



# MiFID Conduct of Business rules and private enforcement

# I. MiFID Conduct of Business Rules (art. 24-25)

- Duty of care
- Product Governance (target market)
- Quality of information (fair, clear and not misleading)
- Information requirements (investment firm and services, financial instruments and strategies, execution venues, costs and charges)
- Know-your-customer obligations (suitability and appropriateness)
- Client records
- Reporting requirements
  
- Conflicts of interest
- Best execution
- Order handling rules

# II. Relationship MiFID COB rules – civil law

## 2.1. Different views

- In certain jurisdictions not really an issue: any violation of MiFID conduct of business rules = violation of private law duty of care
  - Damages can be claimed if loss and causation can be proven
  - E.g. Italy, France and Belgium
- Other jurisdictions consider ‘public law’ COB rules and ‘private law’ as two distinct regimes / debate on impact of ‘public law’ on ‘private law’
  - E.g. Netherlands and Germany
    - Netherlands generally accept impact of COB rules on civil law duty of care
    - Germany generally sees COB rules and civil law as two distinct regimes

## II. Relationship MiFID COB rules – civil law

### 2.2. What is the nature of MiFID COB rules?

- EU Legislator does not distinguish between public – private law
- MiFID aims at maximum **harmonisation of behavioural standard** (how an investment firm should behave vis-a-vis investor)
  - ⇒ Same behavioural standard applies to investment firms, whether privately or publicly enforced

## II. Relationship MiFID COB rules – civil law

### 2.2. What is the nature of MiFID COB rules?

- Public enforcement of this standard is harmonised
  - administrative sanctions
- Private enforcement of this standard is not harmonised
  - Genil-case (C-604/11): ‘it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness’
  - Behavioural standard is harmonised, but other elements are not:
    - e.g. when is causation accepted?
    - What sanctions are provided?
      - Damages? How are they calculated?
      - Nullity of the contract?
    - Who bears the burden of proof?
    - Very different outcome possible in different MS

# II. Relationship MiFID COB rules – civil law

## 2.2. The nature of MiFID COB rules

- Because of harmonisation of public enforcement, MS have typically implemented MiFID in ‘public law’ acts
- **BUT MIFID COB rules are intrinsically of a private law nature!**
  - Private law regulates relationship between two private parties
  - COB-rules regulate the relationship between financial institution – investor
- Consequences of maximum harmonisation of behavioural standard in MiFID COB:
  - Any conflicting legislation / jurisprudence – also in civil law should be abolished

## II. Relationship MiFID COB rules – civil law

### 2.2. The nature of MiFID COB rules

- Cf European Parliament justifying amendment 23 to MiFID I proposal (A5-0287/2003, 4 September 2003):
  - ***“This amendment is necessary to make clear that the new EU framework supersedes traditional pre-existing civil liability. Without such clarification, investment firms in countries such as Germany could be subject to a double layer of regulation, with the old case-based rules undermining the distinction drawn in the ISD between professional and retail investors.”***

## II. Relationship MiFID COB rules – civil law

### 2.2. The nature of MiFID COB rules

- Cf. EP justification to amendment 139 to the MiFID Proposal:
  - *“In some Member States, such as Germany, much investor protection is carried out via civil liability in the courts. **With the codification of investor protection in the ISD, it should be made clear that the new EU framework supersedes traditional pre-existing civil liability. Without such clarification, investment firms in Germany could be subject to a double layer of regulation, with the old rules undermining the distinction drawn in the ISD between professional and retail investors.**”*



# II. Relationship MiFID COB rules – civil law

## 2.2. The nature of MiFID COB rules

- Cf European Commission’s justification for MiFID I implementing directive rather than an implementing regulation (Background Note, 6 February 2006):
  - *“in order to enable Member States, when transposing its provisions into national law, to **not only adjust its requirements to the specificities of their particular market but also ensure coherence with other bodies of law.** For example, the provisions dealing with the conduct of business regulate the relationship between investment firms and their clients, an area that is also governed by Member States’ civil law. However, this should not imply that legal provisions in other existing areas of law which are inconsistent with the provisions of the implementing Directive should not be repealed or adjusted to ensure proper implementation.*

# II. Relationship MiFID COB rules – civil law

## 2.2. The nature of MiFID COB rules

- Comparison with Consumer law (UCPD)
- Are UCPD and MiFID COB rules of the same ‘nature’? Yes!

UCPD	MiFID COB
Consumer law regulates the relationship between two private parties (businesses – consumers)	MiFID COB regulate the relationship between two private parties (investment firms – investors)
<i>Member States are free to ‘choose the enforcement mechanisms which best suit their legal tradition, as long as they ensure that adequate and effective means exist to prevent unfair commercial practices.’ ... ‘Most systems ... combine elements of public and private enforcement’</i>	MiFID harmonises public enforcement.  Member State should determine private law consequences of non-compliance, subject to principles of equivalence and effectiveness (Genil case).
Private law with public and / or private enforcement	Private law with public and / or private enforcement

## II. Relationship MiFID COB rules – civil law

### 2.3. Consequences of maximum harmonisation

- Conclusion:
  - Private law enforcement of duty of care of investment firms should be based on the fully harmonised MiFID standard of behaviour
  - Civil law duties of care should not go beyond MiFID II standard of behaviour (maximum harmonisation)
  - Separate ‘civil law’ standard of behaviour deviating from MiFID II COB rules, violates
    - maximum harmonisation character of MiFID II
    - Level playing field between investment firms and credit institutions of different MS

## II. Relationship MiFID COB rules – civil law

### 2.4. Conclusion

- Impact MiFID COB rules on national case law / civil law duty of care?
  - No ‘MiFID straitjacket’!
  - **MiFID duty of care is open standard, very similar to civil law duty of care => case law should make it more concrete**

# II. Relationship MiFID COB rules – civil law

## 2.4. Conclusion

### ○ Restrictions

- Civil law judge can and should submit a question for a preliminary ruling to CJEU in case of interpretation difficulties
- Civil law judge, and CJEU, should take regulatory guidance (guidelines, best practices, supervisory decisions) into account
- Civil law judge should ensure effectiveness of COB-rules

⇒ Should **not apply less strict standards**

But non-compliance will not necessarily lead to civil law sanction (other conditions!)

- Civil law judge **should not go beyond the requirements of specific COB rules** (e.g. information obligations)

↔ In many jurisdictions civil law judge requires ‘specific warnings’ even in non-advised cases, going beyond the MiFID information / KYC-requirements

# II. Relationship MiFID COB rules – civil law

## 2.4. Conclusion

- Added value of MiFID COB rules on top of pre-existing civil law duties (which are “curtailed” by MiFID COB rules)
    - Supervisory tool:
      - Legal basis for preventive supervisory guidance
      - Legal basis for public enforcement
    - Harmonisation of standard of behaviour:
      - Investors can expect same level of protection in all MS
      - Investment firms enjoy a level playing field
- ⇒ Standard of behaviour should be the same whether privately or publicly enforced

# IV. Conclusion

- Interaction between MiFID COB rules and UCPD:
  - UCPD as *lex generalis*
    - Cumulative application of both standards
    - Different scope of protection
  - In case of public enforcement: need to delineate which supervisor enforces on the basis of what legislation
- Standard of behaviour for investment firms in their relation with investors should be the same, whether enforced on the basis of MiFID, UCPD or civil law.