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ROUNDTABLE

BOOK TALK

FINANCIAL REGULATION AND CIVIL LIABILITY IN EUROPEAN LAW

Book Talk "Financial Regulation and Civil Liability in European Law." | By Olha O. Cherednychenko and Mads Andenas | Edward Elgar 2020.

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Abstract

This book by Prof. Andenas and Chrednychenko is a perfect tool to introduce readers to the challenges of "private enforcement" of European Union law in the field of financial regulation. This seminar explores the interface between public and private law and highlights the power of traditional private law concepts serving the public policy ends set by the EU regulator. A panel of distinguished experts explain their chapters in this book with further eminent academic discussants and create a highly stimulating debate.

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Full transcript

Prof. Olha Cherednychenko [recording tunes in here]… -Approach to civil liability in the EU Financial Regulations and this lack of coordinated approach is manifest not only across different areas regulated by the EU, including payment services, credit and investment, but also this lack of a coordinated approach manifests itself when it comes to the interface between different actors that are involved in the enforcement of financial regulation.

So for example just to give you a few examples, and I think as the chapter by Takis nicely shows we basically have three different approaches in EU financial regulation. Well there are measures such as the Markets and Financial Instruments Directive which will be discussed in more detail during the second hour which basically do not make any reference to civil liability, which is silent on private law remedies as such. This is one extreme. On the other side of the spectrum we have EU

measures that do harmonise civil liability and quite extensively and the Payment Services Directive would be probably the most striking example of this third type. In between we've got a category of measures such as the Prospectus Regulation that do not really harmonise civil liability in the sense of introducing European remedy but they do refer to national civil liability regimes. So basically obliging member states to ensure that violation of the Prospectus Regulation does have consequences in the National Private Law systems. So a great variety of prospectives and if we ask of course is there any coherent rationale behind this diversity the answer would be no. I think the contributions in this book nicely show that this diversity cannot be justified neither from the law and economic perspective and nor from the legal comparative perspective, and basically the explanation for this diversity would rather be the, well path dependency, so which private law remedies have been included in the preexisting regime, in a particular area, for instance they were included in the Payment Services Directive 1 and we seem them again in the Payment Services Directive 2. But areas in such as MiFID their investment services there is nothing and this is again a pattern which dates back also to the early days of the harmonisation of private law remedies in this area. So path dependency could be one explanation of why we don't really have a coordinated approach and the second, basically probably most important explanation for this lack of a coordinated approach is, the political constraints involved in the EU law making basically the law being by financial industry which in some cases has resulted in dropping of civil liability principle in the EU measures. Again, the MiFID II is a nice example of that.

So many different approaches, no coherent rationale based on basically on a thorough analysis of the added value of civil liability. As our book does show civil liability does have an important function in EU law and I think again both, well contributions point out to the importance of civil liability as a remedy and the question also arising as to how we could improve the current situation and as I have mentioned here, we don't have a coherent approach, not only across different sectors such as payment, credit and investment but we also don't have a coherent approach to the interplay between different actors involved in, well in public and private enforcement. What we see in the area of credit rating agencies is that there is in fact, there is no, any coordination between the decisions of ESMA finding a violation of the CRA Regulation and the decisions of civil courts. This leads in fact to a situation that is practically impossible for the aggrieved investors to prove the violation of this regulation in civil proceedings, they cannot really rely on the findings of regulatory agencies. So again, the absence of coordination which has a diverse impact on private enforcement and the role of civil liability.

So coming back to our second major issue, what do about this situation? Can we really remedy this lack of coordination across different sectors and across different actions in the area of financial

law. The answer is indeed yes. Because what we see and I think that we often hear a very pessimistic approach, a pessimistic view about the role of EU law and well obviously we all know the reasons behind this pessimism but perhaps we should be also, we should at least try to better understand what the EU has done so far in this area and in order to see what can be done better. Because what I see from this mapping exercise across different sectors, so financial services is that there is also a lack of knowledge that is really happening.

So in terms of improvements I think that the improvements are possible both at EU level and national and when it comes to the EU level, I think that well it is very important indeed to pay more attention to what I would call the legal grammar used in the EU measures. Here I would like to distinguish between a more top down perspective on EU law and a more bottom up approach to EU law making. I think that under the top down approach we could understand obviously the classical supremacy of EU law and the idea that even if a certain EU measure does not provide for private law remedies, the doctrines of implied rights, as well as the principle of effectiveness may ultimately lead to the creation of those remedies. I would, in theory, this is certainly true and I think that as Takis chapter in the book powerfully shows there is a potential for the development of new remedies, private law remedies even in those areas where the EU is silent, the EU measure in question is silent on this issue.

However, and this brings me to the bottom up perspective. This does not happen in practice, not always happens in practice. Because if we look at the EU Legislation from the point of view of what really happens with it on the ground, this is the context of national legal systems, but also in the caselaw of the European Court of Justice. It seems that we also draw a distinction between more public law and private law oriented EU measures in this area. While EU law certainly doesn't recognise this public/private divide, in practice is not dead and it can have really important implications for the position of the aggrieved individuals in their disputes with financial firms because in those areas where the EU has clearly conferred, explicitly conferred rights and remedies on private parties including civil liability there is no discussion in national law that they can enjoy them, and the Payment Services Directive is a great example of this. Whereas in the case of public more orientated measures such as the Markets and Financial Instruments Directive we see that there is a problem. We see that there is a reluctance at national level. Much more reluctance to EU law that then we see in measures that are more explicit in their approach to remedies.

So the first point would be really more attention to the grammar, to the private law, to the grammar to the drafting and the underlying rationale, well behind a particular approach. So obviously I think we are not advocating here full harmonisation of EU remedies or the creation of the civil code. So we also do not advocate a one size fits all approach because again different

sectors, differ. But what we do, I think advocate is more attention, more informed decision making based on not only the classical EU doctrines of supremacy but also on the empirical evidence of national legal systems on what really happens there and their public/private divide is still very significant.

Again the same also applies to the second aspect of our book, this coordination between actors because again the Credit Rating Agencies Regulation is a wonderful example of a toothless tiger which didn't reduce civil remedies, civil liability but ultimately is quite powerless because in particular of the lack of any coordination between court decisions and the decisions of regulators. So again the EU could also take this type of consideration into account when the law making is in process.

The second aspect obviously, national level. We understand of course that the EU operates under considerable constraints and not everything that we would like to achieve at EU level can be achieved in fact in practice. So national level I think as Marnix has also pointed out in his introduction remains very important. It is here that courts in particular civil courts could play a very important role in the development of complimentary relationship between financial regulation and private law remedies, particularly in those areas where there is no principle of civil liability in EU law and again Investment Services Regulation is a powerful example.

So again this is something that I hope we could also discuss, during the remaining time. But our most important point is I think that the book shows that we need to rethink the role of civil liability in financial regulation today, and hopefully it provides all these perspective that we gathered from our distinguished authors provide an impetus for this.

So thank you very much and I would very much also like to hear from our authors a little bit more on these aspects but also indeed on the general conclusions on the way forward because again there are still many, many questions about the way forward and we have just laid down an analytical framework in a way to proceed but many questions remain. So thank you.

Prof. Mads Andenas: Thank you very much indeed of course the topic is civil liability and civil liability, tort liability has this if you like constitutional function. It's courts developing liability and it's not something which has to be pushed forward by legislation, its most important function is, I would have thought, is where it feels the gaps, where it goes in and acts ahead of legislation and then legislation can take over, restrict whatever it wants in a constitutional system like we have although it's not so obvious it can any longer because of the interaction with EU law and the

constitutional norms. But at least that they have this function in court law and that brings us over to Yane because of course the regulator does not have that same freedom do they Yane, they have basically they have to have a legal foundation, they have to have a provision in legislation authorising them. But then of course they are given some leeway within that framework. Yane please before it becomes midnight where you re.

Yane Svetiev: Well if you read my chapter you might think that they have more leeway than not. The chapter that I contributed to the book picks up an analysis that I develop in a more elaborate way. In the book that I wrote that was published almost simultaneously and which is on Experimentalist Competition Law and the Regulation of Markets, and I apply that argument more specifically, or one of the arguments that are linear in the financial regulation field. So both in the book and in the chapter I argue that experimentalist governance provides a useful framework for understanding recent developments both in competition law and in market regulation more broadly. It asks the question which the editors posed to us, whether civil liability particularly understood as private damages claims, which is a very limited way to understand civil liability can be compatible with an experimentalist framework that I argue rationalises a number of different developments both in the practice and in the theory of market regulation. The issue of course as Marnix and already underscored and Takis' contribution very clearly points out, EU market regulatory tools either implicitly or explicitly, as for example in competition law, seek to rely sometimes on private damages suits to enhance their effectiveness at national level. Now experimental governance may or may not be familiar to the participants in this seminar, there is a decade long literature about experimentalist governance in the European Union and, experimentalism as a kind of framework for thinking about regulation seeks to address two important constraints on regulatory activity. One of which is radical uncertainty and the second, are the limits or the difficulties associated with hierarchical enforcement.

Now with respect to uncertainty, needless to say sets all regulatory action in terms of choosing the appropriate means through which to pursue specified regulatory objectives, and in the book more so than in the chapter, I try to untangle the sources of uncertainty as relating to for example, firstly conceptual uncertainty about the kind of conduct by corporations that we wish to promote, take a simple example such as prompting greater rivalry in markets, economists see competition as disciplining force. The more rivalry you have, this disciplines actors and promotes good market outcomes even from a public welfare perspective they tell us. But in financial markets we know that rivalry, more rivalry also produces herd behaviour which then leads to systemic problems such as financial instability.

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Now in light of such uncertainty about what kind of conduct we wish to promote we can try to model conduct so as to understand it's likely effects, but then we face what I call, predicative uncertainty, especially in dynamic and unstable environments, which as we have seen makes ex ante modelling not always very reliable. Then finally what ever objectives you pursue in a defined specific regulatory field such as financial regulation can lead to negative outcomes with respect to other objectives pursued elsewhere. Whether they are sustainability, distribution of income and wealth, objectives falling under things like environmental goals and so on, and so forth. So this we might think of interaction uncertainty which captures of the idea of unintended consequences of any regulatory action.

The second problem was that of the limits or difficulties associated with hierarchical or coercive enforcement, and this draws on an idea from both regulatory studies and law and society about the difficulty of enforcing rules in a complex and heterogeneous economy if you're relying merely on coercion. So you often need the help of regulated actors and market stakeholders to be able to implement regulation. So these problems are ever present in financial regulation and in particular the regulation of financial products which is the specific example that is picked up on the chapter. It's important to recognise that this uncertainty besits not only regulators but financial institutions themselves. So financial innovation is a pervasive feature of financial markets but as Christy Ford has argued the social benefits of such innovation are often difficult to determine. So financial institutions my design products with a view of serving a particular class of customers or a specific customer need, but they may not be able to themselves fully understand or predict the effects of the products that they've designed. So as many have argued, financial product manufacturing can lead to problems even if it does not have all the elements of fraudulent behaviour.

So with that as background, what experimentalist governance tries to do is rationalise a number of strands also in regulatory theory that respond to these problems and a number of strands in regulatory theory suggests that rather than seeking to elaborate specific rules that comprehensively address a regulatory problem, you somehow then engage in collaborative problem solving with lower level actors. In an experimentalist framework we grant lower level units discretion to fashion their own strategies to pursue defined regulatory goals much like say principle based regulation does, however, experimentalist governance also creates a binding framework for the review of the design and the effects of local strategies through things that are familiar to EU lawyers. Reporting obligations and peer review which are not box ticking exercises but are intended to lead to adjustment of those locally adopted strategies as implementation problems are observed in real time.

Now these lower level units that are granted discretion and I'm sure Mads is upset at this point in an experimentalist framework, can be either national regulatory authorities or the regulated entities themselves, namely financial institutions who develop their own business and marketing strategies, also under conditions of uncertainty and which are coopted into the regulatory architecture.

Again this in and of itself is nothing new, most contemporary regulatory theory developments do incorporate the target corporations as regulatory actors down their own manufacturing design and supply chains.

Now for those who have looked at the chapter you will notice that the example of financial product governance as an inspiration for the reflection comes from empirical research that I did together with Annetje Ottow in a paper that we wrote some years ago where we observed different strategies adopted by national authorities and in particular a specific product intervention, respect to a leveraged turbo product by the Dutch Supervisor where the supervisor was operating under an uncertainty about the outcomes from purchasing such a product from different classes of customers. The modelling was not able to in fact predict whether this product had benefit and for which classes of customers, so as a result the intervention involved a mechanism of observation and review of the product outcomes which could lead to adjustments in the product design and marketing to different classes of investors. As such it had almost all the hallmarks of a full experimentalist governance framework and if you look then to the MiFID II financial product governance rules, which you could see as a kind of management based meta regulation obligations, they imposed precisely the kinds of obligations on product design and monitoring the Dutch Authority implementing even before MiFID II had come into force in order to deal with the problems of uncertainty and difficulty of coercive enforcement. Particularly where you don't have hard bright line rules to guide the conduct of the target corporations.

So this brings me to the question of civil liability. How does an experimentalist think about the civil law consequences of the noncompliance with the EU regulatory norms? So one way to think about it is to consider the Court of Justices decision in **Genil** which is discussed in a number of the contributions. Namely whether the noncompliance with the suitability of appropriateness conduct of business norms should result in the nullity of contracts, or perhaps even the availability of civil damages, why not? Now in an equivocal yes to that yes is problematic for the experimentalist due to the problems of uncertainty. The obligations, the regulatory obligations are not defined in a clear cut way and as such clients could use the fuzziness of the obligations opportunistically to both get out of contracts or seek damages. So in order to sort of see whether we would want such an outcome or not we might be interested to know how frequently the clients have access to the Spanish Courts, to seek nullity or compensation that leads to local access to justice questions and adequate legal

representation in different national legal systems, that will lead us to the question to wonder which clients would we be helping with such a rule. Would we be helping the more sophisticated investors get out of contracts or seek compensation where they've simply made the wrong call. So those are the kinds of reasons that you might want to leave the choice of how to answer that question at a national level.

Finally a second way to think about experimentalist and civil liability is to fix on the fact that experimentalism relies on collaborative engagement with financial institutions to implement solutions. That's what the management based governance rules of MiFID II tried to achieve. But if there is a fear of civil liability, financial institutions may seek to shield themselves from liability rather than openly disclose the information about the problems with their product design, marketing that they have uncovered through the internal monitoring that MiFID II mandates.

Now a non-experimentalist solution to this problem of regulating financial innovation through new financial products is the regulatory sandbox. Suppose the regulator allows an innovative product to be developed under its own close supervision and in return provides immunity to the financial institution from both public or private law liability. If we take seriously the fact that both the regulator and the financial institution are operating under conditions of uncertainty, obviously such immunity would be inappropriate.

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But we can take this idea of the regulatory sandbox, of the collaborative development of a financial innovation as a step along the way towards experimentalism if the financial institution has it developed and markets the product, uncovers problems and adjusts its business strategy in real time then maybe it will avoid parties being harmed. So you're identifying the harm and its insipience and perhaps adjusting the course. Now many of you might be suspicious that that would in fact happen but if you think that parties will be harmed along the way as part of this process of joint learning, the supervisor authority and the financial institution could develop protocols for compensation of harmed parties as part of the operation of the regulatory sandbox. So here the issue of coordination with the kinds of bodies that provide compensation and often alternative dispute resolution bodies for example provide compensation not on civil law principles but on a kind of harm minimisation principle. That could be one way to incorporate them into this process. So this might avoid some of the private parties being harmed in pursue of a public oriented leaning to implement and regulate a financial innovation.

Now going a step further we might ask for the private parties themselves could implement a regulatory sandbox arrangement to cope with the uncertainty of financial innovation, and at least in principle the answer would seem to be yes. It would be a purely private solution to the problem of regulating financial innovation but it does not rely on the classical exposed civil labilities for harm caused, because under conditions of uncertainty ex ante we can't specify either wrongful conduct from an interpersonal perspective or even from a public welfare perspective. A purely private sandbox is certainly feasible for example, for commercially sophisticated parties who already do this kind of thing through contract when they are jointly innovating. But it may not be feasible for the retail end of the market without some form of aggregation of the retail clients but that aggregation would not be a class action for litigation.

So I'll leave it at that in giving you a flavour of the argument and perhaps we can return in discussion if there are any questions or comments, or criticisms which of course are very welcome.

Prof. Mads Andenas: Thank you very much that was excellent, Yane and I am just really wanting to come in with some comment, start the discussion now but I'm showing complete self-restraint and Takis you're the next speaker.

Prof. Takis Tridimas: Thank you very much. Let me first say that it is a privilege to have been part of the publication. I think Mads and Ohla's work, it's a wonderful book and I really benefited enormously by reading the contributions, I think Yane gave us a taste of the wealth in the book. So I just feel that I am a better scholar than I would have been had I not read it.

As for my own contribution I think it is essentially limited. What I'm trying to do and I'm going to be very brief, is to pass through certain points. The first point is to tease out the distinction between rights and remedies. This is a distinction which is at best inherently unable but becomes a lot more precarious in the context of EU law. Secondly tease out this concept of liability in terms of remedies, which is a distinct feature of EU law. Thirdly, map out to what extent directives and regulations in the field of economic law provides for civil remedies, and identify certain categories. Then try and tease out a bit the concept of implies rights of action. Where, at least to my knowledge little has been written in the context of EU law. Finally zoom in on how these are applied in the context of financial law broadly understood.

So let me highlight a couple of points. First of all I would say EU law has certain biases. The first bias is in favour of a public enforcement order. Now that is in line both with financial law as it has developed in the nation states, and also with the inherent if you wish preference of EU law. It makes

sense to use a public enforcement system in the field of securities law. First because rather than rely primarily on private remedies, first because this is more efficient instead of its investor monitoring the performance of financial firms who are intermediaries, it makes a lot more sense to appoint a delegate in the form of a specialised authority that has the resources, has the expertise and does the monitoring for investors. That of course leads to a whole host of different issues about principle agent relationship and all that but I think it makes sense to say that it is a lot more efficient as a system of enforcement. It avoids duplication.

Secondly financial and for enforcement of financial regulation is more effective if it is preventive. If it's operates ex ante rather than if it is based on private law where we are trying to close the stable after the horses have left through secondary remedies like nullity or compensation.

So there is a bias inherent in the area of regulation. Now this is countenanced by EU law which traditionally imposes obligations on states rather than private actors and which by reflection staves of the private laws of the member states. I say this with some reluctance but I think it is the starting point. So first there is a bias towards a public system of enforcement. Secondly, this idea of hybridity that has developed mostly through the caselaw of the Court of Justice is based on the fact that EU law is supported by a centralised system of justice. The primary venue for the protection of rights are national courts, therefore you have to rely on national remedies, traditionally EU law, especially Treaty law, imposes obligations, does not even really provide for rights. Most rights are implied and in any event, where it provides for rights it just stays there, it does not determine specific remedies that flow from those rights.

So what are the attributes of hybridity, I think it is dialogic in the sense that it is developed through a judicial conversation between the European Court of Justice and the national courts. This takes place mostly in the context of the preliminary reference procedure. The hybridity I would say is disruptive at times even subversive because EU law relies on national remedies but these have to be adjusted, reinvented, placed in the procrustean bed of EU led, jettisoning the elements of them will fall short of the EU standards of effectiveness.

I would say the third feature of them is this principle of effectiveness that characterises the model and gradually as EU law has evolved the requirements of effectiveness have become much stricter, effectiveness has become if you wish, the primary standard for determining the constitutional expectations of the EU legal order from the national laws. So I don't think that national procedural autonomy is the starting point, I would view rather as the residue of the application of the principle

of effectiveness and the principle of equivalence which under the classic caselaw must govern the protection of EU rights before national courts.

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Now, as Olha mentioned earlier what the chapter tries to do is make a taxonomy of EU measures depending on whether they are civil order remedies and how specific these remedies are. Then I move on to discuss implied rights of action borrowing mostly from American conception framework. The truth is the court has not articulated in any systematic way the conditions under which a party may derive a right from the imposition of an obligation on another party. Implied rights of action do exist. They can arise as a result of obligations imposed on the public authorities. For example in Environmental law, the **Landelijke** case is prime example of this. They can also arise as a result of obligations imposed on other private parties, classic example of this is the Monmouth case and this idea in the field, the broader field of financial regulation reaches, I think its apex in the **Daihatsu** case. I think that's a very interesting case because essentially what the court says is that the obligation on corporations to publish its annual accounts creates an implied right of anybody essentially to bring an action to enforce that obligation. So a very liberal approach there in relation to the rights of individuals. **Daihatsu** illustrates **Landelijke** in a different context, illustrates the role of individuals as integration agents. They are instrumentalised for the purposes of attaining the objectives of the internal market. I think it is more generally correct to say that areas of regulation including areas which are traditionally perceived to belong to private law in the context of national legal systems, when touched upon by EU law are instrumentalised, consumer law seeks to pursue certain specific key objectives of EU law, internal market, the version of the social market economy that the EU adopts, and the same applies to other areas, not only. We see it more recently in the Regulation of Services, there is an instrumentalization of areas of regulation to attain EU objectives which may not necessarily align with the way these arears are perceived at national law, or at least it colours the way they are regulated.

So the same kind of instrumentalization also appears to be pursued in relation to remedies but it is highly selective. In some areas we see a lot more specificity in terms of the remedies the EU instruments provide, in other areas we see less specificity.

If I stay here reflecting on the comments that Olha and Yane made earlier- Why is that? Why is there such variance in the way EU measures approach private remedies? I think the answer to that is that EU law has these biases and the first bias- Biases make for past dependencies. The first bias is towards public enforcement for the reasons that I mentioned, the second bias is that private law is traditionally the privilege of national laws, the main decision for EU law as I said, public entities not

private parties. The third one is simply the vicissitude of the political process. The way that different interests, conflicting interests coalesce in relation to the negotiation of specific measures, simply differs it's as simple as that. The Credit Rating Regulation is a good example. There was a lot of discussion with the industry which essentially led to the inclusion of a provision on civil liability, Article 35A which to mind at least, pretty much meaningless.

So I think the unpredictable character of the negotiations and the decision making process adds a layer of uncertainty especially in EU law, because not only do you have to balance different interests of those effected by the regulation but also you have to balance different national interests. So I don't think, Olha said earlier, the specificity of remedies depends on whether a measure is perceived to be as a private law one, like the Payments Directive or a public one, the regulatory arm like MiFID, I think that's absolutely right but I wonder whether a measure, has this kind of public or private law intention or is it in fact not the cause of it but the consequence of something else. Why has the EU decided that, this area should be subject to private law disciplines and in other area should be subject primarily to public law disciplines.

A final point perhaps on Yane's excellent analysis. I can understand to the extent that I have read about it, experimentalism as a framework of analysis as a framework of explaining the regulation in itself. I suppose I question the outcome with Yane drew, he said in the **Genil** case, this is a case where the Court of Justice held that the suitability doctrine and MiFID before it was MiFID II was adopted, did not give rise to a civil right of action that was dependent on the member states, and Yane says well from an experimentalist perspective this is the correct outcome because we simply do not know how it will be used, and who would be the winners and the losers out of using that civil remedy, which is perfectly correctly. I accept. But I wonder why that means it's better for the member states to decide this? Why is it that other member states are better placed to choose the winners and losers rather than the EU to do it, or why that is the case in relation to MiFID but it was not the case in relation to the Environmental Directive that the court looked at in **Landelijke** where the same kind of calculation, perhaps more so can be made? So I understand it as a framework of analysis and I think it is extremely useful but I'm not sure if it can explain variants in the way, incoherence in the way it has developed.

So what are the main conclusions, I think you have given them away already the conclusions which are that the distinction between rights and remedies is much less secure than we sometimes assume it is. I think it is particularly problematic in the context of EU law. I think the hybrid model of

remedies whilst inevitable in the context of the EU does have a disruptive effect on EU law and it does, and it's also difficult to establish who are the winners and losers of that model as well.

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Finally the intervention of EU law in the field of private remedies, especially the right to compensation or civil liability more general is incoherent. I think there is a lot of unexplored potential there, especially in the field of financial law.

So thank you again for allowing me to take part in the book.

Prof. Mads Andenas: Thank you Takis that was excellent and sets the scene of course for the next round, and I'll just move straight over to Guido. Guido you have of course read, for instance Della Negra chapter and we put you together in the session here. Do you want to open?

Prof. Guido Alpa: Many thanks again to Mads and Olha Chrednychenko, the speakers, with great interest. Just two general questions. One, just reading many chapters of the book, and after heard what the speakers said. One is a question related to EU law. There is a problem of equal treatment between the investors, the categories of investors and between the categories of actors as Olha said. Actors of this financial world. These means that as the book shows there is a great difference between each sector and these means that there are actors who are in some way protected by EU law and others who are much more exposed to the private law of the national legal systems.

So I think that there should be an equal treatment and equal treatment should be achieved in introducing rules concerning, same rules concerning all the sectors. I want to explain better my idea. Just taking into account the Italian perspective in which the liability of the banks is founded is grounded on the fault. But I've seen in other systems the liability for banks for each kind of their activity is grounded on strict liability because there is a comparison between financial product and general product as we can find in private liability. So I wonder whether it should be better to enlarge the public law perspective and thinking to same rules for all the actors in all the sectors.

I can imagine that your reply could be no because every sector has its own interests, its own balancing of interests and its own aims and so on. But I wonder whether this could be a good beginning to think about how to improve the EU public law.

The second question is about private law. We have seen that in each national system tort law has its own principles, its own rules and unfortunately the attempt to codify European system of tort law was a failure. This means that there is not an equal treatment of investors who are damaged by these activities from two different point of view. First is that investors are treated differently in different sectors and they are treated differently in each national legal system. For example, there are systems in which this kind of torts are considered having sort of contractual aspect, other say it is a system based on precontract rules, and of course the consequences of this qualifications are different having regard to the burden of proof, to limitation period, to the quantum of damages, causation and so on.

So I wonder whether in this field we could not take into account that it is necessary just to make sort of painting a special tort with the same rules which are devoted and to be applied in all national legal systems. So for that reason I would prefer among the three different models of Professor Tridimas, the third one, a very detailed model with the detailed rules.

So these are two questions, basic questions maybe, a bit simplistic but I think it is a good way to begin to think about civil law in the two different perspectives, the European and the national. Thank you.

Prof. Mads Andenas: Thank you. Federico do you have any comments?

Federico Della Negra: Hi Mads, yes. Thanks a lot for the invitation to contribute to the book and also today to join this very interesting seminar. Indeed I had drafted some ideas before but I will take my time to try to answer Professor Alpa's questions which I think bring me anyway into the core of what I planned to say.

So indeed the first question is basically about the public law elements, so the regulatory aspect of content governance if you like, and this is the question whether indeed we could think about uniform content of business rules for protecting investors or market participants who are in the same situation. So on this aspect indeed Professor Alpa is clearly right, he's saying that we have these three different sectors, credit, payment and investment services. All of them regulated by different rules. Some are consumer law rules others are financial sector rules. Even in consumer law rules we have general rules and special rules, and also sectoral rules. We have some cross sectoral instruments, like MiFID and sector instruments like we have now PRIIPs, we have the LTF regulation, we have the personal pension scheme regulation etc. Definitely I fully agree that this is a framework

that the more it develops and the more it gets complicated it gets complicated for investors, and also for firms that have to of course deal with the increasing number of rules that have a similar purpose.

[01:00:10]

I think my constructive which I tried to highlight also in this contribution is that of course we need to distinguish between what are retail investors and non-retail investors. That is a distinction made since, I think a long time, of course by theorists of regulation. Those who rely on the market failure approach. But has been made also more recently by Beryl Finance stating that indeed these two types of investors need to be distinguished. Of course when I say retail the question that arises is that retail includes also legal persons and there we have other fragmentation with MiFID II which includes some legal person in the scope whereas consumer law leaves them outside the scope. So on the legal person issue I think it's another difficulty. But in general what I would say is that there could be good reasons for acknowledgment of organisation of counter business rules when it comes to unsophisticated investors that act outside their trade business and profession. The reason for that I would say, so the first reason for that comes to my mind relates to the ongoing development of financial markets, so we find that nowadays also triggered by digitalisation and also financial innovation driven, not only by demand side but also by offer side. So by financial firms leads to a sort of high degree of substitutability of financial problems. This is something that many scholars have already pointed out. So in other words there are credit problems that have investment elements because they get exposed to market risk, there are insurance problems as well that get exposed to market risks, for example Unit Link Insurance policies. We have typical credit problems like deposits as well can be structured, etc, and then of course we have the case of mortgage law, then leads to foreign currencies etc. So this is a typical example of cases where let's say the consumption and investment mix and overlap and having different rules for financial troubles that are financially singular is unreasonable.

So in that sense I see the point of Professor Alpa's first point that we need to harmonise this and the second point is also that indeed with digitalisation, ongoing changes in business, there's a lot of financial firms. I mean more and more firms are doing the same thing on the market. So credit institutions since a long time in Europe have been able to offer financial services to clients. This is per se a reason to further harmonise because it means that, and especially in continental Europe, in Italy, Spain the business model of these banks is that of selling financial instruments without financial advice, kind of so called supermarket business model, as Professor Maloney names it and so this type of business model makes it even more blurred distinction between a financial adviser and a

seller of financial instruments and credit instruments. So there is also a reason to harmonise consumer business rules in this area.

The second question is even more difficult because it is about what we have found in this book, Professors Andenas and Cherednychenko have edited, so find that there are many different rules for the same law principle. So this is very difficult to address because of the biases that also Professor Tridimas explained for us and Professor Cheredynchenko explained even before and the difficulties that regulators find in regulating civil liability.

What I found very inciteful was Yane said before I wrote, also in this contribution about uncertainty and about the fact that the general phrasing of this civil liability principles can be a reason for opportunism in litigation. I found it interested because I also found the same thing, I also found that in this difference civil liability regimes, the PDU was introduced in these utilisations, so I'm mentioning it is not only MiFID II rules, [unclear 01:05:08] managing directives, CRA regulation. We notice that the parliament was pushing for more civil liability and the council was then resorting to a more conversative approach and the commission as well was pushing for more civil liability. So the reason is probably the fact that there is still a sort of fear of vexatious or pointless litigation in some member states. So this makes it very difficult to harmonise. But the fact that it should be harmonised I think is out of the question for me the problem is that it politically difficult. So probably as a first step it would be important to agree let's say in the legal community, and the legal adopt in Europe about the fact that the general piece was mentioned by Professor Tridimas need to be interpreted by national courts like all national courts possibly, and there should be in this sense, a sort of uniform interpretation of different civil liability rules.

So what I think is that we can't apply the analogy, of course rules from Italy to Spain and to France, but we should be able to apply in a singular manner the basic fact and its equivalence and the criteria to interpret those principles. Probably this is the first step that could start the environment for European legislators to bring forward, to move forward with the issue of harmonisation, like Mads said at the beginning of this intervention, in the past he said, yes in the 90s we had this problem, we were sceptical but now we are in 2021 and having the same issue again in a completely different market environment, a legal environment. It's a bit outdated let's say, it's not up to date with all what is going on.

So probably a first step could be try to have uniformity with these principles. A second step to bring it forward to politicians. With the first step it is important, a book like this for example is fabulous because it is disseminated across Europe, it will be read by Italian lawyers, also by French, by German

lawyers which are bit sceptic of, for example, using principle with finance equivalence to upgrade the initial remedies and this could be one step. The second one, the second step could be motivated like Professor Alpa said by indeed being very concrete about what are the advantages of this system that is so fragmented. One example if I may is this about the different level of damages for basically the same rules. So in Italy and Spain, it is possible for an investor to receive the restitution of the sum that he paid for a financial instrument that turned out to be not adequate, not appropriate, but this is difficult to get in France, impossible to get in the UK unless there is financial advice and a far as I know it is very difficult to get in Germany of course. So this is a clear case where harmonisation is needed because we have clearly different remedies for the same breach with a consequence there could of course be issues indeed of equal treatment because I could decide to buy financial instruments in one country and be more protected instead of doing it to another country.

So I think that indeed it is a big challenge but probably with this two-step approach we can be a bit more optimistic and try to build up probably not immediately but gradually a sort of more coordinated and uniform framework for civil liability.

Prof. Mads Andenas: Now the thing is that if you're looking at the practice of the Court of Justice on the one hand it's general principle and sometimes it's reasoning is not completely dissimilar to the direct effect and it's a kind of direct effect thinking in this. At the same time it's extremely done into minutiae. Here is this deposit guarantee scheme or here is the civil liability requirement and you have this overly technical discussion and it's very easy to be critical of that.

[01:10:05]

But then if you go and look at the big tort cases, at home, you know in the national system, it's the same thing, they work out this very general level and they go down into the details. I mean that's how most of our tort law, general tort law has developed. So again we could focus on the flaws of the community system and there are many but what we're talking about here is incremental development of liability at national level and at the EU level and it is not all that different. But if I could also point back to one of my ideas at the beginning which I'm sure all of your will agree with to some extent. When you teach tort law, you teach contract law. Basically the cases are not there, there's very little reference to EU law. Even the most progressive national text book is not all that much in there and my idea then as I hope you agree with, that well- Example, English, I started to teach English contract law for one of my topics in the 1990s and I went back, as a civilian and

looked at the big books and the hand books and Benjamin's Sale of Goods, horses, it was all about horses. That was caselaw established in the 19th century and you developed the sale of goods on that basis.

Then of course our excellent property lawyer, a Roman lawyer who wrote about a modern law for removal of property. Basically coming from Roman law, with the horses, but mainly slaves because they were more expensive than horse, and how those concepts have followed us the whole time. That's where I want to say that if you've a general discipline at times you have to go back and you have to look at what kind of cases, what about the transactional typical case and now it is very often the case involving the kind of regulation we are talking about here. My challenge then in a sense was to say if you want to stave the general discipline, national contract law or national tort law, well then you have to look at basically what those cases show you and you have to reshape your concepts.

When I say that it sounds revolutionary and then of course it's not revolutionary because with the open textured concepts you're having in contract law and in tort law, and by the way some of your criticism is exactly the criticism that practically any commercial lawyer, contract lawyer and [unclear 01:13:21] will have against tort law because it is unpredictable and much of remedy law is unpredictable and it's supposed to be unpredictable and that's how the legal system develops it. That's how typically tort law has developed. There's a need for a remedy, the courts conjures it up, they conjure it up but of course they do it and they have a method for it, but the idea that like a French tort lawyer would say, absolutely precise, civil liability with a super clear system, if you want to be critical of that, I'm sure it has some truth to it but it's also easy to be critical to it and particularly when its put to the test where the legal framework and actually the restrictions, the regulatory law provides and the products your dealing with, the nature of advice etc, etc which these cases are all about. Well then those concepts are open textured, they can move around but they're definitely not fixed and it's not so that you have a fixed precise domestic, general private law and then you have some rather vague imprecise community law, then one has to go, or regulatory law for that matter. But Guido did you have anything to add to this?

Dr. Maren Heidemann: Can I just jump. Sorry Guido just one second. Dr Marcacci and Dr Wallinga have to go very soon and I wanted to give them the chance of maybe make a comment to what has been said so far and we can pick up from there. So for me the big divide is between the restraints of the community treaties where we just have the competencies and we can't do what we want.

Professor Tridimas has pointed out what is possible there and what is being in the pipeline, has been considered. Then the two chapters by Dr Wallinga and Dr Marcacci they come from the other end to my mind. They focus more on the actual role of the civil liability, once you get into this viewpoint what is the problem and what are the possibilities there and I wonder Dr Wallinga do you want to make a brief comment from your point of view there?

Dr. Marnix Wallinga: Sure thank you. Also thank you for inviting me today and also allowing me to write a contribution to this wonderful book. I prepared a longer presentation of course for today but unfortunately at three o'clock I have to move on to my next appointment.

Dr. Maren Heidemann: That's one for the next seminar then?

Dr. Marnix Wallinga: Next seminar yes that would be great.

Prof. Mads Andenas: Send it to us, and we can circulate it among the people here. Even if it's unpolished.

Dr. Marnix Wallinga: I will. But the thing that strikes me the most is also what Mads said, and Olha said and I think Professor Tridimas said later on. The most important thing for me are not only what national legal systems can learn from EU but also what EU law can learn from what national systems are doing on their own and also using EU law. Especially and again I made a longer presentation which I cannot fully elaborate on now but I think that there are a lot of examples in that national law, when I was researching the interplay between MiFID and civil liability, that you see these legal systems actually using MiFID maybe not by making explicit references to them but by developing private law standards, duties of care that very much resemble what is being done at EU law.

Then sometimes I see that in a lot of publications, people are saying well we have this unfortunate deficit, we have this enforcement gap. But when you look at the cases themselves well of course not every case that is being brought to a court especially in light of more favourable litigation by banks, they litigate the cases they can win. Of course these cases are not all in favour of the investors. But you see courts actually using the conduct of business rules and EU regulation, EU Financial Market Regulations. I think a lot of what we talk about today in determining what should be the next step for EU law, is trying to look at what is being done maybe also under the surface and then not only looking at the interplay of connected business rules and duties of care but a wider category of what I would call private law concepts determining civil liabilities. We have more than duties of care, we have causation, we have contributory negligence, we have attributability of damage.

All of these concepts, at least in my research, show that they have very good gateways too effect of EU law and we see courts, at least in the countries that I've studied, Netherlands, Germany and the UK. You have these gateways for the influence of EU law and especially in the Netherlands, and less so in Germany, you see courts also making use of these gateways, so I think in the brief time that I have, I would say next step I would not be opposed to for example implementing a principle of civil liability and a new version of MiFID but I would say first we need good and concrete evidence, empirical evidence would also fit, Federico prepared for his thesis and also what I tried to do in my thesis of what's working in these countries and these members states of the EU and what is not working in the member states of the EU. Only then we could say well it is desirable to implement principle of civil liability and then we would also need what Olha said, more cross sectoral research of what is being done in other areas of financial market regulation, for example Professor Tridimas said well this principle of civil liability and credit rating agency regulation it's not being used. It's completely useless, it's a paper list, a toothless paper tiger. We need also those inside from other areas to help us figure out next steps.

My last comment and Mr Marcacci can have the entire floor. Is that well if we think about implementing the principle of civil liability we have a lot of regimes we could think of in trying to boost this private individual enforcement, maybe not only individual enforcement, we could think about introducing the principle of civil liability into the MiFID III. We could think about strengthening the unfair commercial practices directives which has worked in the Netherlands, very much so. Also for private investors, could also be used in other countries. We could think about strengthening the directive of honorary representative action. It already has a reference to MiFID. It can be used for all of these connected business rules which is that you could say well, these might of course lead to mis selling scandals. There are a lot of levels you could think about making a step forward, then again I would not be opposed to it but I would like to see also more attention to what is happening in these member states, and also taking into account options and possibilities investors or consumers, or people taking out credit already have and then trying to figure out what we should do next.

[01:20:52]

So very briefly, that was what I wanted to say today. Not covering the research I've done for my book but I think that's the idea that I have about interplay. I hope it makes sense.

Dr. Maren Heidemann: Thank you so much for that. The problem I see with the interplay in the member stages is one of you mentioned in the chapters that the German Supreme Court will not go through

with the idea of making, using the regulation as a case base for the civil liability and that is of course the classic problem between the public/private divide. In countries where there is this form of divide the supreme court will probably think they are not entitled to do that. This is a big problem, this is a big stumbling block. So I think Dr Marcacci has even tackled that even further and is asking about the merit of private enforcement and I think that's something Professor Dalhuisen will also like to comment afterwards because he probably thinks are we going to have an insurance mentality there. So Dr Marcacci very briefly would you like to.

Dr. Antonio Marcacci : Thank you. First of all my apologies I have a steering committed at 3:00 that's why I have to jump out. Again my apologies. Just one thing let me thank Olha because I wouldn't be here presenting my chapter and she's been very super nice inviting me let my chapter be published in the book.

I just would like to draw very briefly the attention on a slightly different approach which is that I have been experiencing in my professional daily life which has of course a connection with civil liability. In my book and the chapter is a summary of the book. I draw a comparison between the US system and the interplay that we all know about the public and private enforcement, the United State collect section, something that doesn't exist in Europe. It's probably we're going to have something very high level soon if the directive agreed last summer will bring about something, but it's still quite early to say. What I've noticed in terms of interplay, has interplay between public regulation and civil liability is that firms, financial institution at least the bigger ones at European level, so the ones that already operate at European level and operates in different jurisdictions, they now have a group level complaints handling procedures. This might sound light and something not important but actually it is and regulators they focus, they put a lot of attention on that.

Basically for two reasons. First of all complaints handling procedures are the first shield for litigation risk which goes hand in hand with civil liability of course. But they also have the other face of the coin which is compliance risk vis-à-vis regulators. So we have, every day we have this kind of double liability which is compliance risk and litigation risk that we need to oversee and monitor via internal complaints handling procedures. These are harmonised at financial institution level across different jurisdictions with similar principles. These principles at least within the European Union come from European law. So it's a kind of an interplay that I can see already operating within financial institutions.

One extra point that I also would like to raise is that when we talk about financial innovation which is obviously important, digitalisation which is obviously important and the huge differences between the different sectors, of course payment services are developed, Olha at the very beginning made this point very clearly. Then for instance investment in terms of remedies and enforcement, investment section. But-

[Talking Aside]

Dr. Antonio Marcacci : Complaints handling procedures-

[Talking Aside]

Dr. Antonio Marcacci : So basically just to close on what I wanted to say is that financial innovation is important, digitalisation is important but what matters a lot probably the most, is mis selling. Mis selling and in case were suitability applies. In that case it goes very much into administrative contract law for mandates. So trying to have a harmonised approach across different jurisdiction because you need to have at least harmonised or standardised better processes at institution level, is very, it's very difficult to handle and is also way too-

[Talking Aside]

Dr. Antonio Marcacci : To close mis selling and mis selling cases are probably the most important parts along with financial innovation of course, but mis selling cases for investment service. As a last point mis selling cases can also be used as the standard of behaviour of sales personnel, can also be used as a standard to evaluate in terms of employment law sales personnel. So the consequences of standards in terms of conduct of business at European level may have an indirect effect on the valuation of sales personnel which is another liability point.

[Talking Aside]

Dr. Maren Heidemann: Could I hand over to Professor Lombardi, he can say something about-

[Talking Aside]

Dr. Antonio Marcacci : Okay so just one last point, I'm going to be super short.

Dr. Maren Heidemann: Sorry I want to leave it at that and invite discussing your comment because I haven't been able to participate yet and we have eaten too much into the second half of the seminar. Could I quickly ask Professor Lombardi to maybe comment on the liability of supervisors because that his area of exploration and this would be the complementary opposing party of course, there is the financial institution or bank, or investment house that you want to take to court but you might also be the supervisor as in our famous most recent Wirecard scandal. Professor Lombardi a few words and then I would like to hand over to Professor Dalhuisen.

Prof. Ettore Lombardi: So thank you very much for inviting me and thank you for book it is very, very interesting as well because it's mixing in my opinion, my humble opinion two profiles. So a theoretical profile and the practical profile, and it's very appreciable for these reasons. So thank you Mads, thank you Olha for this product it is very, very good and I will try to adopt it in my course as well of International Business and Law.

[01:29:55]

Well I will be a little provocative now but I will be very quick. According to the time that is accorded to me. In the parts that I've read there is always this idea of protecting the consumer and protecting the investor. So as the EU legal system is structured it's built in a way just to protect the so called weak part. But are we sure that we have necessarily to protect the investor and not assure as Professor Alpa was saying, before a major equilibrium between the parties. So yes we know that we are playing with a party that is very strong, the supervisor, and the party that is financially weak, the investor. But can we consider a weak party, an investment fund for example, so just to give a hint to what I'd like to tell you to express now.

Especially in of the paragraph that I read there was an idea that was to follow. So if we increase the protection of the investor the harmonisation is positive. If we decrease the protection of the investor the harmonisation doesn't work. Well I humbly considered this view a little it to sectorial to stress because in my opinion we have to reach a level that is equilibrium level that's what I think humbly. So first of al this is the first provocation that I'd like to launch to you.

The second one and according to what Dr Heidermann asked me before, so to address my short speech on the CRI, CRA regulations so the liability of supervisors. Well I would like to use the opportunity to consider a case of the Supreme Court of Italy, the Corte Suprema di Cassazione. It's

not a very update case because it's of 2016 but it's in my opinion very valuable for the principle it expresses. So in this case of 2016 the Corte Suprema di Cassazione, the Italian Court, Cassazione the first lady, the Council as you know Council is one of the authorities, the regulators that control the financial markets, should not just consider a formal profile of products under its control but should control and supervise as well substantial profile of the products. On the basis of this principle Corte Suprema di Cassazione consider Council liable for gross negligence because it didn't consider properly the substantial of the products. But also if the procedure of control and supervise was completed fine and perfect. Well I would like to use this example to say to things. In my opinion, in my humble opinion, sorry again I don't want to appear pompous at all. I'm speaking with expert, much more expert than me. I consider the formalisation profile and politics that can be considered in evaluated in a positive way but it's important in my opinion as well to give a chance to the judges as Professor Wallinga was suggesting before, to give the chance to the judges and to NCA to pronounce themselves on an initial basis according to the general principles that are at European equivalent Italian level. So very built structure would be to have a general principle like the Article 2043 in Italy. The Article 2043, the civil code. The Italian civil code provides a general principle on civil liability and then this principle is applied in different cases and differentiated in the different cases with the function of the judges this is very important. So how to assure in this case in harmonisation, not totally toward a text, a regulatory text but incentivising the function of the European Court of Justice, there can be as a real regulator in practice, so called La Vita Davanti so the living, or low and regulating the different cases according to that principle, European one that is the main one and regulates, as I was saying the civil liability.

So in terms of and to finish my short speech. The function of supervisors would be very important. So here we could have as Antonio Marcacci was suggesting before an interplay, so a mismatch between the function of the NCA in applying the general principle of civil liability as well as being under this general principle of civil liability but a function of mediation would be played in my opinion in a proper way by the European Court of Justice, at the European level by national judges at a national level.

Thank you very much and sorry if I was a little bit fast in expressing my civil ideas.

Dr. Maren Heidemann: Thank you very much Professor Lombardi. We have to be fast because we have not been able to keep our time schedule tight. So could I hand over to Professor Dalhuisen for a comment. I mean we talk about civil liabilities and always seem to talk about damages but we can also talk about not enforcing the contract like bars to the enforceability of a contract or indeed mediation of a more nondescript style. So what would be your opinion of the value of civil liability in this?

Prof. Jan H. Dalhuisen: If I may I have only very little time we are already at two o'clock. Let me make it a number of quick observations. First it does not bother me at all where this protection comes from whether it comes administrative law, whether it comes from private law, or whether it comes for a state or whether it comes through the courts. Ultimately the question is what is it. The origin, much is made of this it seems to me secondary and not really truly relevant in this discussion very much at all. Second, but we have to make certain distinctions. I think the important distinction is to make the one between of course the licensing requirements and conduct of business is also of course a question of market integrity, that's a kind of third pillar here. Let's not worry about that. Indeed we have the licensing requirements which are geared to stability of the financial system whatever that may be and then we have conduct of business. The conduct of business data is private law if we look at it for clients and the licensing requirements are of course administrative law at the evaluation of the withdrawal of the license, is a different one.

Now if we look at the private law protection, conduct of business, then there are number of issues and I was impressed by contribution of course, the absurdity and the ex ante supervision of products, and I don't quite know for myself to take of this, this is a complement to his contribution. But I do not think that a regulator can safely operate here and draw lines. Unless we get very close to fraud and of course when the product because fraud then we can see more. The question of fraud itself poses also question of definition but it becomes relevant in my experience especially the closer you get to tax avoidance or tax evasion. That is a major issue here which again maybe we can draw certain lines to do with certain product but when it comes to whether they are suitable for investors I think there is other lines to be drawn and that is very simply between the professionals and the small investors. That to me is a very fundamental distinction here where we have two very difficult worlds, even though there's a certain overlap and again for this discussion let's not worry too much about that.

So we see here especially concern about the small investor and also the small banking client and retail. That world to me is a very simple world of national governments. I am not upset at all that within MiFID the government have for that and at least for this sector I feel that national laws are the right way to protect or indeed not to protect these people.

[01:39:52]

I go back to an earlier part of our concern here that is the discussion which was very alive in the 1990s and I think the jurisprudence has not gone away that is about the general good and Mads knows more about this than most anybody else. It was accepted from early on, that's superseded now by the discussion in MiFID I and late on MiFID II that of course local government of member

states could push back and carve out especially small investors protection from the general harmonisation directives. That is caselaw that is still valid and again emphasises of course what I think is really the true concern and also the true competency of this is national government business and member state business. If they cannot protect a small investor then nobody. How they do this again given also that financial regulation effectively remains member state even though with this happy layer of harmonisation possibilities. We are here in the world of the small investor and there is another very important issue here which has not so far been mentioned at all.

That is the question that we move to ombudsmen proceedings or to ABR. Because that moves the whole show for these people away from strict interpretation of the law. In ABR or in special ombudsman schemes which in the United Kingdom is very successful we are not concerned with a narrow interpretation of any legal principle at all. For many years I appeared as an assessor under the ombudsman scheme as sole arbitrator, many of these small cases in 1990s, even after 2004, 2005 I think many. So they were all about of course a duty of care and we decided on the basis of the facts. That was never a long discussion on any point of law or civil liability. The three normal sections were the end of the contract, but it is normally not feasible because there is another party to it, the conduct and liability for conduct was simply moved back to the intermediary or there were damages or both of them, or nothing. So these cases were decided. I think when we move as governments want and I think it's quite right for the small cases away from courts altogether then I think this whole discussion of civil liability in the way that we have tried to go about it so far is really in my view truly moot. Maybe if I may say so with the greatest respect, probably irrelevant.

Now that leaves the professional investor and then we can ask ourselves whether a more European system, if it could be at all devised is helpful and then the first thing of course we have to realise there's very little European competency in matters of the situation of private law we have [audio distorted 01:43:24] TFEU and that's available at jurisdiction, also effects the interpretation of these rules or very narrow, of course the European Court is indulgent and not just used as a kind of Christmas tree which you can have everything but must of this is ultra vires, and on the straight interpretation, and more important is nobody asks for it. I mean if the professionals wanted to be protected against each other, under more than national law, it seems to me that they would ask for it. I do not know of anybody who has asked for this but if there operative confidence between the professionals and so far academic European translation law at European level but that's done under national laws, nobody makes an observation, nobody seems to want more, then the question is why should we bother and it creates of course many problems. It creates methodological problems because what are we going to if we go into that direction, are we going to follow the common law tradition that is basically in fiduciary duties as in kind of third pool between contracts and between tort, very important equity, it's not law and that is basically what happens when it comes to common

law, this is not in contract, not in tort. In fiduciary duties, in equity over what I'm going to do. Then if we sort that one out well then are we going to go civil law tradition, try to map out the indirect damage, it's calculation of that. Are we going to or do we need civil law intellectual rights comprehensive system or only be happy with the common law more laissez faire from case to case, and not trying to build a systematic infrastructure of any sort rather than distrusting it. Those of course methodological questions which you don't have to ask yourself and we are far away from an intelligent discussion on any of this at all if assuming that there was some sort of jurisdiction at the European level to enter into all of this if nobody wants it or nobody asks for it, at least those that are most directly interested.

So I think we should relax on all of this. I'm not saying that these academic endeavours are useless, they are helpful, they can clarify a number of issues here but it is in my view over optimistic and maybe even illusory to expect of course a great deal of this. This will take years in academic discourse of course it will help us. To clarify I'm not saying it is useless but when it comes to practicality of the thing I think this will remain national rules and there is really nothing in my view, in particular against it, but the consumer will go after the ombudsman schemes and the professionals if they feel that they do not need to see specialists at the European level, I do not think that we need to bother greatly there either.

So that's basically, sorry to have to be so short and to push it a little but that is in short the observations I would like to make. Also I had a little to say about Marcacci's contribution, is maybe too much or too late for now and will come another day but I'm quite sure that we can say some more parts. Also I have found it very interesting and learnt a lot from this book actually, it will certainly bring my next edition in a major way of very many points. Thank you very much indeed.

Dr. Maren Heidemann: That's a great achievement for this book. Mads would you like to say a few comments to close because I did want to ask Takis again to comment on the prospects-

Prof. Mads Andenas: Ask him first because Takis has to leave.

Dr. Maren Heidemann: Takis has to leave, would you like to give us a few last words Takis?

Prof. Takis Tridimas: Thank you very much. Look I'm not sure if I have much to contribute I very much enjoyed all the comments made. Referring to Yane's latest points although Yane you were breaking up at the end or at least you were breaking up at my end, so I might have missed but I don't think I missed the gist of what you said. My perspective really is I think less normative and more analytical. What I'm trying to establish is to understand the regulatory models that the EU adopts, understand

why they might be different from one area to another and see, on the basis of that understanding what conclusions we can draw. Do we need to change fundamentally the law of remedies? I wasn't reaching that conclusion. I think the influence of the EU is very disruptive in the laws of the member states. I don't use the term disruptive in a pejorative sense.

[01:49:54]

I think it is because mostly the influence is negative rather than positive. It unpicks elements of national law rather than recreating rather than creating a self-standing remedy. Now in other areas I think it has made an enormous difference. This field of environmental law has made most difference. I think in the field of financial law it has made an enormous difference in terms of the regulatory architecture. We are really getting into what I would call the post internal market paradigm but it is no longer based, the model is no longer based on the classic home country control and mutual recognition. We have direct control by EU agencies. So I think inevitably one needs to think through how that impacts on private law. But I agree with you, I wasn't necessarily suggesting that they should be a more private remedies. What I do question is what appears to me to be a) the random element that gives rise to these varieties and secondly, sometimes the unquestionable endorsement by the EU that the public model of enforcement is the only model.

But look I think this has been a wonderful conference and I benefited enormously by the book and also by the conference itself. So I think kudos goes to Olha and Mads, and all the rest of you really.

Prof. Jan H. Dalhuisen: May I make one observation. I think it's quite right the structure and the architecture is basically on the stability side, that is on the licensing, on the supervision and whatever comes with that, which I would then separate from the question of conduct of business. With conduct of business you do not see that structure and I'm not sure whether we need it or whether it can be justified. Anyway it would be a very different structure. But on the stability side, the financial stability side if that is the right expression, the right objective, then of course I entirely agree with you that we have a structure which national laws have not thought about this and then of course much is borrowed from the English and American system, it's not entirely novel. But that I would say especially I would say liquidity requirements and level ratios and all that. But yes that structure is at least for most certainly in the continental European countries entirely new and very significant and I entirely agree with you, and I think a good thing. I would have thought so.

Dr. Maren Heidemann: I think there is a lot of legislation in the EU now, many modern methods that might bring this forward indeed. Mads would you like to-

Prof. Mads Andenas: Can we have Guido's last points and then perhaps we can just conclude with that if you think that's alright.

Prof. Guido Alpa: Thank you very much. I feel richer because it was a very interesting discussion and I have many idea that I will think about and write something. So I give you the floor. Thank you.

Prof. Mads Andenas: Then we'll have some more seminars of course. We just have to go on and I think the book is excellent, and it allow us to identify more narrow focus for one or two projects and then I do my best to assess and I'm sure we all will.

Dr. Maren Heidemann: That's why we thought it might be better to make this into a seminar series because as you can see it provides a lot of comments and ideas so I will conclude the seminar here and invite you to watch this space for our next one in the series and maybe you would like to be involved there again. So thank you very much all for taking the time and I wish you the best for your next appointments of the day.

Prof. Jan H. Dalhuisen: Thank you well done.

[Audio ends: 01:54:29]

Key	
[unclear] – unclear audio [s/l] – sounds like [ph] – phonetic	[overtalking] – to an extent no conversation can clearly be heard [audio distorted] – connection issues/other noises which results in no conversation being clearly heard

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