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Directive 23/2673/EU Addresses Risks From Mobile Investment Applications

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Abstract: The use of mobile phone applications for remote investment may increase the risk of negative economic outcomes for consumers and markets and should be addressed by legislators to prevent a systemic crisis. The GameStop saga is a clear example of these potential negative outcomes.

This article examines how mobile phone distance investment applications can influence consumers' choices regarding financial products as opposed to professional investment service providers. The investigation is based on several pieces of research. Therefore, this analysis will examine the current legal provisions of Directive 2002/65/EC that regulate the use of distance tools for financial contract conclusion. The assessment will focus on identifying any shortcomings in dealing with new tools and practices.

Finally, attention will be paid to the new rules outlined in Directive 23/2673/EU of 22 November 2023. The aim of these rules is to protect consumers from negative and misleading nudges in their investment activities. In the final section of the article, we will examine whether these new provisions can safeguard the interests of consumers and markets.

Résumé: L'utilisation d'applications d'investissements à distance par téléphone mobile peut accroître le risque de répercussions économiques négatives pour les consommateurs et pour les marchés et devrait être traitée par le législateur afin d'éviter une crise systémique. L'aventure de GameStop est un exemple significatif de résultats négatifs potentiels.

Cet article examine la manière dont les applications d'investissements à distance par téléphone mobile peuvent influencer les choix des consommateurs en matière de produits financiers par opposition aux prestataires professionnels de services d'investissements. L'examen se base sur plusieurs éléments de recherche. Ainsi, cette analyse examine les dispositions légales actuelles de la Directive 2002/65/CE qui réglemente l'utilisation d'outils à distance pour la conclusion de contrats financiers. L'examen se concentre sur l'identification de tous les manquements portant sur les nouveaux outils et usages.

Enfin, une attention particulière est portée sur les nouvelles règles énoncées dans la Directive 23/2673/UE du 22 novembre 2023. L'objet de ces règles est de protéger les consommateurs contre des nudges négatifs et trompeurs dans leurs activités

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d'investissement. Le dernier paragraphe de cet article examine si ces nouvelles dispositions peuvent sauvegarder les intérêts des consommateurs et des marchés.

Zusammenfassung: Die Nutzung von Mobiltelefonanwendungen für Ferninvestitionen kann das Risiko negativer wirtschaftlicher Folgen für Verbraucher und Märkte erhöhen und sollte, um eine Systemkrise zu verhindern, vom Gesetzgeber adressiert werden. Die GameStop-Saga ist ein klares Beispiel für diese möglichen negativen Folgen.

In dem vorliegenden Beitrag wird untersucht, wie Ferninvestitionsanwendungen für Mobiltelefone die Entscheidungen der Verbraucher für Finanzprodukte anders als professionelle Wertpapierdienstleister beeinflussen können. Die Untersuchung stützt sich auf mehrere Forschungsarbeiten. Es werden in dieser Analyse die derzeitigen rechtlichen Bestimmungen der Richtlinie 2002/65/EG untersucht, die den Einsatz von Fernabsatzinstrumenten für den Abschluss von Finanzverträgen regeln. Die Bewertung wird sich darauf konzentrieren, etwaige Unzulänglichkeiten im Umgang mit neuen Instrumenten und Praktiken aufzuzeigen.

Schließlich werden auch die neuen Vorschriften der Richtlinie 23/2673/EU vom 22. November 2023 berücksichtigt. Ziel dieser Vorschriften ist es, die Verbraucher vor negativem und irreführendem Nudging bei ihren Anlagetätigkeiten zu schützen. Im letzten Abschnitt des Artikels wird untersucht, ob diese neuen Bestimmungen die Interessen der Verbraucher und der Märkte schützen können.

Resumen: El uso de aplicaciones de teléfonos móviles para inversiones remotas puede aumentar el riesgo de resultados económicos negativos para los consumidores y los mercados, y los legisladores deberían abordarlos para evitar una crisis sistémica. La saga GameStop es un claro ejemplo de estos posibles resultados negativos.

Este artículo examina cómo las aplicaciones de inversión a distancia de teléfonos móviles pueden influir en las elecciones de productos financieros por parte de los consumidores en comparación con los proveedores de servicios de inversión profesionales. La investigación se basa en distintos estudios. Por lo tanto, este análisis examinará las disposiciones normativas de la Directiva 2002/65/CE actualmente en vigor que regulan el uso de herramientas a distancia para la celebración de contratos financieros. La evaluación se centrará en identificar cualquier deficiencia al tratar con nuevas herramientas y prácticas.

Por último, se prestará atención a las nuevas normas descritas en la Directiva 23/2673/UE, de 22 de noviembre de 2023. El objetivo de estas normas es proteger a los consumidores ante estímulos negativos y engañosos en sus actividades de inversión. En la última sección del artículo examinaremos si estas nuevas disposiciones pueden salvaguardar los intereses de los consumidores y de los mercados.

1. Introduction

1. Most of us have a mobile phone in our pockets or bags. They are small and powerful, and generally so useful that it is impossible to imagine our life without them. Apart from calls, we use them for emails, reading the news, and staying in touch with friends and family. Moreover, more and more we also use them to pay

for goods or services or to check our account balance, order a bank transfer and, sometimes, even invest money, using mobile apps expressly created for that purpose.

2. The number of consumers who use mobile phones to conclude distance investment contracts is constantly growing.[1] This growth is partly due to the fact that some investors, already acquainted with concluding distance financial contracts using computers, are increasingly using mobile phones for the same purpose, and partly due to the fact that people who were not familiar with distance financial contracts, because they had never invested before or had done so in presence of human brokers, are starting to use mobile phones for the purpose.[2]

3. This phenomenon has undisputed consequences for consumers. The aim of this article is therefore to investigate if and how consumers' investment strategies and behaviours may be influenced when distance investment contracts are concluded using investment apps, in place of more traditional instruments and what legal remedies can be used to protect consumers from the negative outcomes of these influences.

4. A very famous case, widely known as the GameStop saga, will be used as the departing point of our investigation, because it perfectly highlights the problems and risks that may arise when mobile apps are used by consumers to enter into investment contracts.

5. From there we shall try to understand, from a behavioural point of view, what the attitudes and biases of consumers are when using mobile apps, in place of other more traditional means, for investments, and in which measure these tools may be riskier for consumers' assets.

6. After this assessment, we shall compare our findings with the current European provisions on distance investments, to ascertain their shortcomings and with the solutions offered by the recently enacted Directive 2023/2673 of 22 November 2023 of the European Parliament and of the Council, to try to understand if the proposed amendments to the existing European rules will be able to tackle the problems and risks arising from the use of mobile apps in distance financial contracts.

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1 For some data on the issue please check, among others, www.statista.com/topics/8373/online-trading/#topicOverview and, www.cnbc.com/2018/11/29/td-ameritrade-sees-more-people-trading-on-their-phones.html.

2 In general, on consumer vulnerability, among others and for further references, please read N. Helberger, O. Lynskey, H.-W. Micklitz, P. Rott, M. Sax & J. Strycharz, Consumer protection 2.0. Structural assymetries in digital consumer markets (Bruxelles: BEUC 2021), www.beuc.eu/sites/default/files/publications/beuc-x-2021-018_eu_consumer_protection_2.0.pdf, pp 7-24; C. Riefa & S. Saintier, 'Economic theory and consumer vulnerability: Exploring an uneasy relationship', in C. Riefa & S. Saintier (eds), *Vulnerable Consumers and the Law. Consumer Protection and Access to Justice* (Routledge: Abingdon 2021), p 17.

7. Finally, a few conclusive reflections will be offered to the readers, to define the changes in the approach of the European legislator to the problems under examination and speculate about the possible future outcomes of the new Directive on consumer protection.

2. The 'GameStop Saga'

2.1. Nonprofessional Investors, Mobile Investment Platforms and the GameStop 'Meme Stock'

8. The attention of legal scholars on the risks that may arise from the use of mobile investment applications probably first arose from what we may call the GameStop saga, a case that can provide us with a realistic idea of what can go wrong when some investment mobile services are used by inexpert and impressionable consumers.

9. Indeed, the situation started as a sort of revenge on the part of a bunch of 'brave Reddit users' who, using an investment app called by chance Robinhood, were able to defeat some 'big and mean' hedge funds and large investors who were trying to make money out of the ongoing downsizing of a disgraced company, namely GameStop. Nevertheless, the story ended, a short time later, with many of the nonprofessional investors left in a situation of serious economic distress, after having almost caused the bankruptcy of some hedge funds and a strong market perturbation.

10. GameStop is an American company which sells videogame hardware, software, collectibles and merchandize, whose economic performance began to significantly drop in mid-to-late 2010, primarily because of failed investments projects, the shift of videogames sales to online sellers and the competition of other online and bricks and mortar hardware sellers. Consequently, its equity price plunged.

11. In the meantime, a new generation of investors, most of them in their 20s and 30s, were attracted by 'zero cost' trading services, which made the stock market accessible after the high transaction prices that had kept many potential investors on the sidelines for years. Moreover, also some people who used to bet on sports, started to bet on stocks. Robinhood, the online brokerage company used by a large part of these new investors, therefore saw its customer base soar from 10 million in 2019 to 13 million in 2020, with a triplication of the trading volume.[3]

12. These new investors had absolutely no knowledge of the stock market. Some of them found advice in a section of Reddit, a social news and discussion website, called WallStreetBets, characterized by most posts displaying aggressive, highly speculative trading strategies that ignored fundamental analysis and risk

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3 M.S. Pagano, J. Sedunov & R. Velthuis, 'How did retail investors respond to the COVID-19 pandemic? The effect of Robinhood brokerage customers on market quality', Vol. 43*Fin. Res. Lett. (Finance Research Letters)* 2021, doi: 10.1016/j.frl.2021.101946.

management techniques.[4] The attitude of the people on this subreddit was certainly more akin to gambling than investing, for example, it was quite common to invest all the money into one single stock, without diversification or due diligence.[5]

13. Starting from the summer of 2019 there was a growing interest of many Reddit users in the GameStop stock, thanks to a chartered financial analyst, active on WallStreetBets, and the discovery that the company was being heavily shorted at 80%, that is to say that some investors had, with a practice generally called 'short selling', borrowed 8 shares out of 10 from other investors and sold them, with plans to buy them back when the prices fell and then return them to the original owners, thus making a profit on the price difference. They were in practice betting that GameStop stock prices would fall.[6] However, as we all know, in these cases the possible losses are not limited to the stake, but are theoretically infinite, because if a stock begins an upward run, some short sellers will abandon their short and buy shares at the higher price to return, making the stock rise even higher and pushing in turn other shorts' owners to choose to cover their shorts, and so on, triggering a short squeeze. In the case, the entities that were shorting GameStop stocks were some Wall Street hedge funds, which had borrowed and sold millions of shares, more than what were actually available for purchase on the market.[7]

14. People on the Internet, most of them first-time or inexperienced investors, decided to rally together, against the shortening hedge funds. To that purpose, they used Robinhood or other 'no cost' online brokerage retailers.

2.2. *The Rise and Fall of the GameStop 'Meme Stock'*

15. On 14 January 2021, the price of GameStop stocks jumped to USD 40 per share, and on 27 January 2021, the GME Stock reached an all-time high of USD 347 per share, as many new 'investors' had joined the rally. Unfortunately, the following day Robinhood and other online brokerage retailers halted the buying of GameStop, and other so-called 'meme stocks', to meet legal clearinghouse requirements. Online brokerage retailers were in fact obliged to do so, because the third-party clearinghouse, charged with the clearing of the trades (it generally takes up to two days for the effective transfer of cash and securities to happen) required deposits much larger than usual to be put down, because of the market volatility.

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4 R. Kiberd, 'You probably shouldn't bet your Savings on Reddit's "Wallstreetbets"', *vice.com*, 17 Dec. 2017.

5 J. Davidson, 'Meet the Bros behind /r/WallStreetBets, who lose hundreds of thousands of dollars in a day—and brag about it', *Money.com* 25 Oct. 2018.

6 K. Lyons, 'GameStop stock halts trading after Reddit drama', *theverge.com* 22 Jan. 2021.

7 It should be pointed out that a similar situation could not occur in Europe, because the Short Selling Regulation n° 236 of 2012, Art. 12, prohibits short sellings when there is not the guarantee of their availability.

16. Inevitably, as it was no longer possible to buy GameStop shares on online brokerage retailers' sites, shares value fell to USD 53 over a 9-day span. That stop halted the race of retailer investors, and after a temporary surge in February, GameStop shares prices kept on diminishing over time.

17. Short sellers, and among them the hedge funds that had bet against GameStop, suffered large losses because of the short squeeze. However, they were not the only losers in the game. As many of the retail investors had bought GameStop shares when they were reaching their peak prices, following the buying rush, they suffered tremendous losses when the shares price suddenly dropped. Those losses were heightened by the fact that often the money these retail investors used to buy GameStop stocks were their only savings or, even worse, loans from friends and relatives or credit cards payments. Consequently, quite a few of them went bankrupt, and their stories became headlines on the news and subject of discussion on the social networks.[8] Some of them tried to file class actions against Robinhood, claiming they had lost money when the platform stopped them from buying stock, but those claims were dismissed by some federal courts, holding that Robinhood could not be held accountable because it did not infringe specific legal duties.[9]

18. Therefore, we may say that what started as the glorious story of how small investors can rally together to defeat the financialization of the US economy, and the 'big bad wolves' working in it, ended up showing how the financialization of the economy may threaten the financial resources of small investors, and the market economy as well, with the help of the new at distance mobile investment contracts applications.

19. This case prompted the United States House Committee on Financial Services to issue a 140 page report, urging the Securities and Exchange Commission (SEC) to develop new regulations to address market risks brought to light by the case, including a framework governing liquidity planning for clearing brokers.[10]

20. It also brought to the attention of scholars the issue of the risks for consumers' assets posed by the investment activities made using apps of online brokerage retailers.[11] These new tools, which allow consumers to invest in the financial markets using mobile or tablets are, from many points of view, different from the more

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8 Some investors' personal histories may be found in N. Popper, 'Robinhood Has Lured Young Traders, Sometimes with Devastating Results', nytimes.com 8 Jul. 2020.

9 A. Miao, 'Robinhood Wins Dismissal of Lawsuit Over GameStop and Meme-Stock Trading Restrictions', wsj.com, 11 Aug. 2023.

10 Committee on Financial Services, US House of Representatives, *Game Stopped: how the meme stock market event exposed troubling business practices, inadequate risk management, and the need for legislative and regulatory reform*, Jun. 2022.

11 As well as of other problematic features of investment markets, on which, for a first introduction, please read S.J. Kaplan, 'FOMO And Covid And Cryptos, Oh My!', in B. Alemanni, U. Filotto,

traditional tools of at-distance investments. The next section will therefore be devoted to analysing the main differences between the more traditional and the modern tools, and what risks and consequences for retail investors may entail the use of the latter.

3. The Differences Between Investing Using Apps of Online Brokerage Retailers and Investing Using Traditional Platforms, and Their Consequences

21. As mentioned before, the GameStop saga showed the world the risks that may arise from investing in the financial markets using the apps provided by some online brokerage retailers.

22. Investment apps can in fact, as we shall discover with more details below, be an incentive to invest for people with no or little investment experience, distort consumers' investment behaviours and therefore be a trigger for financial troubles, both at a personal and market level and harm financial stability. They may therefore substantially increase the already existing risks of harm to consumers, arising from financial activities.

23. Hence it is interesting to point out the main differences between distance investment activities performed by consumers using mobile investment apps and distance investment activities performed using instead traditional tools, including computers.

3.1. Investment Costs

24. The first difference between the two is that investing using trading apps is, at least apparently, much cheaper than traditional tools. In fact, brokerage retailers offering online services based on mobile investment apps generally market their trade services as 'fee-free', in contrast with human brokers, who would notoriously take a substantial percentage of the investments and old-style online brokerage retailers, who would generally charge a flat fee per trade. Therefore, retail investors are generally persuaded that the brokerage services offered by retailers by way of investment apps are completely free of charge.

25. The reality is that, apart from the fees directly paid by investors, in both cases, traders are also rewarded by the money deposited in the accounts of the investors and by the 'order flow', that is to say, what is paid to the retail broker from the large market makers, who profits from the difference between the buy and sell price, for the right to take their orders. Hence, none of the brokers offer their services free of charge.

S. Mousavi & R. Viale, *Artificial Intelligence and Financial Behaviour* (Cheltenham UK: Edward Eldgard 2023), pp 192–205.

3.2. *Financial Instruments Types*

26. The second difference is that historically retail investors were used to buy and sell simple financial instruments, such as equities, bonds and funds, while more complex financial instruments were left to professional investors, because of their higher risks. Therefore, (conservative) human brokers and at-distance online brokerage services are used to offer consumers more traditional products.

27. On the contrary, mobile trading apps do not only allow, but actually focus on trading complex or risky financial products, such as cryptocurrencies, buying on margins (that is to say taking out a loan to buy extra shares) or options (that is to say betting that a certain share will rise or fall a certain amount). Although these financial products can be very lucrative, they can also be riskier for consumers, who are nevertheless seldom aware of the greater risk involved, in part because of their financial ignorance, in part because of the way those investing instruments are generally marketed by the brokerage retailers. Investment apps in fact generally tend to underline how easy and quick it could be to earn a lot of money using their tools, as so many have already done, rather than stressing their risks.

3.3. *The Impairment of Trading Abilities*

28. The third difference is that trading abilities may be impaired using investment mobile apps, while traditional trading tools, including distance investment services, apparently do not have those negative effects. As we shall see in the following section, in fact, researchers have proved that the tools used by retail investors may have a direct influence on their investing behaviours as well as on their investment results.

3.4. *The Use of Social Networks*

29. The fourth difference resides in the fact that investment apps make large use of social networks, a feature that is completely unknown to traditional investment tools. Some mobile investment apps allow investors to 'copy' the transactions of 'financial influencers', who can be followed on the same investment apps. If we examine for example the E-Toro Popular Investors Program,[12] we may notice that these 'financial influencers' are not required to have a certified professional qualification, are rewarded based on the money invested by their followers and not on their earnings, and obviously do not bear any liability for possible losses. Moreover, where they have many followers, there is also the chance that they could be able to significantly influence markets.

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12 www.etoro.com/copytrader/popular-investor/.

3.5. *The 'Gamification' of Investing Activities*

30. The fifth difference resides in the fact that the design and functioning of some mobile investing apps is frequently aimed at entertaining investors, within a process of gamification of investment activities. Therefore, in these cases the traditional purposes of investing activities, saving money for the future or for some special expenses, which are protected by EU and national legislations because they contribute to the general welfare, are giving way to entertainment purposes, which are not entitled to the same legislative protection.[13]

31. These listed differences may have, as we saw in the GameStop story, a huge influence, and sometimes also catastrophic effects, not only on the personal assets of the investors but also on the markets, as they can be the cause of systemic risks to the financial sector, because of the large number of investors that may be gathered and coordinated by financial influencers operating on the same mobile apps, with potential distortive effects of the market.

32. In the following section we shall try to better understand how these mobile apps are actually influencing investors behaviour, so as to try to envisage what could be done to counteract them using legislative provisions, when and if it is possible.

4. The Influence of the Use of Investment Apps on Retail Investors' Behaviours

4.1. *Nudges, Biases and Choice Architecture in Investment Technologies*

33. It is today widely known that nudges and choice architecture can significantly affect the economic decisions of individuals, in different relevant fields such as personal investments for retirement, credit cards and mortgages.

34. Consequently, even the behaviour of retail market investors may be influenced by the biases that affect all the human beings in their daily decisions, because of the notorious coexistence of two mental operating systems, the intuitive and fast System 1 and the reflexive and slower System 2.[14]

35. The introduction of technology in retail investments, from telephone orders in the 80s to internet-based trading in the 90s, has certainly largely contributed to the change

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13 See e.g., The Responsible Trading Policy of E-Toro. that in my opinion is a clear demonstration of this new attitude, especially based on no warning on the actual level of risk of certain investments, https://www.etoro.com/customer-service/responsible-trading/.

14 Due to the limited space at our disposal, and to the large diffusion of these theories, we shall not give more details on the subject. For a first approach on the subject, the two reference books are R. H. Thaler & C.R. Sunstein, *Nudge: Improving decisions about health, wealth, and happiness* (New Haven, Connecticut, U.S: Yale University Press 2008) and D. Kahneman, *Thinking, Fast and Slow* (London: Penguin 2011).

in trading habits of retail investors. Changes that are sometimes associated, as some research suggests, to a decline in investors' portfolios efficiency. For example, moving to online trading apparently generally entails an increased turnover of investments and consequently a reduced performance,[15] and the use of mobile phones certainly largely influences consumers' behaviours.[16] Nonetheless, although there is no doubt that the new technologies influence investors' behaviours, the amplitude of this influence may be disputed, as the adoption of the new behaviour by retail investors may not only be the consequence of the adoption of the new technology but, on the contrary, the consequence of the investor willingness to modify their investing behaviour.

4.2. The Latest Researches on the Negative Effects

36. The challenges posed using smartphones for investing purposes were thoroughly examined by America's National Bureau of Economic Research, following, through two German banks, 15,000 clients who had access to both smartphone and website trading, and gave rise to very interesting results.

37. Overall, the researchers concluded that the use of mobile phones for investing increases the purchasing of riskier and lottery-type assets and the chasing of past returns.[17] They discovered indeed that trading on a smartphone, compared to no-smartphone trades, is more likely to result in the purchase of riskier assets, with higher volatility. Moreover, the use of smartphones increases by 67% of the unconditional mean the buying of lottery-type stocks.[18]

38. Moreover, using smartphones for investments encourages people to buy assets that are already near the top of the market, fostering the tendency to chase past returns. In fact, the researchers discovered that using smartphones increases the probability of buying assets in the top 10% of past performance by 70.6% of the unconditional mean.

39. Finally, it was also discovered that the changes in the attitude of retail investors persisted even when the traders who had used a smartphone went back to using other non-smartphone platforms. These behaviours suggest that investors probably learn to become in general more biased following their use of smartphones to trade.

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15 B.M. Barber & T. Odean, 'Online Investors: Do the slow die first?', 15 *Rev. Fin. Stud. (Review of Financial Studies)* 2002, pp 455-87.

16 For the influence of the use of smartphones on consumers' choices in general, please read S. Benartzi & J. Lehrer, *The Smarter Screen: Surprising Ways to Influence and Improve Online Behavior* (New York: Penguin Books 2015).

17 A. Kalda, B. Loos, A. Previtero, A. Hackethal, 'Smart(phone) Investing? A within Investor-Time Analysis of New Technologies and Trading Behavior', America's National Bureau of Economic Research, Working Paper 28363 (Jan. 2021), www.nber.org/papers/w28363.

18 The definition of lottery-type stocks is that of assets with below median prices and above median skewness and volatility, see A. Kumar, 'Who Gambles in the Stock Market?', 64 *J. Finance (Journal of Finance)* 2009(4), pp 1889-1933, doi: 10.1111/j.1540-6261.2009.01483.x.

40. The mechanisms that drive these 'smartphone effects' are still uncertain, but some interesting hypotheses were nevertheless provided by the researchers. Apparently, the time of the day in which trade is performed may have a role, although it does not fully explain retail investors' behaviours. It was in fact ascertained that 'smartphone effects' are stronger during after-hours, that is to say following exchange closure, and therefore it was supposed that, provided that notoriously individuals are more likely to rely on the more intuitive System 1 later in the day, when they are tired,[19] those stronger effects are consistent with the fact that smartphones facilitate trades based more on System 1 thinking.

41. The same researchers even found out that the 'smartphone effect' might also be the consequence of digital nudges because the trading apps that are used on smartphones prominently feature stocks that have recently experienced dramatic positive or negative performances, which investors are apparently more likely to buy.[20] Alternatively, they can display, in the smartphone setting information, mechanically generated trades that favour riskier, lottery-type assets, and past winners, with unavoidable consequences for investors.

42. These results support the findings of some previous research on the effects of mobile technology on investor behaviours, with reference to the increase in the purchase of lottery-type stocks and trend-chasing.[21] As well as this, they also confirm the research affirming that investors who switched from telephone calls to online trading start trading more frequently, but less profitably than before.[22]

43. Moreover, other studies documented that preferences for gambling are correlated with lottery-type stocks with positively skewed payoffs.[23] Therefore, not only smartphones may increase risky investments in retail investors in general, but also provide a gambling-like experience to people already inclined in betting activities, with a distortion of the purposes of investment activities.

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19 D. Kahneman, *Thinking, Fast and Slow*, p 31.

20 As evidenced also in researches concerning the Robinhood app, such as I. Welch, 'The Wisdom of the Robinhood Crowd', 77 *J. Finance* 2022(3), pp 1489-1527; B.M. Barber, X. Huang, T. Odean & C. Schwarz, 'Attention induced trading returns: Evidence from Robinhood users', 77. *J. Finance* 2022(6), pp 3141-3190, doi: 10.1111/jofi.13183.

21 On the topic of consumers' behaviours in financial investments, please also read, Y. Levi & S. Benartzi, 'Mind the App: Mobile Access to Financial Information and Consumer Behavior', Working Paper 2020, ssrn.com/abstract=3557689; F. D'Acunto, A.G. Rossi & M. Weber, 'Crowdsourcing Peer Information to Change Spending Behavior', Chicago Booth Research Paper No. 19-09, Fama-Miller Working Paper (2020) ssrn.com/abstract=3339335.

22 B.M. Barber & T. Odean, 'Online Investors: Do the slow die first?', 15. *Rev. Fin. Stud.* 2002(2), pp 455-87, doi: 10.1093/rfs/15.2.455; J.J. Choi, D. Laibson & A. Metrick, 'How does the Internet affect trading? Evidence from investor behavior in 401(k) plans', 64. *J. Financ. Econ. (Journal of Financial Economics)* 2002(3), pp 397-421, doi: 10.1016/S0304-405X(02)00130-7.

23 A. Kumar, 64 *J. Finance* 2009(4), pp 1889-1933.

44. Lastly, we should also remember that some research pointed out that investors' preferences for lottery stocks are amplified by attention and social interaction,[24] a situation that often occurs when smartphones are used for investments because, as we mentioned above, smartphone investment apps make large use of social networks, allowing or even nudging the retail investors to share their investments achievements or even simply results with their social connections. Therefore, we may presume that the behaviour of retail investors using smartphone apps for their investments may also be influenced by the interactions and the attention they get from social network relationships.

4.3. The Latest Researches on the Positive Effects

45. That said, we should not neglect that technological developments in the field of distance investment contracts, including the use of mobile phone investment apps, can also have positive effects on investors. For example, it was correctly pointed out that robo-advisers, which may be incorporated into investing platforms, may have the potential to reduce investment biases and improve the portfolio performance of retail investors.[25]

46. Moreover, while in theory smartphones can promote financial risk-taking, when investors are sensitive to short-term losses, the more frequent feedback offered by smartphones could reduce the same risk-taking, in force of the 'myopic loss aversion' framework. We can in fact remember that 'myopic loss aversion', which is a framework that streams from 'prospect theory',[26] occurs when investors take a view of their investments that is strongly focused on the short term, a situation that leads them to react negatively to recent losses.[27] It is interesting to point out that this phenomenon may also be intensified by narrow framing, which happens when investors only take into consideration specific investments, e.g., a certain stock or a trade, instead of the bigger picture, that is to say their whole portfolio or sequence of trades over time.[28]

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24 B.G. Turan, D.A. Hirshleifer, L. Peng & Y. Tang, 'Attention, Social Interaction, and Investor Attraction to Lottery Stocks', NBER Working Paper No. w29543 (2021), ssrn.com/abstract=3978401.

25 F. D'Acunto, N. Prabhala & A. Rossi, 'The Promises and Pitfalls of Robo-Advising'. 32. *Rev. Fin. Stud.* 2019(5), pp 1983-2020; B. Loos, A. Previtero, S. Scheurle & A. Hackethal, 'Robo-advisers and investor behaviour', Working Paper 28363 (2021), www.nber.org/papers/w28363.

26 D. Kahneman & A. Tversky. 'Prospect Theory: An Analysis of Decision Under Risk', 47. *Econometrica* 1979(2), pp 263-292, doi: 10.2307/1914185.

27 S. Benartzi & R.H. Thaler, 'Myopic Loss Aversion and the Equity Premium Puzzle', 110. *QJE (The Quarterly Journal of Economics)* 1995(1), pp 73-92, doi: 10.2307/2118511; R.H. Thaler, A. Tversky, D. Kahneman & A. Schwartz, 'The effect of myopia and loss aversion on risk taking: An experimental test', 112. *QJE* 1997(2), pp 647-661, doi: 10.1162/003355397555226.

28 D. Kahneman & D. Lovallo, 'Timid choices and bold forecasts: A cognitive perspective on risk taking', 39. *Manag. Sci. (Management Science)* 1993(1), pp 17-31, doi: 10.1287/mnsc.39.1.17.

47. In fact, a large-scale field experiment has shown that individuals who receive information about investment performance too frequently tend to underinvest in riskier assets, therefore losing out on the potential for better long-term gains,[29] while another research documented that professional option traders take less risk when they are randomly assigned to the treatment of receiving more frequent feedback.[30]

48. The above-mentioned research seem to point to the conclusion that smartphones, providing the ability to almost instantaneously trade in environments that are generally more relaxed than investment human services or computer screens, may allow more impulsive trades, largely driven by System 1, which is notoriously more impulsive, fast, instinctive and emotional, rather than by System 2, which is the slower, more deliberative, and more logical system.[31]

4.4. Overall Results

49. Those listed above are some non-exhaustive examples of how retail investors' behaviours could be influenced by what and how information is displayed to them on mobile phone screens. The truth is that it is very difficult to objectively observe and analyse all the possible manipulation of investors' behaviours by mobile trading services. These difficulties are not only due to the fact that the list of possible deceptive actions may be much longer than those depicted above, but also those manipulations may be subject to swift changes and adaptations.[32]

50. Nevertheless, there is no doubt that when using smartphones for investments the choices made by investors are more largely guided by intuitive decisions, in comparison to investments made using other more traditional tools, such as computers or human investment consultants. The inevitable outcome may often be a lower portfolio efficiency and performance and increased risk-taking, not unlike gambling.

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29 F. Larson, J.A. List & R.D. Metcalfe, 'Can myopic loss aversion explain the equity premium puzzle? Evidence from a natural field experiment with professional traders', NBER Working Paper (2016), www.nber.org/papers/w22605.

30 M.S. Haigh & J.A. List, 'Do Professional Traders Exhibit Myopic Loss Aversion? An Experimental Analysis', 30. *J. Finance* 2005(1), pp 523-534, doi: 10.1111/j.1540-6261.2005.00737.x.

31 K.E. Stanovich & R.F. West, 'Individual difference in reasoning: Implications for the rationality debate?', 23. *BBS (Behavioral and Brain Sciences)* 2000(5), pp 645-726, doi: 10.1017/S0140525X00003435; D. Kahneman, 'A perspective on judgement and choice', 58. *Am. Psychol (American Psychologist)* 2003(9), pp 697-720.

32 On the point, see LE Europe, VVA Europe, Ipsos NV, ConPolicy and Time.lex, *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services*, Directorate-General for Justice and Consumers Consumer Policy, Apr. 2019, n. 14.

5. The first steps taken by the European Union to Protect Consumers in Cases of Distance Contracts Concerning Financial Investments

5.1. The Aim of the European Union Legislation

51. As we all know, the European legislation on the protection of clients and consumers in the field of investment contracts is aimed at securing the individuals in special situations of vulnerability, where the economic exchanges they enter into may have serious consequences on their assets. It should be noted that this purpose does not always correspond to the general aim of protecting the weak party, traditionally embedded in the European rules on consumers' protection.[33]

52. The discipline of the European Union on financial investments answers to a double need and is led by a double purpose: regulating and protecting. Financial markets are in fact complex systems that for their correct functioning and trustworthiness must be disciplined by an authority endowed of a legislative power. But, at the same time, because of the risks that those same financial markets may entail for some categories of clients, namely those less knowledgeable and more prone to be influenced by third parties, their legal discipline should also take into consideration the need to protect such categories of clients. Therefore, while the regulation concerns the market, the protection concerns the subjects.

No doubt that the elaboration of the European rules on financial investments are rooted in what is generally labelled as an 'ordo-liberal' vision of the market, within the principle of the freedom of circulation of capitals. A vision that is not only aimed at a regular and balanced economic growth, through the creation of a proper economic legal environment by the fostering of competition based on market principles, but also takes into consideration the protection of the users of financial services.[34]

5.2. Directive 2002/65/CE

53. Therefore, it is not surprising that the interests of the investors were taken into consideration and protected starting from the Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-

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33 This perspective is underlined by E. Poillot, « Clients et consommateurs en droit bancaire et financier: entre protection subjective et protection objective de la partie faible en droit européen », *Hors-Série Banque & Droit*, Février 2023, p 10.

34 M. Devoluy, « L'ordolibéralisme et la construction européenne », 103. *Rev. Int. Strat. (Revue Internationale et Stratégique*) 2016(3), pp. 26-36; F. Marty, « Évolution des politiques de concurrence en droit de l'UE: de la Wettbewerbsordnung ordolibérale à la More Economic Approach néolibérale ? » in G. Grégoire & X. Miny (eds) *The Idea of Economic Constitution in Europe* (Leiden: Brill 2022), pp. 298-343; F. Cafaggi & H. Muir-Watt, *The Regulatory Function of EU private Law* (Cheltenham UK: Edward Eldgard 2009).

compensation schemes, establishing indemnification systems for investors,[35] while the rules on the protection of markets and consumers in cases of distance selling of financial products were set in Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services.[36]

54. When that Directive was written the European legislator was certainly already aware that how distance financial contracts may be concluded were susceptible to evolution. Therefore, recital 15 of the Directive stated that '*The constant development of those means of communication requires principles to be defined that are valid even for those means which are not yet in widespread use*'.

55. While the second paragraph of Article 3 of the same Directive, concerning the information to be provided to the consumer prior of the conclusion of the distance contracts, affirmed that:

> *The information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors.*

The moment in which all the required information on the contract is provided by the professional to the consumer is in fact the most sensitive in the procedure leading to the conclusion of the agreement, a moment in which consumers should be protected against possible misleading behaviours or predatory practices of professional providers of goods and services. For that reason, also how the information is provided to the consumer may assume a significant relevance, because those means can sometimes, in force of their functioning, constitute an instrument of influence on the consumer's will.

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35 Directive 97/9/EC of the European Parliament and of the Council of 3 Mar. 1997 on investor-compensation schemes. More on the subject and its development in F. ANNUNZIATA, «Towards a EU Charter for the Protection of End Users in Financial Markets », EBI Working Papers Series, 2022, n° 128, papers.ssrn.com/sol3/papers.cfm?abstract_id=4200502.

36 Directive 2002/65/EC of the European Parliament and of the Council of 23 Sep. 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. On Directive 2002/65/EC please read, among others, J. Devenney and M. Kenny (eds), *Consumer credit, debt and investment in Europe* (Cambridge, UK: Cambridge university press 2012).

5.3. *Directive 2002/65/CE Shortcomings*

56. As far as the topic of this article is concerned, it is therefore important to underline that that Directive was clearly written bearing in mind the state of technology current at the time it was enacted, two decades ago. Therefore, it could not take into consideration the possible negative influences that the technological evolution, in our case the use of mobile phones in place of more traditional tools for the conclusion of investment contracts, may have on consumers, and could not foresee the future 'gamification' and 'socialization' of investments activities. The investors depicted in the Directive are in fact active consumers, who buy stocks and obligations using their personal computers, having searched for the financial products and therefore after having acquired a certain amount of information. The investment platforms used by those consumers to make investments and acquire information are kind of 'passive', because they simply display a list of financial products on sale, with their related information, and allow investors to enter into a financial contract.

57. The technological evolution of the tools used for investment purposes has radically changed this situation in the last years. In fact, the approach adopted by some financial intermediary companies with their mobile devices apps, such as Robinhood in the USA and E-Toro in Europe, is the opposite, as these apps are very active in suggesting to consumers what financial products they should buy and nudging consumers to 'follow the herd', allowing them, for example, to browse the 100 most-held stocks among fellow users or simply replicate what other investors are doing. Moreover, as said before, while traditional investment platforms charge a fee for each investment, generally the new apps offer contracts for investments free of charge, thus encouraging rapid and frequent changes of investment 'strategies', which are often risky. And, finally, those same investments apps tend to promote very risky and complex investments, such as crypto-currencies and derivates, which were generally traditionally traded only by professional traders and not by consumers looking for a stable return and a certain level of increase in capitals coupled to a low or medium level of risks.

58. Even if it is true that mobile financial traders warn consumers about the risks of those investments,[37] the inadequacy of these warnings are undeniable, even only because the small print on mobile phones is much more difficult to read than on a computer screen.

59. Although the European Court of Justice has not been asked, to date, to judge cases of violation of the rules on the duties of information provided for by Directive 2002/65/

37 For example, E-Toro states on the page devoted to investments in CFDs '*Please note that CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage. 76% of retail investor accounts lose money when trading CFDs with this provider. You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money*', see www.wikitoro.org/etoro-cfd (accessed 10 Jan. 2024).

EU concerning mobile financial services providing investment contracts, the spread of the use of new tools, primarily mobile phones, for investments directly made by consumers, may certainly constitute a risk for investors, because the laconic provisions of the Directive, that as mentioned before, states that the information to the consumers should be '*provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used*', clearly leaves space to the exploitation of consumers' biases by financial trading providers and other similar intermediaries.

60. This shortcoming certainly was one of the reasons that led the European Commission to elaborate the new Directive on financial services contracts concluded at a distance.

6. The Novelties of the Provisions of Directive (EU) 2023/2673 of the European Parliament and of the Council of 22 November 2023

6.1. The Process of Amendment of Directive 2002/65/UE

61. The process of amendment of the provisions of Directive 2002/65/EC on the distance marketing of consumer financial services was conducted by the European Commission on the basis of the outcome of the evaluation of its effectiveness, efficiency and simplification, burden reduction, relevance, coherence, EU added value. That assessment was carried out with the help of several relevant stakeholders, a public consultation, and a literature review.[38]

62. Meanwhile, the same European Commission took into consideration the discoveries of behavioural studies, asking a group of experts to investigate the consequences of the digitalization of the marketing and distance selling of retail financial services. The outcome of this research was collected in a report,[39] which clearly shows that, as already mentioned above, the use of smartphones increases risky behaviours in consumers, included purchasing riskier and lottery-type assets and chasing past returns.

63. The outcome of this preparatory work was detailed in the Final Report of January 2020 of Evaluation of Directive 2002/65/EC, where the European Commission explicitly stated that digitalization exacerbated some aspects not fully addressed by Directive 2002/65/EU.

64. It was for example stated that the way the information is 'framed' influences the capacity of consumers to read and understand it, especially in the context of very complex financial services or products. It was also pointed out that, because of

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38 ICF Consulting Limited, *Evaluation of Directive 2002/65/EC on Distance Marketing of Consumer Financial Services*, Directorate-General for Justice and Consumers Consumer Policy, Jan. 2020.

39 LE Europe, VVA Europe, Ipsos NV, ConPolicy and Time.lex, *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services.*

the widespread adoption of digital devices for the search or purchase of financial products or services (apparently by one in three consumers), existing information disclosure requirements needed to be adapted to these emerging communication channels, with the purpose of helping consumers to read and understand the information provided.[40]

6.2. Purpose and Tools of Directive 2023/2673/UE

65. Based on the above mentioned evaluation, and on a subsequent proposal by the Commission of a text for a Directive, on the 22 November 2023, Directive (EU) 2023/2673 of the European Parliament and of the Council amending Directive 2011/83/EU as regards financial services contracts concluded at a distance and repealing Directive 2002/65/EC was finally enacted.

66. The purpose of the Directive is to seek to achieve full harmonization in the field of distance selling of financial products, and a high degree of consumer protection in the area of financial services contracts concluded at a distance, in order to enhance consumer trust and confidence in distance selling (recitals 3 and 4).

67. The European legislator is fully aware that digitalization exacerbated some aspects that were not fully addressed, and contributed to market developments that were not foreseen, by Directive 2002/65/EC, as well as the fact that this rapid technological development, which is still ongoing, has brought changes to the financial services market, often in a fast and unpredicted way (recitals 5 and 6).

68. Therefore, the aim of the new Directive is to cover all the financial services and to protect consumers, endowing these latter with legally enforceable rights and obligations and, at the same time, providing legal certainty and transparency for traders, including micro, small and medium-sized enterprises[41] (recitals 7 and 8).

69. To achieve that purpose, the Directive uses a mixture of the traditional informative tools, aimed at providing the consumer with all the needed information, although adapted to the idea that the mere provision of information may not be enough to protect consumers, if that information is not funnelled in the right way, coupled with a new set of potentially intrusive instruments, aimed at prohibiting the financial services provider from adopting misleading and behaviourally impacting techniques.

70. Beginning with the first set of rules, those concerning the information provided to the consumer, the European Legislator is willing to contrast the

40 ICF Consulting Limited, *Evaluation of Directive 2002/65/EC on Distance Marketing of Consumer Financial Services.*

41 The notion of micro, small and medium-sized enterprises should be understood as defined in Art. 2 of the Annex to Commission Recommendation 2003/361/EC(5) of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

widespread use of fully automated electronic tools in the conclusion of the distance financial services contracts, such as chatbots, robo-advice, interactive tools or similar means, which it deems to be potential threats to contractual fairness, by granting the consumer the right to ask for human intervention. This human intervention has the purpose of giving the consumer adequate explanations and therefore ensuring added transparency on the contract to be concluded online (recital 15).

71. The new Article 16d.3 of future Chapter IIIa of the Directive 2011/83/EU therefore explicitly provides that, where the trader uses online tools, the consumer has a right to request and to obtain human intervention at the pre-contractual stage and, in justified cases, after the conclusion of the distance contract.

72. Those provisions add to other previous requirements concerning the actual understanding by the consumer of the characteristics of the financial contracts he or she is concluding.

73. It is therefore upon the Member States to ensure that traders provide consumers with adequate explanations, so that they are able to assess whether the proposed contract is adapted to their needs and financial situation, including the essential characteristics of the proposed contract and the specific effects that the proposed contract may have on the consumer (Art.16d.1). The same Member States may specify the manner and the extent of those explanations and adapt *'the manner and the extent to the circumstances of the situation in which the financial service is offered, the person to whom it is offered and the nature of the financial service offered'* (Art.16d.2).

74. In the recitals, it was expressly stated that these provisions are aimed at counteracting the increasing mechanization of the procedures, information included, leading to the conclusion of distance contracts of financial services, with the duty to assist consumers in the choice of the financial products more suitable to their needs and financial situation, by way of '*adequate explanations concerning the essential characteristics of the contract*'. This 'personalization' of the information given to consumers should take into consideration the consumer's need for assistance, and their knowledge and experience of the financial services object of the contract.

75. This attention toward the information to the consumers on the contracts to be concluded is heightened when the explanations on those same contracts are given by automated online tools such as chatbots, robo-advice, interactive tools or similar. In these cases, in fact, the trader must always offer free of charge human intervention, during business hours, to ensure that the consumer is perfectly aware of the possible effects of the contract on their economic situation (recitals 38–40).

76. Also, the traditional information rights of consumers are 'modernized', for example providing that, apart from the usual information on the financial service and identity and contacts of the provider, the trader is obliged to disclose to the consumer, where applicable, that the price was personalized on the basis of automated decision-making

(differentiating for example prices between different consumer groups or adapting them to the consumers' individual price sensitivity), and that the financial service is related to instruments involving special risks related to their specific features or the operations to be executed or whose price depends on fluctuations in the financial markets outside the trader's control and a notice indicating that historical performances are not indicators for future performances (Art. 16a.1).

77. Special attention is given to the language used, permitting Member States to maintain or introduce in their national law language requirements regarding the information, with the purpose of ensuring that the consumer easily understands that information (Art. 16a.2).

78. In the recitals of the Directive, it is stressed that the information should be easy to comprehend and readable, using characters of a readable size and of colours that do not diminish the comprehensibility of the information, even when read in black and white. Overly lengthy and complex descriptions, small print, and excessive use of hyperlinks should also be avoided, when possible, because they may diminish the understanding of consumers.

79. As these rules could be difficult to apply when mobile phones or similar tools with small screens are used, it is required that these technical limitations are taken into account. With reference to cases where the trader has customized the content and presentation of the online interface on mobile telephone screens, it is required that the information concerning the identity of the trader, the main characteristics of the consumer financial service, the total price to be paid by the consumer to the trader for the consumer financial service including all taxes paid via the trader or, if that is not possible, the basis for the calculation of the price enabling the consumer to verify it, and the existence or absence of the right of withdrawal, including the conditions, time limit and procedures for exercising that right, should be provided upfront and in the most prominent manner possible. All the other information can be layered (recital 30).

80. With regards to layered information, it must be possible for the consumer to view, save and print the information as one single document and the trader is obliged to ensure that the consumer is presented with all the necessary pre-contractual information before the conclusion of the distance contract. (Art. 16a.7).

81. The use of a layering technique is in fact authorized, provided that the key elements are placed on the first layer and the other pre-contractual information is placed in accompanying layers if it does not distract the consumer and obscure key information. Other techniques can also be used, such as 'table of contents', highlights, framing and contextualizing (recitals 32 and 33).

82. The topic of the right of withdrawal will not be discussed here, since it is excluded from the new Article 16b.2.a, in cases of consumer financial services products whose price depends on fluctuations in the financial market outside the trader's control, which might occur during the withdrawal period, such as services related to

foreign exchange, money market instruments, transferable securities, units in collective investment undertakings, financial-futures contracts, including equivalent cash-settled instruments, forward interest-rate agreements (FRAs), interest-rate, currency and equity swaps, and options to acquire or dispose of any instruments referred to in this point, including equivalent cash-settled instruments, in particular options on currency and on interest rates, contracts that are the object of our investigation.

6.3. The Prohibition of the Use of 'Dark Patterns'

83. A novelty of the new Directive, certainly strongly influenced by the research on the behavioural impact of the new technologies on investors' behaviours, is the prohibition of the use of so-called 'dark patterns' on traders' online interfaces.

84. 'Dark patterns' are defined by the European legislator as '*practices that materially distort or impair, either on purpose or in effect, the ability of consumers who are recipients of the financial service to make autonomous and informed choices or decisions*', because of the risks for consumers they may entail. Dark patterns may be especially effective in cases of financial services contracts concluded at a distance, because traders can use them to persuade the consumers who are recipients of their service '*to engage in unwanted behaviours or to take undesired decisions which may have negative consequences for them*'.

85. The European legislator estimates that, to protect consumers, traders should be prohibited from deceiving or 'nudging' consumers who are recipients of their services and from distorting or impairing their autonomy, decision-making, or choice using the design, structure or functionalities of an online interface or one of its parts. For example, by directing the consumer to choices or actions that benefit the trader and are not in the consumer's interest, using exploitative design selections, or by presenting choices in a non-neutral manner, for instance giving more prominence to certain choices through visual, auditory, or other tools, when the consumer must take a decision (recital 41).

86. Therefore, Article 16e.1 of the Directive provides that:

> *Member States shall ensure that traders, when concluding financial services contracts at a distance, do not design, organise or operate their online interfaces, as defined in Article 3(m) of Regulation (EU) 2022/2065 of the European Parliament and of the Council,*[42] *in a way that deceives or manipulates consumers who are recipients of their service or otherwise materially distorts or impairs their ability to make free and informed decisions.*

42 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 Oct. 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

Among the measures that the Member States are asked to adopt, as far as it concerns our topic, we can cite that of addressing the practice by traders of *'giving more prominence to certain choices when asking the consumers who are recipients of their service for a decision'*(§1.a). Even in these cases, Member States are free to adopt or maintain more stringent provisions regarding those requirements for traders, when they are in conformity with Union law (Art. 16e.2).

87. It is worth noting that the prohibition of the use of 'dark patterns' had already been envisaged in Regulation (EU) 2022/2065 of the European Parliament and of the Council (Digital Services Act),[43] which expressly prohibits intermediary service providers operating online platforms from using dark patterns in the design and organization of their online interfaces. Therefore, since in the first case the trader is acting as the operator of the online platform and in the second case as the provider of financial services, the two rules could be treated as complementary.

88. The prohibition of the use of 'dark patterns' was also recently introduced in the provisions of Regulation (EU) 2023/2854 of the European Parliament and of the Council (Data Act), with reference to the protections of the user's data against possible manipulative, coercive or deceiving designs of digital interfaces by data holders or third parties, that may interfere with the free choices of users concerning the access, process and use of their data[44]

89. The purpose of the Directive under scrutiny is clearly to oblige Member States to prevent traders from using dark patterns when concluding contracts of financial services. It should be noted that, because of their complexity and inherent serious risks, the same Member States should be allowed to enforce or maintain more stringent provisions, derogating from the full level of harmonization, if it is required to introduce more detailed requirements concerning dark patterns, provided that those provisions are in line with Union Law. This opportunity is consistent with Article 3(9) of Directive 2005/29/EC of the European Parliament and of the Council, with regard to unfair commercial practices related to financial services, providing that Member States can also impose requirements which are more restrictive or prescriptive in the framework of financial services'.[45] (recital 41)

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43 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 Oct. 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), point 67.

44 Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 Dec. 2023 on Harmonized rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act).

45 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

6.4. The Influence of Social Media on Consumers' Investment Choices

90. Moreover, it is important to underline that the European legislator also takes into consideration the risks that financial decisions can be made under the influence of the unregulated marketing of financial products on social media, for example by so-called influencers. In these cases, there is the risk that consumers are encouraged to make decisions without reflecting on the consequences and risks of their choices, purchasing financial services which do not actually correspond to their needs. Therefore, these marketing practices should be assessed by the Commission, which is also entitled to assess the possible need for action, also based on other relevant Union legislation in the field. Among these cases the European legislator considers those where influencer marketing practices have misled consumers through advertising certain financial services products on social media platforms without informing consumers on the risk of loss for consumers. In such cases it should not be forgotten that Directive 2005/29/EC contains provisions prohibiting misleading practices which deceive or are likely to deceive the average consumer and obliging the trader to provide consumers with all the information needed by the average consumer in order to take an informed transactional decision, that could be deemed to cover influencer marketing practices on social media platforms (recital 42).

91. Finally, as far as the penalties that may be applied to cases of infringements of national provisions adopted pursuant the new rules under examination are concerned, following the insertion of 1b to Article 3 of Directive 2011/83/EU, by Article 1 of Directive 2023/2673/EU, which provides that only §1 and §6 of Article 24,[46] on Sanctions, shall apply, it is provided that Member States have the duty to lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to Directive 2023/2673 and shall take all measures necessary to ensure that they are implemented.

92. Moreover, the new paragraph 6 introduced in Article 24 of Directive 2011/83/EU provides that with regard to infringements of the measures adopted pursuant to the provisions applicable to distance contracts for consumer financial services, Member States shall ensure that, when penalties are to be imposed in force of

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46 Article 24, Directive 2011/83.

1. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive [...].

6. With regard to infringements of the measures adopted pursuant to the provisions referred to in Art. 3(1b) applicable to distance contracts for consumer financial services, Member States shall ensure that, when penalties are to be imposed in accordance with Art. 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both.

Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both.[47]

7. Final Considerations

93. In the last few decades, since the first building of the corpus of European discipline on consumers' protection in distance contracts, researchers and policy-makers have focused their attention on issues of trust, privacy and security.

94. That gave rise to a corpus of legislation that prominently focused on the rights of information of consumers, and the right to withdraw from the distance contract within a certain amount of time. The general attitude was that of considering consumers as rational actors, which needed to have available all the possible information concerning the contracts they were going to conclude.

95. The large diffusion of distance contracts, especially online contracts, and the rising exploitation by professionals of the fallacies in consumers' decision mechanisms, draw attention to the shortcomings of this 'informative' approach, and led scholars and legislators to realize that a shift in the tools used to protect consumers was highly needed. It is in fact clear that providing consumers with all the information on the contract that will be concluded and with a right of withdrawal is often not enough to protect them, simply because consumers do not generally read, understand and take into consideration all the information at their disposal. Moreover, often the same consumers do not always take advantage of their withdrawal rights, because the contract they concluded does not confer that right or

47 O.O. Cherednychenko, 'Public and Private Enforcement of European Private Law in the Financial Services Sector', 24 *ERPL (European Review of Private Law)* 2015(4), pp 621–648, doi: 10.54648/ERPL2015040; O.O. Cherednychenko, 'Public Regulation, Contract Law, and the Protection of the Weaker Party: Some Lessons from the Field of Financial Services', 22. *ERPL* 2014(5), pp 663–684, doi: 10.54648/ERPL2014055; W.H. Van Boom & M. Loos (eds), *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (Groningen: Europa Law Publishing 2007); F. Cafaggi & H.-W. Micklitz (eds), *New Frontiers of Consumer Protection: The Interplay between Private and Public Enforcement* (Antwerpen/Oxford/Portland: Intersentia 2009); H.-W. Micklitz, 'Administrative; Enforcement of European Private Law', in R. Brownsword et al. (eds), *The Foundations of European Private Law* (Oxford: Hart Publishing 2011), p 563; CH. Hodges, *The Reform of Class and Representative Actions in European Legal Systems – A New Framework for Collective Redress in Europe* (Oxford: Hart Publishing 2009); O.O. Cherednychenko, 'Public Supervision over Private Relationships: Towards European Supervision Private Law?', 22. ERPL 2014(1), p 37, doi: 10.54648/ERPL2014003; W.H. Van Boom et al. (eds), *The Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Farnham: Ashgate 2014). H.-W. Micklitz & G. Saumier (eds), *Enforcement and Effectiveness of Consumer Law* (Cham: Springer 2018).

because, when they discover that the contract they concluded does not bring them all the hoped advantages, it is too late to withdraw.[48]

96. The recently enacted Directive 2023/2673/EU takes in account these new problems and tries to broaden the consumers' protection against the manipulation of their behaviours carried out with the use of distance communication tools, especially those used by service providers to conclude online contracts. The new provisions clearly turn from a protection of consumers built on the respect of formal requisites and on abiding to certain requirements, to a protection that is instead based on a more insightful ascertainment on the existence of a free, uninfluenced will of the consumer in the moment in which the contract was concluded and of their awareness on the consequences of the conclusion of the contract.

97. These new rules will certainly entail, in our opinion, difficulties and problems in their implementation. In fact, either the Member States and the European Commission, to whom the implementation of the new rules is entrusted, will be faced with the regulation of attempts to manipulate the consumers' will that, because of the nature of the online tools, of the inventiveness of traders and of their quick evolution will often be difficult to categorize, pre-empt and prohibit.

98. Therefore, it could be easily predicted that national judges and the European Court of Justice will be called to help in the task of protecting consumers from these new predatory attitudes. Their task shall not be easy, because judges will not simply be asked, as before, to ascertain if the formal requirements are met, but will also have the duty to investigate if the will of the consumer was someway manipulated and driven by the way the contract is offered on the online platform and, to a certain extend, if the contract was advantageous for the consumer. Investigation that, moreover, not only must consider the possible negative effects of the online investing tool, but also its possible benefits.

99. In fact, in theory, investment applications can also largely benefit consumers, not only thanks to the notorious speed and convenience of online interaction, but also by directing them toward more profitable investments, with for example the use of 'decision aids', tools designed to improve decision-making. These tools can therefore at the same time help consumers to navigate the complexities and

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48 This formalistic approach and its limits have been criticized by a number of scholars. Among them, and for further references, please read F. Esposito & M. Grochowski, 'The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration', 18. *Eur. Rev. Contract Law (European Review of Contract Law)* 2022(1), pp 1-31, doi: 10.1515/ercl-2022-2035; O. Seizov, A.J. Wulf, J. Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' 42. *J. Cons. Pol. (Journal of Consumer Policy*) 2019(1) pp 149, 152, doi: 10.1007/s10603-018-9393-0; F. Esposito, 'A Dismal Reality: Behavioural Analysis and Consumer Policy', 40. *J. Cons. Pol.* 2017, p 193, doi: 10.1007/s10603-016-9338-4.

support them with better choices, but also nudge them toward potentially risky decisions, more beneficial for the trader than for the consumer.

100. In these cases, where the challenge is to ensure that technology is used for the benefit of the consumer, the distinction between what is favourable for the consumer and what is not requires lines to be drawn frequently, by judges and policymakers. It also requires these subjects to have capacities and knowledge that do not traditionally come with their education and training.

101. Only based on these evaluations, will the European Commission be able to perform the task to which it is called by Directive 2023/2673/EU, the elaboration of standards to be applied to a constantly changing technological panorama.

102. In the meantime, we shall probably witness, at least partially, the disappearance of the old, mostly formalistic tools, which have been traditionally used to protect consumers, built on the presumption that the protection of consumers could be achieved simply by providing them with all the possible information. Tools that, as each of us knows from individual experience, have often proved to not be very efficient, faced with our very human limitations and the inventiveness of services providers.