will entail a fundamental change in the structure of EU finance law, affecting also the regime of retail investor and depositor protection.

The BRRD proposal built on the 2010 Commission Communication "*An EU Framework for Crisis Management in the Financial Sector*"[444] and followed G-20

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[442] *Ibid*.

[443] COM(2012) 280 final. On 12.12.2013, an agreement was reached between the European Parliament and the MSs of the EU for the adoption of the proposed BRRD. See http://europa.eu/rapid/press-release_MEMO-13-1140_en.htm?locale=en.

[444] *Supra*, n. 433.

political decisions in the context of which the FSB "*Key Attributes of Effective Resolution Regimes for Financial Institutions*"[445] were also endorsed. It also took into account extensive consultations with the financial industry and other stakeholders and experts.[446]

By this proposal, the Commission appears to have altered its position with regard to the legal context of bank resolution, explaining that, while in case of failures banks should be wound down according to the usual insolvency procedures, the systemic risk posed by banks (in case of a domino effect as a result of loss of confidence in the financial system) and the important economic function of the financial institutions necessitates a special framework for the management of bank failures; and that where no public interest considerations are raised, a financial institution may be subject to usual insolvency proceedings.[447]

Further, the Commission observed that "[…] *by removing the implicit certainty of a publicly-funded bail out for institutions, the option of resolution should encourage*

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[445] *Supra*, n 156.

[446] See http://ec.europa.eu/internal_market/bank/index_en.htm . The Commission prepared also an impact assessment (available at the same site) according to which the proposed resolution framework "*will achieve the objectives of enhancing financial stability, reducing moral hazard, protecting depositors and critical banking services, saving public money and protecting the internal market for financial institutions*" while "[t]*he costs of the framework derive from a possible increase in funding costs for institutions due to the removal of the implicit certainty of state support, and from the costs related to resolution funds.* […]"; *ibid*.

[447] *Ibid.*

uninsured creditors to better assess the risk associated with their investments".[448] As uninsured creditors include depositors (for the amount of their deposit beyond deposit guarantee protecion), it appears that the Commission regards such depositors as making an investment decision when selecting a credit institution to entrust it with their money.

Moreover, according to the Commission proposal, while losses are to be allocated between the shareholders and the creditors of the financial institution according to national insolvency law, the following principles for the allocation of losses should apply irrespective of national insolvency law: (a) that the losses should first be allocated in full to the shareholders and then to the creditors and (b) that creditors of the same class might be treated differently if it is justified by reasons of public interest and in particular in order to underpin financial stability.[449] These principles are complemented by the "*no creditor worse off*" principle.[450] The proposal noted that national authorities will be able to retain specific national tools and powers to deal with failing institutions (under condition of combatibility with EU law and if they to not impede effective group resolution), observing however that "*ring-fencing*" would thus not be compatible with the proposed legislation.[451]

Especially with regard to the "*bail-in*" tool, the Commission proposed that resolution authorities will be able to write down the claims of unsecured creditors and convert debt

[448] *Ibid.*, p. 5.

[449] *Ibid.*, p. 11, para. 4.4.8.

[450] *Ibid.*

[451] *Ibid.*, p. 12, n 15.

claims to equity, and to implement a business restoration plan, having removed the management responsible for the problems.[452] It further proposed that the hierarchy of claims subject to the "*bail-in*" power will supersede the relevant hierarchy according to national insolvency law, and that in principle shareholders' claims should be exhausted before the claims of subordinated creditors, but under certain circumstances creditors' rights could be affected without exhaustion of shareholders' claims.[453] Also, that resolution operations should be facilitated by temporary stay of rights to enforce claims by counterparties and creditors,[454] as well as by restriction on judicial proceedings against the resolution authorities (that will be liable only for paying compensation for the damages suffered by affected persons) and against the financial institution under resolution.[455]

Regarding the funding of the resolution mechanism, Commission proposed the setting up of financial arrangements in MSs, involving a combination of *ex ante* and *ex post* contributions and where indispensable borrowing facilities from financial institutions or the central bank. National deposit guarantee schemes should also contribute, according to the Commission, to the funding of the resolution mechanism, by ensuring access to covered deposits (compensating retail depositors as if insolvency had taken place and then being subrogated to them in liquidation proceedings, ranking *pari passu* with unsecured non-preferred claims) and by providing also supplementary funding (beyond

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[452] *Ibid.*, p. 13.

[453] *Ibid.*

[454] *Ibid.*, p. 14.

[455] *Ibid.*

covered deposits) should MSs opt for such a financing arrangement (*i.e.* using the national deposit guarantee scheme as a resolution fund).[456]

The proposed introduction of the resolution mechanism for credit institutions and investment firms will entail a necessary adaptation *inter alia* of Directive 2001/24/EC on the winding up of credit institutions.[457]

On 12.09.2012 the Commission issued a Communication to the European Parliament and the Council, titled "*A Roadmap towards a Banking Union*" on the future steps proposed to accomplish the single financial market in the EU.[458]

By this Communication, the Commission urged the co-legislators to take the necessary action to strengthen the single market, the unity and integrity of which must not be compromised by the banking union. Further steps proposed by the Commission in order to achieve banking crisis management include a single resolution mechanism (instead of a network of national resolution authorities), once agreement on the proposed new DGSD[459] and bank recovery and resolution regimes will be achieved.

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[456] *Ibid*.

[457] *Ibid*. See *supra* n 199.

[458] COM(2012) 510 final.

[459] *Infra*, Ch III.2.1.

The proposed Bank Recovery and Resolution Regulation

In July 2013 the Commission proposed the adoption of a Regulation on bank recovery and resolution (the proposed Bank Recovery and Resolution Regulation, BRRR) to establish uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms, in the framework of a Single Resolution Mechanism (SRM) and a Single Bank Resolution Fund (the Fund).[460]

Following its proposals to create a banking union in the EU, on the basis of an integrated financial framework, and after its proposals for the adoption of the BRRD (based on a network of national authorities and resolution funds to resolve banks), the Commission proposed the introduction of SRM, with a central decision-making body, and of the Fund, arguing that such a structure would provide key benefits for MSs, taxpayers, banks and financial and economic stability for the EU, as central decision-making will allow for effective and quick response to crises, and a centralised fund will pool significant resources. Moreover, according to the Commission, the introduction of the SRM within the EU legal and institutional framework would protect the democratic and institutional order of the EU, avoiding the deployment of *ad hoc* inter-governmental instruments. The Commission noted that the SRM will apply the "single Rulebook on bank resolution" (the proposed BRRD), and will follow uniform rules and procedures, together with the Commission and the resolution authorities of the participating MSs (for entities and groups established only within the SRM participating MSs, the SRM will replace the resolution colleges provided in the BRRD). Pursuant to the BBRR

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[460] COM(2013) 520 final.

proposal, resolution will take place according to a process in which ECB will notify the Commission, the Resolution Board and relevant national authorities that a bank is failing, then the Resolution Board will assess whether systematic threat is posed, and if so will recommend to the Commission to initiate resolution, following which the Commission will initiate the resolution and indicate to the SRB the resolution framework to apply; the Resolution Board will then adopt a resolution scheme and the national resolution authorities will be instructed to execute it according to national law, failing which the Resolution Board may supersede the national resolution authorities and address certain decisions for the implementation of the resolution measures directly to the banks. The proposal further suggests that each component of the SRM will be (politically) accountable, so that the Resolution Board will be accountable for its decisions to the EP and the Council and will have to respond to national Parliaments. Furthermore, the proposed Fund will have as aim "*to ensure financial stability, rather than to absorb losses or provide capital to an institution under resolution*". As the Commission clearly states, the Fund "*should not be considered as a bailout fund*".[461] Its ability to pool the resources is expected to serve as a Euro-area insurance mechanism in banking crises, since a common European private backstop mechanism will be more effective than national funds in absorbing shocks through *ex ante* and if necessary *ex post* contributions from the whole Euro-area banking industry, and is expected to be more effective in resolving the interdependence banks and sovereigns.[462]

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[461] *Ibid*.

[462] *Ibid*. Financing the Fund will be provided *ex ante*, as proposed, by the banking industry. Additional *ex post* contributions and further support from financial institutions (and third parties, including public funds) may be available under conditions, this support to be paid back. As provided in the proposal for BRRD, national DGSs will

The proposed BRRR, building on BRRD proposal, reflects a fundamental change in the way EU policymakers perceive financial integration and protection from systemic danger. Since the Hellenic Republic is a member of the Euro-area, the BRRR (if adopted) will govern bank recovery and resolution in the Hellenic legal order.[463]

The *Liikanen Report*

On 02.10.2012, shortly after the publication of the "*Roadmap towards a Banking Union*" Commission Communication, the High Level Expert Group on reforming the structure of the EU banking sector, which was established by the Commission in February 2012, and chaired by E. Liikanen, issued its final report (known as "*the Liikanen Report*").[464]

With a view to consider whether there is need for structural reforms in the EU banking sector or not, and to make relevant proposals as appropriate, in order to establish a stable and efficient banking system, the Report took into account aggregate EU bank

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contribute up to the amount of covered deposits, in application of the "*no creditor worse off*" principle.

[463] See proposed BRRR, Article 4. With regard to the effect of proposed recovery and resolution measures regarding retail investor protection, see *infra* Ch III.2.3.

[464] Available at http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf .

sector developments, the diversity of bank business models in Europe,[465] existing and forthcoming regulatory reforms, as well as further reforms of the EU banking sector.[466]

The *Liikanen Report*, taking into account international initiatives regarding financial markets structural reforms, examined in particular two structural reform avenues that may be useful in order to further limit the likelihood of bank failures, to improve resolvability of banks, and to reduce use of public funds to rescue banks. These two avenues are (a) the introduction of non-risk weighted capital buffer for trading activities

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[465] With regard to bank business models, risk profile, and performance during the Crisis, see AYADI, R., ARBAK, E., De GROEN, W.P. and LLEWELLYN, D.T. (2012) *Regulation of European Banks and Business Models: Towards a New Paradigm*, CEPS; AYADI, R., De GROEN, W.P. and LLEWELLYN, D.T. (2011) *Business Models in European banking: a pre- and post-crisis screening*, CEPS; AYADI, R. and SCHIDT, R. (ed.) (2009) *Investigating Diversity in the Banking Sector in Europe: The Performance and Role of Saving Banks*, CEPS; FITCH (2011) *Global trading and universal bank review*; WAGNER, W. (2010) 'Diversification at financial institutions and financial crises', *Journal of Financial Intermediation*, vol. 19, no. 3, pp. 373-386.

[466] Specifically with regard to recovery, resolution and "bail-in" instruments, the *Liikanen Report* observed *inter alia* that during the period of October 2008 to end 2010, European governments used a total of 1.6 trillion Euros of state aid to support the banking sector, in the form of guarantees and liquidity support, recapitalisation and asset relief measures, noting that the available evidence suggests that the transfer of resources from the government to the banking system through implicit subsidies has been significant, and that 90% of all implicit subsidies were channelled to the largest institutions. As the Report noted, such subsidisation causes distortions, in terms of competitiveness (banks benefiting from implicit subsidy *vis-à-vis* banks not benefiting from it), excessive risk taking, and misallocation of resources. Further, that due to the lack of an adequate crisis management mechanism in the EU, only a few liquidations of small banks took place in the EU during the Crisis; *ibid.*, p. 25, wherein further references.

and contingent functional separation of significant trading activities,[467] and (b) the introduction of immediate functional separation of significant trading activities.[468]

The Report concluded that reform is necessary, and proposed certain measures in that direction.[469]

II.2.3 THE NEW EU RULES ON LICENSING AND PRUDENTIAL SUPERVISION OF FINANCIAL INTERMEDIARIES

On 27.06.2013, the EU took a further important step forward in order to achieve effective operation of the financial market, in the direction of unifying prudential requirements and supervisory mechanisms for credit institutions and investment firms,

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[467] *Ibid.*, p. 95 – 97.

[468] *Ibid.*, p. 97 – 99.

[469] Among such measures, it was proposed by the *Liikanen Report* that proprietary trading and other significant trading activities should be assigned to a separate legal entity if the activities to be separated amount to a significant share of a bank's business, or if the volume of such activities can be considered significant in terms of financial stability. As a consequence, the Report stated, deposits and the explicit and implicit guarantee they carry, would no longer directly support risk trading activities. In particular, the Report concluded that it is necessary to require legal separation of certain risky financial activities from deposit-taking banks within a banking group; the activities to be separated should include proprietary trading of securities and derivates, and activities closely linked with securities and derivatives markets. If further supported inter alia drawing up and maintaining effective and realistic recovery and resolution plans, and that the use of designated bail-in instruments should be supported and banks should have a large quantity of debt to be used in case of bail-in. *Ibid.*, p. 99 *et seq.*

since both have proven to be prone to systemic dangers, by the adoption of Regulation 575/2013[470] and of Directive 2013/36/EU.[471]

The European Single Rule Book

Regulation 575/2013 on the prudential requirements for credit institutions and investment firms explicitly refers in its preamble to the G-20 Declaration of 02.04.2009 and the following international initiatives,[472] as well as to the *de Larosière* Report which stressed the need to establish a "European Single Rule Book" applicable to all credit institutions and investment firms in the internal market.[473]

While Regulation 575/2013 mainly provides the (micro)prudential requirements for financial institutions that relate strictly to the functioning of banking and financial

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[470] Regulation 575/2013 [2013] OJ L176/1.

[471] Directive [2013] OJ L176/338.

[472] *Ibid.*, Preamble, recital 1.

[473] *Ibid.*, recital 2. A credit institution is defined by Regulation 575/2013 as "*an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account*". *Ibid.*, Article 4(1) point 1. For the definition of an investment firm for the purposes of the same Regulation, *ibid.*, Article 4(1) point 2.

services markets,[474] Directive 2013/36/EU contains rules on the access to the activity of institutions, the modalities for their governance, and their supervisory framework.[475]

Together, Regulation 575/2013 and Directive 2013/36/EU aim to form the legal framework for the access to the activity, the supervisory framework and the prudential rules for all financial institutions,[476] thus envisaging to establish a coherent and transparent "single rulebook". The creation of such a single rulebook was considered necessary for reasons of legal certainty and in order to create a level playing field for all participants in the financial market within the EU.[477] In this direction, maximum harmonisation was preferred with regard to minimum prudential requirements,[478] so that those requirements will be directly applicable in the national legal orders.[479] The effort to achieve balance between the requirements for legal certainty and flexibility aims at addressing regulatory arbitrage and at achieving market confidence especially in times of crisis.[480]

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[474] *Ibid.*, recital 5.

[475] *Ibid.*, recital 6.

[476] *Ibid.*

[477] *Ibid.*, Regulation 575/2013 recital 9.

[478] *Ibid.*, recitals 9 and 11.

[479] *Ibid.*, recital 12.

[480] *Ibid.*, recitals 6 and 15.

It is interesting that the new EU law on financial institution endorses a clear and critical position with regard to the role of banking activities, noting that "[c]*onsidering the devastating effects of the latest financial crisis the overall objectives of this Regulation* [575/2013] *are to encourage economically useful banking activities that serve the general interest and discourage unsustainable financial speculation without real added value. This implies a comprehensive reform of the way savings are channeled into productive investments*".[481] In this regard, financial requirements for financial institutions should reflect their different risk profiles.[482]

Taking over Directives 2006/48/EC and 2006/49/EC,[483] Regulation 575/2013 incorporates the EU law provisions applying the *Basel II* and *Basel III* frameworks with regard to financial institutions' capital measurement and capital requirements, taking into account the relevant risk profile of the financial institutions.[484] Disclosure requirements for financial institutions are connected by Regulation 575/2013 to the purposes of strengthening market discipline and enhancing financial stability which are further connected in order "[…] *to ensure that investors and depositors are sufficiently well informed about the solvency of institutions*".[485]

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[481] *Ibid*., recital 32.

[482] *Ibid*., recitals 32-34.

[483] Repealed by Directive 2013/36/EU.

[484] Regulation 575/2013, Preamble, recital 41 *et seq*.

[485] *Ibid*., recital 76; *cf. ibid.* recital 120. See also *ibid*., Articles 431 – 434.

While Regulation 575/2013 illustrates a reform of EU banking law to the direction of ensuring that credit institutions provide vital services to the real economy,[486] it does not proceed to a structural separation of retail and investment banking activities within a banking group, which however it allows for national legislation while requiring the Commission to analyse the issue.[487] In the same direction, and with a view to protecting depositors and preserving financial stability, the Regulation allows for home MSs to require credit institutions to reduce exposures to different legal entities depending on their activities, but only following a future legal act harmonising such measures.[488] Regulation 575/2013 provides (micro)prudential rules of a highly technical nature for financial institutions, with a view to gradually providing relevant uniform rules within the EU;[489] it is necessary to examine in turn the main features of Directive 2013/36/EU which provides the new EU framework for the authorisation, operation and supervision of financial institutions.

Directive 2013/36/EU is a measure adopted with a view to ensure a coherent application of the EU law on the taking up and pursuit of the business of credit institutions and on the capital adequacy of financial institutions;[490] it provides rules for the authorisation of

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[486] *Ibid.*, recital 122; *cf. ibid.* recital 32.

[487] *Ibid.*, recital 122.

[488] *Ibid.*, recital 123.

[489] *Ibid.*, Article 521.

[490] Directive 2013/36/EU, Preamble, recital 1.

the business, the acquisition of qualifying holdings, the exercise of the freedom of establishment and of the freedom to provide services, the powers of supervisory authorities of home and host-MSs in this regard and the provisions governing the initial capital and the supervisory review of financial institutions.[491]

It is interesting that the Directive takes into account that the scope of relevant measures should be as broad as possible "[…] *covering all institutions whose business is to receive repayable funds from the public, whether in the form of deposits or in other forms such as the continuing issue of bonds and other comparable securities and to grant credits for their own account*."[492]

Furthermore, while the principles of mutual recognition of authorisation and of prudential supervision systems are to be respected, they are understood by Directive 2013/36 in conjunction to a requirement of effectiveness, in the sense that authorisation should not be granted or should be withdrawn in cases of regulatory arbitrage[493] or where supervisory authorities are liable to be prevented from effectively exercising their supervisory functions.[494]

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[491] *Ibid*., recital 2. See also *ibid*., Article 1.

[492] *Ibid*., recital 14.

[493] *Ibid*., recital 16.

[494] *Ibid*., recital 17.

The requirement for supervision to be effective further necessitates that supervision on a consolidated basis should be applied to all banking groups, its aim being "*to protect the interests of depositors and investors of institutions and to ensure the stability of the financial system*",[495] while it is acknowledged by the Directive that illegal behaviour (such as fraud) is liable to affect the stability and integrity of the financial system.[496] Moreover, the Directive has taken into account that "[…] *weaknesses in corporate governance* […] *have contributed to excessive and imprudent risk taking in the banking sector which has led to the failure of individual institutions and systemic problems in* [MSs] *and globally*. […] *The unclear role of the competent authorities in overseeing corporate governance systems in institutions did not allow for sufficient supervision of the effectiveness of the internal governance processes*".[497]

Directive 2013/36/EU does not apply to the access to the activity of investment firms insofar as regulated by MiFID.[498]

However, it provides a new, enhanced framework for the powers of competent authorities in connection to its scope: MSs are under the obligation to ensure that competent authorities monitor the activities of financial institutions, so as to assess compliance with Regulation 575/2013, and to ensure that appropriate measures are in

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[495] *Ibid.*, recital 47.

[496] Ibid., recital 30.

[497] *Ibid.*, recital 53.

[498] *Ibid.*, Article 2(5)(1). The terms "credit institution" and "investment firm" are defined as in Article 4 of Regulation 575/2013; see Article 3 of Directive 2013/36/EU.

place to enable competent authorities to obtain information to investigate breaches of applicable requirements, and to carry out their functions.[499] MSs are more specifically obliged to ensure that financial institutions register all their transactions and document systems and processes, which are subject to Directive 2013/36/EU and Regulation 575/2013 in such a manner that the competent authorities are able to examine compliance with said instruments at all times.[500]

With regard especially to prudential supervision, Directive 2013/36/EU provides for enhanced supervisory measures and powers, already at an early stage, to address problems regarding fulfilment of requirements of said Directive or Regulation 575/2013.[501] Furthermore, for the purpose of satisfying prudential requirements of Regulation 575/2013, competent authorities are provided by Directive 2013/36/EU with an array of important powers (which may be further enhanced by MSs) and which include *inter alia* requiring financial institutions to hold extra own funds, to reinforce internal arrangements, processes, mechanisms *etc*., to restrict or limit their business, operations or network or to diversify their activities, to reduce risk in their activities *e.a.*[502]

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[499] Directive 2013/36/EU, Article 4.

[500] *Ibid*., Article 4(6).

[501] *Ibid*., Article 102.

[502] *Ibid*., Article 104.

Furthermore, according to Directive 2013/36/EU, competent authorities are *inter alia* under the obligation to publish not only the legal instruments, administrative rules and general guidance adopted in their legal order in the field of prudential regulation, but also to proceed to disclosure with regard to a number of features relevant to the exercise of their duties under national law.[503]

The proposal for a new MiFID and MiFIR

Further, as part of the reforms in EU financial law necessitated by the Crisis, the Commission proposed the replacement of MiFID by a new Directive on markets in financial instruments, with a view to enhance existing rules.[504] As the Commission

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[503] *Ibid*., Article 143. Furthermore, specific disclosure requirements are provided; *ibid*., Directive 2013/36/EU Article 144.

[504] COM(2011) 656 final, 20.10.2011. This proposal relates to requirements on the provision of investment services, the scope of exemptions from MiFID, organisational and CoB requirements for investment firms, organisational requirements for trading venues, powers available to competent authorities, sanctions, and rules applicable to third-country firms operating *via* a branch. It is complementary to the proposal for a new Markets in Financial Instruments Regulation (MiFIR) to establish uniform and directly applicable requirements in relation to disclosure of trade transparency data to the public and transaction data to competent authorities, removing barriers to non-discriminatory access to clearing facilities, mandatory trading of derivatives on organised venues, specific supervisory actions regarding financial instruments and positions in derivatives and the provision of services by third-country firms without a branch; see COM(2011) 652 final. See also MOLONEY, N. and FERRANINI, G. (2012) 'Reshaping order execution in the EU and the role of interest groups under MiFIID II' *European Business Organization Law Review*, vol. 13, no. 4, pp. 557-597.

notes, "[w]*hile largely vindicated amid the experience of the financial crisis, the comprehensive rules of MiFID nonetheless exhibit the need for targeted but ambitious improvements*".[505]

The proposals for new rules include *inter alia* provisions to strengthen the framework for the provision of investment advice and portfolio management, and to clarify the conditions for minimum protection awarded by investment firms to investors with regard to transactions in non-complex financial instruments. Furthermore, the requirements for the handling of funds or instruments belonging to clients by investment firms are proposed to be strengthened. According to the new proposal, the safekeeping of financial instruments on behalf of clients is classifed as an investment service.[506]

Interim Concluding Remarks

According to the general perception before the Crisis on the sources of systemic risk, EU financial law focused on market efficiency and integration, initially developing banking sector harmonization measures before progressing to the harmonization of investment services. In this context, depositor and retail investor protection by fragmented rules of national origin constituted a potential impediment to market integration requiring harmonization of important normative areas.

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[505] *Ibid.*, p. 2.

[506] *Ibid.*

The adoption of the ISD, as a minimum harmonization directive, and later of MiFID, as a more detailed harmonization measure, related to provision of investment services, the operation of financial markets and the powers of national competent authorities –they were designed to address issues relating to the provision of investment services, while the problematic of retail participants and market protection in the event of intermediary failure was considered as perhaps marginal. In this direction, competence issues regarding CoB rules have been treated extensively (as relevant rules reflect national "imperative reasons" considerations) while EU insolvency law remains largely unharmonised and fragmented.

In the same direction, regulation and supervision of financial markets and intermediaries remained until the Crisis a national competence, and only coordination between national competent authorities, to the extent necessary to address issues in particular regarding the application of free movement and CoB rules, was provided.

This equilibrium, which lasted for a long time in the EU, was upset by the Crisis which demonstrated the dangers associated with the lack of an EU mechanism to regulate, supervise, and protect in extreme conditions the whole European financial market. The new EU financial law and architecture is characterized by the concentration of competences by the new European competent authorities, if not by mistrust to the effectiveness of regulating and supervising financial markets on the national level (and by national authorities).

The new rules on allocation of competences, powers and responsibility between the central EU authorities and the national authorities have yet to be refined; it appears safe though to consider that the era of hesitation and distancing of EU law from the direct

regulatory and supervisory control of the financial markets and the intermediaries has passed.

The fundamental changes to policy perceptions and priorities resulting from the Crisis, and the unprecedented public funding of the banking sector by public funds it entailed, have led to a new impetus to complete the EU financial market and federalize its regulation and supervision. In this context, the new substantive financial rules attempt to achieve predictability and uniformity, while the new financial architecture allows for exercise of full powers by the European competent authorities, with full political accountability and legal responsibility. This brings to the fore once more the question of rights conferred by EU law to individual market participants as well as the connected issue of competent authorities' tortuous liability for breach of EU law.

Further, and as the Crisis appears to be losing its impetus in the EU, the severe sovereign debt crisis that has threatened most MSs has led to the decision to disallow any further "bail-outs" in the future, in particular by the use of public funds.

In the framework of the new proposed recovery and resolution regime, which is still characterized by ambiguity in many aspects, the protection awarded to retail market participants is re-calibrated and the discussion on the legal status of depositors *vis-à-vis* retail investors reopened.

It is important then to examine in turn the delineation by EU law of retail investor protection in the event of intermediary default, as formulated before the Crisis and as reconsidered following the Crisis, as well as the legal status of retail investors under EU law in light of the *acquis communautaire* on individual protection.

PART B

DELINEATING RETAIL INVESTOR PROTECTION IN THE EVENT OF INTERMEDIARY DEFAULT AND THE *ACQUIS COMMUNAUTAIRE* ON INDIVIDUAL PROTECTION

CHAPTER III. THE DELINEATION OF MINIMUM RETAIL INVESTOR PROTECTION BY EU LAW IN THE EVENT OF INTERMEDIARY FAILURE

Having examined the general development of EU finance law, it is now necessary to examine more specifically the protection awarded by EU law to individual financial market participants in the event of intermediary failure, and the effect of the Crisis on this regime.

In line with the distinction of EU financial law in banking and investment services law, according to a criterion of sectoral risk, the protection of individual financial markets participants followed the same pattern, by the introduction of DGSD for the minimum protection of depositors and of ICSD for the minimum protection of investors.

For systematic reasons, it will be useful to analyse each of these EU law instruments *per se* and then in comparison to each other, before examining the effect of the new proposals on their amendment as a result of the Crisis.

III.1 RETAIL INVESTOR PROTECTION AS DELIMITED BY EU LAW BEFORE THE CRISIS, AND THE DISTINCTION OF DEPOSITORS *VIS-A-VIS* RETAIL INVESTORS

The *ex post* protection of individual participants in the financial market, in the form of a minimum compensation payable in the event of intermediary failure, was organised in normative terms by the drawing of a distinction between depositors and investors.

III.1.1 THE DEPOSIT GUARANTEE SCHEMES DIRECTIVE

EU law regulated minimum protection guaranteed to depositors only in 1994,[507] by the introduction of the DGSD.[508]

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[507] In the US, the *Federal Deposit Insurance Corporation* (FDIC) was established in 1933, with a view to protect depositors following the bank failures during the Great Depression. Since then, it has intervened in many bank failures; for a historical perspective in US deposit protection see http://www.fdic.gov/bank/analytical/index.html. The US Federal Deposit Insurance Act (12 United States Code 1811 *et seq.*), which constitutes the main legal framework for the operation of the FDIC (see http://www.fdic.gov/regulations/laws/rules/1000-100.html), provides *inter alia* that the FDIC may accept applications by banks to be admitted to the Federal Deposit Insurance scheme, which thus become "insured depository institutions" (Sec. 5 of FDI Act). FDIC has important powers to monitor insured banks, to impose regulation relevant to deposit insurance, and to withdraw insurance, under certain conditions; see Sec. 8 and 18 of FDI Act. The deposit insurance mechanism is activated when a bank is closed on account of inability to meet the

DGSD was adopted as a minimum harmonisation measure [509] with a view to address competition issues between credit institutions, caused by the disparity of deposit guarantee protection awarded to their clients before harmonisation,[510] to protect depositor confidence in the soundness of the banking system,[511] and thus to protect savers.[512]

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demands of its depositors; according to FDI Act, Sec. 11(b), this is "*in any case in which it has been closed for the purpose of liquidation without adequate provision being made for payment of its depositors*". Payment of insured deposits by FDIC is made "as soon as possible" and either by cash or by making available to each depositor a transferred deposit in a new insured depository institution in an amount equal to the insured deposit; see Sec. 11(f)(1) of FDI Act. The FIDC may, in its discretion, require proof of claims to be filed and may approve or reject such claims for insured deposits (sec. 11(f)(2) of FDI Act). The FDIC is subject to important auditing and reporting obligations (sec. 17 of FDI Act.). A Deposit Insurance Fund operates within the context of FDIC. See also FDIC (2011) "The orderly liquidation of Lehman Brothers Holding Inc. under the Dodd-Frank Act".

[508] Directive 94/19/EC [1994] OJ L135/5. The legal basis for the adoption of the DGSD was EC Treaty Article 57(2), as a market integration measure. For the relevant legislative procedure see Commission Recommendation [1987] OJ L33/16; Commission Proposal [1992] C163/6; Commission Proposal [1993] C115/91; Commission Amended Proposal [1993] C178/14; Decision of the Common Position [1994] OJ C91/85. For analysis of relevant ECJ case-law see *infra*, Ch IV.

[509] DGSD, Preamble, 8th recital.

[510] *Ibid.*, 2nd and 3rd recital.

[511] *Ibid.*, 4th and 21st recitals.

[512] *Ibid.*, 1st recital. *Cf.* 15th recital.

The *ratio* of DGSD is to provide to depositors access to funds as soon as a credit institution was unable to repay them;[513] and while deposits made by credit institutions on their own behalf and for their own account are not protected by DGSD, it provides that national guarantee schemes may take measures necessary for the rescue of a credit institution in difficulty.[514]

The scope of DGSD encompasses deposits in credit institutions established in MSs, deposits being defined as "*any credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and contractual conditions applicable, and any debt evinced by a certificate issued by a credit institution*",[515] while credit institutions are defined as in the relevant banking Directives.[516]

Except for a limited number of exclusions (deposits from credit institutions on their own account, instruments constituting own funds, deposits arising out of transactions in connection to which there has been a criminal conviction for money laundering),[517] all other deposits are *a priori* covered by the DGSD, while MSs may provide that certain

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[513] *Ibid.*, 9th recital.

[514] *Ibid.*, 10th recital. However, DGSD does not provide any directions as to how this option could be exercised by MSs.

[515] *Ibid.*, Article 1(1) point 1.

[516] *Ibid.*, Article 1(1) point 4.

[517] *Ibid.*, Article 2.

depositors or deposits shall be excluded from guarantee or shall be granted a lower level of guarantee –such optional exclusions being also *numerus clausus*.[518] Deposits held by a credit institution at the time of withdrawal of its authorisation are also covered by the Directive. [519]

It is interesting to note that questions regarding the notion of "deposit" under DGSD were brought before the EFTA Court in case E-17/11, for an advisory opinion.[520] The questions related to whether interbank loans may be considered as deposits for the purposes of DGSD, and whether deposits of credit institutions with other credit institutions may be protected under DGSD. In particular, the first question submitted to the EFTA Court asked, as rearticulated by said court, whether loans made by one credit institution to another "[…] *are to be considered deposits within the meaning of Article 1(1) of DGSD, even though (i) the funds were not entered as deposits in the borrower bank's books; (ii) nor were they placed in a special account in the lender banks' name; (iii) no special documents recording the receipt of the funds were issued, and (iv) no premiums to the* [national deposit and investor guarantee scheme] *were paid in respect of the funds*".[521] The EFTA Court answered the question in the affirmative,[522] noting

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[518] *Ibid.*, Article 7(2) and Annex I.

[519] *Ibid.*, Article 5.

[520] EFTA Court decision of 22.11.2012 in Case E-17/11, *Aresbank SA and Landsbankinn hf., Fjármálaeftiritið (the Financial Supervisory Authority) and the Icelandic State* (nyr).

[521] *Ibid.*, para. 47.

[522] *Ibid.*, para. 63.

that while such deposits fall within the notion of deposit under DGSD they do not constitute covered deposits.[523] The EFTA Court took into account inter alia that the requirements for funds to be treated as deposit under Article 1(1) of DGSD are not cumulative, and that the concept of credit balance is not explained in DGSD. In this regard, the EFTA Court noted that "[…] *it can be of no relevance that the funds have not been entered as a deposit in the borrowing bank's books. It would be contrary to the purpose of* [DGSD] *if protection were to be dependent on the characterization given by the credit institution receiving the funds*".[524] Furthermore, the EFTA Court, concurring with the position of the Commission which submitted written observations,[525] proposed a distinction between a "functional" definition of eligible deposits under DGSD and a "technical" definition also including deposits not covered by DGSD for repayment.[526] Thus, the EFTA Court held in our view that the effectiveness of the protection in principle awarded by DGSD should not depend on the characterization of a transaction by the interested parties or by their behaviour (as in the case of not entering it in the relevant books and records).

The main obligation of MSs emanating from DGSD is to ensure that within their territory one or more deposit-guarantee systems are introduced and officially

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[523] *Ibid.*, para. 64.

[524] *Ibid.*, para. 56.

[525] *Ibid.*, para. 49.

[526] *Ibid.*, para. 64.

recognised, while credit institutions authorised in MSs may not take deposits unless it is member of a deposit guarantee scheme.[527]

DGSD provides minimum rules regarding the relation between the national deposit guarantee scheme(s) and the competent national authorities for the supervision and regulation of financial markets. Relevant rules regulate the initiation of depositor payment proceedings by national deposit guarantee schemes, following determination of unavailability of deposits by a credit institution,[528] the obligation of national competent authorities to prohibit taking of deposits by credit institutions that are not members of a deposit guarantee scheme[529] and to impose sanctions on a credit institution which do not comply with obligations regarding membership deposit guarantee scheme,[530] and the discretionary power of national competent authorities to provide extension of the time limit for a national deposit guarantee scheme to pay depositor claims.[531]

DGSD provides for a minimum amount of deposits to be protected per depositor per credit institution,[532] while MSs may limit the protection, for moral hazard reasons,[533]

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[527] DGSD, Article 3.

[528] DGSD, Article 1(3).

[529] *Ibid.*, Article 3(1).

[530] *Ibid.*, Articles 3(2), 4(4).

[531] *Ibid.*, Article 10(1).

but not to less than 90% of the protected amount of (aggregate) deposits per depositor per credit institution ("*co-insurance*").[534]

The (national) DGSs have to be in a position to pay duly verified claims by depositors within twenty (20) working days of the date on which the competent authorities determine the unavailability of deposits.[535] Under exceptional circumstances, a short extension of the time limit may be approved by the competent authorities.[536]

No further substantive or procedural rules are provided by DGSD with regard to the conditions for payment to be made by national DGSs to depositors, including rules on claim verification. DGSD provides in this direction only that "[…] *the documents relating to the conditions to be fulfilled and the formalities to be completed to be eligible for a payment under the guarantee* […] *shall be drawn up in detail in the manner prescribed by national law in the official language or languages of the* [MS] *in which the guaranteed deposit is located*".[537] Following the amendments introduced by

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[532] *Ibid.*, Article 7(1a), after 01.01.2011, as the relevant provision was introduced by Directive 2009/14/EC [2009] OJ L68/3. While the current guarantee level is 100 000 Euros, the relevant amount in the initial form of the relevant provision was 20 000 Ecus.

[533] DGSD, Article 7(1), (3).

[534] *Ibid.*, Article 7(4).

[535] Ibid, Article 10(1), as amended by Directive 2009/14/EC. The initial time limit was three months.

[536] *Ibid.*

Directive 2009/14/EC,[538] it is provided that the time limit for payment of covered depositor claims (*i.e.* twenty working days) includes "*the collection and transmission of the accurate data on depositors and deposits, which are necessary for the verification of claims*".[539]

However, such time limits may not be invoked by the guarantee scheme against a depositor who has been unable to assert his claim in time.[540]

The European deposit guarantee system as designed at the time of introduction of the DGSD has remained unaltered in its substance for almost two decades, despite the Crisis. When the Crisis had reached Europe, it was urgently modified by Directive 2009/14/EC, but only with regard to technical features such as coverage level and payout delay.

Taking into account the development of deposit protection in the EU legal order in the event of intermediary failure, it appears that it may be attributed, in our view, to three main factors:

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[537] *Ibid.*, Article 10(4).

[538] *Supra* n 532.

[539] DGSD, Article 10(1), as amended by Directive 2009/14/EC.

[540] *Ibid.*, Article 10(3).

First, the need to protect the stability of the financial system which would be endangered in case of loss of depositor confidence (to avoid "bank runs" which cause systemic risk).

Secondly, the need to achieve minimum harmonisation in deposit insurance regimes between MSs, a factor connected to intra-bank competition.

Thirdly, it may be argued that the gradual enhancement of the powers of the EP, since the SEA of 1986, and relevant national considerations, built political impetus for protecting "consumers" of financial services, such as depositors.

Depositor protection was thus an element of European policy in the banking sector, aiming primarily at avoidance of systemic danger by enhancing confidence in order to achieve market stability. In this sense, depositor protection *per se* has been an economic "externality"[541] which was treated by legal means mainly for systemic protection reasons, on the basis of a minimum harmonization approach.

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[541] The potential threat to financial stability presented by uncontrolled damage sustained by individual participants may be perceived as an "externality" in economic terms (for the notion of "externality" or "external diseconomy" see *e.g.* BANOCK, G., BAXTER, R.E. and DAVIS, E. (1987) *The Penguin Dictionary of Economics*, Penguin) to financial market stability, *i.e.* an external factor which could negatively affect the financial market and which thus has to be taken into account in the regulation of this system; DAVIS H. and GREEN, D., *Global Financial Regulation*, *op. cit.*, p. 17.

Following the Crisis, a fundamental amendment of the DGSD has been proposed, in the context of the new EU financial architecture and financial law, and will be examined after the ICSD has also been taken into consideration.[542]

III.1.2 THE INVESTOR COMPENSATION SCHEMES DIRECTIVE

ICSD[543] has been characterised as "*one of the pillars of the European Framework for a Single Market in the financial services field*".[544] As DGSD, it is also an instrument of minimum harmonisation of national compensation systems, its adoption necessitated by the introduction of the single European license of investment firms by ISD.[545]

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[542] *Infra*, Ch III.2.1.

[543] Its legal basis is (ex) Article 47(2) EC Treaty and it was issued on the co-decision procedure of (ex) Article 251 EC Treaty. For the legislative procedure leading to its adoption, see EP opinion [1994] OJ C128/85), Council common position [1995] OJ C320/ 9, EP Decision [1996] OJ C96/28, Decision of the Council and of the EP [1997] OJ C85).

[544] See Commission report on the application of the export prohibition clause: COM(2000)0081 final, 3.

[545] See ISD, Article 12; Preamble, recitals 1 and 2.

Its aim, as announced in its Preamble, is the "*protection of investors and the maintenance of confidence in the financial system*"[546] as an "*important aspect of the completion and proper functioning of the internal market*",[547] especially taking into account that "*no system of supervision can provide complete protection, particularly where acts of fraud are committed*".[548] Thus, it was deemed "[…] *essential that each* [MS] *should have an* [ICS] *that guarantees a harmonized minimum level of protection at least for the small investor in the event of an investment firm being unable to meet its obligations to its investor clients*".[549]

An important question that arises is whether the protection of the "small investors" which is considered essential aims (a) to the protection of "small investors" *per se*, as an autonomous aim of EU law, or (b) to the protection of participants' confidence in the financial market, as a mechanism to protect the stability of financial markets, or (c) a combination of the two.[550]

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[546] ICSD, Preamble, recital 3.

[547] *Ibid.*, recital 3.

[548] *Ibid.*, recital 4.

[549] *Ibid.*, recital 4. The reference to "small investors" in recital 4, as well as in recitals 5 and 11, is not repeated in the articles of the Directive; nor does it correspond to any definition provided by ISD or any other Directive.

[550] This problematic is similar to that in case C-233/94 (*supra* n 62), where the question of whether depositor (consumer) protection is an aim of DGSD, and of what nature, was considered by the ECJ and by AG Léger. See *infra* Ch IV.2.1.

The Preamble of ICSD appears to attach importance mainly to competition issues and to the protection of small investor confidence in the market. Indeed, it states that minimum harmonisation of investor compensation schemes will entail that "[…] *small investors will* […] *be able to purchase investment services from branches of Community investment firms or on the basis of the cross-border provision of services as confidently as from domestic investment firms*",[551] while "[…] *in the absence of such minimum harmonization, a host* [MS] *might consider itself justified, by considerations of investor protection, in requiring membership of its compensation scheme*"[552] by an investment firm established and licensed by another MS, "[…] *whereas such a requirement might prejudice the operation of the internal market*".[553] Thus, the imposition of restrictive measures on investment firms licensed in another MS, by invoking reasons of general interest relevant to the protection of investors in the event of investment firm failure, has been perceived as a potential impediment to the completion of the internal financial market necessitating harmonisation of protective measures on the EU level.

Further, the disparity of national investor compensation schemes might lead "[…] *to disparities in competition and unequal conditions of competition between national investment firms and branches of firms from other* [MSs]"[554] and "*market disturbances*",[555] necessitating the introduction of specific provisions with regard to

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[551] ICSD, Preamble, recital 5; *cf. ibid.*, recital 21.

[552] *Ibid.*, recital 6.

[553] *Ibid.*, recital 6; *cf.* ibid., recital 25.

[554] *Ibid.*, recital 15.

[555] *Ibid.*, recital 16.

branch participation in host-MS ICSs, since "[…] *it is not appropriate that the level or scope of cover offered by compensation schemes should become an instrument of competition*".[556] In this regard, ICSD was introduced as an instrument to achieve equal access to the market for competing financial firms, as also confirmed by its legal basis.

The field of application of ICSD encompasses a wide range of investment services offered by investment firms to small investors, leaving however the exact delimitation of its scope to the MSs. Specifically, the definition of "investment firm" for the purposes of ICSD encompasses investment firms as defined in MiFID which are authorised in accordance with ISD and then MiFID[557] or authorised as credit institution in accordance with Directive 2000/12/EC,[558] the authorisation of which covers one or more of the investment services (or activities) listed in Section A of the Annex I relating to any of the instruments listed in Section C of Annex I of MiFID.[559] Further, ICSD defines "investor", for the purposes of its application, as "[…] *any person who has entrusted money or instruments to an investment firm in connection with investment business*".[560] Furthermore, it defines "investment business" as any investment service as

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[556] *Ibid.*

[557] ICSD, Article 1(1); in its original form, this article referred to the relevant provisions of ISD (*i.e.* to Article 1(2) and Article 2), which was replaced and repealed by MiFID; see MiFID, Article 69.

[558] ICSD, Article (1), referring to Directive 2000/12/EC.

[559] MiFID, Article 4(1) point 2; the original reference by ICSD was to investments services listed in Section A of the Annex to ISD.

defined in MiFID[561] plus "safekeeping and administration" in relation to one or more of the financial instruments listed in Section C of MiFID.[562]

Apart from the general differences between the scope and definitions of ICSD, due to the corresponding differences of MiFID with regard to ISD, it is important to note what appears to be a crucial element in the definition of "investor" for the purposes of ICSD: "investor" is defined by ICSD as a person who has entrusted money or instruments to an investment firm "*in connection*" with investment business.[563] The wording "*in connection*" appears to be implying, in our view, the general context of the relation of the "investor" with the investment firm, covering all stages of the relation between a person interested in investing and the investment firm. If this is correct, it may imply a

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[560] ICSD, Article 1(4) referring to Article 4(1) point 2 of MiFID.

[561] ICSD, Article 1; reference in the text of the Directive is to the relevant provisions of ISD (*i.e.* to Article 1(1), and Annex section C point 1) which was replaced and repealed by MiFID; see MiFID, article 69.

[562] *Ibid.*; reference in the text of the Directive is to section B of ISD which has been replaced by Section C of MiFID.

[563] *Cf.* ICSD, Preamble, recital 8: "[…] *each scheme must cover money and instruments held by an investment firm in connection with an investor's investment operations which, where an investment firm is unable to meet its obligations to its investor clients, cannot be returned to the investor*". Further, according to Directive ICSD, "[…] [c]*over shall be provided for claims arising out of an investment firm's inability to* […] *repay money owed to or belonging to investors and held on their behalf in connection with investment business, or* […] *return to investors any instruments belonging to them and held, administered or managed on their behalf in connection with investment business, in accordance with the legal and contractual conditions applicable*".

wider field of application of ICSD than with regard only to financial transactions that had already been entered into or executed at the time of the occurrence of unavailability of funds or instruments by the financial intermediary, covering both "*stricto sensu* investors" and "*lato sensu* investors".[564] It is necessary then to explore whether such an interpretation may be valid.

Literal interpretation of the provision in other official languages of the EU appears to be confirming the above observation regarding the term "in connection".[565]

Furthermore, this interpretation, based on the wording of the provision under examination,[566] appears to be in harmony with the generally stated obligation of MSs to have in operation an investor compensation scheme compensating investors where a decision or ruling has been issued "[…]*which has the effect of suspending investors'*

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[564] *Supra* n 71.

[565] In the French version of the provision, "*dans le cadre d'opérations d'investissement*"; in the Spanish version, "*en el marco des operaciones de inversión*"; in the Italian version, "*nell'ambito di operazioni d'investimento*"; in the Hellenic version, "[in the context of investment services transactions]". According to settled case-law of the ECJ, the various language versions of a text of EU law must be given a uniform interpretation and hence, in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part; see *e.g.* ECJ decision of 28.06.2012 in Case C-19/11*Markus Geltl v Daimler AG* (nyr), para. 43 and cited case-law.

[566] *I.e.* ICSD, Article 4(1)1.

ability to make claims against [the investment firm]".[567] The reference of the latter provision to "investors' ability to make claims" does not specify the cause of the claims, *i.e.* whether it is outstanding obligations on the basis of executed transactions in the financial market or whether it can also be the deposit of funds and/or instruments just with the intention to enter into transactions in the financial market.

Thus, literal interpretation does not resolve the issue of whether depositing of funds or instruments with an investment firm falls *per se* within the ambit of ICSD, and two different interpretations are *a priori* possible: (a) that only *stricto sensu* investors are covered by the ICSD, or (b) that also *lato sensu* investors may be covered by it.

Exclusion of *lato sensu* investors from the protective field of application of ICSD would have important legal consequences, as this category of market participants would fall out of the scope of DGSD as well, revealing an important *lacuna* in the ambit of protection offered by EU law: *Lato sensu* investors would be left totally unprotected, in particular in case of fraud perpetrated against them by the failing investment firm, an result which in our view manifestly ultimately contravenes the *ratio* of ICSD – which is stated to protect investors especially in cases of fraud.[568]

In this direction, the teleological interpretation that *lato sensu* investors are also covered by ICSD appears *de lege lata* to be in accordance with the aim of the latter to provide protection also in cases where (prudential) supervision has failed and damage is

[567] ICSD, Article 2(2).

[568] ICSD, Preamble recital 3.

incurred by the investor as a result of an act that is *a priori* extraneous to the operation of the financial marked under normal conditions, such as and particularly "*where acts of fraud are committed*"[569] –*i.e.* in the case of an externality to (normal) financial market operations.

Indeed, it is not necessary that an act of fraud against the *lato sensu* investor will be committed at a specific point in time; on the contrary, an act of fraud may be committed at any time. Although this is evident, ICSD does not provide any rule clearly differentiating the case of unavailability of funds or instruments occurring after or in connection to the execution of transactions from the case of such unavailability occurring before or independently of the execution of transactions.[570] The absence of any such clear rule advocates for the treatment of both cases as equivalent by the ICSD; this would entail that both cases fall within its field of application also on the basis of an argument *a majore ad minus*, since the first case certainly falls within its field of application.

Furthermore, an argument in support of the interpretation that the field of application of ICSD encompasses not only *stricto sensu* investors but also *lato sensu* investors persons may be derived from the rule of ICSD providing that "[a] [MS] *may* […] *exempt a credit institution to which this Directive applies from the obligation to belong to an investor-compensation scheme where that credit institution is already exempt under Article 3 (1) of* [DGSD] *from the obligation to belong to a desposit-guarantee scheme,*

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[569] *Ibid*.

[570] See, however, ICSD Article 6.

provided that the protection and information given to depositors are also given to investors on the same terms and investors thus enjoy protection at least equivalent to that afforded by an investor-compensation scheme."[571] The condition that the protection awarded to depositors is provided to investors on the same terms may be interpreted as including the case of funds deposited by a person with a financial conglomerate with a view to conduct transactions in the financial market. This assumption is reinforced by the rule of ICSD that "[a]*ny claim* […] *on a credit institution which, in a given* [MS], *would be subject both to this Directive and to* [DGSD] *shall be directed by that* [MS] *to a scheme under one or other of those Directives as that* [MS] *shall consider appropriate*",[572] and that "*no claim shall be eligible for compensation more than once under those Directives*".[573] For a claim to be eligible under DGSD, it must be (a) a duly verified claim by a depositor in respect of unavailable deposit,[574] deposit meaning as noted *inter alia* "[…] *any credit balance which results from funds left in an account* […]"[575] and (b) not a claim exempted from the field of application of said Directive, according to either EU law[576] or national law.[577] Thus, if a person that has deposited

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[571] ICSD, Article 2(1).

[572] ICSD, Article 2(3).

[573] *Ibid*.

[574] DGSD, Article 10(1).

[575] *Ibid.*, Article 1, point 1. *Cf.* for a definition of "unavailable deposit" *ibid.*, point 3.

[576] *Ibid.*, Article 2.

[577] *Ibid.*, Article 8(2); Annex I.

funds with a financial conglomerate is to be protected on the same terms by a national depositor guarantee scheme or a national ICS, then the simple depositing of funds with a financial intermediary with a view to proceed to transactions in the financial market should be covered by ICSD.[578] However, *de lege lata* the answer is not clear.

Another argument to the same direction may be derived from the rule of ICSD that a MS may limit the cover provided to a specified percentage of an investor's claim, in order "[…] *to encourage investors to take due care in their choice of investment firms* […]".[579] This option of MSs may be interpreted as leading to two (concurrent) conclusions: (a) that ICSD law is compatible with national measures designed to prevent or reduce moral hazard , preventing incentives to retail investors to make careful and informed choices of investment firms as financial intermediaries; however, there is no indication as to how retail investors are to evaluate and select investment firms to contract with; (b) that ICSD does not allow for total transfer of risk (market, counterparty, *etc*.) to retail investors, in particular in the case of financial intermediary failure, but only to a very small degree and under specific conditions, in order to satisfy moral hazard considerations. MSs are *a priori* not allowed to provide that no

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[578] *C.f* ICSD, Preamble recital 9 stating that "[…] *in the case of investment firms which are credit institutions it may in certain cases be difficult to distinguish between deposits covered by* [DGSD] *and money held in connection with investment business;* […] [MSs] *should be allowed to determine which Directive shall apply to such claims*.".

[579] ICSD, Preamble, recital 13; *Cf.* DGSD, Preamble, recital 19, according to which "[…] *in certain Member States, in order to encourage depositors to look carefully at the quality of credit institutions, unavailable deposits are not fully reimbursed; whereas such practices should be limited in respect of deposits falling below the minimum harmonized level* […]".

compensation at all will be paid to retail investors, which would imply that counterparty risk is borne by the latter.[580]

This implies that *a priori* ICSD does not allow for a national system of law transferring the risk of investment firm failure to retail investors, especially in case where failure occurs as a result of fraud. According to the wording and the spirit of ICSD, *stricto sensu* investors may be compensated by national compensation schemes even in the case where of investors' unwise or uninformed decisions regarding the choice of financial intermediary.

However, the reasoning leading to the conclusion that *lato sensu* investors are protected under ICSD is not unquestionable. There are certain indications that the opposite conclusion might as well be sound, for different reasons:

Indeed, the above initial conclusion appears incompatible the ICSD rule providing that

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[580] The discretion of MSs to exclude retail investors from compensation schemes or to grant lower level of cover than that provided by ICSD is strictly delimited; see ICSD, Article 4(2); Annex I. *Cf.* however ICSD, Article 8(1). With regard to retail investors not connected to the failing investment firm (see categories of connected persons in ICSD, Annex I, points 4 and 5) MSs are allowed to exclude or grant smaller compensation only to "[i]*nvestors who have any responsibility for or have taken advantage of certain facts relating to an investment firm which gave rise to the firm's financial difficulties or contributed to the deterioration of its financial situation*" or claims connected to money laundering (ICSD, Annex I, point 7); these exceptions from protection being specific and *numerus clausus*, they must be interpreted strictly. For the established case-law of the ECJ regarding strict interpretation of exclusions; see *e.g.* ECJ decision of 17.06.1981 in case 113/80, *Commission* v *Ireland* [1981] ECR 1625, para. 7.

"[a]*fter the withdrawal of an investment firm's authorization, cover* […] *shall continue to be provided in respect of investment business transacted up to the time of that withdrawal*".[581]

The reference to transactions concluded up to the time of the withdrawal of an investment firms' authorisation –and which would be connected to the unavailability of investors' funds and/or instruments– may provide an argument to the direction that only obligations outstanding at the time of investment firm failure as a result of investment services transactions are covered by ICSD, thus excluding the simple deposit of funds and/or instruments from its field of application.

The same problem is posed by the ICSD rule providing with regard to investment firm branch exclusion from the investor compensation scheme of a host-MS *inter alia* that "[i]*nvestment business transacted before the date of exclusion shall continue to be covered after that date by the compensation scheme of which the branch was a voluntary member*".[582]

It emerges in our opinion that legal certainty and predictability are not achieved by the above ICSD rules, in particular when an investment firm fails as a result of fraud (or in connection to other tortuous behaviour); this in turn affects the effectiveness awarded bu EU law to retail investors in whole.

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[581] ICSD, Article 6.

[582] *Ibid.*, Article 7(2) point 2. See also ICSD, Article 5(2), regarding transactions while there has been notice to the investment firm of excluding it from membership of the scheme.

Further, ICSD, as an instrument of minimum harmonisation, does not provide detailed rules on the structure and operation of national investor compensation schemes; it does, however, impose to MSs a series of minimum obligations, regarding *inter alia* the basic obligation of MSs is to ensure that one or more ICSs are introduced and officially recognised within their territory and to ensure that no investment firm authorised in their jurisdiction may provide investment services unless it belongs to an ICS.[583] However, ICSD does not provide for the legal status of the ICSs, leaving this to the discretion of MSs.[584] The obligation of MSs to have in place one or more ICSs (belonging to their public or private sector) appears to be an "*obligation de résultat*", in the sense that this obligation of MSs would be void of meaning if national ICSs do not operate effectively; otherwise, the useful effect of ICSD would be compromised.[585]

Furthermore, ICSD provides rules for the relation between investor compensation schemes and competent authorities of MSs for the supervision and regulation of financial markets only on specific issues.[586] The role of ICSs as outlined by ICSD is

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[583] ICSD, Article 2(1); Preamble, recital 8.

[584] ICSD, Preamble, recitals 7, 11, 14, 18.

[585] *Cf. ibid.*, recital 24, providing that "[…] *this Directive may not result in the Member States or their competent authorities being made liable in respect of investors if they have ensured that one or more schemes for the compensation or protection of investors under the conditions prescribed in this Directive have been introduced and officially recognized* […]". For discussion, see *infra* Ch V.

[586] Such as the decision of the competent authorities that an investment firm is unable to meet its obligations arising out of investors' claims: ICSD, Article 2(2); the cooperation

complementary to the role of supervisory authorities, since "*no system of supervision can provide complete protection, particularly where acts of fraud are committed*".[587] In our view, since the introduction and operation of ICSs in MSs is considered essential for the single market in financial services, and especially since these schemes may not belong to the public sector of MSs, minimum rules on the regulation and supervision of ICSs by the competent national authorities should be provided on EU level. However, no such rule has been provided by ICSD.

The above observations reveal a deficiency, in our view, in the normative structure of ICSD: despite the minimum harmonisation approach adopted, the existing normative structure appears unclear and ambiguous in terms of the relation between national competent authorities and investor compensation schemes, thus leading to further uncertainty as to the respective obligations and possible liability of national competent authorities in case of deficient supervision of ICSs.

Moreover, while the basic obligation of investor compensation schemes as provided by ICSD is to provide compensation for investors in the delay set by law following establishment of the eligibility and the amount of their claim,[588] ICSD does not provide specific rules either for establishing the eligibility of the claim or for establishing the

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between the competent authorities and the investor compensation scheme in case an investment firm does not meet its obligations as member of the scheme: *ibid*., Article 5; and the right of an ICS "*in wholly exceptional circumstances and in special cases*" to apply to the competent authorities for an extension of the time limit to compensate investors: *ibid*., Article 9(1), (2).

[587] ICSD, Preamble, recital 3.

[588] *Ibid*., Article 2(2); Article 4(1); Article 9(2).

amount of the claim.[589] More specifically, ICSD provides that "*the amount of an investor's claim shall be calculated in accordance with the legal and contractual conditions, in particular those concerning set off and counterclaims, that are applicable to the assessment, on the date of the determination or ruling* [on investment firm's inability to fulfil its obligations]*, of the amount of the money or the value, determined where possible by reference to the market value, of the instruments belonging to the investor which the investment firm is unable to repay or return*", therefore in accordance with the applicable rules of the national legal order.[590]

However, this minimum harmonisation approach by the Directive in our view leaves unregulated certain important issues, which affects in turn the effectiveness of protection awarded. In absence of harmonisation of insolvency law in the EU legal order, eligibility of an investors claim under national law may be governed either by rules specific to investor compensation schemes and/or by general or special rules on insolvency and winding-up of financial institutions.[591] The risk of multiple verification procedures under national law and the ensuing legal uncertainty as well as the

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[589] ICSD, Article 9(2); *Cf. ibid.*, Preamble, recital 19.

[590] *Cf.* Directive ICSD, Preamble, recital 8, "[…] *every* [MS] *should be required to have an* [ICS] *or schemes to which every such investment firm would belong; whereas each scheme must cover money and instruments held by an investment firm* […]; *whereas this is entirely without prejudice to the rules and procedures applicable in each* [MS] *as regards the decisions to be taken in the event of the insolvency or winding-up of an investment firm* […]".

[591] Such is the case in the Hellenic legal order. See *infra*, Ch V.

possibility of lengthy and inconclusive proceedings[592] may affect the useful effect of the ICSD.

Furthermore, it is for the MS to choose the appropriate national measures to achieve fulfilment by the investor compensation scheme of its obligations, in light of their obligation to effectively transpose and apply the Directive. Thus, in case national law provides for a complex system of investor's claim verification and calculation, it is for the MSs and the competent public authorities of the MSs to ensure that effective application of the Directive, proceeding interpretation and application of national law in conformity with ICSD.[593]

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[592] ICSD provides that the ICS "[…] *may fix a period during which investors shall be required to submit their claims* […]"; *ibid*., Article 9. It does not provide whether the claims to be submitted during this period have to have already been verified and evaluated. Further, it provides that "[t]*he fact that that period* [the period fixed for submittal of claims] *has expired may not, however, be invoked by the scheme to deny cover to an investor who has been unable to assert his right to compensation in time*"; *ibid.* This reference may be understood as meaning that claim verification and calculation difficulties may not be invoked by the ICS against the investor. The resulting uncertainty is neither resolved by the provision of ICSD that "[MSs] *shall ensure that an investor's right to compensation shall be the subject of an action by the investor against the compensation scheme*"; *ibid*., Article 13.

[593] See *inter alia* ECJ decision of 22.10.1998 in cases C-10 to C-22/97 *Ministero delle Finanze* v *IN.CO.GE.'90 Srl, Idelgard Srl, Iris'90 Srl, Camed Srl, Pomezia Progetti Appalti Srl (PPA), Edilcam Srl, A. Cecchini & C. Srl, EMO Srl, Emoda Srl, Sappesi Srl, Ing. Luigi Martini Srl, Giacomo Srl and Mafar Srl.* [1998] ECR I-6307, para. 21; ECJ decision of 02.12.1997 in case C-188/95 *Fantask A/S e.a.* v *Industriministeriet (Erhvervministeriet)* [1997] ECR I-6783, para. 12; ECJ decision of 15.12.1976 in case 35/76 *Amministrazione delle Finanze dello Stato* v *Simmenthal SpA* [1976] ECR 1871.

In this direction, and in order for the protection awarded by MSs and national investor compensation schemes to retail investors to be effective, MSs are required *inter alia* to regulate and ensure the payment of minimum compensation following prompt and simple claim verification and calculation procedures according to national law, covering not only *stricto sensu investors* but also *lato sensu* investors in case of investment firm failure as a result of fraud.

III.2 THE PROPOSED CHANGES IN THE EU LAW REGIME ON RETAIL INVESTOR PROTECTION AFTER THE CRISIS: THE INCONCLUSIVE LEGAL STATUS OF RETAIL INVESTORS *VIS-À-VIS* DEPOSITORS

In the context of the new EU financial architecture and law, proposals by the Commission have been advanced in the direction of amending DGSD and ICSD so as to bring it in line with the new envisaged recovery and resolution regime for financial institutions. It is therefore necessary to examine the proposed modifications, before proceeding to a brief examination of the new proposed BRRR and how it relates to retail investor considerations.

III.2.1 THE PROPOSED REVISION OF DEPOSIT GUARANTEE SCHEMES DIRECTIVE

As the Crisis had already escalated to a critical point, in mid-2010 the Commission submitted, among an array of other proposed measures,[594] a proposal for a Directive of the European Parliament and of the Council amending DGSD.[595]

The proposal is based on the consideration that "[…] *the existing, fragmented* [deposit guarantee schemes] *system has not delivered on the objectives set by* [DGSD]*, in terms of maintaining depositors' confidence and financial stability in times of economic stress*".[596] While certain urgent measures (decrease of time limit for payment of depositor claims and increase of coverage level) have been introduced by Directive 2009/14/EC, the broader review of DGSD remains outstanding.

The 2010 Commission proposal focuses mainly on the simplification and harmonisation of the DGSD, in particular with regard to the scope of coverage and the payout mechanism, the further reduction of the time limit for payment of depositors, the

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[594] *Supra* Ch II.2.2.

[595] COM(2010) 368 final, 12.07.2010. On 18.02.2014 the Council provided its agreement on the proposal, as amended by the European Parliament; See Prelex, http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=199523.

[596] *Ibid.*, p. 2.

information of deposit guarantee schemes about their members, the financing of deposit guarantee schemes and the introduction of a mutual borrowing facility between deposit guarantee schemes under certain conditions.[597]

Certain of the proposed amendments that are relevant to the issues examined in this study are the following:

The proposal supports that the scope of the DGSD should be extended, to encompass all credit institutions and all schemes, without distinction. Furthermore, it proposes that institutional protection schemes should be allowed to be recognised as deposit guarantee schemes (if they satisfy relevant conditions).[598]

More importantly, it proposes that deposits be defined more strictly, so that structured products, certificates or bonds will not be considered as deposits for its purposes, distancing the risk associated with investment services.[599] According to proposed definition, "*deposit means any credit balance which results from funds left in an*

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[597] For the results of the public consultation held by the Commission with regard to the proposed amendment see http://ec.europa.eu/internal_market/consultations/2009/deposit_guarantee_schemes_en.htm.
For relevant reports and impact assessment results see http://ec.europa.eu/internal_market/bank/guarantee/index_en.htm. See also the European Forum of Deposit Insurers (EFDI) at www.efdi.eu .

[598] According to Directive 2006/48/EC, Article 80(8). Institutional protection schemes are mutual guarantee schemes between credit institutions providing protection to each other in terms of liquidity and solvency.

[599] COM(2010) 368 final, p. 6.

account or from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and contractual conditions applicable".[600] Specifically, it is proposed that an instrument whose existence can only be proven by a certificate other than a statement of account, or an intrument whose principal is not repayable at par, or whose principal is only repayable at par under a particular guarantee or agreement provided by the credit institution or by a third party, will not constitute a deposit for its purposes.[601]

In this direction, important amendments are proposed with regard to the eligibility criteria for deposits to be protected under DGSD. According to the proposal, beyond deposits already excluded under the DGSD as in force (*i.e.* deposits made by other credit institutions on their own behalf and for their own account, own funds, and deposits connected with money laundering), all deposits made by financial institutions, investment firms, insurance undertakings, collective investment undertakings, pension and retirement funds, as well as deposits the holder of which has not been identified when they become unavailable, and debt securities issued by credit institutions, liabilities arising out of own acceptances and promisory notes, are all proposed to be excluded.[602]

In the same direction, the proposal specifies that rules on the determination of the repayable amount have to be simplified and claridied, including payment of interest due

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[600] *Ibid.*, proposed Article 2(1) point (a).

[601] *Ibid. Cf.* proposed Article 4(1) point (k).

[602] *Ibid.*, proposed Article 4(1).

but not credited at the time of unavailability, deposits in currencies other than the Euro, and claim set off against the depositor's liabilities. [603]

Further, rules on the supervision of deposit guarantee schemes by competent national authorities are proposed to be enhanced. According to the relevant proposed provision, "[a]*ll Deposit Guarantee Schemes* […] *shall be supervised by the competent authorities on an ongoing basis as to their compliance with* [DGSD]".[604] An obligation of MSs to ensure that deposit guarantee schemes perform stress tests and that competent authorities inform them when problems in a credit institution that may cause the intervention of deposit guarantee schemes, is further proposed to be provided. [605]

The 2010 Commission proposal is characterised, in our view, by the intention to clarify the field of application of the DGSD, by clearly distinguishing deposits in a strict sense by any other form of transaction by financial market participants with credit institutions. In this regard, the 2010 Commission proposal aims at enhancing legal certainty and predictability, at improving the payout mechanism, and at reducing the risk to deposit guarantee schemes that may be connected with investment services. In the historical context of the problematic on bank rescue without recourse to public funding, it further proposes the use of deposit guarantee schemes, under certain conditions, as facilities to avert credit institution failure, although it does not propose specific rules to this direction.

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[603] *Ibid*., proposed Articles 6 and 2(1) point (a).

[604] *Ibid*., proposed Article 3(5).

[605] *Ibid*., proposed Article 3(6).

The position of the EP, adopted at first reading in 2012,[606] on the 2010 Commission proposal for the revision of DGSD, reflects the new initiatives of the EU that emerged in the meantime, especially with regard to the bank recovery and resolution regime under discussion, but also adopts a differentiated stance to that of the Commission with regard to certain important issues, including the delimitation of the field of application of the DGSD.

In adopting its position, the EP has taken into account the fact that during the Crisis, uncoordinated increases in the coverage levels in deposit guarantee schemes in the EU led to shifting of deposits to MSs where deposit guarantees were higher (and thus causing liquidity problems to the credit institutions from which it was moved),[607] and to the fact that existing deposit guarantee schemes "proved unable" to carry all losses in such a way as to protect depositors.[608]

The EP's position is connected to the requirement, as stated, to create sufficient flexibility to enable DGSs to implement prevention and support measures,[609] including "[…] *(iii) imposing conditions to limit the volume of deposits guaranteed or wholly or*

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[606] [2013] OJ C249E/81.

[607] *Ibid.*, Preamble, recital 11 as introduced by Amendment 13.

[608] *Ibid.*, recital 11a as introduced by Amendment 14.

[609] *Ibid.*, Preamble, recital 3 as introduced by Amendment 3; also recital 22 as introduced by Amendment 19.

partly to limit certain business operations […] *(v) an agreement regarding the exchange of information with competent authorities* […]".[610]

In this direction, the EP position interconnects depositor protection to the possibility of preventing failure of credit institutions by means of appropriate measures,[611] which is in line with the reasoning of the bank recovery and resolution proposals, and which introduces a spectrum of powers of deposit guarantee schemes, ranging from only providing reimbursement ("*pay box function*")[612] to building early warning systems regarding the status of credit institutions,[613] to deciding on support measures or to using their resources for the purposes of orderly winding-up of failing credit institutions.[614] However, the EP notes that the establishment of a European mechanism to resolve banking crises should not affect the protection of depositors through a deposit guarantee system.[615]

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[610] *Ibid.*, Article 2(1) point (f-a) as introduced by Amendment 149/rev. Other individual amendments, including some of a rather technical nature, are introduced by the EP position, including amendments on time limit for repayment and deferring of repayment under conditions, financing of DGSs (*ibid.*, Article 9, Amendments 81 – 96) borrowing between deposit guarantee systems (*ibid.*, Article 10, Amendment 97 – 106) and calculation of contributions to DGSs determined in conjunction with the risk incurred by each participating credit institution (*ibid.*, Article 11, Amendments 107 – 114).

[611] *Ibid.*, Preamble, recital 6 as introduced by Amendment 6.

[612] *Ibid.*, recital 9b as introduced by Amendment 9.

[613] *Ibid.*, recital 9c as introduced by Amendment 10.

[614] *Ibid.*

[615] *Ibid.*, recital 34a as introduced by Amendment 28.

Taking into account the wide range of powers of DGSs, as proposed, the EP position introduces a new description of the aim of the DGSD, which "[…] *lays down rules concerning the functioning of the European scheme for national deposit-guarantee schemes* […] *intended to provide depositors in the Union with a common safety net offering a high level of protection*".[616]

With regard to the scope of DGSD, the EP position attempts a new delineation of the ambit of deposit guarantee as it confirms that certain financial products with an investment character should not be covered,[617] while certain others should be protected,[618] and that in certain cases deposits may be fully protected (beyond coverage level).[619]

According to this position, a deposit is proposed to be defined as "(i) *any credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions, including fixed-term deposits, savings deposits and registered deposits, and which a credit institution must repay under the legal and contractual conditions applicable, or (ii) any debt evidenced by a certificate issued by*

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[616] *Ibid*., Article 1(1) as introduced by Amendment 31.

[617] *Ibid*., recital 17 as introduced by Amendment 37.

[618] *Ibid*., recital 18 as introduced by Amendment 18. *Cf*. ibid., Article 4(1) point (j) and Article 4(2a), as introduced by Amendments 59 and 60, respectively.

[619] Article 5(1a) points (b) and (c), as introduced by Amendment 61.

the credit institution".[620] Yet, if such certificate (other than a statement of account) is the only means of proving the existence of the debt and it is made to the holder (and not to a named person), such instrument shall not be treated as a deposit for the purposes of DGSD.[621]

By this proposal on the definition of "deposits" and on the scope of DGSD the European Parliament attempts, in our view, to achieve an equilibrium between predictability and flexibility in deposit protection under EU, while differentiating deposit taking as a traditional banking activity from investment services.

Finally, with regard to State and competent authorities' liability relating to the operation of DGSs, it is noted that in the Preamble of DGSD, the EP has added that "*it is possible*" that DGSD does not result in such liability if MSs have ensured that "*one or more schemes guaranteeing deposits or credit institutions themselves*" have been introduced and officially recognised, "*ensuring the compensation or protection of depositors under the conditions prescribed in* [DGSD]".[622]

The new form deposit guarantee will assume in the EU, if the proposed revision of the DGSD is adopted, will be essentially different from the current one. Beyond the implication of deposit guarantee schemes in the mechanism of the new bank recovery and resolution regime, the protected deposit-taking function of credit institutions will be

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[620] *Ibid.*, Article 2(1) point (a) as introduced by Amendment 36.

[621] *Ibid.*, according to Amendment 37.

[622] *Ibid.*, recital 30 (Amendment not enumerated in Position).

more clearly defined and thus depositors will be clearly defined with regard to (retail) investors.

III.2.2 THE PROPOSED REVISION OF INVESTOR COMPENSATION SCHEMES DIRECTIVE

Together with it proposal for a revision of DGSD, the Commission submitted in mid-2010 to the EP and the Council a proposal to amend ICSD.[623]

The proposal refers to the need to review ICSD, which was adopted, as it notes, as a complement to ISD, not only to take account of the developments relating to the introduction of MiFID and of the new EU legislation adopted as a response to the Crisis, but also to address *lacunae* in the regulatory and supervisory system, which have led to "*numerous investor complaints about the application of the ICSD in a number of important cases involving large investor losses*".[624] According to the Commission, the

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[623] COM(2010) 371 final, 12.07.2010. For results of the consultation of interest parties by the Commission see http://ec.europa.eu/internal_market/consultations/2009/investor_compensation. HCMC, JGF and HDCF did not participate in the consultation. The work of the ESME and the ESC was also taken into account by the Commission. The 2005 study of OXERA (*supra*, n 25) was also taken into account; available at http://ec.europa.eu/dgs/internal_market/docs/evaluation/national-investor-rep2005.pdf . For the impact assessment analysis conducted by the Commission on the proposal see SEC (2010) 845.

[624] *Ibid.*, p. 2.

proposal aims "[…] *at improving the practical functioning of the ICSD, at clarifying the scope of the ICSD* […]*, at reducing gaps in the regulatory system and disparities between the protection of clients of investment firms and of banking depositors*".[625]

The Commission stresses that the different underlying objectives of DGSD and ICSD have to be taken into account, stating that while the first "*has a prevailing bank stability objective because banks are susceptible to the risk of a run if depositors believe that their deposits are not safe and try to withdraw them at the same time*" the latter "*protects investors against the risk of frauds or administrative malpractices or operational errors making the investment firm unable to return assets to clients*",[626] noting that the proposal "*preserves the specificities of the sectoral legislation*".[627]

In terms of alignment of ICSD with MiFID, the proposal notes that the scope of MiFiD is broader than that of ISD and therefore adaptation of the scope of ICSD to that of MiFID is required. In this direction, the Commission has proposed a number of amendments to adapt ICSD to MiFID, including *inter alia* a new definition of "investment business" which shall mean "*investment business and activities as defined in Article 4(1)(2) of* [MiFID] *and the ancillary service referred to in point 1 of Section B of the Annex I to* [MiFID] […]".[628] With regard to the classification of clients of an

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[625] *Ibid*., p. 4.

[626] *Ibid*., p. 5.

[627] *Ibid*. The ECB has also noted that it considers it important "*that the Union regulatory framework continues to be based on the assumption of different risk profiles of depositors and investors*"; ECB Opinion of 16.02.2011 [2011] OJ C99/1, at p. 3.

investment firm, it proposed that while the ICSD is potentially applicable to all categories of investors, national legislation may provide that "professional investors" and "institutional investors" (according to the definitions provided by ISD) can be excluded from coverage of ICSD.[629] However, as the it further notes, this classification does not coincide with the one under MiFID, so that problems in providing protection may arise, as "*clients classified as professionals for the provision of services may not correspond to the clients which may be excluded from coverage according to the ICSD*".[630] In order to ensure legal certainty and more effective protection (especially for medium-sized enterprises that may be excluded from protection under ICSD but are classified as retail investors under ICSD), the Commission has proposed the correlation of ICSD with the definition of investors provided by MiFID.

More importantly, the proposal notes that one of the issues that have arisen is the coverage of firms depending on the scope of their authorisation –relating to whether an investment firm is authorised to hold client assets or not.

In our view, this issue is central to the problematic that is relevant to the notion and legal nature of depositors *vis-à-vis* investors, and to the interrelation between the legal nature of credit institutions *vis-à-vis* investment firms, and the legal consequences this distinction entails.

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[628] *Ibid*., Article 1(1)(a) of the proposed Directive.

[629] See ICSD, Article 4(2) and Annex 1.

[630] COM(2010) 371 final, p. 5 – 7.

In this respect, a fundamental, in our view, rule is advanced by the proposal: that all investment services and activities covered under MiFID should be subject to the ICSD and that "[…] *if firms* de facto *hold client assets (irrespective of restrictions on their authorisation or the nature of their investment service) then clients should be entitled to compensation under the ICSD*".[631]

In the same direction, the proposal notes that the right of clients to compensation in such a case "*would be irrespective of whether the firm is doing so* [*i.e.* holding clients assets] *in contravention of any limitation on its authorisation (e.g. preventing it from holding client assets or from dealing with retail clients) and irrespective of the nature of the investment service it provides* […]".[632] According to the proposal, "[…] *this will enable retail investors to assume that they are covered by the ICSD without checking detailed conditions on a firm's authorisation. It will also result in more consistency across* [MSs] *in the application of the ICSD which will assist the proper functioning of the ICSD*".[633]

In this respect, the proposed new Preamble to ICSD states that "[i]*nvestors may not be aware of any limits of investment firms' authorisations, thus it is necessary to protect them in situations in which investment firms act in breach of their authorisation notably by holding client assets or providing services to a particular type of client contrary to the conditions of their authorisation. Therefore, schemes should cover clients' assets*

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[631] *Ibid.*, p. 5.

[632] *Ibid.*

[633] *Ibid.*

which are de facto held by investment firms in connection with any investment business".[634]

Thus, with regard to coverage of investment services and compensation payable to investors, the new rules propose the introduction of a provision with the following content:

> "*2a. The coverage* […] *shall be provided in accordance with the legal and contractual conditions applicable for claims arising out of an investment firm's inability to perform either of the following:*
>
> *(a) repay money owed to or belonging to investors and held on their behalf in connection with investment business;*
>
> *(b) return to investors any instruments belonging to them and held, administered or managed on their behalf in connection with investment business.*
>
> [MSs] *shall ensure that the schemes provide coverage where financial instruments or monies are held, administered or managed for or on behalf of an investor, irrespective of the type of investment business being carried on by the firm and of whether or not the firm is acting in accordance with any restriction set out in its authorisation.* […]".[635]

Furthermore, it is interesting to note that the Commission proposes the introduction of these provisions regarding the coverage of clients' assets which are *de facto* held by investment firms not as a new rule, but as a clarification of the existing rule, which

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[634] *Ibid.*, proposed new recital 5

[635] *Ibid.*, Article 1(2)(c) of proposed Directive.

signifies in our view that the Commission considers an interpretation of rules in force to this direction (*i.e.* covering *lato sensu* investors) as valid in the context of applicable law. Specifically, the Commission notes that "*the proposed amendment clarifies that* [...] *if firms* de facto *hold client assets* [...] *then clients should be entitled to compensation*".[636]

Another critical feature of the proposal, which signifies in our view the new approach of the Commission regarding the status of investors, is that the "co-insurance principle", according to which MSs are allowed to limit coverage of compensation (by up to 10%) of an investors claim,[637] as measure to address moral hazard and to raise investor awareness regarding the selection of investment firms. Following the experience of the Crisis, the Commission notes that "[...] *arguably it is unrealistic to expect retail investors to be able to identify which firms are more or less likely to be affected by fraud or systems failures*", proposing that investors should no longer have to bear part of the loss if *inter alia* there is fraud at an investment firm.[638]

With regard to payment of compensation, beyond a proposal to increase the level of compensation,[639] the Commission notes that "[i]*n the case of credit institutions doubts*

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[636] *Ibid.*, p. 5.

[637] ICSD, Article 4(4); *cf.* ICSD, Preamble, recital 13. *Cf.* the co-insurance principle in DGSD, *supra* n 534.

[638] COM(2010) 371 final, p. 11.

may arise as to the coverage under the ICSD rather than the DGSD of monies deposited in a bank in the context of the provision of investment services. To deal with situations of possible uncertainty due to the specific nature of banks which may provide both banking activity and investment services, the Article 2(3) of the ICSD is being amended to specify that in cases of doubt the investor is to be compensated under the DGSD (which provided a higher level of coverage)".[640]

This new rules, as proposed, signifies acknowledgment by the Commission that in certain cases the same person may be characterised both as depositor and as a retail investor –thus accepting in our view that legal uncertainty is not resolved even by the new proposed rules. In this direction, the Commission proposes a new "*in dubio pro reo*" rule, that in case of doubt compensation is to be the higher one provided by DGSD. While this is proposal is protective for retail investors (since in case of doubt a higher level of compensation is awarded) yet it does not offer a solution regarding the problem of classification, so that legal uncertainty remains. This further affects cases where differentiation of retail investors *vis-à-vis* depositors may be significant (as in the case of tortuous liability of competent authorities), affecting in turn the effectiveness of the relevant protective rules.

Furthermore, the Commission proposal takes into consideration the particular characteristics of investment firm failure as a result of fraud, proposing that the delay of

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[639] To a fixed amount of EUR 50 000; *ibid.*, p. 8; proposed Article 1(4). Further new rules are proposed with regard to the funding of ICSs and borrowing mechanisms between ICSs; *ibid*, p. 9 – 10, proposed recitals 13 – 19, proposed Article 1(5).

[640] *Ibid.*, p. 9. *Cf.* Article 1(2)(f) and recital 8 of proposed Directive.

twenty working days for payment of compensation (as in the case of DGSD) is not suitable for the purposes of ICSD, since the underlying situations of fraud (or malpractices or operational problems, according to the proposal) make necessary a longer delay "*in order to reconstruct the position of single investors*", and thus a mechanism of partial initial payment and further payment following reconstruction and of the position and clarification of the claim is proposed.[641] This important, in our view, initiative by the Commission proposes the amendment of the ICSD mechanism on payment of compensation, in connection to claim verification.

Regarding the critical issue of eligibility of claims and on the verification of claims, the proposal advances two new rules, which confirm in our view that the current normative structure of EU law on investor compensation is problematic:

The first proposed rule states that "[MSs] *shall ensure that compensation schemes may participate in insolvency or judicial procedures that may be relevant in establishing the eligibility and the amount of a claim*".[642] Certainly, MSs are not prohibited, under the ICSD as in force, to provide that compensation schemes may participate in such procedures. What appears as a clarification, in the Commission proposal, does not provide in our view useful directions as to how insolvency or judicial procedures are to

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[641] *Ibid.*, p. 12 and proposed Article 1(7). The proposal provides that the investor compensation scheme must be in a position to pay an investor's claim as soon as possible and at the latest within three months of the establishment of the eligibility and the amount of the claim (extension of delay and partial compensation payment provided under conditions).

[642] *Ibid.*, proposed Article 1(7) introducing new Article 9 to ICSD; *cf.* new proposed recital 21.

be correlated in the national legal order to verification of claims procedures under EU and national law on investor compensation. While this may be attributable to considerations relevant to the institutional autonomy of MSs, including rules on the organisation of justice and on procedural law matters, it is not clear in our view how the investor compensation regime may be harmonised on the European level, if the law on verification of claims remains a secluded national domain.

The second proposed rule states that the rule above "[…] *shall be without prejudice to schemes being able to adopt other methods to determine the eligibility or amount of a claim*".[643]This rule appears to add to ambiguity, since it confirms that (at least) two sets of national rules on claim verification may be validly applicable for the purposes of investor protection (*i.e.* one set of rules regarding national judicial procedures in general, as in the context of tortuous liability, and/or one set of rules regarding national insolvency proceedings, which may be governed by general insolvency law or by specific insolvency law for investment firms, plus one set of rules applicable specifically by ICSs).

In our opinion, the interrelation of the two proposed provisions and the envisaged useful effect thereof is not evident; while the first rule clarifies the MSs have to allow for investor schemes to participate in insolvency or judicial procedures relevant to claim verification, the second proposed rule adds that such schemes may adopt other claim verification rules, causing further legal uncertainty and concerns with regard to their effectiveness when applied in practice by a MS.

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[643] *Ibid.*

Perhaps with a view to avoid such a negative result, the proposal further adds that the Commission shall adopt by means of delegated acts "[…] *measures to determine the procedure to deal with investors' claims and the technical criteria to calculate the loss of value of a UCITS* […]".[644] While this provision is also unclear, in our view, it appears to be in a practically useful direction, as claim verification rules should be set by uniformly applicable and detailed rules.

The position of the EP adopted at first reading regarding the Commission proposal for the amendment of ICSD,[645] taking *inter alia* into account the reasoned opinions of the Swedish Parliament and the UK House of Commons, according to which the proposal contravenes the principle of subsidiarity.[646]

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[644] *Ibid.*, referring to Article 1(10) of the same draft legislation, which introduces new Articles 13a, 13b and 13c to ICSD; *cf.* new proposed recital 23.

[645] [2013] OJ C033E/328.

[646] *Ibid.* The UK House of Commons has issued a reasoned opinion, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, according to which the Commission proposal to amend ICSD is not compatible with said principle, as regards the borrowing last resort mechanism between national schemes in proposed new Article 4b of ICSD. Available at http://www.parliament.uk/pagefiles/54364/Reasoned%20Opinion%2025.10.10.pdf .
The Commission replied that it has already taken into account the concerns expressed by the House of Commons in its proposal: see http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/united_kingdom/2010/com20100371/com20100371_commons_reply_en.pdf .

The amendments introduced by the EP at first reading of the draft legislation do not in general alter the essence of the proposed new rules.[647]

III.2.3 The proposed Bank Recovery and Resolution Regulation, Bail-in, and Retail Financial Market Participant Protection

As discussed, the proposal to adopt BRRR[648] is connected to a long political and institutional process in the wake of the Crisis with a view to establish a specific regime

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[647] In the context of the present study, some of the more important amendments introduced by the European Parliament include in our view the broadening of the definition of "investor" encompassing any natural or legal person, including micro-entities, non-profit organisations and public local authorities (proposed Article 1(1)(a)4), the broadening of the conditions for failure of investment firm to apply including beyond fraud, malpractice or operational error, as per the Commission proposal, also bad advice, regarding CoB obligations when providing investment services to clients (proposed Article 1(2)(b), amendment 20), the provision of an obligation for investment firms to disclose on their websites all information concerning the terms and conditions regarding the coverage and the steps to be taken to receive compensation under ICSD (proposed amendment 58), and the proposal that following the entry into force of the revised ICSD the Commission shall, after an open consultation with the stakeholders, submit to the EP and Council a report analysing the advantages and disadvantages of introducing a system of insurance contracts as a complement or replacement of existing ICS (proposed Article 2a). With regard to the issues concerning claim eligibility and verification rules, the EP position does not include any amendments to the Commission proposal.

for the orderly winding down of systematically important financial institutions in the EU, without recourse to public funds.[649]

According to the proposed Regulation, the SRB will be established as an EU agency, having legal personality and enjoying the most extensive legal capacity of legal persons under national law,[650] and being the owner of the (single resolution) Fund.[651]

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[648] COM(2013) 520 final. *Supra*, n 460. Its proposed legal basis is Article 114 TFEU, as an approximation of national provisions instrument, aiming at the establishment and functioning of the internal market; see proposed BRRR, p. 6.

[649] The operation of the resolution procedure is organised by the proposed BRRR both in terms of (basic) substantive rules and in terms of (basic) procedural rules. Following resolution planning (proposed BRRR Articles 7, 9) and assessment of resolvability of a financial institution (*ibid.*, Article 8) and having set minimum requirements for own funds and eligible liabilities per institution (*ibid.*, Article 10), the competent European and national authorities will exercise their powers in order to avoid the disorderly failure of an institution (early intervention, Article 11) and to achieve its orderly resolution (Articles 12 – 26). While the protection of depositors (covered by DGSD) as well as investors (covered by ICSD) is expressly stated as one of the four resolution objectives (*ibid.*, Article 12(2)) the exact operation of this mechanism as a whole needs to be defined.

[650] *Ibid.*, Article 38.

[651] *Ibid.*, Article 64. The proposed Regulation does not provide whether the Fund will have legal personality and legal capacity, and to what extent.

The scope of the proposed BRRR is wide: *Ratione materiae* it encompasses the resolution of all financial institutions falling within its field of application established in participating MSs (Euro-area MSs and others wishing to participate), providing uniform rules and a uniform procedure to be applied by the SRM established by it, and with the support of the Fund.[652] *Ratione personae* it applies to all credit institutions established in participating MSs, to parent undertakings established in one of the participating MSs when subject to consolidated supervision, and to investment firms and financial institutions, as defined therein,[653] established in participating MSs when covered by consolidated supervision.[654]

The proposed BRRR further provides that where the Commission or the SRB exercise tasks or powers which under the proposed BRRD are to be exercised by the national resolution authority, the SRB shall be considered to be the relevant national resolution authority.[655] Furthermore, the national resolution authorities shall act according to

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[652] *Ibid.*, Article 1.

[653] The proposed BRRR applies to systemically important investment firms, 'investment firm' being defined for its purposes as those referred to in point (2) of Article 4(1) of Regulation 575/2013 that are subject to the initial capital requirement specified in Article 9 of that Regulation . COM(2013) 520 final, proposed Article 3(8).

[654] *Ibid.*, Article 2. For the obligation of non-discrimination against *inter alia* depositors, investors and other creditors on grounds of nationality, see *ibid.*, Article 6.

[655] *Ibid.*, Article 5(1).

national law (as will be harmonised by the proposed BRRD) and to the proposed BRRR.[656]

Especially with regard to the resolution procedure, which is relevant to the subject-matter of this study, the proposed Regulation introduces a series of "resolution objectives", which reflect effectiveness and proportionality considerations.[657] Among these announced resolution objectives, public interest considerations (such as the continuity of critical functions, the protection of financial stability and the protection of public funds)[658] and individual property considerations (such as the protection of depositors covered by DGSD and of investors covered by ICSD).[659] Shareholders of the institution under resolution are to bear first losses, while creditors bear losses after the shareholders in accordance with the order of priority of their claims; "the creditor no worse off principle" also applies.[660]

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[656] *Ibid.*, Article 5(3).

[657] *Ibid.,* Article 12.

[658] *Ibid.*, Article 12(2).

[659] *Ibid.*

[660] *Ibid.*, Article 13 (1). A general principle governing the treatment of creditors of the institution under resolution, as proposed, is that creditors will bear losses after shareholders, in the following order of priority of claims: claims related to eligible deposits and claims from DGSs, then unsecured non preferred claims, then claims subordinated (others than the following), then claims from senior executives and directors, then claims related to additional Tier 1 and Tier 2 instruments (as per applicable capital adequacy rules), and then claims related to common equity Tier 1

According to the proposed BRRR, the particular resolution scheme to be implemented with regard to a particular ailing institution will be decided by the SRB, including the resolution measures to be applied (sale of business, bridge institution, asset separation, bail-in, or combination thereof), and the use of the Fund in this context,[661] while the implementation of such resolution scheme by national resolution authorities is to be closely monitored by the SRB.[662] National resolution authorities are to use their powers under national law transposing the European bank recovery and resolution rules taking all necessary action, implementing the decisions of the SRB, exercising control over failing intermediaries and applying relevant safeguards.[663] Should, however, national resolution authorities fail to effectively implement the resolution decision of the SRB, the latter shall have the power to directly order the institution under resolution to proceed to the necessary action,[664] and both the institution under resolution and national authorities will be under an obligation to comply.[665]

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instruments (as per applicable capital adequacy rules); see proposed BRRR, Article 13(1) point b, and Article 15.

[661] *Ibid.*, Article 20.

[662] *Ibid.*, Article 25.

[663] *Ibid.*, Article 26.

[664] *Ibid.*, Article 26(2).

[665] *Ibid.*, Article 26 (3, 4).

The financing of the Fund is envisaged by the proposed BRRR as based upon contributions by credit institutions,[666] *i.e.* indirectly by depositors. The EU budget may not be held liable for expenses or losses of the Fund,[667] while public funding is not excluded in case the funding raised by *ex ante* and *ex post* contributions by the institutions falling within the field of application of the proposed BRRR are not immediately accessible or sufficient to cover expenses,[668] such support to be fully recouped.[669]

While the Fund may not at all burden the EU budget and may not in principle use public funds, the SRB may invest the amounts held by the Fund "*in obligations of the participating* [MSs] *or intergovernmental organisations, or in highly liquid assets of high credit worthiness*",[670] the Commission being empowered to adopt acts on the rules for the administration of the Fund.[671] The use of the Fund by the SRB, as proposed by

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[666] *Ibid.*, Articles 65 – 67.

[667] *Ibid.*, Article 64(2).

[668] *Ibid.*, Article 69(1).

[669] *Ibid.*, Article 69(2).

[670] *Ibid.*, Article 70(3).

[671] *Ibid.*, Article 70(4). While the administration of the property of the Fund is relates rather to policy and financial considerations, than legal, it is not evident how the amounts deposited with this Fund will be readily available or sufficient in case of abrupt distress in the EU financial markets, especially in connection to sovereign debt issues, if such amounts are invested in MSs' sovereign debt. In our view, a new form of negative interconnectedness, between sovereign debt and Fund creditworthiness, might emerge in this way.

the Commission, is connected to the aim served also by the national DGSs (and the ICSs): according to the proposed BRRR, the mission of the Fund will *inter alia* include "[…] *to pay compensation to shareholders or creditors if* […] *they have received less, in payment of their credits, than what they would have received* […] *in a winding up under normal insolvency proceedings*".[672]

Furthermore, in application of the "no creditor worse off principle", the proposed BRRR provides that MSs participating in the SRM shall ensure that "[…] *when the* [SRB] *takes resolution actions, and provided that these actions ensure that depositors continue having access to their deposits, the deposit guarantee scheme to which the institution is affiliated shall be liable for the amounts specified* [in the proposed BRRD]".[673] According to said provisions of the proposed BRRD, the national DGS (to which the failing institution is affiliated) will be liable, up to the amount of covered deposits, for the amount of losses that it would have had to bear if the institution had been wound up under normal insolvency proceedings,[674] and this contribution by the deposit guarantee scheme will be made in cash. [675]

In this way, through the proposed BRRR, which will be directly applicable if adopted in the national legal orders of EU MSs, national DGSs will be used for the purposes of the SRM. The result envisaged in our opinion by the proposed BRRR is that the

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[672] *Ibid.*, Article 71(1).

[673] *Ibid.*, Article 73(1).

[674] *Ibid.*, Article 99(1).

[675] *Ibid.*, Article 99(4).

particularities of each national legal order, regarding the legal form of the national DGS, the supervision exercised by national supervisory authorities on the scheme, and the nexus of national law provisions, or even practical funding difficulties, may not hinder the use of the national DGS for the purposes of the SRM.[676]

While the proposed BRRR will be applicable under conditions to investment firms,[677] and although its aim is to protect investors (as creditors),[678] no specific provision is made with regard to the funding of the SRM in connection to national ICSs. The only relevant reference is on the level of general principles applicable to recovery and resolution, according to which the Commission and the SRB, when making decisions or taking action which may have impact in more than one participating MS, will take into account *inter alia* the impact of any decision or action or inaction on the financial stability, the economy, the DGSs or the ICSs of any of those MSs.[679]

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[676] The proposed BRRR Article 71(4) provides that "[i]*n the event resources of a* [DGS] *are not sufficient to cover the payments to be made to depositors, and other resources are not immediately available from the relevant participating* [MS]*, the Fund may lend the necessary resources to that* [DGS] *provided that all the conditions under Article 10 of* [DGSD] *are met*".

[677] COM(2013) 520 final, Article 2 point (c) and Article 3(8).

[678] *Ibid.*, Article 6(1) and Article 12(2) point (d).

[679] *Ibid.*, Article 6(2) point (a). In our view, and taking into account the legal uncertainty prevailing in many issues relating the status of financial market participants, a clear reference of retail investor position in the order of priority of claims should be included in relevant legislation.

In particular with regard to application of the bail-in resolution tool, it is proposed that a number of liabilities of the institution under resolution will not be subject to write down and conversion. Among such exceptions are proposed to be covered deposits, secured liabilities including covered bonds, and any liability that arises by virtue of the institution under resolution of client assets or money, or a fiduciary relationship between such institution (as fiduciary) and another person (as beneficiary), provided that such client or beneficiary is protected under the applicable insolvency or civil law.[680] For the bail-in tool to be applied, the resolution scheme must establish in particular the aggregate amount by which elibigle liabilities must be reduced or converted, the liabilities to be excluded, and the objectives and minimum content of the business reorganisation plan (where applicable).[681]

From these proposals, taking also into account considerations on the ability of retail financial market participants to identify risks, legal uncertaintly remains, in our view,

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[680] *Ibid.*, Articles 15, 16, 19, 20, 24(3).

[681] *Ibid.*, Article 24(1). The proposed BRRR also provides that in exceptional circumstances, certain liabilities may be wholly or partially excluded from writing-down or conversion, in which case the writing-down or conversion of applied to other eligible liabilitis may have to be increased. If in such a case the losses that would be borne by excluded liabilities have not be passed on fully to other creditors, it is proposed that a contribution may be made by the Fund to the failing institution, under certain conditions. Such contribution by the Fund may be financed by its own resources, or *ex post* contributions, or from alternative sources only after –among other conditions– all unsecured, non-preferred liabilities other than eligible deposits have been written down or converted in full.

regarding the differentiation in protection awarded to depositors *vis-à-vis investors*, also under the proposed BRRR.

While retail investor claim verification rules are left by ICSD to MSs to provide, according to national law, the valuation of assets and liabilities of a failing financial institution is regulated in a rather detailed way by the proposed BRRR. The proposed rules provide *inter alia* that valuation must be performed by a person independent from any public authority, the resolution authority, and the institution concerned;[682] that it must be prudent,[683] reasoned,[684] and that it may be either definitive or provisional (depending on the circumstances of each case and the urgency of the situation).[685] The objective of the valuation, as proposed, is to assess said assets and liabilities,[686] the valuation having no legal effect but being a procedural step preparing for the recommendation of the SRB to apply a resolution tool or exercise a resolution power.[687] Furthermore, the valuation is connected to the treatment of the failing institution's creditors: It is proposed, to this direction, that the valuation shall indicate the subdivision of creditors in classes, and shall indicate an estimate of the treatment of

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[682] *Ibid.*, Article 17(1).

[683] *Ibid.*, Article 17(6).

[684] *Ibid.*, Article 17(8).

[685] *Ibid.*, Article 17(2), (3), (10), (11).

[686] *Ibid.*, Article 17(4).

[687] *Ibid.*, Article 17(14).

each class should the failing institution be wound up under normal insolvency proceedings.[688]

Whether the valuation process is used to determine the resolution tools and powers to be exercised upon a failing institution by the competent authorities, or to protect creditors of the failing institution, relevant proper information is *sine qua non* for the valuation to be valid and effective; if information on the quantity and quality of assets and liabilities of the failing institution is inaccurate –as in the case of fraudulent operation of a financial intermediary– then valuation of its financial position and protection of its creditors is *ex hypothesi* gravely affected as well. In order to collect valid information for the purposes of effecting valuation of the assets and liabilities of the failing institution, the proposed BRRR provides for a series of investigative powers of the SRB.[689] Such powers include requests for information from the failing institution, its employees, and third parties to whom the failing institution has outsourced functions or activities,[690] general investigations of any such person established or located in a participating MS,[691] on-site inspections at the business premises of such persons,[692]

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[688] *Ibid.*, Article 17(9), (16), (17), (18).

[689] *Ibid.*, Article 32(1). The investigatory powers of the SRB may also be applied for the purposes of exercising its main tasks (resolution planning, assessment of resolvability of a failing institution, applying early intervention measures, applying the resolution procedure and also effecting valuation of the assets and liabilities of the failing institution (*ibid.*).

[690] *Ibid* Article 32(1).

[691] *Ibid.*, Article 33.

subject to prior notification to the national resolution authorities concerned, but "*where the proper conduct and efficiency of the inspection so require*" even without prior announcement to such persons (failing institutions, their personel *etc.*).[693] Regarding on-site inspections, MSs must provide assistance.[694] The judicial authorities of MSs may provide authorisation for such measures where required under national law, but examination of the relevant application for authorisation will be limited to control of the authenticity of the decision of the SRB and to control that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection; however, the national judicial authority "[…] *shall not review the necessity for the inspection or demand to be provided with the information on the* SRB file", the ECJ being the only competent forum to review the lawfulness of the SRB decision.[695]

The general investigations performed by the SRB for the purposes of resolution include requiring submission of documents, examination of books and records of the failing institution, its employees and third persons to whom it has outsourced functions or activities, obtaining of written or oral explanations from such persons, or their representatives or staff, and interviewing of any other (consenting) person.[696]

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[692] *Ibid.*, Article 34.

[693] *Ibid.*, Article 34(1).

[694] *Ibid.*, Article 34(4).

[695] *Ibid.*, Article 35. Regarding to the (political) accountability of the SRB, see *ibid.* Article 41.

[696] *Ibid.*, Article 33(1).

It emerges from the above that the investigatory powers of the SRB are essential in order for important information to be found for the purposes of resolution proceedings. The relevant proceedings are *a priori* independent of national law and authorities, since the SRB may directly proceed to exercising the necessary investigative powers, while national resolution authorities are only notified thereof, and national judicial authorities may not question the necessity of such proceedings nor demand to review the relevant file –at least as the relevant proposal stands.

Beyond issues raised that are relevant to the procedural autonomy of MSs and the fundamental right of defence, as applied in each national legal order, it appears in our view that the effectiveness of such measures is also –although indirectly– connected to applicable national law on claim verification and evaluation to the extent that there is no uniform European law on this matter. This may further lead, in our view, not only to difficulties in establishing whether there is a valid claim by a creditor against the failing financial institution, especially in case of fraudulent behaviour by such institution, but may also lead the European single resolution regime in fragmentation in case where it will be practically difficult to apply various national claim verification and evaluation rules in complex situations.

Furthermore, it is interesting to note that the proposed BRRR expressly provides not only for the SRB's contractual liability,[697] but also for its non-contractual liability.[698]

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[697] *Ibid.*, Article 78(1).

The conditions for such non-contractual liability to attach will be provided by the general principles common to the laws concerning the liability of public authorities of the MSs,[699] and if found liable the SRB will have to make good any damage caused by it (or by its staff) in the performance of its duties.

Furthermore, the proposed BRRR provides that the SRB will compensate national resolution authorities for the damages to which the latter has been condemned by a national court, which are the consequences of an act or omission committed by that national resolution authority in the course of any resolution under the proposed Regulation (unless such act or omission constituted a violation of EU law, the proposed BRRR, a Decision of the Commission or a Decision of the SRB, or constituted a manifest and serious error of judgement).[700]

In this way, a quasi-guarantor function seems to be proposed, in our view, to be attributed to the SRB, to cover damages payable by national resolution authorities resulting from the application of its resolution decisions. It appears, in our opinion, that this proposal seeks to address possible opposition by national resolution authorities on ground of liability in tort.

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[698] *Ibid.*, Article 78(3).

[699] *Ibid.*

[700] *Ibid.*, Article 78(4).

While the lack of immunity from liability in tort of a European agency such as the SRB is in line with European *acquis* on EU institutions liability in tort[701] and reflects wider accountalibility considerations, it brings to the fore the problematic regarding the *locus standi* of individuals and the justicialibity of relevant rights, the conditions for such liability to attach, and the competent forum to abjudicate such actions.

The proposed BRRR provides a clear rule only with regard to the last issue, stating that disputes relating to non-contractual liability of the SRB and disputes relating to its responsibility to compensate national resolution authorities will be examined only by the ECJ.[702] With regard to conditions for liability to attach, the proposed BRRR provides only for a five year prescription period, "*from the occurrence of the event giving rise thereto*";[703] no further rules regarding prescription are provided (such as whether it commences from the occurrence of the event *stricto sensu* or whether knowlegde of such occurrence is relevant, whether it is taken into account by the ECJ *ex officio*, whether and how it may be interrupted, *etc.*). In absence of European law thereto, the ECJ is referred to apply "*the general principles common to the laws concerning the liability of public authorities of the* [MSs]". The emerging uncertainty is enhanced by the intrinsic complexity of crises in financial markets.[704]

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[701] See *infra*, Ch IV.1.

[702] COM(2013) 520 final Article 78(5).

[703] *Ibid.*

[704] *Cf. ibid.*, Article 13(1) point d, according to which "*individuals and entities are held accountable for the failure of the institution under resolution to the extent of their responsibility under national law*".

The above considerations demonstrate in our view that while *a priori* liability in tort of the SRB is asserted by the proposed BRRR, the application of the relevant rules –as proposed at the present stage– appears to be problematic.

Most importantly, however, the proposal for the BRRR reveals the definite recognition by EU institutions that EU financial market authorities in the new EU financial architecture may *a priori* be liable in tort.

Interim Concluding Remarks

While retail investor protection has been announced by EU law as one of the aims of financial regulation, in the event of intermediary default the protection offered to retail investors by EU law has been limited to the payment of minimum *ex lege* compensation.

DGSD and ICSD were introduced in the EU legal order as instruments of minimum harmonisation aiming primarily at the avoidance of distortions in the competition among financial institutions and thus at the completion of the internal financial market. In parallel, they aim at enhancing confidence in the financial market by providing minimum protection to depositors and investors.

However, examined *per se* and in conjunction to each other, they do not constitute a coherent system of law providing protection in a coherent way; in particular in case of failure of a financial institution as a result of fraud, the retail financial market participant is exposed to an advanced degree of risk as a result of legal uncertainty and *lacunae* in the available mechanism of protection.

It is reasonable that these normative inefficiencies of EU law in this area may be further reflected in national implementation measures, at the cost of the coherence and effectiveness of the latter.

The proposals to revise DGSD and ICSD attempt to address these issues, establishing a more predictable and coherent system of EU rules with a view also to achieve effective protection of retail financial market participants.

In this direction, it is important that considerations regarding the lack of effectiveness of the regime in force appear to have been endorsed by the Commission, which has proposed new, more functional and clear definitions of depositors and investors, and has further proposed that *in dubio* the higher protection should be awarded.

However, this proposal to improve the system of DGSD and ICSD rules has to be examined in in conjunction with the new proposed recovery and resolution regime for financial institutions, which is not unambiguous.

One central issue characterized by uncertainty, in the pending proposals, is the role and function of the recovery and resolution mechanism with regard to ICSs and more general in relation to retail investor protection.

Furthermore, critical parameters of the system to protect retail investors in the event of intermediary default –as in particular claim verification and evaluation rules– remain unregulated and unharmonised under the emerging new EU law.

It is evident though that should the proposals for the new recovery and resolution regime be endorsed, national arrangements for the operation of DGS and ICSs will be greatly affected, leading to an *ab initio* re-assessment of the role and function of the latter.

In this context, it will be necessary *inter alia* to consider the legal status of retail participants in the financial market under EU law; whether there may be any differentiation of depositors *vis-à-vis* retail investors in this regard; and ultimately whether the preoccupation to protect the stability of the market, as a concern in the general good, may validly outweigh any individual interest, under the light of the *acquis communautaire* on individual protection and the political and legal foundations of the EU.

CHAPTER IV. AN EU RIGHT OF RETAIL INVESTOR PROTECTION?

Following the examination of the development and *ratio* of EU financial law, and the mechanism created to provide minimum protection to retail financial market participants in the event of intermediary failure, it is necessary to examine in turn whether it is valid to consider that a right of retail investors to be protected may be recognised to exist under EU law.

Exploring this issue needs taking into account the EU law *acquis* in the area of individual protection, as well as the relevant case-law of the ECJ which will be analysed also considering the problematic of depositor *vis-à-vis* investor protection.

IV.1 THE *ACQUIS* ON INDIVIDUAL PROTECTION IN EU LAW AND COMPETENT AUTHORITIES' LIABILITY IN TORT

The recognition of justiciable individual rights is a precondition for the effective protection of the individual.[705]

In the EU legal order is closely linked with the impetus provided to European integration by the ECJ, and the central position of individuals in the European legal foundations.[706]

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[705] For the notion of justiciability and the connection of remedies to rights see indicatively FALLON, R. H. (2006) 'The linkage between Justiciability and Remedies – And their Connection to Substantive Rights', *Virginia Law Review*, vol. 92, p. 633; HARRIS, B.V. (2003) 'Judicial review, Justiciability, and the Prerogative of Mercy', *CLJ*, vol. 62, no. 3, p. 631; TZEMOS, V. (2012) 'The Binding Effect and the Justiciability of Fundamental Human Rights*', *NoV*, vol, 60, p. 32.

[706] For a general account of the role of the ECJ in the evolution of EU law and European integration see ARNULL, A. (1999) *The European Union and its Court of Justice*, Oxford: OUP; DEJOUSSE, R. (1998) *The European Court of Justice*, Macmillan; HARTLEY, T.C. (1998) *The Foundations of European Community Law*, 4th edition, Oxford: OUP; JACOBS, F. (2004) 'The evolution of the European legal order', *CMLRev*, vol. 41, pp. 303-316; LASOK, K.P.E. (1984) *The European Court of Justice: Practice and Procedure*, London: Butterworths; POIARES MADURO, M. (1998) *We the Court*, Oxford: Hart Publishing; TRIDIMAS, T. (1996) *The European Court of Justice and the EU Constitutional Order: Essays in Judicial Protection*, Oxford: Hart Publishing.

The EU legal order has gradually evolved from the initial recognition by the ECJ of the legal status of individuals in this particular legal order, to the recognition of the conditions for rights considered to be conferred by EU law to individuals, and further to the recognition of liability in tort of both MSs and EU institutions for breach of EU law causing damage to individuals, under conditions.[707]

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[707] See among many, ANAGNOSTARAS, G. (2001) 'The allocation of responsibility in State liability actions for breach of Community law: a modern Gordian knot?', *ELR*, vol. 26, no. 2, pp. 139-158; BAILEY, S.H. and BOWMAN, M.J. (2000) 'Public authority negligence revisited', *CLJ*, vol. 59, no. 1, March, pp. 85-132; BARNARD, C. (2007) *The Substantive Law of the EU - The Four Freedoms*, 2nd edition, Oxford: OUP; BECKER, F. (2007) 'Application of Community law by Member States' public authorities: between autonomy and effectiveness', *CMLRev*, vol. 44, pp. 1035-1056; BENTLEM, G. (2005) 'Torts, a European ius commune and the private enforcement of Community law', *CLJ*, vol. 64, no. 1, March, pp. 126-148; BEUTLER, B. (2009) 'State liability for breaches of Community law by national courts: is the requirement of a manifest infringement of the applicable law an insurmountable obstacle?', *CMLRev*, vol. 46, pp. 773-804; BOUVERESSE, A. (2004) 'Responsabilité des Etats membres', *Europe*, vol. 12, p. 393; CRAIG, P. (1997) 'Once more unto the breach: the Community, the State and damages liability', *LQR*, vol. 113, January, pp. 67-94; CURTIN, D. and O'KEEFE, D. (ed.) *Constitutional Adjudication in European Community and National Law*, Butterworths; DAVIS, R. (2006) 'Liability on damages for a breach of Community law: some reflections on the question of who to sue and the concept of "the State"', *ELR*, vol. 31, no. 1, pp. 69 - 80; EILMANSBERGER, T. (2004) 'The relationship between rights and remedies in EC law: in search of the missing link', *CMLRev*, vol. 41, pp. 1199-1246; HARRIS, B.V. (2003) 'Judicial review, justiciability and the prerogative of mercy', *CLJ*, vol. 62, no. 3, November, pp. 631-660; HIMSWORTH, C. (1997) 'Things fall apart: The harmonisation of Community judicial procedural protection revisited', *ELR*, vol. 22, p. 29; LEWIS, C. (1996) *Remedies and the Enforcement of European Community Law*, Sweet & Maxwell; NASSIMPIAN, D. (2007) '. And We Keep on Meeting: (De)Fragmenting State Liability', *ELR*, vol. 32, no. 6, pp. 819 - 838; PRECHAL, S. (1998) 'Community Law in National Courts: The Lessons from Van Schijndel', *CMLRev*, vol. 35, pp. 681 - 706; RUFFET, M. (1997) 'Rights and remedies

According to the well-established case law of the ECJ, State liability for damage caused to individuals because of breach of EU law, and for which public authorities are responsible, is a principle of EU law intrinsic to the system created by the Treaty, which creates obligations of MSs.

Therefore, State liability to compensate individuals in case of tort committed in breach of EU rights is based directly upon EU law. According to the case law of the ECJ, there are three conditions for State liability in tort for breach of EU law to attach: (a) that the rule breached confers rights upon individuals, (b) that the breach of the rule is sufficiently serious, (c) that there is direct causation (causal link) between the breach of the rule by the State and the damage suffered by the individual.[708]

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in European Community law: a comparative view', *CMLRev*, vol. 34, p. 307; TALBERG, J. (2000) 'Supranational influence in EU enforcement: the ECJ and the principle of state liability', *Journal of European Public Policy*, vol. 7, no. 1, March, pp. 104-121; TRIDIMAS, T. (2000) 'Enforcing Community Rights in National Courts: Some Recent Developments', in O'KEEFE, D.A. and BAVASSO, A. (ed.) *Judicial Review in European Union Law: Liber Amicorum in honour of Lord Slynn*, Kluwer; *idem* (2001) 'Liability for breach of Community law: growing up and mellowing down?', *CMLRev*, vol. 38, no. 2, pp. 301-332; Van GERVEN, W. (1995) 'Bridging the gap between Community and national laws: towards a principle of homogeneity in the field of legal remedies?', *CMLRev*, vol. 32, p. 679; *idem* (1996) 'Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie', *ICLQ*, vol. 45, no. 3, pp. 507 - 544; *idem* (2000) 'Of rights, remedies, and procedures', *CMLRev*, vol. 37, p. 501; WARD, A. (2007) *Judicial Review and the Rights of Private Parties in EU Law*, 2nd edition, Oxford: OUP; WOODS, L. and SMITH, F. (1997) 'Causation in Francovich: The Neglected Problem', *ICLQ*, vol. 46, no. 4, pp. 925 - 941.

[708] See, indicatively, ECJ in *Francovich* (*supra*, n 82, point 35; ECJ decision of 05.03.1996 in Joined Cases C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame*, [1996] ECR I-1029, point 31; ECJ decision of 26.03.1996 in Case C-

MSs may not deny their responsibility for redress in such case by invoking their internal distribution of competences and responsibilities between authorities existing in the national legal order or by claiming that the national authority, which committed the breach of EU law, did not possess the necessary competence, knowledge or means. It is for the MS to ensure that individuals can achieve redress of the damage caused to them by breach of EU law, irrespective of the public authority that committed the breach and independently of which national authority is *a priori* responsible for redress according to applicable national law.[709]

IV.2 INDIVIDUAL PROTECTION CONSIDERATIONS IN THE ECJ CASE-LAW IN THE AREA OF FINANCIAL MARKETS

Out of the abundant case-law of the ECJ connected to individual protection, only a few relate directly to individual protection in the area of financial markets: The ruling of the

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392/93, *British Telecommunications* [1996] ECR I-1631, point 38; ECJ decision of 23.05.1996 in Case C-5/94, *Hedley Lomas* [1996] ECR I-2553, point 24; ECJ decision of 08.10.1996 in Joined Cases C-178/94 and C-188/94 - C-190/94, *Dillenkofer etc.* [1996] ECR I-4845, point 20; ECJ decision of 02.04.1998 in case C-127/95, *Norbrook Laboratories* [1998] ECR I-1531, point 106.

[709] See, e.g. ECJ decision of 09.02.1994 in Case C-319/92, *Salomone Haim* v *Kassenzahnärztliche Vereinigung Nordrhein* [1994] ECR I-00425, at point 27 *et seq.*; ECJ decision of 01.06.1999 in case C-302/97, *Klaus Könle* v *Republik Österreich* [1999] ECR I-3099, point 62.

ECJ in cases C-233/94 *Germany v European Parliament and Council* [710] and C-222/02 *Peter Paul*[711] merit particular attention and analysis.

IV.2.1 THE ECJ DECISION IN CASE C-233/94 *FEDERAL REPUBLIC OF GERMANY* V *EUROPEAN PARLIAMENT AND COUNCIL*

The critical issue of European finance law objectives was examined by the ECJ in case C-233/94 *Germany v EP and Council*,[712] which related to depositor protection under DGSD, and is one of the few cases in which the ECJ had the opportunity to rule on some of the fundamental features of EU finance law.[713]

The case concerned an action by Germany against the European legislators for the annulment of DGSD, on the grounds that its legal basis (Article 57(2) of EC Treaty) was inadequate and also on the ground that DGSD does not state the reasons on which it is based (as required by Article 190 of EC Treaty). In the alternative, the application

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[710] *Supra*, n 62.

[711] ECJ decision of 12.10.2004 in Case C-222/02 *Peter Paul and others* v *Bundesrepublic Deutschland* [2004] ECR I-9425.

[712] *Supra*, n 62.

[713] See DASSESSE, M. (1998) 'Protection du consommateur: les arrêts Allemagne (garantie des dépôts) et Parodi', *Journal des tribunaux / droit européen*, pp. 9-10; LANDSEER, A. and Van EMPEL, M. (1998) 'The Directive on deposit-guarantee schemes and the directive on investor compensation schemes in view of Case C-233/94', *European Financial Services Law*, pp. 143 - 148.

asked for the annulment of the DGSD provisions (a) on the 'export prohibition' rule (Article 4 (1) of DGSD), and (b) on the obligation of MSs whose DGS exceeds the level or scope of cover provided in another MS to establish a DGS which branches of banks authorised in such other MS may join in order to supplement their guarantee (Article 4 (2) of DGSD), and (c) on the obligation of banks to join a DGS (Art. 3(1) second sentence of first subparagraph of DGSD).

The German DGS provided a high level of protection to depositors, having the following essential characteristics at the time of the facts of the case: although banks having their head office in Germany were not obliged by law to be members of a DGS, most banks participated in such a scheme (except for five out of three hundred, while the *ratio* of unprotected to protected deposits amounted to approximately one in a thousand).[714] The Federal Association of German Banks operated such a scheme, as a self-regulated and voluntary insurance body not under State control. However, any bank not belonging to a deposit guarantee scheme was under obligation to inform its customers thereof before an account was opened; further, the German supervisory authorities could prohibit a bank from receiving payments if it did not belong to a DGS and if there was danger of insolvency. Furthermore, the deposit guarantee fund of the Federal Association of German Banks had been authorised by its members to obtain all necessary information from the Federal Supervisory Agency for Credit Institutions and from the Federal Bank of Germany, as well as to have access and examine member bank documents. Moreover, banks had to provide the national supervisory authorities with the verification reports drawn up by the deposit guarantee schemes they belonged

[714] See Opinion of AG Léger of 10 Dec. 1996 in Case 233/94, points 18 – 23 and 155.

to. [715] This system, while voluntary, was characterised as "*particularly effective*", since it covered most of deposits providing the highest level of depositor protection in the EC.[716]

As AG Léger noted, the DGSD was the first result of the conciliation process provided by the co-decision procedure of Article 189B of EC Treaty.[717] Examining the principal claim of the action for annulment, the Advocate General first considered the position of Germany, that Article 57(2) of EC Treaty could not constitute the sole basis for DGSD, because the aim of the latter was "[…] *rather to strengthen protection for depositors than to allow the completion of the single banking market*",[718] and therefore that the adoption of the Directive could only be achieved on the basis of the unanimity required by Article 235 of EC Treaty.[719] The European institutions, on the other hand, supported that the main purpose of the DGSD was to strengthen the stability of the banking system and to establish equal competition, "[…] *whereas consumer protection is only an incidental effect, inherent in that purpose*".[720] In this regard, it is interesting to note that

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[715] *Ibid.*, points 18 – 23.

[716] *Ibid.*, point 24.

[717] *Ibid.*, points 7, 9.

[718] *Ibid.*, point 27.

[719] *Ibid.*, point 28.

[720] *Ibid.*, point 29.

not only the Commission and the Council, but also the EP, considered depositor (consumer) protection to be only incidental in the DGSD.

However, as ensues from the long political process that preceded the adoption of DGSD and from the positions advanced by the European Parliament during this process,[721] the latter considered the introduction of DGSD as important for depositor protection and acted in this direction.[722]

Taking the above into account, it might be argued that while the European Parliament participated in the DGSD process with a view to achieve depositor protection as an aim of greater or equal importance to harmonisation, when the issue of the correct legal basis arose before the ECJ the European Parliament concurred with the Council and the

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[721] *Supra* n 508.

[722] In this direction, the EP had asked during the co-decision procedure for the limit of compensation to be raised from 15 000 ECU to 20 000 ECU (Decision of the Common Position [1993] OJ C115/91, Amendments No 1, 13 and 15), and for modifying initial Article 4(3), which read "[t]*his Article shall not preclude the retention or adoption of provisions which offer a high guarantee ceiling*" so as to provide that "[t]*his Article shall not preclude the retention or adoption of provisions which offer more comprehensive cover for depositors, in particular by extending the categories of investors protected by the guarantee or raising the maximum level of compensation*" (*ibid.*, Amendment No 14). While it appears that the reference to "investor" instead of "depositors" may be a mistake, the extension of the available protection by the national legal order not only with regard to the level of compensation payable but also to the categories of persons covered by it probably demonstrates the effort of the EP to achieve wider protection possible.

Commission in characterising DGSD as a banking sector integration and stability measure.

A G Léger, in order to opine on the correct legal basis for the adoption of the DGSD, referred to the constant case-law of the ECJ according to which the choice of legal basis for a measure must be based on objective factors which are amenable to judicial review, such as the aim and content of the measure.[723] Recapping the case-law of the ECJ on the correct legal base of a harmonisation measure having a dual objective, the Advocate General distinguished between European measures in which the two aims pursued are "*indissociable*", and measures in which one aim must be considered incidental to the other.[724] Considering that the two objectives of DGSD are, on the one hand, freedom of establishment and freedom to provide services in the banking sector, and, on the other hand, "*the stability of the banking system and protection for savers*",[725] AG Léger proceeded in examining whether these aims are equally pursued by the DGSD or whether one is incidental to the other.[726]

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[723] Opinion of AG Léger, *op. cit.*, point 31, wherein further references.

[724] *Ibid.*, points 33 – 34.

[725] *Ibid.*, point 35.

[726] However, it is not perhaps indisputable that the two concurrent (equal or not) aims of the DGSD are to be classified in this way, *i.e.* freedom of establishment and freedom to provide services, on the one hand, and protection of market stability and depositors, on the other. It could be perhaps be also argued that the two aims of the DGSD are protection of market stability and creation of a level playing field between banks achievable through harmonization, on the one hand, and depositor protection, on the other hand (regarding which the effectiveness of DGSD was seriously contested by the German Government in the same case). By grouping together market stability and

AG Léger based this categorisation of DGSD aims on the wording of the first recital in its Preamble,[727] and moved on to examine which of the two aims prevails[728] –thus treating as resolved the dilemma of whether the two aims are equal or whether one is incidental only to the other. However, said recital states that "[…] *the harmonious development of the activities of credit institutions throughout the Community should be promoted through the elimination of all restrictions on the right of establishment and the freedom to provide services, while increasing the stability of the banking system and protection for savers":* nothing in this wording appears to be subjecting one aim to the other. AG Léger, noting correctly that both aims are referred in numerous recitals, considered that a joint legal basis should be necessary.[729]

Proceeding further to examine the content of DGSD, AG Léger noted the difficulty in establishing a hierarchy between the two aims, as "[…] *the very purpose of a large number of the principles laid down by rules aimed at harmonizing bank deposit-guarantee schemes is to protect depositors*".[730] Again, it is not clear why a hierarchy

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depositor protection, as a single aim, the Advocate General appears to consider these to be necessarily interconnected; however, it could be argued that depositor protection may constitute an autonomous aim of legislation, having as parallel effect the protection of market stability through the creation of confidence in the public.

[727] Opinion of AG Léger, *op. cit.*, point 36.

[728] *Ibid.*, point 37.

[729] *Ibid.*, point 37.

[730] *Ibid.*, point 38.

between the two aims had to be established, since there appears to be no evident reason not to consider them "*indissociable*" or of equal importance.

Recognising that "*at first glance*" the two aims of DGSD may be considered as equal,[731] AG Léger explained why in his opinion the aim of harmonisation should be considered as prevailing.[732] The arguments forwarded by the Advocate General in this direction are interesting:

First, the general objective of establishing an internal market was noted; then, however, AG Léger presented a series of provisions of DGSD which "[…] *were dictated by considerations extraneous to or even, in fact, in conflict with any concern for consumer protection*".[733] Such provisions are, according to the Advocate General, for example those on the level of guarantee provided by Article 7(1 of DGSD,[734] on the 'export prohibition' of Article 4(1) second subparagraph of DGSD,[735] on the rule of Article 4(2) of DGSD providing for the exclusive competence of the host-MS to organise a guarantee scheme which a branch of a bank may join to supplement the level of protection available to depositors in the home State,[736] and on the rule of Article 8

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[731] *Ibid.*, point 38.

[732] *Ibid.*, point 39.

[733] *Ibid.*, point 41.

[734] *Ibid.*, point 42.

[735] *Ibid.*, point 43.

restricting the level of guarantee available by providing for guarantee per depositor per bank (whatever the number of deposits) and not per depositor per deposit per bank.[737] All of these provisions, according to AG Léger, are relevant to considerations extraneous, if not contrary, to depositor (consumer) protection –in other words, depositor protection was an externality to achieving harmonisation of national establishment and provision of services rules for banks to freely operate on a European level.[738]

However, AG Léger considered that while certain provisions of DGSD were dictated by considerations extraneous to or even in conflict with any concern for consumer protection, yet on the contrary "[…] *every provision in the Directive favourable to depositors can be related to the initial objective of harmonization with a view to completing the internal market*",[739] moving on to provide certain examples of that.[740] In the opinion of the Advocate General, all articles which were invoked by the applicant to show that the main objective of DGSD was protection provided rules "[…] *without which no measure of harmonization aiming to establish the internal market could be*

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[736] *Ibid.*, point 44.

[737] *Ibid.*, point 45.

[738] This position, although supported by important arguments and examples, does not explain the position held by the EP in the process of adopting DGSD (*supra* n 508).

[739] Opinion of AG Léger, *op. cit.*, point 46.

[740] *Ibid.*, points 47 – 51.

complete". [741] In this respect, the provisions of DGSD referred to as examples of this are those on compulsory introduction of at least one DGS in each MS (Article 3), on minimum guarantee provided (Article 7), on the obligations of banks to inform (Article 9), and on the setting of a common time-limit for payment of depositors' claims (Article 10). However, in our view, in this selective reference to certain provisions of DGSD several other, important provisions appear to have been omitted – such as those on the ability of MSs to retain or adopt provisions offering a higher or more comprehensive cover for deposits (Article 7(3) of DGSD) or those providing for the right of depositors to take legal action against the national DGS, which do not seem to be indispensable to harmonization.

Having concluded that the aim of DGSD was the harmonisation of national rules on bank deposit guarantee schemes, the Advocate General considered that should a second legal basis be necessary for DGSD to be lawful, it would have to be Article 129a(1)(b) of the EC Treaty and that since the Article 189b EC Treaty procedure used to adopt DGSD is the same as that of Article 129a, the omission of any reference to the latter is a formal defect (since consultation of the EESC required by Article 129a had taken place) so that DGSD was not null and void.[742] Therefore, AG Léger proposed that the plea of lack of legal basis should be rejected by the ECJ.

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[741] *Ibid.*

[742] *Ibid.*, points 52 – 65.

Following the proposal to dismiss the claim of lack of correct legal basis, the Opinion of AG Léger examined in turn the other grounds for annulment,[743] which he also proposed to be dismissed.

The ECJ followed in general the reasoning of AG Léger, and dismissed the application: Regarding the plea of illegality of DGSD on the ground that it was adopted on the wrong legal basis, following a presentation of certain relevant arguments of the German Government and of relevant provisions of primary European law and case law,[744] the

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[743] With regard to the plea of not stating the reasons to enact DGSD, and the relevant issues of exercising competence with respect to the principle of subsidiarity, the Opinion considered that in the area to which DGSD relates there is clearly exclusive competence of the Community so there was no need to demonstrate that the principle of subsidiarity was respected; *ibid.*, points 69 – 90. The pleas relating to the alternative claim of the applicant were equally proposed to be dismissed; *ibid*, points 91 *et seq.* Especially with regard to the plea of the German Government that the 'export prohibition' rule of DGSD is incompatible with the objective of a high level of consumer protection laid down by Articles 3(s) and 129a of EC Treaty, AG Léger referred to the correct in his view legal basis of the Directive, considering that since consumer protection was not the main objective of DGSD and since the new rules of harmonisation introduced by DGSD "[…] *justify and counterbalance the 'export' prohibition* […] *by the lasting improvement in the general level of deposit-guarantee schemes*", therefore the 'export prohibition' rule was not incompatible with the objective of a high level of consumer protection as provided by the EC Treaty; *ibid.*, points 108 – 109. It is submitted, however, that this reasoning appears elliptic: even if depositor protection is not an aim equally pursued by DGSD with the aim of harmonising national rules on DGSs, it is not clear why the relevant claim regarding depositor protection is to be dismissed without further examination in substance. *Cf.* see decision of the ECJ in Case 205/84 (*supra*, n 224) published at the time the case under examination was brought before the ECJ.

ECJ forthwith concluded that “[t]*he effect of the machinery established by* [DGSD] *is to prevent the* [MSs] *from invoking depositor protection in order to impede activities of credit institutions authorized in other* [MSs]. *Accordingly, it is clear that the Directive abolishes obstacles to the right of establishment and the freedom to provide services*”.[745]

With regard to the plea of incompatibility with the objective of a high level of consumer protection (Articles 3(s) and 129a of EC Treaty), the ECJ ruled that DGSD “[…] aims *to promote the right of establishment and the freedom to provide services in the banking sector.* […] *The reduction in the level of protection which may* […] *result in certain cases through the application of the second subparagraph of Article 4(1) of* [DGSD] *does not call into question the general result which the Directive seeks to achieve, namely a considerably improvement in the protection of depositors within the Community*”.[746] In this wording, the ECJ appears to be supporting that the aim of DGSD is depositor protection –by means of harmonising national rules on DGSs which may in some cases entail lessening of the level of protection for an interim period, in order for harmonisation to be achieved smoothly (as in the case of the temporary ‘export prohibition’ of Article 4(1) of DGSD).

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[744] Decision of the ECJ in Case C-233/94 (*supra* n 62), paras. 10 – 18.

[745] *Ibid.*, para 19.

[746] *Ibid.*, para 48.

Then, however, it is difficult to see how depositor protection is not an aim of DGSD or is not an aim equal to achievement of market integration through freedom of establishment and freedom to provide services.

Case C-233/94 is important, with regard to the reasoning both of the ECJ and of the Advocate General, as it led to an examination by the ECJ of the *ratio* and objective of DGSD.

The political disagreement of Germany to DGSD was transformed in legal terms into an argument that since DGSD was a depositor (consumer) protection measure its adoption required unanimity (on the basis of Article 235 EC Treaty) in which case DGSD could not have been adopted given the disagreement of Germany.

The decision of the ECJ may be considered, in our view, as unsatisfactory in terms of legal certainty: By dismissing the plea of wrong legal basis ruling that that it is “clear” that DGSD abolishes obstacles to market integration, the ECJ appears to have avoided entering into an in-depth discussion of the objective of the DGSD with regard to depositor protection, which might have led to a judicial examination of the wider issue of individual protection in the context of European finance law.

IV.2.2 THE ECJ DECISION IN CASE C-222/02 *PETER PAUL*

The decision of ECJ in *Peter Paul* is fundamental with regard to the issue of whether EU law, and in particular DGSD, confers justiciable rights on individual depositors.[747] It is then necessary to proceed to a critical analysis of *Peter Paul*,[748] with a view to determine *inter alia* whether it may also be applicable in the field of investment services.

In *Peter Paul* the ECJ considered a preliminary reference by the German Federal Supreme Court of Justice on questions relevant to the interpretation of EU law on deposit guarantee schemes as well as on credit institutions, insurance undertakings and investment firms, and ruled that, if the compensation of depositors prescribed by DGSD is ensured, DGSD (as well as the First Banking Directive, the Own Funds Directive and the Second Banking Directive) cannot be interpreted as precluding a national rule to the

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[747] See, among others, BINDER, J. – H. (2004) 'The Advocate-General's Opinion in Paul and Others v. Germany - Cutting back state liability for regulatory negligence?', *EBLR*, p. 463; BOUVERESSE, A. (2004) 'Responsabilité des Etats membres', *Europe*, vol. 12, p. 393; CARRA, M. (2005) 'La (ir)responsibilità dello Stato per omessa vigilanza bancarisa', *Giornale di diritto amministrativo*, p. 1175; MITSOU, A. (2006) 'Civil Liability of Supervisory Authorities in the Sector of Capital Markets to Investors under the Scope of ECJ Decision in Case Peter Paul*', *DEE*, vol. 10, p. 999; PROCTOR, C. (2005) 'Regulatory liability for bank failures: The Peter Paul case', *Euredia*, p. 73; TISON, M. (2005) 'Do not attack the watchdog! Banking supervisor's liability after Peter Paul', *CMLRev*, vol. 42, pp. 639-675.

[748] *Supra*, n 711.

effect that the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from defective supervision on the part of that authority.

Specifically, the questions referred by the German Federal Court of Justice to the ECJ were relevant to the interpretation of Articles 3 and 7 of DGSD, as well as to a number of provisions of Directives on credit institutions, insurance undertakings and investment firms.[749] The case in the main proceedings before the referring national court concerned three individuals who had opened term deposits accounts and had deposited money with a credit institution in Germany. The deposits took place while the transposition delay for DGSD had not yet lapsed (*i.e.* before 01.07.1995).[750] The credit institution had been licensed by the national competent authorities but was not a member of a DGS, having unsuccessfully applied for admission such a scheme. When the license (authorisation) of the credit institution was revoked, the claimants were not covered by any deposit guarantee scheme (due to the non-participation of the particular credit institution to any such scheme), as well as the non-transposition of DGSD into the German legal order at the time of the events, DGSD being transferred in 1998).[751] Thus they did not receive any compensation for the loss of their deposits. The depositors brought proceedings

[749] The Directives that the preliminary reference referred to were the First Banking Directive, the Own Funds Directive, the Second Banking Directive, the Second Consolidated Supervision Directive, CAD, ISD, and Directive 95/26/EC (the Post-BCCI Directive).

[750] *Peter Paul*, para. 13; DGSD, Article 14(1).

[751] *Paul*, para. 11, 14-15.

before the competent German Court of first instance against the German State asking for compensation in respect of the losses of their deposits, arguing that if DGSD had been transposed in time then "[…] *Bundesaufsichtsamt* [the competent national supervisory authority] *would have taken supervisory measures vis-à-vis the* […] *Bank before the applicants made payments to that bank*".[752]

Thus, the claimants did not seek compensation on the basis of supervisory authorities' liability for breach of a duty to effectively exercise their competence, but on the ground of breach of EC law by reason of non-transposition of DGSD in time.[753]

Summoned upon an appeal on a point of law, the German Federal Supreme Court of Justice considered that the decisive legal issue in case before it was whether a national rule, such as the German rule which is limiting liability for breach of official duty by the

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[752] *Ibid.*, para. 14. It seems that the claimants maintained that in this way they had been denied the opportunity not to deposit their money in the credit institution in the first place and thus not to have to suffer damage as a result of the failure of the institution. This point is not elucidated in the Court decision and, in general, there is some difficulty in understanding how the failure of the German State to transfer the Directive in time relates to the financial damage suffered by the claimants as a result of competent national authorities misconduct, *i.e.* as a result of the latters' failure to perform their supervisory duties effectively. The causal link between the breach of law (by the German State and by the competent supervisory authority) and the incurring of damage by the claimants is not evident; however, probably neither the German Courts nor the Court insisted on this point. The latter considered that the questions referred were not hypothetical but real and necessary for the referring national Court, and proceeded to answering them; see *ibid.*, para. 24.

[753] *Ibid.*, paras. 14-15, 18.

competent national authorities by imposing to them obligations only in the public interest, is compatible with applicable EC law.[754] It appears that it considered that for such a rule to be incompatible with EC law, the ECJ would have to rule that EC law imposed an obligation on national supervisory authorities to act not only in favour of the public interest, but also in favour of the individuals falling within the ambit of the Directive, *i.e.* of depositors, linking such an obligation to a right of the depositors "[…] *to have the competent authorities take supervisory measures in their interest* […]".[755]

The reaction ECJ to this preliminary reference was to rearticulate the relevant questions posed by the national court.[756] Having rearticulated the questions, the ECJ ruled that DGSD does not confer rights on the individuals. In specific:

The first preliminary question, as submitted, asked: (a) Whether the provisions of Articles 3 and 7 of DGSD confer on the individuals the "[…] *right to require that the competent authorities avail themselves of the measures mentioned* […]" in Article 3(2) to (5), in addition to the right to be compensated by a deposit guarantee scheme,[757] and (b) whether, if such a right is conferred on the individual, it also includes the right to

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[754] *Ibid.*, para. 20.

[755] *Ibid.*, paras. 21 and 22, at 2 and 3.

[756] On the rearticulation of preliminary questions by the ECJ see CHRISTIANOS, V. (1998) *Overruling of prior Judgments in the Case Law of the C.J.E.C**, Athens: Sakkoulas.

[757] *Peter Paul*, para. 23.

claim compensation for damage resulting from the misconduct of the competent authorities, beyond the amount specified in Article 7(1) of DGSD.[758]

The ECJ rearticulated the question, considering that "[…] *the Bundesgerichtshof seeks essentially to ascertain whether* [DGSD] […] *precludes a national rule to the effect that the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from defective supervision on the part of that authority* […]".[759]

This alteration of the question does not lead to a safe conclusion, in our view, as to whether the Court wished, in this way, to distinguish the notion of exercising supervisory competence not only in the public interest from the notion of the individuals having a right to require the competent supervisory authorities to act in their interest, or whether the ECJ intended to provide an interpretation of applicable EC law specifically with regard to the issue of exercising supervisory competence only in the public interest.

In order to answer the first question as rearticulated, the ECJ proceeded to examining Articles 6 and 7 of the DGSD, then Article 3 (2) to (5), and then Preamble recital 24. The ECJ found that as long as payment of compensation is ensured by the national DGS(s), Article 3 of DGSD does not confer on depositors a right to have the competent

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[758] *Ibid.*, para. 22 at 1.

[759] *Ibid.*, para. 25.

authorities take supervisory measures in their interest.[760] From this consideration, the ECJ reached the general conclusion that DGSD does not preclude a national rule to the effect that the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest.

It may be argued, however, in our opinion, that several long steps appear to have been taken in this line of reasoning by the ECJ: Indeed, one statement does not seem to lead necessarily to the next. The ECJ does not explain which is the legal situation in case the compensation of depositors by a deposit guarantee scheme is not ensured; furthermore, it does not explain why a depositor who suffered damage while the compensation system provided by DGSD was not ensured (as *e.g.* in the case of breach of the obligation to transpose DGSD in due time, within the applicable time limit) does not have a right under EU law to claim compensation –not from national supervisory authorities but from the MS, as in the case at hand.

In order to support its reasoning, the ECJ referred specifically to DGSD Preamble recital 24;[761] however, the ECJ does not seem to have taken into account all other recitals, of DGSD and the other Directives mentioned in the questions of the referring national court, and did not make particular references to its case-law on individual protection in case of breach of EU law.

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[760] *Ibid.*, paras. 29 and 30.

[761] *Ibid.*, para. 31.

The second question referred to the ECJ by the German Federal Supreme Court related to the issue of the *ratio*, scope and aim of EC law with regard to individual protection in the fields of banking, finance and insurance law. More specifically, question 2 sub-question (a) referred to the relevant Directives with a view to discover whether they "[…] *confer on the saver and investor rights to the effect that the competent authorities of the* [MSs] *must take prudential supervisory measures, with which they are charged by those directives, in the interests of that category of persons and must incur liability for any misconduct* […]" or whether "[…] [DGSD] *contain*[s] *an exhaustive set of special provisions for all cases of unavailability of deposits*".[762]

Thus, it seems that there is a difference between the scope and content of this question and of the first question referred by the national Court: the first question asked whether applicable EC law confers on depositors a "*right to require that the competent authorities avail themselves of the measures mentioned*" in the law, whereas part (a) of the second question asked whether EC law confers on depositors and investors "*rights*" which the competent national authorities are liable to protect. This sub-question was evidently wider in scope than the first, as it considered not only the case of depositors, but also the case of investors as individuals falling within the general ambit of EC law in the field of banking and finance. Moreover, in part (b) of its second question, the *Bundesgerichtshof* sought to find whether certain recitals of the second Consolidated Supervision Directive, CAD and ISD "[…] *provide assistance with interpretation for the purpose of answering the* [question], *regardless of whether they otherwise contain law applicable in the present case*".[763]

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[762] *Ibid.*, para. 23 at 2.

In this sense, it appears that the national court was implying the existence of a common *ratio*, at least to some extent, in the EU law with regard to investor protection; indeed, the referring court appears to have argued that, although the various Directives to which it referred in its second question "[…] *do not contain any express reference to the protection of depositors* […]",[764] yet they form part of an overall scheme of banking supervision rules which "[…] *would be denied practical effectiveness if the national supervisory authority were to exercise its functions only in the public interest* […]".[765]

Despite the importance of the *effet utile* criterion as underlined by the national court, its position that banking Directives do not contain any express reference to the protection of depositors was not accurate in our view; in fact, taking into account only the provisions to which it explicitly referred in its question 2(a), several references are made to depositor protection *expressis verbis*.[766] Furthermore, express reference to the protection of depositors and/or investors is made several times in the recitals to which the *Bundesgerichtshof* referred in part (b) of its second question.[767]

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[763] *Peter Paul*, para. 23 at 2(b).

[764] *Ibid.*, para. 22.

[765] *Ibid.*

[766] Specifically, in the First Banking Directive: Preamble, recitals 4 and 12; Article 6(1); in the Second Banking Directive: Preamble, recital 11; Article 3. In Own Funds Directive no explicit reference to depositor protection is made in Articles 2 – 7 to which the German court referred; however, reference is made in Preamble recital 1, which was omitted in the question referred. In Post-BCCI Directive: Preamble recitals 11 and 15.

The ECJ did not provide any answer to this general second question of the national court, with regard to issues or provisions not directly related to banking Directives; nor did the ECJ explain the reasons of its silence on this matter. In fact, the only reference the ECJ made in general to part (b) of the second question, which also referred to investors' protection, was that "[i]*n a number of the recitals in the preambles to the directives referred to in the second question, parts (a) and (b), it is stated in a general manner that one of the objectives of the planned harmonisation is to protect depositors*".[768] It is not clear, in our view, what is signified by the reference of the ECJ to the "general manner" of the statement of the objective to protect depositors in the recitals it referred to.[769] It is possible that the ECJ indirectly referred to the case-law, according to which the interpretation of a Directive may not be conducted only by reference to its recitals.[770] The position of AG Stix-Hackl on the issue seems to be in the same direction.[771]

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[767] Specifically: In the Second Consolidated Supervision Directive, Preamble, recital 11. It is not clear why the German Federal Court did not place this reference in the context of part (a) of its second question. In CAD: Preamble, recital 8. In ISD: Preamble, recitals 2, 5, 29, 32, 41, and 42. It is not clear, however, why the national Court referred only to recitals in the Preamble of ISD and not also to articles of the same Directive, which explicitly refer to investor protection, or which are closely connected to it. Indeed, numerous provisions of ISD explicitly referred to investor protection: Article 1(2); Article 10; Article 11(3); Article 12; Article 14(4); Article 17(3); Article 19(8), (9); Article 21(1)-(3).

[768] *Peter Paul*, para. 38.

[769] *Ibid.*

Thus, although the recitals in these Directives refer not only to the objective of protecting depositors, but also to that of protecting investors, the ECJ narrowed the focus of its reasoning to the issue of depositor protection, tacitly excluding all analysis on investor protection and its interrelation to depositor protection.

In responding thus only to second question, part (a), and by referring to the "general manner" of the statement of the objective of depositor protection in the Preamble of cited Directives and to the various supervisory obligations imposed by the same Directives upon the national competent authorities with regard to credit institutions,[772] the ECJ ruled that "[…] *it does not necessarily follow either from the existence of such obligations or from the fact that the objectives pursued by those directives also include the protection of depositors that those directives seek to confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities*".[773] Explaining this conclusion, the ECJ noted that "[…] *it should first be observed that Directives 77/780, 89/299 and 89/646 do not contain any express rule granting such rights to depositors*".[774] The ECJ further referred

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[770] See ECJ decision of 13.11.1990 in Case C-106/89, *Marleasing SA* v *La Comercial Internacional de Alimentación SA* [1990] ECR I-4135.

[771] See Opinion of AG Stix-Hackl in *Peter Paul*, *op. cit.*, points 135 and 136.

[772] *Peter Paul*, para. 39.

[773] *Ibid.*, para. 40.

[774] *Ibid*, para. 41.

to essential harmonization and mutual recognition considerations,[775] also referring to recitals 1 and 4 in the Preamble of the Second Banking Directive, and considering the conclusion to be drawn from these as "clear".[776] It also considered the necessity to coordinate national rules on liability in the event of defective supervision,[777] noting that "[…] *it is not possible in a number of* [MSs] *for the national authorities responsible for supervising credit institutions to be liable in respect of individuals in the event of defective supervision*".[778]

Thus, it might be argued that instead of considering whether a national rule precluding claims of individuals for compensation by competent authorities is compatible with EU law, the ECJ stated the existing legal situation in certain MSs, which exactly precluded such claims.[779]

The above reasoning of the ECJ led to the negative answering of the third question of the preliminary reference, which was relevant to State liability issues for breach of EU

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[775] *Ibid.*, para. 42; *cf. ibid.* paras. 35 and 45.

[776] *Ibid.*, paras. 36 and 37, respectively.

[777] *Ibid.*, para. 43.

[778] *Ibid.*, para. 44.

[779] Regarding the banking supervisory liability regimes in the EC, see TISON, M. *op.cit.*, p. 646 *et seq.*

law in the context of the case at hand, and particularly in the event of defective supervision on the part of the competent national authorities.[780]

Thus, the ECJ, in providing its ruling and in explaining its *ratio decidendi*, appears to have meticulously avoided making any reference to field of investment services, despite the relevant direct and precise questions asked by the referring national court.

The issue that inevitably arises is whether this omission is an implicit way for the ECJ to state that the two relevant fields of law, *i.e.* EU banking and EU investment services law, have to be treated as distinct with regard to their *ratio*, scope and aim, at least with regard to the existence and nature of rights of depositors and (retail) investors, as *a priori* protected by EU law.

In this regard, it appears in our view that the examination of *Peter Paul* in its own merit, as well as taking into account the problematic of the interrelation of depositor and investor protection regime as provided by the relevant Directives, does not lead to any safe conclusions as to whether the *ratio decidendi* of the ECJ in *Peter Paul* may be extended to investment services in the context of EU law until the Crisis;[781] indeed, arguments may be presented both in favour and against such an approach:

If it is considered that the *ratio* and aim of EU banking law and EU investment services law, with regard to individual (depositor or retail investor) protection, is the same or

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[780] *Peter Paul*, paras. 23, 48 *et seq.*

[781] For some considerations on the applicability of *Paul* in the context of public offering of securities as regulated by EU law, see TISON, M., *op. cit.*, p. 674.

similar, then *Peter Paul* may be applicable in investment services. If on the other hand it is considered that the *ratio* and aim of EU banking law with regard to individual (depositor) protection differs significantly from the respective *ratio* and aim of EU investment services law with regard to individual (retail investor) protection, according to the intrinsic characteristics of each sector especially in connection to risk, then *Peter Paul* should not be extended to apply in investment services.

While this dilemma may be more difficult to resolve in the context of EU law as in force pre-Crisis, the evolution of EU finance law since the Crisis may offer a solution to this ambiguity (at least *de lege ferenda*). As noted, the fundamental changes in EU financial architecture, the creation of new central EU regulatory and supervisory authorities, and the proposals for new recovery and resolution rules cannot easily be reconciled with a regime of total immunity of competent authorities from tortuous liability.

In this new context, even if their competence is to be exercised in the public interest (but not "only" in the public interest), this does not appear adequate to *a priori* preclude tortuous liability where the competent authorities have the authority and powers to regulate and supervise financial markets and intermediaries. Retail investors, accepting an increased degree of risk by their participation in investment transactions, have the *animus* to conclude such transactions also because they have confidence in the financial system, a central position in which is held by the competent authorities –not only from a legal and enforcement point of view but also on an institutional level.

Thus, effectiveness of the new EU finance law, which is closely connected to protection of confidence in the financial market system, has to be examined in our view in conjunction to effective protection of individuals: beyond the problematic on the differentiation of depositors *vis-à-vis* retail investors, it would be very difficult in our opinion to support the application of *Peter Paul* in the area of investment services.

While the ECJ ruling in *Peter Paul* did not take such considerations under account, it suffices in our view to consider that this ruling referred only to the EU finance law regime before the Crisis, so that it is not applicable to the new and emerging EU finance law regime, and at least to the new EU investment services law with regard to retail investor protection. Certainly, a preliminary reference on such issues by a national court of law would prove useful.

Such an opportunity arised in the Three Rivers case, which should also be taken into account for the purposes of this study, in particular since *ad hoc* ECJ case-law is scarce.

The *Three Rivers* case in the UK

In the *Three Rivers* case,[782] the *House of Lords* (UK) considered the question of whether EU law may be interpreted as conferring rights on individual depositors.

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[782] *Three Rivers District Council* v *Governor and Company of the Bank of England* [2000], 2 WLR 1220 (HL); *Three Rivers District Council* v *Governor and Company of the Bank of England* [2001], UKHL 16 (HL); see also ANDENAS, M. (2000) 'Liability for Supervisors and Depositors' Rights – the BCCI and the Bank of England in the

BCCI had been established in 1972. The activities of the BCCI group of companies raised suspicions of supervisors. A report produced in 1991 by the auditors appointed by the *Bank of England*, in order to protect depositors' interests, revealed that BCCI was connected to international financial crime, including money laundering, and was involved in fraudulent activities.

Following evaluation of the report, the competent authorities terminated the operation of BCCI in 1991, affecting a large number of depositors. In the UK, an "*Inquiry into the Supervision of the Bank of Credit and Commerce International*" was issued on 22.10.1992 chaired by LJ Bingham[783] giving rise to claims on the ground liability in tort

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House of Lords', *Euredia*, p. 407; FAIRGRIEVE, D. (2003) *State Liability in Tort - A Comparative Law Study*, Oxford: OUP; GRAY, J. (2006) 'Court Castigates BCCI Liquidators' Claim against Bank of England, Legal and Regulatory Commentary', *JFRC*, vol. 4, p. 411; *idem* (2008) 'Lessons from BCCI Saga for the Current Accountability Debate Surrounding Northern Rock', *JIBLR*, p. 37; WALKER, G.A. (2006) *European Banking Law - Policy and Programme Construction: 6 (Sir Joseph Gold Memorial)*, *op. cit.*, p. 205 *et seq.*, wherein further references. Although relevant English law issues arising fall out of the scope of this study, this case is significant as the *House of Lords* proceeded to an extensive analysis and interpretation of applicable European law, and in particular of the First Banking Directive, with a view to determine whether breach of rights conferred to depositors by European legislation had occurred by the alleged omission of the *Bank of England* to effectively supervise and withdraw in time the authorisation of the *Bank of Commerce and Credit International* (BCCI).

[783] Available at http://www.official-documents.gov.uk/document/hc9293/hc01/0198/0198.pdf. LJ Bingham noted *inter alia* that "[t]*he problem of fraud is one to which explicit reference has not been made in the Basle Concordats of 1975 and 1983, or in the Community Directives, or in the Banking Act 1979*"; *ibid.*, paragraph 1.45, p. 17. Having investigated the facts of the case, LJ Bingham concluded with regard to the supervision as conducted by the *Bank of England*

of the *Bank of England*[784] to compensate the claimant depositors who incurred financial damage due to the illegal activities of BCCI which led to its forced closure.[785]

(at the time of the facts competent for the supervision of banks) *inter alia* that "[p]*rime responsibility of course rests with those who devised, directed and implemented the frauds which were practiced. Whether the frauds could and should have been discovered by the auditors earlier is an issue I have not been asked to investigate. The history, however, makes clear that fraudulent management were able to exploit the structure of the group to facilitate and disguise the frauds. This might have been in part prevented, or brought to a head, much earlier, had strong and resolute action been taken to insist on structural change as a condition of continued authorisation and to impose on the group the supervisory regime it was known to require.* […]*The Bank did not pursue the truth about BCCI with the rigour which BCCI's market reputation justified. In later stages the Bank came to rely to an excessive extent, in my opinion, on the auditors: under the British system of supervision the auditors have a crucial role to play but the duty to supervise is placed on the Bank and it is a duty which cannot be delegated. It is the Bank, not the auditor, which is the supervisor. In these respects the Bank's supervisory approach to BCCI was in my opinion deficient. How different the course of events would have been had these deficiencies not existed, one can only speculate*"; *ibid.*, para. 2.484, p. 149-150). The Inquiry included a number of important recommendations; *ibid.*, Chapter 3, p. 181 *et seq.*

[784] For the Bank of England as a competent authority, see HADJIEMANNUIL, C. (1996) *Banking Regulation and the Bank of England: Discretion and Remedies*, PhD Thesis, London: UCL.

[785] The action against the *Bank of England* was based on the tort of misfeasance in public office, under English law. *Cf.* section 1 of the Banking Act 1987 FSMA 2000, Schedule 1 para. 19. See also ANDENAS, M. and FAIRGRIEVE, D. (2002) 'Misfeasance in Public Office, Government Liability and European Influences', *ICLQ*, vol. 51, p. 757.

Before entering the investigation of the facts of the case, LJ Bingham made certain general but important comments, which appear pertinent in all cases of intermediary default as a result of fraud.[786]

In order to decide on the case, the *House of Lords* took into account the relevant European law, and specifically the issue of whether EC banking law Directives conferred rights to individual depositors, concluding that no such rights were conferred to individuals (so that the first condition of *Francovich* case-law was not met according to the *House of Lords*). Lord Hope considered, taking into account the legislative background and the terms of the First Banking Directive, as well as the case-law of the ECJ, that the First Banking Directive was an instrument of harmonisation (having to achieve both objectives, of protecting deposits and of creating conditions of equal competition between banks operating in more than one states) which did not necessitate

[786] "*No one reading the history of BCCI and its supervision today can do so without knowledge of what happened in the end. But that is knowledge which no one had until the last week or so of the bank's active existence. It would not be fair to judge the actions or decisions of supervisors involved at any particular time on the basis of knowledge which they did not have and could not reasonably have had. Nor would it be fair to judge the actions or decisions of supervisors on the basis of supervisory principles or practices which had yet to take shape or gain acceptance at the relevant time* […]*"; ibid.*, paragraphs 2.2 and 2.3, p. 29. The parameter of actual knowledge possessed by supervisors at the critical time to proceed to taking action, in order for supervision to be effective, is critical and indeed is difficult to assess *ex post facto* (but not impossible). Furthermore, knowledge of facts or indications will require the ability on the part of supervisors to collect, combine and analyse information in meaningful ways, in order to assess the behaviour of a supervised entity (which may also be a group of companies). Especially in the case of fraud, and in general financial crime, information officially submitted by the entity will be (at least partly) false and misleading.

the conferral of rights by the Directive to individual depositors; no provisions of the Directive conferring rights to individuals were thus identified by Lord Hope.

It is interesting to note, that while the *House of Lords* as supreme national court of justice is under the obligation to refer preliminary questions on the interpretation of European law to ECJ (under the terms provided by Article 234 TFEU, then Article 177 EC Treaty), it was considered that no such reference was necessary since the issue was *acte clair* and as unanimity was reached by the *House of Lords*.[787]

Relevant to the problematic under examination is also the EFTA Court decision of 2013 in case E-16/11, *EFTA Supervisory Authority* v *Iceland*, which distinguished *Peter Paul* from relevant cases on retail financial market participants' protection and State liability issues and which also has to be taken into account.

The EFTA Court decision in case E-16/11, EFTA *Supervisory Authority* v *Iceland*

While *Peter Paul* referred to the EU finance law regime as developed before the Crisis, the reasoning of the ECJ in this case was taken into account in a recent case brought before the EFTA Court, relating to the interpretation of DGSD in the context of European Economic Area (EEA) Agreement, following the collapse of the Icelandic banking sector during the Crisis.

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[787] The competent Court of Appeals had not considered the issue as *acte claire* but had also refrained from proceeding to a preliminary reference to the ECJ.

In case E-16/11, *EFTA Surveillance Authority* v *Iceland*,[788] the EFTA Court was asked to declare that by failure to ensure payment of the minimum amount of compensation to *Icesave* (a branch of *Landsbanki Íslands hf*, a credit institution established in Iceland) in the Netherlands and the UK, within the relevant time limits, Iceland had failed to comply with its obligations resulting from the Agreement on the EEA relating to the transposition of DGSD.[789] Taking into account the preamble to DGSD,[790] as well as the provisions of DGSD, [791] as well as the relevant national Icelandic legislation,[792] the EFTA Court considered three pleas of the applicant EFTA Surveillance Authority (ESA), the first being that Iceland was under an "obligation of result" to ensure that a deposit guarantee scheme is set up capable of guaranteeing that in the event of deposits being unavailable the aggregate deposits of each depositors are covered in all circumstances to the amount provided by Article 7(1) of DGSD, and to ensure that duly verified claims by depositors are paid within the time limit laid down by Article 10 of

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[788] EFTA Court decision of 28.01.2013 in case E-16/11, *EFTA Surveillance Authority* v. Iceland (nyr). See also BABIS, V. (2013) 'Bank Failures, State Liability, and Protection of Depositors in Foreign Branches: EFTA Surveillance Authority v. Iceland', *University of Cambridge Faculty of Law Research Paper*, vol. 5, http://ssrn.com/abstract=2216847.

[789] Point 19a of Annex IX to the EEA Agreement.

[790] And in particular recitals 1, 2, 3 , 4 , 7, 16, 23, 24, and 25 thereof.

[791] And in particular Articles 1, 3, 4, 7, 8, 9, and 10 thereof.

[792] *I.e.* Act No. 98/1999 (of the Republic of Iceland) on a Deposit Guarantee and Investor Compensation Scheme.

DGSD.[793] In particular, the applicant contented that Iceland had not fulfilled its obligations simply by transposing DGSD into national law, and setting up and recognising a deposit guarantee scheme without any regard as to whether the compensation of depositors was in fact ensured under the conditions prescribed by DGSD.[794] In this regard, ESA argued that if follows from *Peter Paul* "[…] *that the ECJ considers Articles 7 and 10 of* [DGSD] *to require a clear and precise result to be achieved*".[795] The Commission, intervening in support of ESA, concurred that DGSD imposes said obligation of result,[796] to ensure capability of the deposit guarantee scheme to repay covered deposits, noting that any other interpretation would render the provision ineffective to ensure the objective of DGSD,[797] and agreed on the interpretation of *Peter Paul* by ESA.[798] Moreover, the Commission noted that State liability *vis-à-vis* individual depositors would have to be established by national courts.[799] On the contrary, Iceland submitted that DGSD imposes no obligation of result on an (EEA) State to use its own resources in order to guarantee the pay-out of a deposit

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[793] EFTA Court decision E-16/11, paras. 75-76.

[794] *Ibid*., para. 77.

[795] *Ibid*., para. 78. ESA referred specifically to paras. 26, 27 and 30 of *Peter Paul*.

[796] *Ibid*., paras. 86-87.

[797] *Ibid*., para. 88.

[798] *Ibid*., para. 89.

[799] *Ibid*., para. 95.

guarantee scheme,[800] and that DGSD places an obligation upon the State "[…] to set up and supervise a deposit-guarantee scheme, but there is no suggestion whatsoever that it must pay compensation".[801] In particular, Iceland emphasised that "[t]*he sole purpose of recital 24 in the preamble to* [DGSD] *is to exclude State liability if the compensation of depositors is ensured* […]".[802] Among other intervening parties, Lichtenstein argued that DGSD was not intended to deal with the collapse of an entire banking system (as in the case of Iceland),[803] while the UK argued that DGSD imposes an obligation on EEA States to ensure payment of prescribed compensation to eligible investors within the applicable time limit.[804]

The EFTA Court noted that "[…] *there is a general obligation on the EEA States to ensure that the provisions of a directive are fully effective*",[805] further referring to the various degrees of detail in the rules provided by various directives.[806] Considering that the question of State liability is not within the scope of the proceedings before it,[807] the

[800] *Ibid*., para. 96.

[801] *Ibid*., para. 97.

[802] *Ibid*., para. 100.

[803] *Ibid*., para. 110.

[804] *Ibid*., para. 114.

[805] *Ibid*., para. 120.

[806] *Ibid*., para. 121.

[807] *Ibid*., para. 123.

EFTA Court proceeded in interpreting DGSD. In this context, noting the duality of the aims pursued by DGSD,[808] the EFTA Court considered that the obligation of an EFTA State under the EEA is to ensure that within its territory one or more deposit guarantee schemes are introduced and officially recognised, [809] and that the depositor's right to compensation may be subject of an action by the depositor against the DGS,[810] and therefore that DGSD does not lay down an obligation on an EFTA State and its authorities to ensure compensation if a deposit guarantee scheme is unable to cope with its obligations in the event of a systemic crisis.[811]

Furthermore, the EFTA Court consider that the alleged obligation of result cannot be derived from *Peter Paul*,[812] without providing in our view any reasoning as to this conclusion (except from that the case it examined should be distinguished from *Peter Paul* on the facts, which is not satisfactory reasoning in our opinion).[813]

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[808] *Ibid*, para. 125, referring also to the Opinion of AG Léger in case C-233/94 (*supra* n 62), at para. 19.

[809] *Ibid*., paras 126 – 130.

[810] *Ibid*., paras 131 – 143.

[811] *Ibid*., paras. 144 and 178.

[812] *Ibid*., para. 145.

[813] *Ibid*.

Thus, the first plea of ESA was dismissed by the EFTA Court. The other pleas were dismissed as well.[814]

While the ruling of the EFTA Court does not constitute binding interpretation of DGSD for EU MSs, case E-16/11 is important with regard to the issues that were treated by the Court and the parties, including the European Commission which took a clear position that the ECJ in *Peter Paul* acknowledged an obligation of result imposed on the MSs.

While in our opinion the EFTA Court provided a very narrow interpretation of DGSD for the purposes of EEA, its judgment took into account various aspects of the relevant problematic especially when examined in the context of a systemic banking crisis, in which as it noted a severe financial crisis may turn into sovereign default if DGSs are underwritten by States.

In this regard, stating that, "[h]*ow to proceed in a case where the guarantee scheme is unable to cope with its payment obligations remains largely unanswered by* [DGSD]",[815] the EFTA Court appears to have considered that avoidance of public interest considerations, as expressed in disallowing the financing of depositors' compensation by public funds, are more important than the protection of individual depositors.

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[814] The other two pleas related to discrimination contrary to DGSD and to Article 4 of the EEA; *ibid*., paras. 186 – 227.

[815] *Ibid*., para. 160.

Interim Concluding Remarks

Beyond payment of minimum *ex lege* compensation to retail investors in the event of intermediary default, EU law has proven –at least until the Crisis– tacit if not hesitant to recognize the application of the *acquis* on individual protection in the area of secondary EU financial legislation.

If a definitive answer was required as to whether the *ratio decidendi* of *Paul* may validly be applied to investment services and investor protection, it may be argued in our view that it may be construed to this effect only to the extent that the legal status of a (retail) investor is the same or very similar to that of a depositor; and to the extent that EU law in the area of banking and investment services has the same *ratio* and aim.

While such an interpretative approach may be consistent with the treatment of both categories of financial market participants by EU law and case-law until the Crisis, the same is not evident in the new EU financial architecture that emerges from the Crisis; the new developments in EU financial law rather lead to the opposite conclusion.

Thus, and despite the uncertainties caused by the new proposed regime for the recovery and resolution of financial institutions regarding the legal status of depositors *vis-à-vis* retail investors, in our opinion even EU law is to be interpreted as not allowing for tortuous liability of supervisory authorities in the sector of banking, as ruled by the ECJ in *Peter Paul*, such interpretation may not be extended *de lege lata* to investment services law and retail investors.

PART C

RETAIL INVESTOR PROTECION IN THE HELLENIC LEGAL ORDER: APPLICATION OF NATIONAL LAW IN THE EVENT OF INTERMEDIARY FAILURE, UNDER THE LIGHT OF EU LAW AND BEYOND EU LAW

CHAPTER V. PROTECTION OF RETAIL INVESTORS IN THE HELLENIC LEGAL ORDER AS CREDITORS IN THE CONTEXT OF LIQUIDATION OF FINANCIAL INTERMEDIARIES

Hellenic law provides for two double sets of rules regarding retail investor protection (in the form of compensation) in case of an intermediary failure: One set of rules applies to claims against the firm under liquidation,[816] while the other to the verification of claims and payment of compensation by the relevant funds. These sets of rules are further subdivided into two distinct set of rules, one on investment firms, and the other on credit institutions (providing investment services). Furthermore, common liquidation law is applicable to investment firms (after completion of the stage of special liquidation).

Thus, in order to answer examine whether effective protection is provided by the Hellenic legal order to retail investors in the event of investment firm failure (especially as a result of tort), it will be necessary to examine first the rules on protection of retail investors in the context of liquidation of financial intermediaries, in order to assess whether these rules constitute a coherent and effective normative system.

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[816] *Infra*, Chapter VI.

V.1 RETAIL INVESTOR PROTECTION AND THE SPECIAL LIQUIDATION OF INVESTMENT FIRMS

The protection of retail investors in the event of intermediary failure is differentiated in the Hellenic legal order depending on the legal form of the financial intermediary, *i.e.* on whether the financial intermediary is incorporated and authorised as an investment firm or as a credit institution (also authorised to provide investment services). This duality in the protection regime merits analysis.

V.1.1 THE SPECIAL LIQUIDATION OF INVESTMENT FIRMS

At about the same time as ICSD was transposed into the Hellenic legal order,[817] new rules on the special liquidation of investment firms were issued by a modification of Law 1806/1988.[818] For the purposes of research, the analysis of the special liquidation of investment firms should not be limited to law as in force (Law 3606/2007) but should also take into account its original content (as in Law 1806/1988, at the time when ICSD

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[817] Law 2533/1997 transposing ICSD entered into force on 11.11.1997.

[818] By Article 12 of Law 2561/1998 a new Article 4a was added to Law 1806/1988, entering into force on 03.11.1998 (*i.e.* at a time when Law 2533/1997 had already entered into force). The rules on special liquidation were further modified by subsequent legislation, and were finally embodied, after lesser modifications, in Law 3606/2007.

was transferred into the Hellenic legal order), allowing for a wider evaluation of the development of relevant rules as well as of relevant case-law.

After the withdrawal of the authorisation of an investment firm by the HCMC, the ministerial decision which authorising the setting up of the investment firm and approving its articles of association was also withdrawn, following which the investment firm entered a stage of special liquidation.[819]

An important legal consequence of the commencement of the special liquidation procedure was that while it lasts, and for a period of six (6) months from the completion of the procedure of clients' assets recovery[820] the investment firm cannot be declared bankrupt, and for the same period of time individual prosecution and any mandatory enforcement against the firm are suspended.[821]

While said provisions refer to "suspension" of individual prosecution and mandatory enforcement, relevant case-law has considered this stay of proceedings as an absolute bar to even submitting claims by retail investors against the investment firm under special liquidation, such claims been considered as inadmissible.[822] As a result, retail

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[819] Law 1806/1988, Article 4a.

[820] Which took place according to Law 1806/1988, Article 4a (5) – (7).

[821] Law 1806/1988, Article 4a (1).

investors have to revert from exercising any remedies against the investment firm under special liquidation, until the completion of the relevant procedure, which entails unavoidably a great length of civil proceedings against the investment firm.[823]

Moreover, this compulsory stay of civil proceedings against the investment firm due to its entry into special liquidation does not extend to civil proceedings against other persons connected to it,[824] as especially the persons in its direction. As a result, during the same period that legal action against the investment firm under special liquidation is not allowed, final decisions may be issued by competent civil courts of law regarding the responsibility of the persons directing it, or other natural or legal persons connected to it.[825]

In our opinion, the strict and extensive interpretation of the provision entailing suspension of individual prosecution and mandatory enforcement against the investment firm during the stage special liquidation, as adopted by case-law, goes beyond what is required by the aim of this provision and is not compatible even with the wording of

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[822] See indicatively Athens MJ-CCFI 1725/2008 (nyr); Athens MJ-CCCI 4842/2008 (nyr); Athens MJ-CCFI 5249/2008 (nyr); Athens SJ-CCFI 3006/2007 (nyr); Athens MJ-CCFI 1593/2007 (nyr); Athens MJ-CCCI 7913/2007 (nyr).

[823] For example, in the case of *Worldwide Investment Services* (see *infra* n 1141), the special liquidation procedure commenced in 2003 and has not yet been completed.

[824] The wording of the provision of Law 1806/1988, Article 4a, referred explicitly suspension of prosecution and enforcement against the AEPEY under special liquidation only. The same provision is repeated in Law 3606/2007, Article 22, which replaced the relevant provision of Law 1806/1988.

[825] See case-law cited *supra* n 822.

said provision. Indeed, the aim of the provision is to protect the assets examined under special liquidation procedure from individual claims and attachment; this aim may be served, in our view, merely by a suspension of enforcement of decisions, and not by absolute inadmissibility of claims filed against the investment firm during the period of special liquidation.

In this sense, the rule on suspension of individual prosecution should in our view be interpreted strictly, entailing that either individual claims are not adjudicated (but may be filed) until the completion of the special liquidation procedure, or that even if such claims are adjudicated, the competent court of law will issue a decision which will not be enforceable until the completion of the special liquidation procedure.

Thus, in our view the strict approach of existing case-law considering inadmissible all claims filed during the special liquidation procedure is not compatible with the teleological and the literal interpretation of relevant provisions. Moreover, there is no apparent reason in our view why actions requesting only the judicial recognition of claims,[826] or applications for interim measures, may not be exercised or should be suspended during the special liquidation procedure.[827]

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[826] Under Hellenic procedural law, a claimant may request the competent court of law only to recognise the existence of his claim or: see Articles 69 – 72 and 223 of HCCP, and Articles 71 – 73 of HAPC.

[827] In this regard, it is interesting to note that the provision of Article 4a of Law 1806/1988 (and now the relevant provision of Article 22 of Law 3606/2007) refers explicitly to suspension of “mandatory” enforcement.

The organs of the special liquidation procedure (as provided by Law 1806/1988 and now by Law 3606/2007)[828] are the Overseer of the liquidation and the Liquidator. The Overseer of the liquidation is appointed by decision of the HCMC,[829] and may with the approval of the HCMC retain the advisory services of a natural or legal person specializing in AEPEY operation.[830] The Liquidator is appointed by decision of the competent court, following request by the Overseer.[831]

After his appointment, the Overseer has *inter alia* to create an inventory and separate the assets of the investors from those of the firm,[832] and then inform the JGF as to the claims that were not satisfied and to provide it with all necessary information in order for payment of compensation to be effected by the latter, according to applicable

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[828] The translation of Law 3606/2007 in English, as referred here, is that provided by HCMC at www.hcmc.gr .

[829] Law 1806/1988, Article 4a(2); Law 3606/2007, Article 22(2). While the appointment of the Overseer is regulated by this provision, there is no specific provision regarding the dismissal or replacement of the Overseer; *cf.* Article 20(5) of Law 3606/2007 regarding the replacement of the “provisional trustee” by decision of the HCMC (*infra* n 838). The Overseer and the Liquidator enjoy immunity from civil and criminal responsibility with regard to the investment firm’s obligations created before their appointment; Law 3606/2007, Article 22(12) (replacing Article 4a(11) of Law 1806/1988, according to initial enumeration); this provision was originally introduced by Article 18 of Law 2733/1999, having retrospective effect.

[830] Law 3606/2007, Article 22(2).

[831] Law 1806/1988, Article 4a(3).

[832] Law 3606/2007, Article 22(5).

legislation.[833] Upon completion of the special liquidation procedure, the common liquidation procedure of the investment firm commences (according to common provisions on the liquidation of *sociétés anonymes*).[834]

Law 1806/1988 further provided that the special liquidation procedure is supervised by the HCMC.[835] Law 3606/2007 provides that HCMC issues the decision appointing the Overseer, by which it also determines his remuneration and regulates general matters relating to the special liquidation process,[836] while the Overseer reports to the HCMC as to the course of the liquidation.[837]

While it is clear, in our view, that the special liquidation procedure is under the auspices and the supervision of the HCMC,[838] no specific rules are provided regarding

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[833] *Ibid.*

[834] Law 3606/2007, Article 22(9) and (10). *Infra*, Ch V.2.2.

[835] Law 1806/1988, Article 4a (3).

[836] Law 3606/2007, Article 22(2).

[837] *Ibid.*, Article 22(3) and (9).

[838] *Cf.* Article 20(3) and (4) of Law 3606/2007 regarding the provisional suspension of an investment firm's authorisation which provides that the HCMC may appoint a "provisional trustee" (according to the term used in the available official translation, *supra* n 828) who "[…] *shall be subject to the control and supervision of the* [HCMC] *and his duties shall continue as long as the firm is under provisional suspension* […]". It is reasonable in our view to consider that since the "provisional trustee" (whose tasks are relevant to safeguarding the investment firm clients' interests) is placed explicitly under the control and supervision of the HCMC, the same applies to the Overseer in the

the nature, mode and extent of cooperation between the latter and the Overseer, as well as any procedural and substantive rules to resolve any issues or differences arising in the context of the special liquidation procedure.[839]

More generally, the legal framework on the relation between the HCMC, the JGF, and the organs of the special liquidation procedure is not coherent and does not achieve legal certainty, in our opinion. While certain new rules have been introduced by Law 3606/2007 regarding the remuneration of the Overseer and the Liquidator,[840] providing *inter alia* that the JGF may be asked to cover relevant expenses,[841] the legislative framework as has been developed does not lead, in our view, to a safe conclusion as to whether the JGF procedure and the special liquidation procedure are to be understood as components of such a single, wider procedure, aiming at the protection of investment firm's creditors.[842] The emerging uncertainty is intensified by provisions referring on

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context of the special liquidation procedure. Moreover, it should be noted that the term "provisional trustee" as appearing in said official translation is not accurate in the context of the Hellenic legal order (which does not know the notion of trusts and trustees); the exact translation of the original term used in Law 3606/2007 is provisional administrator.

[839] No important improvements resulted in this direction from the introduction of Law 3606/2007, which did not materially modify the relevant provisions of Article 4a of Law 1806/1988 (see also n 818).

[840] Law 3606/2007, Article 22(2).

[841] *Ibid*.

[842] *Cf*. Law 3606/2007, Article 23(1) according to which payments by the investment firm under special liquidation to retail investors is notified to the JFG and *vice versa*.

the one hand to the HCMC regulating general matters of the liquidation process,[843] and on the other hand to the JGF entering into agreements with the Overseer as to "*the schedule of tasks of the special liquidation*".[844]

According to the provisions of Law 1806/1988, as repeated by Law 3606/2006,[845] regarding verification of claims in the context of the special liquidation procedure,

> "*Right after his appointment, the Overseer shall make an inventory and shall separate from the other assets of the firm the assets, cash and securities of the firm, as well as the assets, cash and securities of third parties which are connected to the provision of investment services by the company* […] *which are held by the firm or have been delivered thereby to the Central Security Depository or Banks for safekeeping. The Overseer, within ten (10) days of his appointment, shall invite the beneficiaries of any claims, by notices published* […] *to announce their claims along all required documentation within three (3) months of the last publication.* […]".[846]

[843] See also n 836.

[844] Law 3606/2007, Article 22(2), last indent.

[845] See Introductory Report (Preamble) of Law 3606/2007 available at http://www.parliament.gr/ergasies/nomosxedia/EisigisiEpitropon/546/A-HRIMAT-EIS.pdf

[846] Law 3606/2007, Article 22(5) (replacing Article 4a(5) of Law 1806/1988).

"*Particularly* [847] *for claims relating to the delivery of cash or securities* [848] *held by the firm and associated* [849] *to the provision of investment services thereby* […], *the liquidator* [850] *shall verify the claims on the basis of entries in the books and records of the firm within three (3) months*".[851]

"*Within a period not exceeding two (2) months of the said verification of claims, the liquidator shall deliver* [852] *the cash and financial instruments of third parties held by the firm and associated with* [853] *the provision of investment services thereby* […]. *More particularly, the liquidator shall commensurably satisfy the beneficiaries of unregistered instruments and cash, where existing unregistered financial instruments and cash held by the AEPEY on behalf of its*

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[847] The original version of this provision in the Hellenic language refers to "particularly" (instead of "particulars" as in the official translation provided by the HCMC).

[848] The original version of this provision in the Hellenic language refers to delivery of cash or financial instruments "*in naturam*", which has not been repeated in the official translation provided by the HCMC.

[849] The exact translation of the original is in our opinion "connected to" (instead of "associated with").

[850] The relevant provision of Article 4a(6) of Law 1806/1988 provided that the verification of claims is effected by the Overseer.

[851] Law 3606/2007, Article 22(6) (replacing Article 4a(6) of Law 1806/1988).

[852] See n 848.

[853] See n 848.

clients [[854]] *are not sufficient to satisfy the beneficiaries of unregistered instruments or cash, respectively*”. [855]

Thus, according to the clear wording of the above provision, the verification of claims is effected by the Liquidator “*on the basis of entries in the books and records of the firm*”.[856] Beyond doubts raised in our opinion as to the effectiveness of the protection awarded to creditors of the failed investment firm (including retail investors) by application of this claim verification rule –especially where failure and withdrawal of the authorisation of the firm is connected to unlawful book and record keeping–[857] further discrepancies arise due to the lack of uniformity of this rule even in the context of the special liquidation procedure: According to another rule provided by the same law, financial instruments and cash belonging to the clients of the investment firm under special liquidation, as separated by the assets of the firm in order to be distributed, “[…] *shall include, in addition to financial instruments and monetary amounts belonging to the clients of the AEPEY pursuant to the rules of contract law* [[858]], *financial means in*

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[854] In the original version in the Hellenic language: “third parties”.

[855] Law 3606/2007, Article 22(7) (replacing Article 4a(7) of Law 1806/1988).

[856] *Supra*, n 851.

[857] This has also been noted as a general remark on the claim verification rules in such cases by the 2005 OXERA study (*supra*, n 25), pp. 47 – 48.

[858] The text of the original version of Law 1806/1988, Article 4b(4) in the Hellenic language, as published in the GG, refers to “rules of property law”; the same applies to the corresponding provision of Law 3606/2007, Article 23(4). However, the official translation of provided by the HCMC refers to “rules of contract law”. It has been preferred here to refer to “property” and not “contract” law, since the first relates to

materialized or dematerialized form, and monetary amounts held, directly or indirectly, by the AEPEY on behalf of its clients",[859] in which case the claim of the clients is also verified on the basis of entries in the books and records of the firm "*as well as any other evidence in writing*".[860]

Thus, it appears that the same law provides for two different rules on the verification of claims in the context of the special liquidation procedure: one rule provides that verification of claims is effected on the basis of entries in the books and records of the firm (only), while the other that (general) contract law rules relating to proof of ownership apply and that claim verification is effected also on the basis of "any other evidence in writing".[861]

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contracts *in rem* (real covenants in English law) whereas the latter relating to contracts *in personam* (personal covenants in English law). The reference by this provision to ownership according to the rules of property law may be relevant to the general rule of Hellenic civil law that ownership of mobile property is transferred by relevant agreement (personal covenant in English law) without need for a contract concluded before a notary (by deed in English law).

[859] Law 3606/2007, Article 23(4), replacing Article 4b(4) of Law 1806/1988.

[860] *Ibid*.

[861] The literal, methodological or teleological interpretation of the relevant provisions does not help in resolving this contradiction: while the first provision relates "particularly" to claims for *in naturam* delivery of cash or financial instruments held by the investment firm in connection to the provision of investment services, the other refers also to claims for cash or financial instruments held by the investment firm and belonging to clients "pursuant to the rules of property law". Further, there appears to be no obvious differentiation in the field of application of the two provisions *ratione materiae*.

Beyond considerations connected to lack of any requirement of proof in writing according to general Hellenic contract law for ownership of movable property to be proven, the lack of certainty and predictability emerging from the conjunction of the above two rules on claim verification is apparent. Thus, the effectiveness of the protection awarded to retail investors by these rules on claim verification is questionable, especially in the event of investment firm failure as a result of tort:

If retail investor claim verification is effected only on the basis of entries in the books and records of the investment firm, then it is practically impossible for a retail investor's claim to be verified in the context of the special liquidation procedure when fraud has been perpetrated against him by the investment firm; it is hardly to be expected that fraudulent transactions or embezzlement of investor's assets will have been entered in the books and records of the firm.

This inefficiency may be mitigated by second rule, as noted above, that claim verification may be effected on the basis of any other evidence in writing, as well. However, it is difficult to reconcile the two rules in our view, and to understand the envisaged field of application of each of them (if differing). Under the second, wider rule, claimant investors are allowed to produce and invoke of all written evidence they may possess with regard to their claim against the investment firm. While such evidence may include –especially in case of firm failure as a result of fraud– documents *a priori* invalid with regard to the legal relation they refer to (such as forged certificates of depositing, forged orders or certificates of transactions *etc.*) it may be important *per se*

in proving the relation of the investor with the investment firm. Or, it may constitute an original indication in the context probatory proceedings.[862]

The ensuing contradiction of the provisions on claim verification affects the cohesion, certainty and overall effectiveness of the special liquidation procedure, and demonstrates the ambiguity that characterises the rules on investor protection in the event of investment firm failure, especially for reasons connected to fraud.

The conclusion of the special liquidation procedure follows the compensation procedure by the JGF and is decided by the competent court of law:[863]

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[862] On proof by documents in civil proceedings, see HCCP, Articles 432 – 465. On proof by documents in administrative proceedings (in cases of pecuniary claims) see HAPC, Articles 169 – 176.

[863] The relevant ruled was introduced by Article 48(2) of Law 3282/2004, (BGG vol. A no. 210 of 02.11.2004) which replaced Article 4a(9) of Law 1806/1988, and is now replaced by Article 22(9) of Law 3606/2007. This amendment was necessary since the conclusion of the special liquidation procedure was not previously regulated in a definite way. However, it actually allows for the persons in control of the investment firm before its failure to be placed back at its direction should the general meeting of the investment firm's shareholders convened by the Overseer and the Liquidator so decide. The issues arising were treated by a further modification to the above rule (addition of a new paragraph 10 to Article 4a of Law 1806/1988 by Article 43(2) of Law 3371/2005, BGG vol. A, no. 178, 14.07.2005) which provided that said rule is not applicable and the liquidation of the investment firm continues by the Overseer and the Liquidator in case a civil action has been filed by investment firm under special liquidation against members of the (ex) BoD of the investment firm, or against its shareholders, or in case a criminal action has been filed against the same persons or if a criminal process has been commenced against them, or if they have already been criminally convicted. Further, by Article 43(3) of Law 3371/2005 it was provided that the new rule would enter into

After the provision of information by the Overseer to the JGF regarding investor claims that were not satisfied in the context of the special liquidation procedure, the JGF has to decide "[…] *having received all necessary information from the Overseer all necessary information from the records of the firm*"[864] whether it is obliged to pay compensation under applicable legislation,[865] and to compensate investors accordingly "*without being obligated to observe any additional procedure or notification*".[866] Lack of clarity and of predictability characterizes in our view the applicable provisions, especially when examined *en bloc*.

Moreover, while the insertion of a provision relating to the payment of compensation by the JGF in the law governing the special liquidation procedure is not understandable in our opinion, from a systematic point of view,[867] it is also important to note that

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effect retrospectively, as of the time of entry into force of Law 3283/2004, obviously with a view to cover all issues which had appeared in the meanwhile. However, it is interesting to note that this provision is not repeated in Law 3606/2007, which repealed Law 1806/1988; it is not certain in our view whether this omission was intended yet the relevant law as it stands cannot be freely interpreted as incorporating this provision which was part of earlier law that was repealed.

[864] Law 3606/2007, Article 22(5).

[865] *I.e.* Article 67 of Law 2533/1997.

[866] Law 3606/2007, Article 22(5), replacing Article 4a(8) of Law 1806/1988.

[867] Since conditions for payment of compensation by the JGF are governed by Law 2533/1997, to which said provision refers, and which sets different applicable criteria. *Infra*, Ch VI.1.

according to this provision the source of information regarding investors' claims is common, for both the organs of the special liquidation procedure and the JGF.

Following the payment of compensation by the JGF, the special liquidation procedure is concluded, by judgment of the competent court[868] which also orders the organs of the special liquidation to convene a general meeting of the shareholders of the investment firm under liquidation, who have to elect (new) liquidators to continue the liquidation pursuant to common corporate law.[869]

V.1.2 THE SPECIAL LIQUIDATION OF CREDIT INSTITUTIONS

The reorganisation and liquidation of credit institutions in Hellas is governed by Law 3458/2006,[870] which transfers Directive 2001/24/EC into the Hellenic legal order.[871]

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[868] Law 3606/2007, Article 22(9). If the firm is completely deprived of assets, the court may declare cease of the liquidation and order the de-registration of the firm from the register of *societés anonymes*: Law 3606/2007, Article 22(10).

[869] *I.e.* according to Article 49 of Law 2190/1920; *infra* Ch V.2.2. While the special liquidation lasts, the common liquidation may not commence: see indicatively LCS Opinion 322/2007, *Nomos* (436980).

[870] BGG vol. A, no. 94, 08.05.2006.

[871] See in general KALAMBOUKA - GIANNOPOULOU, P. (2007) 'The operation of European and non-European credit institutions and measure taking after L. 3458/2006*', *DEE*, p. 428. For earlier law, before the introduction of Law 3458/2006 on the special liquidation of credit institutions, see indicatively LCS Opinion 52/2008, *Nomos*

Within the field of application of Law 3458/2006 fall credit institutions having their statutory seat in Hellas as well as their branches in EU MSs, with the exception of credit institutions falling out of the scope of Law 2076/1992.[872]

Law 3458/2006 generally follows the structure and content of Directive 2001/24/EC and set the general framework for the reorganization[873] and liquidation of credit institutions.[874]

The competent national authorities for deciding the opening of liquidation procedures, according to Law 3458/2006, is the central *Bank of Greece*.[875]

With regard to the national rules applicable on the liquidation of credit institutions, Law 3458/2006 closely follows the respective provisions of Directive 2001/24/EC[876];

(446830); BOTOPOULOS, K. (1996) The Liquidation of Banks: an Incomplete Institution*, *DEE*, p. 675.

[872] Law 3458/2006, Article 2.

[873] *Ibid.*, Articles 4 – 10.

[874] *Ibid.*, Articles 11 – 20.

[875] *Ibid.*, Articles 3 and 10. Regarding withdrawal of credit institution's authorisation by the *Bank of Greece* and public interest considerations, see indicatively HSACJ (Injunctions Committee) 453/2012, *Nomos* 594505; HSACJ (Injunctions Committee) 488/2012, *Nomos* 595416.

[876] See Article 11 of Law 3458/2006 and Article 9 of the Directive. Thus, for example, Article 11(2) of said Law *inter alia* provides that "[…] *the law of the home Member*

without specifying how national rules governing the liquidation of credit institutions operate as normative system, it states that "*according to Hellenic law, liquidation procedures are: (a) the entering of a credit institution into liquidation procedure, as provided by the provisions of Article 9 of* [Compulsory] *Law 1665/1951* [[877]] *in conjunction with Currency Committee decision 975/1/12.7.1956* [[878]] […] *and the provision of Article 1(1) of Law 2330/1995* [[879]]*; (b) the insolvency procedure according to the provisions of Articles 525 to 707 of* [Royal Decree] *19.4/11.5.1835 and according to Articles 1 to 21 of* [CompL] *635/1937;* [[880]] *(c) any collective procedure which is opened and controlled by the Hellenic administrative or judicial authority,*

State shall determine in particular: […] *(f) the claims which are to be lodged against the credit institution and the treatment of claims arising after the opening of the liquidation proceedings; (g) the rules governing the lodging, verification and admissions of claims* […]".

[877] CompL1665/1951 (BGG, vol. A, no. 31) was repealed by Article 92(4) of Law 3601/2007. Article 9 of Law 1665/1951 provided that, following issuing of decision by the *Currency Committee* of the *Bank of Greece* on the commencement of liquidation proceedings and the appointment of liquidators, who are responsible for the administration of the credit institution under the supervision of the *Currency Committee*, the credit institution may not accept deposits and may not be declared insolvent. See, indicatively, HSCCJ 1007/2013, *Nomos*.

[878] Repealed by Article 8(1) of the Regulation on the Special Liquidation of Credit Institutions (see *infra* n 883).

[879] Article 1(1) of Law 2330/1995 provides that a credit institution under liquidation may set up a credit institution by transferring to it assets and liabilities, according to specified therein rules.

[880] Articles 525 – 707 of RD 19.4/11.5.1835 (*HComL*) and CompL 635/1937 were repealed by Articles 181 and 182 of Law 3588/2007 (HIC); see *infra* n 898.

[having as] *content that of the 'liquidation procedures' as defined above*".[881] Thus, Law 3458/2006 refers to the general legal framework governing the insolvency of credit institutions under Hellenic law.

Further, the liquidation of credit institutions is also governed by Law 3601/2007, which provides for rules of the same normative content as those of Law 3458/2006, to which it refers, and further delegates the *Bank of Greece* to issue regulation for its implementation.[882]

On the basis of this delegation provided by Law 3601/2007, the Credit and Insurance Committee of the *Bank of Greece* issued the Regulation on the Special Liquidation of Credit Institutions,[883] which merits closer examination as it is applicable in the case of special liquidation of credit institutions providing also investment services.

According to said Regulation, its aim is to introduce rules to supplement HIC where necessary and not to establish an autonomous system of rules for the special liquidation of credit institutions which would govern relevant matters without need to apply HIC.[884] Instruments of the special liquidation are the special liquidator and the *Bank of Greece*, while the competent court adjudicates claims relating to the special liquidation

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[881] Law 3458/2006, Article 3.

[882] Law 3601/2007, Article 68.

[883] *Bank of Greece* Decision 21/2/4.11.2011, BGG vol. B, no. 2498, 04.11.2011.

[884] *Ibid.*, Preamble.

according to *ex parte* proceedings.[885] The competence and powers of the special liquidator are determined by reference also to relevant provisions of HIC (regarding *inter alia* contractual obligations and achieving settlement of claims of a certain amount).[886]

Following relevant public announcement by the special liquidator, all claimants are called to submit their claims; the notice of claims must be in writing, has the content provided by the relevant rule of HIC,[887] and must be supplemented "by the documents proving the claim".[888] A specific remedy is provided for the verification of claims which were announced out of time,[889] while the special liquidator includes in the table of distribution claims that have not been announced if their cause is deposits according to applicable law.[890]

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[885] *Ibid.*, Article 1(1).

[886] *Ibid.*, Article 1(3) – (5).

[887] Reference to Article 91(2) of HIC, which provides that "[t]*he creditor states the nature and cause of his claim, the time it arose, the amount, as well as whether his claim has or does not have a privileged nature or security* in rem *and the assets which form the collateral of the security* in rem *or special lien or whether there is retention of title.* […]".

[888] Decision 21/2/4.11.2011 (*supra*, n 883), Article 3(2), as modified by *Bank of Greece* Decision 55/23.11.2012 (BGG vol. B, no. 3399).

[889] *Ibid.*, Article 3(3).

[890] *Ibid.*, Article 3(4) referring to Article 9(1) of Law 3746/2009.

Claim verification is effected by the special liquidator in writing, without presence of the claimants, in a time limit set by the *Bank of Greece* (not exceeding three months which may be extended for not more than two months).[891]

The verification of claims is effected by comparison of the documents of the claimant to the books "and other documents" of the credit institution, while the special liquidator presents objections against the claims that are not verified and submits a report of the verification of claims to the *Bank of Greece*.[892]

Furthermore, other creditors and the credit institution may present to the special liquidator objections against announced claims.[893] All objections are introduced in total by the special liquidator to the competent court which rules according to *ex parte* proceedings;[894] its decision may be appealed only before the court of appeals.[895]

Beyond the rules on special liquidation, it is useful to also take into account generally applicable rules of the Hellenic legal order on insolvency law and the liquidation of *sociétés anonymes*, since after completion of the special liquidation the latter regime applies in the final stage of the liquidation of a failed financial institution in Hellas.

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[891] *Ibid.*, Article 4(1).

[892] *Ibid.*

[893] *Ibid.*; *Cf. ibid.* Article 6(3).

[894] *Ibid.*, referring to HIC, Article 95(2).

[895] *Ibid.*, Article 4(2).

V.2 RETAIL INVESTOR PROTECTION, HELLENIC COMMON INSOLVENCY LAW AND THE LAW ON LIQUIDATION OF *SOCIÉTÉS ANONYMES*

The liquidation of *sociétés anonymes* under Hellenic law is governed by the provisions of Law 2190/1920, as codified.[896] Before a brief examination of the relevant provisions Law 2190/1920 for the purposes of the present study, it will be useful to examine basic provisions of general Hellenic insolvency law, to which especially the law on liquidation of credit institutions refers,[897] in order to have a more complete view of the issue discussed.

V.2.1 HELLENIC INSOLVENCY LAW

Hellenic insolvency law is understood systematically as a branch of commercial law, being applicable only to merchants.[898] HIC provides, as a general rule, that insolvency

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[896] *Infra*, n 930.

[897] *Supra*, Ch V.1.2.

[898] Hellenic insolvency law is codified in HIC (Law 3588/2007, BGG, vol. A, no. 153), which entered into force on 16 Sept. 2007 (*ibid.*, Article 180). Before the introduction of HIC, Hellenic insolvency law was organised in the context of the HComL (Articles 525 *et seq.* of RD 19.4/11.5.1835, repealed by HIC, Article 181).

aims at the collective satisfaction of the bankrupt's creditors by the liquidation of his property (or by other means that may be provided in plans for the reorganisation of its business, and especially by the continuation of the latter). HIC *inter alia* provides that legal persons of public law (such as the HCMC), local administration authorities, and public organisations may never be declared bankrupt.[899] Insolvency organs are the competent Court, the Receiver, the *Juge-rapporteur*, the assembly of creditors, and the creditors' committee.[900] Creditors recognised by the HIC are those having against the debtor an existent and judiciable monetary claim at the time of declaration of insolvency,[901] and are categorised as unsecured creditors, "privileged" creditors (creditors whose claims are satisfied preferentially according to applicable Hellenic law before all other creditors), secured creditors, and subordinated creditors.[902]

As a rule of public order, the declaration of insolvency entails the *ex lege* suspension of all individual enforcement measures by creditors other than secured creditors,[903] which

[899] HIC, Article 1(2).

[900] HIC, Article 52 *et seq.* The *Juge-rapporteur* is a Judge serving at a CFI: HIC, Article 58.

[901] Claims which have not become mature at the time of declaration of insolvency are considered mature for the purposes of insolvency: HIC, Article 23(1).

[902] HIC, Article 21(1).

[903] Secured creditors may proceed to the satisfaction of their secured claims: HIC, Article 26.

if pursued are null and void.[904] The prohibition is wide and encompasses all remedies, including actions for the judicial recognition of claims.[905]

However, creditors and interested parties are able to seek judicial protection against actions of the *Juge-rapporteur*, by filing a relevant petition before the competent Court;[906] interim protection may also be provided.[907]

Creditors have to announce their claims before the competent Court, following declaration of the insolvency.[908] Claims which have been duly announced are verified by the Receiver in a procedure before the *Juge-rapporteur* and which is open for creditors having verified claims to attend.[909]

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[904] See indicatively, HSCCL 808/1990, *EEmpD* (1991) 712.

[905] HIC, Articles 25 and 26. *Cf.* suspension of enforcement in the context of special liquidation proceedings, *supra* Ch V.1.

[906] In the context of the special liquidation procedure, while the Liquidator is also appointed by Court (pursuant to Articles 739 *et seq.* of the HCCP), so that he may be replaced according to the same procedure, the Overseer is appointed only by decision of the HCMC; *supra*, n 829.

[907] HIC, Article 60.

[908] HIC, Articles 89 – 92. *Cf.* HIC, Articles 162 – 163.

[909] HIC, Article 93.

Decisions on the verification or not of announced claims may be challenged before the competent Court by interested parties.[910] Also, claims that were not announced on time may be brought before the competent Court for verification.[911]

The rules of HIC on claim verification are laconic: "[claim] *verification is performed by the comparison of creditor's documents to the* [commercial] *books and other documents of the debtor*".[912] No specific rule is provided by HIC as to which documents are considered as "creditor's documents" acceptable into the verification of claims procedure, nor according to which criteria such assessment is performed. Further, the "other documents of the debtor" are not specified.[913] Moreover, it is interesting to note that judicial review of the verification of claims is performed pursuant to the non-adversarial procedure[914] in the context of which the court has power to "[…] *order also by own motion for any measure to be taken which is suitable for verifying true facts,*

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[910] HIC, Article 94.

[911] HIC, Article 92. Earlier law provided for such a right until the end of distribution: see indicatively HSCCL 1416/1995, *EllDik* 1998, p. 856; HSCCL 1070/1979, *NoV* (1980) 490.

[912] HIC, Article 93(3). The receiver may always, at the request of any interested person or *ex officio*, request the disclosure of the creditor's books or of an official excerpt thereof, as evidence: HIC, Article 94(3).

[913] However, the former requirement for the proof of a creditor's claim by documents "of certain date" has been repealed by HIC, which in our view implies that documentary evidence is allowed by documents in general, as the latter are defined by the general provision of HCCP, Article 443.

[914] HCCP, Articles 739 *et seq*.

even regarding those which have not been proposed and in particular of facts which contribute to the protection of the interested persons or of the legal relation or of the greater social interest".[915]

It is difficult in our view to reconcile the rule of HIC regarding documentary evidence with this procedural rule; and it is not clear in our opinion whether one rule prevails over the other (as *lex specialis*, or on other grounds). Furthermore, it is not clear in our view how the requirement for documentary evidence under examination is to be interpreted in conjunction to the issue of proof of commercial claims between merchants by witness.[916]

Relevant considerations are also reflected in the area of criminal law, where it is specifically provided that the competent criminal court decides freely on the existence or not of a claim which has been announced for verification (and attested by oath, under previously applicable law)[917] independently of civil justice decisions on the matter, which are taken into account only as evidence.[918]

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[915] HCCP, Article 744.

[916] According to one opinion, proof by witness may be acceptable for creditors' claim verification under the HIC and in any case the court will examine whether it may be allowed on grounds of its importance and according to the general practice in relevant transactions: see BECHRI - KECHAGIOGLOU, G. (2008) 'The Importance of Assets and Liabilities in Bankruptcy*', *EEmpD*, p. 8.

[917] Oath has been repealed as a form of evidence in civil proceedings; Law 2915/2001, BGG vol. A, no. 109; Law 3994/2011, BGG vol. A, no. 165.

However, in common insolvency proceedings, the *Juge-rapporteur* draws a report on the verification of claims, in which a brief description of documents produced in evidence is included.[919] This report is considered full evidence on the verification of claims in the context of enforcement.[920]

In an effort to clarify which means of proof may be acceptable in the context of insolvency proceedings for the verification of creditors' claims, it may be useful to also briefly take into account –for the benefit of analysis– other relevant rules of the Hellenic legal order, such as the rules and relevant case-law on creditor claim verification before the introduction of the HIC the rules of the HIC on the examination of the insolvency estate by the receiver; and the rules and relevant case-law on creditor claim verification in certain specific cases of insolvency being under a special regime.

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[918] See indicatively HSCCJ 935/1998, *Nomos* 275068, *EEmpD* (2000) 557, *Poinika Chronika* (1999) 536.

[919] HIC, Article 93(5).

[920] See indicatively, HSSCJ 225/2010, *EEmpD* (2010) 703; HSCCL 1779/2007 *DEE* (2007) 593; HSCCL 443/1976, *NoV* (1976) 958; HSCCL (Plenary) 82/1964, *NoV* (1964) 186.

Rules on creditor claim verification before the introduction of the HIC

Before the introduction of the HIC, the relevant rule of HCL on verification of claims initially provided a rule similar to that as currently in force, *i.e.* that "[claim] *verification is performed before the Juge-rapporteur and in the presence of the creditor or his attorney and the receivers and by comparing the* [creditor's] *documents of title to the* [commercial] *books and other documents of the debtor"*.[921] This rule was subsequently complemented by the introduction of a rule providing that claims under verification in the context of insolvency proceedings have to derive from documents of certain date, or from the official commercial books.[922]

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[921] *HComL*, Article 586 (repealed). This rule was supported by a provision on the competence of the *Juge-rapporteur* to order the presentation (disclosure) of the creditors books or of an official excerpt thereof (*HComL*, Article 587, repealed), and by the provision of an obligation of each creditor whose claim was verified to take oath before a competent authority that his claim was true and guileless as to its verified amount, as a condition of his participation in insolvency proceedings (*HComL*, Article 589, repealed).

[922] Amendment by Article 6(18), indent 19, of Law 2479/1997, BGG, vol. A, no. 67. Law 2479/1997 entered into force on 6 May 1997. This rule was in force until the entry into force of the HIC. According to case-law, the relevant provision established as sole acceptable means of evidence of a claim by any creditor, submitted in the claim verification procedure under general insolvency law, private documents which have obtained a certain date (through attestation by a notary or other competent public official) as well as official commercial books of the bankrupt or the creditor; see indicatively HSCCL 852/2006, *Nomos* 402869; Athens CCA 116/2009, *Dikaiosyne* (2009) 605.

The *ratio* of this strict rule on acceptable evidence for the purposes of creditors' claim verification may be linked to requirements of legal certainty and predictability. However, in case of tort, and especially of fraud, committed by the bankrupt against creditors, such restrictive approach to evidence may have an adverse effect on the protection actually awarded to such creditors. In this regard, it has been ruled that the restriction of acceptable evidence to documents of certain date and official books is applicable only to the claim verification procedure by the organs of insolvency (the *Juge-rapporteur* and the receiver) and it does not affect the means of evidence that are acceptable in the context of judicial procedure for the review of the decision of the organs of insolvency.[923]

Furthermore, it is not clear whether such strict rules on evidence apply to all claims irrespective of their *causa*.[924]

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[923] Dodoni CCA 73/2007, *Nomos* 451297. It is not clear though, in our opinion, whether this case-law may be considered as established, and whether it may further be considered as applicable also in the context of the claim verification procedure under the HIC.

[924] It has been ruled, that when claim verification is contested before the competent Court and such claim falls within the field of application of special labour law civil procedure (HCCP, Articles 633 *et seq.*) then proof of such claim will also be governed by the special labour law civil procedure (which allows for all means of evidence): see indicatively Thessaloniki CCA 195/2008, *Nomos* 463939, *Harmen.* (2008) 740, and further references therein; Athens CCA 146/2007, *Nomos* 434496, *DEE* (2007) 687; Athens CCA 4634/1997, *Nomos* 187287, *Dikaiosyne* (1998) 1657, *NoV* (1998) 71. It is not clear in our view which is the *ratio* of this differentiation with regard to labour claims (only): it may be that, for reasons of uniformity of application of the special labour law civil procedure, it was considered that all relevant remedies, including those

Rules of HIC on the examination of the insolvency estate by the Receiver

According to the rules of HIC on the duties of the Receiver, the latter "*examines the commercial books and other data* [*i.e.* not expressly documents] *of the debtor and asks him to acknowledge their content, to attest their condition, to provide any useful information and to be present at the* [closing] *of the books*". [925] Further, if the debtor has not filed a balance sheet and fails to do so after relevant petition by the Receiver, the latter draws a special accounting sheet on the basis of the commercial books and data "and any other relevant information" which he has collected.[926]

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in the context of insolvency proceedings, should be governed by the same rules of evidence. However, it may also be supported that labour claim verification rules in insolvency proceedings are *lex specialis* with regard to general insolvency law and thus prevail over the latter. In both cases, it appears that a teleological approach would support that strict rules of evidence for the verification of labour claims would lead to the rejection of the majority of such claims; thus, perhaps for reasons of effectiveness of the protection awarded in the context of insolvency proceedings, evidence rules on claim verification are relaxed. In such a case, however, it is not evident why only labour claims should be allowed a special regime regarding evidence, whereas other unsecured creditors meriting protection (such as retail investors, in this case) should be subject to strict rules of evidence. This problematic is differentiated in the context of HIC proceedings, which provide for judicial review of claim verification by the competent Court according to non-adversarial procedure; *supra*, n 914.

[925] HIC, Article 76 (1).

[926] HIC, Article 76 (2).

These two rules clearly provide that the Receiver may, and even has an obligation, to take into account not only entries in the commercial books and other commercial documents of the debtor, but also any other "data" and piece of information that can be collected; the *ratio* of these rules is probably that the Receiver has to achieve a presentation of the insolvency estate as complete and accurate as possible.

However, it is not clear whether all these means of proof are acceptable for creditor claim verification as well: Although Hellenic insolvency law has aimed at uniformity – in which direction HIC was also introduced– there has been a degree of uncertainty as to whether general insolvency law provisions on creditors' claim verification may also be applied in areas of special insolvency regimes as provided by Hellenic law.

Rules on creditor claim verification in certain special insolvency regimes

In the case of "problematic enterprises" (businesses in great financial difficulties) and special liquidation thereof, a *sui generis* regime applied according to Law 1892/1990 which while similar in many aspects to common insolvency law it was considered not analogous to that of common insolvency law with regard to judicial review of claims; it was considered that since this special liquidation regime did not include a claim verification procedure then judicial protection appertaining specifically to such verification procedure was not applicable, as there is no *vacuum legis* to be filled by analogy.[927]

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[927] See indicatively Larissa CCA 904/2005, *Nomos* 417417, *EpiskED* (2006)1093; Larissa CCA 513/2001, *Nomos* 315012, *Dikografia* 2002/56.

However, in the case of liquidation of insurance firms the opposite has been ruled: According to applicable Hellenic law, insurance firms having their license revoked entered into a special liquidation procedure aiming at the *pro rata* satisfaction of the creditors of the insurance firm; [928] taking into account the similarity of this procedure to the corresponding on in the context of insolvency law, it was ruled that for reasons of uniformity of reasoning certain rules applicable to insolvency had to be also applicable in the special liquidation regime of insurance firms.[929]

V.2.2 HELLENIC LAW ON THE LIQUIDATION OF *SOCIÉTÉS ANONYMES*

The general provisions for the dissolution and liquidation of *sociétés anonymes* under Hellenic law are provided by CL 2190/1920, Articles 47 – 49.[930] Beyond rules for the

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[928] Mainly, LD 400/1970, BGG vol. A, no. 10.

[929] See Peiraeus CCA 279/2001, *Nomos* 304498, *DEE* (2001) 870, wherein further references.

[930] As modified by Law 3604/2007, BGG vol. A, no. 189. For a translation in English see LAMBADARIOS LAW OFFICE (2007) *Law 2190/1920*, Nomiki Bibliothiki, Athens. For an overview see PERAKIS, E. (2007) *The New Law of the Societé Anonyme*. *Law 2190/1920 as in force after Law 3604/2007**, Nomiki Bibliothiki; *idem* (ed) 2010 *The Law of the Societé Anonyme, Interpretation of Law 2190/1920 per Article**, Athens: Nomiki Bibliothiki.

triggering and procedure of the dissolution of an S.A.,[931] more important for the purposes of the present study are the rules of Article 49 of CL 2190/1920 on the method of conducting the liquidation, which again reveals in our view inconsistencies with the relevant rules of the special liquidation and the JGF/HDICF compensation procedures.[932]

Article 49 of CL 2190/1920 *inter alia* provides that:

> "*1. The liquidators appointed by the General Meeting* [of the shareholders of the SA] *must, upon assumption of their duties, draw up an inventory of the company's assets and publish a balance sheet in the press and the* [GG] […]. *2. The liquidators have the same obligation at the end of the liquidation procedure. 3. The General Meeting of the shareholders retains its rights during the liquidation procedure. 4. The liquidators must conclude, without any delay, any pending matters of the company, liquidate its assets, pay its debts and collect its claims. They can also perform new acts if such acts serve the process of liquidation and the interest of the company.* […] *5. The annual financial statements as well as the financial statements at the end of the liquidation procedure must be approved by the General Meeting.* […] *After the conclusion of conclusion of the liquidation procedure the liquidators draw up the final financial statements* […] *return to the shareholders their contributions, as well*

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[931] Law 2190/1920, Articles 47, 47a, 48, 48a. See in general HSCCJ 2192/2013, *Nomos* (616006); HSACJ 1827/2013, *Nomos* (611837); HSACJ 3143/2012, *Nomos* (581616); HSCCJ 30/2010, *Nomos* (517930), *EEmpD* (2010) 618.

[932] See also MARINOS, M.(ed.) (2011) The *Societé Anonyme between Corporate and Insolvency Law and Capital Markets Law**, Athens: Sakkoulas.

as any above par amounts, that had been paid, and distribute the balance of the poceeds from the liquidation of the company's assets to the shareholders, pro rata *to their participation in the paid-up share capital.* […] *7. The appointment of the liquidators results* eo ipso *to the cessation of the powers of the Board of Directors. The provisions regarding the* [BoD] *are applied* mutatis mutandis *to the liquidators.* […] *The General Meeting may appoint only one liquidator, if the Articles of Associations do not provide otherwise.*"

This procedure, although applicable to SAs in general, is only applicable to investment firms after the conclusion of the special liquidation procedure, while it is not applicable at all to credit institutions –which are subject only to the special liquidation provided by Law 3458/2006.[933]

As a result, not only there are two different regimes regarding the liquidation of investment firms *vis-à-vis* credit institutions –which might for be regarded as reasonable on account of their different structure and function– but there is further differentiation in the treatment of retail depositors depending on whether the financial intermediary is an investment firm or a credit institution, which does not appear necessary nor efficient.

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[933] *Supra*, Ch V.1.2. See HSCCJ 1007/2013, *Nomos* (610150); ROUSSIS, K. (2013) '"The *de Lege Lata* Inoperation of the Corporate (*ex Parte*) Liquidation of CL 2190/1920 in the Termination of the Legal Person of a Bank*', *HreDik*, p. 57.

Interim Concluding remarks

The analysis of the special liquidation of investment firms regime *vis-à-vis* the special liquidation of credit institutions regime leads to the conclusion that while the latter is characterised to an important extent by inner consistency and coherence, the same is not evident in the case of the first –especially where claim verification in the context of special liquidation is connected to tort perpetrated against the retail investor.

Overall, the two special liquidation regimes differ significantly while the relevant differences appear difficult to justify on objective grounds if Hellenic rules on retail investor protection are to be examined as a normative system.

As a consequence, the rules on retail investor protection in the event of financial intermediary default and the effectiveness of the protection awarded will depend to a great extent on whether the intermediary is an investment firm or a credit institution.

Moreover, following the completion of the special liquidation procedure, the continuation of liquidation according to common insolvency law leads to further unpredictability, as the rules on the relevant procedure –especially with regard to claim verification and relevant remedies– again differ importantly, indicating also in this context lack of coherence which further entails deficiencies in the protection awarded to retail investors by the applicable rules considered as a normative system.

It is then necessary to examine in turn the rules of the Hellenic legal order on *ex lege* compensation of retail investors in the event of intermediary failure *per se*, as well as in conjunction to the rules on the liquidation of financial intermediaries.

CHAPTER VI. PROTECTION OF RETAIL INVESTORS IN THE HELLENIC LEGAL ORDER IN THE CONTEXT OF *EX LEGE* COMPENSATION

Together with the application of the special and common liquidation rules for the protection of retail investors as creditors following the failure of a financial intermediary, Hellenic law provides for the *ex lege* compensation of retail investors as financial market participants transposing relevant EU law with the double aim of protecting retail investors and thus their confidence in the financial system and of protecting stability of the financial market.

As in the context of the Hellenic law on the special liquidation of financial intermediaries, also in the context of compensation of retail investors by relevant funds applicable substantive and procedural rules are differentiated on the basis of whether the failing financial intermediary is an investment firm or a credit institution: analysis will follow the relevant categorisation attempting to assess the two regimes, *per se* and in conjunction to one another.

VI.1 RETAIL INVESTOR COMPENSATION WHEN THE FAILING INTERMEDIARY IS AN INVESTMENT FIRM

The transposition of ICSD in the Hellenic legal order was effected by the setting up of the JGF. Before proceeding to the examination of the relevant law transposing ICSD, it will be useful to examine the earlier Hellenic law on retail investor protection in the event of investment firm failure, in order to better assess the transfer of ICSD.

VI.1.1 DEVELOPMENT OF HELLENIC LAW ON RETAIL INVESTOR COMPENSATION BEFORE THE TRANSPOSITION OF ICSD INTO THE HELLENIC LEGAL ORDER

Before the transposition of ICSD into the Hellenic legal order, the mechanism on retail investor protection in the event of investment firm failure consisted of a combination of the applicable provisions of several legislative instruments, namely Law 3632/1928, Law 1818/1951, LD 3078/1954 and Law 1806/1988 (in its original form).

Originally, the system of protection of investors in the event of a broker's failure was based on Law 3632/1928 "On Securities Exchanges".[934] Law 3632/1928, referring to a

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[934] BGG vol. A, 1928. See in general GEORGAKOPOULOS, L. (1961) 'Stock Markets of Merchandise and Stock Exchange Legal Acts. General Principles of the Law and Practice of the Hellenic Stock Markets of Merchandise*' *EpiskED*, p. 241;

period characterised to an important extent by financial market transactions concluded between natural persons,[935] was characterised *inter alia* by the stipulation of sanctions against brokers failing to fulfil their financial obligations to their clients (investors) and other counterparties, and by the obligation of the broker and "*Common Guarantee Fund for the Securing of Exchange Transactions*",[936] to provide compensation to the broker's creditors (clients and counterparties) in the event of failure. Specifically, each broker was obliged before commencing his professional activity to deposit as guarantee a sum of money in his name with a State-owned credit institution (the *National Bank of Greece*).[937] This guarantee was to serve as collateral for claims of clients and counterparties of the broker in connection to transactions in financial instruments,[938] *i.e.* in connection to claims rising not from the broker's professional activity in general but only from transactions in the financial market. The guarantee was in principle not subject to attachment, and was not subject to assignment or to any claim irrelevant to the purpose it served.

The compensation mechanism established by Law 3632/1928 had shortly as follows: Upon inability to fulfil his obligations, the broker was obliged to declare this in writing to the Government's Overseer of the Stock Exchange, attaching to his declaration

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PAPADIMITRIOU, G. (1995) 'The Legal Status of the Athens Stock Exchange*' *DEE*, vol. 10, p. 841.

[935] Law 3632/1928, Article 12.

[936] Set up by LD 3078/1954, BGG vol. A, no. 245.

[937] Law 3632/1928, Article 10 (1).

[938] *Ibid.*, Article 11 (1).

copies, certified by himself, of the relevant documents (extracts from the book of securities, brokers and clients) for each unsatisfied claim, and to abstain from any further transaction in the Stock Exchange.[939] In case the broker did not submit such a declaration, every creditor of the broker had the right to submit a declaration as to the broker's default to the Overseer of the Stock Exchange.[940] The Overseer, receiving such a declaration (either from the broker or from his creditors) was obliged to immediately (on the same day) notify the Stock Exchange Commission and to call all other brokers who had had transactions with the defaulting broker to submit to the Stock Exchange Commission, also on the same day of the call, copies certified by them of the accounts of the defaulting broker, as appearing in their broker books.[941] On the basis of these copies, the Stock Exchange Commission drafted on the same day (and by the latest before the opening of the Stock Exchange on the following day) a record with all necessary information regarding the securities transacted by the defaulting broker.[942] Following a procedure for the satisfaction of outstanding claims against the defaulting broker on the basis mostly of set-off,[943] the brokers who had still outstanding obligations were obliged to draft an index presenting in detail the outstanding amounts on a clearance per clearance basis.[944] The debtors of the defaulting broker were then

[939] *Ibid.*, Article 27 (1).

[940] *Ibid.*, Article 27 (2).

[941] *Ibid.*, Article 21 (3).

[942] *Ibid.*, Article 21 (4).

[943] *Ibid.*, Article 21 (5) – (7).

[944] *Ibid.*, Article 21 (7).

obliged, on the basis of the results appearing on the table, to deposit with the cashier of the Stock Exchange all amounts due; the cashier then distributed immediately and proportionally the amount received to the creditor brokers.[945] The Stock Exchange Commission was obliged to draft on the same day an index of the amounts still outstanding to brokers and to transmit a copy of it to the Overseer of the Stock Exchange.[946] The Overseer of the Stock Exchange was then obliged, as soon as he received the Stock Exchange Commission index to call all brokers and other creditors of the defaulting broker to reach an out-of-Court settlement with the defaulting broker, with regard to any still outstanding amounts. In case the attempt was successful, the procedure was ended by the drafting of a relevant official document.[947] In case the attempt was unsuccessful, the Overseer called all debtors of the defaulting broker by reason of transactions in the financial market to submit a declaration as to the amount due to them, as well as all relevant documents proving the claim, within ten days of the last announcement.[948] Claims were not to taken into account but to the extent verified by the relevant documentation.[949] After the expiration of the ten-day limit, the Overseer of the Stock Exchange and the Stock Exchange Commission examined the declarations (claims) submitted and decided which claimants could participate in the distribution of the amount of the guarantee of the defaulting broker, deducting expenses of the procedures and the financial transaction taxes for which the defaulting broker was

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[945] *Ibid.*, Article 21 (8).

[946] *Ibid.*, Article 21 (9).

[947] *Ibid.*, Article 21 (11).

[948] *Ibid.*, Article 21 (13).

[949] *Ibid.*

liable.[950] To the amount of the guarantee was added any amount deposited with the cashier of the Stock Exchange by clients who had outstanding debts to the defaulting broker.[951] The decision as to which claims were verifiable necessitated the positive opinion of at least four of the members of the Stock Exchange Commission and the agreement of the Overseer of the Stock Exchange.[952] Any disagreement between the Stock Exchange Commission and the Overseer of the Stock Exchange was to be resolved by the competent Court.[953] The final decision of the Stock Exchange Commission and the Overseer of the Stock Exchange was made public, was executed as soon as it made public in the Stock Exchange, and was not subject to any remedies.[954] The person executing the decision was exempted from all liability arising from the distribution of the guarantee.[955] The persons participating in the procedure were also exempted from liability connected to the execution of their duties. The provisions of Law 3632/1928 were also applicable in case any person having a claim against the defaulting broker submitted an application to receive compensation, in connection to transactions in the financial market or recognised by the competent court.

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[950] *Ibid*., Article 21 (14).

[951] *Ibid*., Article 21 (10).

[952] *Ibid*., Article 21 (14).

[953] *Ibid*.

[954] *Ibid*., Article 21 (15).

[955] *Ibid*.

Thus, in our view the mechanism initially established in the Hellenic legal order by Law 3632/1928 for the compensation of investors (as creditors) in the event of financial intermediary failure had the following main characteristics:

The commencement of the procedure was flexible in terms of the persons permitted to submit a relevant declaration for its commencement but strict in terms of applicable time limits which were very short, probably with a view to protect market stability. The claimant had the *onus* to provide the necessary documentation proving his claim and the amount of his claim. The only source of compensation was the guarantee deposited by the broker at the commencement of his professional activity, which could be increased by payment by third parties of debts to the broker. *A priori* there was no upper limit to the amount of compensation a creditor could claim and be paid in the context of this procedure; however, there was also no lower limit as well (minimum guaranteed amount) due to application of *pro rata* satisfaction of creditors. However, not all creditors could apply for such protection since the *causa* for their claim to be covered had to be the conclusion of transactions in financial instruments and in the financial market. The relevant procedure did not entail suspension of other, judicial, procedures for the verification of claims. The organs of the competent authorities conducting the compensation procedure were exempted from liability.

In general, the mechanism for protection of retail investors under Law 3632/1928 was quite simple, and focused on the swift payment of compensation; however, it was also deficient in certain aspects, and especially with regard to judicial review which was very limited.

VI.1.2. Transposition of ICSD into the Hellenic Legal Order and the JGF

The transposition of ICSD into the Hellenic legal order was effected by the introduction of Law 2533/1997 "*Derivative Exchange* [Market] *and other provisions*".[956] Law 2533/1997 modified the already existing *corpus* of Hellenic legislation on investor compensation and restructured the already existing "*Joint Guarantee Fund for the Securing of Exchange Transactions*",[957] which was renamed "*Joint Guarantee Fund for the Securing of Investment Services*"[958] (the JGF).[959]

Law 2533/1997, which is still in force, states that its aim is the transfer of ICSD into the Hellenic legal order and "[…] *the better response by the* [JGF] *to the needs of the investing public*". [960]

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[956] BGG vol. A, no. 288, 1997. See in general MITSOU, A. (2007) 'The [Hellenic Investor Compensation Fund] as a Mechanism to Protect Investors in Case of Definitive inability of an [Investment Firm] (EPEY) to Fulfil its Obligations*', *DEE*, vol. 12, p. 1281.

[957] *Supra*, n 936.

[958] Law 2533/1997, Article 61 (1).

[959] The official website of JGF is www.syneggiitiko.gr

[960] Law 2533/1997, Article 61 (1).

Law 2533/1997, as a national implementing measure has to be examined on its own merit and taking into account the aim of ICSD, the obligations it prescribes for MSs, the legal mechanism of protection it provides, as well as certain inconsistencies and deficiencies that characterise it, as discussed.[961]

According to Law 2533/1997, the JGF is a legal person of private law (of the public sector) and "of an insurance nature",[962] supervised by HCMC.[963] Its purpose is "[…] *the payment of compensation to clients and* [ASE] *members* [as] *counterparties in case of determining permanent or irreversible inability of an Investment Firm to fulfil its obligations which arise out of the provision of investment services covered* [by this Law] *and the support, in this way, of the stability and credibility in the functioning of the investment services market*".[964]

All investment firms authorised in the Hellenic legal order have to be members of the JGF;[965] the sanctions against investment firms contravening their obligations to the JGF[966] may amount to authorization withdrawal by the HCMC.[967]

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[961] *Supra*, Ch II.1.2.

[962] Law 2533/1997, Article 61 (2).

[963] *Ibid*., Article 76 (1).

[964] *Ibid*., Article 63.

[965] *Ibid*., Article 64 (1).

[966] *Ibid*., Article 64 (4) *et seq.*

The payment of compensation procedure commences by "[...] *(a) the provision of notification to the* [JGF] *by the* [Depository S.A.] *that* [a] *member has failed to fulfil in time* [its] *obligation to deliver financial instruments or money for the settlement of a Stock Exchange transaction, (b) the filing of a petition for compensation by a client, (c) the filing of a declaration by an* [investment firm] *to the* [JGF] *that it is unable to fulfil its obligations to* [*its*] *clients or (d) the issuing of a final bankruptcy* [judicial] *decision against an* [investment firm]*, (e) the withdrawal of licensing for the setting up of the* [*investment firm*] *and its placement in special liquidation* […]».[968]

Following the triggering of the compensation procedure, the JGF calls all interested persons to announce their claims within a limited period of time.

Claim verification by the JGF[969] is not differentiated depending on the way (instances (a) – (e) above) the compensation procedure commences; furthermore, no rule is provided as to whether, and to which extent, relevant claim verification rules in the context of the JGF procedure are interconnected to relevant rules in the context of the special or common liquidation law.[970] More specifically, a question which is pertinent in our view for the purposes of this study arises in this regard: whether the rules on claim verification by the JGF according to Law 2533/1997 are compatible with ICSD,

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[967] *Ibid.*, Article 63 (4) (b). The same obligation is provided by Article 19 of Law 3606/2007.

[968] *Ibid.*, Article 65 (1).

[969] See *ibid.*, Article 66 (1).

[970] *Supra*, Ch V.

and furthermore whether they constitute a coherent system of rules of national law examined together with the relevant rules for claim verification under the special liquidation procedure.

According to Law 2533/1997, "[i]*n case of receipt by the* [JGF] *of a client's application for compensation, the* [JGF] *will immediately notify the* [investment firm which provided the investment] *services* [in connection to which] *the claim is filed, of the existence of the relevant claim and will set a time limit for it to provide evidence and data with regard to the filed petition, as well as data of clients and counterparty members* [with regard to which] *there may exist other outstanding claims*".[971] Thus, it is provided that it is the investment firm that has to provide "evidence" and "data" relevant to the investor claim to the JGF, the nature or form of such "evidence" and "data" not being specified by the relevant provisions.

Furthermore, it is provided that "[…] [i]*n case of placing of an* [investment firm] *under the special liquidation* [regime], *the* [JGF] *provides compensation to investors for monetary claims which derive from covered investment services on the basis of all the documents* [[972]] *and other data which are at the disposal of the* [investment firm] *or of the* [Central Depository of Securities] *or are transmitted to it* [*i.e.* to the JGF] *by the Overseer* [*i.e.* of the special liquidation procedure] *and which the Overseer of the liquidation is obliged to transmit to the* [JGF]".[973]

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[971] Law 2533/1997, Article 65 (3).

[972] The exact term used in the original is "particulars".

[973] Law 2533/1997, Article 65 (7).

With regard to claim verification in the context of the JGF procedure, this rule is important for the subject-matter under investigation, for the following reasons:

Firstly, it refers to "all documents" and "other data" as a basis for verification of investor claims by the JGF and does not refer restrictively to the "books and records" of the investment firm; however, it indirectly demands for all such documents and other data to originate from a source other than the claimant investor. Taking into account that it is not specified whether, in the context the special liquidation procedure as organized by Laws 1806/1988 and 3606/2007, the claimant investor is allowed to present "any other evidence in writing",[974] it appears reasonable to assume that the JGF may also take into account written evidence (beyond entries in the books and records of the investment firm) forwarded to it by the investment firm under special liquidation, which was originally presented to the latter by the claimant investor.

However, the same Law also provides that "[i]*n any event, the existence of a claim against an* [investment firm] *regarding which* [payment of] *compensation is being examined by the* [JGF] *will be proven by the data which the* [investment firm] *issues according to existing finance law and regulation, while any other means of evidence is prohibited, including oath*".[975] It appears difficult to reconcile this provision with the above rules of the same Law on claim verification;[976] not only does it refer exclusively to data issued by the investment firm, which is problematic *per se* (especially in the case

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[974] *Supra*, Ch V.1.1.

[975] Law 2533/1997, Article 67 (5).

[976] *Ibid.*, Article 65 (3) and (7).

where the failure of the investment firm is connected to fraud), but also it expressly prohibits all other means of evidence. Such means of evidence, which are prohibited, include proof by witness, expert's report, and autopsy.[977]

Taking the above observations into account, it appears that the rules on verification of investor claims by the JGF, as provided by Law 2533/1997, are *per se* unsatisfactory in terms of legal certainty, predictability, flexibility and effectiveness as they fail to produce a coherent and consistent system of rules on claim verification. For the same reason, they do not achieve effective transposition of ICSD in the Hellenic legal order, taking into consideration that ICSD aims also at the protection of retail investors in case of fraud.

Moreover, the examination of the relevant provisions of Law 2533/1997 in conjunction with those of the law on the special liquidation of investment firms, as a whole, leads to the conclusion that relevant Hellenic law does not constitute a coherent and effective system of rules on claim verification in the event of investment firm failure: Law 2533/1997 does note stipulate whether the conclusions reached by organs of special liquidation of an investment firm on the verification of investor claims (which are forwarded by them to the JGF)[978] are binding for the JGF or not. Since the JGF is called to perform its own claim verification according to the rules provided by Law 2533/1997, it may be argued that the JGF is not bound by any relevant decision of the

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[977] See HCCP, Article 339. It is not clear in our opinion whether the restrictive rule of Article 67 (5) of Law 2533/1997 was introduced as *lex specialis* with regard to said HCCP rule.

[978] Law 3606/2007, Article 22.

organs of special liquidation of the investment firm. While the purposes of the two procedures differ in that the special liquidation procedure relates to the protection of all creditors of the failed investment firm in general, while the JGF procedure relates to the payment of compensation to a specific subcategory of creditors, it is not evident in our opinion why claim verification rules should differ –this does not affect the question of whether a verified claim is also covered by the JGF law, since a verified claim of a creditor may not qualify also as a claim for the payment of compensation if it does not fall within the field of application of ICSD and the relevant transposing national law. This problematic brings to the fore the more general question as to the aim, scope and effectiveness of the two procedures, effected by the organs of the special liquidation and by the JGF (in both cases under the supervision of the HCMC), as a system of rules.

After the verification of investor claims and the payment of compensation by the JGF, the relevant procedure is concluded and the file of investors claim is forwarded by the JGF to the organs of special litigation, for any further action.[979]

While actions may be filed by interested persons (such as claimant retail investors) against the JGF, yet according to an anachronistic in our opinion rule of Law 2533/1997 interim measures may not be imposed against the JGF;[980] beyond incompatibility with EU law issues emerging –if ICSD is considered as conferring rights upon individual investors claiming compensation, according to the *Factortame* case-law –this restriction

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[979] Law 2533/1997, Article 66.

[980] *Ibid.*, Article 66 (10).

is in our view in any case incompatible with rules of the HCon and ECHR on effective access of individuals to court and for effective remedies.[981]

In the context of the Hellenic legal order, the nature of the obligation of the JGF to compensate claimant investors (whose claims are verified and covered) is that of an *ex lege* obligation (stemming from Law 2533/1997 and from ICSD transposed by it) –its legal basis is neither contractual nor non-contractual liability (and therefore no causality issues arise), but a form of *ex lege* insurance liability in the context of which the JGF is responsible as principal debtor.

One of the most controversial issues regarding the regime of investor compensation in the Hellenic legal order is the scope of protection awarded by the JGF. This issue is more specifically connected to the conditions necessary under to Law 2533/1997 for the *ex lege* obligation of the JGF to compensate investors to apply.[982] According to Law 2533/1997, the JGFis under the obligation to compensate investors in the event of investment firm's inability to fulfil its obligations (*i.e.* to repay money or to return instruments) which "arise out of" the provision of "investment services covered by Law

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[981] Article 20 of HCon and Articles 6 and 13 of ECHR. See indicatively PAPADIMITRIOU, C. (2002) *The Influence of Community Law on the Judicial Protection of Fundamental Rights*, Athens: Sakkoulas.

[982] The aim of the JGF, as stated by Law 2533/1997, is to compensate not only clients, *i.e.* investors, but also investment service providers as counterparties of the investment firm unable to fulfil its obligations. However, the relevant problematic has emerged in connection to retail investors claims to be compensated especially in cases the investment firms' failure was connected to fraud and misappropriation of investors' funds. See case-law cited in n 987 – 990.

2533/1997", as such investment services are specifically and exclusively defined by Law 2533/1997 in *numerous clausus*; for the purposes of its application investment services covered by it are only:

> "*the conclusion of transactions in* [financial instruments][983] [by investment firms] *in the ASE for the account of third* [parties] *or for their own account*",
> "*the safekeeping and* [circulation] *of financial instruments in the ASE for the account of third* [parties] [in order] *to conclude transactions in the ASE or which are the product of* [the] *conclusion of transactions in the ASE*",
> "*the holding of funds of third* [parties] [in order] *to conclude transactions in financial instruments in the ASE or which are the product of* [the] *conclusion of transactions in the ASE*", and
> "*as of 26 September 1998* […] *also the* [investment] *services* [described] *in article 2 paragraph 1* [indent] *a(i), c and d of Law 2396/1996*".[984]

Thus, it appears from the wording of the above provision of Law 2533/1997, that an obligation of an investment firm to an investor which is connected to "*the holding of funds* [belonging to the investor] [in order] *to conclude transactions in financial instruments in the ASE* […]" is an obligation connected to an investment service covered by Law 2533/1997 and, thus, activating the *ex lege* obligation of the JGF to compensate the investor in case of failure of the investment firm. However, this conclusion is has been disputed by the JGF, which considers that when no transactions

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[983] Law 2533/1997, Article 1 (25), defines financial instruments as transferable securities of any kind negotiated in the ASE.

[984] Law 2533/1997, Article 1 (12); for the investment services as per Article 2 (1) of Law 2396/1996 see *supra*, Ch II.1.3.

in securities are proven to have taken place by the investment firm for the claimant investor, its obligation to compensate the latter does not apply. These disputes on the field of application of the relevant protective rules and notion of “covered transactions” have led to issuing of interesting case-law in recent years. This case-law touches upon a core issue of finance law, that of the aim of financial law with regard to individual protection and consequently of the legal nature of retail investors *vis-à-vis* depositors.

In particular, this recent case-law examined cases where retail investors had entrusted money to investment firms in order for investment services to be provided to them, mainly transactions in securities and portfolio management. Following the failure of such investment firms after withdrawal of their authorisation on the grounds of illegal operation, it was reveal that clients’ money had been misappropriated by the investment firms.[985] However, the JGF refused payment of compensation arguing that entrusting of money with a view to conclude financial transactions is not a covered investment service and so, even in the event of tort committed by the intermediary against the retail investor, no compensation is payable by the JGF.

The decisions of the competent civil courts[986] on this matter have been divided. Certain rulings found that when entrusting or depositing of money with a view to enter into financial transactions, even where these have not taken place as a result of fraud against

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[985] Many of relevant cases relate to *Tetraktys and Astraia*, and *Worldwide Investment Services* failures; see *infra* VII.2.2.

[986] Civil courts are competent to adjudicate actions against the JGF since it is incorporated as legal person of private law.

the client, compensation was payable by the JGF.[987] However, other decisions ruled to the contrary.[988] In an interesting distinguishing, the HSCCJ in 2011 ruled that while the holding of funds for the conclusion of transactions in securities constitutes a covered transaction for the purposes of JGF, the depositing of capital which is not in the context of investment transactions and the depositing of funds for management do not constitute covered transactions.[989]

The same issue was faced the supreme civil court in subsequent cases, until it was referred to its plenary.[990]

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[987] See indicatively, HSCCJ decision 533/2011 which ruled that ICSD protects also the depositing of funds in order to conclude financial transactions and that the field of application of Law 2396/1996 is narrower than that of ICSD, and therefore that depositing of funds has to be protected (is covered); HSCCJ 631/2011, *DEE* (2011) p. 1258, by which it was ruled that according to ISD, the management of money does not constitute an investment service but also that ICSD, which aims at the protection of investors, protects money deposited by persons with a view to conclude transactions in the capital markets; Athens CCA 381/2013. The first decision in this direction was Athens CCA 1689/2007, *DEE* (2007) p. 812, *Nomos*; see also PAPADOPOULOU, R. E. (2008) 'The Greek Judge facing the obligation of interpretation of national law in conformity to Community law: at last the recognition of the self-evident - On the occasion of Athens Civil Court of Appeals decision 1689/2007 *', *DEE*, p. 12.

[988] See for example HSCCJ 993/2010, *DEE* (2010) p. 1068; Athens CCA 5369/2009, *DEE* 2010 p. 1311; Athens CCA 3547/2010, *DEE* (2010), p. 1311; Athens CCA 85/2012 *DEE* (2012) p. 567.

[989] HSCCJ 631/2011 *DEE* (2011), p. 1258 .

[990] By HSCCJ 373/2012 *DEE* (2012) p. 786.

The 11/2013 decision of the Hellenic Supreme Civil Court of Justice (Plenary)

The Plenary Session of the HSCCJ considered the issue in the same direction as noted above, ruling *inter alia* that:

> "[f]*rom the juxtaposition and comparison of the provisions of Community and national law it emerges that the provision of Article 12(1) of Law 2533/1997 provides (a priori) a lower degree of protection than that of Directive 97/9/EC and in consequence the interpretation of said provisions of national law must be effected under the light and the scope of the latter Directive, so as to ensure the principle of effectiveness of Community law, of which Directive 97/9/EC expressly comprises and protects also the depositing of funds for investment (in contradistinction to Directive 93/22/EEC, which refers only to instruments). Therefore, in correct interpretation of the provisions of internal law, it is not required that the management of investment capital of clients have as only content the provision of investment services, which shall have as object one or more of said instruments, but also the management of a clients' investment portfolio which includes money which were provided with an order for investment services* [to be concluded], *independently of whether they were realized at the time of withdrawal of the operation license of the investment firm, where the obligation of the* [JGF] *for compensation is also created. On the contrary, and in harmony, in that, to the above Directive, the management of a clients' investment capital which includes only money, the management of which*

> *the investment firm undertakes, does not fall within covered services (i.e. those for which the obligation of the* [JGF] *for compensation is created in case inter alia of withdrawal of the license of an investment firm), where such management does not include the order to conclude, on* [the clients'] *behalf, transactions in financial instruments or the provision of financial services in the same sector*".[991]

This ruling is not only important for practical reasons but also interesting in the doctrinal analysis of the relevant law, as the court took into account EU law and further proceeded to an interpretation of ICSD with regard to ISD (applicable *ratione temporis* to the facts of the case) and to an interpretation of Law 2533/1997 under the light of EU law.

The result attained by the reasoning of the plenary of the supreme civil court appears in our view to be allowing for the effective protection of retail investors in the event of investment firm failure as a result of tort, while not endorsing a very broad delineation of the field of application of the relevant protective rules which would go beyond what is required by EU law.

At the same time, it could be argued that this case-law may in practice also entail difficulties for claimant retail investors, as the burden of proof of the nature of transactions concluded with the failed investment firm rests mainly on retail investors.

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[991] HSCCJ (Plenary) 11/2013 (nyr).

Even so, this case-law allows for much more comprehensive protection of retail investors in the Hellenic legal order, taking into account that according to earlier case-law (in which ICSD and Law 2533/1997 were not applicable *ratione temporis*) the obligation of the JGF to compensate retail investor covered only claims arising out of "a concluded financial transaction" and not claims arising out of tort, undue enrichment, or from a contract of deposit, even if in the latter case the money were deposited in order to conclude transactions in financial instruments in the future.[992]

Furthermore, the plenary avoided submitting a preliminary reference to the EJC on the interpretation of relevant Directives, although there is no EJC case-law on the matter and the issue under examination by the supreme national court certainly gave rise, in our view, to questions on the interpretation of EU law.

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[992] See indicatively HSCCJ 23/2006 *DEE* (2006) 399, *ETrAxHrD* 2006, p. 182; *Nomos* 382280. In this ruling, the HSCCJ had applied earlier law (mainly LD 3078/1954 and Law 3632/1928). It has to be noted, though, that the investment firm in the case under examination in this decision had failed in August 1997, while ICSD entered into force on the date of its publication, *i.e.* on 26.03.1997 (see ISD, Article 17). The investment firm was placed under the special liquidation procedure provided by Hellenic law by applicable at the time (Article 27 of law 3632/1928 and Article 17 of LD 3078/1954). It could thus be argued, in our view, that since unavailability occurred while ICSD had entered into force, the national Supreme Court ought to have proceeded to interpretation of applicable national law in conformity with ICSD, or should have submitted a reference for a preliminary ruling on the matter to the ECJ.

VI.2 RETAIL INVESTOR COMPENSATION WHEN THE FAILING INTERMEDIARY IS A CREDIT INSTITUTION

The protection of retail investors in case of intermediary failure has been organised in the Hellenic legal order, as noted, by reference to the legal form of the intermediary: in case of investment services provided by investment firms, the JGF is competent to compensate retail investors; however, in case investment services have been provided by a credit institution, compensation is payable by a different scheme, the *Hellenic Deposit and Investment Guarantee Fund* (HIDGF), which succeeded the *Hellenic Deposit Guarantee Fund* (HDGF),[993] covering both depositors and investors in case of bank failure.

With a view to consider whether the applicable Hellenic legislation establishes a consistent and coherent system of rules protecting retail investors in case of intermediary failure, it is necessary to examine the development of the relevant rules and their interrelation with the rules on retail investor protection in case of investment firm failure.

As the law on compensation of investors where the failing financial intermediary is a credit institution, by the HDICF, emerged from the modification of earlier law on the

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[993] For the structure and operation of the HDGF see GORTSOS, C. (2001) *The Hellenic Deposit Guarantee System**, 2nd edition, Athens - Komotini: Ant. Sakkoulas.

HDGF, the development of the latter should be taken into account for the purposes of this study.

VI.2.1 PROTECTION OF DEPOSITORS IN THE HELLENIC LEGAL ORDER BEFORE THE TRANSPOSITION OF DGSD

Before the entry of Hellas into the EEC, and before the adoption and transposition of DGSD into the Hellenic legal order, in case of unavailability of funds protection was provided to depositors by Law 2114/1993, which established a system of deposit guarantee, repealing earlier legislation on the appointment of a provisional commissioner by the *Bank of Greece* to credit institutions in distress.[994]

Law 2114/1993 established a national deposit guarantee system in order to protect depositors and stability in the banking system,[995] with compulsory participation of all credit institutions licensed in Hellas,[996] as well as branches of foreign credit institutions up to the amount covered by the Hellenic system, if their depositors were not covered for the same amount by the deposit guarantee system of the State of establishment.[997]

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[994] *I.e.* Law 236/1975, BGG, vol. A, no. 283; *cf.* Law 1665/1951 on the operation and control of banks. See also HSCCJ (Plenary) 23/1998, *Dikaiosyne* (1998) 793.

[995] Law 2114/1993, Article 1(1).

[996] Except for certain credit institutions owned by the State; *ibid.*, Article 1(2).

[997] *Ibid.*, Article 1(3).

Law 2114/1993 provided for the issuing of regulation (in the form of PDs) on all relevant matters, such as covered and exempted deposits, amount of coverage, obligations of credit institutions, the setting up, operation, and funding of a deposit guarantee fund, and the activation of the mechanism of compensating depositors etc.,[998] while it provided only the general principles of said regulation to be issued.[999]

According to Law 2114/1993, such regulation should provide that the deposit guarantee system must ensure the payment of compensation "[…] *to depositors who do not have the means to duly evaluate the financial policy of the credit institutions to which they entrust their deposits*",[1000] that it must distinguish exactly the actions that take place before the liquidation of credit institutions from the compensations paid following the liquidation,[1001] and that it must clearly define the criteria and the procedure for payment of compensation.[1002] It further provided *inter alia* that the deposit guarantee fund shall be a legal person of public law.[1003]

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998 *Ibid*., Article 2(1).

999 It is not certain, in our view, that such general delegation may be considered in conformity with relevant constitutional rules and case-law of the HSACJ; *supra* n 19. However, no such regulation was issued to our knowledge. See also GORTSOS C., *op. cit*., pp. 93 *et seq*.

1000 *Ibid*., indent a.

1001 *Ibid*., indent b.

1002 *Ibid*., indent c.

1003 *Ibid*., Law 2114/1993 Article 2(1) Article 2(3). See also GORTSOS, C., *op. cit*., pp. 96 – 97.

It is interesting to note that this legislation, which was issued a short period of time before the adoption of DGSD, provided a rule connecting the payment of compensation (or "insurance") to depositors to their ability to evaluate the financial policy of the bank they deposit their money. Although this criterion was not specified by Law 2114/1993 or by other instruments, it is important in our view in that it connects the right of depositors to be compensated to a qualitative criterion relating to their sophistication as financial market participants, in a sense not far from the relevant considerations which reverberate the emerging new European financial law post-Crisis. In this way, depositors were to be treated under Law 2114/1993 as investors (retail or not) to the extent that their choice of counterparty for the depositing of their money was considered as an investment decision (an approach which perhaps related not only to financial or legal but also to moral hazard considerations). It is equally important in our opinion to note the abandonment of this criterion in the Hellenic legislation that was issued in transposition of DGSD.

VI.2.2 TRANSPOSITION OF DGSD IN THE HELLENIC LEGAL ORDER – THE HDGF

As noted, the transposition of the DGSD in the Hellenic legal order was initially effected through the adoption of the legislation on the HDGF, which concerned only the protection of depositors in the event of bank failure; however, following the introduction of relevant EU law,[1004] the Hellenic legislation on the protection of banks'

[1004] Directives 2006/48/EC and 2006/49/EC.

clients in the event of failure was extended to cover investors as well, where investment services are provided by a credit institution, by the introduction of the HDICF.

The DGFD was set up Law 2324/1995 transposing DGSD into the Hellenic legal order.[1005] The HDGF was set up as legal person of private law, its purpose being to provide insurance,[1006] and operating under the supervision of the Minister of Economy. Later, the relevant provision was modified, explicitly stating that the HDGF "[…] *shall not be a public entity and shall not belong to the broader public sector*".[1007] Its aim was "*the payment of compensation to depositors of credit institutions* […] *which are unable to fulfil their obligations to them, and the enhancement of the stability of the credit system*".[1008] The majority of the BoD of the HDGF were appointed by the State.[1009]

[1005] BGG vol. A, no. 146. Codified and replaced by Law 2832/2000, BGG vol. A, no. 141 / 13.06.2000. Law 2832/2000 brought only minor modifications to Law 2324/1995, of a rather technical nature. See also GORTSOS, C. (1996) 'The prudential supervision of banks regime and the guarantee of deposits in banks in Greece*', *ETrHrAxHrDik*, p. 248; MOUSAS, N. (2007) 'Deposit Guarantee Fund', *HreDik*, p. 309; *idem*, (2007) 'Deposit Guarantee Fund*', *HreDik*, p. 456; *idem* (2008) 'Deposit Guarantee Fund*', *HreDik*, p. 270.

[1006] Law 2324/1995, Article 41(1); the exact wording of the provision refers to HDGF being "of insurance nature".

[1007] Law 2832/2000, Article 2(2). The exclusion of HDGF from the public sector has important consequences under Hellenic law, regarding *inter alia* the legal regime governing its administration, operation and financing, applicable employment legislation, as well as the rules on non-contractual liability.

[1008] Law 2324/2995, Article 41(2).

The compensation or "insurance" payable by the HDGF covered all credit institutions licensed in Hellas (and optionally on request branches of credit institutions of other EU MSs, for supplementary cover).[1010] According to Law 2324/1995, "[f]*or the purposes of this Law, 'deposit' shall mean any credit balance which results from funds left in an account of from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and contractual conditions applicable, and any debt evidenced by a certificate issued by a credit institution*".[1011] The exceptions from coverage follow the relevant rules of DGSD, although certain

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[1009] Three members were appointed by the *Bank of Greece*, one by the supervising Ministry, and three by the *Hellenic Bank Association* (which is a non-profit legal entity of private law established under Hellenic law and representing Hellenic and foreign credit institutions operating in Hellas; see www.hba.gr); Law 2324/1995, Article 41; and Law 2832/2000, Article 12. The initial capital of the HDGF was provided by the *Bank of Greece* (60%) and the *Hellenic Bank Association* (40%); Law 2324/1995, Article 41(3); and Law 2832/2000, Article 2(3). The funding of the HDFG is provided by the credit institutions participating in it and covered by it (Law 2832/2000, Articles 3, 4 and 10) deriving from regular annual contributions levied from them, as well as from additional contributions (levied *ex post*, when its funds are insufficient to compensate depositors), donations, income generated from the management of its assets, and loans (Law 2832/2000, Articles 3 and 4).

[1010] Law 2324/1995, Article 42, and Law 2832/2000, Article 3, referring to Law 2076/1992, Article 2.

[1011] Law 2324/1995, Article 44(1); same in Law 2832/2000, Article 5(1). Translation of the relevant provision from Law 2832/2000, English edition, as provided by www.teke.gr . See *ibid*., Article 5(2), for coverage per depositor.

optional exceptions under DGSD were not followed by the transferring Hellenic legislation.[1012]

The law on the setting up and operation of the HDGF did not provide specific rules on its relation and cooperation with competent national authorities, such as the *Bank of Greece* and the supervising Ministry.

The mechanism of payment of compensation by the HDGF was activated by the unavailability of deposit (when it is due and payable but has not been paid under applicable statutory and contractual conditions), under condition that either the central *Bank of Greece* had determined the inability of the credit institution to repay the deposit, or a judicial authority has issued a ruling which is connected to the credit institution's financial circumstances and has the effect of suspending depositors' claims against it.[1013]

No specific rules were provided by applicable legislation on payment of compensation to depositors by the HDGF, beyond rules relating to time barring of relevant claims (being set at five years from the commencement of relevant procedure), to postponement of payment of compensation in case of suspicion for deposits being

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[1012] Exceptions from coverage include *inter alia* deposits held by other credit institutions in their own name and for their own account, own funds, deposits by investment firms, the State, connected persons, as well as negotiable certificates of deposit (CDs), bonds issued by credit institutions and liabilities arising from own acceptances or promissory notes, and liabilities arising out of repos; see Law 2324/1995, Article 50; and Law 2832/2000, Article 11.

[1013] Law 2324/1995, Article 45; and Law 2832/2000, Article 6.

connected to money laundering or other illegal activity (until a final judgment is issued on the case), and to publication of information relating to the procedure relating to payment of compensation.[1014]

In order to calculate the payable compensation, set off of the credit balance of deposit with any counterclaims of the credit institution against the depositor applied, according with the data supplied to the HDGF by the liquidator of the credit institution.[1015] No specific rules were provided by the law on HDGF on the conclusion of the payment of compensation procedure, beyond the rules providing that is subrogated to the rights of depositors, and at the same class, for an amount equal to the compensation paid to them, in the context of the liquidation of the credit institution.[1016]

In general, although the law on HDFG provided for the issuing of a PD specifying rules on its funding and operation, including coverage and exemption of deposits, no relevant specification was provided by regulation.[1017]

[1014] Law 2324/1995, Article 46; and Law 2832/2000, Article 7.

[1015] Law 2324/1995, Article 44(3); Law 2832/2000, Article 5(3). Special rules applied with regard to payment of supplementary compensation to depositors of branches of credit institutions of other EU Member States; *ibid*., Articles 5(3) and 15.

[1016] Law 2324/1995, Article 47; and Law 2832/2000, Article 8.

[1017] PD 329/2000 (BGG vol. A, no. 269) which was issued on the basis of the delegation provided by Article 17 of Law 2832/2000 related only to the participation of credit institutions and cooperative banks.

VI.2.3 THE MODIFICATION OF HELLENIC LAW TRANSPOSING DGSD TO COVER INVESTORS – THE HDIGF

Following the introduction of Law 3601/2007[1018] transposing Directives 2006/48/EC and 2006/49/EC into the Hellenic legal order, and as the Crisis had reached Hellas, Law 3746/2009[1019] was adopted with a view to codify and supplement Hellenic law on deposit guarantee, by a single instrument setting up HDIGF as a successor to HDFG and also extending protection in cases investment services are provided to clients by credit institutions (and not by investment firms, in which case JGF remains competent to pay compensation).

In this way, Hellenic law on investor protection in case of intermediary failure follows the relevant typical criterion introduced by EU law which differentiates the applicable set of rules on the basis of the legal form of the counterparty (credit institution providing investment services or investment firm) and not on the basis of a functional criterion (whether the services offered to the client relate to banking or investment).

Law 3746/2009, which is currently in force, merits analysis *per se* and in conjunction with the Law 2533/1997 relating to the operation of the JGF.

[1018] BGG vol. A, no. 178.

[1019] BGG vol. A, no. 27. See for an overview MOUSAS, N. (2009) 'Deposit guarantee, legislative developments and liquidation of credit institutions', *DEE*, p. 673.

The HDIGF was set up by Law 3746/2009 as a legal person of private law, expressly falling out of the broader public sector.[1020] Its purpose is to "[…] *(a) pay compensation to depositors in the event that deposits in any of the credit institutions* [participating in the HDIGF] *become unavailable, (b) pay compensation to investors in the event that credit institutions* [participating in the HDIGF] *are unable to pay their obligations to investors stemming from guaranteed investment services* […] *with a view to ensuring stability in the credit system*".[1021] Law 3746/2009 refers to the aim of HDIGF being to ensure stability in the market[1022] –no reference is made to protecting depositors and investors *per se*.[1023]

The terms "depositor" and "investor" are not defined in Law 3601/2007. The term "deposit" is defined in the same way as per previous legislation.[1024] With regard to the term "investment", reference is made to investments falling within the protective ambit

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[1020] Law 3746/2009, Article 2(1); *cf. supra* n 1007.

[1021] *Ibid.*, Article 2(2).

[1022] *Ibid.*

[1023] While it could perhaps be argued that this omission is accidental, in our view it is not easy to support such an interpretation taking into account one the one hand that the protection of depositors and/or investors is noted as an aim of other instruments of Hellenic law and on the other that Law 3746/2009 was introduced with the purpose of "[…] *codifying provisions regarding schemes for compensating depositors and investors/customers* […] *of credit institutions*" (Law 3647/2009, Article 1) so that due care would have been taken in its drafting not least with regard to its aim.

[1024] *Supra*, n 1011. For the categories of deposits excluded from coverage of Law 3647/2009, see *ibid.*, Article 11.

of said Law: "guaranteed investment services" are defined for the purposes of Law 3601/2007 the investment services "*as per Article 4 of Law 3606/2007 paragraphs 1(a) – (d), (f) and (g), and the service specified in paragraph 2(a) of the same Article*".[1025] It is noticeable that the definition and ambit of covered of investment services under Law 3601/2007 does not coincide with that under Law 2533/1997 on investor compensation by the JGF.[1026] Thus, it emerges that the ambit of protection awarded to (retail) investors is unduly differentiated depending on whether the financial intermediary is a credit institution or an investment firm. Such differentiation lacks any objective justification.

Furthermore, Law 3647/2009 (or any other legal instrument) does not provide any clear rule as to how claims for compensation are to be classified by the HDIGF; on the contrary it allows for absolute discretion of the HDIGF without providing for the issuing of regulation to specify relevant criteria, procedure and remedies. According to the relevant provision of Law 3647/2009, "[…] *if a customer has a claim against a credit institution and it is not possible to classify the claim as belonging clearly to either* [payment of compensation to depositors or payment of compensation to investors][1027] *the HDIFG's Board shall, in its judgment, classify it in whichever of the two cases it considers to be more appropriate, since double compensation shall not be allowed for the same claim*".[1028]

[1025] See *supra* n 335.

[1026] See *supra* n 335 and n 984.

[1027] See Law 3647/2009, Article 2(2); *supra* n 1021.

Beyond secondary issues that arise from this provision, such as the reference to "customers" who are not defined, the provision is in our view characterized by lack of clarity: First, the reference to "impossibility" to classify a claim as relating "clearly" to banking or investment services is ambiguous as it does not specify what constitutes a claim impossible to classify and moreover what degree of exactitude or certainty is required for a classification to be clear. Secondly, and more important, it does not provide any substantive or procedural rules as to how the BoD of HDIFG is to proceed to such classification "in its judgment".[1029] Thirdly, it does not provide any rule as to what form does such decision of the HDIFG take and by which remedies and according to which procedures it may be judicially reviewed. Although any act or omission of the HDIFG as a private law entity may be reviewed by the competent civil courts of justice, the lack of more detailed rules leaves ground for ambiguity.[1030] Fourthly, it does not provide for the issuing of regulation specifying these rules on classification of claims.[1031]

[1028] Law 3647/2009, Article 2(3). *Cf. ibid.*, Article 2(4) relating to coverage of deposits and investment claims in case of branches in other States of credit institutions located in Hellas.

[1029] *Cf.* the rule proposed in the context of the revision of DGSD according to which *in dubio* the higher protection will be awarded; *supra*, n 640.

[1030] No relevant regulation has been issued, to our knowledge.

[1031] No relevant rulings have been reported, according to our research.

The emerging uncertainty of law and lack of predictability of applicable rules on the classification of claims by the HDIFG is not without consequences in practice, since claims for compensation of depositors receive a higher level of pecuniary protection *vis-à-vis* claims for compensation of investors.[1032] Moreover, it leads to further internal inconsistency of the rules on retail investor protection in the Hellenic legal order, such rules being examined *in toto*.

The funding of the HDIGF according to Law 3647/2009 is provided by credit institutions which mandatorily participate in it[1033] and is distinguished in assets relating to the coverage of deposits[1034] and assets relating to the coverage of investment claims,[1035] each category of assets allocated solely for the meeting of the corresponding claims.[1036] Detailed rules are provided with regard to the calculation of relevant contributions by participating credit institutions, which to an extent reflect earlier law. Conditions for *ex post* extraordinary and supplementary contributions are also provided.

The commencement of the HDIGF procedure for the provision of compensation to depositors and investors in case of credit institution failure reflect those of earlier

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[1032] *I.e.* in current levels of protection EUR 100 000 vs. EUR 30 000, accordingly. See Law 3647/2009, Articles 9 and 10; *cf.* Law 2533/1997, Article 66 (1).

[1033] Law 3647/2009, Article 3.

[1034] *Ibid*., Articles 4, 4a, and 9.

[1035] *Ibid*., Articles 5, 6, 7, 8 and 10.

[1036] *Ibid*., Articles 4(1) and 5(1).

relevant law on the activation of the HDGF procedure, which related only to deposit guarantee, *i.e.* following determination by the *Bank of Greece* or ruling of a judicial authority.[1037] The rules provided by Law 3647/2009 for the activation of the compensation procedure regarding investment services do not reflect the corresponding provision of Law 2533/1997 for the operation of the JGF.[1038] Specifically with regard to investors, following the relevant determination by the *Bank of Greece* or ruling of a judicial authority, and within a "reasonable period of time"[1039] the HDIGF has to publish an invitation to all investors to make a written application stating their claims and has to "[…] *specify the procedure and* [time limit] *by which applicants* [have to] *file their claims*".[1040] No further rules are provided in this regard by Law 3647/2009, and the specification of the relevant procedure and criteria is left to HDIGF to determine on a case per case basis.[1041]

Law 3647/2009 does not provide any specific rules as to the verification of investors' claims either: it only states in this regard that "[i]*n order to assess the* [applications for compensation] *the relevant units of the HDIFG and the Bank of Greece* [[1042]] *and the*

[1037] *Ibid*., Article 13. *Cf.* Law 2832/2000, Article 6.

[1038] See Law 2533/1997, Articles 65 - 66.

[1039] Law 3647/2009, Article 15(1).

[1040] *Ibid*.

[1041] No relevant regulation has been issued, to our knowledge.

[1042] The participation and competences of the *Bank of Greece* in the relevant procedure is not stated; beyond the competences of the *Bank of Greece* as (co)supervisor of credit

capital markets experts [[1043]]*: a) may request from the credit institution concerned the following: (i) to provide an opinion regarding the validity of the applications made, and (ii) in the event that the validity of an application is doubted, to provide the relevant supporting documentation; and b) shall consider the validity of an applications on the basis of available data, determining the* [amount of compensation] *for each applicant*".[1044]

It emerges from the above provision, that the HDIFG in order to verify an investment claim may *inter alia* request the credit institution concerned to provide the "relevant supporting documentation"; no reference is made to the nature of such documentation. Furthermore, according to the same Law, with regard to investor claim verification the HDIGF has to take into account "[…] *the books held by the credit institution concerned and the data supplied to the HDIGF by the said credit institution* […] *as well as the supporting documentation* [provided] *by the applicant* […]".[1045]

While these provisions appear to allow for any documentary evidence to be taken into account in determining the validity and evaluating investors' claim for compensation by the HDIGF, they are not consistent with the corresponding rules regarding claim

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institutions, it is *inter alia* competent for controlling the data submitted to the HDIGF by its member credit institutions: see Law 3647/2009, Article 6 (15).

[1043] The HDIGF may appoint experts to assist it; *ibid*., Article 16 (1).

[1044] Law 3647/2009, Article 16.

[1045] *Ibid.*, Article 17(1).

verification in the context of the special liquidation of investment firms, and in the context of claim verification by the JGF.[1046]

The above rules provided by Law 3647/2009 with regard to the documentary evidence for the purposes of the HIDGF verification procedure have to be interpreted in conjunction with the rule provided by the same Law, according to which "[t]*he level of compensation to be paid to each investor is computed in accordance with the rules of law and the terms governing the contractual relationship of the investor with the credit institution, while observing the provisions regarding set-off* […]".[1047] While this provision does not appear to be introducing any specific rule (since statutory and contractual rules would *a priori* be applicable) it is useful in that it clarifies indirectly that there is no limitation or specificity as to applicable rules.

At the same time, the issue of intermediary failure as a result of tort (and in particular fraud) does not appear to be taken into account by Law 3647/2009 in determining the rules governing claim verification, although such a cause of failure is considered as critical by EU law on investor compensation.[1048]

[1046] See Law 2533/1997 and *supra* Ch VI.1.2.

[1047] Law 3647/2009, Article 17(2).

[1048] See *supra* n 569.

Interim Concluding Remarks

Retail investor protection in the form of *ex lege* compensation awarded by the relevant funds in case of financial intermediary failure is fragmented in the Hellenic legal order depending on the form of the financial intermediary (as an investment firm or a credit institution providing investment services).

Each set of rules, on the compensation of retail investors by the JGF and by the HDICF, examined separately is characterized by inner deficiencies especially with regard to claim verification when failure is connected to tort.

Moreover, the two sets of rules do not offer equivalent protection, and do not constitute corresponding sub-systems of a larger consistent system of rules providing effective protection to retail investors in the event of intermediary failure –whether the intermediary is a credit institution or an investment firm.

Instead, the conditions of protection available differ for reasons unconnected to the intrinsic characteristics of each type of financial intermediary but rather to historical circumstances relating to the incoherent development of the relevant rules.

This is also related to the fragmentation of relevant EU law on retail participant protection in the event of intermediary default, which has led to the duality of the EU compensation regime depending on the legal form of the intermediary and not on a functional criterion.

The fragmentation and incoherence of the EU law rules transposed into the Hellenic legal order, in conjunction with discrepancies in their transposition *per se* and also in conjunction with the lack of a consistent EU or national insolvency regime, leads to unsatisfactory results in terms of uniformity, predictability and at the end effectiveness of the applicable rules *in toto*.

Certain of these problems have been considered by recent case-law on the protection of retail investors in case of investment firm failure, which has attempted to achieve a balance of the need to protect retail investors in particular in case of failure as a result of tort with the requirements of legal certainty and predictability. In this direction, the recent case-law by the HSCCJ has sought to safeguard the *effet util* of EU law in this area, as perceived by the supreme national court –which refrained though from submitting a preliminary reference to the ECJ.

While this new case-law illustrates the potential of reaching effective legal solutions in the context of the Hellenic legal order, with a view to achieve protection in practice of retail investors in the event of intermediary failure, yet as a judicial decision it addresses specific issues and cannot by its nature cure the overall structural and substantive deficiencies of relevant national rules as a whole, establishing a uniform and predictable legal system. The latter would require legislative initiatives to simplify, specify, systematise and unify national rules in this area. The introduction of the revised DGSD, ICSD and the new recovery and resolution regime in the EU, if completed, will provide for such an opportunity upon their transposition in the national legal order.

CHAPTER VII. RETAIL INVESTOR PROTECTION AND COMPETENT AUTHORITIES' LIABILITY IN TORT IN THE HELLENIC LEGAL ORDER

Having examined the liquidation and *ex lege* compensation regimes operating in the Hellenic legal order in the area of financial intermediary failure, it is now necessary to address the problematic of the tortuous liability of national competent authorities, as developed in the Hellenic legal order.

In this direction, and on the basis of long established case-law on the non-contractual liability of the State and public authorities according to Hellenic law, it will be interesting to examine recent developments especially with regard to non-contractual liability of the HCMC, legislative initiatives to provide it with immunity from liability and the judicial response, and the criteria for liability to attach developed by case-law, also taking into account the relevant problematic from an EU law perspective.

VII.1 THE *ACQUIS* ON INDIVIDUAL PROTECTION AND PUBLIC AUTHORITIES' LIABILITY IN TORT IN THE HELLENIC LEGAL ORDER

Hellenic law on non-contractual liability of the State and public authorities has been developed on the basis of the respective *acquis* in the area of civil law, regarding liability in tort of individuals (and private law persons), which has to be taken into account before examining the main features of State and public authorities' liability in tort, and then the specific considerations relating to HCMC liability in tort.

VII.1.1 LIABILITY IN TORT OF INDIVIDUALS

According to the HCC, the conditions for liability of individuals in tort to occur are:[1049] damage, unlawfulness of act or omission, causal connection of unlawfulness of act or omission to damage, and culpability of the author of damage.[1050]

[1049] For an overview of Hellenic tort law, see among many BALIS, G. (2005) *Law of Obligations, General Part**, 3rd edition, Athens: Sakkoulas; FILIOS, P. (2004) *Law of Obligations, General Part**, Athens: Sakkoulas; *idem* (2005) *Law of Obligations, Special Part**, Athens: Sakkoulas; GEORDIADIS, A. and STATHOPOULOS, M. (ed.) (1979-1982) *Civil Code, Article-by-Article Commentary**, Athens: Sakkoulas; GEORGIADIS, A. (1999) *The Law of Obligations, General Part**, Athens: Sakkoulas; *idem* (2004) *The Law of Obligations, Special Part**, Athens: Sakkoulas; KERAMEUS,

Culpability is relevant to the notion of fault, as it refers to the subjective element of willful or negligent behaviour of the author of damage. The burden of proof for the fulfilment of these criteria rests on the injured person. In certain cases, Hellenic civil law provides for strict liability in tort.[1051] In case several persons have committed a delict, or are responsible for the damage caused, they are liable to the injured person jointly and severally.[1052] The injured person is entitled to claim reparations *i.e.* damages for pecuniary injury[1053] and reparation in money for moral or non-pecuniary injury[1054] caused as a consequence of the unlawful act or omission. Moreover, compensation for future damages may be claimed.[1055]

K. and ROUSSOS, K. (1995) 'Confines and Limitation of Damages under Hellenic Law of Torts', *RHDI*, vol. 48, pp. 233 - 252; LIAKOPOULOS, T. and MENTIS, G. (1998) 'Civil liability for pure economic loss in Hellas', *RHDI*, vol. 51, pp. 61 - 69; SPYRIDAKIS, I. (2004) *The Law of Obligations, General Part**, Athens: Sakkoulas; STATHOPOULOS, M. (1995) *Contract Law in Hellas*, The Hague - London - Boston - Athens; *idem* (2004) *General Law of Obligations**, Athens – Thessaloniki: Sakkoulas.

[1050] HCC, Article 914.

[1051] As in HCC Articles 922 and 924.

[1052] HCC, Article 927.

[1053] HCC, Articles 914, 919.

[1054] HCC, Articles 57 – 59, 299, 932.

[1055] HCC, Articles 928 – 930.

The issue of causality is central to the problematic of civil liability in tort, the theory of *causa adequata* being used by case-law to determine causality.[1056]

The prescriptive period for claims arising from liability in tort is five years from the time of knowledge by the injured party of the injury and the identity of the responsible person, and twenty years from the commission of the delict independently of such knowledge. In case criminal law provides for a longer prescriptive period, the latter prevails.[1057]

8.1.2 LIABILITY IN TORT OF THE HELLENIC STATE AND OF HELLENIC PUBLIC AUTHORITIES

Liability in tort of the Hellenic State and Hellenic public authorities may arise on the ground of breach of EU law, or on the ground of breach of national law.[1058]

Hellenic law provides specific rules on State and public authorities' liability to

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[1056] For a comparative survey of causality theories see VITSA, P. (2013) 'Causality and Possibility: A Judicial Policy Approach*', *NoV*, vol. 61, no. 4, p. 1111.

[1057] HCC, Article 937.

[1058] See among many GERONTAS, A., LYTRAS, S., PAVLOPOULOS, P., SIOUTI, G. and FLOGAITIS, S. (2004) *Administrative Law**, Athens – Komotini: Sakkoulas; PAVLOPOULOS, P. (1986) *Civil Liability of the State - I. General Perspective**, Athens – Komotini: Sakkoulas; *idem* (1989) *Civil Liability of the State - II. According to Public Law Rules** , Athens – Komotini: Sakkoulas.

compensate individuals for damage unlawfully caused to them. According to Hellenic law on State liability in tort, "[fo]*r illegal acts or omissions of the organs of the State in the exercise of the public power that has been assigned to them, the State is liable to* [payment of] *compensation, except if the act or omission was effected in breach of a provision which exists in the sake of the public interest. Together with the State is jointly liable the responsible person, subject to the special provisions for the responsibility of ministers*". [1059] The same rule is extended to cover liability in tort of public authorities having autonomous legal personality.[1060]

The conditions for liability to attach on the basis of Articles 105 – 106 of Introductory Law to the HCC, as formulated by well-established case law, are: unlawful act or omission by an organ of the State or a public authority, damage suffered by the individual and causal link between the unlawful act or omission and the damage suffered by individuals. Fault (and thus culpability) is not a condition. These conditions necessitate further analysis:

Regarding the notion of act or omission includes according to case-law not only regulatory administrative acts or individual administrative acts, but also material acts and omissions, if they are connected to the exercise of public power.[1061] Such acts or

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[1059] Article 105 of Introductory Law to the HCC, ComL 2783/1941, in force since 1946. See, indicatively, HSACJ (Plenary) 377/2014, *Nomos* 620416; HSACJ 167/2014, *Nomos* 620026; HSCAJ 201/2014, *Nomos* 620419; HSCAJ 523/2014, *Nomos* 620710.

[1060] Article 106 of Introductory Law to the HCC. See, indicatively, HSACJ 528/2014, *Nomos* 620712; HSACJ 268/2013, *Nomos* 610398.

omissions may be positive (as in the issuing of a decision) or negative (as in the dismissal of an application), explicit or implicit, and may be enforceable or not – however, they must be directly linked to the exercise of public power (*i.e.* not when an organ of the State or of a public authority operates as *fiscus* and not in its official capacity).[1062]

Further, the State or public authorities may be responsible to compensate an individual when there is breach of a specific provision of law or regulation by the competent organs of the State or the public authority.[1063] According to case-law, the requirement for unlawful act or omission is connected to the breach of a legal rule, by which an

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[1061] See, indicatively, HSACJ (Plenary) 3045/1992, *Harmen.* (1992) 1069; HSACJ 395/2010; HSSCJ 10/2003, *DDike* (2004) 1174.

[1062] In such case, liability is based on private law; see Article 104 of Introductory Law to HCC, HSCCJ 599/2013, *Nomos* 609887.

[1063] The obligation of the State and public authorities to compensate individuals as a result of tort may further give rise to a claim by the State and public authorities against their responsible organs to cover the loss, by recourse. The question of whether the illegal behaviour of an organ of the State or a public authority also constitutes a criminal offense, as in the crime of "*disloyalty by public servants*" (Article 256 of HCrC) is also raised. L. 1608/1950 (BGG vol. A, no. 301), as in force, provides for incarceration (*i.e.* imprisonment of duration over five years; HCrimC, Articles 51 – 52) of persons having illegally received or attempted to receive financial gain or having illegally caused or risked to cause financial damage, of over EUR 120 000 to the detriment of the State or a public authority, by committing certain crimes. If the illegal gain or loss of the State or public authority is over EUR 150 000, or in case of aggravating circumstances, the sanction is imprisonment for life; *ibid*., Article 1. See, indicatively, HSCrCJ 108/2013, *Nomos* 602507; HSCrCJ 125/2013, *Nomos* 602707; HSCrimCJ 333/2013, *Nomos* 602815; HSCrimCJ 456/2013, *Nomos* 608695; HSCrimCJ 497/2013, *Nomos* 607946.

individual right or legitimate interest is protected.[1064] In this sense, there must be breach of the rule of law.[1065] In the same direction, State liability in tort exists not only when there is breach of a specific provision, but also "[…] *when the duties and obligations inherent to the specific public service, as stemming from legislation in general, the facts of common experience, and the principle of good faith, are infringed*".[1066] In the same direction, it has been ruled on a number of cases, that an unlawful act or omission is committed not only "[…] *when there is breach of a specific provision of law, but also when the actions inherent to the specific* [public] *service and stem from the general legislation in force and the facts of common experience, of scientific and professional training, and of good faith*".[1067]

In this sense, there appears to be accepted by Hellenic case-law that public authorities have to operate effectively, in order to achieve the aim of the law in each case.

However, it is intrinsically difficult to consider which is the "best execution" of the supervisory authorities' duties, where the aim of the provisions at hand is not clear –or where such aim is considered to be only in the general interest.

[1064] See, indicatively, HSACJ 1141/1999, *DDike* (2000) 163.

[1065] See among many, PAVLOPOULOS, P., Civil Liability of the State II, *op. cit.*

[1066] See, indicatively, HSACJ 3102/1999, *Nomos* 286129; HSACJ 4776/1997, *Nomos* 254473.

[1067] See, indicatively, HSACJ 2692/2009, *Nomos* 503500; HSACJ 2727/2003, *Nomos* 344099; HSACJ 3632/2001; HSACJ 347/1997, *Epitheorese Dikaiou Koinonikes Asfaleses* (1997) 205.

Thus, it has been supported that financial markets supervisory authorities' duties constitute an "*obligation de moyen*";[1068] whether there has been breach of duty will be considered not according to the end result but on the basis of whether all necessary preemptive and enforcement supervisory action was taken on time –*i.e.* according to a criterion of effectiveness of the action taken. According to this reasoning, effectiveness in the exercise of the supervisory power may be assessed only on a case per case basis, taking into account the degree of discretion that the supervisor possessed and the way it applied it.[1069]

Furthermore, fault is not considered by case-law on the interpretation of relevant provisions as a condition for State or public authorities to attach; fault (*i.e. dolus*) is not a necessary condition for a damaging unlawful act or omission to occur, and vicarious liability of the State and public authorities is considered to exist in case of tort.[1070] This

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[1068] See FLOROS, N. (2012) *The Liability of Supervisory Authorities in the Financial Sector**, Athens: Nomiki Bibliothiki, p. 222; KATSIGIANNIS, F. (2008) 'Limits of Obligations and Liability of the [HCMC] in the Context of its Controlling Competences in the Scope of Provisions of Articles 105 and 106 of the Introductory Law to the Civil Code*', *DDike*, vol. 5, p. 1119; TSIMPANOULIS, D. (2001) 'The scope of [HCMC] competence to supervise companies with securities listed in the Athens Stock Exchange (opinion) *', *DEE*, vol. 8-9, p. 843.

[1069] Regarding exercise of supervision and the question of discretion see FLOROS, N. (2012), *op. cit.*, pp. 229 - 232.

[1070] See, indicatively, HSACJ 740/2001, *Nomos* 301765; HSCCJ 566/1995, *EEmpD* (1995) 666. The relevant case-law is in line with ECJ case-law for liability of MSs for breach of EU law; see indicatively *Francovich*, *supra* n 82.

approach has raised criticism, as it is considered that it is not compatible with the role and functioning of supervisory authorities in the modern financial markets and if further induces moral hazard on the part of retail investors and clients in general.[1071]

Such arguments in favour of introduction of fault as a condition for liability in tort to attach are further connected to the issue of whether, in the case of participation by individuals in the financial market, the participation *per se* entails even indirectly or tacitly acceptance by the retail participants of an enhanced decree of risk associated with the intrinsic characteristics of financial markets.[1072]

In our view, however, the non-introduction of fault as a condition for State and public authorities' liability in tort to exist, as provided by the relevant provisions[1073] and case-law in the Hellenic legal order, is correct (in light of the stated protective purpose of relevant rules) and necessary in that it constitutes a balancing element to the evident asymmetry of information and powers between the individual market participant and the competent authorities.

[1071] See among others FLOROS, N. (2012) *op. cit.,* p. 263; MITSOU, A. (2006) 'Civil Liability of Supervisory Authorities in the Sector of Capital Markets to Investors under the Scope of ECJ Decision in Case Peter Paul*', *DEE*, vol. 10, p. 999.

[1072] *Cf.* FLOROS, N. (2012) *op. cit.,* pp. 264 - 265.

[1073] For the non-insertion of fault as a condition for non-contractual liability of the State and public authorities according to Articles 105 and 106 of the Introductory Law to the HCC, see BALTAKOS, P.D. (1985) *Civil Liability of the State**, Athens: Ant. N. Sakkoulas.

Furthermore, in our view there is already an important factor to counter the lack of fault as a condition for liability in tort, operating in practice in favour of the competent authorities and rendering the admissibility in merit of actions against them very demanding for retail participants: the issue of causality. As noted, in the Hellenic tort law, it is accepted that causality exists when there is *causa adequata*,[1074] *i.e.* when according to common knowledge and experience, the illegal behaviour of State or public authorities' organs are objectively capable, in the usual course of events, without any exceptional and unusual event taking place, to bring about the damaging result.[1075]

In the case of ineffective exercise of supervisory powers by the competent authorities, the retail participant incurs financial damage usually by an event directly concerning the financial intermediary and only indirectly connected to the behaviour of the competent authority.

Thus, in case of failure of an investment firm for reasons connected to illegal behaviour, the retail investor incurs damage *prima facie* due to the collapse of the intermediary –in practice it may be difficult even to be informed of circumstances amounting to illegal behaviour of the supervisor which permitted for the damage to be sustained by the retail investor; and it will be even more difficult to prove that such behaviour constitutes *causa adequata* of the damage sustained by the retail investor. While similar problems

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[1074] On the contrary, the causality theory of *conditio sine qua non* is not followed by case-law. See also MARGARITIS, M. (2000) 'The Causal Link in Compensation Law*', *Kritike Epitheorese*, vol. 2, p. 13.

[1075] See, indicatively, HSACJ 1956/2009, *Nomos* 498835; HSCCJ (Plenary) 23/1988, *Dikaiosyne* (1989) 1150.

in causality have been treated by Hellenic case-law on non-contractual liability of the State and public authorities,[1076] the operation of financial markets appears to be presenting more perplexed causality issues.

In our view, it would perhaps be more accurate to consider that the retail investor has been deprived of a chance to avoid or to mitigate his losses.[1077] While such a construction has been criticized as leading to uncertainty of law as it equates the loss of opportunity to avoid damage to damage itself,[1078] in our opinion it counteracts the

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[1076] For instance, it has been ruled that in the case of unlawful omission by the personnel of a public hospital to examine blood to be transfused to a patient for the HIV virus, the public hospital was liable to compensate the individual patient affected; HSACJ 2463/1998. In another case, a Customs Office was liable to compensate individuals for the destruction of goods stored in the Customs Office storage area, due to the failure of its personnel to take suitable measures in order to safely store the goods; HSACJ 3027/1998; *cf.* HSACJ 1794/2001 *Dioiketike Dike* (2003) 234; HSACJ 2635/1996 *Dioiketike Dike* (1997) 201; HSACJ 313/2003. Also, it has been ruled that in case of damage caused to the house and other property of a private individual, as a result of a flood caused by the faulty construction of a canal by the State, the latter was liable to compensate him; HACJ 3182/1998. Furthermore, in case of damage caused to the property of individuals as a result of violent rioting, the ability of public authorities to prevent damage was taken into account and it was ruled that where the possibility of such rioting and damaging of private properties is predictable (as in the case of anniversaries of politically important events) the police are able to predict and prevent such destruction by taking appropriate preventive measures, so that the State is liable to pay compensation if the police do not act effectively; HSACJ 28/2000.

[1077] In the sense of the French causality theory of "*perte de chance*"; see FAIRGRIEVE, D. (2003) *State Liability in Tort - A Comparative Law Study*, Oxford: OUP; VAN DAM, C. (2006) *European Tort Law*, Oxford: OUP.

[1078] See FLOROS, N. (2012) *op. cit.*, p. 269.

unsurpassable difficulties which would otherwise be caused if the individual claimant had to support his action on the basis of the traditional *causa adequata* theory. In this way, the loss of opportunity causality theory may also alleviate the exceptional difficulties faced by an individual in terms of proving his case against the State or public authorities.

However, in our view the choice of a causality theory as more relevant to the issue of competent authorities liability in tort reveals to a certain extent theoretical preoccupations, since a behaviour which according to "common knowledge and experience" is "objectively capable", in the "usual course of events" to cause the damaging result (according to the *causa adequata* construction) may not in practice be completely different from a behaviour which deprived the injured individual of "a chance to avoid or to mitigate his losses" (according to loss of opportunity construction). In both cases, there are vague legal notions that will have to be specified on the basis of evidence for the court to consider that a causal link between illegal behaviour and damage exists. Thus behind the problematic of causality lies the central problem of evidence to support relevant claims.

More specifically, in the case of action for compensation against competent authorities, the issue of proof becomes very complicated as *ex hypothesi* retail investors are unable to possess vital information at the time critical events take place, as to the exercise by the competent authority of its duties. While fault is not a requirement under Hellenic law on State and public authorities' liability in tort, still the claimant individuals have the burden to support and prove their claims.[1079]

Furthermore, the difficulties faced by retail investors, in case of actions against competent authorities on the basis of non-contractual liability, are intensified by the application of the rules on interruption of causality and rules on contributory negligence.[1080]

On the issue of the damage incurred for which claimant individuals have to be compensated by the State or public authorities the relevant provisions on State and public authorities' liability in tort[1081] are interpreted and applied in conjunction with the general provisions of the HCC on compensation.[1082] The compensation to be awarded must be full (covering all positive damage proved as well as lost future gains).[1083]

[1079] Relevant rules in the Hellenic legal order are Articles 902 and 903 of the HCC, Articles 450 *et seq*. of the HCCP, and Article 174 of the HACP. Furthermore, Article 5 of the Hellenic Administrative Procedure Code (Law 2690/1999, BGG vol. A, no 45, which relates to the operation of the public administration and not to judicial proceedings in administrative law cases) provides for the right of access of persons to administrative documents.

[1080] HCC, Article 330. See Athens ACA 1151/2010, *HreDik* (2010) 96 in which it was ruled that the HCMC was liable to compensate retail investors but recognised a degree of 60% of concurrent fault of retail investors who had failed to show the diligence required in respect of the amount of their investment. For discussion of the case, see *infra* Ch VII.2.2, n 1148.

[1081] *I.e.* Articles 105 and 106 of the Introductory Law to the HCC

[1082] Mainly, Articles 914 *et seq.* of the HCC on non-contractual liability and Articles 297 – 300 of the HCC on pecuniary damage and the extent of compensation.

Further, "pecuniary satisfaction" may be awarded to the claimant for any moral damage sustained by him.[1084]

The court may set off the amount of the compensation payable against any profit the claimant has received in connection to the damaging event (according again to the causality theory of *causa adequata*),[1085] such as in particular any amount of compensation paid to the claimant retail investor by the relevant guarantee funds and any amount received by him in the context of the special liquidation or insolvency proceedings of the credit institution (operating also as investment firm) or of the investment firm.

In this respect, it has been supported that there is danger of (undue) profit of the claimant in case of payment of double compensations due to the parallel progress of insolvency proceedings and of actions for compensation against the competent authorities; and that this danger necessitates the introduction of a new rule obliging claimants to take legal action first against the (failed) financial intermediary and only

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[1083] See indicatively HSACJ 2705/2009, *Nomos* 503594; Punitive damages (as known in the English legal system) may not be imposed in the Hellenic legal order; there are however pecuniary sanctions which may be imposed with a view to achieve enforcement of a judicial decision (Articles 946 - 947 of the HCCP).

[1084] This is not compensation *stricto sensu* as it does not cover damage to property but relates to the protection of the personality (Articles 57, 59, 932 of the HCC). See KARAKOSTAS, I. (2008) 'Moral damage pecuniary satisfaction in case of civil liability of the State', *Epharmoges Astikou Dikaiou*, p. 379.

[1085] See HSACJ 1139/2013, *Nomos* 610853; HSACJ 3320/2012, *Nomos* 586843.

then against the competent authorities.[1086] In our view, however, such a development would not lead to satisfactory results as it does not take into account that insolvency proceedings are intertwined with special liquidation proceedings which are conducted under the supervision and control of the competent authorities,[1087] and that insolvency proceedings invariably have a very long duration, so that the opening of judicial proceedings against the competent authorities after their conclusion would become disconnected from the allegedly damaging behaviour of the latter. This would further bring to the fore prescription issues, which would require a further new rule for the interruption of prescription, and which in our view would cause uncertainty as to the liability of the competent authorities for a particularly long time. More importantly, in our opinion it would negatively affect the confidence of retail investors in the financial system as competent authorities would appear as not in practice immune from liability.

Another parameter relating to State or public authorities' liability in tort in Hellenic law is that (as a negative condition) the rule breached must not be in the general interest.[1088]

[1086] See FLOROS, N. (2012), *op. cit.*, p. 272.

[1087] *Supra*, Ch V.1.

[1088] The notion of the general interest in tantamount to that of the public interest, as also recognized by the case-law which uses both terms interchangeably; see indicatively from earlier theory STASINOPOULOS, M. (1950) *Civil Liability of the State (of the Civil Servants and the Legal Persons of Public Law according to the Civil Code)**, Athens; TSATSOS, D. (1960) *The Notion of Provision Existing in Favour of the General Interest according to Article 105 of the* [Introductory Law to the HCC]*, Athens: To Nomikon; VEGLERIS, F. (1946) *Judicial Control of the Administration, Part A, the Limits of the Competence of Regular Administrative Courts against the Administration**, Athens: Ant. N. Sakkoulas 1987. See further, DAGTOGLOU, P.

According to well established case-law, there is no liability in tort of the State or public authorities when the rule breached has been introduced "solely" in the public interest – but not when it has been introduced also in the public interest.[1089] If both the public interest and individual rights are served by the relevant provision, State or public authorities' liability in tort may *a priori* exist.[1090]

(2004) *General Administrative Law**, Athens-Komotini: Sakkoulas; MATHIOUDAKIS, I. (2006) *Civil Liability of the State from Material Acts of its Organs (according to Articles 105-6 of the* [Introductory Law to the HCC]*)**, ANION; VENIZELOS, E. (1990) *The General Interest and the Limitation of Constitutional Rights**, Thessaloniki: Paratiritis.

[1089] See indicatively HSACJ 1422/2006, *NoV* (2007) 197; HSACJ 3624/2001, *Nomos* 314569; HSCCJ 426/1984; HSCCJ 1417/1977, *NoV* (1978) 1069. See also GEORGOUTSOU, E. (2008) 'The Approach by Jurisprudence of the Public Interest in the Context of Civil Liability of the State*', *DDike*, p. 13, 24; THEOHAROPOULOS, L. (1988) *The Principle of Equality of Citizens in Public Obligations and the Civil Liability of the State**, Athens - Komotini: Ant. N. Sakkoulas.

[1090] For example, it has been ruled that fixing of the highest permissible price for certain products by regulation is not only in the general good, but also aims at the protection of the rights of each enterprise, in the sense that such highest price may not be lower than production cost, but must also include a margin of gain for the enterprise; HSACJ 3624/2001, *Nomos* 314569. Also, that the provisions of HCon providing that the number of members of Parliament elected in each electoral region is provided by PD on the basis of the most recent census, has been established not only in the general good *i.e.* for the smooth operation of representative democracy, but it also aims at the protection of the right of each citizen to participate in the electoral process, and specifically of the right of each citizen to be elected; HSACJ 2692/2001, *Dioiketike Dike* (2003) 525. Furthermore, it has been ruled that urban law provisions on the one hand set the general terms and conditions for building constructions, which serves the public interest in building according to health and safety requirements in favour not only of the builders but of third persons as well, and one the other hand give a right to

Taking the above into account, the Hellenic State and the HCMC may *a priori* be found liable to compensate retail investors, under conditions that the rule breached exists also in favour of the individual retail investors –and not only in the general (or public) interest.

The relevant problematic, as presented especially in the case of HCMC liability in tort, is pertinent for the purposes of this study and must now be examined in turn.

VII.2 RETAIL INVESTOR PROTECTION AND COMPETENT AUTHORITIES' LIABILITY IN TORT IN THE HELLENIC LEGAL ORDER

Having examined the general context of State and public authorities' liability in tort in the Hellenic legal order, it is further necessary to examine whether HCMC may be considered as exercising its competences only in the general interest, thus enjoying immunity from civil actions, and in the negative under which conditions the HCMC may be found liable in tort.

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each interested person to acquire as provided by law a construction license; HSACJ 1920/1993, *Dioiketike Dike* (1994)178.

VII.2.1 THE HCMC AS A REGULATOR AND SUPERVISOR, AND THE QUESTION OF *EX LEGE* IMMUNITY FROM LIABILITY

The HCMC originated from a special Council, established by LD 3746/1957,[1091] which was part of the public administration and was competent to authorise the issue of sovereign bonds and other financial instruments. This Council was replaced by the HCMC,[1092] which was set up initially as a Commission of the Ministry of Coordination, having as main competence to authorise the issue of sovereign bonds and other instruments, to advise the Currency Committee and other competent authorities on capital markets issues, to supervise issuers and to study and provide opinions on the control of abrupt fluctuations in the Stock Exchange.[1093] The BoD of HCMC were designated by the Minister of Finance, and consisted of eleven members, having mainly advisory and certain licensing competences, operating within the framework of the Hellenic public administration.[1094]

[1091] BGG vol. A, no. 173 / 31.08.1957, 09.09.1957.

[1092] By Article 12 of Law 148/1967 (BGG vol. A, no 173), which was modified by subsequent legislation and finally repealed in 01.11.2007 by Article 85 of Law 3607/2007 (transposing MiFID).

[1093] *Ibid*.

[1094] These were (a) three public servants, (b) one member designated by the *Bank of Greece*, (c) two members chosen among persons proposed by Hellenic commercial and investment banks, (d) one member designated by ASE, and (e) four members designated by the *Hellenic Federation of Enterprises*, the *Athens Chamber of*

HCMC was re-established by Law 1969/1991, as a legal person of public law, *i.e.* as a public authority having (autonomous) legal personality, supervised by the State (the Minister of Finance), and competent for controlling the application of investment services law:[1095] all powers granted by law to it as established by Law 148/1967 were granted again,[1096] and the Minister of Finance was granted authority to designate its BoD.[1097] Further, wide regulatory and supervisory competences were granted to HCMC, as well as important enforcement powers.[1098]

The HCMC was awarded very wide competence to regulate the provision of investment services: Law 1969/1991 granted power to HCMC to issue administrative acts on most

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Commerce and Industry, the *Thessaloniki Chamber of Commerce and Industry*, and the *Hellenic Chamber of Economy*; Article 12(1) of Law 148/1967 as replaced by Article 35 of Law 1806/1988.

[1095] Law 1969/1991, Article 76(1), (2).

[1096] Law 1969/1991, Article 76(3).

[1097] Law 1969/1991, Article 77. Following amendment by Article 39 (8) of Law 2324/1995, the designation of the President of the HCMC is governed by Article 49A of the Hellenic Parliament Regulation, which provides for hearing by a parliamentary committee and provision of opinion by said committee regarding suitability of persons proposed to direct public authorities. According to Article 77 of Law 1969/1991, the BoD of the HCMC consisted of seven members, out of which three (the President as designated by the Hellenic Parliament and the two Vice-Presidents) constitute the Executive Committee, as a separate executive instrument of the HCMC which refers matters to the BoD under certain conditions.

[1098] Law 1969/1991, Article 76 (8).

areas of investment services law (including the criteria for authorisation of investment firms), to provide and revoke investment firm authorisations, to provide opinions to the Minister of Finance on financial market issues, to supervise investment firms, and to enforce sanctions and disciplinary penalties as provided by law, and "[…] *to regulate every issue that is connected to the smooth operation of the financial market, the observing of financial law and every other matter that stems from other provisions*".[1099]

Although such general and unconditional granting of competence by law to a public authority "to regulate every issue" relevant to the financial market could be considered problematic from a legal point of view (exercise of regulatory competence has to be based on specific authorisation by law),[1100] it demonstrates the intention of the legislator to provide HCMC with as wide powers as possible in the area of financial market regulation.

In transposition of the relevant ISD provisions, HCMC was empowered by Law 2396/1996[1101] to take appropriate measures to protect investors, in the context of the exercise of freedom of movement by investment firms; *inter alia* HCMC was granted power to prohibit the operation of branches of investment firms where it "[…] *would endanger investors' interests*",[1102] to take measures, including to prohibit temporarily or

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[1099] Law 1969/1991, Article 78.

[1100] *Supra*, n 19.

[1101] Articles 1 – 31 of Law 2396/1996 have been repealed since 01.11.2007, and replaced by Law 3606/2007 transposing MiFiD; Law 3606/2007, Article 85.

permanently carrying out of activities by foreign investment firms in Hellas,[1103] to proceed to adoption of temporary measures in urgency without following the procedure of cooperation with home-MS competent authorities,[1104] "*when delay in taking up the measures implies an immediate and unavoidable risk for investors' interests and for the orderly operation of the capital market*".[1105] Law 2396/1996 further provided that (subject to rules on supervision of credit institutions by the *Bank of Greece* and other competent authorities) HCMC was provided the general competence for supervising investment firms established in Hellas, as well as investment firms operating in Hellas "[…] *aspiring to investors' protection and to the protection of the general interest and with regard to the Rules of Conduct, according to the respective legal provisions*".[1106]

Moreover, Law 2396/1996 made reference to the need for effective exercise of supervisory duties: "*The Hellenic competent authorities responsible for the supervision of investment services firms may collaborate closely as for the exchange of confidential information, regarding investment services firms, with the purpose of effecting and*

[1102] Law 2396/1996, Article 12(3). *Cf.* same rule regarding establishment of a branch in a third (non-EU) state, in Article 12(6). *Cf.* Article 14(1) and (3) regarding provision of services in a third country without establishing a branch.

[1103] Law 2396/1996, Article 17(1).

[1104] *Ibid*., Article 17(3).

[1105] *Ibid*., Article 17(4).

[1106] *Ibid*., Law 2396/1996 Article 5(1).

facilitating the control as provided by law on investment services firms and their effective supervision […]”.[1107]

In the wake of the 1999 ASE crisis, Law 2836/2000 was passed,[1108] providing *inter alia* that members and staff of the HCMC do not have any civil liability to any person for acts or omissions in the exercise of their duties, and especially with regard to the exercise of supervisory competence, except for abuse of information and breach of confidentiality.[1109] Furthermore, the relevant immunity provision of Law 2836/2000 was given retrospective effect, providing that such immunity covers also the period since the entry into force of Law 2533/1997, *i.e.* since 11.11.1997.[1110] However, it did not provide immunity from liability in tort to the HCMC itself, as a public legal person having an autonomous legal personality under Hellenic law.

[1107] *Ibid.*, Article 5(9). Regarding the exchange of information between competent authorities, including the *Bank of Greece* and the HCMC, and organs of insolvency and liquidation proceedings, no detailed rules were provided by Law 2396/1996; it was provided though that in the event of an investment firm failure, clients’ assets are to be separated by the firms’ assets and delivered to their owners, the HCMC having to draw up a table of relevant assets (of securities and money) which belong to the firms’ clients and to disclose it to the beneficiaries, the instruments of the liquidation proceedings and any other person having a legitimate interest; Law 2396/1996, Article 6(3).

[1108] BGG, vol. A, no. 168.

[1109] Law 2836/2000, Article 3(3).

[1110] Law 2836/2000, Article 3(4); Law 2533/1997, Article 122.

The legal status of the HCMC was further defined in 2005, by a modification to Law 1969/1991 effected through the introduction of a new Article 76A, according to which "*the* [HCMC] *constitutes a legal person of public law with own resources, operating exclusively in the public interest and benefiting from functional independence and administrative autonomy*".[1111] Furthermore, it was provided that the members of the BoD of the HCMC also have personal and functional independence in the exercise of their duties,[1112] and that the HCMC submits a yearly activity report to the Hellenic Parliament and to the Minister supervising it.[1113]

It is noted that the provision by formal law that the HCMC operates "*exclusively in the public interest*" appears in our view directly connected to the filing at that period of actions against the HCMC requesting compensation to be paid to retail investors on the ground of liability in tort,[1114] taking also into account the (negative) requirement according to Hellenic case-law that public authorities may be held liable in tort where their competence is not exercised solely in the public interest.[1115] The introduction of Article 76A has been criticized by theory as aiming at providing total immunity to the HCMC, since it appears to be disallowing application of the provisions on liability of

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[1111] Law 1969/1991, Article 76A(1), as introduced by Article 22 of Law 3371/2005, vol. A no. 178, 14.07.2005.

[1112] *Ibid*., Article 76A(2).

[1113] *Ibid*., Article 76A(3).

[1114] As in the *Tetraktys and Astraia* and *Worldwide Investment Services* cases.

[1115] *Supra*, Ch VII.1.2.

public authorities in tort in the case of the HCMC.[1116] Such an outcome appears incompatible with the requirement of the Hellenic constitutional order for effective judicial protection,[1117] in conjunction with the requirement for protection of private property,[1118] as also recognised by the ECHR. Considerations as to the compatibility of this provision with EU law (an issue relating to whether EU law may be considered as conferring rights upon individual market participants) also arise.

However, in our view the interpretation of the relevant provision not be confined to a literal approach, but must also take into account the aim of the law on the establishment of the HCMC, its regulatory and supervisory competences and its enforcement powers, in a teleological approach also. Taking into account the power of courts of law to authentically interpret the law,[1119] it is probable in our view that case-law will not recognize such a total immunity from liability to exist in favour of the HCMC. In this direction, it is important to note that all relevant decisions on actions for compensation by retail investors against the HCMC have directly or indirectly dismissed the relevant arguments of the latter that it enjoys total immunity.[1120]

[1116] See among many FLOROS, N. (2012), *op. cit.*, pp. 329 – 344. See also PAGONIS, S. (2005) 'The Independence of the [HCMC] as a Requirement*', DEE, vol. 10, p. 1037.

[1117] HCon., Article 20.

[1118] HCon., Article 17(1).

[1119] See indicatively HSSC 3/2001, *Dikaiosyne* (2001) 368; HSCCJ (Plenary) 18/2006, *Harmen*. (2007) 304.

Moreover, regarding the functional independence of the HCMC declared by same provision,[1121] it is noted that this does not amount to full independence, as in the case of independent administrative authorities in the Hellenic legal order.[1122] It refers to functional (or professional) independence in the exercise by HCMC of its competence, although it remains a legal person of public law, legally and administratively supervised by the Government, which also designates the members of its BoD.

[1120] See *infra*, Ch VII.2.2. However, the relevant issue has not yet been treated by the HSACJ, to our knowledge.

[1121] *I.e.* Article 76A of Law 1969/1991.

[1122] The Hellenic Constitution provides for the establishment of certain independent administrative authorities, while others have been established on the basis of common legislation. As a major feature, independent administrative authorities are legal persons of public law whose operation is declared to be free of political supervision (by the executive), whose members (persons in their direction) are designated according to procedures involving decisions or consent of the Hellenic Parliament, and which are accountable to the Hellenic Parliament. In general with regard to independent administrative authorities in the Hellenic legal order see among many DELLIS, G. (2003) 'Judicial Review of the Sactioning Function of the Independent Authorities*', *Dike International*, p. 1281; KAMINIS, G. (2002) 'Independent Authorities between Independence and Parliamentary Control*', *NoV*, p. 95; COURAKIS, N. (2004) 'The Revealing of "Scandals" by Illegitimate Means and the Jurisdictional Function of Independent Authorities*', *Poinikos Logos*, p. 2061; PARARAS, A. (2006) 'The Independent Administrative Authorities Today*', *EphemDD*, vol. 1, p. 123; VENIZELOS, E. (2004) 'Independent Authorities after the Constitutional Reform in 2001*', *DtA*, vol. 22, p. 361.

The transposition of MiFiD in the Hellenic legal order by Law 3606/2007 did not affect the legal nature, structure and competences of the HCMC, as provided by earlier law, which Law 3606/2007 replaced.[1123]

Certain features of Law 3606/2007 relating to the competences of HCMC must be taken into account with a view to explore the extent of its powers which should reflect in our view also the extent of its responsibility and liability in relation to the exercise of its duties.

In terms of specific supervision and enforcement powers of the HCMC in the context of illegal behaviour by an investment firm, Law 3606/2007 provides for the provisional suspension of an AEPEY authorisation in case of emergency,[1124] as well the withdrawal of authorisations.[1125]

The provisional suspension of the authorisation of an investment firm by the HCMC is connected to "*indications of violations of capital market legislation that makes its operation dangerous to investors and the smooth functioning of the market*",[1126] may concern the license of the investment firm or only some of the investment services

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[1123] *Inter alia* Article 12 of Law 148/1967, Articles 60, 69, 71, 71A of Law 1969/1991, and Articles 1 to 31 of Law 2396/1996 that were repealed by Article 85 of Law 3606/2007.

[1124] Law 3606/2007, Article 20.

[1125] *Ibid*., Article 21.

[1126] *Ibid*., Article 20(1).

provided by it, is immediately effective and enforceable,[1127] and may be complemented by setting of a time-frame for the investment firm to take necessary action and cease violations or eliminate their effects,[1128] as well as by the appointment of a provisional administrator[1129] of the AEPEY whose prior consent will be required for certain acts of the management of the AEPEY as determined by the relevant HCMC decision.

The (definitive) withdrawal of authorisation of an investment firm by the HCMC may also be in whole or only with regard to certain investment services,[1130] and follows a reasoned notification by the HCMC to the investment firm calling to express its views and to take necessary measures to cease infringements or eliminate their effects.[1131] The authorisation is withdrawn when an investment firm *inter alia* has obtained it "by making false statements or by any other irregular means",[1132] no longer meets the conditions under which authorisation was granted[1133] or the conditions regarding capital

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[1127] *Ibid*., Article 20(2).

[1128] *Ibid*., Article 20(1).

[1129] *Ibid*., Article 20(3).

[1130] *Ibid*., Article 21(1). The HCMC may also temporarily suspend the functioning of investment firms if there is breach of financial law on their part which renders their functioning dangerous for investors and for the smooth operation of the financial market, according to the provision introduced by Article 7 of Law 2836/2000.

[1131] Law 3606/2007, Article 21(2).

[1132] *Ibid*., Article 21(1).

[1133] *Ibid*.

adequacy,[1134] or "has seriously and systematically infringed" capital markets legislation.[1135]

It emerges from the legal framework on the competences of the HCMC that it has been entrusted by the Hellenic State with extensive competences and duties, on the one hand to regulate (having wide authorisation to adopt regulations and decisions), and on the other to supervise and enforce (having a great array of procedures and instruments). Furthermore, HCMC as a legal person of public law has its own resources and infrastructure, in order to support its function and operations.

It emerges therefore, in our opinion, that in view of the aim, competences and powers and means of the HCMC, relevant Hellenic law may not be interpreted in the direction that HCMC enjoys total immunity from liability in tort, as its aim according to national law is to protect the market and also market participants and further it is equipped with the competences, powers and means to pursue this double objective.

As such an interpretation appears to be endorsed by relevant case-law, it is necessary to examine next which are the criteria formulated by case-law for HCMC to be found liable in tort.

[1134] *Ibid*.

[1135] *Ibid*.

VII.2.2 THE CRITERIA FOR HCMC TO BE LIABLE IN TORT TO COMPENSATE RETAIL INVESTORS

In the recent past, two groups of landmark decisions considered the conditions under which HCMC may be liable in tort, the decision on the case of *Tetraktys* and *Astraia*, and the decisions on the case of *Worldwide Investment Services*. These merit closer examination. Furthermore, decisions on the *Goldsmith Investment Fund* case have also to be taken into account.

The *Tetraktys* and *Astraia* case

In *Tetraktys and Astraia* case, the HCMC was found liable in the first instance by the Athens ACFI to compensate two individual claimants, paying to them the full amount of financial loss they had sustained.[1136]

The claimants had entrusted money to connected investment firms, *Tetraktys* and then *Astraia*, in order for investment services to be provided to them. The investment firms operated unlawfully and when administrative action was taken against them, they collapsed failing to return the funds, which had been misappropriated.

[1136] Athens MJ-ACFI 15526/2003, *DEE* (2004) 553.

When *Astraia* collapsed in 2002, no record of depositing the claimant's money was to be found in the (illegally kept) books and records of the investment firm.[1137]

The action for compensation filed by the claimants against the HCMC for liability in tort claimed that the supervisory authority had breached its obligation to exercise its supervisory and enforcement competence in an effective way, both at the stage of initial authorisation of *Astraia* and on a continuous basis, which resulted in the persons in control of the firm being allowed to misappropriate their funds.[1138]

[1137] When the When the claimants announced their claims to the organs of the special liquidation of *Astraia*, which was conducted under the supervision of HCMC, their claims were rejected on the ground that they were not verified by the entries in the books and records of the firm. However, the claimants were in possession of other documents, such as bank certificates of deposit and contracts, proving that they had entrusted money to *Tetraktys* and then *Astraia* which had never been repaid: these documents were not accepted as verifying their claims. Their claims were equally rejected by the JGF, on the ground that there was no proof of "covered" investment services having been conducted for them by the defaulting investment firm. For relevant case-law see *supra* Ch VI.1.2.

[1138] The facts of the case are revealing of the problematic of retail investor protection. As it emerges from the decision of the Athens ACFI, the claimants were retail investors who were contacted in 1999 by persons in the direction of "Tetraktys Pythagorean S.A." (hereinafter, *Tetraktys*). *Tetraktys* was a Hellenic *société anonyme* established in 1996 and having as purpose to provide, according to its articles of association, "[…] *only the investment service of receipt and transmission of orders to conclude transactions in financial instruments*" and "*of investment advice to third parties*", therefore not requiring (at the time) licensing as an investment firm under Law 2396/1996, transposing ISD into the Hellenic legal order. The money entrusted by the claimants with *Tetraktys* was supposed to be invested in financial transactions through *Tetraktys Wordlwide*, a connected company having its registered office in Luxembourg, with

which they were also supposed to have entered into portfolio management agreements. For a long period of time, *Tetraktys* was marketing through the Press that it was providing investment services and invited the public to trust it as financial intermediary. In the meantime, the HCMC had already been notified, in 1997, of the marketing practices of *Tetraktys*, and had sent a letter to *Tetraktys*, informing it that special authorisation was required by law for the provision of investment services and that special provisions applied for the invitation of the public to proceed to investments. Further, the HCMC had asked *Tetraktys* to inform it as to the nature of investment services it provided and as to whether it held a relevant authorisation. *Tetraktys* had then replied that it was a company providing only the investment service of receipt and transmission of orders; and that due to organisational issues it had not had any financial activity from its setting up (in 1996) until that time (1997). Following a relevant request by the HCMC, *Tetraktys* published a relevant statement in the Press. However, in fact *Tetraktys* continued to attract clients claiming that it was successful in the provision of investment services, and clients regularly received notifications from *Tetraktys* showing that their portfolio was managed in a profitable way. In end-2001, they were advised by persons in the direction of the *Tetraktys Croup of Companies* to transfer their portfolio from *Tetraktys* and *Tetraktys Worldwide* to another member of the Group, "Astraia S.A. for the Provision of Investment Services" (hereinafter, *Astraia*), which they did. *Astraia* was a Hellenic *société anonyme* established in 1998, and had received authorisation by the HCMC to as an investment firm (*AEPEY*). *Tetraktys Worldwide*, *Tetraktys* and *Astraia* were connected companies. Following further complaints on the allegedly illegal activities of *Tetraktys*, HCMC proceeded to an on-the-site investigation of *Astraia* in end-2001. This investigation revealed *inter alia* that *Tetraktys* had been receiving on an ordinary basis and until as late as mid-2001 money belonging to its clients in its bank accounts, and that *Tetraktys Worldwide* was active in portfolio management in Hellas, without having any relevant authorisation (in fact, as it was later revealed, *Tetraktys Worldwide* was unknown to the supervisory authorities in Luxembourg, and was a "letterbox company"). Following this investigation of end-2001, HCMC proceeded in the following months to issuing decisions on the prohibition of operation of *Tetraktys* (since there was no authorisation to be revoked), and on the imposition of fines on *Tetraktys Worldwide* (as an investment firm allegedly operating from Luxembourg). The relevant investigation on *Astraia*, which was also conducted in end-2001, revealed a number of serious infringements including *inter alia* that it did not

The action was accepted by the Athens ACFI, which found that HCMC was in breach of its legal obligations, having illegally omitted to perform its supervisory duties effectively, and that there was sufficient causal link between such illegal omission and the damage incurred by the claimants.

The action for compensation had been based both on Hellenic law and on EU law; however, the Athens ACFI based its reasoning on national law only, and did not specifically refer to the grounds of alleged breach of EU law by the HCMC.

The HCMC filed an appeal against the decision, claiming *inter alia* that the exercise of its competence is only in the public interest, and that no rights are conferred by applicable legislation to individual investors to seek compensation against it. Alternatively, that it had duly exercised its duties taking into consideration that in the case under examination there had been fraudulent behaviour by the firms concerned, which is beyond the scope of its field of competence.

The Athens ACA accepted the appeal, ruling that the action of the claimant investors for compensation was unfounded on its merits, because the HCMC had promptly acted to

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hold accounts per client, nor was there any asset separation, that it was not taking any measures for the protection of investors and of assets belonging to them, that it kept financial books and records in an unlawful manner. HCMC proceeded to the provisional withdrawal of authorization of *Astraia* in end-2001, and then to the permanent withdrawal of authorization and the initiation of liquidation proceedings in 2002, finding that the operation of the investment firm was illegal and "[…] *dangerous for investors and for the effective operation of the financial market*".

investigate on *Tetraktys* and *Astraia*, as soon as it received information raising suspicion about the behaviour of these firms.[1139]

This decision of the Athens ACA is very important: First, the court of appeals implicitly –but clearly– rejected the argument that the competence of the HCMC is exercised only in the public interest. On the merits of the case, the court focused on the nature and timing of the information that the HCMC had received from the Press (when it commenced its investigations, in end-2001, without considering material the fact that HCMC had first received information on allegedly illegal operations of connected firms controlled by the same persons in previous years). For this reason, it considered that \ HCMC had duly and timely executed its supervisory duties and was not liable to compensate the claimant retail investors.

These decisions of the Athens ACFI and of the Athens ACA in *Tetraktys* and *Astraia* case have been ground-breaking in the area of Hellenic law on tortuous liability of competent authorities:

Despite the differentiation between the two decisions on the merits of the case, both decisions recognised that HCMC, as a public authority, may *a priori* be liable in tort, having to compensate retail investors for the financial loss they have suffered due to investment firm failure which is connected to failure of the supervisory authority to perform its duties effectively. No immunity from liability in the public interest was accepted to exist. The ruling of the Athens ACA was followed by subsequent decisions

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[1139] Athens ACA 1367/2008, *EEmpD* (2008) 628. There is no further ruling on the case by the HSACJ, to our knowledge.

on the same case, concerning claims for compensation of *Tetraktys* and *Astraia* clients against the HCMC.[1140]

The criteria formulated by the Athens ACA in *Tetraktys and Astraia* case were further applied and developed by the Athens ACFI in the case of *Worldwide Investment Services*, although in a strict direction, leading in our view to an excessive restriction in the effectiveness of judicial review –at least, if the rules on tortuous liability of competent authorities are to be meaningful in practice and to have useful effect.

The *Worldwide Investment Services* case

Worldwide Investment Services was set up in 1999 as an investment firm established under Hellenic law, with its seat in Athens.[1141] Its purpose was to provide the main and secondary investment services as per Law 2396/1996 then in force (mainly portfolio management, also in the derivatives market). In June 2002 HCMC decided to investigate the firm, with regard of its administrative and organizational adequacy, the effectiveness of its internal control system and its accounting structure, following rumours in the market that the firm was concluding agreements of guaranteed returns

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[1140] See Athens MJ-ACFI 2661/2013 (nyr); Athens MJ-ACFI 1150/2013 (nyr); Athens MJ-ACFI 7093/2013 (nyr).

[1141] The factual background of the case as deriving from relevant court rulings: Athens MJ-ACFI 1150/2013 (nyr); Athens MJ-ACFI 8787/2012 (nyr); Athens MJ-ACFI 8788/2012 (nyr); Athens MJ-ACFI 9672/2012 (nyr); Athens MJ-ACFI 9669/2012 (nyr); Athens MJ-ACFI 16904/2012 (nyr); Athens MJ-ACFI 11308/2012 (nyr).

with its clients. An interim report was issued on 09.08.2002 by the HCMC.[1142] While the findings of the interim report signaled that the operation of the firm was unlawful and it was placing investors and other counterparties in danger, no measures were taken at this stage by the HCMC, which continued the investigation for another two months. On 15.10.2002 the final report on the investigation was issued by the HCMC, which confirmed the findings of the interim report and further concluded that the firm was in serious breach of financial law and regulation.[1143]

Following the alarming confirmation of the findings of the interim report by the final report, HCMC issued on 31.10.2002 –four months after the commencement of its investigation on *Worldwide Investment Services*– a decision by which it attested that the

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[1142] The findings of the interim report were disturbing, as deficiencies were discovered in the accounting systems of the firm, in the invoicing of services to clients and in the internal audit system. Moreover, conflict of interests issues were identified. Further, certain transactions appeared incompatible with the agreements concluded between the firm and its clients, while losses in the funds managed by the firm exceeded the limit of acceptable losses as agreed between the firm and its clients.

[1143] The final report of the HCMC found *inter alia* contraventions of the Conduct of Deontology of investment firms, serious deficiencies in the management of investors' portfolios (including lack of any procedures of internal audit, no operation in practice of the investment committee of the firm, no assessment of the result of the management of investors' portfolio by the firm, no control of withdrawals of funds by investors, deficiencies in the accounting system and on the data transmitted to HCMC), conflict of interests in the case of the person responsible for transactions in derivatives, lack of transparency of accounting records of transactions resulting to obstruction of control by the supervising authorities, serious breaches of the rules on keeping of books and records by the firm, and serious problems in the information technology systems of the firm, causing inability to define managed funds and incompatibility of the recording of investment transactions with general accounting rules.

firm was in serious and repeated breach of financial law which render its operation dangerous for investors and the smooth operation of the financial market (for the reasons stipulated in the relevant report).

However, HCMC did not revoke the authorisation of the firm (the adaptation of such a measure requiring prior hearing of the firm by the HCMC) nor did it suspend its authorisation; the HCMC declared the commencement of the procedure to revoke the authorisation of the firm, and further decided that the firm had to immediately proceed to asset separation, placing all client funds with a third person as a custodian. HCMC also called the firm to be heard, submitting its views and objections with regard to the findings of the HCMC, and to proceed to curing all deficiencies and breaches attested by HCMC, within thirty (30) days of the servicing of said decision of the HCMC.

The firm submitted its views and objections to the HCMC on the expiration of the relevant time limit, and only then did the HCMC decide to proceed to a new investigation on the firm, in order to find whether its decision of 31.10.2002 had been implemented by the firm. When the inspectors of the HCMC visited the offices of the firm on 17.01.2003, they found them abandoned.

Following this development, HCMC issued on the same day a decision on the suspension of the authorisation of the firm –without having until then verified whether the firm had proceeded to asset separation and depositing of investors funds with a θεματοφύλακα.

On 20.01.2003 a new report issued by the HCMC concluded *inter alia* that the firm had not observed said obligations; further, that the books and records of the firm were not

kept according to law, that clients were not informed as to the transactions concluded on their behalf, and on their profits and losses, while the accounting systems of the firm were not in a position to provide information on the position of its client and to evaluate open positions of clients in the derivate markets. On the next day, 21.01.2003, the HCMC revoked the authorisation of the firm and thus *Worldwide Investment Services* entered into special liquidation.[1144]

In the meanwhile, on 15.01.2003 the HCMC had received from ADECH a letter informing it that there were open positions of firms' clients in the derivatives market which posed great risk, and that ADECH had proceeded to modifications in the methodology to determine the margin necessary to cover relevant transactions. Shortly before the collapse of *Worldwide Investment Services*, the open positions of the firms' clients in the derivatives market were forced to close by financial intermediaries providing settlement services, due to nonpayment of the margin required by ADECH, with serious losses for the clients' positions and leading to filing of actions against them for relevant amounts to be paid by them.[1145]

[1144] In the context of the special liquidation procedure, it was revealed that the firm had many clients who had entrusted funds with a view to receive portfolio management services, who did not appear in the official books and records of the firm. These clients had concluded written agreements with the firm, for the provision of investment services, and received regularly by the firm information notices as to their investments and the value of their portfolio, as well as copies of transactions documents –which were revealed to have been falsified.

[1145] Thus, retail investors had not only lost all the total of the funds they had entrusted to *Worldwide Investment Services* but many of them were faced with important claims against them as a result of the closing of their positions in the derivatives market at great loss. Moreover, their claims against the firm were hard to verify as the books and

Many retail investors filed actions for compensation against not only the persons in the direction of the firm, and the JGF when it denied payment of compensation, but also against the HCMC, on the ground that it had manifestly breached its duties in the supervision of *Worldwide Investment Services*. They argued that HCMC was liable to compensate them, for a number of reasons connected to the initial authorisation of the firm by the HCMC (on the ground that the "fit and proper" condition for the management of the firm had not been satisfied, and that the firm did not possess the necessary administrative, organizational and technical means from the beginning), to the on-going supervision of the firm by the HCMC (in particular regarding the lack of internal audit mechanisms, the unlawful keeping of books and records by the firm, and the infringement of asset separation obligations and of CoB rules), and most important to the lack of effectiveness in the exercise by the HCMC of its duties in the context of the inspections of the firm (as the HCMC had not cross-examined documents issued by the firm on financial transactions with relevant data kept by ADECH and Athens Derivatives Exchange, had taken particularly long to complete the inspections of the firm and to reach conclusions, and had failed to make use of the findings of the inspections with a view to protect retail investors).

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records of the firm were not lawfully kept –and in many cases clients and transactions effected in their behalf did not appear in them at all, as there was cooking of the books and issuing of falsified evidence of transactions by the firm. This led to further difficulties for the retail investors, since even where their claims against the firm could be verified (as in the case *e.g.* of documents taken into account in the context of the special liquidation, such as *cheques* proving the depositing of funds with the firm) they were not considered to be covered by the JGF, since financial transactions had always really taken place.

Furthermore, retail investors argued that had manifestly breached its obligation to protect them, in particular by failing to proceed to the suspension of operation of the firm in due time (which it only decided four months after it had initiated inspections of the firm and while all evidence suggested from the beginning that the operation of the firm was illegal and dangerous) and that this omission by the HCMC was directly connected to the damage incurred by them. Also, retail investors argued that HCMC had manifestly breached its obligation to properly exercise its competences and to protect them in that it had not taken any action to enforce the measure it had taken, regarding asset separation and custodianship of clients assets, an omission which was directly linked to their financial loss.[1146] Thus, retail investors claimed that the lack of effectiveness in the exercise by HCMC of its competences regarding supervision and enforcement led to their financial detriment, and in any event were denied of any opportunity to avert or mitigate their financial damage.

Athens ACFI adjudicated several actions by retail investors against the HCMC on the ground of liability in tort for its actions and omissions in the *Worldwide Investment Services* case. The administrative courts of first instance confirmed the *Tetraktys and Astraia* case-law denying that HCMC enjoys *ex lege* immunity from liability in tort. However, in applying the tests developed by the *Tetraktys and Astraia* case-law, they considered that HCMC had not breached its obligations as a competent authority,

[1146] In particular the aggressive tactics of the firm in the derivatives market, as notified by ADECH to the HCMC, and which entailed rising of the margins, reached its peak in the period of December 2002 to January 2003 and while no measures were enforced on the firm.

considering that it had acted promptly and effectively under the light of the circumstances of the case at hand.[1147]

In our view, the relevant rulings of the administrative courts of first instance are incorrect: they appear to have repeated the reasoning in *Tetraktys and Astraia* case, without taking into account the particularities of the *Worldwide Investment Services* case which illustrate failure by the HCMC to exercise its duties effectively. Whereas in *Tetraktys and Astraia* evidentiary difficulties caused ambiguity as to the time HCMC had taken knowledge of the illegal operation of those firms, leading further to doubts as to whether it had breached its obligations as a supervisor, in *Worldwide Investment Services* certain knowledge by the HCMC can be pinpointed at the latest on 09.08.2002 (when its interim report was issued following a two-month long inspection of the firm) –*i.e.* about five months before it suspended its operation, while the firm continued to disregard HCMC decisions on asset separation and custodianship.

While the appeals against the rulings of the administrative courts of first instance in *Worldwide Investment Services* case are still pending before the Athens ACA, the dismissal of all actions (to our knowledge) against the HCMC in the first instance raises concerns, in our opinion, as to the effectiveness of relevant remedies and procedures. These rulings illustrate that even where retail investors are in a position to overcome evidentiary and causality issues which are intrinsic to actions on non-contractual liability of competent authorities, still the courts may prove very hesitant in finding the behaviour of the latter unlawful and damaging.

[1147] See case law cited *supra* in n 1141.

Certainly, re-examination of the merits of *Worldwide Investment Services* case on appeal may alter the current position of case-law.

A more balanced, in our view, and reasoned approach regarding the standard of exercise of supervision by HCMC and liability for failure to exercise its powers effectively was adopted in the *Goldsmith Investment Fund* case, which has also to be taken into account in this regard.

The *Goldsmith Investment Fund* case

In the *Goldsmith Investment Fund* case, Hedley Finance Ltd, an offshore company established in the UK Virgin Islands, operated in Hellas under specific license issued in 1997 by the Hellenic State (according to *CompL* 89/1967, BGG vol. A, no 132). This license did not constitute an authorization to exercise business activities nor to provide investment services but only to promote its activities abroad. By an anonymous document transmitted to the HCMC and by publication in a newspaper in May 2001, HCMC was informed that the firm solicited retail investors (through *OvB*, a company acting as intermediary) to invest in the "*Goldsmith Investment Fund*", a mutual fund promoted as having guaranteed returns and as managed by the offshore company. HCMC called *OvB* to abstain from offering units of the fund (an activity for which it was not authorised) and to proceed to disclosure of information as to its activity to the HCMC. The investigation carried out by the HCMC revealed unlawful operation of *OvB*, which claimed ignorance as to its obligation to receive authorisation in order to provide said services. HCMC proceeded in September 2001 to filing a criminal lawsuit against the persons responsible for the administration of *OvB*, and to imposing administrative sanctions for the unauthorized provision of investment services, while

also an announced was published in the Press by the HCMC with a view to protect investors.

When informed of the matter by HCMC four months later, the Hellenic Ministry of Finance mandated the Hellenic Financial Crime Prosecution Agency (*Soma Diokses Oikonomikou Egklematos*, SDOE) to also investigate the case. The Report issued by SDOE on 15.12.2004 revealed that the whole operation was a scheme organised and directed by persons prosecuted in the US for fraud and other crimes, that no "Goldsmith Investment Fund" existed, and that the money entrusted by retail investors (on the basis of contracts providing for 9%-15% yearly guaranteed returns) was embezzled by the persons in control of the scheme and laundered through an international network. The fraud was so extensively organised that it included even the presentation to retail investors of *Lloyd's* insurance contracts (which were falsified).

Retail investors whose funds were embezzled in the context of the "*Goldsmith Investment Fund*" scheme filed in 2006 before the administrative courts of law an action for compensation against the Hellenic State and HCMC, for failure to duly exercise their duties. In this action, they claimed *inter alia* that the competent authority had not effected a true investigation of the firm in May 2001, but only a formalistic one, as the HCMC had not even reviewed the books and records of the firm to understand the nature of its operations. Also, that it failed to duly inform the public as to the dangers posed by the operation of the firm, omitting to proceed to a relevant public announcement for a long time, while the firm was free to continue soliciting investors. The decision of the Athens CFI[1148] found HCMC liable in tort to partly compensate

retail investors, taking into account their contributory negligence in failing to thoroughly scrutinize the firm in view of the important sums of money they entrusted with it. The Hellenic State was not found liable by the court, as the licensing of the offshore company (under *ComL* 89/1967) was not in causal connection to the unlawful provision of investment services, and said license was revoked by the State when the illegal activity of the firm was revealed following the SDOE investigation.

The reasoning of the CFI regarding the breach by HCMC of its duties is based on its failure to conduct a comprehensive investigation when it was first informed in May 2001 of the possibly illegal operation of the firm. According to the CFI, HCMC ignored the serious indications that the firm was *de facto* operating as an (unauthorised) investment firm, and avoided to conduct comprehensive investigation on the ground that the firm was licensed as an offshore company (under CompL 89/1967) and not as an investment firm. However, the SDOE investigation conducted later led to serious findings which HCMC could have reached had it investigated the case, so that the public could have been informed and thus protected in due time. Instead, according to the decision, the HCMC did not proceed to a comprehensive investigation of the case nor to a meaningful and timely information of the public; in its public announcement of September 2001 HCMC did not mention the name of the mutual fund and only four months later did it inform the Ministry of Finance of the issue.

The court, referring to applicable EU and Hellenic law considered that HCMC had breached its supervisory duties, which it has to exercise effectively and not solely in the

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[1148] Nyr. Presented as in the relevant 1151/2010 decision of the Athens ACA (*supra* n 1080).

public interest but also in order to protect investors. The decision of the ACFI was affirmed by the ACA.[1149]

The *Goldsmith Investment Fund* case-law reveals in our view how public interest considerations and retail investor rights may be applied harmoniously, through the application of the *acquis* on non-contractual liability of public authorities in the area of investment services.

Interim Concluding Remarks

The issue of HCMC liability in tort has been examined by case-law on the basis of the *acquis* in the area of State and public authorities' liability in tort, and further criteria have been specified by case-law for HCMC to be found liable to compensate retail investors.

While case-law has not acknowledged that HCMC enjoys total immunity from liability –despite the introduction of a legislative provision stipulating that it operates solely in the public interest– yet has in general proven hesitant to consider unlawful the behaviour by HCMC even in some cases where its actions and omission appear manifestly ineffective to protect retail investors and the financial market. In other cases, it has found HCMC partly liable to compensate retail investors, recognising concurrent fault of the latter.

[1149] ACA 1151/2010 (*supra* n 1080); it has not yet been review by the HSACJ to our knowledge.

Thus, from the review of recent case-law in Hellas, in the *Tetraktys and Astraia*, *Wordwide Investment Services*, and *Goldsmith Investment Fund* cases, it emerges in our view that effective protection of retail investors may *a priori* be achieved in relation to tortuous liability of competent authorities, by recognising that the latter are obliged to timely and efficiently exercise their duties in the public interest (or general good) but also in order to protect individuals, and by applying strict liability rules in conjunction with (a) a not excessively strict application of causality criteria regarding the behaviour of the competent authorities (taking into account the complex nature of retail investor – intermediary – supervisor relation), (b) a determination of possible concurrent fault by the retail investors (following however relevant objection by the interested litigant), and (c) a useful implementation of rules on evidence according to the inquisitorial system applicable in administrative procedural law.

As case-law on the matter stands, while courts do not recognize *ex lege* immunity of the HCMC, yet at the same time they appear very cautious in finding it liable to compensate retail investors.

Under the criteria formulated by case-law on the issue of competent authorities' tortuous liability, it appears that in practice a manifest breach of their duties must be diagnosed for liability to attach, as in the case of failure to take any measures after certain knowledge of illicit activity posing a threat to investors and the market.

CONCLUSIONS

This study attempted to treat a question on the effectiveness of protection awarded by the Hellenic legal order to retail investors, in the event of intermediary failure, especially as a result of tortuous behaviour, under the light of EU law.

The concern to primarily promote financial market integration and to avert systemic danger (traditionally understood to concern the banking sector) and the differentiation of financial law per sector of economic activity according to a criterion of risk, understood to be intrinsically associated with sectoral characteristics and activities, has led to retail market participant being perceived as a secondary aim of financial law.

The legal definition of the status and the level of protection of depositors *vis-à-vis* retail investors has remained uncertain, while the minimum protection offered in the event of intermediary default in the form of *ex lege* compensation by national schemes under harmonized legislation has not been complemented by the harmonization of insolvency law.

Following the Crisis, the new EU financial architecture and substantive law entails concentration of competence by the new EU regulatory and supervisory authorities together with a new approach to accountability and liability, more detailed EU financial regulation, and new structures in the area of intermediary failure, as the proposed recovery and resolution regime.

The revision of EU law on minimum protection in the event of intermediary failure, as proposed, aspires to establish a more predictable and coherent system of EU rules, taking into account effectiveness issues caused by the fragmentation, uncertainty and lacunae which characterize the of the DGSD and ICSD mechanisms. However, ambiguity remains in many aspects, as to the legal status and rights of depositors and retail investors under the new regime, the interrelation of the two categories of market participants, and the legal consequences thereof.

In the context of revision of EU finance law, and taking into consideration the enhanced powers of the new EU competent authorities, the interpretation provided by the ECJ in *Peter Paul* of EU law with regard to retail market participants status and rights in the European legal edifice, as it stood before the Crisis, does not appear applicable in the context of the new legal regime emerging from the Crisis –at least with regard to investment services and the protection of retail investors.

On the national level, the main features of EU law relating to retail investor protection in the event of intermediary failure have exercised a major influence on the structure and content of the relevant rules in the Hellenic legal order. National rules of EU origin further interact with other rules not of EU origin, and form together the wider context in which legal protection is manifested in practice.

In this framework, protection of retail investors in the event of intermediary failure, as awarded in the Hellenic legal order, is fragmented and inconsistent, depending on the form of the intermediary (as an investment firm or a credit institution providing investment services).

The differentiation of procedural and substantive rules in the various sets of applicable rules (special and common liquidation of investment firms *vs* special liquidation of credit institutions, compensation by the JGF *vs* compensation by the HDICF) does not allow for the establishment of a coherent legal system for the protection of retail investors in the event of intermediary failure. Furthermore, inner deficiencies, inconsistencies and lacunae characterise each set of applicable rules, in particular with regard to claim verification, ultimately leading to lack of effectiveness in the protection awarded.

Recent Hellenic case-law on the protection of retail investors in the form of *ex lege* compensation has attempted to achieve effective protection, taking into account the protective aim of EU law as perceived by the national courts, and the need to address the difficulties related to intermediary failure as a result of tort. Further, with regard to non-contractual liability of competent authorities, recent Hellenic case-law has proven constructive, applying the *acquis* in the area of State and public authorities' liability in tort in light of the specificities of financial markets regulation and supervision.

Not acknowledging total *ex lege* immunity of the HCMC from liability –and despite the introduction relevant legislative provisions– recent case-law has elaborated strict substantive criteria for liability to attach.

Thus, it emerges that judicial effective protection of retail investors in the event of intermediary failure may *a priori* be achieved in the Hellenic legal order, under the light of EU law, and despite certain structural and normative deficiencies on the level of both EU and Hellenic law. For such judicial protection to be effected, certain conditions have

to be met. These include, on the level of protection in the form of ex lege compensation by the relevant schemes, the meaningful interpretation of rules on the notion and ambit of covered investment services, as well as of evidentiary rules, taking into account the particularities of intermediary failure as a result of tort. Furthermore, on the level of protection in the form of compensation by the competent authorities on the ground of tortuous liability, they include the non-application of immunity rules and the application of strict liability rules in conjunction with (a) a not excessively strict application of causality criteria regarding the behaviour of the competent authorities, (b) a determination of possible concurrent fault by the retail investors, and (c) a useful implementation of rules on evidence according to the inquisitorial system applicable in administrative procedural law.

Certainly, legal certainty, predictability and coherence require for the improvement of existing national law, which may not be achieved only by judicial interpretation, but has to take also the form of wider legislative revision. Such revision should focus on simplification, clarity and uniformity of applicable rules –in particular where the relevant issues are of a technical or evidentiary nature and no wider policy questions are involved, as in the case of claim verification.

The new, emerging and proposed EU finance law will offer the opportunity and should entail the *ab initio* re-assessment, revision and systematization of Hellenic finance law relating to intermediary failure, in order to achieve effectiveness of retail investor protection in practice.

Such a protective outcome will be in line with the new and emerging EU finance law, and in harmony with the European *acquis* on effective individual protection, which

surpasses the current financial crisis and reflects the political, institutional and legal foundations of the EU.

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