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MiFID II and the new regulation of European trading venues: a step towards the creation of a Capital Markets Union

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Introduzione

L'importanza dell'attuazione del principio di libera circolazione dei capitali nell'Unione Europea è attualmente in primo piano nello sviluppo della legislazione europea, specialmente dopo il Libro Verde redatto dalla Commissione nel 2015 per definire obiettivi e basi per la creazione di un'Unione dei Mercati dei Capitali in Europa. Nel presente lavoro verrà posto in rilievo l'apporto fornito a questa causa dalla Direttiva 2014/65/UE, relativa ai mercati degli strumenti finanziari, e del Regolamento Europeo n°600/2014, che compongono, insieme, il sistema MiFID II, che sarà in vigore dal 2018 e porterà diverse novità nella regolazione di questo settore. L'oggetto di questo lavoro, più precisamente, è la nuova disciplina contenuta in questi due atti riguardante le sedi di negoziazione europee, in quanto la creazione dell'Unione di Mercati di Capitali passa proprio attraverso l'incremento delle connessioni fra le diverse sedi e l'abbattimento delle barriere che le separano. Per fare ciò è necessaria una più profonda armonizzazione della regolazione che le governa e la riduzione dello spazio che viene lasciato alla negoziazione al di fuori di essi, cioè over-the-counter (OTC).

Innanzitutto sarà brevemente descritta l'attuale disciplina dei mercati dei capitali europei, verrà esposto il problema relativo alla concorrenza normativa nel settore fra gli Stati Membri, e si cercherà di identificare e spiegare il ruolo dell'ESMA, la European Securities and Markets Authority, nel sistema europeo dei mercati di capitali. Per quanto riguarda il primo punto, verrà fatta una breve analisi del sistema MiFID I, che ha abolito la possibilità per gli Stati Membri di concentrare gli scambi sui mercati regolamentati, portando il principio di frammentazione dei mercati in tutta Europa, e aprendo così alla possibilità di una vera e propria concorrenza fra sedi di negoziazione in tutti gli Stati Membri. In secondo luogo l'importanza della concorrenza normativa per questa analisi deriva dallo stesso principio di frammentazione: la concorrenza non è più solo fra Stati. L'aver introdotto diversi tipi di sedi di negoziazione significa, infatti, aver introdotto nuovi regolatori nel sistema: ciascuna sede di negoziazione avrà il proprio operatore e questi detterà le proprie regole per governarla; ciò significa che la concorrenza normativa influenzerà anche i rapporti fra questi molteplici regolatori privati, desiderosi di attrarre società nei loro mercati. Indipendentemente da chi siano i regolatori in competizione fra loro, però, i meccanismi della concorrenza normativa sono comunque molto simili e si potrà, per questo, trattare uniformemente del problema, senza dover fare differenziazioni non necessarie. L'ESMA è un'Autorità europea istituita nel 2010 per vigilare sui mercati e sugli strumenti finanziari in Europa. Essa è una parte cruciale del sistema di regolazione dei mercati di capitali e delle sedi di negoziazione sia per i suoi poteri quasi-regolatori, sia per il suo ruolo di vigilanza sui mercati, sulle sedi di negoziazione e sulle società che le gestiscono.

Il secondo capitolo si concentra sull'Unione dei Mercati di Capitali e sul sistema MiFID II. In esso viene analizzato il progetto della Commissione e si descrive il concetto di UMC e il significato di questa espressione alla base dell'attuazione del progetto stesso, per poi passare ad esaminare quanto previsto da MiFID II riguardo le sedi di negoziazione europee. L'UMC può essere definita come la connessione delle "liquidity pools" europee e l'abbattimento delle barriere che le separano; questo processo coinvolge sia i regolatori pubblici, gli Stati, l'Unione, le Autorità di vigilanza europee e nazionali, sia i regolatori privati, come le società che gestiscono le varie sedi di negoziazione. MiFID II e le misure attuative che verranno adottate dagli Stati saranno particolarmente importanti per la realizzazione del progetto: innoveranno la disciplina delle sedi di negoziazione, che altro non sono se non liquidity pools esse stesse, e inoltre porteranno dei cambiamenti anche alla disciplina applicabile alle così dette dark pools e ad altre strutture di trading OTC. Le novità riguardanti questa disciplina, cioè i cambiamenti del complesso normativo riguardante mercati regolamentati, sistemi multilaterali di negoziazione e internalizzatori sistematici, nonché i sistemi organizzati di negoziazione, che vengono introdotti nell'ordinamento proprio dalla MiFID II, saranno il centro dell'analisi contenuta in questo capitolo. Vi sono anche disposizioni che modificheranno il regime di trasparenza delle sedi di negoziazione e la disciplina applicabile alle dark pools, così da migliorare la protezione degli investitori e rendere più solido il sistema. Il nuovo sistema normativo uniforma la disciplina della trasparenza pre e post trading per tutti i tipi di sede di negoziazione previsti: la natura di sistemi multilaterali che accomuna tutti i tipi di sede, infatti, fa sì che i problemi riguardanti la formazione del prezzo degli strumenti negoziati, e più generalmente la circolazione delle informazioni, siano molto simili per i mercati regolamentati, i sistemi multilaterali e i sistemi organizzati. Inoltre viene introdotto un regime di trasparenza per tutti gli strumenti finanziari, differentemente da quanto accadeva in MiFID I che prevedeva una disciplina di questo tipo per le sole azioni negoziate nei mercati regolamentati.

Queste modifiche mirano a ridurre la porzione di mercato occupata dal trading OTC, senza tuttavia azzerarla: questa scelta è anche alla base della nuova disciplina delle strutture di trading OTC ossia gli internalizzatori sistematici e le dark pools. La regolazione delle sedi di negoziazione può generalmente essere intesa come disciplina delle strutture nelle quali vengono negoziati gli strumenti: il termine struttura non deve però trarre in inganno, in quanto non identifica un luogo o un apparato fisico, ma un insieme di servizi necessari alla negoziazione, mantenendo intatte trasparenza e garanzie di adempimento delle obbligazioni connesse alla negoziazione stessa. Da questo punto di vista, le dark pools sono molto particolari: esse, infatti, sono sì strutture di negoziazione, ma non hanno trasparenza, così da rendere possibile la negoziazione di grandi volumi di strumenti senza che ciò abbia un impatto troppo rilevante sul processo di formazione dei prezzi di questi strumenti. L'opacità rende le dark pools molto pericolose per il sistema, ma controllarle può creare dei vantaggi. Questo tipo di ragionamento viene applicato dal legislatore a tutto il sistema di trading OTC: un maggiore controllo su di esso può essere possibile solo riducendo lo spazio che esso occupa fino al minimo indispensabile per sfruttarne i vantaggi. La diminuzione di questo spazio è anche parte della ratio sottesa all'introduzione dei sistemi organizzati di negoziazione: queste sedi sono dedicate alla negoziazione di valori mobiliari non azionari; questa specializzazione permette a questi sistemi di poter offrire condizioni di negoziazione simili a quelle che possono essere trovate nelle dark pools in termini di prezzo e dell'essere punto di riferimento per investitori specializzati e altamente professionali, senza per questo sacrificare la trasparenza che permette a soggetti meno competenti, sia dalla parte degli emittenti degli strumenti stessi, sia dalla parte degli investitori, di operare.

I mercati di crescita delle PMI sono un particolare tipo di sistema multilaterale di negoziazione la cui introduzione ha come obiettivo attrarre le PMI sui mercati di capitale. La qualifica di mercato di crescita dovrebbe servire a dare più visibilità ai sistemi multilaterali che si specializzano in emittenti qualificabili come PMI e, conseguentemente, alla possibilità per queste ultime di quotarsi. Ciò è parte di un disegno del legislatore europeo volto a modificare il sistema di finanziamento delle imprese dell'Unione, facendo sì che la principale fonte di raccolte di capitale per esse diventino i mercati, deviando cioè dal sistema banco centrico che caratterizza attualmente la maggior parte degli Stati Membri.

MiFID II regola anche il trading algoritmico e ad alta frequenza così da poter gestire i grandi rischi che l'uso di queste tecniche può comportare per il sistema. Esse consistono nell'utilizzo di algoritmi per attuare strategie di investimento e la loro crescente importanza ha spinto il legislatore a disciplinarle appositamente, in modo da poter gestire il rischio sistemico che esse generano. In particolare, MiFID II prevede che imprese e mercati regolamentati si dotino di sistemi e controlli in grado di aumentare la resilienza dei loro sistemi di negoziazione.

L'impatto del sistema MiFID II sembra essere non solo coerente, ma anche probabilmente decisivo per la creazione di un'Unione di Mercati di Capitali. La normativa introdotta dalla direttiva ha infatti due obiettivi: da una parte una più profonda armonizzazione della disciplina di settore, che ridurrà le barriere che ostacolano gli investimenti transfrontalieri; dall'altra la diminuzione e il controllo del rischio sistemico dia attraverso la riduzione del trading OTC che l'adeguamento dell'ordinamento all'evoluzione delle pratiche di negoziazione. Come già accennato, la disciplina introdotta per le sedi di negoziazione è tassello importante della creazione di un'Unione dei Mercati di Capitali, proprio per la riduzione dello spazio occupato dalla negoziazione OTC: lo sfruttamento dei benefici che possono essere apportati al sistema dal mantenimento di una "soglia minima" di trading fuori dai mercati, può migliorare il sistema e, contemporaneamente, portare più imprese sui mercati. È anche importante sottolineare come il regime di trasparenza introdotto da MiFID II sarà un importante punto di partenza per tutti gli Stati e il beneficio che ne trarrà il processo di creazione dell'Unione dei Mercati dei Capitali è duplice: l'armonizzazione delle norme in materia faciliterà infatti gli investimenti transfrontalieri, riducendo il rischio di incertezza normativa per gli investitori; l'estensione del regime di trasparenza a tutti gli strumenti finanziari negoziati, in secondo luogo, renderà più facile per gli investitori operare sul mercato, poiché è una misura che ne migliora la protezione. Da ultimo anche l'introduzione dei mercati di crescita e la regolazione riguardante il trading algoritmico e ad alta frequenza avrà il suo ruolo per quanto concerne l'UMC. I primi, come detto, sono parte del processo tramite il quale il legislatore intende modificare il sistema di finanziamento delle imprese europee, un processo che sarà fondamentale per la crescita dei mercati e conseguentemente per le loro possibilità e capacità di interazione. Regolare il trading algoritmico e ad alta frequenza, in secondo luogo, dà la possibilità alle legislazioni nazionali di poter usufruire di un punto di partenza comune per poter affrontare il rischio sistemico che esse generano; il controllo di tutte le forme di rischio che possono nuocere al sistema sarà molto importante in una rete che connetta strettamente tutte le liquidity pools europee.

L'ultimo capitolo è dedicato all'analisi della disciplina italiana delle sedi di negoziazione e al progetto di decreto legislativo di attuazione di MiFID II. La creazione dell'Unione dei Mercati di Capitali sarà fortemente influenzata dalle scelte che verranno fatte a livello nazionale per attuare le decisioni del legislatore europeo.

Dopo un breve excursus sull'evoluzione storica della disciplina, sarà analizzato l'attuale assetto della materia, particolarmente coerente con il sistema MiFID I; infine saranno esaminate le modifiche che verranno apportate dal decreto attuativo del sistema MiFID II, tramite un'analisi del progetto sul quale sarà basato.

L'adeguamento della legislazione italiana, molto probabilmente, avverrà seguendo quasi pedissequamente le modifiche stabilite in sede europea, risultando in una modernizzazione del sistema e in una maggiore integrazione del mercato italiano nel sistema europeo. Anche se è difficile che la riforma riesca ad attrarre le PMI italiane verso la quotazione, è comunque molto probabile che il suo effetto sia comunque positivo, sia per il sistema nazionale che per l'UCM: migliorerà, infatti, le possibilità per il mercato italiano di attrarre investitori stranieri, facilitando le operazioni transfrontaliere.

Introduction

The implementation of the principle of free movement of capitals is a very relevant issue in the modern EU law. The Commission, in 2015 issued a Green Book, which poses the objectives to be fulfilled in order to create a Capital Markets Union throughout Europe. In this work it will be examined the contribution of the Directive 2014/65/EU, on markets in financial instruments, and of the European regulation n°600/2014, the so called MiFID II system, to the process of creation of the CMU. In particular, the analysis is focused on the innovations to the discipline of European trading venues, since the main point to realise this project is connecting them, and harmonizing their discipline, while contemporarily reducing the space of the over-the-counter trading.

At first, the regulation of European capital markets will be briefly described, together with the problem of regulatory competition in the sector and the risks that it can trigger, and explain the role of the European Securities and Markets Authority in the European capital markets system. As for the first subject, we will make a general overview over the MiFID system, which made mandatory the fragmentation of markets in all EU Member States, through the abolition of the obligation to concentrate trading in regulated markets: it will be necessary in order to understand the evolution brought by MiFID II and mainly related with the reduction of the space left to OTC trading by the new discipline. The importance of regulatory competition through Europe, secondly, is then to be taken into account when approaching the theme of trading venues regulation: we have now, indeed, not only competition among States, to deal with, but, after the fragmentation that lead to many different types of venues each of which has its regulator and its rules, we also have to consider the one running among these new regulators. Fortunately, these types of competition normally present almost the same problems as for what interests our work and can so be treated together. Lastly the first chapter deals with ESMA, the recently instituted authority governing EU markets and securities, both for its importance as a quasi-regulator, and for its role of supervision upon markets, intended both objectively, as system, both subjectively, as companies running these system, which aims to protect the Union economy from financial crises.

The second chapter examines the capital markets union and to the MiFID II system. We will analyse the concept and the project of capital markets union, then we will examine the provisions of the MiFID II system concerning trading venues. As for the first point, we will see how we can define the capital markets union as a net meant to connect liquidity pools in the Union and that will be conditioned both by public and private regulators, due to the growing fragmentation of the system. MiFID II and its implementation will have a crucial role in realizing the CMU project, due to the fact that it contains a discipline to be applied to trading venues, which compose the main part of the liquidity pools to connect, the other being dark pools and other OTC structures, which are also disciplined, at least partially by the Directive. The chapter will, so, focus on the innovations to this discipline, on what changes about regulated markets, multilateral trading facilities and systematic internalisers, together with the newly introduced category of the organized trading facilities. There are novelties about the discipline of transparency of the venues and dark pools, which are meant to enhance investor protection and better control systemic risk. Pre and post trade transparency discipline is uniform for all the three kinds of venue provided by MiFID II: this is possible since these three venues share the same problems regarding the price formation and discovery process, and more generally the circulation of information inside them. Also a general regime of transparency for equity and non equity instruments is created, a novelty of some impact if we consider that in the previous system only shares had a transparency regime defined by the MiFID II system.

All these measures are meant to reduce the space occupied by over the counter trading, although without eliminating it: the lawmaker has chosen to govern this kind of trading instead of forbidding it, and has still given a discipline to be applied to dark pools and systematic internalisers, which are structured examples of OTC trading. The regulation of trading venues can in fact be said to be the regulation of structures in were trading happens and of the companies managing them. It is clear that the term “structure” is not to be intended in a physical sense, but rather as defining a complex of services and organizational features that are necessary to enact trading without sacrificing transparency and guarantees of fulfilment of trading-connected obligations in order to protect both the system and the investors. From this point of view, when it comes to dark pools we are facing a particular phenomenon: trading structures without transparency the scope of which is to make it possible to exchange large amounts of instruments without having a too big impact upon the price formation process of the exchanged instrument thanks to their opacity; in other words, a dangerous instrument which may, if well controlled, still create a benefit for the market. Controlling dark pools is part of a process that the lawmaker has put in motion in order to have a greater control over the whole OTC trading system, so to be able to exploit its benefits and minimize the risks coming from it. This reduction is also the rationale behind the creation of OTFs: venues meant for non equity instruments that, thanks to this specialization, should be able to host trading conditions closer to the ones that can be found on dark pools (for the instruments that are traded on them) in terms of price and in the sense of being a reference point for specialized and highly professional investors, without sacrificing the transparency that may allow also smaller and less competent subjects to operate.

The introduction of the Small and Medium Enterprises growth markets as a particular type of MTF meant to attract SMEs on capital markets is another very important and interesting element of the new discipline. SMEs growth markets are intended to give more visibility to the possibility of listing for SMEs across the Union, due to the fact that the EU lawmaker tries, with this and with other measures and initiatives, to incentive enterprises to resort to capital markets rather than to banks when needing funds. SMEs growth markets are, in the mind of the lawmaker, a tool that should result particularly useful in this sense, and that can be the starting point, or better one of the starting points, of this change in the funding system of European enterprises.

MiFID II also regulates algorithmic and high frequency trading, in order to mitigate the risks coming from these trading techniques, which consist in using algorithms to implement investment strategies. The growing relevance of this kind of trading, and above all the risks that it may bring to the system, lead the lawmaker to find some countermeasures in MiFID II. These are mainly based upon the implementation of systems and risk controls that allow both investment firms and regulated markets to improve the resiliency of their trading systems.

The impact of the MiFID II system on the regulation of trading venues it is likely to be very relevant and coherent with the aim of creating a capital markets union. The provisions introduced by the Directive have two scopes: from one hand a further harmonization of rules, so to reduce barriers to cross border investment and trading; secondly to reduce systemic risk both by diminishing the space left to OTC trading and by enhancing the normative asset in order to make it more adequate to the evolution of trading practices. This means that the creation of a capital markets union is an aim that should include a continuous reduction of the trading outside trading venues: it will be reduced to the minimum, without being forbidden, in order to let the lawmaker govern it more easily so to obtain all the advantages that can derive to the system from its existence and processes. Moreover the CMU will benefit from the transparency regime introduced by the MiFID II system, since it uniforms some basis that are of great relevance for the investor to decide upon a cross border investment choice: the very extension of the market transparency to the whole spectrum of equity instruments and non equity ones is, indeed, a great step in this direction, since in the previous system States could choose to have or not a transparency regime for instruments different from shares, and this choice could relevantly influence the price formation process of securities, which could have been different for every market. Lastly the choice to regulate expressly SMEs growth markets and to introduce a discipline for algorithmic trading is of great importance for the CMU. SMEs growth markets, as said, are instituted as part of a process that is trying to move enterprises of the whole Union towards market funding, and it is so essential in order to let markets grow bigger and to make easier even from non-national capital to flow toward enterprises which are worth to obtain it, irrespectively from their Member State of origin or dimension. Secondly, the regulation of algorithmic and high frequency trading contained in MiFID II is a core that makes every national legislation potentially adequate to face a phenomenon the systemic relevance of which makes it a source of risk for the whole Union and, consequently, for the creation of the CMU, and for the management of risk inside it.

In the last chapter, there will be an analysis of the Italian discipline of trading venues and of the project of legislative decree implementing the MiFID II system. This is necessary, since the creation of a capital markets union is not only a matter of choices made at the supranational level, but also something that will depend on the correct implementation of these choices in the national systems.
The chapter starts with a brief summary of the historical evolution of this discipline, in order to understand its main traits and how they developed. Then the regulation of trading venues, mostly connected with the reform following the MiFID I system, will be examined, and lastly innovations that will be brought by the legislative decree implementing the MiFID II system, through an analysis of its project, will be examined. The Italian legislation will very likely adhere to the changes brought by MiFID II, and this will result in a modernization of the system and in a closer integration of the Italian markets with the rest of the Europe. There should be both an enhancement of the national possibilities to attract foreign investors and a facilitation of cross border operations, even if it is very probable for the reform to fail in attracting Italian SMEs towards capital markets.

Chapter One

An overview on Mifid I and other main issues related to the regulation of European capital markets before Mifid II

Contents: 1. The Lamfalussy procedure; 2. MiFID, a common set of norms for capital markets; 3. Regulatory competition in the European securities legislation; 4. The role of ESMA in the European financial system; 5. Conclusion

1. The Lamfalussy procedure

The regulation of European capital markets is a multi-level one: Union, Member States and European Authorities work together to ease the adoption of EU normative acts in the context of capital markets and financial services. This is necessary for two main reasons: the first is to try avoiding the risk of overregulation and goldplating, the problem being a too detailed normative net in which it would be difficult to operate both for investors and for companies; the second is to strengthen the European market, by harmonizing the discipline of capital markets and by fastening the adaptation to the development of new business praxes in finance[1].

The process of adoption of new European legislation for financial services is called "Lamfalussy procedure", after Alexander Lamfalussy, head of the Committee created by the Commission in 2000 to understand how to enhance the efficiency of the regulating system in this area. The Committee proposed, in 2001, a four levels approach[2]:

- the first level sees the Council of the European Union and the Parliament as protagonists: they adopt a framework legislation containing the main principles to be followed in implementing the new discipline and build guidelines to do so;
- the second level shifts on the role of the European Commission which, advised by the committees (now by the ESAs), adopts technical standards of execution and sets out measures which are necessary to implement the first level regulation;
- the third level consisted in committees of national supervisors that have to advise the Commission for the acts in level 2 and for the proposal of acts in level 1, and which have to coordinate national regulators and independent administrative authorities operating in this

[1] I. PORCHIA e P. SPATOLA, La direttiva di primo e secondo livello, in L. Zitiello, MiFID: La nuova disciplina dei mercati, servizi e strumenti finanziari, Itaedizioni, Torino, 2007, pag. 1
[2] N. DE LUCA, Capital Markets, in Foundations of European Company Law, Luiss University Press, Roma, 2016, pag. 307

field to guarantee a harmonized, if not homogeneous, implementation of the first and second level legislation. This role has been now taken by three European supervision authorities (ESAs), the European Securities and Markets Authority, the European Banking Authority, the European Insurance and Occupational Pensions Authority, which also draft the standards that the Commission approves and publishes in the second level;

- the fourth level is the "enforcement" one: the Commission, helped by the ESAs, the Member States, and by the national independent authorities, monitors the application and the implementation of the new rules in the Member States themselves and, in case of breach, launches the infringement procedure to sanction non-complying States[3].

European financial legislation is now created through this four-stages concept, built of framework principles, implementing measures, cooperation between Member States, and enforcement[4] the efficiency of which is proved by its adoptions in other fields related with the securities one: banking, insurance, occupational pensions and asset management[5]. One of the main reasons of this extension of the application of the Lamfalussy procedure is due to the new approach that banks, investment firms and insurance companies have of their work[6]: most of them do not follow a strict, sectorial approach to their activities, they range between the three areas (banking, investment and insurance). This outdates the sectorial system of vigilance[7], creating a problem of secondary regulation of the area: national and European authorities should collaborate and be closer not only with their counterparts working in the same sector, but also with authorities which have power in other fields, since their interventions aimed to discipline, say, investment services, can be an interference in the regulation of the economic activity of, say, an insurance firm and so on. The Lamfalussy procedure is a good mean to overcome this problem: the whole procedure guarantees cooperation, particularly at the third and fourth level, between Member States and between national authorities governing the same sector, and seems to be suited also for cooperation between national authorities governing different sectors. Moreover, there is also the possibility to coordinate the ESAs in the creations o drafts for the technical standards to be adopted by the Commission in the second level: if well exploited, this could be a legislative method which further fasten and ease the European lawmaking

[3] European Commission, Regulatory process in financial services, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-reforms-and-their-progress/regulatory-process-financial-services/regulatory-process-financial-services_en

[4] T. MÖLLERS, Sources of Law in European Securities Regulation - Effective Regulation, Soft Law and Legal Taxonomy from Lamfalussy to de Larosiere, in European Business Organization Law Review II: 379-407, 2010, pag. 382

[5] European Commission, Regulatory process in financial services, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-reforms-and-their-progress/regulatory-process-financial-services/regulatory-process-financial-services_en

[6] V. COLAERT, European Banking, Insurance and Investment Service Law, 2015, pag. 5

[7] We will approach this problem later, in paragraph …

process in the three areas, could also result in an improved quality of legislation, since a coordination between authorities would decrease the possibilities of overlapping of competences and actions taken by the ESAs thus reducing the risk of overregulation.

1.2 The “MiFID system” as an example of application of the Lamfalussy procedure

The MiFID directive is a product of the Lamfalussy procedure. Actually, although our analysis will focus on directive n°2004/39/EC, we can talk about a “MiFID system” which has seen light through the application of the Lamfalussy procedure: it is composed by two directives (the already quoted 2004/39/CE and the 2006/73/EC), a regulation (1287/2006), some CESR, the Committee of European Securities Regulators (now replaced by ESMA), recommendations, and by a series of consultations which were made by the European Commission. If we analyze this system by looking at it as a product of the Lamfalussy procedure, we can easily pose its structure in the four levels scheme[8]:

- Directive 2004/39/EC, even being very detailed, is the first level provision: it contains the framework principles regulating markets in financial instruments;
- Directive 2006/73/EC and Regulation 1287/2006 constitute the second level, containing some execution and technical standards;
- The ESMA[9] recommendations are the third level of the procedure, the scope of which is the harmonization of Member States’ application of second level norms;
- The last level is composed by the consultations made by the Commission: they were aimed to ascertain the correct application of the first level directive.

This procedure adopted in the creation of the MiFID system has a particularity if compared with the “standard” proposed by the Lamfalussy Committee: we have a Directive used in the second level, an instrument which, apparently, is not suited for the function considered for this step of the procedure. As we have seen, indeed, the second level discipline should be composed by norms of execution: a Directive is a normative instrument used to lay down objectives to be complied with by States[10] so, usually, it should not be a very detailed act, at least not as detailed as executive norms or technical standards should be. The use of the instrument is justified, as we can deduct from the second recital of the Directive, by the impact that a supranational discipline of the financial sector can have on the economic life of Member States: the use of the Directive is meant to allow States to adequate their legislation to the executive norms laid down in it, without constricting them to fully sacrifice their

[8] I. PORCHIA e P. SPATOLA, La direttiva di primo e secondo livello, in L. Zitiello, MiFID: La nuova disciplina dei mercati, servizi e strumenti finanziari, Itaedizioni, Torino, 2007, pag. 6
[9] European Securities and Markets Authority, the institution supervising European financial markets, the role of which will be examined in the fourth paragraph.
[10] P.CRAIG e G. DE BÚRCA, EU Law: Text, Cases and Materials, Oxford University Press, Oxford, 2011, pag. 106

authority on a so delicate sector[11]. On the other hand, the use of a Regulation, to complete the range of executive provisions that we find in the second level of the procedure, permits the Union to impose, through the direct applicability which characterize the instrument, provisions regarding markets' integration to Member States. According to the second recital of the Regulation, the choice of this legislative mean is aimed not only to "promote market integration" itself and the "cross-border provision of investment" but goes further, by aiming "to facilitate the further integration of the single market"[12], which can be seen as an even more demanding requirement to apply to the approach that the lawmaker enacts with the Regulation we are speaking of.

The combination of the two instruments in shaping the normative system of executive provisions of the MiFID Directive is so a way through which the Union could both start to harmonize the discipline of financial instruments, services and markets and guarantee that legislation in an economic sector of increasing importance could be managed, for a certain extent, by Member States without prejudice for European economic integration.

In the Directive n°2006/73/EC is also laid down the principle of goldplating, according to which Member States can impose stricter conditions than the one provided for in MiFID. We will analyze this principle and its consequences, mainly regarding competition between law systems in attracting financial investment, later, in paragraph 3. Now we will shift our attention to the MiFID directive and its main provisions and implications.

2. A common set of norms for European capital markets

The aim of creating a European single market could not be accomplished without taking in account the evolution of financial markets. The growth of the cross-border operations in this sector imposes to create a transnational normative system to regulate the issue. Three approaches can be followed in doing so[13]:

- First of all, we can rely on "shared international standards" laid down by market agents[14], so on a "regulation from below" made by and for market players;

[11] I. PORCHIA and P. SPATOLA, *La direttiva di primo e secondo livello*, in ZITIELLO L., *MiFID: La nuova disciplina dei mercati, servizi e strumenti finanziari*, Itaedizioni, Torino, 2007, pag. 5
[12] Regulation n°1287/2006/EC, recital n°2
[13] G. FERRARINI, *Pan-European Securities Markets: Policy Issues and Regulatory Responses*, Centre for Law and Finance, 2002, pag. 4
[14] H. BAUM, *Globalizing Capital Markets and Possible Regulatory Responses*, in I. BASEDOW and T. KONO, *Legal Aspects of Globalization. Conflict of Laws, Internet, Capital Markets and Insolvency in a Global Economy*, The Hague-London-Boston 2000, pp. 77-132, pag. 99

- Secondly, we can seek for a “minimum harmonization” regime, in which the framework regulation is created by supranational entities and States discipline only some detailed aspects of the subject[15], remaining in the boundaries created by the principles laid down in the framework;
- Lastly, we can try to reach “comprehensive harmonization”[16], so the creation of a uniform supranational law system without the need nor the possibility for States to discipline the area.

In European legislation, the second approach has been combined with the principle of “mutual recognition” according to which the authorization given by national supervisory authorities allows firms to operate in the whole Union.

The MiFID system seems to be borderline between the second and the third approach: it uses a combination between a Regulation and two Directives to replace the ISD Directive, one of the first examples of harmonization of European securities law. As said, the use of a Regulation allows to uniform some normative elements in Member States and the Directives are used to let States adequate themselves to the new system without imposed “normative shocks”. Anyway, in this being borderline, the system appears to tend more toward the third approach: according to some literature[17] the MiFID Directive can have direct effect in Member States, since it is sufficiently clear, precise and unconditional wording[18] in many of its parts, so allowing citizens to go before court against States which failed in implementing the Directive. This interpretation of the Directive is obviously closer to the concept of “comprehensive harmonization” than to the “minimum harmonization” approach.

2.1 MiFID, the first step toward the CMU: the birth of a European financial market

The very aim of MiFID was to bring stability to the European network of capital markets[19]: as long as it remains stable and united, it can resist the globalization of capital markets, in the sense of maintaining its independence and importance as a market aggregation. The European market could so, with the common set of rules established by MiFID, become a hodgepodge of connected markets, able to interact with other major players of the global finance, the U.S. for example[20], strongly linked

[15] See N. MOLONEY, *EC Securities Regulation*, Oxford, chapter 1;

[16] H. BAUM, *Globalizing Capital Markets and Possible Regulatory Responses*”, in I. BASEDOW and T. KONO, *Legal Aspects of Globalization. Conflict of Laws, Internet, Capital Markets and Insolvency in a Global Economy*, The Hague-London-Boston 2000 note 1, p. 105

[17] F. MALERBA, L’attuazione e la diretta applicabilità della Direttiva I, in L. ZITIELLO, MiFID: La nuova disciplina dei mercati, servizi e strumenti finanziari, Itaedizioni, Torino, 2007, pag. 523

[18] Van Gend en Loos, Case 26/62 European Court of Justice

[19] G. DI GASPARE, Metamorfosi dei mercati finanziari e ambizioni della MiFID, in DE POLI M., La Nuova Normativa MiFID, CEDAM, 2009, pag. 93

[20] As we have seen in the case of NYSE Euronext about which we will discuss later in the paragraph regarding the LSEG-Deutsche Borse fusion

to each other by common functioning rules and by its common currency, the Euro. According to the literature[21], the Euro and its stability could constitute the concrete which kept European capital markets not only connected, but also convenient for investors: it had an exchange rate that tended to remain stable and the monetary policy followed by the European Central Bank maintained the exchange risk on low levels, meaning that it was, and still is, improbable that a significant and completely unexpected devaluation will occur. This means that an investment in euro-traded securities brings to the investor an advantage if compared with an investment in dollar-traded securities since the cost of the intermediate capital used to buy security, normally rises "if the monetary basis on which [financial] transactions lie is not stable, as it's the case of dollar and pound"[22]. The Euro constitutes, so, a strong foundation for the European financial market, since, without it, connections between national markets would not have been strong enough to form the network we spoke about: the instability of the exchange rates would have compromised the role of the European financial market, intended as a network of national ones partially subjected to common rules, in the ongoing globalization of finance.
The structure of the access to the Eurocentric market is made by "gates", namely the various and different trading venues, which are both the national stock exchanges and the "new generation" ones, that permit to market players to start acting in the common market that MiFID shaped as a bud that will now, after MiFID II and its implementation, start to blossom and become a real Capital Markets Union. Here is to notice the importance of admission to listing and to trading: both are authorizations, that can be obtained, when a firm, in case of listing, or a security, in case of trading, respects some non-discretionary conditions established by primary and secondary regulation of the sector. The combination of mutual recognition and home country control principle, allows firms to operate through the whole Union by exercising their right to listing[23]only once, before the supervising authority of their home country.

2.2 Objectives and principles of the MiFID Directive

Now that we know what was the rationale behind MiFID, we have to briefly analyze its content and mainly the principles that it has laid down to modernize the discipline of capital markets.
The MiFID Directive replaces the ISD one and faces four main problems:

- Enhance investors' protection;

[21] G. DI GASPARE, ibid., pag. 93 ss.
[22] G. DI GASPARE, ibid., pag. 94

- Regulating the competition between trading venues and facing the raise of “a new generation of organized trading systems”[24];
- Improving openness and security of markets;
- Guaranteeing transparency of transactions.

Actually, these four problems can be reunited in two: transparency and regulation of the competition between trading venues can be connected each with the other two problems faced by MiFID. First of all, transparency of transactions can be taken in two perspectives, the first being a feature to improve the stability of markets, so following what should be its “direct” effect, or as a mean which scope is to protect the investor, by creating a market environment in which he can seek and find information on its own, which is an “indirect” effect; the second is crystalized by the lawmaker in the provisions relating the information to be given to the client himself before enacting any transaction. It directly improves the security of the market since it works as an obligation arising toward authorities and institution governing the market, so making easy-to-find and public some information sought by professional market players. On the other hand, it indirectly protects retail clients, since they normally act in the market through relating with professional agents, who are obliged to give them information about their strategies and policies in investing the client’s capital (this means that, normally, the retail client has only a second-hand perception of the information, so an indirect one), but, in a transparent market, the client can more easily obtain information and so can choose more consciously the firm to relate with. For this reason, we will start our analysis from the investors’ protection in MiFID as it is built trough best execution principle and disclosure obligation, then we will shift our attention to the improvement of openness and security of markets, an achievement which the Directive tries to reach by the disclosure principle itself, by regulating competition between trading venues, and by norms about clearing and settlement of investment firms. In paragraph 3, we will better analyze the problem of regulatory competition as an alternative to comprehensive harmonization of national law systems.

2.3 Client protection in MiFID

According to the recital n° 31 of the Directive n°2004/39/EC, “one of the objectives of this Directive is to protect investors. Measures to protect investors should be adapted to the particularities of each category of investors (retail, professional and counterparties)”[25]. The lawmaker considers the need to calibrate the level of protection on the features of each category of investor: professional clients, eligible counterparties and retail clients have a different level of knowledge and information about

[24] Directive 2004/39/CE, recital n°5
[25] Directive 2004/39/EC, recital N° 31

investment services, meaning that they need different levels of protection. The category in which the client can be classified, so, is a meter to identify different parameters to be respected to satisfy disclosure, best execution and the assessments of suitability and of appropriateness of operations[26]. Given the definition of client according to Directive 200/39/EC as “any natural or legal person to whom an investment firm provide s investment and/or ancillary services”[27], the Directive defines professional clients, as the ones meeting the criteria in the Annex II of the Directive itself[28], and retail clients, as the ones who are simply not included in the professional[29], in article 4; eligible counterparties are subjects included in the definition of professional clients to which some specific provisions of the Directive[30] do not apply[31].

Retail clients take advantage of the maximum level of protection: investment firms will have to fully respect the whole range of protective measures laid down by MiFID and Directive 2006/73/EC: they are presumed not to have experience, information and competences comparable to the ones of the other categories. The firm will have to follow strictly the rules provided for in the Directives to allow retail clients to make a risk assessment and informed investment choices[32].

Professional clients and eligible counterparts, on the other hand, have competences and information that allow them to play in the market with more awareness if compared with retail clients. However, they can ask the firm to respect the regime applied to retail clients[33], or anyway a stricter one than their own, when they consider themselves not to be capable of managing risks deriving from investment operations. According to MiFID, a client can be also included in a less protected category than its “natural” one: this is the nature of the “on request” categories of professional clients or eligible counterparties[34].

These categories are particularly important for the best execution principle: according to art. 24 of the Directive 2004/39/EC, as said in note 29, obligations laid down in artt. 19, 21 and 22 par. 1 do

[26] F. VEDANA, Le regole informative e contrattuali, in RAZZANTE R., La MIFID: Com’è cambiato il TUF, Sistemi Editoriali, Napoli, 2008, pag. 133

[27] Directive 2004/39/EC, art. 4, point 10

[28] The category includes the whole range of subjects requiring authorization or regulation to operate in capital markets and the ones requesting the firm to be treated as professional clients.

[29]Directive 2004/39/EC, art. 4, point 11

[30] Obligations laid down in artt. 19, 21 and 22 par. 1 of the MiFID directive

[31] They are enumerated in art. 24 of the MiFID directive

[32] F. CIVALE, La classificazione della clientela, in ZITIELLO L., MIFID: La nuova disciplina dei mercati, servizi e strumenti finanziari, , Itaedizioni, Torino, 2007, pag. 304

[34]An important difference between professional clients on request and eligible counterparties on request is in the conditions to be met to accede to the category: for professional clients, they are provided for in the directives and are verified by firms; for eligible counterparties, these conditions to be considered eligible counterparties are, instead, defined by member states when implementing the Directive.

not apply to eligible counterparties, while in operations involving professional clients, investment firms will be allowed to presume
that it is unnecessary to provide the client information about products and services which are involved in his professional activity[35].

The principle of best execution is contained in art. 21 of the MiFID directive and in art. 44 and 45 of the Directive n°2006/73/EC: the norms impose to firms to "take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant for the order"[36]. The literature qualifies the best execution as an "*obligation of method"*[37], meaning that it is not important for its satisfaction that "the best possible result" is achieved, but the essential point is in firms adopting procedures and policies the adequacy of which is to be evaluated *ex ante*, so independently from their outcome. For the issue we are treating, the fragmentation of the trading venues galaxy in the whole Union, deriving from the recognition of the rising of "a new generation of organized trading systems alongside regulated markets"[38] and their normative definition, is a relevant point. The best execution obligation, indeed, includes the choice of the most adequate trading venue where the transaction has to be performed to obtain "the best possible result" for the client[39]. This means that the principle we are talking about will have an impact on the competition between trading venues and will so enhance also the regulatory competition between law systems: each State will have to compete with others in attracting investments and this will be necessarily reflected in the regulation that it will enact for its national trading venues.

The other main theme regarding client protection is the imposition of a set of disclosure obligations on investment firms toward clients: these, as said, are mainly intended as a condition to open the market and enhance its transparency to facilitate the action of its main players, namely the investment firms themselves, but have been also used to make possible to the client to invest his capital more consciously, through an informed choice of the firm to relate with and, eventually, of the service to ask them. This is the rationale of the disclosure obligation imposed to firms toward clients which will obviously have a different consistency graduated in function of the category of which the client is part. When interacting with professional clients, firms will only have to respect the principles laid

[35] This will happen, in particular, when the firm makes the suitability and appropriateness assessment regarding the product or the service which is offering to the client.
[36] Directive 2004/39/EC, art. 21, par. 1
[37] A. PEPE, La best execution, in ZITIELLO L., MIFID: La nuova disciplina dei mercati, servizi e strumenti finanziari, Itaedizioni, Torino, 2007, pag. 269
[38] Directive 2004/39/EC, whereas n° 5
[39] A.D. TEMPESTINI, L'internalizzazione sistematica e la negoziazione in conto proprio, in ZITIELLO L., MIFID: La nuova disciplina dei mercati, servizi e strumenti finanziari, Itaedizioni, Torino, 2007, pag. 366

down in article 19, the most part of which is in giving fair, clear and not misleading information[40], further specified in Directive2006/73/EC; obligations regarding information to be given to retail clients, on the other hand, are more specific and contained in artt. 29, 30, 31, 32 and 33 of the Directive 2006/73/EC. The firm will have to communicate to the retail client information about terms of any eventual agreement, the firm and its services for clients, financial instruments they work with, costs and associated charges, client classification, and information concerning safeguarding of client financial instruments or client funds[41].

Client protection imposes another set of obligations regarding information on firms; they will have to obtain from the client some information to create their strategies and policies of investment and to make the assessments of suitability and appropriateness: in this way, firms will be able to evaluate the level of knowledge and experience of the client. When offering advising services regarding investment or portfolio management, firms will ask for information regarding knowledge and experience of the client about the investment sector relevant for the financial instrument or service offered, the objectives of the client’s investment, and the financial situation of the client himself: these will be the data used to make the suitability assessment[42]. Firms are precluded from relying on these information only when they are manifestly incomplete, inexact or outdated; if the firm doesn’t obtain these, it must not provide for the aforementioned services. On the other hand, when offering services different from the ones mentioned before, firms will ask for the type of services, operations and instruments which are familiar to the client, nature, volume and frequency of the operations the client made on financial instruments and the time period in which those operations have been enacted, level of education, and current, or when relevant past, job of the client[43]: this is the appropriateness assessment. After this assessment, differently from the suitability one, the firm can anyway perform the operation, after communicating its evaluation of non-appropriateness of the service or the instrument in relation to the client’s condition, and the same rule applies if the client refuses to provide the required data.

The information provided from the client are so essential for the firm to comply with the best execution principle and are very useful to the firm itself to profile their clients: client profiling makes the firm able to map its position in the market and so enhances competition inside the market itself,

[40] Directive 2004/39/EC, art. 19, par. 2

[41] L. FRUMENTO, Le informazioni fornite ai clienti, in L. ZITIELLO, MIFID: La nuova disciplina dei mercati, servizi e strumenti finanziari, Itaedizioni, Torino, 2007, pag. 182 ss.

[42] D. SPREAFICO, Le valutazioni di adeguatezza e di appropriatezza, in L. ZITIELLO, MIFID: La nuova disciplina dei mercati, servizi e strumenti finanziari, Itaedizioni, Torino, 2007,, pag. 199

[43] F. VEDANA, Le regole informative e contrattuali, in R. RAZZANTE La MIFID: Com’è cambiato il TUF, Sistemi Editoriali, Napoli, 2008, pag. 169

by strengthening the consciousness of the firm and making possible for it to better evaluate risks of its investment strategies.

2.4 Openness, transparency and efficiency of markets

As said, the European lawmaker used MiFID to improve openness and transparency of markets, in the view of creating a capital market system which could connect the whole Union. Increasing the amount of information which circulates in the system and imposing fragmentation of the trading venues system in the whole EU is a way to increase competition in the financial sector, and, contemporarily, to have a twofold approach to this issue. Transparency of markets, indeed, influences competition between firms: each of them will have more information available and will be able to play more consciously in the market; on the other hand, if Member States cannot impose to firms an obligation to concentrate trading in national stock exchanges, but must allow transactions to happen in other trading venues, the competition between the venues themselves becomes an issue in the whole Union. Although some countries already had permitted to alternative venues to work, many others, still relied on the "concentrated" system as a mean to have greater control on transactions. The harmonization of this issue, derives from the need to recognize "the new generation of trading venues" as an element of increasing importance for the financial economy and as a new mean to fund the real one.

MiFID distinguishes regulated markets from multilateral trading facilities and systematic internalisers. Regulated markets are defined as "multilateral systems operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way which results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorized and functions regularly and in accordance with the provisions of Title III"[44]. Multilateral trading facilities (henceforth MTFs) are, instead, "multilateral systems, operated by an investment firm or a market operator, which brings together multiple third party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract in accordance with the provisions of Title II".[45] In the end, a systematic internaliser is "an investment firm which on an

[44] Directive 2004/34/EC, art. 4, n°14
[45] Directive 2004/34/EC, art. 4, n°15

organized, frequent and systematic basis, deals on own account by executing client orders outside a regulated market or an MTF", where the concept of "dealing on own account means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments"[46]. These venues will be in competition across Europe to attract investments and liquidity; one of the most relevant motors of this competition is the obligation laid down in art. 21 of the MiFID: the disposition states that, to comply with the best execution principle, the firm must include in its order execution policy also "information on the different venues where the investment firm executes its client orders and the factors affecting the choice of execution venue"[47], the execution policy shall include "at least those venues that enable the investment firm to obtain on a consistent basis the best possible result for the execution of client orders". This means that some criteria will have to be taken in count when choosing the venue to act in: price, liquidity, costs, medium order size, counterparties characteristics, likelihood of execution and settlement; these are the factors that will influence the choice of the most appropriate venue and, consequently, are the battlefield of competition between venues.

In a so fragmented system, transparency becomes essential for a good functioning of markets: pre-trade transparency enhances the price formation process, by reducing costs of seeking information, while post trade transparency is fundamental to verify the execution quality of transactions and so to improve the efficiency of markets[48].

Transparency oriented measures soften some risks deriving from markets' fragmentation since they permit to consolidate information: recital n°34 of the MiFID Directive, indeed, recommends to Member States to remove obstacles that can block the consolidation at a European level of relevant information and its publication. This is a necessary element in the MiFID system since the main problem in the relation between fragmentation of markets and discipline of the information flux in the market is the risk of dispersion, intended as a greater difficulty for market players to find the information itself due to non-harmonized publication criteria and procedures or to economic obstacles, such as too high access costs. MiFID imposes some ad hoc rules of transparency for systematic internalisers: they must "make public their quotes in a regular and continuous basis […] in such a manner which (makes them) easily accessible to other market participants on a reasonable commercial basis"[49] , these are firm quotes of "shares admitted to trading on a regulated market for

[46] Directive 2004/34/EC, art. 4, nn°6 and 7
[47] Directive 2004/34/EC, art. 21, par. 3
[48] M. ANOLLI, B. BIANCHI, M. VENTURINO, Evoluzione della normativa comunitaria sui mercati e nuove regole contabili, Interventi tenuti nell'ambito del Seminario su "Banche e mercati italiani nella prospettiva internazionale" S. Marco - Perugia, 2004, pag. 9
[49] Directive 2004/39/EC, art. 27, par. 3

which they are systematic internalisers and for which there is a liquid market"[50] ; regulated markets and MTFs, are required by Member States to "make public current bid and offer prices and the depth of trading interests at these prices which are advertised through their systems in respect of shares admitted to trading on a regulated market"[51] and States have also to provide "for this information to he made available to the public on reasonable commercial terms and on a continuous basis during normal trading hours"[52]. These provisions are clearly imposed by the concept of transparency that we have described before: a mean to soften the risk of informative dispersion. A very important point is that MTFs and internalisers are required to publish quotes of "shares admitted to trading in a regulated market", meaning that the system is built around the idea of fragmentation as having a "main market" and some "satellite markets": in this situation price discovery happens on the main market and satellite markets will use information generated by it, this brings to having a cream skimming mechanism, in which orders on instruments that have a greater liquidity and come from uninformed players, which are easier to execute, will be enacted on satellite markets, while orders from informed market players will be attracted on the main market[53]. This can cause negative effects the most relevant of which is in that traders will have to defend themselves, since they will face more easily a problem of informative asymmetry[54], and to do so they will have a greater spread between sell and buy prices in their orders[55]. This spread growth implicates a decrease in market's liquidity, and so to a weaker market.

The information required to be public is related with the price of the financial instrument involved: this reflects the view of Hayek who stated that the most relevant information in the market is the price itself, since it sums up a range of metainformation. These metainformation, so the elements which concur in determining the price, and in part the value, of the instrument in the market, are not imposed to be made public by MiFID, since it would lead to a too onerous costs growth for trading venues and also for firms. Price discovery, according to literature, is a fundamental element for the efficiency of the market since it is the result of the interactions between the most part of information available, and it also improves liquidity of the market: the more order flow-related information is available, the easier will be for price setters to assess their position by protecting themselves against losses to

[50] Directive 2004/39/EC, art. 27, par. 1
[51] Directive 2004/397EC, art. 29, par. 1
[52] Directive 2004/39/EC, art. 29, par. 1 and art. 44, par. 1
[53] M. ANOLLI, B. BIANCHI, M. VENTURINO, "EVOLUZIONE DELLA NORMATIVA COMUNITARIA SUI MERCATI E LE NUOVE REGOLE CONTABILI", Interventi tenuti nell'ambito del Seminario su "Banche e mercati italiani nella prospettiva internazionale" S. Marco - Perugia, 2004, pag. 19
[54] This problem derives from the concentration of informed players on the main market, meaning that there will be more subjects having a great amount of information undisclosed to the market, and so hardly obtainable by other players.
[55] See note n°52

insiders and their spreads can be narrower[56]. The same literature asserts that order driven markets[57] have a greater degree of transparency than quote driven[58] ones and this depends on the market microstructure[59] so by the mechanism of price formation inherent to the market itself. Starting from here, an imposition of transparency requirements to quote driven markets, can alter their microstructure, making them closer to order driven ones. This has happened with systematic internalisers in MiFID: to avoid a too opaque structure of this kind of venue, pre trade transparency requirements have been imposed, and this has made possible to be closer to the level playing field sought by the discipline. In this view is also very relevant the fact that the Directive 2004/39/EC imposes to venues to make information available "on reasonable commercial terms": having the possibility to obtain information only at high costs would have hampered the competition inside the market, by giving to economically stronger players a significant informational advantage, namely the one to be able to accede to information that would not have been available to "weaker" players due to access costs. This point, in our opinion, can be seen by a twofold perspective: we can say that it is a provision improving fairness in the market, improving so competition inside the market itself, competition between trading venues is also influenced by pre trade transparency provisions, if, as said, imposing this kind of measures to quote driven markets, such as internalisers, makes them closer to order driven markets, such as MTFs and regulated markets, the competition between them is enhanced too since they cannot give to informed market operators the guarantee of a market much more opaque than an order driven is.

Post trade transparency is, instead, used to verify the execution quality of transactions on shares admitted to trading on regulated markets. All the disciplined trading venues, internalisers, MTFs and regulate markets, have the same post trade disclosure obligations, namely to make public price, size and moment of execution of every operation[60], internalisers can, differently from other venues, operate anonymously, a possibility which the lawmaker gave to them in order to protect transparency of the market, without imposing to internalisers to expose their risk positions[61]. To benefit from this advantage, internalisers have to publish on a three-month basis every negotiation made as internalisers: in this way, there is still the possibility to evaluate the execution policy of the firm. This

[56] G. FERRARINI, Market transparency and best execution: bond trading under MiFID, V.A. Perspectives in company law and financial regulation, Cambridge University Press, 2009, pag. 479

[57] Markets in which the price formation is made through the encounter of proposals from buy and sell sides

[58] Markets in which the price is made by market makers, subjects which propose two prices for the same instrument, one at which they are disposed to buy it and one, normally higher, at which it is disposed to sell

[59] G. FERRARINI, European regulation of Stock Exchanges: new Perspectives, Common Market Law Review, n° 36, 1999, pag. 580.

[60] The regulation enacted in the second level of the Lamfalussy procedure which lead to the MiFID system imposes also to make public other more specific information, still without differentiating between trading venues.

[61] A. VERNA, La trasparenza post trading, in L. ZITIELLO, MIFID: La nuova disciplina dei mercati, servizi e strumenti finanziari, Itaedizioni, Torino, 2007, pag. 347 and following

publication must contain only cumulative data: the number of concluded transactions, the total number of negotiated shares, and lowest, highest and average prices of shares' exchange. Regarding the access to this information, the Regulation requires that the mean of publication chosen to accomplish post trade transparency obligations complies with three conditions: it must guarantee reliability of the published data, it has to verify them continuously and to be able to find and correct errors in them[62]. This is necessary since post trading transparency, as said, is strictly related with checking the efficiency of the system, meaning that it is the principal way to verify firm's execution policies and, so to be sure that they comply with obligations (e.g. the best execution one) created to improve client protection.

Until now, we have analyzed the main traits of the MiFID system: we have examined client protection measures and transparency ones, all tended to create a healthy competition between trading venues in attracting investment. However, there still are spaces left to Member States' discipline, spaces in which States can join the so called regulatory competition, namely to produce a normative environment in which firms can see advantages, in order to attract investment in their economic system.

3 Regulatory competition in the financial sector

As said, the MiFID regime was a set of rules the aim of which was achieving a greater level of harmonization of securities law in the European Union. Harmonization is one of the possible approaches that a community, either federalized or not, can adopt regarding sectors of its legislation or, more widely, areas of its regulatory environment.

Another approach, particularly important in business law, and presenting particular problems in financial law, is the one guaranteeing to States the possibility to regulate the same issue differently and independently one from another, this would mean giving to firms "free choice" of the legislative regime that will govern themselves. This means that, given the presence of differences between legal regimes of States which are part of the community, in our case of the Union, a firm can choose the one that best suits its needs and serves its interests[63].

[62] A. VERNA, La trasparenza post trading, in L. ZITIELLO, MIFID: La nuova disciplina dei mercati, servizi e strumenti finanziari, Itaedizioni, Torino, 2007, pag. 355

[63] In the E.U., this freedom of choice was granted by three pronounces of the European Court of Justice that overcame the so called "real seat theory" (Realsitztheorie): Centros, Uberseering and Inspire Art. Through them, freedom of choice was granted to firms across the Union as for their State of incorporation, allowing them to act outside it and even to only make business in other States. This brought more relevance to the issue of regulatory competition across the Union, meaning that States started more intensely to compete one with each other to shape a legal environment which was attracting to firms.

3.1 What is regulatory competition?

The European legal environment allows for the existence of a “market of rules”: Member States, although being obliged to follow and to enforce a common set of rules established by the Union, maintain an high degree of sovereignty, meaning that they can regulate some issues according to their needs, interests, ideals; when this happens in the field of corporate, securities, and more in general business and business related[64] law, firms will be able to choice what is the most fitting “rule supplier” for their interests and will adopt its legal set to govern their affairs. This is the concept of “market of rules” that we will use to explain regulatory competition: a situation which is generated whenever States can act as “rule suppliers” and adapt their offer to the “demand of rules”, to what firms look for in regulation. This process of adaptation is what we call regulatory competition: a race between States to attract companies through providing attractive rules. Regulatory competition is an important concept both in corporate and in securities law; according to some literature[65] the conclusions which can be made about its functioning in the first of these two branches can be extended, with some adaptation, to the second, this is what we will try to do to understand what is the situation of European regulatory competition in financial services before Mifid II, and in the second chapter of this work we will extend our investigation to the new system.

3.2 Why is regulatory competition an important issue to face for the European financial regulation?

In the whole EU, financial regulation is an open field of regulatory competition: the freedom of providing trading services in the whole Union, independently from the State in which the firm has been authorized, is something to be considered together with an important consequence that it has on securities regulation. The point here is that, in securities regulation, the choice of applicable law can be managed more elastically than in other sectors: firms can make, indeed, two choices, one relating the legal system in which they want to obtain the authorization to operate on markets, the second regarding the State in which they will operate[66]. This implies that firms’ internal affairs, or at least some of them, can be regulated by a legal system which is not the one governing their external operations. Being capital markets and securities of great importance in the modern economic system,

[64] For example in labour or tax law.
[65] L. ENRIQUES, M. GELTER, How the old world encountered the new one: regulatory competition and cooperation in European Corporate and Bankruptcy law, Discussion Paper n°19, Harvard Law school, 2008, pag. 7
[66] L. ENRIQUES, M. GELTER, How the old world encountered the new one: regulatory competition and cooperation in European Corporate and Bankruptcy law, Discussion Paper n°19, Harvard Law school, 2008, pag 11

we can see that State will obviously try to attract investment firms to their local capital markets, so improving the bulk of the market itself and increasing the movements of capital on it.

Securities regulation also involves heavy externalities, meaning a range of consequences affecting third parties (and not only management and shareholders) such as clients of the investment firm, or, more generally, since the financial system is interconnected worldwide, the economy as a whole. This last problem is particularly relevant in the European Union, since this institution is trying to achieve an high level of integration of its capital markets.

Moreover, securities regulation has some distinctive features that make it an area in which regulatory competition plays an important role: lots available arbitrage opportunities, with high incentives for arbitrating; an almost immediate impact of regulation changes on profits or losses of the involved companies; and multiple regulators which are pressed by firms and strictly involved in the competition are the most important ones[67].

The high amount of arbitrage opportunities is a character that derives from the fact that providing financial services is not a material business: it does not involve material constraints, such as, say, a factory or machines needed for production, which have to be moved together with the business itself; only money and competences may have to be taken in different jurisdictions to profit from the arbitrage. This is the reason because of it is rather trading itself that is moved abroad than firms performing it: for financial institutions it is sufficient to outsource trading operations to a foreign affiliate, and more precisely to the one which is settled in a country which regulation is more close to what are the interests of the firm related to the specific operation moved abroad[68]. This point is important even when we consider the outcomes of the regulatory competition: a probable result would be a “specialization of States”[69], which, as regulators, and so as “rule suppliers”, will offer different legal instruments which can fit different purposes.

The second point to be underlined is related to the “demand side” of the market: being the financial industry a sector in which the impact of regulation on profits and losses shows itself in a short time, the assessment of it by firms is very easy and becomes an immediate incentive, or disincentive, to conduct business in a jurisdiction rather than in another; furthermore, stricter regulation normally causes a detriment of profits, meaning that firms will usually move towards laxer legal environments. About the demand side, it is important to consider also the fact that not only the basic resources used in this industry, money and competences, are easy to transfer abroad, but also that financial products are very similar worldwide, meaning that, to have an advantage, firms will rely on “financial

[67]W. G. RINGE, Regulatory Competition in Global Financial Markets – the Case for a Special Resolution Regime Oxford university legal paper research series, Paper No 49/2015, pag. 15

[68] Ibid. pag. 17

[69] Ibid. pag. 14

engineering" to shape their products as required by the market's demand, and this usually brings to a constant increase of complexity and innovation of the product itself. These two features of the product, the fact that it relies on movable resources and its constant changes, entail that firms will be able to adapt the instruments that they offer not only to the product demand they face, but also to the rules that will govern their action, and this means that they will be able to gain from regulatory arbitrage the highest benefits possible, by choosing the regulatory environment that best fits their interests and adapting their products to the environment itself. The problem here relies mostly in the involved externalities, so in the reflection that this process has on third parties, and in particular on clients and on the frail structure of the system, rather than on shareholders and managers of financial institutions.

The last important element that makes regulatory competition crucial for securities regulation is the pressure felt by regulators in competing with each other: the two points we made above, indeed, create a situation in which being able to compete is necessary to avoid migration of firms to other countries or markets. There are many regulators in the financial sector and some of them are private entities, such as stock exchanges or multilateral trading facilities or systematic internalisers, which have regulatory power on the market they manage. After MiFID definitely opened the competition between trading venues in the whole Union, by eliminating the possibility to concentrate trading on regulated markets, the existence of private regulators has become a very important element to analyze regulatory competition in the sector. The point here is that, when regulation is made by States or by supranational entities, there is more attention to the externality problem: third parties are less considered by private regulators than by public ones, since these still seek their interest above the social one. To understand why this happens, we can apply a reasoning that could be made when considering regulatory competition between States: major financial jurisdictions have more interest in maintaining financial stability and controlling systemic risk than smaller ones, since, in case of crisis or negative shocks, they would have much more to lose; in other words, financial stability can be considered as a public good with a high risk of free riding[70]. This is because the system is very interconnected and, if major financial jurisdictions are more likely to try containing the risk of a major failure in it, since they would face heavy consequences also on the real economy, smaller ones are more likely to offer "financial casinos"[71], meaning environments with a soft regulation to attract investors. In our opinion, the same could be said for private regulators: the "tragedy of commons", so the risk of a major failure in the financial system which would lead to a crisis of big proportions, that could happen as a consequence of a too lax regulation would hit them, but not as hard as it would

[70] J. COFFEE, Extraterritorial Financial Regulation: Why E.T. Can't Come Home, Cornell Law review, volume 99, issue 6, 2014, pag. 20
[71] ibid. pag. 5

strike on economies. We are talking about the difference of the failing of a private company, such as, say, an MTF, and a crisis which would spread in the whole financial system because of interconnections between firms which could result also in a domino effect. So, for who runs the private regulator, the risk of failure could be greatly repaid by profits that can be made through attracting transactions on his market, but the real consequences of this failure could potentially hamper the economy of the whole State in which the regulator conducts its business and from there also have reflections on other economies and so on, infecting the system globally. Obviously, this is the worst-case scenario, but it still has to be taken into account when examining the role of regulatory competition in financial and securities law.

3.3 Race to the top and Race to the bottom: possible configurations of regulatory competition

Given this starting point, we have now to understand what regulatory competition involves, practically, in terms of regulators behavior.

Scholars are divided between those who advocates for considering regulatory competition a dangerous phenomenon and who thinks it as a mechanism improving the quality of lawmaking. The first school of thought calls for the risk of regulators running a “Race-to-the-bottom”: being normally managers the ones deciding on where the company would conduct its business, to attract firms in a jurisdiction the easiest way would be creating a legal environment attractive for the management. The problem here would be that these rules must be created to meet management’s interests, which often are divergent from the ones of the company, in the sense that are not aimed to maximize shareholders’ value, and that only managers, and not firms, benefit from them: there would be value transfers from the company to managers, which would create frail points in the system and place the company at risk[72].

The second conception, supports, instead the thesis that if managers do not seek for maximizing rules, they will be punished both by market mechanisms and by the shareholders themselves which would substitute them; this means that regulators, in order to attract firms, will have to shape their rules to fit the scope of maximizing shareholders’ value, so having positive effects on the firm as a whole and making them more solid. Regulatory competition would so result in a call for the more efficient legal system and be conducted as a “Race-to-the-top” by regulators, resulting in positive reflections on the economy[73].

[72] L.A. BEBCHUK, Federalism and the corporation: the desirable limits to state competition in corporate law, Harvard Law Review, Vol. 105, No. 7, 1992, pag. 25
[73] Ibid.

These two poles constitute the most relevant debate about regulatory competition. The stance that we will take in this debate is, anyway, that made by Bebchuk[74]: we cannot define regulatory competition as a race to the top or to the bottom speaking in absolute terms; rather, we must admit that regulatory competition can be functional to enhance the efficiency of certain legal issues and that, contemporarily, it can cause a detriment to legislation in other areas. In his analysis, Bebchuck explains how the whole set of brakes to the occurrence of the race to the bottom theorized by race to the top supporters, and particularly the part of it deriving from market forces, is not strong enough to be functional whenever "highly redistributive issues" are at stake[75]. The effectiveness of the constraints on management's choices of regulation, and particularly of the ones rooted in market forces, is determined by two traits characterizing the matter at stake[76]: the distributive one, which depends on "the size of the potentially involved value transfer from shareholders (or, in the financial sector, even clients) to management"; and the efficiency one, which relates to "the magnitude of the potential effect (of the choice) on the overall company value". The relationship between these two elements describes the significance of the choice to be made: more, it can also make clear to who the issue is important; given that for every issue there will be both the elements, the distributive and the efficiency one, the higher is the fraction of the second that will be covered by the value of the first, the more is likely that the choice will be made following management's interests irrespective of shareholders' (or clients') ones. So we can say that if a relevant part of the overall increase of the company's value deriving from the choice (which is the value of the efficiency element) is covered, and so can be transposed, by the potential transfer of value from the company itself to managers (the value of the distributive element), market forces will not be strong enough to stop managers from considering only their interest when making a choice relating to the rules governing the company or its operations.

Now we can make a point: whenever the regulatory issue on which regulators are competing is highly redistributive, meaning that a relevant fraction of the efficiency element is covered by the value of the distributive one, this competition will be enacted as a race to the bottom to indulge management's opportunism, since managers will very probably seek their advantage instead of benefits for the company; when the issue has a low redistributive value, instead, market forces will be strong enough to pilot managers towards legal environments which are more likely to increase shareholder (or client) value, and so there will be a race to the top among States to meet shareholders' (or clients') interests.

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74 Ibid.

75 L.A. BEBCHUK, Federalism and the corporation: the desirable limits to state competition in corporate law,, Harvard Law Review, Vol. 105, No. 7, 1992, pag. 29

76 Or, better, the result of the choice.

Focusing on the enactment of the race, it can be made through an offensive or a defensive behavior[77]. Regulators can, indeed, choose between two behavioral patterns in facing competition: they can choose to act “offensively” by creating rules aimed to attract firms and investment, which means that regulators provoke arbitrage by changing their legal environment; or they can act “defensively”, meaning that their conduct is a reaction to firms’ arbitrage, and it’s focused on gaining back firms and investment from other regulators that behaved offensively. Offensiveness or defensiveness of the regulatory behavior is independent from the qualification of regulatory competition as a race to the top or to the bottom, but could be very important in steering it towards one of the two directions: whenever a regulator acts offensively, and so changes some elements of its regulation in order to attract firms, the defensive reaction, and so the course of competition, will be determined by the reaction of firms to the occurred changes. If the change causes a migration of firms or, in case of securities and financial law, a migration of transactions towards the environment managed by the regulator which acted offensively, others will imitate it and adapt their environments to changes rewarded by companies through migration; if, on the opposite, the action is not welcomed by the “demand side” of the rule market, other regulators could both maintain their environments untouched or provide for changes opposite to the one made by the first changer, so enacting themselves an offensive strategy. In here, it may seem that the first to change could obtain an advantage only if its move is effectively welcomed by firms: his environment will be the first to attract firms and will be the first to obtain the benefits from the migration, furthermore, it can remain the only one, since, for what we have said in the previous subparagraph, other regulators could be more interested in maintaining financial stability than in attracting firms to avoid the aforementioned tragedy of commons represented by a systemic crisis. Actually, the advantage is obtained also if the changes made are hosted by firms on the long period: the regulator will be the first to know that a certain rule does not work in attracting firms on the long run, since it provides them only short term benefits. This means that, if the regulator has been imitated by others, it has better probabilities to be the first to know that, if another change is not enacted, the migration flow could stop or also be inverted. This is particularly important in financial and securities regulation, since, as said, modifications of the legal environment in these sectors have an impact on profits and losses which is visible and significant in the short term, but that can change on the long run due to innovations in the creation of financial instruments or in the use of new financial technologies. The only scenario in which who changes first do not gain an advantage on other competitors is the one involving rejection of the modification occurred on the short term: if firms are not migrating to, or worse, are migrating from, the

[77] W. G. RINGE, Regulatory Competition in Global Financial Markets – the Case for a Special Resolution Regime Oxford university legal paper research series, Paper No 49/2015, pag. 7

environment created by the first regulator that changes its rules, this changer will be surpassed by others which have enacted a rulemaking more attractive for firms; even if it reacts fast enough not to lose business, foreign firms will already be attracted by other and more favorable environments, so it will hardly gain from a change in regulation which is not attractive in the short term. The problem of enacting a defensive behavior in regulatory competition is indeed in not having this "first mover advantage"[78] meaning the possibility of determining the course of the competition and its direction by being the first that succeeds in trying to captivate firms toward the governed regulatory environment.

Another problem lies in the fact that, normally, regulators are aware of the fact that the first mover advantage can only be achieved if the adopted regulation can attract firms on the short term, meaning that, anyway, the long run is not their main concern, since they can take countermeasures to firms' rejection before other regulators which imitated the first changer. This may seem a radical statement, given the fast circulation of information in our times, but we have to deal also with the fact that the regulatory process takes time, even when enacted by privates, since it has still to try to assess its outcomes, meaning that no decision can be taken immediately and that the first to act is the one who has more time to choose its course of action; so competitors will have to wait even a little amount of time before enacting their defensive strategy, which can be fundamental, if well exploited, for the first mover to adapt its environment in order to avoid firms (or transactions) from moving in other markets. This attention for the short run rather than for the long one could be one of the main traits of free riding in financial regulation: the more contained is the potential damage for the regulator, if compared with the potential gains, the more is probable that it will enact a rulemaking which can attract firms on the short term without caring of what happens in the long one. It is important to say that this could occur both in case of a race to the top or to the bottom: in both cases, short term benefits will be more likely to be sought than long term ones. The difference between the two scenarios is in the fact that efficiency can be only evaluated on the long run, since if in the short term a firm increases its value, this does not mean that it will stay stable; so rules that are management friendly or which involves significant externalities could also be adopted as a sort of "short term placebo" in the sense that they are to generate almost immediately value for firms, if chosen, but could hamper the firm and the system itself on the long run. So, actually, the race on the short term can be said to be a race to the bottom, since what happens in the long run is not taken into account. We said that this short term race could happen to be also a race to the top, but this is more unlikely to happen: it is true that a short term value increasing rule could also maintain its effects on the long run, or even amplifying

[78] W. G. RINGE, Regulatory Competition in Global Financial Markets – the Case for a Special Resolution Regime Oxford university legal paper research series, Paper No 49/2015, pag. 42

them, but is also true that are laxer rules the ones increasing profits for the company[79] and that profits are the element determining the company's survival or extinction in the market[80], meaning that they are normally the main concern of managers, and so one of the most important elements to consider when choosing the legal environment in which conducting business. Taking as example the financial sector, regulators could make choices that, in the short term increase profits for firms, through allowing, say, a particularly risky kind of transaction without obliging the firms to provide sufficient disclosure about it. This would mean that, on the short run, firms could convince clients to invest in the operation, without providing them sufficient information to evaluate it, and then transferring the risk totally on the client they money of whom is invested, but still obtaining profits through commissions imposed to client. This is also a case showing the high possibility of having externalities reflecting on third parties in an undesirable way: one of the aim of financial regulation should, indeed, be protecting uninformed players from damages generated by the informational asymmetry which is typical of this kind of market[81]. This kind of externality is neither the more dangerous: there could be situations in which the looseness of the regulatory environment could lead to a speculative bubble which could explode posing the whole system in danger as happened with the 2007 crisis.

The assertion of Bebchuck, according to which regulatory competition does not generate positive results when faced with highly redistributive issues is so particularly valid for the financial sector: the process of risk transposition now described, by which firms can avoid risk and put it only on clients, and the mechanism of financial casinos through which regulators are awarded when asking from laxer requirements for firms to act in their markets through firms and transactions migration is indeed a radiant example of the validity of the thesis of Bebchuck. Moreover, it can also be said that there even is at least an issue relating to which regulatory competition could have positive effects in the financial sector: it stimulates innovation. From the "supply side" of the market of rules, since regulators could use the first mover advantage to create a best practice standard to be adopted by other competitors, particularly if they are managing a major market; and from the "demand side" it incentives firms to create new financial instruments.

3.3.1 Goldplating in the MiFID system

[79] W. G. RINGE, Regulatory Competition in Global Financial Markets – the Case for a Special Resolution Regime Oxford university legal paper research series, Paper No 49/2015

[80] A. ALCHIAN, Uncertainty, Evolution, and Economic Theory, in The Journal of Political Economy, Vol. 58, No. 3. (Jun., 1950), pp. 211-221

[81] W. G. RINGE, Regulatory Competition in Global Financial Markets – the Case for a Special Resolution Regime Oxford university legal paper research series, Paper No 49/2015, p. 20

The practice of goldplating, namely the imposition of stricter rules than the ones required by European legislative acts, is allowed by the lawmaker in the second level Directive of the MiFID system, the 2006/73/EC. This is an important element of the system, since it expressly allows States to use the first mover advantage we have talked about, in a positive way: to face issues relating to investor protection or market integrity which are not sufficiently taken on by European rules. This means that it could be used to create a stricter regime which could be necessary due to the particular characteristics of a national market and that it could be the starting point of a race to the top in protecting investors and market integrity.

Art. 4 of this act states "Member States may retain or impose requirements additional to those in this Directive only in those exceptional cases where such requirements are objectively justified and proportionate so as to address specific risks to investor protection or to market integrity that are not adequately addressed by this Directive"[82]. This possibility is conditioned on two alternative requirements: the addressed risk has to be of particular importance for the market structure of the Member State; or the additional requirements have to be imposed about issues or risks which emerge or become evident after the date of application of the Directive and are not otherwise regulated by community measures. These conditions are somewhat vague and not really constricting: being these two conditions alternative, States could rely on the first one even to elude the second. This is one of the reasons because of which the same article poses a third condition on the possibility for States to goldplate their legal systems: the additional requirements may not interfere with the freedoms of providing services and of establishment enshrined in artt. 31 and 32 of the MiFID directive[83]. This looks as a statement of principle which, nevertheless, puts the unity of the Union's financial market above market integrity of single Member States: by stating that the freedoms provided for in artt. 31 and 32 exclude the possibility for States to goldplate, the European lawmaker affirms that the aim of connecting the Union's markets is more important even than the protection of single markets themselves. The problem here is that this point, although creating an ideological premise for the connection of markets, and so for the creation of a capital markets union, from on hand it seems to amplify the risk of a systemic crisis, through the mechanism of free riding in exploiting financial stability that we have explained before. States will not be able to act defensively whenever this defensive act would interfere with the aforementioned freedoms. This particularly happens whenever the menace is external, in the sense that derives from something that the State cannot control as, say, too lax authorization requirements asked for another State. On the other hand, the real importance of this article lies in the fact that it allows States to protect themselves in every other case: whenever the

[82] Art. 4, p. 1, Dir. 2006/73/EC
[83] ibid, c. 2

threat to their market structure and integrity is internal, since it derives from, say, a risky practice which is enacted in their markets, they can adapt their regulation in order to prohibit it. We must not forget that the real aim of the Union is to avoid overregulation and harmonize the legislation, in order to have a simpler set of rules to be managed by investors and firms. For this reason, the provision laid down in art. 4 of Directive 2006/73/EC imposes on States an obligation to notify the Commission the new (or retained) requirements adopted following the first paragraph of the article, together with a justification of this additional imposition. These notifications will then be published by the Commission on its website and communicated to other Member States[84]. The fact that the terms for this notification are at least one month before the requirement enters into force, for new requirements (or before the date of transposition of the Directive for retained ones), reduces the first mover advantage of the State, since the time lapse we have mentioned before is shortened and so other States can adapt relatively fast. This, anyway, may be a positive point: being the requirements we are talking about "additional" to the one already provided for in European legislation, their imposition could effectively start a race between States, given that their laws are still not completely harmonized, which would be a race to the top, since it would be based on rules protecting investors and market integrity.

3.4 Alternatives to regulatory competition

Regulatory competition may so have different outcomes: it could be a race to the top or a race to the bottom. We have said that it is a functional phenomenon for certain issues, but that it can pose at risk the system if it develops negatively in the financial sector. We have now to understand what are the other possibilities in regulating of this sector.

The two main alternatives to regulatory competition are harmonization and extraterritorial regulation. Given that they could coexist, we will try to understand which one could be better and if they can replace regulatory competition with positive results.

Harmonization or unification of financial law is the first response that come to mind to avoid risks deriving from regulatory competition. Having similar legal standards is indeed a condition which lowers the possibilities of regulatory arbitrage and, consequently, the possibility to enact regulatory competition[85]. European regulation of financial services can be seen as a system trying to contain regulatory competition in the Union[86]: it creates standards which are shared by all Member States, guaranteeing at least a core of common guarantees both for investors and for market's integrity.

[84] Art. 4, c. 3, dir. 2006/73/EC

[85] W. G. RINGE, Regulatory Competition in Global Financial Markets – the Case for a Special Resolution Regime Oxford university legal paper research series, Paper No 49/2015, pag. 31

[86] J. FAULL, Some legal challenges of financial regulation in the EU, Ninth Slynn Foundation Lecture, 2011, pag. 11

Harmonization is meant to reduce the risk of a systemic crisis, but it is still far from an heavy unification of rules: actually in the Union currently coexist both an harmonizing tendency and the occurrence of regulatory competition. We think that this is not a negative condition for the system: we agree with some scholars[87] that consider harmonization as not only a method to contain risks, but also an impediment to exploit its benefits: normative innovation and mutual learning deriving from the process of offense and defense in competitive behavior would be significantly reduced, if not blocked, if an heavy harmonization process would be enacted. An evidence can be found in banking regulation: the I and II Basel Accords had harmonized capital standards for banks, but this had not brought improvements in the stability of the banking system, nor in the efficiency of intermediation; the only positive outcomes of these accords came from imposed disclosure requirements, so from an element supporting competition[88]. Anyway the European lawmaker aims to a Capital Markets Union, meaning to an heavy harmonization, which could result in blocking, as said, benefits coming from competition[89], but which could effectively stop some risks deriving from regulatory competition in this sector.

Another kind of regulatory behavior that can be enacted is giving extraterritorial reach to financial regulation. According to Coffee[90], financial regulation has become increasingly extraterritorial for four main reasons, which are roughly the same that qualify regulatory competition in the sector as dangerous: first, if this regulation had not the character of extraterritoriality, it would be very difficult to manage risks coming from financial institutions, since, as said before, it is very easy for them to move their operations in other contexts in such a way that allows them to exclude non favorable regulation; secondly, it is not possible to manage systemic risk if only domestic firms are regulated, but also their counterparties have to be reached: this relates to the fact that financial institutions are "too interconnected to fail", meaning that there could always be a domino effect spreading a crisis in the whole system; thirdly, some States, as already said, would free ride systemic risk by offering financial casinos, meaning very lax legal environments, in which a crisis is more likely to start, since they would not bear the majority of damages in case of a system's failure; lastly, given that soft law standards are often not adequate, extraterritorial authority of major financial nations could be a way to pose pressure on institutions promoting these standards in such a way to make them act more

[87] J. GRIFFITH, Substituted Compliance and Systemic Risk: How to Make a Global Market in Derivatives Regulation, Minn. L. Rev. 1291, 2014, but see also W. G. RINGE, Regulatory Competition in Global Financial Markets – the Case for a Special Resolution Regime, Oxford university legal paper research series, Paper No 49/2015
[88] The study was a long term one, considering years from 1998 to 2006. And see J. R. BARTH, G. CAPRIO, Jr., R. LEVINE, Rethinking banking regulation: till angels govern, Cambridge University Press, 2006
[89] We will better analyse the issue of the capital markets union and its consequences in the next chapter.
[90] J. COFFEE, Extraterritorial Financial Regulation: Why E.T. Can't Come Home, Cornell Law review, volume 99, issue 6, 2014

rapidly even if a broad consensus on the measure to take is not reached. The discussion for the enactment of extraterritorial reach of the regulation is an issue that is being recently faced by the European legal system: EMIR regulation, indeed, provides for its own applicability also to trading between non European entities, whenever the operation could have a significant impact on the Union. (Applying this reasoning to legal system of the Member States, in the sense that they could regulate the same kind of trading, but when performed between European entities, in order to receive more easily international consensus, would let them be able to better protect themselves at least from risks deriving from free riding of other States of the Union). Extraterritorial authority is a good way to prevent damages coming from regulatory competition, without cutting off its benefits: it does not exclude the possibility for States to run one against another, but it still contains damages by giving to the potentially injured entity the possibility to prevent them even if they are caused by subjects outside its boundaries.

4 The role of ESMA in the European financial system

We have analyzed both the MiFID system, as a crucial step towards the creation of a capital markets Union, and the importance of the regulatory competition phenomenon for European financial markets regulation. We have seen how the aim of the European lawmaker is to harmonize Member States' legislation in the area to avoid risks deriving from the occurrence of regulatory competition as a race to the bottom. Now we have to examine the role of a major player in European financial regulation, the European Securities and Markets Authority, in order to complete the brief exam we are conducting of the European financial regulation before MiFID II comes into force.

4.2 A new regulatory and supervisory system as a response to the crisis

The 2008 financial crisis underlined many frail points of the European financial system. Between them, one of major importance was in the weakness of the Union in supervising and regulating the financial sector: although the system of Committees already existed, this worked poorly on the regulatory side and even worse on the supervisory one. In most of the Union, the financial sector is divided in three legal areas: banking, securities and insurance, each of which is posed under the competence of an independent authority with powers of regulation and of supervision. As Wymeersch makes clear[91], national authorities have a great amount of autonomy from the Union,

[91] E. WYMEERSCH, Europe's New Financial Regulatory Bodies, journal of corporate law studies, vol. 11, issue 2, 2011, pag. 1

since they are neither considered accountable for breaches: they act for their States, with almost no concern for the interest of the Union as a whole and with no responsibility towards European institutions. This lead to a system which was not well coordinated and so to great divergences in practices enacted by the authorities, increasing regulatory arbitrage and posing the system at risk. In order to reform these inefficiencies, the de Larosiére Report, which contained proposals of response to the crisis, advocated for the creation of European System of Financial Supervision (hereinafter ESFS), in order to prevent systemic crisis and individuate possible risk sources before they could harm the European financial system. This system became operative in 2011 and is made of four parts: the three European Supervisory agencies (hereinafter ESAs) and the European Systemic Risk Board (hereinafter ESRB). The ESAs follow the traditional division of the financial sector adopted in most of the Member States: they are, indeed, the European Banking Authority; the European Insurance and Occupational Pensions Authority; the European Securities and Markets Authority. They are all invested with supervisory powers and with regulatory powers, and also work very similarly, since most of the parliamentary discussion was made to adopt the wording of Regulation 1093/2010, instituting the EBA, while the 1094 and 1095, respectively creating EIOPA and ESMA, resulted from the application of the same wording[92]. When discussing about these new authorities, some also proposed not to respect the traditional division and to confer all the competences regarding the financial system to a sole "super regulator"; this solution was not welcomed and, instead, it has been chosen to create mechanisms of cooperation between the ESAs: two bodies were created to enact this vision, the Joint Committee and the Board of Appeal. The first deals with matters assigned to its competence by the European rules[93]due to their cross sectoral character; the Board is the body deciding on appeals against ESAs' decisions addressed to national authorities or market players and more precisely "any person which has individual concern in the decision may bring appeal, even if the decision addresses another subject"[94].

The ERSB is an institution meant to identify trends and menaces which evolve in the financial market (and in the system as a whole) and could hamper its stability or bring a systemic crisis[95]: it should warn ESAs and propose methods to prevent crisis[96]

In our analysis, we will concentrate on the Esma, as it is the most relevant for capital markets: it has strong powers, which include the possibility to interfere with the competences given to national

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[92] E. WYMEERSCH, Europe's New Financial Regulatory Bodies, journal of corporate law studies, vol. 11, issue 2, 2011, pag. 5

[93] Such as economic analysis, anti money laundering, accounting and auditing, financial conglomerates, retail investment products. The committee is also supposed to play a major role in the creation of a common supervisory culture, one of the most important objectives of the reform.

[94] E. WYMEERSCH, ibid.

[95] D. KULL, Legal implications of establishing ESMA, 2011, pag. 7

[96] We will better discuss the role of the ERSB in the next subparagraphs.

authorities in case they breach Union law by directly addressing market players, and it should be the most important supervisory body for capital markets in the European system.

4.3 ESMA: objectives and main traits of Regulation 1095/2010

Esma has been instituted with the Regulation 1095/2010, which specifies its composition, objectives, powers, and some of the procedures it has to follow to enact them.

Art. 1, par. 2 of the Regulation contains the limits in which the authority can take action: it has the powers conferred by the Regulation and acts within the scope of the Directive listed in the paragraph[97]; this list is anyway not close, since the paragraph also includes in it "all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers power to the Authority"[98]. The same article also contains a list of the authority's objectives: they are, obviously, linked to the stability and effectiveness of the financial system, for the Union economy, its citizens and businesses. More specifically, these are: improving the functioning of the internal market, with particular regard to the maintenance of an adequate level of supervision and quality of regulation; to ensure transparency, integrity, efficiency, and orderly functioning of markets; the strengthening of international supervisory coordination; prevention of regulatory arbitrage and promotion of equal conditions of competition; consumer protection[99]. Furthermore, the Regulation states that the Authority has to monitor systemic risk threats posed by market participants, specially when the failure of those could hinder system's integrity, in financial markets or in the real economy. The ESMA acts independently and in the interest of the Union alone.

Art. 8 of the Regulation lists ESMA's tasks and powers[100]; the most important tasks to be achieved by the authority are: contributing the diffusion of high-quality common regulatory and supervisory standards; taking part in the consistent application of legally binding EU acts[101]; and face all tasks previously assigned to CESR. The same article entrusts ESMA with the necessary powers to fulfil its duties, powers that can be divided in supervisory and quasi-rulemaking powers[102].

[97] Investment Compensation Scheme Directive, Settlement Finality Directive, Original Prospectus Directive, Financial Collateral Arrangements Directive, Market Abuse Directive, Revised Prospectus Directive, Markets in Financial Instruments Directive, Transparency Directive, Recast UCITS Directive, Capital Adequacy Directive, any future legislation in the area of Alternative Investment Fund Managers (AIFM), Regulation on Credit Rating Agencies, Financial Conglomerates Directive, Third Money Laundering Directive and Distance Marketing Directive; see Reg. EU 1095/2010, art. 1, par. 2.
[98] Reg. EU 1095/2010, art. 1 par. 2
[99] Reg, EU 1095/2010, art. 1, par. 5
[100] Reg. EU 1095/2010, art. 8
[101] See also art. 17, Reg. 1095/2010, which will be discussed below.
[102] D. KULL, Legal implications of establishing ESMA, 2011, pag. 10

4.4 ESMA’s quasi rulemaking powers

Starting with these second ones, we have to say that in the literature[103] we can find broad agreement on the point that one of the weaknesses of the pre crisis system was in the fact that on level 3 of the Lamfalussy procedure there was no possibility for CESR to create rules which could be enforced in the Union. The implementation of level 1 and level 2 normative, indeed, is also made through technical standards, to be proposed by technical organs (such as the ESAs are), which are intended to be part of a “common European rulebook” together with legislative acts. If there is no enforcement possibility, the strength of the third level regulators would be reduced indeed: for this, ESMA has been entrusted with the power to make proposals of binding technical standards: art. 10 and 15 of the Regulation, respectively named “Regulatory technical standards” and “Implementing technical standards”, give to ESMA the power to develop such acts and to submit them to the Commission for approval. As for regulatory technical standards, the Authority may develop their drafts whenever the Parliament and the Council delegate to the Commission the power to adopt them, the drafts are submitted to this last institution for endorsement and may not imply strategic decisions nor policy choices: their content must stay into the limits of the legislative acts basing the standards[104]. An interesting element is in the fact that the Authority conducts open public consultations when developing the drafts and has to make a cost/benefit analysis of the standards’ impact, unless it is disproportionate to do so because of the particular urgency of the matter or of the scope of the act. A new actor here comes into the regulation stage: the Regulation provides for the institution of a “Securities and Markets Stakeholder Group”, to be consulted in the case of drafting of standards and guidelines, and, more generally, in areas relevant for to the tasks of the Authority[105]. This group is composed by market players acting in the Union’s markets, their employees’ representatives, consumers’ and users of financial services representatives, representatives of SMEs. The European lawmaker institutionalizes the lobbying activity in the financial sector, and tries to contain in this way its negative reflections: this is one of the reasons, other than their particular competence and experience, because of at least five members, out of thirty, of the Group have to be independent top ranking academics. The Group has obviously to be provided with all the relevant information, subject to professional secrecy, by the Authority.

[103] See D. KULL, Legal implications of establishing ESMA, 2011, but also E. WYMEERSCH, Europe’s New Financial Regulatory Bodies, Journal of Corporate Law Studies, vol. 11, issue 2, 2011 and others.
[104] Reg. 1095/2010, art. 10
[105] Reg. 1095/2010, art. 37

Implementing technical standards are disciplined by art. 15 of the Regulation. They can be developed by the authority by means of art. 291 TFEU[106], in areas covered by the directives listed in art. 1 of the Regulation. As for the regulatory standards, they have to be technical and not to imply strategic or policy decisions: they are limited to defining the conditions of application of those acts and have to be submitted to the Commission for endorsement. Also in this case, a public consultation and a cost/benefit analysis have to be done, at the same conditions that have to be respected under art. 10, and the Stakeholder Group has to be consulted too.

The last element of the rulemaking powers conferred to ESMA to be treated is the power give to this body by art. 16 of the Regulation: elaborating guidelines and recommendations addressed to national authorities or to market players[107]. This power is borderline with the supervisory ones: it is indeed aimed to establishing consistent, efficient and effective supervisory practices, and to ensure the common, uniform and consistent application of Union law. The drafting of these acts has also to be preceded by a public consultation and by a consultation with the Stakeholder Group. Differently from the CESR guidelines[108], the implementation of the ESMA ones follows a "comply or explain" model: art. 16, after stating that the competent authorities and the market players must make every effort in order to comply with the issued guidelines (or recommendations), also affirms that national authorities have to confirm to ESMA whether they comply, intend to comply or won't comply with the issued act and, in this last case, has even to inform the Authority of the reasons basing its decision. Moreover, also market players, if required by the issued act, have to report, in a clear and detailed way, whether they do or do not comply with the act. Lastly, it has to be said that the last paragraph of the article imposes to ESMA to inform the Parliament, the Council and the Commission, in the annual report on the activities of the Authority, of guidelines and recommendation issued, of which national authorities decided not to comply with them, and how the ESMA intends to make these not complying subjects adhere to future recommendations and guidelines.

4.5 ESMA supervisory powers: the case of breach of Union law

[106] Article 291, TFEU: 1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.;2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.; 3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. […].

[107] Reg. 1095/2010, art. 16

[108] See Commission Decision 2001/527/EC, instituting the CESR which neither gives it rulemaking power.

In art. 17 of the Regulation takes root one of the most interesting powers of the Authority, the ones arising in case of breach of Union law.

The article disciplines the case of a national authority not applying with the acts listed in art. 1, par. 2 of the Regulation, or which has applied them in a way seeming to breach Union law, and in particular when it has not been able to ensure that a market player respects the requirements laid down in those acts. The procedure is structured as follows: first of all there is an investigation phase, in which the ESMA, upon request from on or more authorities, from the Parliament, the Commission, the Council, the Stakeholder Group, or on its own initiative, takes information upon the alleged breach, and the national authority has to provide it all the necessary elements considered necessary for the investigation. After this, the ESMA may address to the concerned authority a recommendation containing the what it considers the course of action to be taken to comply with Union law. Where, within a month from this recommendation, the national authority has still not complied with it, the second phase starts: the Commission may issue a formal opinion, both on its own initiative or after receiving communication of the non-compliance by ESMA, which, taking into account the Authority's recommendation, requires the national authority to comply with Union law. If neither this step reaches its scope, and when taking timely action is necessary to maintain or restore neutral conditions of competition in the market or to ensure the orderly functioning and integrity of the system, and if the breached act is directly applicable to market players, ESMA may adopt an individual decision, addressed to a financial market participant, which requires it to take action in order to comply with the requirements laid down by acts listed in art. 1, par. 2, and, to do so, may also impose the cessation of any practice[109].

This is a power of great importance and of great interest for our analysis: it is a case in which has been chosen to give to a supranational regulator the possibility to heavily interfere with the powers and with the competences of the national one, in order to preserve the financial system. The procedure of art. 17 is also an example of how the competition between regulators may also be vertical: the ESMA is posed above the national authorities, but can attract elements of their competence in case of non compliance; we can speak of vertical competition in a different sense from the one we have given to the common one in paragraph 3. This is the case in which an area of regulation is contended between regulators and, whenever the one which is posed below in the hierarchy does not respect the framework posed or guarded by its superior, it looses part of its competence, which is taken by the superior itself in order to achieve the interest of the community of which both are part. This is so a limit posed to the possibility to profit from regulatory arbitrage, and particularly to the possibility to

[109] For a deeper analysis, C. V. GORSTOS, The powers of Esma in case of breach of the Union law: in particular the case of breaching the ne bis in idem principle, National and Kapodistrian University of Athens, 2016

profit from it in particular way: not by posing laxer regulations, which could more easily be individuated and fought, but by enacting laxer supervisory practices, which are something more difficult to spot, but above all, more difficult to eradicate, since remain in the autonomy of national regulators. With art. 17, a limit is posed to this mechanism, ESMA can advocate to itself part of the competence which normally is prerogative of the national authority, and left to regulatory competition, thus eliminating, or reducing, risks of damages to the system.

4.6 ESMA supervisory powers: emergency situations

The Regulation also give ESMA special powers to deal with emergency situations. The potential occurrence of an emergency situation is considered by ESMA or by the ESRB, which issue a confidential recommendation to the Council, together with an assessment of the situation; the Council then determines the existence of an emergency situation and, eventually, informs the Parliament and the Commission. In case of emergency, it adopts a decision addressed to the Authority, which expires in one month if not renewed and the discontinuation of which may be declared anytime[110]. More generally, the Regulation entrusts ESMA with the duty to facilitate and coordinate actions taken by national authorities in case of threats to stability which could compromise the functioning and integrity of the market. For these purposes, the Authority can also adopt individual decisions addressed to national authorities in which it requires them to act in order to satisfy requirement posed by legislation listed in art. 1, par. 2; if the authority involved in the decision does not comply with it, within the time limit imposed in the decision itself, and where the requirements not complied with are directly applicable to market players, the ESMA can again interfere with the competences of the national authority and impose an individual decision upon a market participant, decision which will prevail over any previous measure taken by the national authority on the same matter[111].
We can see how ESMA could be considered a “supervisor of supervisors”: the problem of the accountability of national authorities is so partially resolved in the two provisions of art. 17 and art. 18, in where ESMA acts, as already said as a hierarchical superior in certain areas, namely the ones included in art. 1, par. 2, which are directly applicable to market players.

4.6 ESMA coordination role: the creation of a common supervisory culture and the settlement of cross border disputes

[110] Reg. 1095/2010, art. 18, par. 2
[111] Reg. 1095/2010, art. 18

In order to unify the European capital markets, it is necessary to make practices of supervision the more similar from State to State: the Regulation 1095/2010 considers this issue in stating that ESMA should fulfil a general coordination role between national authorities, particularly in dangerous situations[112]. It should facilitate the exchange of information between authorities and centralize information received by them in order to share it with other authorities to which it could be relevant; it should take action in emergency situations and identify, together with the ESRB situations of potential systemic risk.

Moreover it should try to build a common supervisory culture across the Union[113], in order to ensure that supervisory practices are as shared as possible and that there are uniform procedures and approaches by the different authorities when facing the same issue. Article 29 of the Regulation lists a series of activities which should constitute the minimum core of action to be taken by ESMA in this sense. The Authority should provide opinions on the course of action taken o to be taken by national authorities; contributing to the development of common and high quality standards of supervision; review the application of regulatory and implementing technical standards adopted by the Commission and of the guidelines and recommendations issued by the Authority itself; and establishing sectoral and cross sectoral training programs and facilitating personnel exchanges. Furthermore, the Authority may also develop new practical instruments and tools of convergence in order to promote common supervisory practices and approaches. The lawmaker also gave ESMA the duty to organize periodical peer reviews of the activity of national authorities[114]: these should be based on methods created by the Authority itself which would allow for comparison and evaluation of reviewed authorities. In the Regulation are also identified some fields which could be object of this peer review, ranging from the adequacy of resources and governance arrangements of the authority, and in particular the application of the standards disciplined by art. 10 and art. 15 of the Regulation; to the degree of convergence in applying Union law and supervisory practices and its effectiveness in the enforcement of the provisions implementing Union law itself; and including best practices developed by national authorities, in order to ease their diffusion across the Union.

The Authority has also to stimulate the delegation of tasks and responsibilities between competent authorities provided for in art. 28[115], by identifying delegable issues which result in a reallocation of competences between the authorities, coherently with the consideration of the Union as a unity, and of its markets as one: it is now clear that, given the powers that the Regulation gives to ESMA, each authority is considered similarly to a branch of it, even having a consistent degree of autonomy, this

[112] Reg, 1095/2010, art. 31
[113] Reg. 1095/2010, art. 29
[114] Reg. 1095/2010, art. 30
[115] Reg. 1095/2010, art. 28

view is also consistent with the approach of using extraterritorial financial regulation as a mean of contrast to negative outcomes of regulatory competition. If an authority can delegate tasks to another, this possibility could be used to let the second discipline an operation made on a foreign market which would have effect in its own.

Obviously, if the scheme is so interconnected, disputes may rise between national authorities about procedures or content of actions taken by them. In this case, at request of one or more of the authorities, or by its own initiative, ESMA can intervene by assisting them in seeking an agreement[116]. The Authority sets a time limit for conciliation, taking into account the complexity and the emergency of the matter and acts as a mediator; if this phase does not reach its aim, the Authority may take a decision addressed to the involved national authorities in which it requires them to take a specific action or to abstain from acting. Where the national authority does not comply with this decision, ESMA can interfere with its competences and address directly one or more market players with a decision which would prevail every other one taken by a national authority on the same issue.

5. Conclusion

The system we have analyzed in the previous paragraphs is meant to be a step towards the creation of a capital markets union across the European Union: a unification of its markets in order to strengthen the economy of the community and to better manage the risk of a crisis. The approach taken by MiFID, both toward the "consumers" of financial markets, the clients of investment firms, to be protected from the natural agency problems that rise in the sector, and toward the firms themselves which have to be able to benefit from an environment in which a healthy competition is possible and information is as diffused as possible, is an important starting point to reach the objective. Opening the markets to all European players, both by allowing them to provide services across the whole Union and by eliminating the obligation to concentrate trading on national stock exchanges, enabling competition between trading venues so to enhance the competitive conditions inside each of them, are important developments in European legislation, which may, anyway bring some criticalities to light. These are linked to bad outcomes of regulatory competition, which, specially in the financial sector, could have externalities which are able to pose the system in danger. Allowing the competition to run with no brakes could lead to a systemic crisis deriving from laxity of normative regimes, and particularly from the ones of "free riding countries", namely the ones that would have less to lose in case the systemic risk would concretize in a diffused financial crisis, a very likely scenario in case of failures, since the financial system is very interconnected and contagion

[116] Reg. 1095/2010, art. 19

would spread rapidly across States. In order to avoid or reduce this risk the European lawmaker chooses the way of harmonization, which is coherent with the view of creating a union from European capital markets, but, on the other hand, could impede to the Union to benefit from positive outcomes of regulatory competition, such as stimulating innovation. Another important point of the path leading to the capital markets union has been the creation of ESMA, an agency acting as a European supervisor and regulator, the power of which is strong enough to make it, maybe, the strongest element of connection between the markets, together with the freedom of providing investment services in the whole Union, once authorized in one Member State. ESMA acts as a link between supervisors in the Union and is meant to solve some of the problem which have been underlined by the crisis, from lack of regulatory powers in the CESR, to the absence of a common supervisory culture and uniform practices and approaches in implementing Union law by the national authorities governing financial markets.

In the next chapter, we will analyze the impact of MiFID II on the system, and particularly of some provisions of it which are important elements in creating the union: from the incentives to listing for SMEs to the regulation of financial technologies across the Union, and other features of this directive that will have a major role in shaping the future capital markets union.

Chapter Two

MiFID II and MiFIR: a new discipline for trading venues towards the creation of a Capital Markets Union

Contents: 1. Creating a Capital Markets Union; 2. Levelling the playfield: innovations brought by MiFID II in the regulation of trading venues; 3. Algorithmic trading and high frequency trading in MiFID II; 4. Conclusion

1. Creating a Capital Markets Union

In 2015, the European Commission made a "Green Paper" which had an important topic: "Building a Capital Markets Union". Contemporarily, it held a public consultation on the topic, which was followed by an "Action Plan". In these acts we can find the core of what a capital market union means and what is to be achieved to create it. Before them, in 2014, Directive 2014/65/EU, on markets in financial instruments, from now on MiFID II, was released together with the Regulation 600/2014, on markets in financial instruments, from now on MiFIR. According to the Recital n°7 of the MiFID II and n°3 of MiFIR, the two together will constitute "legal framework" posing conditions on firms and venues to operate and be part of the European capital markets system[117]. What we argue is that many of the provisions which we can find in these two acts are aimed to strengthen the market in the

[117] Recital n°7, Dir. 2014/65/EU; Recital n°3 Reg. 600/2014

sense of being closer to a capital markets union and we will analyze some of them: we will focus on four areas, that we think can be very important in supporting markets' growth and to the creation of a capital markets union. Our work will concentrate on the new regulation of trading venues, on the transparency discipline, on SMEs growth markets and on the regulation of algorithmic and high frequency trading under the new legislation. We think these to be fundamental points in strengthening EU markets and in preparing the field for the birth of a real capital markets union; we can neither forget that the MiFID II system, so MiFID II and MiFIR, are to be in force from January the 3rd and that the creation of a single market for capital should be done by 2019, according to the Commission: even from a "temporal" perspective, it is evident that the MiFID II system is a preparatory step of great relevance in the creation of the capital markets union.

In this paragraph, we will explain what is exactly intended with the term "Capital markets union" and what are the main obstacles to overcome in order to reach this objective; in the following ones, we will examine the aforementioned provisions of MiFID II and MiFIR in order to underline what could be their potential role in strengthening the markets and in stimulating their growth.

1.1 What we mean by "creating a Capital Markets Union"

The Green Paper issued by the Commission in February 2015 closes its foreword with this statement: "The direction we need to take is clear: to build a single market from the bottom up, identifying barriers and knocking them down one by one, creating a sense of momentum helping to spark a growing sense of confidence in investing in Europe's future. The free flow of capital was one of the fundamental principles on which the EU was built. More than fifty years on from the Treaty of Rome, let us seize the opportunity to turn that vision into reality"[118]. According to this, the creation of a Capital Markets Union can be said to be coincident with the elimination of obstacles and barriers impeding a free flow of capital and investment across the Union. In particular, the Commission aims to shift the financing method of European enterprises toward the market of capital rather than maintaining the current state of things in which bank funding is the main source of capital[119]: the main concern is so the one of making investors and savers an important engine for the growth of the European economy.

The most relevant advantages of a market-centered funding system lie in the fact that it allows risk dispersion, by unburdening banks from part of it, since the risk connected to banking activity would be converted in risk of investment; it is a system much more open, transparent and standardized than

[118] European Commission, Green Paper, Building a Capital Markets Union, 18/02/2015, pag. 3
[119] ibid. pag. 1

the banking one, due to its own nature; and allows to a wider possibility of diversification of funding tools, which can be chosen by enterprises according to their particular needs[120].

According to some literature,[121] EU markets are too fragmented and with liquidity pools which are not sufficiently capacious nor enough interconnected to easily produce more funding for enterprises: the union of capital markets would so serve a process of integration of markets that is meant to strengthen liquidity pools and their connections by eliminating barriers to the free flow of investment across the Union, and this would give to the system the resources and the ability to make the shift wished for by the Commission, in order to benefit from advantages deriving from this kind of system. Moreover the CMU is meant to create a sustainable network of capital markets, meaning that they are meant to stimulate growth of jobs and real economy both through this shift in financing EU businesses and by making long term investment more attractive for investors, so to give firms the possibility to rely on market especially for long term resources, which are the ones giving the benefits we have mentioned before.

1.2 Main issues to face in order to achieve the CMU

The Commission sets some basic principles to be respected by the CMU itself to be efficient: it should be aimed to the maximization of the benefits deriving from capital markets to enhance the economy, to create jobs and stimulate growth; it should remove obstacles to cross-border investment within the European Union and contemporarily play an important role in linking Europe with global capital markets; it should be based on a financially stable environment and contribute to the stabilization itself, by spreading risk, so lessening possibilities of concentration and consequently of failures for financial institutions (which as said in the previous chapter are closely interconnected one to another, meaning that there is an high risk of domino effect deriving from their failure); it should be able to guarantee protection to consumers and investors in the market; and it should be attractive to foreign investors so to improve not only the capital flow within the Union, but also towards it[122]. The Commission also set out some objectives to be achieved in order to be able to transform these principles into reality: first of all there is the need to improve access to financing for European enterprises, and particularly for the ones which are of small and medium size, since they constitute the backbone of European economy[123]; secondly, it aims, as already said to create a funding system

[120] See D. VALIANTE, Europe's Untapped Capital market, Final Report of the European Capital Markets Expert Group Chaired by Francesco Papadia, Center for European Policy Studies, 2016
[121] ibid., pag. 171
[122] European Commission, Green Paper, Building a Capital Markets Union, 18/02/2015, pag. 5
[123] Commissione Europea, Le politiche dell'Unione Europea – Imprese, una nuova rivoluzione industriale, 2014

which does not rely only on banks, but which exploits different sources deriving from investors and savers both in the Union and from third countries; finally the Commission wants more effective and efficient markets, as already explained. In the end, by analyzing the feedbacks of the public consultation held with the Green Paper, it has created an "Action Plan" in which some priorities are defined that shape areas in which the Commission will take action to starting to concretize the project of a Capital Markets Union.

The modernization of the prospectus directive, done through a recent regulation, measures to support venture capital and equity finance, encouraging enterprises to use innovative forms of funding (such as crowdfunding), are all legislative means to allow EU businesses to accede to a range of funding possibilities which, if not unexplored, have a great potential[124] which remains unexpressed due to difficulties faced by firms in taking advantage of them or because of their relatively recent birth which could mean that they still have to demonstrate their trustworthiness.

The public consultation held with the Green Paper found out that retail savings, life assurance companies and pension funds may be the turning point to enhance our capital markets, since they can move retail investors and savers capital. In the Union, the main points to deal with are finding measures and policies which can support competition in cross border retail financial services, developing means to diversify the offer of private pensions in the EU through building a stronger market for this kind of service and by obtaining an higher degree of interaction between it and capital markets; eliminating cross border barriers and delivering a European fund passport to overcome the problem of cross border fees[125].

Even if one of the main goals of the CMU is in shifting financing to business from banks to capital markets, this does not mean that banks will completely lose their role. The point is, the bank centered system is too important to be completely overcome. This means that, even if the objective is to let real economy rely more on capital markets, banks will still be the "main source of funding for many businesses alongside capital markets[126]". This means that banks should increase their lending capacity: this could be done through standardized and transparent European securitization, which would also be a good way to improve long term investment; allowing local credit unions to "operate outside the scope of the EU's capital requirement rules for banks" would also be an action to take for

[124] And see K. SIMEONOV, EU capital markets initiatives for better financing SMEs, in Modelling the New Europe, issue 16, 2015, where he says "EU capital markets are underdeveloped. On the other hand, they demonstrate that these capital markets have further potential for future enhancement and deepening in order to serve better the needs of SMEs. Developing capital markets for SMEs will mean also providing further opportunities for investors to invest their funds. Before that, many obstacles and barriers in front of the capital markets shall be successfully tackled".

[125] European Commission, Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Action Plan on Building a Capital Markets Union, 2015, pag. 4 and following

[126] ibid.

the objective, since it would allow these credit unions to be an important element of support for local SMEs in the whole Union. An idea to be explored, instead, would be an assessment of if, and eventually how, EU covered bond legislations could be harmonized, starting from the national regimes which function better, and contemporarily try to understand if covered bonds, or something similar, could become efficient funding tools for SMEs loans.

Lastly, the Commission stated that it is going to definitely tear down cross border barriers obstructing the free flow of investment. According to the Commission, these barriers derive from national legislations, involving insolvency, tax and security law issues, but also from the very structure of the market in Europe, which is fragmented and so naturally can cause some difficulties in cross border operations. This last point is particularly important for the creation of the CMU, actually, we could say that it is the most relevant of all and so it is worth of a deeper examination. First of all, we have to define a "barrier": it is a national or European law, a market or supervisory praxis or procedure, which could hamper data comparability, fairness of procedures and legal certainty of a transaction which, in our case, occurs in capital markets, or its related to it, so creating obstacles to price discovery, execution and enforcement of the transaction itself, making it consequently less attractive for investors. Cross border barriers are the ones that make more expensive for a foreign, but EU-based or authorized, legal entity to enact or be involved anyway in the transaction, if compared with a domestic entity[127]. An important difference is the one between artificial and structural barriers: the first type is composed by barriers which do not depend from the structure of the transaction, but are rather imposed from an external regulator or supervisor or even from a praxis established by a dominant market player. Structural barriers, on the other hand, do not arise from the outside, but are elements already included in the transaction, as it could be the informational asymmetry which characterizes many operations.

We have to understand which barriers are to be removed and what are not in the end hampering markets' integration: what kind of obstacle is posed to the connection of liquidity pools and to the sustainability of the market[128]? The point of cost predictability could be a good answer. Anytime that a barrier impedes to predict the cost of a transaction, it is harmful for markets integration. This is because, if there is uncertainty in assessing the cost of an operation, it is more difficult to recover it through the pricing of the operation itself, while, instead, if the cost is predictable, the problem is inexistent since all parts involved in the operation could better evaluate their respective costs and so

[127] D. VALIANTE, Europe's Untapped Capital market, Final Report of the European Capital Markets Expert Group Chaired by Francesco Papadia, Center for European Policy Studies, 2016, pag. 183.
[128] Always intended as its capacity to support growth of real economy, jobs and enterprises.

decide to join it or not without other risks but the one deriving from the operation itself[129].

1.3 Legislative instruments for capital markets and CMU

Once that we have briefly explained what is the Capital Markets Union and what are the priority areas to intervene in to achieve it, we will try to understand what can the lawmaker do to make it real, and what will he use do it.

To begin, we have to examine some of the main legislative instruments used in regulating the issue: disclosure requirements, mandatory intermediation and regulatory interventions on products (e.g. product banning or restriction of its distribution after an observation period) or on firms (e.g. authorizations and supervision; approval of prospectuses) [130]. These instruments will be very important in shaping the future of European capital markets and are to be considered together with the role that ESMA will concretely have in the CMU.

1.3.1 Disclosure requirements

If investors are not informed about companies that they are financing, it will be less likely that they invest their money in capital markets: on the other hand, a too heavy disclosure regime would mean heavier costs to be borne by issuers and even problems for investors who would have to deal with a problem of "overinformation", meaning that they would have difficulties in finding important information which would be "hidden" in a stream of irrelevant one. This means that the role of the regulator is to understand what is to be disclosed and what information is unnecessary to the market. To do so, some important things are to be kept in mind when shaping disclosure requirements in capital markets: first, information needed by investor changes according to the product offered by the issuer, since some of them are more risky than others and would need more detailed information to be given, while for other products a laxer regime could be sufficient; secondly, not all investors are able to understand the information they have access to, this meaning that, despite having it, they could still make unfitting decisions due to their lack of competence[131].

These considerations allow us to make some conclusion regarding the proper use of disclosure requirements: to begin, diversification of disclosure regimes is necessary to avoid overinformation

[129] D. VALIANTE, Europe's Untapped Capital market, Final Report of the European Capital Markets Expert Group Chaired by Francesco Papadia, Center for European Policy Studies, 2016, pag. 185.
[130] L. BURN, Capital Markets Union and regulation of the EU's capital markets, Capital Markets Law Journal, Vol. 11, n°3, 2016, 374 and following.
[131] L. BURN, Capital Markets Union and regulation of the EU's capital markets, Capital Markets Law Journal, Vol. 11, n°3, 2016, 376

and the consequential difficulties for investors in finding a suitable product, this diversification means adapting the requirements both to the product offered and to the issuer, according to the level of risk that is inherent to the investment made in them; secondly, legislators should be able to identify who is supposed to have access to information, since these are not understood by all investors in the market. A certain level of competence is necessary in order to fully take advantage of available information which means that it is unnecessary, and sometimes even detrimental, to impose disclosure requirements which will not be useful to investors. Two possible solutions can be given to the problem: the first is simplification, meaning to concentrate on the form of disclosure, by making use of documents which are shorter and drafted in a less technical language than usual; this kind of solution may work in some cases, but has several flaws[132], so it could be used only for simpler issues, while more complicated situations would need a traditional long form and technical disclosure document. Moreover, it is still not certain that investor could fully understand even this kind of disclosure method.

The second solution relates more strictly with this last problem: if in some cases simple and short disclosure documents are not sufficient and could anyway be misunderstood, we can solve the puzzle by maintaining the form of the disclosure unaltered and by shifting its direction toward players in the market which can effectively understand its content and consequently gain a benefit as counterpart of the cost that firms face to produce it. This shift is, we think, at the base of the concept of mandatory intermediation: there are some cases in which the investor can not rely only on its competence, and so has to take advantage of the support of a subject whose ability is greater.

1.3.2 Mandatory intermediation

Mandatory intermediation is an effective mean to protect investors who have not sufficient competences to act in the market consciously in order to serve their interests[133]. There are indeed products, firms and periods which are too risky for some retail investors and, contemporarily, as said above, the disclosure requirements may not be sufficient to make these investors aware of the risk they are facing. This is the reason because of which regulators impose mandatory intermediation: the protection of consumers in capital markets is a particularly important issue, due to highly technical character of the products that are exchanged in them. Anyway, this instrument needs some

[132] For example, a non technical language often is not suited to express exactly the kind of risk the investor is facing, meaning that there could be more interpretative problems in case of litigation; or the fact that a shorter document can not, obviously, contain the same amount of information of a long prospectus, meaning that to solve the problem of overinformation, the regulator would fall in the opposite one of scarcity. And see L. BURN, ibid.

[133] L. BURN, Capital Markets Union and regulation of the EU's capital markets, Capital Markets Law Journal, Vol. 11, n°3, 2016, 374 and following

"environmental" conditions to be efficacious: it can not be too expensive, its functioning is strictly related to the competence of involved intermediaries, it needs constantly to be supervised. If it is too costly, we would again fall in a situation in which investors would not enter capital markets due to too high costs; if intermediaries are not competent enough, it would prove to be unnecessary, since it would result only in higher costs for investors, this can be avoided through testing intermediaries in time, through educating them and through limiting the range of products that they can offer, according to their competence. As for supervision, it is essential to make a system of mandatory intermediation a useful element in the market: if not properly supervised, intermediaries could start to enact selling practices which could be harmful both for investors and for the market as a whole.

1.3.3 Regulatory intervention

With this term, we intend to address every form of intervention in the market by a supervising or regulating authority[134]. Those interventions are necessary to avoid the collapse of the market and to protect weaker and less skilled investors, which could be otherwise unfairly deceived by other players. Banning products which are too dangerous for the market, supervising and authorizing intermediaries to operate in the market are only some of the interventions that could be made. The very existence of an authority in the market which aims to their protection, is essential in order to contain systemic risk.

This kind of intervention has to respect the rule of law and to be adherent to the concept of legal certainty: if the two conditions are not respected, and in the intervention power is used too much arbitrarily, it would be a problem for the market's safety and integrity.

1.3.4 The use of these instruments and the Capital Markets Union

To achieve the Union, the instruments that we have examined until now will be very important: the Commission already called for the modernization of the prospectus directive as a mean to give SMEs easier access to capital markets in its Action Plan through the idea of "a genuinely proportionate regime for SMEs to draw up a prospectus"[135]. Mandatory intermediation will be also fundamental to protect and help investors in the CMU, in where consumers will have to chose from issuers around the whole EU, meaning that will need assistance even due to the differences that will remain in

[134] L. BURN, Capital Markets Union and regulation of the EU's capital markets, Capital Markets Law Journal, Vol. 11, n°3, 2016, 374 and following

[135] European Commission, Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Action Plan on Building a Capital Markets Union, 2015, pag. 12

national regimes. We think, anyway that the most interesting instrument will be regulatory intervention, as it directly relates with the role of ESMA in the system, which we will better explain it in the next subparagraph. For now, we have to say that the three legislative instruments that we have considered so far will be the core of the toolkit to be used by the European lawmaker both to set in motion the mechanism that will lead definitely to the CMU and to keep it working: adjusting the direction that will be taken by the CMU will indeed be essential in order to make it a success and not a failure of the EU.

1.4 ESMA and the CMU

A major player in creating and shaping the CMU will be ESMA[136]: the Authority quasi rulemaking powers and its supervisory tasks are indeed essential for European markets, and it is the most important example of how regulatory interventions in the market will affect the CMU. On the other hand, the agenda set for the CMU will have important effects on the Authority and on its role in the system: so ESMA and the CMU, in a certain sense, will influence each other and now we will try to explain how this could happen.

There are three possible configurations of this mutual influence[137]: there is the possibility that the CMU will lead to further centralization in the institutional governance of capital markets, it may strengthen ESMA without leading to this centralization, or it may be a burden for the evolution of the governance of our capital markets. Given the powers that ESMA has been entrusted with and how it has exercised them in these first years of existence, the opinion given by an authoritative literature[138] is that the more likely outcome would be one between the second and the third ones prospected, since it would assume ESMA’s influence on the development of CMU as more relevant than the one of Member States which should cover an important role only in the first scenario in which political support would be needed to achieve governance centralization. Our opinion is different. We think that, if we consider even the scope for which these powers have been given to ESMA, we can see that it can be clearly seen as a first element of real unification. The scope to impose “a common supervisory culture” or the power to substitute national authorities whenever they do not take action, clearly point in that direction: Regulation 1095/2010 is an important element of the building of the CMU since it gives the possibility to ESMA to become a real central authority, and it is a first step to

[136] And see Regulation 1095/2012, art. 1, where the regulator lists the objective of the creation of ESMA, which can all be linked to a further and stronger integration of markets, and also art. 8 of the same regulation, shaping tasks and powers of the authority towards the same objective.
[137] N. MOLONEY, Institutional Governance and Capital Markets Union: Incrementalism or a ‘Big Bang?”, European Company and Financial Law Review, 2016, pag. 393 and following
[138] ibid.

begin a real change in capital markets governance, in which national authorities will become, on the long run, something more similar to branches of it. This may seem very similar to the second prospected configuration of the mutual influence between CMU and ESMA, in which the Authority is strengthened without a greater centralization of the institutional governance of capital markets, but it is not: we think that the path being followed by Europe in creating the CMU will lead, on the long run and with many changes to have a single real Authority for capital markets. The point is that unifying capital markets law is a difficult task, but to create a sing supervisory and regulatory system is not as difficult and has even been done with Regulation 1095/2010, at least on paper. The occurrence of the political conditions to do so in practice is only an incidental circumstance that is likely to come to reality one day: capital markets law, and more generally financial law, is universal and finds its roots in principles shared by every law system[139], this means that the unification of supervision on financial markets is something that could easily follow the evolutionary path that is being followed by the regulation of this sector (there have also been proposal to create an authority shaped after the WTO, a World Finance Organization, to do so globally[140]). If this last assumption may sound strong and even unattainable, it may be possible to do so not globally, but locally, in the EU: ESMA quasi rulemaking powers are strong enough to be the premise to see it as the center of a supervisory and regulatory system in charge for a unique European market, and national markets could become just "access points" of it in a near future[141]. ESMA's soft powers are indeed not-so-soft, since when a national authority does not respect the recommendation and the opinion issued by ESMA and by the Commission according to art. 17 of the Regulation 1095/2010, it may be possible that the national authority gets substituted by ESMA itself in dealing with the issue at stake, meaning that ESMA could be considered a hierarchical superior of national authorities. Given this very strong power and other issues considered in the previous chapter (above all the aim to create a common supervisory culture and the power to settle cross border disputes) which allow us to consider ESMA as the very center of EU supervision on capital markets, the hypothesis that in a near future the EU supervisory system will be shaped as mentioned before is not so strange.

Due to the principle of mutual recognition and to the existence of acts regulating the most important and dangerous part of capital markets for the whole EU, trading and financial instruments, then, we can say that a unique supervisory system will soon be not only desirable, but also necessary since it

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[139] M. FOSCHINI, Alcune riflessioni sulla rilevanza nel mercato dell'impresa finanziaria di investimento e sulla costante evoluzione del diritto dei mercati finanziari, pag. 2258

[140] And see B. J. EICHENGREEN, Out of the Box Thoughts about the International Financial Architecture, IMF Working Paper WP/09/116, 2009

[141] And see B.J. EICHENGREEN, ibid. and E. WYMEERSCH, The institutional reforms of the European Financial Supervisory System, an interim report, Financial law institute working paper, WP2010-01, 2010, for an analisis of the new EU supervisory system and of some tendencies in the sector's regulation.

is probable that, without a common supervisory culture, divergent practices in the Union would exacerbate the use of regulatory arbitrage in a detrimental and dangerous sense for EU markets: the laxity or rigidity of the “supervisory style” of the national authority would become even more relevant in the choice of the law system to operate in.

1.5 Who will regulate markets in the CMU: the role of private regulation

Now that we have a framework of what will be the legislative instruments used to achieve CMU and what will be the role of ESMA as a central authority in the system, we will briefly explain why private regulation will be important in the CMU.

The CMU is to be enacted in a situation in which a major circumstance is in the fact that public regulators tend to give privates the legitimacy not only to create a contractual framework, but also some ways of enforcement whenever they able to manage it[142]. Private regulation may be considered of growing importance since it can adapt faster to markets’ innovation, due to the lack of the typical procedural restrictions to rulemaking power that slow down public rulemaking: private regulation has to be authorized by public powers, but it may usually intervene faster. We can make many examples of legal institutions that have developed from privates’ practices and found their basic regulation in them, and only after this process have been crystalized by public regulators in national and supranational laws[143]. As for the development of private regulation, there is a clarification to be made: of course it can not be completely independent from public one, but it is created by using the most fitting parts of it in relation to the faced issue. I can choose the content of the contract regulating a relation between me and another, or many other, subjects within the limits posed by the law system, but I am certainly not obliged to put every allowed content in it. Normally, indeed, I will choose only some of these contents, namely the ones I need to regulate my interests and the ones of my counterparties. This is a very important concept when coming to the regulation of markets in the CMU: in capital markets private regulation will play an important role, particularly in relation to the possibilities of private enforcement. Often quarrels between traders are dealt informally or anyway privately, through agreements between firms or through trade associations[144], even arbitration has an important role to cover in the financial system’s dispute resolution mechanism[145]: firms involved in trading value their reputation so much that they try to avoid as possible this kind of public exposure.

[142] N. DORN, Capital cohabitation, EU Capital Markets Union as public and private co-regulation, Capital Markets Law Journal, Vol. 11, n°1, 2016, pag. 94 and following
[143] The whole range of derivative contracts is maybe the best fitting example.
[144] N. DORN, ibid.
[145] For an analysis of the point, see J. GOLDEN, The Courts, the Financial Crisis and Systemic Risk, Capital Markets Law Journal, 4, 2009

Trading associations also play a major role in regulation: the International Swaps and Derivatives Association, for example, drafts globally accepted standards for derivatives and classifies what can be recognized as a "credit event" in redacting such contracts[146].
The CMU will so see a strong participation of privates in the regulation of markets, but obviously it will not leave everything to them: we can speak about "cohabitation"[147], a situation in which the connection between public and private regulators is neither one between complete separated entities, nor a hierarchical, vertical one. We assist to a contemporary explication of both private and public regulatory power, the first expressing itself through alternative dispute resolution and constant innovations to market practices that become accepted as a standard[148], and the second through both the recognition of progresses made in private regulation, as happened with derivatives, and the more classical rulemaking "from the above".

1.6 Mifid II and the CMU

This paragraph served as a brief analysis of some fundamental elements of the CMU: what it is, what are its main issues, some of the instruments that will be used to regulate it, how it will affect ESMA, and who will regulate markets in it. By the way the very scope of my work is related to MiFID II and MiFIR system and to innovations in the regulation of markets and financial instruments that they contain and to their relationship with the CMU. I chose to examine some aspects that I think are both relevant and interesting in this sense: in the next paragraphs, we will consider the discipline of trading venues under the MiFID II system, the regulation of dark pools and of transparency in the trading venues, the creation of the SMEs growth markets to give easier access to capital markets to this kind of businesses, the regulation of algorithmic and high frequency trading to manage and important evolution in financial technology and reduce the risks connected to it. These issues have connections with the idea of CMU, of connecting European capital markets and of developing a stronger system of financing for European enterprises, and trying to reduce risks to the minimum in doing so.

2. Levelling the playfield: innovations brought by MiFID II in the regulation of trading venues

[146] J. BIGGINS, "Targeted Touchdown" and "Partial Liftoff": Post crisis resolution in the OTC derivatives markets and challenges for the ISDA, German Law Journal, 2009, pag. 1297 and following
[147] N. DORN, ibid.
[148] Recalling the process of creation of customary law.

The first point that we will consider is the analysis of the innovations brought by MiFID II system to the discipline of trading venues. MiFID II has two main objectives related to the discipline of trading venues: the first is limiting regulatory arbitrage possibilities, and the second is to diminish the space of OTC transactions. These two objectives are strongly connected to the idea of creating a CMU since there are aimed to strengthen the markets and to stabilize them[149].

In here we will consider what are the new issues concerning regulated markets, MTFs, systematic internalisers and the newly created OTF, and then we will shift on an analysis of how financial markets infrastructure groups will be regulated after MiFID II.

2.1 Systematic internalisers

We start our analysis from systematic internalisers, which are expressly excluded from the trading venues category by MiFID II: art. 4 states "'trading venue' means a regulated market, an MTF or an OTF"[150]. They are now defined as "investment firm which, on an organized, frequent, systematic and substantial basis, deals on own account when executing client orders […] without operating a multilateral system" and outside trading venues[151]. Moreover, quantitative criteria are specified: the "frequent and systematic basis" is measured "by the number of OTC trades in the financial instrument carried out by the firm on own account when executing the client's orders; the substantial basis can be measured by the size of OTC trading carried out by the firm in relation to the totality of trading made in the EU, or by in relation to the total trading of the firm, in a specific instrument[152]. The provision gives even firms the possibility to opt-in the systematic internaliser's regime: this definition, indeed, will apply when both of the two quantitative criteria are respected or when a firm chooses to be considered as an internaliser. Systematic internalisers, according to MiFID II, deal on own account, meaning that they trade against proprietary capital resulting in the conclusion of transactions in one or more financial instruments[153], and cannot run a multilateral system, intended as a trading venue as defined by the directive.

Systematic internalisers shifted from being defined by qualitative criteria in the MiFID I system, to

[149] And see N. MOLONEY, Trading venues, in EU securities and financial markets regulation, Oxford University Press, 2015, pag. 468: "the Commission argued that the creation of the OTF should substantially decrease the weight of OTC trading in non equities, but also in equities. The European Parliament was hostile to the OTC sector and called for all trades in non equity instruments, bar large ad hoc professional trades, to be executed on organized venues (regulated markets, MTFs, OTFs, SIs), and for the equity trading to take place on regulated markets, MTFs and SIs only. The Council approach was more liberal, but it nonetheless sought to ensure that as much trading as possible took place on open, transparent and regulated platforms".
[150] Directive 2014/65/EU, art. 4, par. 1, n°24
[151] Directive 2014/65/EU, art. 4, par. 1, n°20
[152] ibid.
[153] Dir. 2014/65/EU, art. 4, par. 1, n°6

be qualified through qualitative criteria in the MiFID II one[154] and from being considered a trading venue, to being excluded from the category. This allowed both to define more precisely what is a systematic internaliser and to reduce risks coming from the fact that it had to follow a less strict regime than venues: due to the new definition, firms operating as internalisers cannot bring together interests from multiple parties; the lawmaker, so, limited the space of action they can act in. They are now to operate bilaterally, meaning that they can only run a system structured as a platform in which only a single dealer is allowed for each financial instrument negotiated: a systematic internaliser can be a defined as such "in relation to each single financial instrument"[155], the point is not allowing to qualify as systematic internaliser a system in which multiple dealers interact on the same instrument[156].

Notwithstanding the fact that they operate OTC, systematic internalisers are still subject to some pre trade transparency requirements under the MiFIR, which differ depending on the fact that we are talking about equity or non equity markets. For equity ones, "firms shall make public firm quotes in respect of those shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue for which they are systematic internalisers and for which there is a liquid market"[157]. Whenever, instead, there is no liquid market[158], quotes are provided to clients upon request. Moreover, SI quotes have to be public and easily accessible on a reasonable commercial basis during normal trading orders: it is always possible for the internaliser to update the quotes and to withdraw them at the occurrence of exceptional markets conditions[159]. We can see that the main change in comparison with the MiFID I discipline is the extension of the obligation to make public quotes to other instruments in addition to shares[160]. In this way the lawmaker is able to reduce problems coming from opacity of OTC trading, at least for transactions dealt by internalisers: this aim can be deducted even from the imposition of new transparency requirements for non-equity markets. There are three conditions that, when met, cause the internaliser to be obliged to make public firm quotes in non-equity instruments (and precisely in "bonds, structured finance products, emission

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[154] Reg. 1287/06, indeed, considered systematic internalisers only the firms which respected the criteria enshrined in art. 21 (whose activity has a material commercial role for the firm, and is carried on in accordance with non-discretionary rules and procedures; whose activity is carried on by personnel, or by means of an automated technical system, assigned to that purpose, irrespective of whether those personnel or that system are used exclusively for that purpose; whose activity is available to clients on a regular or continuous basis), and asked for firms to demonstrate their status thorugh the provision of proving documents, but this kind of criteria created interpretative discrepancies. See C. GHIELMI, Le sedi di negoziazione nella disciplina Mifid II e Mifir; Diritto Bancario: approfondimenti, 2015, pag. 2-3
[155] Regulation 600/2014, recital n°19
[156] Regulation 600/2014, recital n°20
[157] Regulation 600/2014, art. 14, par. 1
[158] A liquid market is defined by art. 4, par. 1, n°25, of Mifid II as market for financial instruments where there are ready and willing buyers and sellers on a continuous basis, assessed in accordance to the criteria provided for by the same disposition. See Dir. 2014/65/EU, art. 4, par. 1, n°25
[159] Regulation 600/2014, art. 15, par. 1
[160] And see Dir. 2004/39/EC art. 27

allowances and derivatives traded on a trading venue for which they are systematic internalisers and for which there is a liquid market"[161]): when they are prompted for a quote by a client of the internaliser; when the internaliser agrees in providing a quote; when the internaliser deals in sizes below the one at which it would be "exposed to undue risk as a liquidity provider"[162].

In both the cases of equity and non-equity instruments, internalisers have the right to set clear standards governing the access to their quotes, through which they can pose limits to this access: they can indeed decide to which client the quotes are accessible, basing on their commercial policy, although if this decision has to be taken in an objective and non-discriminatory manner. This can be seen as a way to reduce one of the problems that we have underlined before regarding disclosure: information has to be accessible, but also addressed to the ones having the competences to take advantage from it, since otherwise it has no use in facilitating investors' choices.

Internalisers can also refuse to begin or quit relationships with clients due to the client credit status, the counterparty risk, and the final settlement of the transaction.

MiFIR imposes also a post trade transparency regime, which applies also to other investment firms operating OTC. For equity instruments listed in art. 20 of the MiFIR, firms which conclude transactions on them are obliged to make public the volume and price of these transactions and the time at which they are concluded[163]; for non equity instruments listed in art. 21, the same data[164] have to be disclosed, through an APA[165].

This transparency regime to be applied to internalisers is shaped in such a manner that allows to give the market some information, although maintaining a certain range of contractual choice for the internaliser. We have said before, in pararagraph 1.5, that private regulation will play a crucial role in the CMU, and the possibility given to internaliser to set out conditions at which quotes are accessible to clients appears to be an example of this. Allowing the internaliser to choose the "type" of client to give access to quotes to, and to interact with, testimonies the respect paid by the legislator to its independence. The exclusion of this kind of firm from the category of trading venues and the imposition of pre trade transparency requirements on it are apparently contradicting provisions: why should the legislator exclude such a figure from the trading venues category, and so subjecting it to the regime of investment firms, but contemporarily impose on it heavier requirements of transparency

[161] Regulation 600/2014, art. 18, par. 1
[162] N. MOLONEY, Trading Venues, in EU Securities and Financial Markets Regulation, Oxford University Press, 2015, pag. 491, and Reg. 600/2014, artt. 18 and 9
[163] The requirements are the same asked for by art. 6 of the Mifir for trading venues. And see, Regulation 600/2014, artt. 20 and 6
[164] The requirements are the same asked for by art. 10 of the Mifir for trading venues. And see, Reg. 600/2014, artt. 21 and 10
[165] Approved publication arrangement, a particular type of data reporting service, and see, for an analysis, F. SCACCHI e G. ZAGHINI, Mifid II, I servizi di comunicazione dati: APA, ARM e CTP, in Diritto Bancario: Approfondimenti, 2015

than other investment firms? Could this element pose the internaliser in competitive disadvantage with respect to them? To intend the systematic internaliser as an hybrid[166] figure, which operates OTC, but still has to respect a pre trade transparency regime may be an interesting choice, that may still have an impact on what happens in our markets, even if not too heavy (since it is not very different from what happened under MiFID I[167]): the main changes are in the fact that its activities are to be considered OTC and in its more precise definition, attached to quantitative criteria and not to the previous and more vague qualitative ones. The maintenance of pre trade transparency requirements, that where asked to internalisers also under MiFID I, is a mean not to increment the opacity of the OTC market by adding to it the operations conducted by this kind of firm. Instead, from the point of view of competition, the confinement in the OTC segment of firms running a systematic internaliser could be a mean to set in motion an harder competition between internalisers and other firms operating OTC: if the firsts gain a greater market quote in detriment of the seconds it would mean that a greater part of transactions would come to the light of pre trade transparency, and that would be advantageous for investors.

2.2 Regulated Markets

Regulated markets are multilateral systems managed by a market operator[168], which bring together multiple third parties interests in buying and selling interests in financial instruments in the system and in accordance to its non discretionary rules, in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and which is authorized and functions regularly[169]. MiFID II acknowledges the importance of this structure, as it is the very pillar of the trading venues system: regulated markets are the point in which the most important stock and derivative exchanges are gathered. For this reason, they have a strict regime regarding their corporate governance issues, their organization, pre and post trade transparency regime[170], and conditions to obtain authorization.

As for corporate governance, MiFID II provides in art. 45 for some conditions to be met by the management of regulated markets, in order to test its adequacy to the delicate role of being in charge of an institution which covers a great importance in the system and which also bear great risks for it

[166] And see G. FERRARINI and P. SAGUATO Governance and Organization of Trading Tenues, in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017
[167] And see Directive 2004/39/EC, artt. 4, par. 1 n°7,
[168] Which may be the regulated market itself. See Directive 2014/65/EU, Art. 4, par. 1, n°18
[169] Directive 2014/65/EU, art. 4, par. 1, n°21
[170] These last provisions are shared by regulated markets, multilateral trading facilities and organised trading facilities indistinctly, for this reason they will be examined in paragraph 2.. after concluding the analysis of the single venues.

if does not work efficiently. Management has to be of sufficiently good repute, possess sufficient knowledge, skills and experience, and met some precise requirements provided from the same article[171] related to its composition. It is also provided that not meeting the requirements laid down in art. 45 can be a reason for which the competent authority shall refuse to give authorization to operate as a regulated market[172]. Management has also to define and oversee the implementation of the governance arrangements that ensure effective and prudent management of an organization, including the prevention of conflicts of interest, in a manner that promotes the integrity of the market[173]. According to some literature[174], this disposition is the key to identify a main concern of the regulation of regulated market's corporate governance. As said, regulated markets have a great importance in the financial system and generate a specific type of risk which derives from the necessity of fairness and integrity of the market system. The management has so to pursue the objective of implementing risk management systems that can contrast the rise of system failures and conflict of interests, that may damage the regulated market and, consequently the financial system as a whole, due to its strongly interconnected character. As already said in the first chapter, indeed, financial institutions are "too interconnected to fail"[175] and the fall of one of them, specifically if of great relevance such as a regulated market is, could reflect damages in the whole system.

As for provisions regarding organization of markets, the Directive imposes Member State to require that markets meet some organizational requirements, they have to: have arrangements to identify clearly and manage adverse consequences arising from conflicts of interest; be adequately equipped to manage the risk to which they are expose, mitigate and identify them through appropriate arrangements; have transparent and non discretionary rules and procedures that provide for fair and orderly trading and establish criteria for the efficient execution of orders; facilitate the efficient and timely finalization of transactions executed under its systems; have available sufficient financial resources to facilitate its orderly functioning[176]. Moreover, there is an explicit prohibition on market operators to execute client orders against proprietary capital, or to engage in matched principal trading on any of the regulated markets they operate. These requirements are meant to guarantee that regulated markets will work efficiently, since otherwise there would be serious possibilities that the financial system gets hampered by them and their malfunctions.

Provisions regarding the authorization to operate as a regulated market are in art. 44. Authorization

[171] Directive 2014/65/EU, art. 45, parr. 1,2,3,4
[172] Directive 2014/65/EU, art. 45, par. 7
[173] Directive 2014/65/EU, art. 45, par. 6
[174] G. FERRARINI and P. SAGUATO, Governance and Organization of Trading Tenues, in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, pag. 293
[175] And see J. COFFEE, Extraterritorial Financial Regulation: Why E.T. Can't Come Home, Cornell Law review, volume 99, issue 6, 2014
[176] Directive 2014/65/EU, art. 47

is given by the national competent authority when it is satisfied by the compliance of the market operator and of the regulated market with the requirements of the MiFID II, Title III[177]. To obtain it, the market operator has to provide all the necessary information, included a program of operations setting out the types of business envisaged and the organizational structure: in this way, the authority can be ascertain the respect of the requirements asked for in Title III; moreover, the authority shall review this compliance periodically[178].

The discipline did not change too much from the one of MiFID I: the main modification regards corporate governance requirements, which are now lined up with the ones imposed on investment firms[179].

As said, regulated markets are the most important infrastructures of capital markets since in them it is concentrated the most part of stock and derivatives exchanges. This means that they will be the knots sustaining the net that will link all trading venues in the EU in order to support the CMU, better, they are already that: they are centers of aggregration for trading, to which there already is some flow of cross border capital. This flow has to become stronger and enhancing the trust that investor have to the market may be one of the easiest way to do so[180]. The modifications done to the discipline of regulated markets go in this sense: providing more detailed requirements of corporate governance could be a way to attract investors, and particularly the ones whose competences make them aware of the increased guarantee that the system is giving to them. The detailed set of provisions of art. 45 has as main objective to enhance the soundness of the market, but could be a good way to make regulated markets to seem more trustworthy than before, at least to professional and more competent investors.

2.3 Multilateral Trading Facilities

A multilateral trading facility is a multilateral system operated by an investment firm or a market operator which brimgs together multiple third parties buying and selling interests in financial instruments, in the system and in accordance with its non discretionary rules, in a way that results in a contract in accordance with Title II of the Directive[181].

Being investment firms, MTFs organizational requirements are the ones provided for by art. 16 and

[177] Which are the one listed until now plus the ones of art.48, which will be treated in the fourth paragraph of this chapter.
[178] Directive 2014/65/EU, art. 44, parr. 1 and 2
[179] G. FERRARINI and P. SAGUATO, Governance and Organization of Trading Tenues, in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, pag. 292
[180] And see European Commission Green Paper, Action Plan for the creation of a Capital Markets Union, pagg. 20 and following
[181] Directive 2014/65/EU, art. 4, par. 1, n°22

18 of the Directive[182], the ones applying to all investment firms. Their governance must comply with requirements imposed by CRD IV, which do not radically differ from the ones now imposed on regulated markets[183]. Moreover, there also is a specific set of requirements for multilateral trading facilities that can be found in art. 19. MTFs are required, in addiction to following provisions of artt. 16 and 18[184], to establish non discretionary rules for the execution of orders; be equipped to manage, identify and mitigate risks they are exposed to; efficaciously facilitate the efficient and timely finalization of transactions executed under their systems; have sufficient financial resources available to guarantee their orderly functioning; they cannot execute orders against proprietary capital, nor engage in matched principal trading[185].

2.4 Organised Trading Facilities

Organised trading facilities are a new type of trading venue introduced by the MiFID II system and are more interesting for our analysis, since one of the main objective of their creation lies in reducing the space occupied by OTC transactions[186].

The Directive defines OTFs as multilateral system, which is not a regulated market nor an MTF, where multiple third party buying and selling interests in bonds, structured finance products, emission allowances, or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of the Directive[187]. We can already notice some important characteristics of this new venue: its activity is limited to non equity instruments; they are not obliged to follow non discretionary rules in their activity. The first of the two is strongly connected with the second: the lawmaker wanted to avoid the circulation of equity instruments on discretionary multilateral platforms[188], in order to have more guarantees for investors, and coherently with the choice of imposing the obligation to negotiate shares only in regulated markets, MTFs and systematic internalisers[189], apart from operations which are non systematic, ad hoc, irregular and infrequent or carried out between eligible or professional counterparties and do not contribute to the price discovery process.

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182 See Directive 2014/65/EU, art. 19, par. 1

183 G. FERRARINI and P. SAGUATO, Governance and Organization of Trading Venues, in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, pag. 296

184 Article 17 deals with firms engaging algorithmic trading and will be treated in par. 4.

185 Directive 2014/65/EU, art. 19

186 And see N. MOLONEY, Trading Venues, in EU Securities and Financial Markets Regulation, Oxford University Press, 2015

187 Directive 2014/65/EU, art. 4, par. 1, n°22

188 M. SEPE, La MiFID II e i mercati, in V. TROIANO, R. MOTRONI, La MiFID II: Rapporti con la clientela – regole di governance – mercati, CEDAM, 2016, pag 279

189 Regulation 600/2014, art. 23, par. 1

OTFs have the same regime of common investment firms regarding the respect of the principle of best execution: they have to follow the provisions of the whole art. 27, which is actually a main difference with the regime of other venues[190]. OTFs are considered as investment firms even regarding the rest of organizational and corporate governance regime, with some additional requirements provided by art. 20 of the Directive: OTFs can not execute directly client orders against proprietary capital, and may engage in matched principal trading in the aforementioned non equity instruments only when the client gave consent, or may deal on own account, in a different form than the matched principal one, when treating sovereign debt instruments which do not have a liquid market. Moreover the operations of an OTF can not take place in the same legal entity of the ones of a systematic internaliser, nor can an OTF connect with this type of firms in such a way that allows interaction between their respective orders and quotes, and this last prohibition is valid also for connections between OTFs[191]. In this way, coherently with the exclusion of internalisers from the possibility to engage in multilateral trading, the lawmaker tries to avoid interferences between the multilateral, and the bilateral segments of the market, so to make it safer.
As said, OTFs operate with discretion. This discretion is not absolute: it is limited to choosing whether placing or retracting an order on the OTF, or it can be exercised when deciding not to match a specific client order with other orders available in the system in the moment, given that this complies with instructions received by the client and with the best execution obligation enshrined in art. 27[192].
This new figure is supposed to limit the occurrence of OTC trading of non equity instruments, but, given that there is no obligation to concentrate trading in these venues (as happens with shares which must be traded only in structured systems), only time will say if the stricter transparency requirements, and the consequent better protection for the investor through the reduction of the structural informational asymmetry, will effectively be sufficient to reduce significantly OTC trading of non equity instruments[193].

2.5 The transparency regime of regulated markets, OTFs and MTFs

Regulated markets, MTFs and OTFs have to respect the same provisions regarding pre and post trade transparency: due to their multilateral nature, they share the same problems regarding circulation of information and price discovery and formation. We can distinguish, as done for internalisers, between the transparency requirements for trading in equity instruments and the ones for trading in non equity

[190] As for MTFs, indeed, art. 19, par. 4, refers only to the respect of par. 3 of art. 27.
[191] Directive 2014/65/EU, art. 20, parr. 1,2,3,4. For the definition of liquid market see note n°38 of this chapter.
[192] Directive 2014/65/EU, art. 20, par. 6
[193] See N. MOLONEY, Trading venues, in EU securities and financial markets regulation, Oxford University Press, 2015, pag. 468

instruments.
Starting with equity instruments trading, pre trade requirements of transparency impose to firms to make public current bid and offer prices and the depth of trading interests at those prices which are advertised on their systems for equity instruments (shares, depositary receipts, certificates and alike); the requirements have to be calibrated for different types of trading system, some of which are enlisted in the norm; moreover operators of trading venues are obliged to give access on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information to firms obliged to publish their quotes for equity instruments[194]. The fact that this regime is paired with some ad hoc provisions for non equity isntruments is an innovation of some relevance: in MiFID I there was a transparency regime to be respected only for shares and for equity instruments[195]. This should have a positive impact on the markets, enhancing the quality of the price formation process due to a larger view for market players, who will be able to better compare instruments and to take more conscious investment choices. This is very important for the CMU: the connection of liquidity pools needs both transparency on every trading venue, even if, as said, regulated markets remain the most important elements, and the possibility to compare instruments, since firms that will decide to use the market as a source of capital will choose not only the more suitable venue, but also the best fitting instrument to obtain funds according to their necessities and interests.
There are some waivers provided for to pre trade transparency: national competent authorities may decide to exempt operators of the venue from the publication of the normally required information in four cases, corresponding to different types of trading systems. In these cases, we have little risks regarding the price formation, but the ones regarding liquidity and position would be high in case of disclosure of the trades. The new waive system regarding equity trading transparency is shaped in such a way that restricts the possibilities for venues to operate without transparency, and gives ESMA a greater power, in respect to the provisions of the previous MiFID I system; we will analyze it in the next subparagraph, to understand the approach of MiFID II to dark pools.
Regarding post trade transparency for equity instruments, price, volume, and time of the executed transactions have to be made public[196]. In some cases, since the risks deriving from disclosure gaps in post trading are significantly minor than the ones generating by the same event occurred pre trading, it is also possible to be authorized to defer the publication of the required data. In particular, the deferral of the data publication may be permitted in case of transactions of large scale if compared

[194] Regulation 400/2014, art. 3
[195] N. MOLONEY, Trading Venues, in EU Securities and Financial Markets Regulation, Oxford University Press, 2015, pag. 480
[196] Regulation 400/2014, art. 6

with the normal market size for the instrument involved: the national competent authority is to give authorization to firms and has to clearly disclose the relating arrangements to market participants and to the public, and these arrangements will be monitored by ESMA as for their application[197].
Non equity instruments transparency regime applies to some precise instruments, which are the ones that may be traded on OTFs[198], and even in this case it has to be calibrated depending on the type of trading system: operators of trading venues have to make public current bid and offer prices and the depth of trading interest at those prices for non equity instruments listed by the norm. Derivative transactions by non financial counterparties, which are objectively measurable as reducing risks relating to commercial activity or treasury financing activity of the non financial counterparty, are exempted from these requirements[199]. Even in this case there is a system of waivers, the relevance of which is, by the way, greater than the case of equity instruments, since we have significantly higher risks relating to liquidity[200]. Whenever an instrument's liquidity goes below a threshold defined according to objective criteria specific to the market and for the financial instrument involved, the national competent authority can allow for a suspension of the transparency regime, for a period which do not goes further than three months and that can be renewed once (for three months again), in case the liquidity problem is still present[201].
This transparency regime is meant to create a safer environment for investment, in which information is spread across the market. It does not completely solve the problem of addressing information to the right spots, in the sense of ensuring that who has it is able to use it before being allowed to step in and invest in the market, but enhances the MiFID I regime. Now there will be more useful data in the system, without great risks of overinformation: the transparency regime has been extended, but in connection to the object of information, namely, for example, equity instruments different from shares admitted to trading on a regulated market, meaning that there is a greater possibility of comparison for investors, not only between instruments of the same type, but also between different types of instruments. As said before, this is very important for the CMU: as said before, the possibility to emit different instruments for firms already existed but it had poor meaning from a competitive point of view, since there was not a possibility for easy comparison, due to the non existence of transparency requirements for every instrument. This will possibly lead to a healthy competition of firms in attracting investment on the market and so to a stronger and more useful capital markets system.

[197] Regulation 400/2014, art. 7
[198] Bonds, structured finance products, emission allowances, derivatives.
[199] Regulation 400/2014, art. 8
[200] N. MOLONEY, EU financial governance and transparency regulation, in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, pag. 328
[201] Regulation 400/2014, art. 9

2.6 Dark pools

“Dark pools are off-exchange trading venues that promise to keep secret the existence of the orders sent to them and to restrict the kinds of parties allowed to trade”[202]. Dark pools can reduce problems linked with adverse selection[203] due to the fact that buyers and sellers in the pool, even if asymmetrically informed, which are wanting to operate on a large amount of stocks, may reduce significantly the movement of price against these stocks, and so conclude transactions at prices that can be better than the national best bid or offer[204] price: this is an advantage directly deriving from the fact that the pool does not make public any quote and can exclude traders[205]. In a dark pool in which the totality of buyers and sellers acts completely “in the dark”, without having any information and posting only mid point orders the price of which is better than the national best offer for the buyer and of the national best bid for the seller[206]. This happens because the lack of transparency permits a significant reduction of the market impact of the large transactions executed in the pool, which would otherwise relevantly move the price of the traded security due to their dimensions. The risk in this system is that there may be parties posting limit orders that are informed: the parties which are instead posting market orders would not have the possibility to know that the poster of the limit order is an informed party, and so that there may be actually a precise reason and strategy behind posting the limit order itself, meaning that the posted price takes advantage from the information owned by the party and hampers the uninformed players in the pool. The same happens when the informed party is the one posting market orders: in this case transactions of these subjects against limit orders will occur only in case that from their information can be deducted that the mid point price is a benefitting price for them, and so hampers the poster of the limit offer. This means that who operates a dark pool has to constantly monitor parties posting limit orders and market orders, in order to exclude informed subjects from the pool itself, and maintaining the situation balanced.

There is the possibility to restrict the access to the pool, due to their particular nature: they are “reserved” by their operators to institutional investors, or anyway particularly competent ones, who are trying to buy and sell only large amounts of stocks: limiting the access in this way, together with the lack of transparency, is a way to reduce the impact on the markets of such operations, so avoiding

[202] M. FOX, L. GLOSTEN, G. RAUTENBERG, The new stock market, sense and nonsense, Duke law journal, 2015
[203] Adverse selection refers to a situation, in which there is asymmetric information between buyers and sellers about some aspect of product quality. And see www.investopedia.com/terms/a/adverseselection.asp
[204] Which are the ones that the average person sees, and correspond with the lowest ask price and the highest bid price that investors can obtain when transacting securities.
[205]See R. PREECE, *Dark Pools, Internalization, and Equity Market Quality*, CFA Institute Codes, Standards, and Position Papers 12-13, 2012
[206] M. FOX, L. GLOSTEN, G. RAUTERBERG, ibid.

a too high fluctuation of prices. One of the problems, and maybe the biggest one, that rises, or may rise, in dark pools is linked with liquidity: it may happen that there is little liquidity in the pool since sometimes, and more often then on the other trading venues, there are transactions in which the buy order is not corresponded by the selling one and vice versa, meaning that traders do not participate to the trade; this can be an high risk for the trader, and it is one of the reasons because of which who manages the pool accepts only qualified investors, which can have more guarantee that their order will be followed[207]. This seems to be a contradiction: we have said before that, in principle, the pools would work with a poor impact on the systemic risk only with almost completely uninformed players, but in here we see that their operators accept only subjects who have effectively a certain degree of information, due to the problem of unfollowed orders, and the consequential problem of lack of liquidity. We can deduct that, actually, the practical functioning of the dark pool may be a little different than expected, but it still has an important role in preserving the price formation of securities in the markets. If there were not dark pools, there would not be the possibility to exploit the advantages coming from their particular structure to buy and sell large amount of securities, which, as said before, lie in the price which can be obtained by both parts. Secondly the presence of dark pool allows for a potential, even if partial solution to a problem that we have underlined before: we said that a problem of the information on the market is that it is not addressed to subjects which can make good use of it. On dark pools, actors work, due to the restrictions to the access and the opacity, in a theoretically opaque environment, but, actually, it may be more correct to say that it is an environment which is partially opaque, in the sense that on it there may be the possibility to arrange exchanges between traders, for example by placing an order to sell a precise amount of a certain security which would be answered by a contemporary order to buy the same precise quantity of the same kind of stock. This would be more easily possible on pools in which there is continuity of order crossing and which would have the simpler requirements of execution policy[208] (e.g. first come first served), even if it would be wise that the operator may prevent this sort of operation since it could cause distortions of the price formation once executed.

There are regulated and not regulated pools, depending on the qualification of their operator. Regulated dark pools are the ones operated by regulated markets and multilateral trading facilities. The first ones are created in order to obtain more liquidity on the market, since the MTFs category obviously took part of the market share of regulated markets in this sense: in dark pools managed by

[207] D. NAROTZKI, Dark Pools, high frequency trading, and the financial transaction tax: a solution or complication?, Drake law review, vol. 64, 2016, pag. 113

[208] Discretion of the dark pool as its order execution policy (time of execution, possibility to execute and order before or after another without particular conditions to be respected and so on) is a very relevant subject, but it for our work it may be sufficient to say that it is a delicate matter, due to the fact that both regulated, and so more controlled, pools and not regulated ones exist, as we are going to explain.

regulated markets, the operator normally aims to lessen the impact of certain operations and to be able to serve its members with executive conditions that are better than the usual ones, in other words, it both uses the dark pool for one of its main natural scopes, to reduce the impact of large transactions on the market, and for a competitive reason, attracting in this way other players which may be otherwise discouraged to work with a regulated market. MTFs on the other hand, created their dark pools to manage transactions which involved a considerable amount of transactions[209].

When the operator of a dark pool is neither a regulated market nor an MTF, we speak about not regulated dark pools, which operate completely over the counter. Their operators are normally firms which choose to offer to their client a range of services including dark trading[210] ; this kind of dark pools is also called “broker/dealer crossing network”, meaning an internal electronic matching system operated by an investment firm that execute client orders against other client orders or house account orders[211].

We can also make a distinction based upon the type of prevalent security traded in the pool and on the fact that the crossing of orders in the pool is continuous or is programmed to happen at a certain scheduled time[212]. Moreover we can also find pools which are specialized on the sole buyers side, while other give the complete buy/sell possibility. Anyway, for our analysis, the most important distinction is the one that we made before, based on the entity operating the pool, since on it it is based the possibility that the pool works or not according to the transparency waivers provided by MiFID II to the regime to be applied to trading venues.

We will now analyse the approach of MiFID II to this phenomenon, since it is very relevant in defining the space of OTC trading in the EU.

2.6.1 The regulation of dark pools in MiFID II

Before describing how MiFID II will affect the regulation of dark pools, we have to premise that between the goals of the Directive there is the reduction of the space of OTC trading and the deviation of part of those operations on regulated venues and internalisers, meaning that dark pools would see

[209] See on the point P. GOMBER, I. GVOZDEVSKIY, Dark trading under Mifid II, in D. Busch and G. Ferrarini, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, referring to the cases of Liquidnet and ITG POSIT

[210] See P. GOMBER, I. GVOZDEVSKIY, ibid.

[211] CESR, Technical Advice to the EU Commission in the context of Mifid review and responses to the EU commission request for additional information, oct. 2010; to be precise there also are consortia dark pools among the not regulated ones, which are pools jointly operated by more than one firm.

[212] Referring again to Liquidnet and ITG, the first, as the most of the newer pools, offers continous crossing; while ITG as most of established pools uses the scheduling method.

their space a little reduced. Furthermore, the extension of the transparency regime to instruments other than shares traded on regulated markets should again be another limit to dark trading.
The main elements of the MiFID II system which we will describe here impact directly dark pools, due to their being legislative instruments that allow for less transparency in certain cases: we are speaking both of the pre trade transparency waivers and of the mechanism of volume cap introduced by the MiFIR[213].
As for waivers, we have pre trade transparency waivers for equity instruments, which are the most important in the context of dark pools. They are defined in art. 4 of the MiFIR, they are four: reference price, negotiated transactions, large in scale, order management facilities.
First of all, national authorities can waive the obligation of pre trade transparency for market operators and firms which run a venue, for system that match orders by using a trading methodology that derives the price of the equity instrument from the venue in which it was first admitted to trading or, alternatively, from the market which has the greater relevance in terms of liquidity, where not only the reference price is public, but it is als considered a reliable one by the players in the market[214]. This reference price is established by considering the midpoint between the current bid and offer prices of the venue in which the instrument was first admitted to trading or its most relevant market in terms of liquidity, or, when these data are not available, by considering the opening or closing price of the relevant trading session[215].
Secondly the obligation can be also waived for systems that formalize negotiated transactions which respect certain conditions: they have to be made within the current volume weighted spread reflected on the order book or on the quotes of the market makers which act in the trading venue that operates the system we are takin of; or are made in an illiquid equity instrument[216] that are not definable as liquid market and which are negotiated in a certain percentage of a reference price, given that both the percentage and the reference price have to be previously set by the system operator; or which have to respect price conditions which are different from the current market price of the traded instrument[217]. These transactions have to be made according to the rules of the trading venue and the venue itself must ensure that it has means, systems and procedures through which it can prevent and detect market abuse or attempted market abuse relating to the transactions we are speaking of, moreover there have to be systems implemented by the venue which can detect attempts to use the

[213] Regulation 400/2014, artt. 4 and 5
[214] Regulation 400/2014, art. 4, par. 1, l. a
[215] Regulation 400/2014, art. 4, par. 2
[216] Precisely one of the instrument listed in art. 3 of the MiFIR
[217] Regulation 400/2014, art. 4, par. 1, l. b

waiver of art. 4, par. 1, l. b to elude other requirements imposed by MiFIR or MiFID II and report the attempts to the national authority which has jurisdiction on it[218].

The third waiver is for order that are in large scale if we compare them with the ordinary market size, and the fourth regards orders which are held in an order management facility operated by the venue attending to be disclosed[219].

The reference price waiver and the negotiated transactions of the first type one are the most important for our analysis, since when the trading is made under them the double volume cap mechanism, which is the main element of “direct” dark pools regulation in the MiFID II system, applies.

Art. 5 of the Regulation, imposes a volume cap mechanism on the transactions which are operated under the reference price and negotiated transactions waivers in order to reduce the risks for the price discovery process which come from the orders in dark pools, which are consequently limited[220]. This mechanisms restricts trading under the aforementioned waivers so that the percentage of trading which is made on a venue under them cannot be more than the 4% of the total volume of trading in the involved instrument considering all the trading venues in the Union in the previous 12 months, and that the overall trading made in the Union in a certain instrument covered by the waivers cannot exceed the 8% of the total volume of trading in the instrument considering all the trading venues in the Union in the previous 12 months[221]. So we have a restriction that applies on the single venue and another one that covers trading in the whole Union: if the first limit is exceeded, the national authority must suspend the venue from trading under those waivers for six months, while if the second one is not respected, there may be the suspension from trading under the waivers for every venue in the Union[222].This regime should move trading on more transparent venues, also due to the risk of suspension: at least regulated dark pools could so see their space reduced to a “safety level” in which they can fulfil their positive role, by allowing the trading of large amounts of stocks without an high market impact, without becoming too risky due to their opacity for the whole market. Some are not fully convinced that the volume cap system will work and bring benefits[223], due to the high demand for dark trading and for the fact that the required data will be difficult to verify, meaning that venues could operate with the problem of unconsciously break the caps.

So these provisions are designed to attract more liquidity on the market by moving dark pools in the net that will constitute the CMU: reducing OTC and opaque trading means strengthening the main

[218] Regulation 400/2014, art. 4, par. 3
[219] Regulation 400/2014, art. 4, par. 1, l. c and d
[220] P. GOMBER, I. GVOZDEVSKIY, Dark trading under Mifid II, in D. Busch and G. Ferrarini, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, pag. 383
[221] Regulation 400/2014, art. 5, par. 1
[222] P. GOMBER, I. GVOZDEVSKIY, ibid.
[223] And see P. STAFFORD, Markets Planning for a World after the day of the Mifid, Financial Times, 13/10/2015, and R. HEALEY, Vision Note: MiFID II double volume cap: slam dunk or air ball?, 2015

markets, although, as said, the opacity of dark pools has its function in the system and may be exploited for it. To attract this liquidity, in MiFID II there has been another attempt: the one to move on capital markets SMEs. Actually part of the reasons for this second intervention are coincident with the ones of shrinking the space of OTC trading: with more transparency it would be less risky to invest in SMEs and this could both benefit the investors and smaller companies. For the purpose of moving these last ones on the market, in MiFID II SMEs Growth markets have been introduced.

2.7 Strenghtening the funding system of SMEs: the growth markets

As said before, one of the main aims of the CMU project is to partly change the funding system of SMEs, by pushing them to rely more on capital markets to obtain capital resources. MiFID II introduces SMEs growth markets as a mean to incentive this process.

In most part of the EU, there already are markets specifically meant to serve SMEs and attract them towards capital markets funding. MiFID II aims to boost the development and creates a sub category of MTFs for this purpose[224]: the idea of the lawmaker is to enhance their visibility in this way and to create a starting point to generate common regulatory standards for them across the Union[225]. The bigger problem with creating this category lies in balancing the protection of investors with a regulatory regime the cost of which is bearable by SMEs: typically investing in SMEs brings great risks to investors, who will face serious problems of opacity, the same kind of problem faced by banks in evaluating their credit merit, but the difference is that banks have normally the structures and the resources to manage and reduce these risks, while retail investors do not. On the other hand, imposing too heavy requirements in order to protect investors, both on the disclosure side, both on the organizational one, would mean that SMEs should face high costs both direct, such as doting themselves of structures meant to monitor compliance with those requirements, both indirect, such as the ones deriving from the transmission of more information to the market than expected; this would be a strong disincentive to their use of capital markets to fund themselves[226]. This means that the regulation of SMEs growth markets has to be characterized by a certain degree of adaptability, in order to take inspiration from the regulatory scheme adopted by the most efficient between the already existing SME markets in the EU, to which it should be guaranteed the possibility to continue operating without needing to register as SMEs growth markets, in order not to hit them negatively[227]. By the way, an eventual registration would not necessarily hamper these markets: their new formal

[224]Directive 2014/65/EU, recital n°132
[225] ibid.
[226] The same problem do not arise in case SMEs would chose to resort further to bank credit, since they already normally have structures deputed to this kind of work relatively to it.
[227] Directive 2014/65/EU recital n°133 and 134

qualification could be just an identification character for the market, since their attractiveness would derive from the conditions they impose upon firms and investors, and upon SMEs seeking for capital. It will be likely, anyway, that existing venues would not register themselves as SME growth markets only for competitive purposes, in the sense of maintaining their specificity of "forerunners" in respect to the category.

2.7.1 The regulation of SME growth markets

The power to register an MTF as SME growth market is given to the national competent authorities to which operators have to apply. The requirements to be met by the operator are the ones provided for in par. 3 of the article 33 which may also impose further requirements[228]. In particular, at least the 50% of the issuers whose instruments are admitted to trading have to be SMEs at the time of registration and the requirement is to be maintained and controlled every subsequent calendar year; there have to be appropriate criteria for initial and ongoing admission of financial instruments to trading; on initial admission there has to be sufficient information published so to enable investors to be conscious about their investment choice; there has to be an ongoing periodic financial report by or on behalf of an issuer of the market; issuers, persons discharging managerial responsibilities and persons closely associated with them, have to comply with requirements set by Reg. 596/2014[229]; there is diffusion to the public of regulatory information concerning the issuers on the market; there are effective systems and controls the scope of which is the prevention and detection of market abuse as required by Reg. 596/2014[230]; whenever these requirements are not complied with anymore by the market, it is to be deregistered[231].

Registration and deregistration of an operator as SME growth market has to be noticed by the national competent authority to ESMA as soon as possible, so that it can keep up to date the list of SME growth markets that, coherently with the scope of granting them visibility, has to publish on its website[232]. Differently from what happens on regulated markets[233], a financial instrument admitted to trading on a SME growth market may be traded on another facility of the same category only if its issuer has been informed and has not objected. It may seem that this provision could have been coherent with the scopes of the regulation of SMEs growth markets only if trading the instrument on a different growth market could have meant heavier, or anyway different requirements to comply

[228] Directive 2014/65/EU, art. 33, parr. 2 and 4
[229] It is the MAR, market abuse regulation.
[230] Directive 2014/65/EU, art. 33, par. 3
[231] The same happens when the operator applies for its deregistration, and see Directive 2014/65/EU, art. 33, par. 5
[232] Directive 2014/65/EU, art. 33, par. 6
[233] See Directive 2014/65/EU, art. 51, par. 5

with for the issuer; the paragraph in which this provision is contained[234] instead, explicitly states that when it's the case the issuer has no obligation to comply with disclosure or corporate governance requirements asked for by the second market in which its instruments are to be traded. The norm pays, in this case, more attention to the needs of the issuer involved than on other aspects of the situation: the lower requisites asked for by the first market could give a significant competitive advantage to the issuer whose shares are to be traded on the second, and contemporarily pose at risk investors acting on this second market, if it is not clear what are the requirements complied with by the issuer, uncertainty is a major threat for these investors.

The Commission shall then adopt delegated acts in which more precise provisions are expressed, regarding the requirements laid down in par. 3 of art. 33. In doing so it has to consider that measures taken have to take in account the need to maintain investor protection on high levels so to improve the confidence posed in markets by investors, and contemporarily imposing nothing more than the necessary administrative burdens on issuers, and that deregistrations or refusals of registrations do not occur only due to a temporary failure in meeting the asked requirements[235].

ESMA provided the Commission with a Technical advice on the MiFID system in which it suggested some principles to be followed in drafting the delegated acts; the most important among them are the principle for which an SME growth markets should not be asked to impose on issuers heavier requirements than the ones applicable to regulated markets; the one establishing that European law should not interfere too much with existing national alternative markets for SMEs in the sense that, given that their regulation is the result of their evolution; SMEs growth markets should allow its issuers to use national account standards, rather than obliging them to adhere to the IFRS; issuers on SMEs markets would have to publish a prospectus meeting the requirements of the Prospectus directive regime[236], but it could be also sufficient an admission document; issuers should have to publish an annual an a semi-annual financial report, in order to reduce opacity risks.

The delegated regulation adopted by the Commission takes these principles in consideration, from requiring a prospectus of which there has to be a review of completeness, consistency and comprehensibility to admit the firm in the market, and which has to have some essential contents in order to let investors be aware both of the financial situation of the firm and of the rights given by its instruments. The Commission has also included the obligation to publish financial reports annually and semi annually, and it is to the SME growth market to decide whether they have to be drafted

[234] Directive 2014/65/EU, art. 33, oar. 7
[235] Directive 2014/65/EU, art. 33, par. 8
[236] Which has recently been enhanced with the Prospectus Regulation, 1129/2017 released in April of the same year, in which, coherently with the plan for the CMU there are provisions making easier and cheaper the access of small firms to capital, such as the introduction of th EU growth prospectus. See Regulation 1129/2017, art. 15

following IFRS or national accounting standards[237].

Some[238] argue that this normative scheme may not effectively attract a great number of firms towards capital markets: due to the fact that some of the disclosure requirements requested by the market abuse regulation will apply even to firms which issue their shares on a SME growth market, the costs for them would still remain too high to let them easily accede to this source of funding[239]. Despite this critique, this new regime could actually work in attracting SMEs towards capital markets: both the lighter regime, if compared with the one of regulated markets, given by the MTFs regime and the visibility given by this "regulatory brand"[240] could effectively drive some firms toward this source of funding. It is also true that, for now, the costs may be still be high, and that a progressive adaptation of the regime will be necessary to solve this problem, but tailoring a market upon the necessities of SMEs would mean that at least the bigger ones could accede to it, which is, at least a step toward the objective[241].

2.8 Admission of instruments to trading

MiFID II provides some requirements to be imposed by regulated markets in order to admit instruments to trading which are focused upon guaranteeing efficient price formation, transparency, liquidity and transferability of instruments together with negotiability and fairly and orderly trading[242]. The Directive states that regulated markets must be required to have clear and transparent rules governing admission to trading of financial instruments, which have to guarantee, as said, the fairness, efficiency, order in trading and the freedom of their negotiation. Furthermore, derivatives have to be structured in such a way which makes possible its orderly pricing and that its settlement conditions are effective[243]. Regulated markets are also obliged to have efficacious means to verify compliance of issuers of admitted instruments with disclosure obligations, and to make easier the

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[237] And see Commission's delegated regulation 565/2017, art. 78

[238] R. VEIL and C. DI NOIA, SME Growth Markets, in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, pag. 356 and following

[239] The MAR asks for requires issuers to inform the public of inside information that interests it and that persons discharging managerial responsibilities and the ones closely associated with them have to notify the issuer of every operation which they have done on their own account that has involved instruments of the issuer, which must make public directors' dealings. The point is that this is a costly disclosure obligation, since it requires a qualified legal advise: for example inside information includes circumstances that may occur on the base of a reasonable prevision, which is not an easy assessment. More generally, the disclosure requirements which are provided for by the MAR may be complicated to comply with, in the sense that cause high costs to be bore by firms. And see R. Veil and C. Di Noia, ibid.

[240] N. MOLONEY, Capital raising, in EU Securities and Financial Markets Regulation, Oxford University Press, 2015, pag. 175

[241] And see K. SIMEONOV, EU capital markets initiatives for better financing SMEs, in Modelling the New Europe, issue 16, 2015

[242] And see N. MOLONEY, ibid., pag. 176 and Directive 2014/65/EU, artt. 51 and 52

[243] Directive 2014/65/EU, art. 51, parr. 1 and 2

access of its participants to information disclosed accordingly to EU legislation[244]. Once admitted to trading upon a regulated market, a security can be admitted on other regulated markets even without the consent of its issuer, which has only to be informed and is not obliged to give directly information required by par. 3 of art. 51 to the market on which it is admitted[245]. As said this is a main difference with the case of SME growth markets, where to do the same there has to be the consent of the issuer[246]. The specification of these rules is given to the ESMA which has to redact a draft regulatory technical standard in which it is specified what are the characteristics of financial instruments that regulated markets have to consider in assessing if the instrument is issued coherently with the possibility of fair, ordinated, efficient way of trading and is freely negotiable; it has to make clear what arrangements are to be put in force by regulated markets to comply with their obligation of verifying the compliance of their issuers with disclosure obligations created by EU legislation; lastly it has to establish what means are to be implemented so to ease the access of its participants to published information[247]. In this draft regulatory standard, ESMA notices that the provision of art. 51 is almost the same contained in the art. 40 of MiFID I[248], and so it will develop the technical standards for the admission to trading starting for the norms implementing this last empowerment[249]. The Authority it is so very likely to follow the principle based approach that was already used in these norms and the resulting discipline will probably be not so different from that one[250]. There are three norms implementing art. 40 of MiFID each of which is referred to the discipline of a certain instrument category: transferable securities, units in collective investment undertakings, derivatives; this is a remarkable choice since the lawmaker could merge implementing provisions on the base of the matter they were approaching (so, for example, it could have made an article regarding the first delegation given by art. 40, an article for the second and one for the third) but this could have lead to a more unclear set of provisions with more difficulties in finding the relevant requisites. Choosing to use an instrument-based approach, instead brings more clearness and ease in understanding what is required to put the involved instrument on a regulated market.

As for securities, they can be said to be freely negotiable when they can be transferred with no restriction and if securities that belong to the same class can be considered fungible[251]. The same

[244] Directive 2014/65/EU, art. 51, par. 3
[245] Directive 2014/65/EU, art. 51, par. 5
[246] And see Directive 2014/65/EU, art. 33, par. 7
[247] Directive 2014/65/EU, art. 51, par. 6
[248] And see Directive 2004/39/EC, art. 40
[249] The ones of artt. 35, 36 and 37 of Regulation 1287/2006
[250] N. MOLONEY, Capital raising, in EU Securities and Financial Markets Regulation, Oxford University Press, 2015, pag. 177
[251] Also securities which are not already paid for their full value can be considered freely negotiable whenever it can be guaranteed that their negotiability do not suffer any restriction and there are sufficient disclosure requirements about the fact that they are only partially paid and about consequences stemming from this provision; see Regulation 1287/2006, art. 35, parr. 1, 2, 3 and N. MOLONEY, ibid.

article continues explaining that, when the regulated market is exercising discretion in admitting the instrument to trading, it has to consider a series of elements which are the distribution of the instrument to the public and historical information regarding the issuer and which can give a general outlook about its business, that is asked for by Directive 2003/39/EC[252], more precisely, these information shall be used when the regulated market should do the assessment to understand if the instrument can be traded in a fairly, orderly and efficient manner[253].

To admit to trading units of collective investment schemes, the regulated market has to be satisfied with the compliance of the investment scheme itself with the discipline of constitution laid down in Directive 1985/611/EC[254] and that it has respected the procedures governing its registration, notification or that anyway constitute a precondition for its marketing in the jurisdisction in which the regulated market acts[255]. Moreover, the factors that are to be considered in doing the assessment of the possibility of fairly orderly and efficient trading of the instruments are laid down: together with taking into account the distribution of the units to the public, the regulated market has also to consider if there are market making arrangements (or if the scheme's management has disposed alternative arrangements) to allow units' redemption for the investors; and if there is a periodic publication of the net asset value of the units which ensures its transparency to investors[256]. Lastly, the article provides for units of a closed-end scheme, which follow the same criteria of assessment of trading's characteristics, but without the necessity to have redemption arrangements and being also obliged to publish information regarding the scheme's strategy of investment as an alternative to the publication of the net asset value of the units[257].

Derivatives are to be admitted on the basis of criteria relating to the contract that creates them and to their settlement: the contract has to be construed upon clear and unambiguous terms, which make possible to relate the price of the instrument with the one of its underlying; this last price, or the other value measure related to the underlying, has to be of sufficient reliability and made public; there has to be availability of the information needed to value the instrument; the settlement price of the contract must reflect the value of its underlying in a proper way; if the settlement requires or gives the possibility to deliver an underlying security or an asset instead than settlement in cash, there have to be adequate arrangements that make possible to who participates in the market to gain appropriate

[252] The Prospectus directive, now probably this provision can be interpreted as obliging the regulated market to take into account the requirements asked by the Prospectus Regulation of 2017, and see R. VEIL and C. DI NOIA, SME Growth Markets, in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017
[253] Regulation 1287/2006, art. 35, par. 4
[254] Which is the Directive coordinating the discipline relating to undertakings for collective investment in transferable securities.
[255] Regulation 1287/2006, art. 35
[256] Regulation 1287/2006, art.36, par. 1, 2, 3.
[257] Regulation 1287/2006, art. 36, par. 4

information about the underlying and there also have to be in place delivery and settlement procedures which are adequate for the underlying itself[258].

These conditions are established only for regulated markets: their concrete application by markets leaves them the space to make some choices (for example there is no precise requirement of minimum free float for securities and neither minimum trading record one), which means that there could be a race to attract firms and investors on the market, contemporarily, they do not constrict MTFs, OTFs nor internalisers, meaning that these facilities could have an advantage in attracting issuers, rather than investors. Stricter requirements, indeed, mean a greater degree of investor protection, while laxer ones are translated in lighter controls and allowance of more risky products, so giving more possibilities to issuers as to what they can place on the market. Whether the race will be to the top or to the bottom is hard to say: a race to the top could translate in greater disclosure requirements, through which there would be a better evaluation of the issuer and of the shares, reducing potential risks coming from them, which would be the most socially desirable outcome; on the other hand, a race to the bottom would mean laxer controls, minimum disclosure requirements imposed and the possibility, as said, to place more risky products on the market: this is obviously a solution that bears a great risk of hampering the market system, but it is an easy path to follow and could grant an high number of issuers asking for admission, even due to the lighter costs that they should bear to comply with the market's conditions. The more articulated and detailed are the criteria taken into account to admit an instrument on the market, the more there will be direct and indirect costs upon the issuer, which will face a greater disclosure, as well as greater costs of analysis and financial engineering of the instrument, particularly when we are speaking about derivatives.

2.9 Suspension and removal of instruments from trading venues

Market operators can suspend or remove an instrument from trading if it does not respect the regulation of the regulated market, but only when there would be no significant damage to investors nor to the orderly functioning of the market in doing so. Moreover, when it is necessary in order to support this removal, the market operator must also suspend or remove derivatives that refer to it as their underlying. When the operator decides for the suspension or the removal of the instrument, it has to communicate this choice to the national competent authority. In order to better protect the capital markets system, the national competent authority which has jusrisdiction upon the regulated market from where there has been the removal or the suspension, if this has happened because of suspected market abuse, takeover bid, or non disclosure of inside information about the issuer which

[258] Regulation 1287/2006, art. 37, par. 1

was required by the market abuse regulation, requires that other venues and internalisers falling under its powers and trading the same instrument or derivative remove or suspend the instrument, if this do not entails significant damage to investors or to the orderly functioning of the market[259].

The national authority deciding about the suspension or removal of the instrument from all the trading venues in its jurisdiction has to notify this decision to ESMA and to other national authorities (or if it has opted to not suspend nor remove the instrument, it has to give an explanation): these notified authorities can also suspend the instrument from trading on their governed trading venues, unless this decision would hamper investors or the orderly functioning of the market.[260]

These provisions are particularly important for the CMU, since they make easier to prevent risks that could spread in the whole capital markets system: an instrument which has been suspended or removed, say, because the issuer did not fulfil its disclosure obligation of inside information under the MAR, bears the same risks for all the markets in which it is traded, since it does not give information that could be essential for investors in order to make a conscious choice, and this is a problem the character of which remains unaltered in every jurisdiction. To adapt then the situation to the specificities of the national environments, the national authorities maintain power upon their own jurisdictions[261]: it will be to them to assess if the same risk perceived by another national competent authority exists also in their markets, but, since the situations in which the suspension or the removal from the market could potentially extend to markets of the whole Union are particularly risky, the authority also has to explain why, in the specific case, it does not recognize their occurrence and so why it eventually decides not to align with the decision of the authority in the jurisdiction of which happens the first removal, and so maintains the instrument on its markets[262].

The same discipline applies to MTFs and OTFs[263]. This is important, since it excludes that there could be a choice of regulatory arbitrage based on the procedure for suspension and removal of instruments from the market: it is particularly important to harmonise the provisions governing this issue since it is to reduce risks that are generated on the market only after admitting the instrument or that were not correctly assessed when evaluating the admission, either due to an error or to a choice of the venue, which could have chosen a lighter approach to this evaluation, since, as said also practices could be a mean to run the race of regulatory competition. Operating on the procedural side of the matter,

[259] Directive 2014/65/EU, art. 52, parr. 1 and 2
[260] Directive 2014/65/EU, art. 52, par. 2
[261] Here we see a potential problem of regulatory competition and race to the bottom: free riding made by the authorities through not suspending or excluding instruments, may spread in the whole Union, since the national authorities may choose not to lose an important category of instrument from their markets. For this the possibility give to ESMA to intervene directly in dangerous cases may be essential in preserving market integrity. And see J. COFFEE, Extraterritorial Financial Regulation: Why E.T. Can't Come Home, Cornell Law review, volume 99, issue 6, 2014 and EU regulation 1095/2010, artt. 17 and 18
[262] And see Directive 2014/65/EU, art. 52
[263] Directive 2014/65/EU, art. 32

indeed, is useful to go closer to that common supervisory culture which is one of the goals of the ESMA's action: diverging practices among supervisors could be, as said, a major base for the regulatory arbitrage and this applies both to supervisors intended as national authorities and to market operators acting in order to preserve the integrity of their and of other markets, as happens in artt. 32 and 52 of the MiFID II.

2.10 Non discriminatory access to CCP

Even if not strictly related to the discipline of the organization and functioning of the trading venues, it is necessary here to briefly explain the discipline that MiFID II imposes about the access to central counterparties for clearing and settlement of financial instruments traded in the venues.
Clearing and settlement procedures are meant to enhance market efficiency through facilitating and ensuring that there is an effective functioning of the transaction procedures between the subjects involved. Clearing procedures are the ones in which an "organizations acts as an intermediary and assumes the role of a buyer and a seller in a transaction in order to reconcile orders between transacting parties"[264]. "Settlement mechanisms are necessary to close transactions made through the delivery of the instruments to the buyer and the payment of the monetary countervalue by the seller"[265]. So these procedures are used to the purpose of guaranteeing that there is an orderly functioning of the market and are a "third player" in transactions. Clearing reduces the complexity of the operation to be done in order to achieve a greater clearness in trading that means obtaining a greater degree of transparency and efficiency in the functioning of the market. Standardizing the settlement procedures allows to have a uniform set of practices to complete negotiations so that there cannot be procedural differences that hamper smooth price formation or distortions in placement strategies of instruments on the market[266]. Moreover the fact that the discipline of the systems that enact clearing and settlement procedures for trading venues imposes the principle of non discriminatory access to them, which ensures that there cannot be conditions for unfair competition between venues[267].

2.10.1 Non discriminatory access to CCP in MiFID II

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[264] http://www.investopedia.com/terms/c/clearing.asp
[265] A. TROISI, La negoziazione degli strumenti finanziari e l'accesso non discriminatorio alle procedure di regolamento, in V. TROIANO and R. MOTRONI, La MiFID II: Rapporti con la clientela, regole di governance, mercati, CEDAM, 2016, pag. 532
[266] A. TROISI, ibid.
[267] A. TROISI, ibid.

MiFIR contains the provisions guaranteeing and governing non discriminatory access to the CCP, which is necessary for the efficient functioning of the market: the uniformation of these procedures and the possibility of non discriminatory access to them is meant to guarantee, as said, the smooth ìfunctioning of the market. The concept of non discriminatory access to the CCP implies that interests in buying and selling financial instruments are meet with each other without being influenced by an eventual discretionary choice made by who manages the system: this principle is strong enough to protect competition between trading venues since in this way CCP are obliged to regulate every transactions which is made on a venue, if the transaction is respecting some technical requirements that are defined a priori by the CCP itself.

The discipline provides for a substantial equality of trading venues in accessing the CCP to regulate transactions in financial instruments that are made in them, meaning that they shall have the same treatment of contracts traded on the venue in terms of collateral requirements and netting of economically equivalent contracts, and procedures of cross margining with the correlated contracts cleared by the same CCP[268].

Furthermore, the national competent authority which has jurisdiction upon the CCP or the one having jurisdiction upon the trading venue has to verify that the access of the venue to the CCP does not create problems regarding market's smoothness or its orderly functioning, and particularly when these problems derive from liquidity fragmentation or would increase systemic risk[269]. The same paragraph obliges the authority to verify also that, in case of derivatives not being OTC ones, an interoperability arrangement[270] is not required.

These provisions make possible to remove obstacles and discriminatory practices on the EU markets, and allows a better explication of competition between venues, so leading to inferior costs to be bore by investors, and for issuers which means that capital markets may become more attractive for them, coherently with the scopes of the CMU. Moreover, this allows also to have similar operational costs for investors irrespective of the venue they are operating in[271], meaning that there is more probability of capital being invested cross border due to the fact that the uncertainty of investment costs is reduced.

3. Algorithmic and high frequency trading in MiFID II: implications for trading

[268] Regulation 600/2014, art. 35, par. 1
[269] Regulation 600/2014, art. 35, par. 4
[270] CCP interoperability is an arrangement that links different CCPs, allowing participants of one CCP to seamlessly deal with participants of another CCP. And see N. Garvin, Central counterpart interoperability, on https://www.rba.gov.au/publications/bulletin/2012/jun/pdf/bu-0612-7.pdf
[271] A. TROISI, La negoziazione degli strumenti finanziari e l'accesso non discriminatorio alle procedure di regolamento, in V. Troiano and R. Motroni, La MiFID II: Rapporti con la clientela, regole di governance, mercati, CEDAM, 2016, pag. 539

venues regulation

In MiFID II is also regulated algorithmic trading and a particular type of it called high frequency trading. These have an important impact on markets: in particular high frequency trading may bear high risks for the system. Their influence on the regulation of capital markets is not limited to the discipline of this kind of trading itself, but in MiFID II extended to obliging venues, and in particular regulated markets, to implement systems that can prevent or at least reduce the risks coming from their use. It is so important to analise this discipline to understand how significant will be its impact for the CMU, particularly for preserving the system from negative shocks.

3.1 What algorithmic trading and high frequency trading are

Algorithmic trading is defined by the Directive as a type of trading where an algorithm determines automatically some parameters of an order (whether or not to initiate it, timing, price, quantity, how to manage it after the submission) with limited, or in absence of, human action, without including systems used for the sole purpose of routing orders to trading venues or to process orders which have no determination of trading parameters or to confirm orders or for the post trade processing of executed transactions[272]. A more general definition is the one according to which algorithmic trading is a method of trading involving the use of precise, pre-programmed computerized instructions in all aspects of executing a trade[273]. From these definitions, we can take out some important characteristics of algorithmic trading: first, it requires a well-defined investment strategy to be created, in order to program the algorithm, meaning that this last one will follow the strategy and, if not well monitored, will not adapt to eventually unexpected changes in the market; secondly, algorithms need to be able to autonomously gain information and recover data which they need for trading and to make assessments on the importance of the information collected for the strategy: they are, in this sense, autonomous decision makers in the market[274]; thirdly, the fact that algorithms are not able to adapt themselves to sudden changes in the market, means that the instructions given by traders are fundamental in their functioning and also have to contain some "security belt elements", which may stop the algorithm from trading when certain events occur[275].

The Directive defines then high frequency trading as an algorithmic trading technique which is

[272] Directive 2014/65/EU, art. 4, par. 1, n°39

[273] Y. YADAV, How algorithmic trading undermines efficiency in capital markets, Vanderbilt Law Review, vol. 68, n°6, 2015, pag. 1619

[274] And see S. PATTERSON, Dark pools: the rise of the machine traders and the rigging of stock market, 2013

[275] For example sudden falls of market price or too low payoffs, and see I. ALDRIDGE, High frequency trading, a practical guide to algorithmic strategies and trading systems, 2010

characterised by infrastructures meant to minimize latencies, including co-location, proximity hosting or high speed direct electronic access; the system determination of orders initiation, generation, routing or execution of which need no human intervention for individual orders; high message intraday rate constituting orders, quotes or cancellations[276]. High frequency trading is differentiated from algorithmic trading mainly by two elements which are the execution speed and the intraday perspective. We can find many definitions in literature about what is the high frequency trading[277], and for this reason, MiFID II makes a very important point in defining it legislatively.

High frequency trading is even more deeply linked with the exploitation of big data than others algorithmic trading techniques are. The strategy of investment made through it is based on the informational advantage that can be obtained by the interpretation given by an algorithm of a certain group of data. According to some[278] the prediction of market movements on the very short time is possible, if there is a relevant known event (for example an order of large size[279]): high frequency trading exploits calculation power to infer the future movements on the market from past patterns, even if the further in time is the predicted movement, the less precise and reliable is the prediction.

Part of the literature[280] considers high frequency trading an instrument having lots of positive effects for the market: it would increase efficiency, bring more liquidity, reduce price volatility. In other words, through this instrument it could be possible to reduce cost and time required for trading: high frequency trading systems are continuously negotiate stocks, meaning that they reduce the time of execution and response to orders. Anyway, most part of the literature, considers this kind of trading dangerous and pushes to find ways to mitigate risks for the market, even considered that a relevant part of trading is nowadays made through algorithmic and high frequency systems[281].

So both algorithmic trading and high frequency trading can be synthetically described as trading techniques which are executed with a particularly high speed (or frequency) of trading, that can be obtained only by the use of electronic instruments that automatically process data about what is happening on the market and use them to generate and execute orders without the intervention of a human operator.

[276] Directive 2014/65/EU, art. 1, par. 1, n°40

[277] And see, for a broad exemplification, G. JACCARD, High frequency trading: the technological puzzle, University of Zurich, 2015

[278] F. PASQUALE, Law's acceleration of finance: redefining the problem of high frequency trading, Cardozo Law review, 2014-2015

[279] The point is strictly linked with dark pools, in where orders are normally much above tha average market size: high frequency trading discipline should also be seen as connected with the one of dark pools, and actually is often used in there.

[280] See for example N. D. BROWN, The Rise of High-Frequency Trading: The Role Algorithms, and the Lack of Regulations, Play in Today's Stock Market, Appalachian Journal of Law, n° 209, 2012

[281] And see Y. YADAV, How algorithmic trading undermines efficiency in capital markets, Vanderbilt Law Review, vol. 68, n°6, 2015

3.2 Risks deriving from the use of high frequency trading

High frequency trading is a technique which brings some risks for the market's safety. First of all, the use of high frequency trading on a market can amplify shocks that happen on it, and particularly the ones that are connected with a single operator[282]. It can have negative effects upon quality and integrity of markets: there may be risks for the price formation process, on the stability of prices, and on liquidity. In particular, it seems that when high frequency trading techniques are used, they are more lucrative when there is an high volatility of prices, and, contemporarily, their diffused and heavy use may influence the volatility itself and cause large price variations[283]. Moreover, high frequency trading may heavily influence liquidity: when there is a massive use of the technique on a market, liquidity grows: this growth, however, is not always real, since it usually vanishes in a short time[284]. Another problematic character of high frequency trading lies in its accessibility: to be used, it is necessary a significant investment which is not something every player in the market can afford. This is critical since it means that fairness, transparency and non di discrimination in accessing the market may be in peril: high frequency trading brings a relevant advantage in terms of information. The algorithm on which this trading technique is based can process data much faster than a human, meaning that, once the input order has been given, the trader using high frequency trading is in an advantageous position in respect of the ones that operate traditional trading, since he obtains faster the "meaning" of data on the market and may consequently adapt its strategy; moreover, when there is no need for adaptation, the algorithm would make good use of this informational advantage by enacting the strategy fast and autonomously. According to the MiFID II[285], this may be an incentive for traditional investors to move on markets in where this kind of trading is not used; it may also be an incentive for informed and competent investors to move to dark pools (or anyway to more opaque venues), and this could have consequences on the efficiency of the price formation process[286]. The use of high frequency trading may also be oriented to manipulate market prices through an ad hoc strategy input, with the advantage that there would be more difficulty in detecting and sanctioning this conduct for the national authorities.

3.3 The regulation of algorithmic and high frequency trading in MiFID II

282 So called "idiosincratic" shocks.
283 V. CAIVANO, The impact of high frequency trading on volatility. Evidence from the Italian market, Consob, Quaderni di finanza, n°80, 2015, pag. 8
284 And usually in complicated market conditions, Consob, Relazione per l'anno 2012, 2013, pag. 161
285 And see Directive 2014/65/EU, recital n°62
286 Consob, Relazione per l'anno 2012, 2013, pag. 161

To mitigate problems and risks coming from the use of algorithmic and high frequency trading, MiFID II uses a twofold approach: it imposes obligations both on firms enacting algorithmic and high frequency trading, and on regulated markets in where this kind of trading is operated. In here, coherently with the purpose of this work, we will briefly explain the regime to be applied to investment firms, and then focus on the provisions concerning regulated markets.

3.3.1 Investment firms

MiFID II, as briefly said, intervenes both on firms and on trading venues in order to mitigate risks coming from the use of algorithmic and high frequency trading. This is necessary because, if it is true that the misuse of these trading methods can cause systemic shocks, it is also true that, as said, the main risk is the one of idiosyncratic shocks, meaning that an intervention on the organization and functioning of firms is necessary to prevent this kind of event.

Investment firms that operate algorithmic trading must have effective systems and risk controls that can guarantee the resiliency of its trading systems and are sufficiently capable and appropriate for their business. An important feature of these system is the obligation to impose on them trading thresholds and limits and prevent events deriving from their functioning, such as erroneous orders, that can hamper the orderly functioning of the market[287] . Firms are also obliged to notify the fact that they engage in algorithmic trading to the national competent authority of their Member State of origin and to the one that has jurisdiction on the trading venue they operate with this trading method. The authority of their Member State of origin may always ask for proof of compliance with the first paragraph of art. 17 by the firms and also for a description of the nature of investment strategies enacted by the firm with algorithmic method; the authority competent on the venue in which the firm operates can obtain these same information by requesting them to the one of the Member State of origin[288]. Moreover, firms are also asked to keep records of anything related with the information that can be asked by the authorities and ensure that the records kept is sufficient to let the authority monitor its compliance with the Directive. If the firm engages in high frequency trading, in the end, it has to keep also accurate and time sequenced records of every order it has placed, cancellations, executed ones, and quotations on venues included and has to make them available to the authorities when requested.

When the firm operates through algorithmic trading in order to follow a market making[289] strategy, has some additional obligations to respect, which are to be fulfilled taking into account liquidity, scale

[287] Directive 2014/65/EU, art. 17, par. 1
[288] Directive 2014/65/EU, art. 17, par. 2
[289] See http://www.investopedia.com/terms/m/marketmaker.asp for a definition.

and nature of the market and the specificities of the instrument traded. These firms have to carry out the market making strategy continuously during a precise proportion of the trading hours of the venue in which the strategy is enacted, save for extraordinary circumstances, this should provide liquidity to the venue regularly and predictably; in order to fulfil this obligation, the firm has to enter in a binding written agreement with the venue that specifies at least the aforementioned points; it also has to have systems and controls which effectively guarantee the respect of the agreement[290].

3.3.2 Regulated markets

Regulated markets are subject to a series of obligations which are relevant to deal with the risks deriving from algorithmic and high frequency trading, even if mostly not expressly meant to this scope[291].

Regulated markets must, as a condition to be authorized to operate, must have set systems, procedures and arrangements that can guarantee the resiliency of their trading systems, their capability to manage peak order and message volumes, the fact that they may always assure orderly trading notwithstanding eventually critical market conditions, that they are also tested to secure the respect of these conditions, the presence of effective business continuity arrangements that safeguards the continuity of services in case of any breakdown that may hit them[292]. Moreover, when on the market there are firms enacting a market making strategy, the firm shall have written agreement with them, together with schemes that guarantee that there are enough firms adhering to the agreements: these agreements impose to post firm quotes at competitive prices so to provide regularly and predictably liquidity to the market[293].

Another very important set of provisions to maintain order and fairness of negotiations is the one imposing to regulated markets the obligation to be always capable of temporarily stopping or constraining trading in case of unexpected price movements[294]. In particular, regulated markets have to calibrate appropriately parameters to do such a stop so to take into account also the liquidity of different classes and subclasses of assets, the nature of the market model and typologies of users; these parameters and their eventual modifications have to be communicated to ESMA. Furthermore,

[290] Directive 2014/65/EU, art. 17 par. 3

[291] And see S. MEZZACAPO, La regolamentazione dell'algorithmic trading nell'UE, in V. TROIANO and R. MOTRONI, La MiFID II: Rapporti con la clientela, regole di governance, mercati, CEDAM, 2016, pag. 379 ss.

[292] Directive 2014/65/EU, art. 48, par. 1

[293] Directive 2014/65/EU, art. 48, par. 2; the minimum content of the agreements is specified in par. 3 of the same article.

[294] And see S. MEZZACAPO, La regolamentazione dell'algorithmic trading nell'UE, in V. TROIANO and R. MOTRONI, La MiFID II: Rapporti con la clientela, regole di governance, mercati, CEDAM, 2016, pag. 380

Regulated markets shall have all the instruments to refuse orders exceeding a certain threshold of price and volume or which are manifestly erroneous; to suspend or constrain trading whenever there is a relevant price movement in a financial instrument that occurs in the market (or in the related ones) over a short period; exceptionally, regulated markets have to be able to correct, eliminate or modify any transaction that occurs in their venue[295].

The Directive also binds markets to have procedures, systems and arrangements to require to its members and participants to test the algorithms they use so that algorithmic trading systems do not bring disorder in trading and, in case this happens, these disorderly conditions may be managed. These systems have at least to guarantee to be suited to limit the ratio of unexecuted orders to operations in the system which can be joined by a market participant, to slow down the order flow whenever there is a risk to reach the maximum capacity of the system, and to limit and enforce the minimum tick size[296] that can be enacted on the regulated market[297].

Also fee structures used by regulated markets are relevant for the matter: they have to be shaped in such a way that makes them transparent, fair and non discriminatory and do not create incentives to orders and transactions which may lead to disorderly trading or market abuse, such as misused algorithmic and high frequency trading techniques are[298].

Lastly it is provided that regulated markets should be able to identify orders that are generated by using algorithmic trading, the algorithms that have generated them and the persons to which they correspond[299]. The information has then to be give to competent authorities when requested. This provision is meant to ensure effective supervision and to allow authorities to deal with the misuse of algorithmic trading, both if it is done unconsciously or with a precise scope; this means that authorities should not only be able to identify orders coming from different algorithms, but also to assess the strategies used by the algorithms themselves in generating the orders: for this, orders coming from algorithmic trading must be flagged, by members or participants to the market, otherwise authorities could not provide an efficient and effective reaction to risky algorithmic trading practices and strategies[300].

Other detailed aspects of the matter we are analyzing will be further specified by ESMA through some regulatory technical standards[301].

The provisions regarding algorithmic trading in MiFID II are aimed to maintain and orderly

[295] Directive 2014/65/EU, art. 48, parr. 4 and 5
[296] Minimum price movement of an instrument. See http://www.investopedia.com/terms/t/tick-size.asp?ad=dirN&qo=investopediaSiteSearch&qsrc=0&o=40186
[297] Directive 2014/65/EU, art. 48, par. 6
[298] Directive 2014/65/EU, art. 48, par. 9
[299] Directive 2014/65/EU, art. 48, par. 10
[300] And see Directive 2014/65/EU, recital n°67 and art. 48, par. 10
[301] Directive 2014/65/EU, art. 48, par. 12

functioning of the market and to avoid unexpected shocks on it. They are necessary in order to achieve a capital markets union, since the risks connected to the misuse of these trading techniques may rapidly take the venue in which they are enacted to the collapse. For this reason, the Directive uses two sets of norms, one to regulate firms engaging in algorithmic trading, so to have a minimum level of protection for the markets, and the other imposed to regulated markets, in order to obtain a more resilient normative environment at least for the venues containing the most of the liquidity in EU market.

4. Conclusion

MiFID II is a directive strictly connected with the concept of creating a capital markets union. Many of its elements are aimed to achieve a better connection of liquidity pools in the Union and to reduce the space that is now occupied by OTC trading. The new regulation of trading venues, and particularly the creation of the new category of the organized trading facilities, the new regulatory environment in which dark pools will operate, the idea of the SMEs growth markets, and the regulatory elements meant to diminish risk coming from algorithmic and high frequency trading, are some of the most important provisions in this sense. Reforming the trading venues regulation is, indeed, maybe the most important pillar to further the process of integration of markets and to have less barriers to the cross border movement of capital: the more similar the rules in each same type venue of each Member State, the less relevant the non normative barriers are (one example out of all the linguistic one, but many others are possible).

Some elements of MiFID II may also not bring the expected positive effects. The choice of creating a new category of trading venue, OTFs, may be an effective way to attract OTC transactions in non equity instruments in a regulated environment, but on the other hand is an additional element of fragmentation of the market, meaning that creates a new possibility for regulatory arbitrage. Moreover the creation of SMEs growth markets may not be so useful in attracting SMEs on the market, at least in some cases[302], and again, may result only in more fragmentation and confusion on the market. The volume cap mechanism will have to prove itself with time, even if, as said, some authors are skeptical about its efficacy.

Another important question to be tackled is how this new system will affect groups governing financial markets infrastructures. Although neither prudential regulation nor supervision of these

[302] We will see the Italian one in the next chapter.

groups have been covered by the new MiFID II system[303], some of its provisions will certainly influence them. Firstly we have to consider that in a group of this type there will be all kind of venues, from regulated markets, to MTFs and OTFs: this should trigger provisions regarding conflict of interest[304], meaning that market operators and investment firms in the group should have effective arrangements which should be suited for the prevention and the management of conflicts of interests that can arise between the trading venues in the group, their owners and the market operators or investment firms that manage them. Another important area in which MiFID II may influence these groups is the one of transparency of ownership and suitability of shareholders[305]. Firms and market operators managing MTFs and OTFs have to give to their national competent authority a description of the functioning of their venue, which has to contain also the description of eventual links to or participations by regulated markets, MTFs, OTFs or systematic internalisers which are owned by the firm or by the market operator we are talking of, together with a list of its members and participants. Moreover there is a disclosure obligation regarding information about the ownership of the trading venue and of the investment firm or the market operator. When the involved venue is a regulated market, then, whoever can have a significant influence over its management has to be suitable according to the directive, and the same goes for firms intending to operate MTFs or OTFs. These elements may influence the structural organization of groups governing financial market infrastructures: this happens in particular with vertical groups in which a subsidiary governs the venue and the management of the mother company is in such a position to strongly influence it. In the end, we have to briefly refer to what we have said regarding nondiscriminatory access to CCP: since these structures are normally part of the groups we are talking of, this will have an influence upon the groups themselves which will not be able to preclude the access to them on a base non depending from the group the venue is part of.

[303] G. FERRARINI and P. SAGUATO, Governance and Organization of Trading Venues, in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, pag. 314
[304] Directive 2014/65/EU, art. 18, par. 4 and art. 47, par. 1
[305] Directive 2014/65/EU, art. 10, par. 1, art. 46

Chapter Three

The Italian regulation of trading venues and the implementation of MiFID II in Italy

Contents: 1. The historical evolution of the Italia regulation of trading venues; 2. The current Italian regulation of trading venues; 3. The implementation of MiFID II in Italy: innovations in the trading venues discipline; 4. Conclusion.

1. The historical evolution of the Italian regulation of trading venues

To understand what will be the effects of MiFID II on the Italian system, we have to analyse the existing situation. The regulation of Italian trading venues is mainly contained in the Consolidated Law of Financial Intermediation[306] (Testo unico dell'intermediazione finanziaria), Part III, Title I, in articles 60-ter to 79-ter. Before examining the discipline, we will briefly introduce its historical evolution.

1.1 The historical evolution of Italian's trading venues regulation: a brief summary

In 1913 it was for the first time created a systematic and consistent discipline[307] for the Italian bourse market, in which there were both defined rule that governed institution and supervision of the first

[306]Legislative decree n°58/1998
[307] Law n°272/1913 and Royal decree n°1068/1913

example of trading venues, the so called "borse di commercio". That model of regulation already followed the paradigm of the Italian regulation of trading venues in the most part of the twentieth century: a strong public and monopolistic characterization for what attained to the institution and organization of the venues. Together with this tendency, a private-law oriented approach was used to regulate what concerned players and contracts in the market[308]. A decade later, in 1925, another step[309] towards a public-governed bourse model had been done, through the qualification of bourse mediators as public officials and the institution of a guarantee fund for the investors.

The discipline remained virtually untouched until 1974, when there was a reform[310] aimed to incentive investors to act on capital markets and attract capital deriving from savings on it, to enhance the information system of the market, and to create a better supervisory system of listed companies. This act introduced the CONSOB, the national commission for companies and the bourse, which is the national competent authority in Italy for supervision and secondary regulation of listed companies and trading venues. The reform gave CONSOB all the powers regarding the organization and the functioning of markets, and the admission to trading of financial instruments[311].

Apart from some legislative interventions that were anyway aimed to integrate the existing discipline, the next evolutionary level of the system was achieved in 1991, when was enacted a new law[312] which brought further changes to the discipline of trading venues. Its main features can be summed up in the institution of the "Consiglio di Borsa"; the introduction of a discipline regarding telematics negotiations, clearing and settlement of operations and the connection between intermediaries and stock exchange; the empowerment of CONSOB with the possibility to institute and discipline local markets to negotiate non-listed securities, and to authorize and regulate the negotiation of standardized derivatives[313]. With this reform, we had two main characteristics that emerged regarding the regulation of securities markets, and that became distinctive of the Italian legislation in of the area: the first is that it became very detailed about all the aspects regarding intermediation and players in the market, in order to better guarantee both investors and the market itself; the second, which is more important for our work, is that from law 1/1991 the importance of secondary regulation has started to grow and, in a certain sense, surpassed the one of primary regulation. The point is in the rapidity the system grows with: if it was demanded to primary regulation something more than expressing framework principles and allocating supervisory and regulatory powers, the process of

308 Especially for this last category, much has been left to bourse customs, which became a strong source of soft law.

309 Royal decree n°222/1925, converted in law n°597/1926

310 Law n°216/1974 and its three implementing decrees, the presidential decrees n°136,137 and 138 of 1975

311 And see M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 640 and following

312 Law n°1/1991

313 Law n°1/1991, artt. 12, 20, 22, 23, 24, and see M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 645

adaptation of the legislation to the markets' changes and innovation would be too slow, and result in an enshrinement of discipline in laws that would need too much time to be changed to follow markets' novelties, meaning a concrete loss of competitive power of the Italian law system in attracting investment, or worse, in an attraction which is based on the too late response of the system, say, to hampering or too risky market practices and so on. The choice to move the locus of the detailed provisions in secondary legislation was so necessary, in order to maintain a functioning market environment.

Before analyzing the last steps of the evolution of the Italian discipline of trading venues, namely the Consolidated Law of Financial Intermediation and the legislative decree n°164/2007, which implemented MiFID I, we have to make a premise, in order to better understand their impact on the system. The discipline of Italian venues, even after the 1991 reform, has always presumed two characters of the discipline of stock markets: their management, so the provision of negotiation services, was considered as having public nature and monopolistic structure[314]. The Italian law system gave to the "Consiglio di Borsa", which had legal personality of public nature, the role of provider of the services related to negotiation through a "società consortile", which did so in a regimen of administrative concession[315]. As a logical consequence of the public conception of the nature of the stock market activity, came the monopolistic structure of this kind of activity: only the State could provide these services and contemporarily guaranteeing the conciliation and the balance between investors protection and growth of the markets, since the appearance of private subjects with this role could have led to free riders and to a race to the bottom in the regulation of private-managed markets. Moreover, in the law n°1/1991, was specified the principle of concentration of negotiations in "regulated markets"[316], which were only the ones governed by the public authority. This meant that there was no possibility for trading venues different from the public managed ones to exist[317]: the consequence was a serious difficulty of integration of the Italian market with the European ones.

The definitive shock to this system was given by the Eurosim decree[318], which implemented the directives 93/22/CEE and 93/6/CEE. These European acts provided for the enactment of the principle of freedom of movement of capitals and for the liberalization of investment services: there was a

[314] Presidential decree n°138/1975, art. 5; M. SEPE, I mercati regolamentati, in F. Capriglione, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 646, but see also, G. FERRARINI, L'attuazione della direttiva comunitaria sui servizi d'investimento. Temi e problemi, Rivista delle Società, 1995, p. 112

[315] M. FOSCHINI, Struttura e funzionamento del mercato mobiliare, in Il Diritto del mercato finanziario, Giuffrè Editore, 2008, pag. 97

[316]Law n°1/1991, art. 11; it is to note that until the implementation of MiFID I, regulated market meant something slightly different than what is intended after the Directive: we will further specify this meaning in the next pages when examining the reform of 1998.

[317] M. DRAGHI, Commento sub art. 46, in F. CAPRIGLIONE, La disciplina degli intermediari e dei mercati finanziari, Padova, 1996, pag. 386

[318] Legislative decree n°415/1996

serious risk of migration of negotiations towards foreign markets, in case the system could not stand the price quality ratio of them in providing the same services. Although none of these Directives imposed that change as an obligation, to prevent the movement of investors and investment firms abroad, the Eurosim decree implemented the principle considering the activity of organization and management of regulated markets as a private business activity to be carried out by a limited company (società per azioni). This lead, in 1998 to the creation of Borsa Italiana s.p.a., that is even now the only company acting as market operator for regulated markets in Italy[319], and to the definitive change of model from public to privately held securities markets. In any case there has not been a complete override of the public model: there still are a great degree of public supervision and deep controls on Italian market operators, since the lawmaker also has to protect savings, and consequently investors that decided to act in the market instead than engaging other uses of their capital[320].

In 1998 the Consolidated Law of Financial Intermediation (CLFI) was enacted. It confirmed the separation between financial intermediaries and markets, which were further divided in regulated and non regulated markets: the first ones were the ones that needed authorization to operate, had heavier disclosure obligations and had the so called European passport since the benefitted of the mutual recognition principle granting them to operate in the whole Union on the base of the domestic authorization; non regulated markets, on the other hand, did not benefit of such a privilege, but were neither burdened by the same disclosure obligation nor of the same extension of the authorities' intervention power[321]. Innovations were made concerning the post trading discipline, with the enlargement of the authorities powers that from then on had supervisory powers upon transparency, orderly proceeding of the negotiations and investors protection which were to be exercised on a general and continuous basis and not only limited to the approval of the market regulation. Some[322] say that this further empowerment of the authorities could be a signal of how the lawmaker was convinced of the fact that private regulation could be dysfunctional in certain cases and so at least supervisory and intervention powers of the authorities were to be enhanced. This vision could be effectively correct, since, how we have said in the first chapter, the private regulator is a very important player in regulatory competition: being easier for him to modify the rules of its market, being subject to less constraints when enacting a practice, and consequently being faster to react to

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[319] Actually, there also is MTS s.p.a., but the majority of its capital is property of Borsa Italiana s.p.a. (for a portion around the 60%); the same company, also operates three out of the ten MTFs authorized by the CONSOB, and a fourth one is operated by MTS s.p.a.
And see http://www.consob.it/web/area-pubblica/mercati

[320] And see F. ANNUNZIATA, Mercati regolamentati e quotazione ufficiale, in La disciplina del mercato mobiliare, Giappichelli, 2015, pag. 299

[321] And see legislative decree 58/1998, artt. from 60 ter to 79 ter

[322] See M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 649, referring to C. MOTTI, I mercati regolamentati di strumenti finanziari, in A. PATRONI GRIFFI, M. SANDULLI, V. SANTORO, Intermediari finanziari mercati, e società quotate, Giappichelli, 1999, pag. 352

market changes in one of these two ways, if compared with a public subject, it could more easily engage a race to the bottom, since it would more probably be able to gain benefits from free riding the systemic risk. This means that it cannot be left free of acting how it wants, but it needs a continuous supervision: if the powers of the authority were limited to the approval of the market regulation, it would mean that the market operator would have a lot of space of manoeuver to enact practices that could favor investment firms and companies seeking for listing without caring if they hamper investors or if they are risky for the market system.

The last step that we will mention in this paragraph occurred in 2007, when our law system implemented the MiFID I[323]. With this evolution something very important happened: there has been the abolition of the obligation to concentrate negotiations on regulated markets and a structural transformation of the venues themselves occurred. The implementation of MiFID I brought in our system the concept of trading venue as it was intended in the UK system and gave a new role to the market operators (but also to investment firms): the possibility to create markets parallel to the existing regulated ones which were operated by companies under the CONSOB supervision[324]; in few words, with this reform competition was definitely opened in this sector, also with the creation of MTFs and systematic internalisers[325]. Moreover, in order not to leave investors undefended when acting in the newly born venues, and to avoid negative consequences on the processes of price formation and price discovery, pre and post trading transparency obligations were instituted[326], together with a reinforcement of the best execution principle. The MiFID I implementing decree continued the path traced by the CLFI: it followed the dispositions of the European lawmaker, and opened to competition the sector, but contemporarily it gave more powers to authorities, in order to maintain an high level of investor protection.

Analysing what will happen with the implementation of MiFID II is something that we will treat in the third paragraph of this chapter. What we can say after this brief exam of the historical evolution of the Italian trading venues regulation is that, even if formally the nature and the structure of the discipline changed relevantly, in the substance the change was a little bit smoother. The conception of the market operator as being an activity of public nature and which consequently had to be exercised by public powers did not left space to a complete privatization of it, but rather to a leading role of privates strictly supervised by the public powers and restricted in their regulatory and

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[323] Legisltive decree n°164/2007

[324] R. RAZZANTE, M. BARBETTI, Introduzione alla MiFID. Come cambia il TUF, in R. Razzante, La MiFID: Com'è cambiato il TUF, Sistemi Editoriali, Napoli, 2008, pag. 30

[325] See the first chapter of this work.

[326] See for an analysis M. BARNI and A. PORTALUPI, La trasparenza pre trading, and A. VERNA, La trasparenza post trading, in L. ZITIELLO, MiFID: La nuova disciplina dei mercati servizi e strumenti finanziari, Itaedizioni, 2007, pagg. 332-361

discretionary powers[327]. Also competition is another issue in this system: even if there is a formal opening to it, at least for now, Borsa Italiana s.p.a. has an almost monopolistic role in the market, since, as said, out of nine regulated markets authorized by CONSOB, six are directly operated by it and the other three are operated by a company the capital majority of which is held by Borsa Italiana, MTS s.p.a.; moreover out of ten MTFs which are authorized by the same authority, three are operated by the same Borsa italiana, and a fourth by MTS.
Now that we have described the evolutionary process of the regulation, we will proceed in examining what is now the Italian discipline of trading venues and of market operators.

2. The current Italian regulation of trading venues

The current regulation of Italian trading venues follows the division made by MiFID I: there are regulated markets, multilateral trading facilities and systematic internalisers. The most relevant discipline is the one that the CLFI imposes on regulated markets, we will start from there, analyzing the norms governing market operators and market regulation and then we will treat the regulation of MTFs and systematic internalisers.

2.1 Regulated markets

The definition of regulated market given by the Italian legislation is almost the same that can be found in MiFID I: a multilateral system, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, admitted to trading conformingly to its rules, in a way that results in a contract, which is operated by a market operator, and which is authorised and functions regularly[328].

2.1.1 The requirements of the market operator

Running this system, as said, is considered by the Italian law as a private business activity[329], although if an authorization from CONSOB is necessary in order to exercise it. The CLFI lists a series of standards that a company must meet in order to obtain the authorization: it is worth noticing, even

[327] The activity of market operator is anyway to be approved by the Consob, although with little discretion in the evaluation, and that the modifications of the market regulation have to be approved by the same authority. It is also worth mentioning that the CONSOB maintains extended powers about suspension and removal of instruments from the market. And see legislative decree 58/1998, art. 63, parr. 1 and 2, and art. 64, par. 1-quater
[328] Legislative decree n°58/1998, art. 1, par. 1, lett. w-ter, and see also Directive 2004/39/CE, art. 4, par. 1, n°14
[329] Legislative decree n°58/1998, art. 61, par. 1

before analysing them, that out of seven conditions established by the law, four need an integration by secondary regulation, either coming from CONSOB or from the Ministry, confirming the tendency to rely on secondary levels to discipline detailed questions.

The first requirement posed by law is the existence of financial resources for a minimum amount which is determined by CONSOB[330], in order to guarantee the concreteness of the initiative undertaken by the company asking for authorisation[331]. The authority has not precisely determined this minimum amount, and has limited its regulatory intervention to a transposition of the provision of MiFID I asking for financial resources which are sufficient to the functioning of the market, considered the nature and the entity of operations there concluded and of the undertaken risks[332]: this provision, according to some[333], could result in a too large discretionary power guaranteed to CONSOB when authorizing a company, since it means that it is the authority which can decide case by case if the financial resources can be sufficient or not.

The company's scope of activity must be exclusive[334], in the sense that the company seeking for authorization as market operator can only engage the organization and management of a trading venue, more specifically of a regulated market or of a MTF. The CONSOB can determine which activities can be considered ancillary (connected and instrumental) to them, and can therefore be enacted by the company together with its main one[335].

Executives of the company, together with persons having supervisory roles, must meet the requirements established by a ministerial regulation in order to prove their honorability, professionality and independence, and cease from their office in case they lose them[336].

Even the participants to the capital of the company must meet honorability requirements established through ministerial regulation[337]. Moreover whenever there is a transfer of shares of the authorized company, the parts must communicate it to the CONSOB, in order to let the authority verify that the buyer meets the honorability conditions[338]. The heavy power give to the national competent authority on this kind of company is further proved by the fact that it can oppose to changes in the capital's

330 Legislative decree n°58/1998, art. 61, par. 2, letter a
331 And see M. DRAGHI, Commento sub art. 46, in La disciplina degli intermediari e dei mercati finanziari, a cura di F. Capriglione, Padova, 1996, pag. 395
332 And see CONSOB regulation n°16191/2007, art. 3 and Directive 2004/39/CE, art. 39, par. 1
333 M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, in Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 659
334 Legislative decree n°58/1998, art. 18, par. 3-bis
335 Legislative decree N°58/1998, art. 61, par. 2, letter b. The activities are listed in the Consob regulation n°16191/2007, art. 4, and the company has to communicate to the Authority which of them it wants to engage.
336 Legislative decree n°58/1998, art. 61, par. 3
337 Legislative decree n°58/1998, art. 61, par. 5
338 Legislative decree n°58/1998, art. 61, par. 6

composition, even when the requirements are met, in case these changes may hamper the sound and prudent management of the market[339].

The company has to submit a scheme of operations that shows its organisational asset and the activities that it would engage[340]. Even if its contents are not specified by the secondary regulation, it should contain at least the statute of the company, together with documents regarding the same matters treated in the annual reports that the company must submit to CONSOB on its organizational asset and risk management structures, together with an industrial and financial plan in which are explained both the characteristics and the feasibility of its business proposal[341].

Lastly, the company is subjected to mandatory statutory audit and has to appoint a clearing and settlement system for the operations concluded in its markets[342].

The law does not specify if these requirements have to be met only when asking for the authorization or from the very constitution of the company; anyway the discipline poses as a condition for the authorization the meeting of the requirements laid down in art. 61, parr. 2 to 5[343], without making references to the moment of constitution. So we can say that, to be authorized to be a market operator, a company must meet these conditions when it asks for authorization, and not necessarily from, before[344].

These requirements appear to leave, as said a consistent space to the regulation power of the CONSOB, augmenting the public influence upon the market. This choice is justified due to the fact that, even being private entities, market operators engage an activity with a significant public characterization: allocating capital means, indeed, as already mentioned, also trying to attract savings in the market, in order to augment its liquidity, and the safeguard of these savings is an interest that the Italian constitution protects[345]. The constitutional protection, in this sector, is mainly meant to avoid hampers to retail investors: the reason because of which this interest should have reflections on the discipline applicable to the market operator, which interacts mainly, and almost only, with investment firms, rather than with retail investors, is that protecting the very infrastructure of the market is necessary in order to reduce risks of collapse of the intermediaries, and consequently the loss of capital entrusted to them bi retail investors.

[339] Legislative decree n°58/1998, art. 61, par. 8-bis
[340] Legislative decree n°58/1998, art. 63, par. 1-bis
[341] M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 665
[342] And see legislative decree n°58/1998, artt. 62, par. 2 and 70-bis, par. 2
[343]Legislative decree n°58/1998, art. 63
[344] And see F. ANNUNZIATA, Mercati regolamentati e quotazione ufficiale, in La disciplina del mercato mobiliare, Giappichelli, 2015, pag. 303
[345] See F. ANNUNZIATA, Mercati regolamentati e quotazione ufficiale, in La disciplina del mercato mobiliare, Giappichelli, 2015, pag. 299

2.1.2 The role of the market operator

The CLFI determines the core of the activities to be engaged by the market operator in order to fulfil its role[346].

First of all, the market operator must establish market structures, provide services as a regulated market, determine payments for its activity. This appears to be obvious, but the express normative provision gives to these activities the character of power and duty; the determination of fees and other payments is an element recalling the private structure of the system, even if, as said, mitigated by a series of significant public powers that the authority can exercise on the market operator, and is a direct consequence of the nature of private business of this activity, and for this it may have been effectively unnecessary to be recalled by law.

Secondly, the market operator must adopt every act which is necessary for the good functioning of the market, and to verify that its regulation is not breached. This provision funds the intervention and supervisory powers of the market operator[347], meaning that private supervision on the market becomes a legal obligation: the fact that the lawmaker decided to enshrine this concept in a legislative disposition underlines again the character of private activity of the market operator, but on the other hand is another bond of public nature, in the sense that, being one of the core activities to be engaged by the company, imposes on it an obligation to collaborate with the public supervisory system to avoid market crises. Indeed, the same norm, both imposes to communicate to CONSOB breaches of the market regulation and the responses to them, and to adopt dispositions and necessary acts to prevent and identify insider trading and market manipulation[348]. The role of the market operator as a regulator is highlighted by these provisions: regulators often also engage in supervision, since regulation has little meaning with no controls nor enforcement, and in this case, we have a private subject, the company running the market, which acts as regulator and has consequently also supervisory and intervention duties[349].

Moreover the market regulator is entrusted with the power to admit, exclude or suspend instruments and operators from trading. This is a duty/power in relation to which there may arise issues of conflict

[346] Legislative decree n°58/1998, art. 64, par. 1, lett. a to f.

[347] And see M. SEPE, I mercati regolamentati, in F. Capriglione, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 687, according to whom the supervisory role goes beyond the literal wording of the norm: it mentions only the market regulation, but the market operator must be concerned with the whole discipline of the market.

[348] See legislative decree n°58/1998, art. 64, par. 1, lett. b, b-bis, d

[349] This is very relevant even in considering the impact of the capital markets union plan on the Italian legislation: as mentioned in chapter two, the role of private regulators will be very important in the future union, since it may be difficult to reconcile regulation and practices on the private level, but it will be a necessary step of harmonization, even if it is not of secondary importance respecting the local specificities. And see N. DORN, Capital cohabitation, EU Capital Markets Union as public and private co-regulation, Capital Markets Law Journal, Vol. 11, n°1, 2016

of interests: we will see how the market regulation, indeed, leaves spaces of discretion[350] in the evaluation of the requirements to be met by operators and instruments to accede to the market[351]. It is important to underline that, given the private nature of the activity, not only violations of norms and legislative discipline may be sanctioned with suspension or exclusion from trading, but there is also the possibility to use such instruments whenever conditions having contractual nature, such as the market regulation or other agreements between the market operator and the other company involved, are breached or not fulfilled. Obviously these attributions are restrained by the powers entrusted to CONSOB on the point: the authority may ask to the market operator to exclude or suspend operators and instruments from trading, and, whenever the market operator does not intervene, use the power guaranteed by art. 74 of the CLFI which allows the authority to proceed directly[352]. The execution of the decisions regarding admission to trading, when they involve shares, bonds or any financial instrument coming from subjects different from EU Members States, EU banks and companies listed on a regulated market, together with the decision to exclude instruments or operators from negotiations, are suspended for a five-days term, which starts with the reception of the communicate advising the CONSOB of the decision taken. The authority may decide to forbid this execution if, after an evaluation of different elements than the ones considered by the market operator, considers the decision not coherent with the scope of the markets' supervision[353].

Lastly, the market operator must carry out the tasks eventually given by the CONSOB. These tasks are obviously additional to the ones provided for by law and it would be coherent to ask for the consensus of the market operator itself: otherwise we could qualify the activity we are talking about only and solely on the formal plan as a private business, since the power of CONSOB would reduce it as a substantially public subject[354].

2.1.3 The market regulation

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[350] Which has anyway to be considered technical, as we will better explain in the next paragraph. And see N. DE LUCA, Sul "diritto alla quotazione in Borsa. Difesa di una tesi nella prospettiva del listing comunitario, in Banca, borsa e titoli di credito, fascicolo 1, 2009

[351] M. SEPE, I mercati regolamentati, in F. Capriglione, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 688

[352] And see legisltive decree n°58/1998, art. 64, c. 1-bis, art. 74, c. 3 and also European Regulation n°1095/2010, artt. 17 and 18, allowing ESMA to intervene directly when violations of EU law are not sanctioned by national authorities and in emergency situations.

[353] And see legislative decree n°58/1998, art. 64, c.1-bis lett. a and also art. 74, c.1 in which are listed the scopes of the supervision, as guaranteeing transparency, orderly trading and investor protection.

[354] And see R. DE CHIARA, Disciplina dei mercati, in Il testo unico dei mercati finanziari, L. LACAITA, V. NAPOLEONI, A. NAPPI, Milano 1998, and F. CAPRIGLIONE, Commento sub art. 64, in Commentario al testo unico delle disposizioni materia di intermediazione finanziaria, G. ALPA, F. CAPRIGLIONE, Padova, 1998

As said, the market operator acts as regulator of its own market, in the sense that it can impose further rules and conditions, which have contractual nature, on the subjects wanting to accede to the market: these rules are mostly contained in the market regulation, which is the main act disciplining the regulated market. The market regulation, indeed, governs the organization and the managing of the market and is deliberated by the general meeting of shareholders or by the board and may give to this last organ the powers to enact implementing dispositions[355].

As for the nature of the regulation, part of the literature considers it to be a contractual act which can be considered as containing general contractual conditions which are unilaterally disposed by the market operator and have to be adhered to in order to accede the market[356]. This would mean that the market operator (that in Italy we have already seen that it's a role mainly, if not solely covered by Borsa Italiana, for a substantially monopolistic situation, at least in regulated markets) would still have the contractual autonomy to refuse the admission to listing in certain cases, when there would not be a regular course of the instruments to be traded or when the company could not generate gains, and may impose additional conditions or accept that the company does not fully satisfy the provided requirements in order to allow the listing, with no obligations to conclude the contract for the operator, nor a right to listing for companies[357]. In the light of the discipline introduced with MiFID I, this interpretation seems to leave too much discretionary space to the market operator: instead, it would be more coherent with the EU discipline, but actually also with some provisions of the Italian one, to accept a different interpretative orientation, which considers the market regulation as an offer to public[358], consequently restricting the discretion of the market operator to technical evaluations[359].

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[355] Legislative decree n°58/1998, art. 62, par. 1, and see F. ANNUNZIATA, Mercati regolamentati e quotazione ufficiale, in La disciplina del mercato mobiliare, Giappichelli, 2015, pag. 304

[356] M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 667

[357] And see M. DE MARI, La quotazione di azioni nei mercati regolamentati: profile negoziali e rilievo organizzativo, Torino, 2004

[358] It is necessary to briefly remember the difference between the two institutes under the Italian law. The Italian civil code considers the offer to the public and the general contractual conditions when disciplining the system of proposal/acceptation which generates a contract, respectively in artt. 1336, and 1342 and 1343. In particular, the offer to the public is a specific form of contractual proposal which has indefinite recipient: the contract is concluded as effect of the sole acceptance declaration by the one interested to conclude the contract. The general contractual conditions, are in stead standardized rule or clauses that a subject embodies in the contracts concluded with others, and we also speak of accession contracts, since normally the second subject cannot discuss their content, but this type of contract does not seem to limit the contractual freedom of the proponent since it does not have, in principle, indefinite recipient, but it's a mere standardization of the content of a contract often used in concluding contract with clients. And see A. TORRENTE, P. SCHLESINGER, Manuale di diritto privato, Giuffrè, 2011 pagg. 496 and following, and pagg. 503 and following

[359]N. DE LUCA, Sul "diritto alla quotazione in Borsa. Difesa di una tesi nella prospettiva del listing comunitario, in Banca, borsa e titoli di credito, fascicolo 1, 2009, pag 21 and following

EU and Italian law, indeed, consider the market operator of a regulated market as an entity which must have non discretionary and transparent procedures which guarantee its functioning[360] and moreover the access of operators to the market must be based on transparent and non discretionary rules, that follow objective criteria[361]. Admission to listing is based upon an evaluation made by the market operator of some conditions and requirements to be met by the company asking for the admission itself: these conditions are established by the market regulation, but it is unclear whether the market operator is free or not to refuse to list a company for reasons which are discretional or anyway different from the ones contained in the market regulation. However, if we follow the aforementioned provisions of Italian and EU law, it becomes clearer that they do not allow the market operator to impose discriminatory or arbitrary conditions in order to accept the listing request[362]. If we consider the market regulation as an offer to the public, this would mean that the market operator would be already obliged by the contract in the moment in which the company asking for listing satisfies the requirements posed by the market regulation, since it would be a manifestation of the contractual will of the market operator, and valid as a proposal of contract under the Italian law[363]; this could include the possibility to claim compensation in case of a company respecting the conditions but not admitted on the market, a possibility which would act as a further deterrent from illegitimate behavior of the market operator. The possibility to admit issuers of instruments in particular cases, moreover, should not only be seen as a goldplating[364] possibility, but also as the chance for the market operator to admit subjects which do not fulfil the requirements when seeking for the admission, but will do so or depart from them just irrelevantly. The consideration regarding discretion of the market operator about the admission to listing is very relevant for the EU securities market system[365]: if the legislation imposes to market operators to adopt conditions which are non discretionary which are strict enough to fund a real right to listing, and to allow on the other hand, the same market operators to admit issuers which do not respect the requirements, imposing particular constraints to ensure investor protection, there could actually be an effective competition of the

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[360] And see N. DE LUCA, Sul "diritto alla quotazione in Borsa. Difesa di una tesi nella prospettiva del listing comunitario, in Banca, borsa e titoli di credito, fascicolo 1, 2009, pag 21 and following, and legislative decree n°58/1998, art. 62, par. 2 and Directive 2004/39/EC, art. 40, par. 1

[361] And see legislative decree n°58/1998, art. 62, par. 3 and Directive 2004/39/EC, art. 42, par. 1

[362] N. DE LUCA, Sul "diritto alla quotazione in Borsa. Difesa di una tesi nella prospettiva del listing comunitario, in Banca, borsa e titoli di credito, fascicolo 1, 2009, pag. 21 and following

[363] N. DE LUCA, Sul "diritto alla quotazione in Borsa. Difesa di una tesi nella prospettiva del listing comunitario, in Banca, borsa e titoli di credito, fascicolo 1, 2009, pag.21 and following

[364] See chapter 1 of this work.

[365] And it is coherent with its last developments: as we have already explained in chapter 2, the only trading venues that may operate with discretion, and with anyway a very limited one, are OTFs. And see Directive 2014/65/EU, art. 4, par. 1, n°23, which does not mention the obligation to operate by following non discretionary rules in defining OTFs; and see also the chapter 2 of this work for further explanation.

market operators based upon these listing conditions[366]. The only critical point may be in the fact that this could become a race to the bottom, in the sense that market operators could indulge in permissive special conditions to admit companies in their market even when this choice could be dangerous for investors. This is anyway unlikely for two reasons: first there is a reason which relates to market mechanisms, if a market operator would allow too many “dangerous issuers” in its market, investment firms would move away from it, since the market’s reputation would fall; secondly, there is the supervisory system composed by the national authorities and the ESMA which monitor markets and may, as seen, exclude or suspend negotiations of an instrument or for a player which risks to hamper the market itself[367].

Now that we have clarified what is the nature of the market regulation, we can examine its mandatory contents. According to the law[368], indeed, the market regulation must contain a minimum core of provisions which are, consequently the minimum contractual conditions to be met by who wants to operate in it.

First, the market regulation determines conditions and modalities of admission, exclusion and suspension of operators and financial instruments from trading. The use of the term operator is coherent with the possibility for regulated market to admit subjects which are different from authorized intermediaries[369], and the wording of the norm seems to suggest that the authorization of the intermediary is not sufficient to admit them on the market, since the admission becomes a successive step. This solution is coherent with the privatization of the market operator activity, even if, as said, it is necessary that the conditons we are talking of remain non discretionary, non discriminatory[370] and objective.

Secondly, in the regulation conditions and modalities of the trading and obligations to be respected by operators and issuers are also determined. The aim of the market regulation is to guarantee the orderly functioning of the market and of the negotiations, meaning that it has to regulate each phase of negotiation, from the conclusion of contracts, to the operation of the intermediaries in respect of the functions that they cover, and the parameters that have to be respected by the operations to be considered regular, in order to avoid a too high volatility for instruments. The regulation may also impose obligation upon operators and issuers, which are connected with the criteria of participation

[366] N. DE LUCA, Sul “diritto alla quotazione in Borsa. Difesa di una tesi nella prospettiva del listing comunitario, in Banca, borsa e titoli di credito, fascicolo 1, 2009, pag. 21 and following

[367] Moreover, this would also be the solution to the problem of a complete race to the bottom of market operators: they could indeed not only allow dangerous issuers on their markets, but also not sanction nor signal abuses or breaches made by investment firms which do not respect principles of investor protection, the authorities have the power to intervene also in these cases, and may work as an efficacious brake to bad practices.

[368] Legislative decree n°58/1998, art. 62, par. 2

[369] Banks and investment firms, and see M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 669, and legislative decree n°58/1998, art. 25, par. 2

[370] Particularly towards European subjects not authorised in Italy.

to the market, and to the obligations concerning the conditions that have to be fulfilled from the admission up to the entire period of permanence in the market. The shaping of these conditions allows the market operator to create a balance in the market itself, safeguarding competition and integrity of the market structure, together with the investors, which may be protected through more strict requirements to be respected in the market itself[371].

The market regulation has also to determine modalities of assessment, publication and diffusion of prices, integrating the provisions enshrined in the acts of CONSOB on the matter[372]. This is a very important point, since it relates with one main element of the market mechanism: disclosure about prices. We have already seen[373] how it is essential to diffuse information about prices in the market, since it sums up a series of metainformation that would slow too much the negotiations if considered one by one: by displaying price, the market sintetises some elements, from the reliability of the company to expectation for its future, and many others, that become of rapid consultation thanks to the reunion under a sole parameter, the price.

In the regulation are also listed the types of contracts that can be traded and the criteria to determine the minimum quantities to be negotiated. The contract admitted to trading are always regarding the buying and selling of financial instruments, while the minimum quantities to be negotiated are to be calibrated both on the smooth functioning of the market and on the effective capability of access to the market and affordability of orders to be executed by investment firms and retail investors[374].

Lastly, the regulation has to determine the conditions of clearing and settlement and guarantee of the operations concluded on the markets. Both the clearing and settlement system on which palyers in the market have to rely and the mechanisms to relate with it have to be determined by the market regulation and must allow operators, when meeting conditions determined by law[375], to use a different clearing and settlement system from the one of the market operator.

We have until now treated the discipline of the regulated market and of its functioning, mainly related with the market operator and its role and with the market regulation and its content and nature. We have now to examine how the implementation of the MiFID I system has shaped the regulatory structure of the other trading venues. We will start with MTFs and then we will analyse systematic internalisers.

[371] And if the market operator engages in this practice, and it attracts investors on the market, this may be the starting point of a race to the top.
[372] Consob regulation n°16191/2007, artt. 25, 26 and 29
[373] See chapter 1 of this work.
[374] M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 675
[375] See legislative decree n°58/1998, art. 70 bis, par. 2

2.2 Multilateral trading facilities

Multilateral trading facilities entered in the Italian system of trading venues after the implementation of the MiFID I system: before it, the Italian legislation regulated together the organized exchange of financial instrument, irrespectively from the nature of the system.

Italian law does not define MTFs if not indirectly: there is, indeed a definition of the activity of running an MTF as managing multilateral systems which consents the bringing together, in the system and according to non discretionary rules, of the multiple interests of buying and selling of third parties in financial instruments in a way that results in a contract[376]. Although indirect, the definition is identical to the one of MiFID I. The multilateral character is to be intended to diversify MTFs from systematic internalisers, which, we will see, operate on bilateral basis, and is an element commonly shared by regulated markets and MTFs, in the sense that the venue is not a part of the negotiation, but its is the "place" in which the negotiation and the trading occur[377]. According to the definition[378], the main difference with regulated markets is in the necessity for the second to obtain authorization by the CONSOB, has to function regularly and the securities have to be admitted to trading according to its regulation in order to be effectively negotiated inside it. These differences, though, are not substantial, but only formal. First of all, also MTFs necessitate of an authorization, which may be divided on two levels: the first is the authorization to the firm to perform investment services, and the second is the authorization to the MTF itself as an activity[379]. Secondly the regular functioning of the MTF is not actually something very different from the one of the regulated market: there are minimum requirements of functioning for the MTFs which are to be established by CONSOB[380], some of which are fit to represent a practical implementation of the concept of regular functioning.

Lastly the admission to trading of instruments conformingly to the rules of the venue is something which is evidently obvious to happen, since also MTFs have their rules governing the access of operators and issuers to the venue and the admission, exclusion and suspension of instruments from trading.

So the real difference between regulated markets and MTFs is in the fact that certain provisions can be applied only to securities traded or to the market operator in the first type of venue: for example

[376] And see legislative decree n°58/1998, art. 1, par 5-octies, and directive 2004/39/EC, art. 4, par. 1, n°15

[377] And see M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 700

[378] And see legislative decree n°58/1998, art. 1, par. 1, lett. w-ter for a comparison

[379] And see legislative decree n° 58/1998, artt. 18 and 77-bis, par. 2, lett. c, and M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 702

[380] Legislative decree n°58/1998, art. 77bis, par. 1, we will examine the CONSOB provision on the matter, which is in the CONSOB regulation n°16191/2007, art. 19, par. 1, in the next subparagraph.

the takeover bid discipline and the mandatory supervision over disclosure obligation fulfillment from issuers[381].

2.2.1 Organisation and functioning of MTFs

Italian law leaves the discipline of the functioning of MTFs to the secondary legislation[382]: the CONSOB has to establish the minimum functioning requirements of the venue, included obligations related to negotiations and finalization of the operations, admission of securities, information to the subjects in the market, access to the system, supervisory duties. Actually the national authority did not provide for a detailed set of obligation, imposing to the MTF's operator the adoption of certain rules, without specifying a minimum standard or content for them. In particular, the CONSOB[383] establishes that operators running an MTF have to dispose and maintain transparent and non discretionary rules and procedures that are suited to guarantee fair and orderly trading, and objective criteria for an efficacious order execution; transparent rules about the selection criteria for financial instruments to be traded in the system; transparent rules, based on objective criteria to discipline the access to the system; efficacious procedures and means to regularly control the respect of rules by the participant to the system; all the necessary measures in order to promote the efficient regulation of operations concluded in the MTF. Moreover, these subjects must also ascertain that the public has the possibility to accede to sufficient information in order to make a conscious evaluation about the investment, according to the nature of the traded securities and to the characteristics of the user; provide for a clear information about their responsibilities regarding the settlement of operations concluded in the MTF; execute CONSOB instructions concerning suspension or exclusion of financial instruments from the system; monitor the operations concluded in their system in order to identify breaches of the MTF's rules, abnormal negotiating conditions, and behaviors that may be considered market abuses. Lastly the operator of an MTF has to give adequate publicity of the system's rules[384]. As said these rules have not a detailed minimum content to be included, since the authority did not define it. This leaves the provision of art. 77-bis unimplemented[385], since the substance of the rules to be disposed has no constraints, meaning that the level of investor protection, safeguard of the market integrity, and of risk allowed in the system is left to the MTF. This could also

[381381] M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 704
[382] Legislative decree n°58/1998, art. 77-bis, par. 1
[383] And see CONSOB regulation n°16191/2007, art. 19
[384] CONSOB regulation n°16191/2007, art. 19
[385] M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 705

not be necessarily a negative trait, depending on the direction of the competitive race in the sector: it could also result in a race to the top, since it is an issue related with the attitude of investors toward risk, the more the investor is inclined to accept risk, the more is probable that the race to regulate Italian MTFs is a race to the bottom, the more the same subject tends to safer investments, the more it is likely that this can become a race to the top, seeking to give investors sufficient guarantees in order to attract them on the market, always considering that the requirements imposed on firms and issuers should be shaped in such a way to be competitive against the more strictly disciplined regulated markets[386].

As for supervision, multilateral trading facilities have, as regulated markets do, an obligation to monitor their system and the compliance of its players with its rules and the current legislation. Moreover there are some informative duties to be fulfilled: the operator has to send to CONSOB the list of securities and operators admitted in the system, rules governing its functioning and the supervision procedures that safeguard orderly trading, rules concerning the outsourcing of some functions of the MTF, the description of its informatics structure and the discipline that deals with the managing of the default risk, results of assessments made on rules and procedures, and significant breaches found[387].

When analysing MTFs, so we find a structure very similar to a regulated market, on which the CONSOB has less power and where the securities traded have a different discipline, in the sense that there is no possibility to apply part of the rules governing them in regulated markets, on example, again, is the one of the takeover bid discipline. Moreover the operator has a larger freedom in determining the functioning of its market precisely because of the restricted powers that are entrusted to CONSOB on it: this means that the MTF's operator has less bonds constraining its competitive ability, but it may also more risky to deal with than a regulated market, at least for investors.

2.3 Systematic internalisers

The last structure to be examined is the systematic internaliser, which acts and function on a completely different plan than regulated markets and MTFs. Systematic internalisers are defined as subject which, on an organized, frequent and systematic basis, deal on own account by executing

[386] It is to be remembered, indeed, that in the MTFs case, the CONSOB does not have the same substitutive powers that it has towards regulated markets when they do not comply with the request of exclusion or suspension of instruments from trading, and compare artt. 74 and 77-bis of the legislative decree n°58/1998 to see how different are the powers of the authority in the two cases.

[387] CONSOB regulation n°16191/2007, art. 20, par. 1

client orders outside a regulated market or an MTF[388], which is a wording identical to the one of the MiFID I directive[389].

Systematic internalisers are so subjects which fall inside the dealing on own account activity, which is defined by Italian law as the activity of buying and selling securities in direct contribution and in realtion to client's orders, and also the activity of market maker[390].

This kind of activity is defined by a negative and a positive element[391]. The negative one is that it is exercised outside a regulated market or an MTF; this is an unnecessary element of the definition, since the concept of dealing on own account implies that the activity has a bilateral character and necessitates of a direct assumption of the risk: it is not possible, so to exercise it on an MTF or on a regulated market in execution of clients' orders and on an organized, frequent, and systematic basis[392]. The positive element is in the fact that it is necessary to operate on an organized, frequent and systematic basis, element that constitutes the differentiating character of the systematic internaliser from the proper and simple activity of dealing on own account. The qualification of this activityin the terms asked by the definition of systematic internaliser is made through some criteria established by CONSOB, following the ones imposed by the MiFID I system[393]: the activity of dealing on own account has to cover of a relevant commercial role for the firm, has to follow non discretionary rules, has to be carried on by personnel or an automated technical system which is assigned to that purpose, even if not exclusively, and must be regularly and continuously accessible by clients.

Now that we have clear the discipline that the Italian legislation uses to regulate trading venues, we can try to understand how the MiFID II system will be implemented, through and analysis of the project of the legislative decree that will do so and its preparatory acts.

3. The implementation of MiFID II in Italy

Since the Member States are required to implement MiFID II within 2018, the Italian Government has already disposed a project of legislative decree to this purpose. We are now going to examine this project, since it is very likely that the final act will have little, or even absolutely no changes if

388 Legislative decree n°58/1998, art. 1, par. 5-ter
389 And see Directive 2004/39/EC, art. 4, par. 1, n°7
390 Legislative decree n°58/1998, par. 5-bis
391 And see M. SEPE, I mercati regolamentati, in F. CAPRIGLIONE, Manuale di Diritto Bancario e Finanziario, CEDAM, 2015, pag. 715
392 Ibid.
393 See Consob regulation n°16191/2007, art. 21, and EU regulation n°1287/2006, art. 21

compared with it, in order what will be the impact of MiFID II on the Italian regulation of trading venues.

The modifications will be important also to understand the approach chosen by the Italian lawmaker to the capital markets union project: being MiFID II a very important step towards this objective, its implementation is essential to see what local action can do in order to further connect national markets to the EU network.

For the trading venues' regulation, the act will modify the Third Title of the CLFI, and will aim to an enhancement of the comprehensibility of the obligations imposed on subjects regulated by this discipline. Coherently with the aim of levelling the playfield in which the competitive race of trading venues will occur, the lawmaker tried to dictate general provisions to be applied to all the venues' categories, and then to shape more detailed obligations for each category[394]. Also there has been a thoughtful division between matters to be left to the primary and the secondary level of legislation: the secondary level will be used to regulate cases in which there is an highly technical and detailed ruleset to be implemented[395], in the sense that primary legislation will only establish the general obligation in the CLFI and the rest will be left to the regulatory acts of the CONSOB or of another public subject[396]. This scheme of action seems to confirm the classical use of secondary legislation in the Italian regulation of the sector: as said, very technical issues often need a fast revision process since they may be subject to rapid changes, moreover, the high level of technicity of an issue may make convenient to entrust its regulation to an organ which has an higher level of competence and experience in the matter than the Parliament, to which it is left the shaping of general principle guiding the action of the second level regulator.

3.1 Innovations brought by the project of legislative decree implementing Directive 2014/65/EU to the Italian discipline of trading venues

As said, the whole decree, in its art. 3, contains a reformation of the discipline of Italian trading venues.

This is in order to adhere to the changes brought by MiFID II to the EU discipline. As said, the discipline of trading venues in the new implanting decree is divided in general and particular provisions, we will briefly examine the firsts to pass then to an analysis of the seconds.

3.1.1 General provisions

[394] Explanatory memorandum to the legislative decree implementing the Directive 2014/65/UE, pag. 22
[395] For example the provisions of artt. 17 and 48 of the MiFID II directive.
[396] Explanatory memorandum to the legislative decree implementing the Directive 2014/65/UE, pag. 22

Starting from the beginning, the decree innovates art. 61 of the CLFI: there will be new definitions, mutuated from art. 4 of MiFID II, such as the new definition of market making strategy and of SME and, most importantly, in order to include in the Italian trading venues' landscape also the newly created OTFs, and to the application of the pre and post trading transparency regime, that how we have already explained[397] have a major influence on the discipline of dark pools, the new definitions of certain securities to be included in the groups of equity or non equity instruments[398].

In the modification of article 63[399], there is the specification that every multilateral system for the negotiation of financial instruments operates as regulated market, MTF or OTF, meaning that every other form of negotiation shall be of bilateral nature. In the following modification of article 64, there is at first reproduced the provision about the competences and duties of the market operator of a regulated market, which remains untouched together with the range of competences and determinations left to CONSOB on the matter, and then it is stated the possibility for the same market operator to run another trading venue, an MTF or an OTF, without the need of authorization to provide investment services, but with the sole necessity for the CONSOB verify compliance with the provisions on the matter[400] , apparently creating an exception to the authorization discipline. The general part concludes with the discipline of people exercising a significant influence on the management or covering roles of administration, direction or control in it, and with the norms regarding the authorization as a regulated market[401].

The general provisions brings some changes to the discipline in order to create a coherent framework for the particular ones; the provisions regarding authorization are dictated particularly for regulated markets since the MTFs and OTFs have in MiFID II to fulfil they special requirements as investment firms to engage the activity, while the market operator of a regulated market needs a special authorization which is completely different and do not include the provision of investment services; indeed, we have seen that the explanatory memorandum considers the fact that this subject does not need further authorization to run an MTF or an OTF as an exemption from the investment services authorization regime.

3.1.2 Particular provisions

397 See chapter 2 of this work

398 See project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part modifying art. 61 of the legislative decree n°58/1998

399 ibid.

400 ibid, and see also explanatory memorandum to the legislative decree implementing the Directive 2014/65/UE, pag. 27

401 And see project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part introducing artt. from 64-bis to 64-quinquies of the legislative decree n°58/1998

The act continues with modifications to the discipline of the venues, and particularly with the regulation of the organization and functioning of the trading venues, admission, suspension and exclusion from trading, and SMEs' growth markets; this part concerns the discipline of MTFs and regulated market, to conclude, lastly with provisions regarding systematic internalisers[402].

3.1.2.1 Organisation and functioning of trading venues

The modification of article 65 deals with the organizational requirements to be met by regulated markets both to obtain and to maintain the authorization to operate and gives CONSOB the power to further define them through its regulatory powers. Article 65-bis contains the same genre of provisions, but related to MTFs and the newly introduced OTFs: these venues are now obliged to introduce norms that allow the managing of conflicts of interest, aimed to avoid their negative consequences, and the obligation to have at least three members, clients or participants concretely active on the system and which interact one with another in order to contribute to the price formation process[403]. It is important to notice that the requirements that the project of decree includes in artt. 65 and 65-bis of the CLFI were until now, and technically still are, contained in the secondary legislation[404],but now they have been moved on the primary level[405]. This choice may be justified from the relevance that the lawmaker gives to these provisions: the requirements we are talking about are concerned with reducing the risks on the market, guaranteeing orderly and fair trading on the market, and to facilitate settlement operations on the market. Moving them on the primary level at first glance seems to increase their rigidity, in the sense that, as already explained, it becomes more complicated to change them, but it is possible that the lawmaker does not expect them to need modifications in the short term; moreover if we look at these requirements, we see that they are not so specifically formulated. This means that there still is a certain degree of flexibility in them, in the way that the CONSOB has a certain space of maneuver in their specification, meaning that in case of need or of sudden changes to the market structure it can always intervene to adapt the discipline.
Also additional requirements are established for MTFs and OTFs in the newly introduced articles 65-ter and 65-quarter. The first of the two dispositions imposes on MTFs some of the requirements that have to be respected by regulated markets and remarks the how its activity must respect and implement non discretionary rules for the execution of orders in the system; these provisions level

[402] See the project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part modifying artt. from 65 to 73 of the legislative decree n°58/1998
[403] And see explanatory memorandum to the legislative decree implementing the Directive 2014/65/UE, pag. 29
[404] See CONSOB regulation n°16191/2007, artt. 8 and 19
[405] Explanatory memorandum to the legislative decree implementing the Directive 2014/65/UE, pag. 29

the playfield of competition between venues[406]: the organizational requirements now common to MTFs and regulated markets are the one regarding the adequacy of financial resources and the one concerning risk management, both conditioning from an economic point of view the company running the respective venue[407]. If MTFs could be authorized also in absence of financial resources sufficient to guarantee an orderly functioning of the market, considering the entity of the operations and of the risk to which the system is exposed, they could start operating with a capitalization significantly lower than regulated markets not only in absolute terms, but also if considered proportionally to the activity which is about to engage, and this could be a competitive advantage since it would be easier to start the business. If, on the other hand, MTFs' activity could not have procedures, mechanisms and systems adequate to identify and manage systemic risk, there would be first of all consistently lower costs to be bore, always considering the thing not only on the absolute plan, but also proportionally to the activity engaged, but also, and this is obvious, a relevantly higher probability of the system to be hampered, resulting in free riding of the MTFs as private regulators for what concerns the integrity of the system[408].

OTFs' particular requirements are contained in article 65-quarter, which will be introduced by the implementing decree. As already explained, one of the main traits of this new venue is the possibility to execute client orders with discretion, which, as already explained[409], means choosing whether placing or retracting an order on the OTF, or it can be exercised when deciding not to match a specific client order with other orders available in the system in the moment, given that this complies with instructions received by the client and with the best execution obligation. Given this possibility to operate with discretion, the CONSOB will be entrusted with the power to dictate through a regulation the minimum content of the disclosure obligation to be respected by the OTF when requesting for the authorization.

The implementing decree will also protect the markets' resiliency and provide for the cases algorithmic trading with the introduction of article 65-sexies, implementing articles 18 and 48 of the MiFID II[410]. In this article there is a series of operational requirements imposed on trading venues and in particular the ones connected with orderly trading, such as the obligation to dispose means to manage volume peaks, and the obligation to guarantee the orderly trading also when facing critical market conditions, together with the enactment of procedures which can guarantee that the venue is

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[406] And see Explanatory memorandum to the legislative decree implementing the Directive 2014/65/UE, pag. 29
[407] See the project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part introducing art. 65-quater of the legislative decree n°58/1998
[408] And see chapter 1 of this work for further explanation of this mechanism.
[409] And see chapter 2 of this work.
[410] See Directive n°2014/65/EU, artt. 18 and 48

able to work continuously, with no unexpected interruption during trading hours[411]. Moreover in the same disposition there are the requirements to be met by the company running the venue in case it admits the use of algorithmic trading on its system: the disposal of means suited to guarantee that there is no possibility for an algorithmic trading system to create abnormal market conditions and to manage the eventual occurrence of such a breach; the intervention powers of the venue in terms of safeguarding volatility of the securities and cancellation, modification or correction of operation; and the necessity to be able to identify orders generated thorugh algorithmic trading, the algorithm that has generated them and to who it corresponds as person sending the order[412]. This is a provision which applies to all the categories of trading venues: the risks deriving from algorithmic trading, indeed may affect the venue independently from the meeting of the other organizational requirements: due to the high risk deriving from this trading technique, the lawmakers, the European one first and then the Italian one, preferred to uniform the discipline, in order to avoid the risk of free riding of the systemic risk on such a delicate matter.
The section that will discipline the organization and functioning of trading venues ends with article 65-septies, regulating disclosure requirements, the precise content of which is to be defined by the CONSOB through secondary legislation.

3.1.2.2 Admission, suspension and exclusion of instruments from listing and trading

The following section of the act, disciplines admission, suspension and exclusion of instruments from listing and trading[413]. It is worth noticing that now the subject is autonomously regulated, in the sense that it will have a section on its own when the decree will be in force, both due to its specificity in respect to the organization and functioning of the venues, and to the division of competences between the company running the venue and the national competent authority; moreover, even if regulated markets have to follow a stricter discipline, the lawmaker uses a "transversal approach" in regulating this point, in the sense that the regulation is divided by issues and not by venue to which it applies[414]. The starting point of this section is article 66 dictating the criteria to which venues have to uniform when admitting to listing or trading a security, coherently with the current discipline of the point, and the same is done in the following article 66-bis for the listing of holdings. Given that it will be article 64 the point that gives competence to admit, exclude or suspend securities from listing and trading to

[411] And see the project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part introducing art. 65-sexies, par. 1 of the legislative decree n°58/1998
[412] We can see how these requirements' wording is almost identical to the one of the MiFID II.
[413] Project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part modifying art. 66 and introducing artt. 66-bis to 66-quinquies of the legislative decree n°58/1998
[414] And see Explanatory memorandum to the legislative decree implementing the Directive 2014/65/UE, pag. 31

the market operator[415], the new article 66-ter disciplines this competence. In there it is disposed that the possibility to exclude or suspend instruments from trading need a previous assessment of the impact of this choice on the investors' interests and on the orderly functioning of the market, the two values guiding the whole section. Moreover, it is provided that the consequences of these choices also involve derivatives: whenever the underlying is excluded or suspended, it is obvious that, if necessary, the same will happen to its derivative. Lastly, the powers of CONSOB on the matter are determined[416]. Strictly related to this article is the following one, article 66-quater, which regulates a different case: the one of exclusion and suspension of securities from listing or trading by impulse of the CONSOB. First of all, in the article is restated the power of CONSOB to suspend or exclude an instrument or to request its suspension or exclusion to the market operator, then there is the implementation of the disposition that extend, in certain cases, the exclusion or suspension of an instrument from trading on a venue to every venue and systematic internaliser in which the instrument is traded, in order, as usual, to safeguard both orderly trading and investors' interests[417]. Furthermore, when the exclusion or suspension is due to possible market abuses, takeover bids or to the breach of the disclosure obligations contained in articles 7 and 17 of the European regulation n°596/2014, the same possibility to extend the taken measures to other venues can derive from exclusion or suspension deliberated by the market operator.

This section modifies the collocation of some norms, by giving to the discipline an autonomous collocation and an organic organization, and regulating the matter through a strict adherence to the discipline of MiFID II. This is very important and maybe also a very positive fact: having provisions about admission, exclusion or suspension of instruments organized in this way, makes them easy to consult, and their adherence to the MiFID II standard makes them closer to the ones of other Member States; both these elements are essential as local action to further integrate markets.

3.1.2.3 Access to trading venues

Also the access to trading venues gains, in the project, an autonomous collocation. The real innovation on the point consists in the new rules about algorithmic trading. The section's initial provision is the article 67[418], in which there is a confirmation of the actual provision asking for transparent, non

[415] See Project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part modifying art. 64 of the legislative decree n°58/1998

[416] See Project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part introducing art. 66-ter of the legislative decree n°58/1998

[417] See Project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part introducing art. 66-quater of the legislative decree n°58/1998

[418] Project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part modifying art. 67 of the legislative decree n°58/1998

discriminatory and objectively-based access rules, and in which is determined the range of subjects (generally banks and investment firms, but also other subjects when fulfilling some conditions) which can accede to the market. The modification of this article will extend to every trading venue category the discipline imposing the disposal of means to facilitate remote access, and it disciplines both the disposal made by trading venues of others member States, both the disposal made by Italian venues in other member States. In this disposition we can also find proof of the growing importance of connecting not only markets, but also authorities supervising, governing and regulating them: it is indeed stated that, whenever a foreign trading venue which has made such a disposal becomes of fundamental importance for the Italian market and for the safeguard of Italian investors, Italian authorities will draft agreements with the authority of the venue's State of origin in order to coordinate and cooperate their action, and also to facilitate cross border informative fluxes[419].
The following article 67-ter brings in the Italian law system innovations coming from the implementation of the MiFID II provisions about the activity of participants to trading venues who want to operate through algorithmic trading[420]. The aim is, for already mentioned reasons[421], to safeguard market integrity[422]. The article gives to CONSOB the power to regulate with more detail some of the requirements and of the obligations to be respected by the firms engaging in algorithmic trading, together with the power to ask information, continuously or on a case by case basis, about their operativity.

3.1.2.4 SMEs growth markets

In the project there also is a section, even if composed by a single article, dedicated to the new figure of the SMEs growth market. In article 69 are listed the requirements to be ascertained by the CONSOB to register an MTF as SMEs growth market, together with the conditions that provide justification to revoke the authorization, also when requested by the company running the MTF. Moreover there are conditions and consequences of the admission to listing and trading on the SME growth market without request by the issuer: is the classical case of an issuers whose instruments are already traded in an SMEs growth market, so in a same-type venue, has been informed, and has not raised any objection to the trading in another market; in this case the issuer will not be obliged to respect eventually different governance or disclosure requirements than the ones that it already fulfils

[419] And see Project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part modifying art. 67, parr. from 8 to 11 of the legislative decree n°58/1998
[420] See Directive n°2014/65/EU, art. 17 and Project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part introducing art. 67-ter of the legislative decree n°58/1998
[421] See chapter 2 of this work.
[422] See Explanatory memorandum to the legislative decree implementing the Directive 2014/65/UE, pag. 33

under the discipline of the first market in which its securities are traded[423].

3.1.2.5 Systematic internalisers

For the purpose of this work, the last provision of the project of implementing decree to be noticed is the one poorly regulating systematic internalisers. Article 71 begins with introducing the new character to qualify the activity of this kind of subject: following the new definition in MiFID II[424], the firm, to be qualified as systematic internaliser, has also to operate on a substantial basis, and not only on a frequent and systematic one. The article goes on by giving CONSOB the power to ask to internalisers to communicate, also on a periodic basis data, news, acts and documents, in order to better monitor these subjects. Moreover, to systematic internalisers article 65-septies, par. 6 applies, imposing to it to keep available to the public, at least annually and for free, data related with the quality of operations, included price, costs, speed and probability of execution for single financial instruments[425].

4. Conclusion: the effects of MiFID II and of the CMU project on the Italian system

The MiFID II system is one of the most important steps towards the realization of the CMU project: its aim of further harmonization of the discipline of securities, intermediaries and trading venues and the provisions in which it is enacted will very likely be an efficacious tool to connect EU liquidity pools. To achieve such a result, acting on the supranational level is not sufficient: intervening on the national legislation by implementing European provisions is the only mean to effectively integrate the Union's markets.
In the Italian law system, the implementation of the MiFID II system brings novelties in the discipline of trading venues, which are a good starting point to adequate the regulation to the evolutionary tendencies of the sector. The reorganization of part of the discipline of trading venues, together with the introduction of organized trading facilities, as a new trading venue meant to reduce OTC transactions, at least for non equity instruments, the creation of small and medium enterprises' growth markets, in order to promote the use of securities' markets as a mean of funding, and the regulation of algorithmic trading and of venues accepting it, in order to reduce risks coming from this trading

[423] Project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part modifying art. 69 of the legislative decree n°58/1998
[424] See directive 2014/65/UE, art. 4, par. 1, n°20
[425] And see Project of legislative decree implementing the directive 2014/65/EU, art. 3, par. 1, in the part modifying art. 69 of the legislative decree n°58/1998, and in the part introducing art. 65-speties, par. 6

technique, are the most important innovations to the discipline of trading venues[426]. These provisions will enhance competition in the sector, and will also get Italian markets closer to the rest of the Union, simplifying cross border listing and investment operations, both for national subjects towards foreign markets and for foreign subjects towards the Italian ones. The directive and its implementing acts, according to the analysis of the regulatory impact of them[427], will have consequences on SMEs and on the Italian markets in terms of competition and competitive condition of the State. As for SMEs, to simplify their access to financial resources, and the growth of specialized markets for them, the creation of the growth markets should contribute both to their visibility[428]and to the development of favourable legislation. Moreover requirements to be met by this category are meant to guarantee investor protection and consequently promote the trust of investors in SMEs, irrespectively from the specific and lighter transparency and disclosure obligations to be applied to them. The provisions about SMEs should attract these companies on market, even if they may not work, since, notwithstanding the 2014 reform bringing much more incentives to SMEs listing[429] than what happens with MiFID II and its implementation, on the AIM market segment, the one dedicated to high growth potential SMEs we can find only 74 companies listed[430].

The competitive asset of the country will be enhanced by the modernization of the legislation in the sector, which will make, as said before, it closer to the resto of Europe, and, maybe, could be a step towards gaining ground in the European markets' landscape. Attracting investment from foreign countries is an issue that has the same relevance of attracting national capitals towards securities' markets: the shift towards a funding system of enterprises in which the capital markets play a major role could be started right from the implementation of the MiFID II system, and relieve the banking system from some of the weight that it has carried until now.

[426] And see D. SICLARI, CMU e Ordinamento nazionale, Banca Borsa Titoli di Credito, fasc.4, 2016, pag. 481 and following
[427] Analysis of the regulatory impact, project of legislative decree implementing the Directive 2014/65/EU, pag. 13 and following
[428] As said in chapter 2.
[429] See legislative decree n°91/2014
[430] http://www.aim-italia.it/faq-domande/89-elenco-societa-quotate.html; to have a comparative idea, the Euronext group lists 750 SMEs, although if divided in four countries, France, Belgium, Netherlands and Portugal, and see https://www.euronext.com/enternext/France

CONCLUSIONS

In this work we have examined the MiFID II system and its innovations to the European regulation of trading venues. The scope of this work was to understand the impact of MiFID II and MiFIR on the creation of a capital markets union, that, as seen[431], means to eliminate obstacles and barrier to the the free movement of capital around Europe. In this sense the harmonization of the discipline of trading venues is very significant: they are the liquidity pools to connect in order to achieve the Union[432]. The Capital markets union also seeks to move European enterprises from a bank centered funding system to a method of fundraising that involves more relevantly capital markets[433]. Moreover, the reduction of the OTC transactions[434] and the provisions influencing dark pools[435] aim to a better protection of investors, and also market integrity's safeguard is enhanced through provisions relating both to market's transparency[436] and to algorithmic trading[437]. It is also important

[431]See chapter 2 of this work.

[432] See D. VALIANTE, Europe's Untapped Capital market, Final Report of the European Capital Markets Expert Group Chaired by Francesco Papadia, Center for European Policy Studies, 2016

[433] European Commission, Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Action Plan on Building a Capital Markets Union, 2015, pag. 4 and following

[434]See N. MOLONEY, Trading Venues, in EU securities and financial markets regulation, Oxford University Press, 2015, pag. 467 and following for an analysis

[435] See P. GOMBER, I. GVODEVSKIY, *Dark trading under MiFID II*, in D. BUSCH, G. FERRARINI, *Regulation of the EU financial markets: MiFID II and MiFIR*, Oxford University Press, 2017, pagg. 363 and following for an analysis

[436]See N. MOLONEY, EU Financial governance and transparency regulation, in D. BUSCH, G. FERRARINI, Regulation of the EU financial markets: MiFID II and MiFIR, Oxford University Press, 2017, pagg. 315 and following for an analysis

[437] See D. BUSCH, MiFID II: regulating high frequency trading, other forms of algorithmic trading and direct electronic access, in Law and Financial Markets review, vol. 10, n°2, 2016

to see what is the impact of the innovations on the national level, due to the fact that their implementation phase may determine success or failure of the project.

Starting from the innovations brought by MiFID II on the supranational level, we have lots of provisions meant, as said, to reduce transactions which occur OTC. First of all, we have the introduction of a new venue in which will be negotiated only non equity instruments, OTFs[438], and the obligation to negotiate shares only on regulated markets, MTFs and systematic internalisers[439]. If the second provision will surely have effect, since there is an obligation by law to concentrate negotiations in organized systems, the same cannot be said for he introduction of OTFs. It is true that creating a venue specifically intended to support trading in non equity instruments means to impose certain transparency requirements and so to have a system which can guarantee a better investor protection than the OTC trading, but it is also true that, in this case, there is no obligation to concentrate negotiations, and so only time will say if the provision will have the desired effect of reducing trading of non equity instruments outside structured venues.

The new discipline of transparency is also an important feature of MiFID II, both for the discipline of pre and post trade transparency itself, both for its waivers influencing the regulation of dark pools under the new regulatory system. The transparency regime to be applied to almost every kind of instrument, both pre and post trading is an important innovation, since the previous MiFID I system provided only for transparency regimes to burden issuers of equity instruments, the imposition of new and heavier obligations in this sense[440] is an enhancement which will be likely to reduce informational asymmetry and information related problems which could influence the price formation process. Moreover the discipline of transparency influences also the so called dark pools, off exchange trading venues with reduced transparency[441]. In particular the provisions having the greater impact on this kind of venue will be the system of pre trade transparency waivers and the volume cap mechanism[442]. The first one will compose the set of provisions under which a good part of the dark pool trading will occur[443], which is more restricted than under MiFID I, the second is meant to limit trading under the some of the waivers, both on the single venue and in the Union[444]. These interventions should move dark pools inside the system composing the CMU: the scope of this kind of venue (allowing both

[438] Directive 2014/65/EU, art. 4, par. 1, n°22
[439] Regulation 600/2014, art. 23, par. 1
[440] And see N. MOLONEY, EU financial governance and transparency regulation, in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, pag. 324 and following where she says “By contrast with MIFID I, which limited transparency requirements to the equity markets and contained extensive exemptions and waivers, MiFIR adopts a maximalist approach to transparency”.
[441]And see M. FOX, L. GLOSTEN, G. RAUTENBERG, The new stock market, sense and nonsense, Duke law journal, 2015
[442] Regulation 600/2014, artt. 4 and 5
[443] See P. GOMBER, I. GvVOZDEVSKIY, Dark trading under Mifid II, in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, pag. 379 and following
[444] Regulation 600/2014, art. 5

buyers and sellers to obtain better prices for great amounts of instruments) has an important role in the capital markets system and, if well limited, can be exploited as an element enhancing integration of markets. The point is that once that the capital markets union is enacted, cross border use of dark pools could benefit larger companies seeking for better prices than the ones that they can obtain in their national markets; controlling the pools by posing some limits to their use, on the other hand, is necessary to avoid operations that could hamper the price formation process in the Union[445].

The creation of SMEs growth market is a main feature of the reform too. It is meant to attract SMEs on the market by giving visibility to dedicated venues and by giving incentives to them[446]. Anyway the application of certain disclosure requirements[447], even to firms listed in SMEs growth markets, according to some, could maintain still too high costs for SMEs to act in capital markets. Actually, the lighter regime of the MTFs, in respect to the one of regulated markets, and the regulatory brand posed on SMEs growth markets could actually be an incentive for SMEs' listing, at least for bigger ones which could bear the costs.

The regulation of algorithmic trading, both for firms engaging the technique and for venues allowing its use, is a significant element of the MiFID II system. This discipline is designed to contain the risks deriving from this kind of trading[448]: the double set of provisions will be very likely to effectively reduce this kind of problem. Restrictions and requirements asked to investment firms and to venues in order both to engage and to allow this kind of trading are necessary and may be an effective way to exploit advantages that they can have for firms and for the system, while not obliging the system to fully bear the risks.

The discipline of MiFID II will also have some effects on firms running financial market infrastructure groups, but it seems not to limit so much their action, nor to impose the fact that the parent company must an Europe-based one[449]. The reform, indeed, is likely to influence the structure of these groups, but without substantial changes from the current situation.

On the national level, we have analysed the situation of Italy and of its trading venues' regulation. The impact of the reform will modernize such a sector of the Italian legislation and increase the competitiveness of the country in attracting foreign investment[450]. The reform could also delude

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[445] And see chapter 2 of this work.

[446] See Directive 2014/65/EU, art. 33

[447447] The ones provided for in the MAR directive, and see R. VEIL and C. DI NOIA, SME Growth Markets,in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, pag. 356 and following

[448] And see see S. MEZZACAPO, La regolamentazione dell'algorithmic trading nell'UE, in V. TROIANO and R. MOTRONI, La MiFID II: Rapporti con la clientela, regole di governance, mercati, CEDAM, 2016, pag. 380

[449] And see G. FERRARINI and P. SAGUATO, Governance and Organization of Trading Tenues, in D. BUSCH and G. FERRARINI, Regulation of the EU Financial Markets: MiFID II and MiFIR, Oxford University Press, 2017, pag. 285 and following

[450] Analysis of the regualtory impact of the legislative decree implementing Directive 2014/65/EU

expectations regarding its impact on attracting SMEs on capital markets: there are very few listed SMEs in Italy, notwithstanding recent regulatory interventions[451] that have brought significant incentives to them, and it is unlikely that an innovation lighter than that, as SMEs growth markets' creation is, will bring them on capital markets[452].

MiFID II is a reform that brings some advantages in term of investor protection, such as increased transparency requirements, or attempts to move trading from OTC to organized and regulated venues, and which makes another step towards the creation of a Capital Markets Union, with provisions integrating markets and uniformly controlling risk across the whole European Union.

If well implemented on the national level, considering specificities of national markets and taking into account the role that supervisory authorities have in regulating them, it will be a great occasion to create an integrated market and to enact the principle of freedom of movement of capitals. Obviously it cannot be the sole step in this direction, but it is surely one of the most important ones, since its action upon the discipline of trading venues is fundamental: giving the same discipline to the "places" in which trading occurs, means giving some guidelines that make easier for investor to orientate in them, tearing down, although partially, some of the traditional barriers to cross border investment, two above all, the ones related to uncertainty, and to linguistic barriers. A more detailed discipline, such as is the one introduced by MiFID II in respect of the one of MiFID I, indeed, means that the investor may understand a more detailed legislation, since it is common to all Member States.

This work highlighted the characters until now recalled, and has shown how and why the system composed by the Directive 2014/65/EU, so called MiFID II, and the Regulation n°600/2014, so called MiFIR, may be considered an important step toward the creation of a Capital Markets Union across Europe.

[451] And see See legislative decree n°91/2014

[452] And see http://www.aim-italia.it/faq-domande/89-elenco-societa-quotate.html and https://www.euronext.com/enternext/France

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