EU Case Law

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The Bankinter Case on MIFID Regulation and Contract Law

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1 The Case and the Questions Raised

The Markets in Financial Instruments Directive (MIFID),[1] despite its high importance for secondary capital markets in the EU,[2] ie as the basis of all types of

1 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, *EC OJ* 2004 L 145/1; for this measure see, among others, G. Ferrarini, 'Contract Standards and the Markets in Financial Instruments Directive (MiFID): An Assessment of the Lamfalussy Regulatory Architecture' (2005) 1 *European Review of Contract Law* 19–43; A. Knight, 'The Investment Services Directive – Routemap or obstacle course' 11 *Journal of Financial Regulation and Compliance*, 219–224 (2003); C. Chance LLP, 'EU legal and regulatory developments: Safeguarding of client assets: CESR's technical advice in relation to Directive 2004/39/EC on Markets in Financial Instruments (MIFID)' 11 *Derivates Use, Trading Regulation* 67–74 (2004); and in a broader context: S. Grundmann, 'European Law and Principles on Commercial and Investment Banking Contracts: An Advanced Area of Codification', in A. Hartkamp, M. Hesselink, E. Hondius, Ch. Mak and E. du Perron (eds), *Towards a European Civil Code*, (4th ed, Alphen: Kluwer Law International, 2011) 787–817; S. Grundmann and Y. Atamaer (eds), *Financial Services, Financial Crisis and General European Contract Law – Failure and Challenges of Contracting* (Alphen: Kluwer International, 2011). Still relevant, core literature on the ISD, such as, among many others: D. Bliesener, *Aufsichtsrechtliche Verhaltenspflichten beim Wertpapierhandel* (Berlin: de Gruyter, 1998); G. Ferrarini (ed), *European Securities Markets – the Investment Services Directive and beyond* (London *et al*: Kluwer, 1998); P. Lastenouse, 'Les règles de conduite et la reconnaissance mutuelle dans la directive sur les services d'investissement' *Revue du Marché Unique Européen* 1995, 79–120.

2 Increasingly, this (second generation) directive integrates all important questions of ordinary secondary market transactions, also alternative capital markets (besides stock exchanges). The content had first been harmonised in: Council Directive 93/22/EEC of 10 Mai 1993 on investment services in the securities field, *EC OJ* 1993 L 141/27. At the European level, however, abnormal

transactions in all types of financial instruments in the EU, has not been the object of important decisions by the European Court of Justice so far.[3] The Bankinter case provoked the first important decision – on the basis of one of four requests for a preliminary ruling by the ECJ, all formulated by Spanish courts. One of these requests has been taken off the records by resolution of the President of the Court on 12 January 2012 due to settlement by the parties.[4] Two others are still pending as joined cases.[5] The Bankinter case is the first, which has now been decided.[6]

All four requests concerned financial instruments or contracts combined with a swap,which the bank had proposed as a measure neutralizing risks stemming from the other instrument. The (financial) instruments were different ones: from a mortgage to a traditional commercial sales contract. Otherwise, however, the questions were the same. Therefore, the cases still pending might also have been

transactions, namely insider dealing and market manipulation, have been left apart and regulated in the Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on Insider Dealing and Market Manipulation (Market Abuse), *EC OJ* 2003 L 96/16 (substituting and enlarging the EC Insider Dealing Directive of 1989). This is different in several large Member States such as Italy (with its *Testo Unico della Finanza*) or Germany (with its *Wertpapierhandelsgesetz*). Here, the law has already been addressed very prominently as the 'Constitution' of EU secondary market law; see K. Hopt, 'Grundsatz- und Praxisprobleme nach dem Wertpapierhandelsgesetz – insbesondere Insidergeschäfte und Ad-hoc-Publizität', *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)* 159 (1995) 135–163, 135; similar then M. Moloney, 'The Regulation of Investment Services in the Single Market: The Emergence of a New Regulatory Landscape' (2002) 3 *European Business Organization Law Review* 293–336, 304.

3 There have been three infringement proceedings against Member States, all decided without entering into the substantive law issues of the directive or of transposing acts, but on the basis of lack of transposition or of insufficient transposition: ECJ case 87/08, *Commission* v *Czech Republic*, [2008] *ECR* I-132; ECJ case 143/08, *Commission* v *Poland*, [2009] *ECR* I-41; ECJ case 233/10, *Commission* v *Netherlands*, [2010] *ECR* I-00170. Moreover, there has been one decision in criminal proceedings because of market manipulation (criminal proceedings launched by the supervisory authority) where the Court had to decide on the definition of the term 'regulated markets': ECJ case 248/11, *Criminal Proceedings* v *Rareș Doralin Nilaș et al*, [2012] *ECR* I-00000.

4 Request for preliminary ruling by resolution of the Juzgado Mercantil de Barcelona of 18 July 2011, (ECJ) case 381/11, *Manuel Mesa Bertrán and Cristina Farrán Morenilla* v *Novacaixagalicia, EU OJ* 2011 C 290/3.

5 Two requests for preliminary ruling by resolution of the Juzgado Mercantil de Barcelona of 30 December 2011, (ECJ) joined cases 664/11, *Serveis en Impressio i Retolacio Vargas, S L* v *Banco Mare Nostrum, S A , EU OJ* 2012 C 80/11 and 665/11, *Alfonso Carlos Amselem Almor* v *NCG Banco S A, EU OJ* 2012 C 80/12.

6 ECJ case 604/11, *Genil 48, S L and Comercial Hostelera de Grandes Vinos, S L* v *Bankinter S A and Banco Bilbao Vizcaya Argentaria, S A*, [2013] *ECR* I-00000 (not yet reported). Preliminary reference as such in *EU OJ* 2012 C 32/15.

joined with the Bankinter case. Perhaps, however, the Court will take the opportunity to express itself more explicitly on the third (set of) questions raised in the request(s) for preliminary ruling(s) which will be taken up below in section 4.

Three sets of questions were asked by the juzgado (court) de Madrid: (i) Question 1 was about the (substantive) scope of application, namely about the definition of the concept 'investment advice' under Article 4(1) n 4 MIFID; Questions 4–5 also have some indirect bearing on this question; (ii) questions 4–5 were about an exception which Article 19(9) MIFID (and also Article 19(6) MIFID) makes from the core duty which is triggered by any investment advice or other investment service, namely the duty to 'know your customer' and make an assessment of the 'suitability' or at least of the 'appropriateness' of the investment envisaged for or by the customer (Article 19(4)(5) MIFID); (iii) finally, questions 2–3 are about the legal consequences of a violation of these rules, namely whether nullity has to ensue – or more broadly speaking, but not asked by the Spanish court – whether there have to be private law sanctions, ie some kind of compensation awarded to the customer as the result of a violation of the duties owed by the provider of investment services. In the case at hand, it was clear that neither the 'suitability' nor the 'appropriateness' test had been made by the bank. Therefore, the ECJ did not have to decide on the content of these core duties, but only about their scope of application (investment advice given in this case), exceptions from this scope of application (namely Article 19(6) and 19(9) MIFID) and – because the Court came to the conclusion that indeed the duty under Article 19(4) MIFID applied – about the legal consequences, namely about the question whether the MIFID contains only standards for prudential supervision or whether these standards have to be seen also as standards of contractual duties or validity under national contract law. Unfortunately, the Court answered the last question, the most fundamental of all three, very vaguely – perhaps in part as well because the Spanish court had formulated its question(s) 2–3 rather narrowly. The three (sets of) questions asked and the answers given by the ECJ are taken up in turn below sections 2–4.

Advocate General Y. Bot was heard, but did not render a written opinion. The Court first dismisses doubts about the admissibility of the requests (para 23 *et seq*). It argues (and refers to its own long-standing case law) that the ECJ does not have to second-guess the assessment made by the national court referring the case to the ECJ that the outcome of the national case depends on the interpretation of EU law – unless the contrary is obvious.[7]

7 For one of the rare cases in which the ECJ did dismiss the case on the basis of irrelevance of the question referred to it, see: ECJ case 83/91, *Meilicke*, [1992] ECR 4871.

2 Investment Advice (Article 4(1) n 4 MIFID)

The ECJ does not deal with the question of scope of application first – although the Spanish court raises this as the first question, and this would indeed seem to be the logical (or dogmatic) starting point. Does the offering of an interest swap (with a view to neutralizing risks stemming from another instrument) constitute an investment advice under Article 4(1) n 4 MIFID? Or alternatively, does it constitute at least another investment service, as is asked implicitly then in question 3 referred to the ECJ, because there, application of Article 19(5) MIFID is at stake which refers to all other investment services except an investment advice? The Court answers this question only second (para 49 *et seq*). Indirectly, this question is linked to the one raised later (in questions 4–5, below section 3) which is about the combination between the one instrument (the risk of which is to be neutralized) and the other instrument (the swap). Here the question is how narrow the link between the two must be to strip or how narrow it may be not to strip the transaction of its character as an 'investment advice' or as an 'investment service' which trigger(s) the duties contained in Article 19(4) and 19(5) MIFID.

Before answering this question, the Court refers twice to the two recitals (recitals 2 and 31) which specify 'investor protection' as one of the key aims of the directive, perhaps even the most important one (para 39 and 47). Moreover, these are the only two recitals which the Court quotes at all when first exposing the EU Law basis of the case (para 3). This is significant also for the definition of 'investment advice'. The Court confirms what had already been the largely prevalent view before, ie that it is not the content of the instrument offered, proposed or advertised, that is decisive, but only the form in which the financial institution transfers its opinion to the investor: i.e. whether this is via standardised information channels or whether this is done in relation to a particular investor specifically.[8] Indeed, given Article 52 of the Implementing Directive 2006/73/

8 See para 53; and before already: CESR/04–562 (October 2004) (on the distinction between so-called generic recommendations and specific recommendations), http://www.esma.europa.eu/page/MIFID-archive; also number 8.1. of the Background Notes on the Implementing Directive 2006/73/EC, http://ec.europa.eu/internal_market/securities/docs/isd/dir-2004–39-implement/dir-backgroundnote_en.pdf; and M. Harrer, 'Neufassung der Wohlverhaltensregeln aufgrund der Richtlinie über Märkte für Finanzinstrumente (MiFID) und ihrer Durchführungsbestimmungen' *Österreichisches Bankarchiv (ÖBA)* 2007, 98–110, 105; P. Balzer, 'Umsetzung der MiFID: Ein neuer Rechtsrahmen für die Anlageberatung' *Zeitschrift für Bankrecht und Bankpraxis (ZBB)* 2007, 333–345, 335; H. Teuber, 'Finanzmarkt-Richtlinie (MiFID) – Auswirkungen auf Anlageberatung und Vermögensverwaltung im Überblick' *Bank- und Kapitalmarktrecht (BKR)* 2006, 429–437, 430. There had been some slight doubts whether really all financial instruments are covered, namely if the instrument rather works like an insurance (namely credit default swaps): see, for instance,

EC,[9] any other criterion would not seem convincing. This reflects as well the core function of investment services as the core service in secondary markets. The core function of investment services is to transform the bulk of standardised information available in capital markets and even more in regulated markets into information which the individual investor can use adequately, ie which he can 'digest'.[10] This implies a process to reduce information, often even radically, to choose the relevant information and to assess it. Therefore, a further delimitation of the concept is also highly convincing: the information has to be addressed to the customer as investor – this being still the scope of any capital market information, also the standardised types, also in primary capital markets, for instance also information contained in prospectuses or in ad hoc disclosure statements etc –[11] Moreover one of the two additional criteria has to be satisfied: either there has to be an individual assessment of the financial aims and expertise of this individual customer or the instrument must have been proposed or introduced to this customer individually – not to a group of customers in standardized form.[12] What is important about this definition is that it highlights the needs of the individual customer/investor – not the functioning of the market at large (although this may also be fostered by protection of each single investor individually). It would seem to ensue from this that 'investor protection' – in distinction

H. Assmann, in H. Assmann and U. Schneider (eds), *Wertpapierhandelsgesetz – Kommentar* (6th ed, Cologne: O. Schmidt, 2012) § 2 WpHG para 55.

9 Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, *OJ EC* 2006 L 241/26.

10 For this concept see (legal and economic theory): S. Grundmann and W. Kerber, 'Information Intermediaries and Party Autonomy – the example of securities and insurance markets', in S. Grundmann, W. Kerber and S. Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Berlin/New York: de Gruyter, 2001) 264–310; also T. Gehrig, 'Intermediation in search markets' (1993) 2 *Journal of Economics and Management Strategy* 97–120; F. Rose, *The economics, concept, and design of information intermediaries* (Heidelberg: Springer, 1999); A. Yavas, 'Search and Trading in intermediated markets' (1996) 5 *Journal of Economics and Management Strategy* 195–216.

11 For a condensed description of these (standardized) instruments and measures, see S. Grundmann, *European Company Law – Organization, Finance and Capital Markets* (2nd ed, Antwerp/Oxford: Intersentia, 2012) §§ 21 *et seq*. and § 23; and more extensively N. Moloney, *EC Securities Regulation* (2nd ed, Oxford: Oxford University Press, 2008) (several parts).

12 See para 55; these are indeed the two ways to individualize the relationship, albeit only implicitly, and therefore the Court is right in even including those cases where it should happen that an individual assessment of investment aims and expertise has been made and then (only) a standard advice has been given to the customer.

from the market function at large –[13] can only refer to the protection of each investor individually.[14]

In summary, investment advice is characterised as any opinion given or a proposal made by a provider of investment services – on his own motion or after solicitation by the customer – which is either framed as an assessment vis-à-vis the customer individually that the instrument is 'suitable' for him or which is based on a personal assessment of this customer's financial aims and/or expertise in such financial transactions. These are the cases where the provider of investment services 'transforms' market information into information individually shaped (tailor-made) for his customer.

3 Know Your Customer, Suitability and Exceptions in Case of Equivalent Investor Protection Standards (Article 19 MIFID)

The second question is that of exceptions. The ECJ addresses it already as the first one (though the Spanish court had listed these as questions 4–5). The first exception invoked, Article 19(6) MIFID which allows in certain cases a limitation of the provider's duties to 'execution only' services, was easy to exclude (para 33 *et seq*). Annex I sub C n 4 and Article 38 of the Implementing Directive 2006/73 clearly characterise swaps as 'complex' instruments, and the exception named applies only to non-complex instruments. For them, if in addition the instrument is traded in (more secure) regulated markets, it makes sense that customers may want to choose the less costly 'execution only' alternative, because advice may not be

13 For reference to these other goals (though often less heavily emphasised than the goal of [individual] investor protection), see namely recitals 2, 5 and 44; for functioning capital markets at large: I. Koller, 'Commentary on the Conduct of Business Rules' (§§ 31 *et seq* Investment Services Act), in Assmann and Schneider, n 8 above, § 31 WpHG para 1–3; also Moloney, n 11 above, 564–571; and more broadly on the (larger range of) functions of public capital markets and their regulation: P. Sester, 'Zur Interpretation der Kapitalmarkteffizienz in Kapitalmarktgesetzen, Finanzmarktrichtlinien und -standards' *Zeitschrift für Gesellschaftsrecht (ZGR)* 2009, 310–345, 317–334.

14 More specifically on individual investor protection as the overarching principle of capital market law, see E. Avgouleas, 'The New EC Financial Markets Legislation and the Emerging Regime for Capital Markets' *Yearbook of European Law* 2004, 321–361, 356; H. Fleischer, 'Die Richtlinie über Märkte für Finanzinstrumente und das Finanzmarkt-Richtlinie-Umsetzungsgesetz – Entstehung, Grundkonzeption, Regelungsschwerpunkte' *Bank- und Kapitalmarktrecht (BKR)* 2006, 389–396, 391; Teuber, n 8 above, 429; and also references below n 20.

needed for them. To give lee-way in this respect, but alsoto define clearly the conditions for such lee-way, was one of the core aims of the reform in the MIFID – as compared with its predecessor directive, the Investment Services Directive (ISD) of 1993.[15] The compromise reached has been carefully drafted and therefore had to be taken literally. This implied that this exception did not apply in the case at hand.

More important was the second exception, contained in Article 19(9) MIFID (para 35 *et seq*). It is for the interpretation of this exception that the Court invokes 'investor protection' as one or even as *the* core aim of the directive twice (para 39 and 47), for the two core holdings. After dismissing arguments on the basis of wording (because the different language versions diverged),[16] the Court first invokes the rule that exceptions – as contained in Article 19(9) MIFID – have to be construed narrowly. This would be a rather formal argument, often criticised, if the Court did not invoke in addition the argument that the conduct of business rules (or best practice rules) in investment services contained in Title II, Chapter II, are mainly aimed at investor protection (recitals 2 and 31).[17] The argument then is that the information rules (including advice or warning) which constitute the core protection for investors should be applied as broadly as possible. Also the following explanations given by the Court have to be read in this perspective. The Court comes back to the wording and explains that Article 19(9) MIFID covers only those cases where it is not the investment provider in question who gives the advice individually, but where the advice to enter into a swap agreement – different from what was the case at hand – is not given individually but already inbuilt in the financial instrument sold, ie part of it, as for instance in 'Spread-Ladder' agreements, which have so prominently been treated in German case law la-

15 Summary on the highly disputed question whether execution only was possible under the ISD at all, and for the new regime, see, for instance Moloney, n 11 above, 533–534; S. Grundmann, 'Commentary to §§ 31 *et seq*, Bankrecht VI – Wertpapierhandelsgesetz', in C. Ebenroth, K. Boujong, D. Joost and L. Strohn (eds), *HGB-Kommentar*, 2 vol (2nd ed, Munich. C H Beck, 2009) Bankrecht VI – Wertpapierhandelsgesetz para 264–267; N. Moloney, 'Large-Scale Reform of Investor Protection Regulation: the European Union Experience' 4 *Macquarie Journal of Business Law* 147–178 (2007).

16 See para 37 *et seq*, this represents long standing case law, see before, for instance: ECJ case 30/77, *Boucherau*, [1977] *ECR* 1999, 2010; ECJ case 135/83, *Abels*, [1985] *ECR* 469, 482 *et seq*; ECJ case 72/95, *Aannemersbedrijf Kraaijeveld*, [1996] *ECR* I-5403, 5443; joined ECJ cases 230/09 and 231/09, [2011] ECR I-03097 para 60; ECJ case 19/11, *Geltl*, [2012] *ECR* I-00000, para 43; in one earlier case, however, the narrower wording had been given preference: ECJ case 29/69, *Stauder* v *Ulm*, [1969] *ECR* 419, 424 *et seq*.

17 Again not completely new as case law, see before: ECJ case 248/11, *Criminal Proceedings* v *Rareș Doralin Nilaș et al*, [2012] *ECR* I-00000, para 48.

tely,[18] where a combination of futures *is* (or constitutes) the financial instrument and not only the advice given individually *afterwards*. In this latter case – which as the Court specifies is to be presumed whenever the terms of the instruments combined differ, whenever a swap offered relates to different instruments and, more generally, whenever it cannot be seen as 'integral' part of the financial instrument underlying – Article 19(9) MIFID does not apply and the conduct of business rules (or of best practice) remain fully applicable. This, however, is only the one part of the exception. The second part is equally important or even more important because it emphasises the consistency of the scheme of protection (para 45 *et seq*). Even if the exception applies, because the swap etc. relating to another instrument is not proposed individually, but is part of that other instrument, the exception requires still a substantive element. This substantive element is an equivalent element of protection given elsewhere. Again the Court refers to investor protection as the main aim of this section (recitals 2 and 31). Although the wording of the directive was not clear in this respect and even was rather lacking such a requirement, the Court required for the 'other provisions of Community legislation or common European standards related to credit institutions ... with respect to risk assessment of clients and/or information requirements' (Article 19 (9) MIFID) which have to exist that they offer an *equivalent*, albeit not identical, standard of protection. In other words, in substance, the exception contained in Article 19(9) MIFID may not lead to inroads into the main goal of (individual) investor protection and this is true even in cases where the MIFID does not express this. The equivalent rule must empower the investor in a similar way as do the conduct of business rules contained in Article 19(4)(5) MIFID to 'assess the risk' of the instrument acquired. Although this concerns only an exception that may not even apply very often, this is perhaps the most telling part of the judgment insofar as it construes a rule not only on the basis of wording or for systematic reasons, but clearly puts the scope of individual investor protection in the foreground and

18 *Bundesgerichtshof* (German Private Law Supreme Court) case XI ZR 33/10, *Neue Juristische Wochenschrift (NJW)* 2011, 1949–1954 = *Bank- und Kapitalmarktrecht (BKR)* 2011, 293–299, *CMS Spread Ladder Swap*; case notes by M. Haas, *Lindenmaier-Möhring Kommentierte BGH-Rechtsprechung (LMK)* 2011, 318031; B. Hanowski, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2011, 573–575; J. Köndgen, *Bank- und Kapitalmarktrecht (BKR)* 2011, 283–286; A. Lange, *Betriebsberater (BB)* 2011, 1678–1679; M. Lehmann, *Juristenzeitung (JZ)* 2011, 749–752; J. Lieder, *Gesellschafts- und Wirtschaftsrecht (GWR)* 2011, 175–179; J. Pitsch, *Deutsches Steuerrecht (DStR)* 2011, 926–928; C. Schmitt, *Betriebsberater (BB)* 2011, 2824–2828; G. Spindler, *Neue Juristische Wochenschrift (NJW)* 2011, 1920–1924; see also S. Grundmann, 'Wohlverhaltenspflichten, interessenkonfliktfreie Aufklärung und MIFID II – Jüngere höchstrichterliche Rechtsprechung und Reformschritte in Europa' *Wertpapier-Mitteilungen (WM)* 2012, 1745–1755, 1747 *et seq*.

installs it in capital market law as a similarly overarching principle as 'effet utile' in general EU Law.[19]

4 Regulatory Standards as Duties in Contract Law

The most fundamental question is dealt with last – and rather shortly (para 56–58). This is the question whether the standards contained in the MIFID have a bearing on contract law.

Had a German court referred this MIFID case to the ECJ – which the 9th senate of German Supreme Court (*Bundesgerichtshof*) competent for banking law so far consistently refused to do – it would probably have asked the question more broadly, more generally: whether the standards contained in the MIFID are binding also as contractual – or more generally as private law standards. The question is highly disputed in Germany – with additional ramifications.[20] The Spanish courts asked a somewhat more restrictive question ... and got a very limited answer: They asked the question whether violation of either Article 19(4) MIFID (for investment advice) or of Article 19(5) MIFID (for other investment services) had to have the consequence of nullity under national contract law (questions 2 and 3 asked by the Spanish Court), ie of one particular sanction in national contract law.

As the ECJ characterises the contracts as investment advice in the case at hand, it had to answer only question 2 (on Article 19(4) MIFID). It does so in a very limited way, by stating that (i) national law – including national contract law –

19 See references above n 14.

20 In favour of applying these rules as standards relevant also for the private party relationship very early already: S. Grundmann, 'Commentary to §§ 31 *et seq*, Bankrecht VI – Wertpapierhandelsgesetz', in C. Ebenroth, K. Boujong, D. Joost and L. Strohn (eds), *HGB-Kommentar*, 2 vol (1st ed, Munich: C H Beck, 2001) BankR para VI 229 *et seq*, 266; today C. Kumpan and A. Hellgardt, 'Haftung der Wertpapierdienstleistungsunternehmen nach Umsetzung der EU-Richtlinie über Märkte für Finanzinstrumente (MiFID)' *Der Betrieb (DB)* 2006, 1714–1719, 1715; Moloney, n 11 above, 591 *et seq*, 595; R. Sethe, *Anlegerschutz im Recht der Vermögensverwaltung* (Tübingen: Mohr, 2005) 758–768; V. Lang and A.O. Kühne, 'Anlegerschutz und Finanzkrise – noch mehr Regeln?' *Wertpapier-Mitteilungen (WM)* 2009, 1301–1308. In favour of characterising the rules as purely in the public interest (and relevant only for prudential supervision): R. Fischer and T. Klanten, *Bankrecht* (3rd ed, Cologne: Recht Wirtschaft Steuern, 2001) para 7.45; F.C. Leisch, *Informationspflichten nach § 31 WpHG* (Munich: C H Beck, 2004) 86 *et seq*; F. Schäfer, 'Sind die §§ 31ff. WpHG n. F. Schutzgesetze i. S. v. § 823 Abs. 2 BGB?' *Wertpapier-Mitteilungen (WM)* 2007, 1872–1879, 1879; see as well the recent judgments by the German Supreme Court of 19 February 2008 (XI ZR 170/07) *Neue Juristische Wochenschrift (NJW)* 2008, 1734 and on the Spread-Ladder Swap (above n 18).

had to contain 'equivalent and efficient' sanctions (para 58), that (ii) the directive certainly contained standards which had to be imposed by the national supervisory authorities (para 57), and that (iii) 'each Member State [had] to determine the contractual consequences where an investment firm offering an investment service fails to comply with the assessment requirements laid down in Article 19(4) and (5) of Directive 2004/39' (para 58). This last part of the answer is highly prominent as it also constitutes the court's ruling number 3 – not the two other specifications. In consequence, however, the ECJ held that it could be in conformity with European Law – the MIFID – not to impose the nullity sanction in national law for any violation of the conduct of business rules contained in this directive.

This leaves us with open questions. What does it mean that the Member States have to decide on 'the' contract law sanctions they impose (the German translation even specifies '*which* contract law sanctions they impose'), but also to stress the prime importance of an imposition by supervisory agencies and to conclude that at least nullity need not be imposed in the contractual setting? Here it becomes clear how important the framing of the question referred to the ECJ may be, how important the explanation of the actual setting in the national law can be.[21] Would the Court have decided the outcome differently had it been asked a different question, namely whether national private law was in conformity with the MIFID if it did not impose *any* private law sanction for the violation of duties owed directly to the investor (as contained in Article 19(4) and 19(5) MIFID), ie neither nullity sanctions nor damages nor any other contractual remedy or

21 A very illustrative example for how a national court can explain the context in national law when refering the case to the ECJ for preliminary reference is: ECJ case 215/08, *Friz* v *von der Heyden*, [2010] *ECR* I-02947, para 25–34 = *Zeitschrift für Wirtschaftsrecht (ZIP)* 2010, 772–775 (the principles of a de facto [but invalid] partnership can be applied also in doorstep situations, restricting the effects of withdrawal to the future); the case was referred to the ECJ by the *Bundesgerichtshof, Zeitschrift für Wirtschaftsrecht* (*ZIP*) 2008, 1018 (case note by F. Schäfer *ibidem*); final decision by the *Bundesgerichtshof, Zeitschrift für Wirtschaftsrecht* (*ZIP*) 2010, 1540, case notes or articles reviewing the cases, also the ECJ decision, among others, by W. Goette, *Deutsches Steuerrecht (DStR)* 2010, 878–881 and 1681–1686; M. Habersack, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2010, 775–776; P. Kindler and S. Libbertz, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2010, 603–606; K. Riesenhuber, *Lindenmaier-Möhring Kommentierte BGH-Rechtsprechung (LMK)* 2010, 303284; C. Schäfer, *Deutsches Steuerrecht (DStR)* 2010, 1138–1141; H.P. Westermann, *Deutsche Zeitschrift für Wirtschaftsrecht (DZWiR)* 2010, 265–269. This is a case discussed mostly in Germany, but relevant also for many other national laws which contain similar rules on invalid, but de facto existing partnerships, and which restrict nullity to the future (after ad hoc 'termination'): see J. Oechsler, 'Die Geschichte der Lehre von der fehlerhaften Gesellschaft und ihre Stellung im europäischen Gesellschaftsrecht' *Neue Juristische Wochenschrift (NJW)* 2008, 2471–2475.

specific remedy in tort? Is a national law in conformity with the MIFID if it does not give any remedy also to the customer individually?

Member States are apparently split on this question. Some important Member States such as Italy characterize at least those duties owed directly to the investor (as contained in Article 19 MIFID) as part of the contractual information, warning or advice duties, sometimes even duties less directly owed to the customer, ie duties of how to organise the internal relationships within the services provider (as contained in Article 13 and 18 MIFID). The Italian Supreme Court has taken this path with respect to the rules on best execution (Article 21 MIFID and Article 44 of the Implementing Directive 2006/73/EC).[22] Some authors see this already as the prevalent view in Europe.[23] Other Member States such as Germany do not even see the need to refer such cases to the ECJ for preliminary ruling when, in the case of a violation of the duties contained in the MIFID, they exclude any individual customer claims both in contract and in tort. In my view, this can no longer be upheld given the diverging case law in other Member States and given the ECJ decision in *Bankinter*:[24]

22 Corte di Cassazione, Sez I, Urt 3773 of 17 February 2009, *Altalex Massimario* 23/2009, 31 *et seq* (obiter dictum); G. Ferrarini, in G. Visintini, *Trattato della responsabilità contrattuale* (Padova: Cedam, 2009) n 3 and 4. (on best execution and on rules on avoidance/prevention of conflicts of interest); used as a basis for the application of art 1218 of the Italian Civil Code (*Codice Civile*) on contract based damages for breach of contractual duties.

23 M. Tison, 'The civil law effects of MiFID in a comparative law perspective', in S. Grundmann (ed), *Festschrift for Hopt* (Berlin: de Gruyter, 2010) 2621–2640, 2638 ('wide consensus on the existence of civil law effects of the MIFID, and in particular the body of conduct of business rules ...') and 2632 ('generally realized through integrating these rules into the duty of care owed in a contract or generally towards clients ...'). It has, however, to be admitted that this view is based – as often in literature inspired on the French system – mainly on opinions expressed in legal academia rather than in court decisions.

24 According to the CILFIT line of cases, a national court of last instance is obliged to refer a case involving the interpretation of an EC/EU Law measure to the ECJ for preliminary ruling, unless in a so-called 'acte claire', ie when all courts [probably: of last instance] of all Member States would decide the case 'clearly' and in unanimity in the way in which the court wants to decide: ECJ case 283/81, *CILFIT*, [1982] *ECR* 3415, 3430 *et seq*; confirmed in ECJ case 495/03, *Intermodal Transports*, [2005] *ECR* I-08151; ECJ case 461/03, *Gaston Schul*, [2005] *ECR* I-10513; some authors rather propose only a duty to refer to the ECJ in case of actual divergence (from other courts of last instance in the Member States), in part even only in questions of fundamental importance: see on all these proposals, prominent in German legal academia (and inspired by the German procedural system): B. Heß, 'Die Einwirkungen des Vorabentscheidungsverfahrens nach Art. 177 EGV auf das deutsche Zivilprozeßrecht' *Zeitschrift für Zivilprozess (ZZP)* 108 (1995) 59–107, 84–88. Even the most restrictive proposal, given the positive case law in some Member States, would require any court of last instance not willing to impose duties contained in the conduct of

What is the ECJ's position in this question? In my view, it unfortunately remains unclear, but can most consistently be interpreted as: (i) characterising the duties contained in the MIFID, in principle, also as contractual or other private law rules giving also individual claims to customers, but as (ii) leaving the freedom to national law to determine the exact private law remedy that it wants to apply. This interpretation is supported by two aspects of the judgment itself. The first is related to wording. While in para 57, the Court stresses so prominently that the MIFID was primarily aimed at installing a supervisory regime and that, conversely, the MIFID does not directly contain rules on private law remedies, this sounds much more nuanced in para 58. There, the Member State is only left with the freedom to choose '*the* [or in German: *which*] contractual consequences' it wants to impose. This would also be in line with leaving such choice to Member States, namely the choice between nullity and damages, rescission and damages etc, when there is no more specific harmonised rule on these issues.[25] The second aspect is even stronger, it is about 'investor protection', highlighted twice by the Court in a way that it even emphasises the wording. This is so important because the Court clearly shows that it wants to use this overarching principle also for deciding on the interpretation of disputed issues in the MIFID, ie that this principle has a high dogmatic bearing, even when the wording does not necessarily prompt the result reached. Asking now under the heading of (individual) 'investor protection' or even of 'confidence' inspired by the MIFID, the following questions would seem to decide the case. The explicit scope of the directive is to improve the trust of individual investors in the providers of investment services all over Europe (recital 17, 31, 41, and 44, including explicitly the small private investor and specifying as well that they must be enabled to act, not only the supervisory authorities). Would it really further investor confidence if he learnt that not *he,* but only the system at large, is protected when his provider of investment services violates the rules? Moreover these standards first were developed in contract law, which would seem to imply that only an additional layer of protection (via public supervision) has been added. There is even a third aspect, related to the second: whenever supervisory agencies do not want to

business (or best practice) rules also as contractual duties to refer the case to the ECJ for preliminary reference.

25 See, early already, ECJ case 14/83, *von Colson and Kamann*, [1984] ECR 1891, 1907–1909; ECJ case 341/05, *Laval*, [2007] *ECR* I-11767, para 58; see also U. Bernitz, 'Horizontal Effects of Private Rights Vested by Union Law on Damages to be Paid by Another Private Party: The Laval Case as Model', in S. de Vries/U. Bernitz/S. Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Oxford *et al*: Hart Publishing, 2013) 139–150.

intervene in single cases – as for instance the German BaFin in those concerning the giving of advice in the upcoming financial crisis of 2008 –, there would be no sanction at all and certainly none 'sufficiently efficient and equivalent', as the ECJ explicitly requires.

If really only a further case brought before the European Court of Justice can give clear guidance, the reference should be drafted as generally and precisely as possible, namely asking (i) *whether in principle* European Law requires that private parties can invoke the duties contained in the conduct of business rules (on best practice) also as contractual duties and (ii) (if (i) is answered in the affirmative) whether national law is bound in any way *how* to use the duties contained in the conduct of business rules in the context of its national contract law, namely whether it has to use these duties literally and is free only with respect to which consequences it attaches to violations (nullity, damages etc) or whether it may use these duties only as general guideline influencing in principle national contract law application. For the sake of clarity, one might be inclined to encourage the ECJ to take a rather 'active' stance in its answers to such questions.[26]

5 Conclusions

The Bankinter decision is the first important substantive law decision on the MIFID. For this important directive, it clarifies interesting issues for the scope of application and some exceptions. Above all, however, it clearly establishes 'investor protection' as the overarching principle which has to guide interpretation, also interpretation which is not necessarily supported by the wording of the rule. In the most important question – whether the MIFID establishes also a standard of private, namely contract law –, the decision remains vague, perhaps because the question asked was too narrow. What is clear is that Member States have to install 'efficient and equivalent' sanctions, but that they have the choice between different contract law sanctions. What is less clear is whether they have to take the standards established by the MIFID as contract law standards at all – and whether they have to do so in the full amount. Investor protection as the overarching principle would seem to speak for a positive answer, perhaps as well the fact that the Court's ruling leaves to the Member States only the decision of

26 See S. Grundmann, '"Inter-Instrumental-Interpretation" – Systembildung durch Auslegung im Europäischen Unionsrecht' *The Rabel Journal of Comparative and International Private Law (RabelsZ)* 75 (2011) 882–932.

'the contractual consequences': The MIFID standards have to be seen in their full amount also as contract (or tort) law standards. In any case, a court of last instance can no longer decide to the contrary without yet another reference to the ECJ. One is still pending anyhow.