

The private law effect of MiFID: the Genil case and beyond

Danny Busch¹

I. GENERAL

As regulatory provisions are in most jurisdictions classified as public law, any failure by an investment firm to comply with one or more regulatory provisions applicable to it will primarily affect its relationship with the competent financial supervisor.² In other words, the relevant financial supervisor can enforce these provisions under administrative law in the event of an infringement, for example by imposing an administrative fine on the firm.³

However, the regulatory provisions, in particular the conduct of business rules under MiFID I and MiFID II,⁴ also have a major influence on relations between the investment firm and its

¹ Professor Dr Danny Busch, LLM (Utrecht), MJur (Oxon), Chair for Financial Law and Director of the Institute for Financial Law (IFL), University of Nijmegen, the Netherlands, Visiting Professor at *Università degli Studi di Genova*, Visiting Professor at *Università Cattolica del Sacro Cuore di Milano* and Member of the Dutch Banking Disciplinary Committee (*Tuchtcommissie Banken*). E-mail: d.busch@jur.ru.nl. Website IFL: <http://www.ru.nl/ifl/>. A previous, but largely identical version of this paper appeared in D. Busch and G. Ferrarini (eds), *Regulation of the EU Financial Markets: MiFID II and MiFIR*, OUP 2016.

² Please note that in Germany a minority view in the legal literature qualifies the MiFID conduct-of-business rules (which most clearly pursue investor protection) as norms with a dual legal nature (*Doppelnatur*), with the effect that they not only qualify as regulatory rules, but also as private law norms. See *inter alia* M. Casper and C. Altgen, 'Chapter 4 – Germany', in D. Busch and D.A. DeMott (eds), *Liability of Asset Managers* (Oxford: Oxford University Press, 2012) § 4.23; R. Veil, 'Anlageberatung im Zeitalter der MiFID – Inhalt und Konzeption der Pflichten und Grundlagen einer zivilrechtlichen Haftung' *Zeitschrift für Wirtschafts- und Bankrecht (WM)* 2007, 1821, 1825-1826; T. Weichert and T. Wenninger, 'Die Neuregelung der Erkundigungs- und Aufklärungspflichten von Wertpapierdienstleistungsunternehmen gem. Art. 19 RiL 2004/39/EG (MiFID) und Finanzmarkt-Richtlinie-Umsetzungsgesetz' *Zeitschrift für Wirtschafts- und Bankrecht (WM)* 2007, 627, 635. One German author even advances the view that the MiFID conduct-of-business rules qualify solely as private law norms because they place an obligation on a private firm towards its clients. See D. Einsele, 'Anlegerschutz durch Information und Beratung – Verhaltens- und Schadensersatzpflichten der Wertpapierdienstleistungsunternehmen nach Umsetzung der Finanzmarktrichtlinie (MiFID)' *Juristenzeitung* 2008, 477, 482. In Italy, the MiFID duties have a dual nature because they are considered both public and private law duties that an asset manager owes its clients. See P. Giudici and M. Bet, 'Chapter 5 – Italy', in Busch and DeMott, this note above, § 5.42.

³ The same applies if a regulated market infringes MiFID rules.

⁴ Directive 2004/39/EC, *OJEC* L 145, 30 April 2004, 1-47 (MiFID I); Commission Directive 2006/73/EC, *OJEC* L 241, 2 September 2006, 26-58 (MiFID I Implementing Directive); Commission Regulation (EC) no 1287/2006, *OJEC* L 241, 2 September 2006, 1-25 (MiFID I Implementing Regulation). MiFID I and the MiFID I Implementing Directive should have been transposed into national legislation in the various Member States of the European Union (EU) and the European Economic Area (EER) by 1 November 2007 the latest. In the Netherlands, for example, they have been transposed into the Financial Supervision Act (*Wet op het financieel toezicht*, Wft) and various implementing regulations such as the Market Conduct Supervision (Financial Institutions) Decree (*Besluit gedragstoezicht financiële ondernemingen*), in Germany into the *Wertpapierhandelsgesetz* (WpHG) and in the United Kingdom into the Financial Services and Markets Act 2000 (FSMA), the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by way of Business) Order 2001 and, above all, the Financial Conduct Authority Handbook, which was known as the FSA Handbook before 1 April 2013. The name changed when the Financial Conduct Authority (FCA) succeeded the Financial Services Authority (FSA) on 1 April 2013. The MiFID II regime consists of (1) Directive 2014/65/EU, *OJEC* L 173, 15 May 2014, 349-496 (MiFID II); (2) Regulation (EU) No 600/2014, *OJEC* L 173, 15 May 2014, 84-148 (MiFIR); and (3) an impressive number of implementing measures. The relevant directives pertaining to MiFID II will in a similar fashion as MiFID I be transposed into national law (see above). Initially, MiFID II and MiFIR stipulated that the bulk of the new

clients under private law.⁵ It is now commonly accepted in most European jurisdictions that the regulatory rules help to define the precontractual and contractual duty of care of investment firms (and other financial undertakings as well) under private law. Moreover, in many jurisdictions, an infringement of national implementing provisions can constitute not only a breach of the civil duty of care but also a tort (unlawful act) for contravention of a statutory duty. It should also be noted that in the context of institutional portfolio management (for pensions funds, insurers and so forth) duties of care under public law and other regulatory provisions are regularly explicitly incorporated into the contract, with all the contractual consequences that this entails. Institutional portfolio management contracts routinely include a provision in which the portfolio manager declares that he has an authorization from the competent financial supervisor and will at all times comply with the applicable regulatory law.⁶

This article examines to what extent the civil courts are bound by MiFID I/MiFID II under EU law. The following questions are considered in this context: (1) May civil courts be less strict than MiFID I/MiFID II? (2) May civil courts be stricter than MiFID I/MiFID II? (3) May contracting parties be less strict than MiFID I/MiFID II? (4) May contracting parties be stricter than MiFID I/MiFID II? (5) What effect does MiFID I/MiFID II have on the requirement of proximity or relativity in the Member States where this is a requirement for liability in tort? (6) What effect does MiFID I/MiFID II have on the proof of causal link? (7) What is the influence of MiFID I/MiFID II on a contractual limitation or exclusion of liability? (8) Should civil courts apply MiFID I/MiFID II of their own motion? In the final section I draw some conclusions.

Below, MiFID I and MiFID II will be jointly referred to as ‘MiFID’.

II. MAY CIVIL COURTS BE LESS STRICT THAN MIFID?

It seems to follow from the *Genil* case that the European principle of effectiveness (*effet utile*) prevents the civil courts from imposing private law duties on investment firms that are less strict than that to which they are subject under the MiFID rules.⁷ In *Genil* the Court of Justice of the

legislation would become binding on the financial sector as per 3 January 2017, but this has been extended to 3 January 2018. See Directive 2016/1034/EU, *OJEC* L 175, 23 June 2016, 8-11; (2) Regulation (EU) No 2016/1033, *OJEC* L 175, 23 June 2016, 1-7. The reason for the extension lies in the complex technical infrastructure that needs to be set up for the MiFID II package to work effectively. The European Securities and Markets Authority (ESMA) has to collect data from about 300 trading venues on about 15 million financial instruments. To achieve this result, ESMA must work closely with national competent authorities and the trading venues themselves. However, the European Commission was informed by ESMA that neither competent authorities nor market participants would have the necessary systems ready by 3 January 2017. In light of these exceptional circumstances and in order to avoid legal uncertainty and potential market disruption, an extension was deemed necessary. See http://europa.eu/rapid/press-release_IP-16-265_en.htm?locale=en.

⁵ The same applies to the relationship between regulated markets and their participants.

⁶ See for a comparative overview of the civil law effect of MiFID in several European jurisdictions: Busch and DeMott (eds), n 2 above; D. Busch, ‘Why MiFID matters to private law – the example of MiFID’s impact on an asset manager’s civil liability’ *Capital Markets Law Journal* 2012, 386-413.

⁷ At least prior to the *Genil* case, this question has hardly been addressed in the legal literature across Europe, let alone in case law. Nevertheless, there is some discussion of this question in Germany, where some authors advance the view that the civil courts are allowed to be less demanding in the circumstances of a specific case. See A. Fuchs, in A. Fuchs (ed), *Wertpapierhandelsgesetz* (Munich: C H Beck, 2009) Vor §§ 31 ff para 61. Other German authors submit that the civil courts are not so permitted, because in their view MiFID provides minimum standards in civil law. See E. Schwark, in E. Schwark and S. Zimmer (eds), *Kapitalmarktrechts-Kommentar* (4th ed, Munich: C H Beck, 2010) Vor §§ 31 ff WpHG para 16. Two Luxembourg authors have explicitly addressed this question as well. At first sight the strict separation between public law duties and civil law duties under Luxembourg law suggests that the civil courts are *a priori* free to be less demanding. However, it is difficult to conceive that the duties under public and civil law could be totally inconsistent. It is the view of these authors that a court might not

European Union (below: the Court of Justice) held that in the absence of EU legislation it is for the Member States themselves to determine the contractual consequences of non-compliance with the know-your-customer (KYC) rules under MiFID I, but that the principles of equivalence and effectiveness must be observed (paragraph 57).⁸ The Court of Justice referred in this connection to paragraph 27 of a judgment of 19 July 2012 concerning a tax matter (*Littlewoods Retail and Others*, Case 591/10) and the case law cited there. This paragraph reads as follows:

‘In the absence of EU legislation, it is for the internal legal order of each Member State to lay down the conditions in which such interest must be paid, particularly the rate of that interest and its method of calculation (simple or ‘compound’ interest). Those conditions must comply with the principles of equivalence and effectiveness; that is to say that they must not be less favourable than those concerning similar claims based on provisions of national law *or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible* (see, to that effect, *San Giorgio*, paragraph 12; *Weber’s Wine World*, paragraph 103; and Case 291/03 *MyTravel* [2005] ECR I-8477, paragraph 17).’

In the MiFID I context, the principle of effectiveness therefore means that the conditions which an investor must fulfil in order to bring a civil action against an investment firm may not be such that success is practically impossible. The judgment appears to mean, among other things, that civil courts may not be less strict than MiFID I. Where, according to MiFID I, there is non-compliance with KYC rules in a specific case and the aggrieved investor brings a civil action for damages, the civil courts may not dismiss this claim by arguing that in the particular circumstances it was not necessary to comply with the KYC rules. This would, after all, be at odds with the principle of effectiveness.⁹ This approach can be extended to claims for damages for non-compliance with other MiFID I provisions, particularly infringements of other conduct of business rules. And the approach can also be extended to MiFID II, especially as under MiFID II the operation of the principle of effectiveness has been explicitly codified in Article 69(2), last paragraph, MiFID II:

‘Member States shall ensure that mechanisms are in place to ensure that compensation may be paid or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive or of [MiFIR].’¹⁰

decide that there is neither a duty of best execution nor a duty to assess the client (suitability test) in civil law. Given that MiFID is largely a maximum harmonization regime and that according to Luxembourg law the MiFID regime probably has a public order character, these authors hold the view that the civil courts may not subject asset managers to private law duties that are less strict than the relevant regulatory duties. See I. Riassetto and J.-F. Richard, ‘Chapter 6 – Luxembourg’, in Busch and DeMott, n 2 above, § 6.63.

⁸ EU CoJ 30 May 2013, no case 604/11, AA (2013) 663, with note by Busch; *JOR* 2013/274, with note by Busch (*Genil 48 SL and Other v Bankinter SA and Others*).

⁹ Regarding the question of how the principle of effectiveness affects the impact of EU law on private law in a general sense see for example: A.S. Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals* (2nd ed), Cambridge: Intersentia, 2016, 98-116; T. Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press, 2006) 418-476; W. van Gerven ‘Of rights, remedies and procedures’ *Common Market Law Review* 2000, 501-536.

¹⁰ For a different view, see: O. Eloit and H. Tilley, ‘Beleggersbescherming in MiFID II en MiFIR’ *Droit Bancaire et Financier* 2014, 179-201, 200.

III. MAY CIVIL COURTS BE STRICTER THAN MiFID?

1. General

Genil does not seem to provide a definitive answer to the vexed question of whether civil courts may impose *stricter* duties of care under private law than those resulting from MiFID.¹¹ If a civil court holds, for example, that although an investment firm is admittedly not obliged to comply with KYC rules under MiFID (or indeed with other MiFID rules), it is nonetheless obliged to do so in the particular circumstances of the case because of its civil duty of care, the aggrieved client is not denied a claim on account of non-compliance with MiFID rules. If a civil court is stricter than MiFID, there would not appear to be any conflict with the principle of effectiveness as formulated by the Court of Justice in *Genil*. It should be noted, however, that the question whether civil courts may be stricter than MiFID was not at issue in *Genil* and was therefore not explicitly addressed. *Genil* dealt, after all, only with the question of the private law consequences of non-compliance with MiFID rules.¹²

However, this does not exclude the possibility that an argument could be made on the basis of other principles of European law that civil courts may not be stricter than MiFID. The recent judgment of the Court of Justice in the case of *Nationale-Nederlanden v Van Leeuwen*¹³ concerning the sale of insurance policies with exorbitant management charges (*woekerpolissen*) provides some leads in this respect. So this is sufficient reason to pause and consider this judgment at rather greater length, although it should be noted that it relates to the Third Life Assurance Directive and not to MiFID.

2. *Nationale-Nederlanden v Van Leeuwen*

2.1 *Facts*

In 1999 Mr Van Leeuwen concluded a life assurance contract with Nationale-Nederlanden Assurance forming part of an investment known as ‘flexibly insured investing’. It is evident from the policy dated 29 February 2000 that Nationale-Nederlanden insures a benefit of NLG 255,000, or the value of participations in investment funds taken out for Van Leeuwen (plus 10% thereof). Under this contract Mr Van Leeuwen was both the policyholder and the insured.

If Mr Van Leeuwen dies before 1 December 2033 the contract offers two options. Benefit A is a guaranteed and fixed amount of NLG 255,000. Benefit B is the (variable) sum of the value of his participations in investment funds (based on the value of those participations) as of the date of his death, plus 10% thereof. If, at the time of his death, benefit B is greater than benefit A, then the higher sum is to be paid to the beneficiaries of his life assurance. Thus, benefit A sets a minimum level for the benefit to be paid out in case of death prior to 1 December 2033.¹⁴

¹¹ The answer to the question whether the civil courts may be stricter than MiFID differs across Europe. In addition, in many jurisdictions the answer is simply not clear. See for a comparative overview Busch, n 6 above, 394-398 (with further references).

¹² In the same sense, see: C. Herresthal, ‘Zu den Auswirkungen der MiFID auf das nationale Vertragsrecht’ *Zeitschrift für Wirtschaftsrecht (ZIP)* 2013, 1420-1422, 1421; J. Lieder, ‘EuGH: Anlageberatung bei Zinsswaps’ *LMK: kommentierte BGH-Rechtsprechung* (2013) 349404.

¹³ EU CoJ 29 April 2015, no case 51/13, AA (2015) 696, with note by Busch and Arons (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelminus van Leeuwen*).

¹⁴ See Opinion of Advocate-General Sharpston, 12 June 2014, case 51/13, ECLI:EU:C:2014:1921, paragraph 15.

The ‘gross premium’ consisted of a single payment of NLG 8,800 at the start of the contract and then monthly payments of NLG 200 from the inception date of 1 May 1999. This gross premium is invested in investment funds chosen by the policyholder. Costs such as premiums for the death cover are periodically deducted from the value accrued in this way. These premiums are therefore not charged separately, but – like these costs – form an integral part of the gross premium.

Before Mr Van Leeuwen concluded this insurance contract with Nationale-Nederlanden, he was supplied with a ‘Proposal for flexibly insured investing’. This proposal contained three scenarios based on different returns and management costs of 0.3%. The text under the heading ‘product return’ contained the following sentence:

‘The difference between the fund return and the product yield is dependent on the risks insured, the costs payable as well as any additional coverage.’

2.2 Legal framework

Article 31 of the Third Life Assurance Directive¹⁵ (which has now been repealed and replaced by a more recent version¹⁶) plays a crucial role in this respect and reads as follows:

- ‘1. Before the assurance contract is concluded, at least the information listed in Annex II(A) shall be communicated to the policyholder.
2. The policyholder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex II(B).
3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex II only if it is necessary for a proper understanding by the policyholder of the essential elements of the commitment.
4. The detailed rules for implementing this Article and Annex II shall be laid down by the Member State of the commitment.’

The obligation to furnish the information specified in Annex II to the Third Life Assurance Directive was transposed into Dutch law at that time in Article 2 of the 1998 Regulation regarding the provision of information to policyholders (*Regeling informatieverstrekking aan verzekeringnemers 1998*). In view of the text of the 1998 Regulation, the Netherlands did not at that time make use of the possibility of imposing a duty to furnish additional information under Article 31(3) of the Third Life Assurance Directive.

It has been established that Nationale-Nederlanden, in compliance with Article 2(2)(q) and (r) of the 1998 Regulation, furnished the policyholder with information about the effect of the costs and the risk premiums on the return. However, the policyholder did not receive a summary or full overview of the actual and/or absolute costs and their composition. Nor was this obligatory under the 1998 Regulation. In short, it is been established that Nationale-Nederlanden furnished the policyholder with all information which it was bound to supply under the 1998 Regulation.

Nonetheless, in its interim judgment Rotterdam District Court held as follows about the fact that Nationale-Nederlanden had not sent the policyholder a summary or full overview of the actual and/or absolute costs and their composition:

¹⁵ Directive 92/96/EEC, *OJEC* L 360, 9 December 1992, 1-27.

¹⁶ See the present judgment, paragraph 3.

‘Although Nationale-Nederlanden fulfilled the requirements referred to in Article 2(2)(q) and (r) of the 1998 Regulation regarding the provision of information to policyholders, it nonetheless infringed the open rules (including, in this legal action, the general and/or special duty of care owed by Nationale-Nederlanden to Van Leeuwen in the context of their contractual relations, pre-contractual good faith and/or requirements of reasonableness and fairness) by confining the information it furnished to information about the effect of costs and risk premiums on the return.’¹⁷

Nationale-Nederlanden argued that it could not be required to furnish additional information on the basis of open and/or unwritten rules.

2.3 *Questions referred for a preliminary ruling*

The District Court referred the following two questions to the Court of Justice for a preliminary ruling:

(1) Does EU law, and in particular Article 31(3) of the Third Life Assurance Directive, preclude an obligation on the part of a life assurance provider on the basis of the open and/or unwritten rules of Dutch law — such as the reasonableness and fairness¹⁸ which govern the contractual and pre-contractual relationship between a life assurance provider and a prospective policyholder, and/or a general and/or specific duty of care — to provide policyholders with more information on costs and risk premiums of the insurance than was prescribed in 1999 by the provisions of Dutch law by which the Third Life Assurance Directive was implemented (in particular, Article 2(2)(q) and (r) of the 1998 Regulation)?

(2) Are the consequences, or possible consequences, under Dutch law of a failure to provide that information relevant for the purposes of answering question 1?

2.4 *Duties to furnish additional information on the basis of reasonableness and fairness?*

The first question referred for preliminary ruling is answered in the affirmative. In short, the civil courts may, by reference to the dictates of reasonableness and fairness under Article 6:2 of the Dutch Civil Code (Burgerlijk Wetboek, DCC) and Article 6:248 DCC,¹⁹ impose duties to furnish information additional to that required under the 1998 Regulation, provided that three *cumulative* conditions are fulfilled (this is a matter for the referring court to decide):

- (1) the information required must be clear and accurate;
- (2) the information required must be necessary to enable the policyholder to understand the essential elements of the commitment;
- (3) legal certainty for the insurer is sufficiently safeguarded (paragraphs 21, 29-31 and 33).

¹⁷ Rotterdam District Court 28 November 2012, ECLI:NL:RBROT:2012:BY5159, paragraph 2.9.

¹⁸ In Dutch: *redelijkheid en billijkheid*.

¹⁹ Art 6:2 DCC read as follows: ‘(1) A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and fairness. (2) A rule binding upon them by virtue of law, usage or legal act does not apply to the extent that in the given circumstances, this would be unacceptable according to criteria of reasonableness and fairness.’ See also art 6:248 DCC: ‘A contract has not only the legal effects agreed to by the parties, but also those which, according to the nature of the contract, result from the law, usage or the requirements of reasonableness and fairness. (2) A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to the criteria of reasonableness and fairness.’

The first two conditions follow from the express wording of Article 31(3) of the Third Life Assurance Directive, Annex II and Recital 23 in the preamble to the Third Life Assurance Directive (paragraph 21). The third condition expresses the principle of legal certainty under EU law. The Court of Justice holds that the legal basis for the use by the Member State concerned of the possibility provided for in Article 31(3) of the Third Life Assurance Directive must be such that, in accordance with the principle of legal certainty, it enables insurance companies to identify with sufficient foreseeability what additional information they must provide and which the policyholder may expect (paragraph 29). An additional duty to provide information based on the requirements of reasonableness and fairness under Article 6:2 DCC or Article 6:248 DCC would not seem at first sight to fulfil this requirement since this rule is extremely vague and has little if any predictive value. So that seems to be good news for *Nationale-Nederlanden*.

But the Court of Justice then goes on to formulate two arguments that are favourable to the policyholder and unfavourable to *Nationale-Nederlanden*. It holds that when deciding whether the legal certainty principle has been fulfilled the national court *may* (not ‘must’) take into consideration the fact that it is for the insurer to determine the type and characteristics of the insurance products which it offers, so that, in principle, it should be able to identify the characteristics which its products offer and which are likely to justify a need to provide additional information to policyholders (paragraph 30). In short, the ball is played back into the insurer’s court. It knows best what information it should furnish to its clients in order to ensure that they understand the insurance product. What perhaps played a role in this connection is that, according to the Court of Justice, the fact that the policyholder should receive a summary or full overview of the actual and/or absolute costs and their composition to be able to understand the operation of the product is so apparent that the insurer itself should have realized it was necessary to furnish this information to the policyholder.

The Court of Justice adds in this connection that, in accordance with the Explanatory Memorandum to the 1998 Regulation, its application is governed, in particular, by the national private law in force, ‘including the requirements of reasonableness and fairness’ set out in Article 6:2 DCC and Article 6:248 DCC (paragraph 31).

In short, the Court of Justice clearly considers that *Nationale-Nederlanden* could and should have known that its responsibility did not begin and end with literal compliance with the 1998 Regulation.

3. May civil courts thus be stricter than MiFID?

It seems to follow from the *Nationale-Nederlanden* judgment that EU law is blind to the distinction between public and private law when it comes to implementing rules of EU law (paragraph 28). After all, the Court of Justice has no problem with the fact that directives are transposed into national law by a combination of public and private law. Annex II to the Third Life Assurance Directive has been transposed into Dutch law by the 1998 Regulation (public law), whereas the Member State option to furnish additional information may be implemented by means of the requirement of reasonableness and fairness under Article 6:2 DCC (private law), provided that three conditions are fulfilled (see paragraph 2.4 above).

If it is indeed true that EU law is blind to the distinction between public and private law, this also has an important bearing on whether civil courts may impose stricter standards than the rules under MiFID. For the most part, MiFID provides for maximum harmonization. If EU law

is truly blind to the distinction between public and private law when it comes to the transposition of EU legal rules, the maximum harmonization standard also applies to the civil courts. They may not therefore impose stricter duties of care than those that apply under the rules resulting from MiFID. In the above-mentioned *Genil* judgment about the private law impact of MiFID, the Court of Justice admittedly notes that in the absence of EU legislation it is for the Member States themselves to determine what effect non-compliance with MiFID has under private law (provided that it is not practically impossible to recover compensation for the loss or damage suffered), but this refers to the sanction and not to the legal rule itself.²⁰

If this line of reasoning is rejected because it is considered that the civil courts may be stricter than MiFID, the present judgment in any event shows that legal certainty is an important factor that the civil courts must take into consideration in deciding whether they may impose stricter duties of care than apply under MiFID (see paragraph 2.4 above).

What has been said above can be qualified as follows. MiFID itself also contains open rules. One important rule of this kind is that investment firms must act honestly, fairly and professionally in accordance with the best interests of their clients (below: duty of honesty).²¹ This obligation is admittedly translated into more specific rules in MiFID (including KYC rules and duties to furnish information), but the general rule does not coincide with the more detailed provisions. The general duty of honesty therefore leaves some scope for additional duties of care. This scope could be used by the civil courts. By doing so, they would not, strictly speaking, be applying stricter standards than MiFID since they would be using the space provided by MiFID itself.

The only question is how much space exactly is left by the open rule, bearing in mind the EU principle of legal certainty. Let us take an example. Under MiFID, warnings may be provided in a standardized format.²² An approach in which the civil courts hold that the special duty of care means that investment firms are obliged to provide express investment risk warnings in terms that are not misleading, and that the investment firm must subsequently check to ensure that the private investor is actually aware of these risks seems to go further than a standard warning,²³ although a standard warning too must naturally be sufficiently clear. Would a civil court then be justified in adopting the following reasoning? The investment firm has discharged its duty to provide a warning in standardized format of the risks of the product and has thus

²⁰ EU CoJ 30 May 2013, no case 604/11, AA (2013) 663, with note by Busch; *JOR* 2013/274, with note by Busch (*Genil 48 SL and Others v Bankinter SA and Others*).

²¹ Art 19(1) MIFID I; art 24(1) MIFID II.

²² Art 19(3), last sentence, MIFID I. Please note that this becomes a Member State option under MIFID II: the Member States *may* allow the information to be provided in a standardized format (see art 24(5), last sentence, MIFID II). In short, if a Member State does not allow this, it seems as though the information must always be provided in a personalized format. In for example The Netherlands this Member State option is exercised (implicitly). The relevant Dutch implementing provision (art 4:20(6) Wft) is not altered in the Draft Bill to implement MiFID II, and the accompanying Explanatory Memorandum is also silent on this point. See *Dutch Parliamentary Papers II*, 2016/2017, 34 583, no 2 (Draft Bill) and no 3 (Explanatory Memorandum). It will therefore remain possible in the Netherlands to provide information in standardized format. The situation will undoubtedly be different in at least a few other Member States. If the Member States had unanimously considered that information could be provided in standardized format, a compromise in the form of a Member State option would have been unnecessary.

²³ For this approach in relation to private investors, see Dutch Supreme Court (*Hoge Raad*, HR) case law: HR 3 February 2012, *NJ* 2012/95; AA (2012) 752, with note by Busch; *JOR* 2012/116, with note by Van Baalen (*Coöperatieve Rabobank Vaart en Vecht UA v X*) (duty of care in relation to the provision of investment advice), paragraph 3.6.2. It should be noted that these (and other) judgments of the Dutch Supreme Court about the duty to provide warnings relate, without exception, to the pre-MiFID era. Whether the Supreme Court will continue this line of reasoning under MiFID remains to be seen.

complied with its specific duty to provide information under MiFID. But in view of the general duty of honesty, the investment firm should nonetheless have given an express warning in not misleading terms, and should have subsequently checked to ensure that the private investor was actually aware of these risks. Consequently, the investment firm has breached the general duty of honesty under MiFID and must pay damages to the investor.

Reservations based on the EU principle of legal certainty could be expressed about this argument. Nonetheless, the *Nationale-Nederlanden* judgment shows that the Court of Justice is prepared to adopt a flexible approach to the principle of legal certainty and does not shun acrobatic reasoning in its efforts to achieve a just result. It remains to be seen, therefore, whether the Court of Justice will actually bar civil courts of the Member States from using the argument that investment firms have a general duty of honesty under MiFID as a ground for requiring them to issue personalized rather than standardized risk warnings on the risk.

IV. MAY CONTRACTING PARTIES BE LESS STRICT THAN MIFID?

Do contractual provisions that are less strict than MiFID actually have an effect?²⁴ In *Genil* it was held that although in the absence of European legislation it is admittedly for the Member States themselves to determine the contractual consequences of non-compliance with the MiFID rules, one of the principles that must be observed is the principle of effectiveness. As noted above, the principle of effectiveness has been explicitly codified in Article 69(2), last paragraph, MiFID II. The principle of effectiveness means in this connection that the conditions on which an investor can bring a civil claim against an investment firm may not be such that successful legal actions are practically impossible.

Naturally, however, the argument is less strong in cases where the civil courts, regardless of the contractual provisions, wish to be less strict than MiFID (see paragraph II above) – the investor has, after all, himself agreed to the contract. On the other hand, private investors in particular often have little influence over the contractual conditions. The effectiveness principle could therefore be cited in support of the argument that the civil courts are obliged to hold that the relevant contractual provision is unacceptable, for example (depending on the applicable private law) according to the criteria of reasonableness and fairness or, if included in general terms and conditions, constitutes an unreasonably onerous provision.

This goes further, by the way, than an assessment by the courts of their own motion since in the above approach the result of the assessment is also predetermined. The subject of assessments by the court of their own motion is dealt with in paragraph IX below.

V. MAY CONTRACTING PARTIES BE STRICTER THAN MIFID?

Do contractual provisions that are stricter than MiFID actually produce an effect?²⁵ At first sight, it would seem that there can be little objection to such provisions since they can only

²⁴ Most jurisdictions tend towards ineffectiveness in one way or another of contractual clauses setting lower standards than those following from MiFID. Nevertheless, in at least Ireland, Spain, Luxembourg, the Netherlands and Germany, the answer is open to doubt. See for a comparative overview Busch, n 6 above, 399-403 (with further references).

²⁵ The question whether the contracting parties may be stricter than MiFID has not been much addressed in the legal literature across Europe, let alone in case law. Nevertheless, in Germany, Poland and Luxembourg there are some authors who have addressed this question explicitly. In Germany, some authors have advanced the view that it follows from the principle of freedom of contract that contractual clauses setting higher standards than those

benefit investor protection. Moreover, unlike the situation where civil courts, regardless of the contract, impose stricter duties of care than apply under the MiFID rules (see paragraph III), legal certainty is not at issue here. After all, the investment firm voluntarily submits to stricter duties of care. Nonetheless, if investment firms in a particular Member State were to voluntarily submit on a large scale to stricter duties of care, for example pursuant to local market usage, this might jeopardise the European level playing field. I should add, however, that in my view this is rather theoretical argument.

Just as in connection with the question of whether civil courts may be stricter than MiFID, *Genil* does not seem to provide a definitive answer to whether contractual provisions that are stricter than MiFID actually produce an effect. In such a case, a client's claim is in any event not rejected on the grounds of non-compliance with MiFID rules. If contracting parties themselves are stricter than MiFID, there would not seem to be any conflict with the principle of effectiveness, as formulated by the Court of Justice in *Genil*.

Could it perhaps be reasoned on the basis of the *Nationale-Nederlanden* case that the civil courts are bound to hold that where a contractual provision is stricter than MiFID it is to this extent unacceptable according to, for example (depending on the applicable private law) the criteria of reasonableness and fairness or, if included in general terms and conditions, constitutes an unreasonably onerous provision? Although it may be possible to draw such a conclusion from a strictly logical approach, I must confess to having some difficulty with it.

To start with, one of the key objectives of MiFID is to offer investors a high level of protection.²⁶ If an investment firm voluntarily submits to stricter contractual rules than apply under MiFID, there could surely be little objection to this.

Moreover, offering contractual conditions that go further than MiFID is one of the ways in which an investment firm can compete with its rivals. To this extent the question goes to the root of free enterprise. If an entrepreneur wishes to do more than he is obliged to do by law, this must be possible. Another factor here is that the freedom to conduct a business is included in the Charter of Fundamental Rights of the European Union and is therefore a principle that forms part of the European legal order.²⁷

following from MiFID are as a general rule effective. See I. Koller, in H.D. Assmann and U.H. Schneider (eds), *Wertpapierhandelsgesetz* (5th ed, Cologne: Schmidt, 2009) Vor § 31 para 5; Einsele, n 2 above, 481. In Poland, one author is similarly of the view that the courts will likely uphold contractual clauses that set higher standards than MiFID. This author submits that a reasonable legislator should not prevent market participants from voluntarily raising the bar, although he realizes that this approach may in theory have a negative impact on the European level playing field. See A.W. Kawecki, 'Chapter 8 – Poland', in Busch and DeMott, n 2 above, § 8.10, § 8.50 - 8.52. According to two Luxembourg authors, at first sight it may be argued under Luxembourg law that provisions setting higher contractual standards than MiFID should be valid because of the strict separation between public law and civil law duties based on case law denying the right of the client to claim damages in case of a violation of a public law duty. However, according to these authors it is difficult to conceive that the duties under public law and civil law could be totally inconsistent. In contradistinction to the German and Polish authors addressing this question, they are therefore of the view that they can reasonably assert that the public order character of public law rules of conduct, combined with the logic of maximum harmonization of MiFID rules, should impose limits on the possibility of setting higher contractual standards than MiFID. Art 6 Luxembourg Civil Code, which refers to public policy, might be the ground of these limits. See Riassetto and Richard, n 7 above, § 6.18, § 6.74.

²⁶ See Recital 2 MiFID and Recital 70 MiFID II.

²⁷ Art 16 EU Charter: 'The freedom to conduct a business in accordance with Union law and national laws and practices is recognized. As regards the significance of the EU Charter for financial supervision law, see: E. Dieben,

Finally, a client may have valid reasons for requesting an investment firm to submit contractually to rules that are stricter than those applying under MiFID. For example, under the Dutch supervision rules contained in the Pensions Act (*Pensioenwet*) and the Occupational Pension Scheme (Obligatory Membership) Act (*Wet verplichte beroepspensioenregeling*), pension funds are permitted to outsource their portfolio management to one or more external asset managers (investment firms), but in doing so are required to ensure that the external portfolio manager complies with the rules applicable to them.²⁸ Insofar as relevant here, these rules mean that outsourcing to an external portfolio manager is permitted only if the contract regulating the outsourcing or portfolio management meets certain requirements, for example that the external portfolio manager must enable the pension fund at all times to comply with the provisions laid down by or pursuant to the Pensions Act or the Occupational Pension Scheme (Obligatory Membership) Act.²⁹ Naturally, any such contractual obligation to which the external portfolio manager concerned is subject does not result from MiFID and may to this extent be stricter than the obligations to which it is subject under MiFID.³⁰

VI. INFLUENCE OF MIFID ON THE PRINCIPLE OF RELATIVITY

In some European jurisdictions (such as Germany and the Netherlands) a tort claim based on breach of statutory duty cannot succeed in the absence of ‘proximity’ or ‘relativity’, which means that the relevant duty must not only serve the general interest, but also the claimant’s patrimonial interests. In the jurisdictions imposing a relativity requirement the question therefore arises whether the relativity requirement is met in case of a breach of MiFID duties.³¹

It is apparent from *Genil* that in the absence of EU legislation it is admittedly for the Member States themselves to determine the contractual consequences of non-compliance with MiFID rules, but one of the principles that must be observed is the principle of effectiveness. According to this principle, the conditions to be fulfilled by an investor in bringing a civil action against an investment firm may not be such as to virtually exclude the possibility of success. As noted above, the principle of effectiveness has been explicitly codified in Article 69(2), last paragraph, MIFID II. In my view, *Genil* and Article 69(2), last paragraph, MIFID II mean that in view of the principle of effectiveness a claim for damages on account of an infringement of MiFID rules, in particular the conduct of business rules, may not fail by virtue of the requirement of relativity.

VII. INFLUENCE OF MIFID ON PROOF OF CAUSATION

In Europe (and beyond), it is a universal requirement that a causal connection must be established between an investment firm’s breach of duty (be it in tort, contract, or otherwise)

‘Vijf jaar bindend EU-Handvest en het financieel toezichtrecht’, in J. Gerards, H. de Waele and K. Zwaan (eds), *Vijf jaar bindend EU Grondrechtenhandvest* (Deventer: Wolters Kluwer, 2015), 277–350.

²⁸ See section 34(1) Pensions Act and section 43(1) Occupational Pension Scheme (Obligatory Membership) Act. These provisions are elaborated in chapter 4 of the Decree implementing the Pensions Act and the Occupational Pension Scheme (Obligatory Membership) Act.

²⁹ Art 13(2)(e) Decree implementing the Pensions Act and the Occupational Pension Scheme (Obligatory Membership) Act.

³⁰ As regards outsourcing by pension funds under Dutch law, see, for example, P.L. Laaper, *Uitbesteding in de financiële sector, in het bijzonder van vermogensbeheer door pensioenfondsen*, *Onderneming en Recht* no 88 (Kluwer: Deventer, 2015); J.A.M.I. Hoens, ‘Uitbesteding: een achilleshiel in de Pensioenwet?’ *Pensioen & Praktijk* 2009, 16-22; R.H. Maatman and J.W. van Miltenburg, ‘Pensioenfondsen’, in D. Busch, D.R. Doorenbos, C.M. Grundmann-van de Krol, R.H. Maatman, M.P. Nieuwe Weme and W.A.K. Rank (eds), *Onderneming en financieel toezicht*, *Onderneming en Recht* no 57 (2nd ed, Kluwer: Deventer, 2010) 323-359, 339-342.

³¹ See for a comparative overview Busch, n 6 above, 404-406 (with further references).

and the loss suffered by the client. As a rule, the client claiming damages has the burden of proof with respect to this requirement. However, especially in the case of duties to furnish information or duties to warn, which may or may not be MiFID-derived, proof of this requirement is often problematic. After all, an investment firm may argue that there is no causal connection between the breach and the loss suffered because the client would have made the same investment decision had the manager complied with its duties to provide information and its duties to warn.³² In view of this, another interesting question about the effect of MiFID in private law concerns the influence of MiFID on proving causal link.

To answer this question, it is worthwhile to consider a well-known judgment of the Dutch Supreme Court concerning the internet company *World Online*.³³ That case concerned loss allegedly suffered by investors in World Online as a consequence, among other things, of a misleading prospectus published on the occasion of the company's flotation. In brief, the Supreme Court held as follows.

As it is often hard to prove a *condition sine qua non* link (a 'but for' link) in relation to liability for a prospectus, the investor protection which the EU Prospectus Directive is intended to provide may prove illusory in practice. Although this Directive admittedly contains detailed provisions about what information must be included in the prospectus, it does not regulate civil liability if the prospectus is misleading because it is incomplete or incorrect. It does, however, require the Member States to ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus (Article 6 (2), first paragraph). According to the Supreme Court, this means that 'effective legal protection' must be provided in accordance with the rules of national law.³⁴

The Supreme Court also held as follows:

'With a view to that effective legal protection and having regard to the protection which the prospectus rules are intended to provide for investors and potential investors against misleading information in the prospectus, the basic principle should be that a *conditio sine qua non* link ('but for' link) must exist between the misleading information and the decision to invest. This means that it must be assumed, in principle, that if there had been no misleading information the investor would not have proceeded with the purchase of the securities or, in the event of purchase on the secondary market, would not have done so on the same conditions'. However, the court may conclude – from the submissions of the parties (either party being free to prove the correctness of the alleged facts) and any further information available – that the basic principle referred to above does not apply in the specific circumstances. This will be the case, for example, if it is shown that the investment decision was made before disclosure of the misleading information. It should be noted by the way that as professional investors have knowledge and experience of the relevant market and of analysing the available information, there will generally be more reason than in the case of retail investors to conclude that, despite the misleading information in the prospectus, they were not actually influenced by it in making their investment decision.'³⁵

³² See for a comparative overview Busch, n 6 above, 406-412 (with further references).

³³ HR 27 November 2009, *NJ* 2014/201, with notes by Du Perron, *AA* (2010) 336, Raaijmakers, *JOR* 2010/43, and Frielink (*Vereniging van Effectenbezitters and Others v World Online International NV*).

³⁴ See HR 27 November 2009, *NJ* 2014/201, with notes by Du Perron, *AA* (2010) 336, Raaijmakers, *JOR* 2010/43, and Frielink (*Vereniging van Effectenbezitters and Others v World Online International NV*), paragraph 4.11.1.

³⁵ See HR 27 November 2009, *NJ* 2014/201, with notes by Du Perron, *AA* (2010) 336, Raaijmakers, *JOR* 2010/43, and Frielink (*Vereniging van Effectenbezitters an Others v World Online International NV*), paragraph 4.11.2. As regards this aspect of the judgment, see A.C.W. Pijls and W.H. van Boom, 'Handhaving prospectusaansprakelijkheid niet illusoir: vermoeden van causaal verband bij prospectusaansprakelijkheid'

In short, the basic assumption of the Supreme Court is that a causal link exists between the misleading information and the investment decision. In the case of a professional investor, however, the court may be justified in concluding, on the basis of his knowledge and experience, that he was not actually influenced by the misleading information. In such case, it is possible to revert to the basic rule that the investor bears the burden of proving the causal link.

In any event, it is clear from the above that the Supreme Court applied the EU principle of effectiveness with respect to proof of causation in the context of prospectus liability. A question that arises in connection with the issue of how MiFID influences the proof of causal link is whether the reasoning of the Supreme Court in its *World Online* judgment based on the EU principle of effectiveness, as set out above, could also be applied if investment firms neglect to comply adequately with one or more duties under MiFID to provide information or warnings. My own view is that, subject to a few adjustments, this is indeed a legitimate argument. As already explained, one of the key objectives of MiFID is investor protection.³⁶

Although MiFID does not contain any provision comparable to Article 6(2) of the Prospectus Directive, we may assume that the EU legislator intends Member States to offer effective legal protection in relation to the MiFID rules as well. The principle of effectiveness is, after all, a fundamental principle of EU law.³⁷ *Genil* and Article 69(2), last paragraph, MiFID II provide support for this notion. It is apparent from the judgment, after all, that in the absence of EU legislation it is admittedly for the Member States themselves to determine the contractual consequences of non-compliance with MiFID obligations, but that one of the principles to be observed is the principle of effectiveness (paragraph 57). As noted previously, the principle of effectiveness has been explicitly codified in Article 69(2), last paragraph, MiFID II. The principle of effectiveness means in this connection that the conditions on which an investor can bring a civil claim against an investment firm may not be such as to virtually exclude the possibility of bring a successful legal action.

To provide effective legal protection (to use the terminology of the *World Online* judgment), it is legitimate, in my view, to argue that where the duty under MiFID to provide information and warnings is infringed, the basic rule should be that a causal ('but for') link exists between the infringement of the rule and the loss as the investor protection intended by MiFID may otherwise in practice prove to be illusory.³⁸

Weekblad voor privaatrecht, notariaat en registratie (WPNR) 6834 (2010) 194-200, 196-197; B.J. de Jong, 'Liability for Misrepresentation – European Lessons on Causation from the Netherlands' *European Company and Financial Law Review* 2011, 352-375, 364-366.

³⁶ See Recital 2 MiFID I and Recital 70 MiFID II.

³⁷ As regards the question of how the principle of effectiveness affects the impact of EU law on private law in a general sense, see for example: Hartkamp, n 9 above; Tridimas, n 9 above, 418-476; and Gerven, n 9 above, 501-536.

³⁸ See D. Busch, 'Drie fundamentele vragen voor de Europese Commissie' *Ondernemingsrecht* 2010, 294-295, 295. The following authors also consider that the Supreme Court's approach in *World Online* could conceivably be applied to information duties of European origin other than the duties under the Prospectus Directive: Pijls and van Boom, n 35 above, 199 (referring to the duties mentioned in Annex II to the Unfair Commercial Practices Directive; de Jong, n 35 above, 271-272; G.T.J. Hoff, 'Civielrechtelijke aansprakelijkheid van uitgevende instellingen bij niet-naleving van de openbaarmakingsplicht van koersgevoelige informatie', in D. Busch, C.J.M. Klaassen and T.M.C. Arons (eds), *Aansprakelijkheid in de financiële sector*, Onderneming en Recht no 78 (Kluwer: Deventer, 2013) 711-772, 760-770 (both refer to the Transparency Directive and the obligation to provide immediate disclosure of price sensitive information under the Market Abuse Directive. For similar reasoning in relation to MiFID, see: Den Bosch Court of Appeal 15 April 2014, *JOR* 2014/168, with note by Van der Wiel and

In keeping with the *World Online* judgment, an exception could be made in the case of professional investors since it could be concluded on the basis of their knowledge and experience that they are not actually misled by the incorrect information into making their investment decision. However, this exception may be less appropriate in the event of non-compliance with duties to provide information and warnings under MiFID.³⁹ After all, the provisions of MiFID on investment firms make a clear distinction between duties to provide information and warnings to retail clients on the one hand and professional clients on the other. The duties under MiFID to provide information and warnings to professional investors are geared to their specific information needs. In the event of non-compliance with one or more of these duties, it is reasonable to suppose that the investment decision of the professional client may have been influenced by this.

It therefore seems legitimate to argue that even where an investment firm infringes its duty under MiFID to provide information or warnings to professional clients, the basic principle must be that a causal connection exists between the infringement and the loss. However, whether this approach would be followed by the Supreme Court or other civil courts is at present unclear. Naturally, other approaches which help the client to prove a causal connection may also be in keeping with the principle of effectiveness.⁴⁰

VIII. INFLUENCE OF MIFID ON A CONTRACTUAL LIMITATION OR EXCLUSION OF LIABILITY

The principle of effectiveness as formulated in *Genil* and in Article 69(2), last paragraph, MiFID II could be used to argue that in relation to consumers and small businesses the civil courts are obliged to hold that a contractual clause excluding or limiting liability for an infringement of MiFID rules constitutes an unreasonably onerous provision if included in the general terms and conditions, and that the contractual clause does not therefore prevent a claim for damages on account of non-compliance with the MiFID rules. Likewise, it could be argued that the civil courts are obliged to hold that a contractual clause that seeks to exclude or limit liability for infringement of the MiFID rules is unacceptable according to (depending on the applicable private law) the requirements of reasonableness and fairness that the contractual clause does not therefore prevent a claim for damages on account of non-compliance with the MiFID rules (even in relation to clients *other* than consumers and small businesses).

The principle of effectiveness as formulated in *Genil* and in Article 69(2), last paragraph, MiFID II means, after all, that the national conditions which an investor must fulfil in order to bring a civil action against an investment firm for infringement of MiFID-obligations may not be such that success is practically impossible. It can be argued that this also means that contractual clauses that seek to exclude or limit liability for infringement of MiFID rules are contrary to the principle of effectiveness. Naturally, however, the argument is less strong in cases where the civil courts, regardless of the contractual provisions, are less strict than MiFID.

Wijnberg; *Ondernemingsrecht* 2014/92, with note by Arons (*Holding Westkant BV, in liquidation v ABN AMRO Bank NV*) paragraph 4.11.15.

³⁹ In D. Busch, 'Het "civiel effect" van MiFID: Europese invloed op aansprakelijkheid van vermogensbeheerders' *Ondernemingsrecht* 2012, 67-78, 77, I was still inclined to argue for such an exception. However, I qualified this in the main body of the text. See also Busch, n 6 above, 408-409; D. Busch, 'De invloed van MiFID op aansprakelijkheid in de Europese financiële sector', in Busch, Klaassen and Arons (eds), n 38 above, 11-70, 51-52.

⁴⁰ On this last point, see C.J.M. Klaassen, 'Bewijs van causaal verband tussen beweerdelijk geleden beleggingsschade en schending van een informatie- of waarschuwingsplicht', in Busch, Klaassen and Arons (eds), n 38 above, 127-174, 151.

After all, the client has himself agreed to the contractual clause. On the other hand, retail clients in particular often have little influence over the contractual conditions. Arguments that also carry weight are, naturally, that clauses of this kind jeopardise the high level of investor protection which MiFID intends to provide and also detract from the level playing field envisaged by MiFID.

An example may help to clarify this. Article 14(1) of the MiFID I Implementing Directive provides that:

‘Member States shall ensure that, when investment firms outsource critical or important operational functions or any investment services or activities, the firms remain *fully responsible* [italics added, *DB*] for discharging all of their obligations under [MiFID I]’.⁴¹

It follows, for example, that where a portfolio manager outsources part of the management to a third party (eg a more specialized portfolio manager), it remains *fully responsible* (despite the outsourcing) for observance of the regulatory provisions applicable to the outsourced activities under MiFID.⁴² In short, if the third party infringes conduct of business rules under MiFID during these activities and the portfolio manager’s client suffers loss as a result, it can be argued that, according to the principle of effectiveness, the civil courts are obliged in relation to consumers and small businesses to hold that a contractual provision limiting the liability of the portfolio manager to carefully selecting third parties (including independent agents to whom activities have been outsourced) and excluding his liability for infringements of MiFID rules by a third party to whom aspects of the portfolio management have been outsourced constitutes an unreasonably onerous condition if included in general terms and conditions. Likewise (depending on the applicable private law), it can be argued that the civil courts are obliged here to hold that the contractual clause is unacceptable in the light of the requirements of reasonableness and fairness and is not therefore a bar to a claim for damages for infringement of the MiFID rules.

This goes further, by the way, than an assessment by the courts of their own motion since in the above approach the result of the assessment is also predetermined. The subject of assessments by the court of their own motion is dealt with in the following section.

IX. MIFID ASSESSMENTS BY THE COURTS OF THEIR OWN MOTION IN RELATION TO PRIVATE INVESTORS?

This brings me, finally, to what I regard as an intriguing question that has a bearing on the intensity with which MiFID impacts private law. At present, the parties to a legal action are often unaware that they could invoke an infringement of MiFID (conduct of business) rules. Are the civil courts obliged in such cases to determine of their own motion whether the MiFID (conduct of business) rules have been infringed? I would certainly not exclude this possibility.

It is apparent from the settled case law of the Court of Justice that the national courts must determine of their own motion whether, on the basis of the European principle of effectiveness, unreasonably onerous clauses in contracts between businesses and consumers are ‘unfair’

⁴¹ See also art 31(1), first sentence, Draft Commission Delegated Regulation, C(2016) 2398 final, 25 April 2016.

⁴² See extensively on outsourcing in the financial sector: Laaper, n 30 above.

within the meaning of Directive 93/13/EEC. The Court of Justice may also direct the civil courts to determine of their own motion whether the legislation is applicable.⁴³

Indeed, it would seem to be extending the protection to the entire field of consumer protection directives. Recently, the Court of Justice gave such a direction in the case of the consumer purchases directive.⁴⁴ In any event, the MiFID conduct of business rules can, in my view, be treated as consumer protection provisions insofar as they must be observed in relation to private investors.⁴⁵ National civil courts should in that case determine of their own motion whether there has been an infringement of MiFID conduct of business rules in disputes between investment firms and private investors.

X. CONCLUSION

The last word has not been spoken about the effect of MiFID on private law. MiFID II is as unclear about this as MiFID I. Although the possible contours are somewhat clearer as a result of the judgments in the *Genil* and *Nationale-Nederlanden* cases, the Court of Justice has not yet explicitly answered the main questions. For more definitive answers it will be necessary to await the further judgments of the Court of Justice.

⁴³ See EU CoJ 26 October 2006, no case 168/05, *NJ* 2007/201, with note by Mok (*Mostaza Claro*); EU CoJ 4 June 2009, no case 243/08, *NJ* 2009/395, with note by Mok (*Pannon*); EC CoJ 6 October 2009, no case 40/08, *NJ* 2010/11 (*Asturcom*); EU CoJ 30 May 2013, *NJ* 2013/487, with note by Mok (*Asbeek Brusse and De Man Garabito*); EC CoJ 28 July 2016, no case 168/15, AA 2016/658, with note by Hartkamp (*Milena Tomášová v Ministerstvo spravodlivosti SR ea*).

⁴⁴ See EU CoJ 3 October 2013, no case 32/12, AA 2015/222, with note by Hartkamp (*Soledad Duarte Hueros v Autociba*); EU CoJ 4 June 2014, no case 497/13, *Ars Aequi* 2015/816, with note by Hartkamp (*Froukje Faber v Autobedrijf Hazet Ochten BV*). See also A. Ancery and B. Krans, ‘Ambsthalve toepassing van consumentenrecht: grensbepaling en praktische kwesties’ *Ars Aequi* 2016, 825-830.

⁴⁵ One of the key objectives of MIFID is to offer a high level of investor protection. See Recital 2 MiFID I and Recital 70 MiFID II.