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PROFESSIONAL CIVIL LIABILITY OF THE FINANCIAL INTERMEDIARIES AS AN INSTRUMENT OF INVESTOR PROTECTION

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TABLE OF CONTENTS

INTRODUCTION. The Great Depression, which started in the United States in 1929 and rampaged across whole capitalist world, revealed that in the face of specific investor protection problems, general law is not sufficient. Therefore, to protect investors the US promptly created regulation of the financial markets, which proved to be sufficiently effective not only to withstand time challenges, but also to spread in the other parts of the globe. Reception of the US law also took place in its main trade partner – the European Union and therefore its member state Lithuania. Ambitious Financial services action plan (1999) culminated in 2004 then Markets in Financial Instruments Directive (MiFID), which established qualitatively different regulation of the investment services and consequently – new design for protection of investors in the secondary markets, was adopted.

However, in contrast with the financial regulation of the United States, one fundamental investor protection issue was not directly addressed in MiFID – this directive still does not regulate professional civil liability of the financial intermediaries against investors. European Commission, in its MiFID review consultation, raised questions about possibility to establish rules of civil liability in the MiFID, but in the light of very different positions of the Member States and especially due to very straight objections from several Member States, the new MiFID recast does not include this initiative. Question of civil liability of the financial intermediary, except several minor aspects, also is untouched in the Prospectus directive. Therefore, it is correct to state, that today, with several insignificant exceptions, the European Union law does not directly addresses the issue of civil liability of the financial intermediary neither in the primary, nor in the secondary markets at all and this issue, at least for now, is left to the domain of national law.

Current state when the EU law on financial markets essentially does not regulate questions of civil liability of the financial intermediary is taken as starting point for purposes of this research. Whereas European legislator does not undertook any related actions (although discussed and had chance to do it), for the purposes of this thesis, first of

all, hypothetically will be presumed that in the present circumstances it is best and optimal legislative decision, which is in harmony with purposes of financial regulation, and second, the author will try to assess the correctness of the hypothesis, which means – to convincingly confirm or deny it.

THE OBJECT OF THE RESEARCH is civil liability of the financial intermediary as one of investor protection instruments. The *financial intermediary* in this research refers to the intermediary operating in the financial markets who connects the issuers with the investors and facilitates the investment capital movement in the society. Each jurisdiction has different names for the above-mentioned intermediaries; therefore, to avoid unnecessary confusion, the term "financial intermediary" was chosen as it best describes their economic function; it is informative, neutral in regards to jurisdictions and well known in legal and economic literature.

This research seeks to highlight the activities of the financial intermediaries in providing investment services as independent modern profession with its own common features; therefore, the title of the thesis clearly states that the topic to be discussed is solely the *professional* liability, i.e. the civil professional liability. The research consists of the issues about the substantive law and it leaves out the procedural aspects of civil liability of the financial intermediary, except such issues as the distribution of the burden of proof, defenses against the investors' claims and some other issues that are necessary to discuss in the view of the aims of this thesis and even in the context of the substantive law. This paper will focus on the problems and procedures of compensatory and restitutionary damages; therefore reparation in kind, reparation for non-pecuniary loss, the award of nominal and liquidated damages (penalties), and preventive actions are not analyzed. Only the issue of punitive damages has been briefly addressed.

THE AIM OF THE RESEARCH – to theoretically analyze and scientifically explain civil liability of the financial intermediary as investor protection instrument, to provide reasoned assessment of the regulation of civil liability of the financial intermediary and its application practice in the USA and the EU, to identify relevant

problems and suggest theoretically grounded solutions and recommendations for these problems which would also put an emphasis on practical efficiency of civil liability; thus supplementing the doctrine of the EU and national law in this field.

In order to achieve the aims, **the following objectives** have been raised:

1. Analyze the benefits and position of civil liability of the financial intermediary in the investor protection system.

2. Identify the sources of civil liability of the financial intermediary in the law of analyzed jurisdictions; determine the relation between public law on financial markets and private law applicable in a particular jurisdiction as well as identify its effect for the establishment and application of civil liability.

3. Research the relevant aspects of the establishment and application of civil liability of the financial intermediary and examine the specific character of civil liability of the financial intermediary by comparing it with the general cases of civil liability; and identify the problems of the analyzed issues of the legal regulation and interpretation in case law as well as provide reasoned solutions. To identify the main defects of interaction between the institute of civil liability in private law and the institute of investor protection in public law in the context of thesis research, and suggest general or specific ways to remove it.

4. Examine the validity of **the hypothesis** *that the current passiveness of the EU legislator, when the issues of civil liability of the financial intermediary are left to national law, is compatible with the regulatory purposes of the financial markets and is optimal decision.*

STRUCTURE OF THE THESIS. This thesis consists of two related yet relatively independent parts. The first part of this paper analyses civil liability of the financial intermediary and the conditions of its establishment. It covers the most common issues of civil liability of the financial intermediary against the investor: first of all, the economic function of the financial intermediary is described, together with investment services, the investor protection systems and models. Then, civil liability is compared with other

investor protection instruments, which will help to determine its position in the investor protection system. This part also analyzes MiFID and other sources of civil liability of the financial intermediary; it investigates parties of liability relationships and justifies the professional aspect of the investment services provided by the financial intermediaries. The first part analyzes the conditions of civil liability of the financial intermediary, i.e. fault, damages, causation and unlawfulness, last one being of particular importance because due to the massive regulation of the activities of financial intermediaries it covers the widest range of legal issues.

The second part of the thesis analyzes the relevant questions of the application of civil liability, which is possible only when the required conditions for the rise of civil liability have been established. Therefore, it analyzes the cases under the law or the contract, where the financial intermediary is relieved of liability even if the conditions of civil liability are met. However, the main focus of the second part is placed on the most relevant question of this doctoral thesis – the award of compensatory and restitutionary damages.

RESEARCH METHODS. The methods of legal analysis used in the thesis are widely recognized and applied by legal scholarship. Linguistic, logical and systemic analysis methods are used to doctrinally analyze the sources of law and determine the direct meaning of the information it provides. Doctrinal analysis is the basis of the research but as such in this case it is not sufficient for high–quality research; therefore, additional teleological, historical and comparative analysis methods are used which enable a broader perspective towards the sources of law and thus reach in depth and universal understanding of the rules of law. The topic of the thesis is closely related to economic aspects, so it also uses arguments and insights provided in the legal, economic and finance literature, for example, the effect of the duties to inform on the efficiency of the financial markets.

In order to achieve more universal and versatile understanding that would be geographically independent, the method of comparative analysis is widely used as it

allows analyzing civil liability of the financial intermediary from perspectives of different legal systems. Due to rather complicated and overlapping regulation of the activity of the financial intermediary, the comparative analysis is carried out in two parts: public and private law. In context of public law, jurisdictions with the largest financial markets – the EU and the USA – are being analyzed. The EU public law is analyzed because the Republic of Lithuania is its member state and all legal acts of the EU are binding on Lithuania. The analysis of the regulatory regime of the USA is useful here as it is well developed regulatory system, having a solid practice in the interpretation and application of financial markets law; and historically it has developed first. It played a significant role in developing the EU financial markets regulation, so it is useful to compare different investor protection systems and use the experience of the legislature and case law of the USA in the regulation and application of civil liability of the financial intermediary[1]. In context of private law, the legal system of Lithuania is compared with the legal systems of doctrinally most influential jurisdictions – France, Germany, United Kingdom and the USA. Also, the law of the Netherlands is investigated because it was partially used to design the conditions of civil liability in Lithuanian law. The Netherlands is open to a modern doctrine of the private law: not only its legal framework combines the Germanic and Romanic profiles of civil law systems, but also some important legal doctrines of common law. Finally, the Netherlands has one of the most advanced financial markets in Europe. The thesis also partially mentions the legal systems of other countries, i.e. Italy, Russia and Canada; however, their legal systems will not be analyzed separately. Private law is analyzed using the comparative method in order to determine the main existing models of civil liability of the financial intermediary in the USA and the EU; to assess their options in dealing with the specific problems in defending the rights of investors and

[1] It should be noted that the rules of public law of both the EU and the USA (which are analyzed in the context of this thesis) are established at the federal (union) level, while the rules of private law are lied down in state (member states) law.

third parties and thus take into account valuable practices of the foreign jurisdictions when formulating recommendations to the lawmaking and case law of Lithuania and the EU.

THE STATE OF EXPLORATION, THE ORIGINALITY AND NOVELTY OF THE WORK. In the legal doctrine of Lithuania, except for the author of the thesis, civil liability of the financial intermediary as investor protection instrument is hardly analyzed. The exception to some extent can be some works of legal literature but they barely discuss civil liability of the financial intermediary used against investors. A great number of legal literature in Europe generally discusses and analyses the financial regulation designed to enhance investor protection while the issues of civil liability are usually partially mentioned. A lot of scholars in Europe have analyzed civil liability of the financial intermediary in various aspects; however, there is only a small number of works in legal literature, which systematically analyze professional liability of the financial intermediary as investor protection instrument. The US legal literature in the field of civil liability of the financial intermediary is definitely larger. This may lead to the conclusion that in Europe civil liability of the financial intermediary as one of investor protection instruments has only started to be investigated; and in Lithuanian legal literature, despite the increasing MiFID related case law, this field remains *terra incognita*. Thus, this thesis, where the analysis of civil liability of the financial intermediary as investor protection instrument is systematic (the aspects of public and private law; including the analysis of liability for all the main investment services and not just particularly for one of them) and integrated (it relies extensively on the economic literature and experience of other countries), can be viewed as a unique and fresh contribution to this field.

MAIN CONCLUSIONS AND RESULTS

1. Risks in the financial markets necessitate a more effective investor protection system. In order to be effective, investor protection system needs to involve the integrated system of different legislative and non–legislative instruments. Legislative instruments should consist of the instruments of public and private law and should not rely solely on

legal responsibility. The most optimal private instrument for investor protection, which enables an effective and non–destructive protection of rights of investors, is civil liability.

2. The efficiency of civil liability in the financial markets *ex ante* is limited by factual aspects related to the market dynamics and trade risk: the financial markets are vulnerable to fluctuations; there is an uncertainty, and investments as well as the behavior of investors are influenced by many factors; therefore, it may be difficult to prove the negligence of the financial intermediary and causation; it might be difficult to quantify the damage suffered in the financial markets and as it can obtain various forms so it would be complicated to prove it; modern financial institutions are multifunctional and have diversified sources of profit so the threat of compensatory damages might not be sufficient in discouraging from breach of fiduciary obligations; majority of the obligations of the financial intermediary are related to provision of information and the application of civil liability here is problematic as it is difficult to prove how the investor would have acted if he had enough information. Such occasions in case law form a certain paradox – a major part of rules for investor protection are most difficult to enforce. Therefore, in order to maintain the efficiency of civil liability in big, dynamic and risky financial markets it is necessary to ensure the adaptability of this legal institution towards technical progress, economic rationality as well as flexibility to protect investors.

3. In order to maintain the efficiency of civil liability it is crucial to move away from narrow and outdated approach about civil liability as solely compensatory instrument and start to interpret its functions more broadly. In the opinion of doctoral student, the civil liability is related to two legally significant aims: the *implementation (restoration) of justice* by awarding damages (thereby realizing the individual function of civil liability) and the *enforcement of lawful conduct* by coordinating behavior of general public (realizing the social function of civil liability). The individual function of civil liability is carried out between the financial intermediary and the investor by restoring or implementing justice. In the context of civil liability the justice is primarily implemented by compensating the investor. The significance of the compensatory function of civil

liability is that civil liability restores the investor's pecuniary position, which in turn allows him to safely withdraw from the financial market or continue to invest. Furthermore, the individual function of civil liability can be realized by restoring to previous position also the financial intermediary, if he benefits from the wrongs. It is important to demotivate the financial intermediary so that he would not be willing to breach the fiduciary obligations against the client. The social function of civil liability seeks to ensure the desired public behavior and avoid the undesired one, which is legally considered to be unlawful. The preventive effect of civil liability is especially relevant in the context of civil liability of the financial intermediary because the financial practitioners tend to be more emotionally attached to wealth than others; therefore, monetary sanctions have a serious impact on them. The efficiency of civil liability prevents the occurrence of damage and helps to reach specific aims of the financial regulation. Moreover, the concept of civil liability decreases both individual and social costs of behavior by limiting economically inefficient (harmful) conduct.

4. As civil liability is a part of investor protection system and the axis of private investor protection, it cannot be considered as just simple measure for individual dispute resolutions. The financial regulation can be intentionally construed to provide attractive conditions for a certain group of persons in claiming damages in order to promote private monitoring of breaches of financial laws and subsequent litigation. In this context civil liability becomes the important instrument for coordinating social behavior, which can be applied to reach economic purposes: civil liability helps to form the infrastructure of the financial markets by enforcing compliance with best execution requirements; it increases the efficiency of the financial markets by ensuring compliance with obligations to inform; facilitates an effective allocation of capital in the society by enforcing suitability duty; strengthens general protection of investors by limiting unlawful and disloyal conduct; limits social costs of investment services, firstly by ensuring that the financial intermediary acts with care towards third parties and secondly by obligating investors to mitigate losses. As has been seen, the financial regulation interacts with the institution of

civil liability by legally programming the content of unlawfulness as a necessary condition for the establishment of civil liability obligation. The social function of civil liability acts as legal link between relevant institutions of public and private law.

5. The social function of civil liability of the financial intermediary is determined at the legislative level but it is mainly realized by the investors who seek restoration of justice, i.e. the individual function of civil liability. Therefore, fulfilment of the aims of investor protection and regulation of the financial markets by using the remedies of private law greatly depends on the efficiency of the individual function. Procedurally, the individual function is closely related to the proof of conditions of civil liability and the application or exemption from liability, i.e. the application of law carried out in the courts. Furthermore, it is also related to the development of the private law rules that programs general conditions of civil liability, so if the concept of civil liability is being outdated, inflexible and unbalanced it makes it difficult to a court to ensure in practice the efficiency and implementation of the social function of civil liability. This means that lawmaker influences the efficiency of the individual function of civil liability and investor protection; however, its compatibility with the social function and efficiency depends largely on courts. The relation between the social and individual functions in this context requires the courts to take into account *inter alia* the aims of the financial regulation when dealing with cases of civil liability of the financial intermediary. This can be carried out by interpreting the content of the conditions of civil liability, unlawfulness in particular, and by shifting the burden of proof as well as deciding upon the application or discharge from liability.

6. The problems of the efficiency of the individual function of civil liability of the financial intermediary in some EU member states usually arise from not awarding pure economic loss, the lack of the effective remedies to ensure fiduciary obligations, failure to prove lost profits of the investor and future damage, the breach of the financial intermediary duties to inform and other negative facts. The effective system of civil liability has to solve these problems; therefore, pure economic loss needs to be

compensated, fiduciary duties must be acknowledged and restitutionary damages for the breach of these duties have to be awarded; the standard of proof needs to be reduced in regards to damages that are objectively difficult to prove – lost profits and future damage, the burden of proof of negative facts must be shifted to the financial intermediary; all-or-nothing principle must be avoided in dealing with problem of uncertain factual causation, damages must be awarded for the breach of professional obligations *erga omnes* of the financial intermediary, etc.

7. Civil liability of the financial intermediary must serve for the restoration of justice; therefore, it has to be flexible, effective and balanced. As a general rule, civil liability of the financial intermediary can arise only from the lack of best efforts to perform obligations, i.e. fault. The exception to the rule can be justified only to such mainly technically (physically) performable obligations with concrete content regulated by MiFID, as the duty to provide the information, the duty to account, the duty to safeguard the assets and the duty to comply with client order handling rules, which can be referred to the obligation to reach specific results and liability for it can arise despite the best efforts of the financial intermediary to fulfill these obligations. The financial intermediary should be obliged to be loyal to his client only in fiduciary relations. The defenses from liability claims have to be available, which would prevent from legal extremities and promote rational conduct of the investor. Civil liability of the financial intermediary should not arise when damage was not objectively foreseeable or in other cases of the absence of legal causation. The financial intermediary should be completely or partially exempt from civil liability if he proves the facts of *inter alia* contributory fault, the assumption of the risk, the ratification, the intervening cause and the extinction of limitation period. The contractual limitation of the civil liability must be restricted, because it may cause a threat to social function of civil liability and as a result to the efficiency of economic aims. In order to avoid legal uncertainty, relatively short limitation period has to be set up. The application of civil liability also has to be rational and balanced; therefore, the remedies must be adapted to the defended interests: compensational damages calculated by positive

interest, when liability is contractual, by negative interest, when liability is tortious and restitutionary damages calculated according to the restitutionary interest. The estimation of at least trading losses of the investor must be connected with the doctrine of mitigation of damage and as a result should be limited in time. Restitutionary damages in the context of investment services could be awarded only for the breach of fiduciary duties.

8. Currently, the EU investor protection system is being developed intensively in the framework of public enforcement; however, it fails to cover the measures of private enforcement. The EU financial legislation and the rules of MiFID in particular, designs modern, systematic and detailed regulation of investor protection but it does not address the civil law effects of this regime and does not specify civil remedies for the protection of the investors. Thus, the competence of lawmaking in the field of civil liability of the financial intermediary is left to 28 national private law systems of the EU, including jurisdictions based on Anglo-Saxon, Romanian and Germanic traditions. This results in gross differences among jurisdictions and accordingly differences in investor protection in the EU, which hinders the development of the internal market. For instance, group of EU Member States apply relativity doctrine, which blocks the direct impact of MiFID rules on the content of unlawfulness as the condition for civil liability; other striking example – the limitation period in France is 10 times longer than in its neighbor state Germany. Also, Member States holds different approaches towards the possible awards of pure economic loss and the possibility to restrict civil liability by contractual clauses; the significance of fault and the problem of uncertain factual causation is interpreted and solved differently; Member States apply different standards of proof and different rules for the distribution of burden of proof; they calculate compensatory damages and account of profits derived from the wrongs (if account at all) differently, etc. However, even the EU financial regulation as such, which is especially significant to the countries like Lithuania, where the relativity doctrine is not recognized, has its defects. For example, the EU financial markets legislation *expressis verbis* does not establish the duty of confidence and the duty to warn about material facts, which result in additional differences, apart from the aforementioned,

among the jurisdictions. Therefore, we can draw the conclusion that private investor protection system in the EU which consists of supranational financial regulation and 28 legal systems embodying different private law traditions is one-sided, non–integral and less effective. These arguments, especially considering the fact that civil liability of the financial intermediary is *conditio sine qua non* in investor protection, allow to **deny the hypothesis of the thesis**, that "*the current passiveness of the EU legislator, when the issues of civil liability of the financial intermediary are left to national law, is compatible with the regulatory purposes of the financial markets and is optimal decision.*

9. The differences in civil liability among 50 states of the US are not as big as those of 28 Member States of the EU because private law of the American states follows the same common law model; therefore, it is suggested that the need for the federal rules of civil liability in the US law is even lower compared to the need of respective EU supranational rules in the field of financial markets. Nevertheless, besides existing state law, US created and developed federal financial regulation, which proved to be effective and time–resistant. Federal regulation *inter alia* provides the most popular remedy of investor protection in legal practice – federal action against tort of fraud, expressed under Article 10(b) of the Securities Exchange Act. Therefore, investor protection system in the US, besides public enforcement system, establishes an effective, universal and modern private enforcement system[2]. On the other hand, the US securities law is tailored to the American legal and economic environment which, even though is similar to the European one, is not identical. The culture and the extent of litigation in the USA are much larger than in the EU, so, particularly with regard to pragmatic reasons, the federal legislator should avoid to establish federal negligence claim. This factor prevents from establishing the complete regulation of civil liability in the US federal law, which currently focuses on particular problems and is less systematic than in theory it could be. There are other

[2] The shown differences in the effectiveness of private enforcement systems between the USA and the EU would be even greater if, for the purpose of comparative analysis, such criteria as punitive damages or group action would be included, which are not extensively analyzed in this thesis.

arguments questioning the completeness of the US financial regulation, for example the classification of investors in the US law is insufficiently developed in contrast to the EU; brokers–dealers and investment advisors in the US law are regulated separately; there is no simplified regime of appropriateness; the regulation of conflicts of interests in the US law is rather selective, in comparison with more general and systemic regulation of MiFID; etc. This is why the EU law should not automatically follow US law but find its own way for the development that would suit best the European society and its legal traditions. Heading towards this direction, it is rational to use the American legal experience; for example in regulating civil liability of the financial intermediary and its limitation period in supranational law, in regulating the duty of professional confidence, etc. At the same time, it would be rational not to follow some defects of the USA law; for example refrain from establishing the superfluous differences by providing different regulation for particular types of financial intermediaries, etc.

10. The efficiency of Lithuanian private law in regards to investor protection can be assessed in two qualitative aspects: normative and practical. According to the normative aspect, it is noticeable that system of civil liability in Lithuania is flexible and effective enough to support the application of the ambitious EU financial regulation instruments in the cases where the investors claim damage compensation from the financial intermediary. The system of civil liability in Lithuania, which at most follows Romanic tradition, but in particular had adopted some modern liability rules of other legal systems, entrenches broad conditions for civil liability which are flexible for practical needs and which allow to award pure economic loss, loss of chance, to account profits from the wrongs without associating them with the damage made; also, it does not hold courts from lowering the standard of proof to show the future damage or lost profits and from shifting the burden of proof of negative facts to the defendant; it enables to protect third parties who suffered harm; it allows to reasonably balance the obligations of the financial intermediary and the investor so that the former would not become a "guarantee fund" for the latter; it leaves discretion to the courts in dealing with issues of legal causation; provides a rational

limitation period of civil liability claim; it allows to assess different interests by calculating damages, etc.; Lithuanian civil law as well as other Romanic jurisdictions have no requirement for the relativity of civil liability; therefore, Lithuanian private law does not establish alternative private law based regulation of investment services which would compete with the institutions existing in public law, or, in other words, do not duplicate the requirements for conduct of business rules lied down in public law. Nevertheless there are questionable rules; for example under the contractual liability the financial intermediary can provide a contributory fault defense based on a simple negligence, in case of tortious liability such reply would not be sufficient.

11. From the practical point of view, the evaluation of the efficiency of Lithuanian civil liability system is not such positive anymore. It can be stated that case law in Lithuania does not use all available possibilities offered by flexible and balanced regulation of civil liability in the positive law because the interpretation of the professional, fiduciary and confidentiality duties is not being developed; there is a lack of clarity and coherence in the allocation of the burden of proof for the conditions of civil liability, such as fault; the standard of proof is not differentiated for different types of damage; the problem of uncertain factual causation is not being addressed and if it is, usually it follows all-or-nothing approach; the peculiarities of different estimations of main pecuniary interests play a minor role. The huge shortcoming in Lithuanian case law is that the duty of the financial intermediary to warn the investor is not recognized, even though it is crucial element in investor protection. It could be noticed that the case law of Lithuanian general competence courts at least in the first years of MiFID application delivered weaker interpretation of MiFID rules compared to case law of the administrative courts. Partially, it happened because the Supreme Court of Lithuania almost did not expressed any interpretations of MiFID rules. However, the practice of the administrative courts, as noted *expressis verbis* by Senior Administrative Court of Lithuania, is not coherent when applying MiFID. Of course, apart from these practical issues in Lithuania there is an additional factors related to legal doctrine on civil liability, which is still not

such rich as in other jurisdictions, and also a legal doctrine on the financial markets, which is almost non-existent in Lithuania. The practical possibilities for the enforcement of investor protection in Lithuanian case law by remedies of civil liability, are objectively restricted by underdeveloped infrastructure of professional ethics in the financial sector, especially when taking into account the fact that particular professional standards created by self–regulatory organizations contradicts with the EU law. On the other hand, there are still some aspects in Lithuanian case law, which strengthens investor protection, e.g. in case of the restitution for wrongs, case law relies on civil liability: first of all, the case law of Constitutional Court legitimized possibility to step back from the exclusively compensatory model of civil liability; secondly, the Supreme Court approved that the award of the defendant profits gained from the wrong can be unrelated with the extent of damage. The additional advantage of Lithuanian legal system regarding investor protection is that case law and legal doctrine recognizes the fiduciary duties, so it provides suitable conditions to create functional links between the breach of fiduciary duties and restitutionary damages in order to enforce MiFID and protect investors. Furthermore, in Lithuanian case law we can find some positive examples of successful application of ratification defense or the interpretation of civil liability of the financial intermediary against third parties.

12. Practical problems for the establishment of the effective investor protection system in Lithuania are related not only to underdeveloped case law, but also to the legislation, which is not always satisfactory. This thesis has identified several debatable cases of the implementation of the EU financial regulation in Lithuanian legal system. For example, Lithuanian Law on Markets in Financial Instruments allows to expand the application of regime of eligible counterparty on the protection of professional clients, while it is not permissible under MiFID. Such regulation clearly contradicts with the guarantees for professional investors provided by MiFID. Another example – the Organizational rules of the activities of financial broker firms in Lithuania seek to change the normative hypothesis lied down in Article 18(2) of MiFID by connecting the duty to

disclose conflicts of interests not with the lack of organizational arrangements to ensure, with reasonable confidence, that risks of damage to client interests will be prevented, but with the simple fact of rise of these conflicts. This means, that in all cases the disclosure becomes the main measure to resolve conflicts of interests rather than the management of conflicts of interests. This statutory regulation, which in fact proclaims *caveat emptor* principle, is doubtful and illegitimate. In addition, MiFID regime of "*execution-only*" services is not properly implemented in Lithuania because under MiFID, both requirements of suitability and appropriateness are not applied to "execution-only" services, while under Lithuanian Law on Markets in Financial Instruments only the requirement of suitability is not applied. This means that under Lithuanian law even in case of "execution-only" services the financial intermediary must fulfil duty to ensure appropriateness of investment. Lithuanian case law revealed that Investor compensation system is not functioning properly, first of all, because the protective scope of the directive on Investment compensation schemes was impermissibly narrowed in national law. The problem of professional confidence of the financial intermediary should be mentioned separately: protection of investor information in financial brokerage firms in Lithuania is based only on general principles: professional secrecy principles, which still are undisclosed in case law; professional ethics which prohibit the disclosure of confidential information about the client; general constitutional and civil law rules which protect privacy. Special rules on confidentiality of the financial intermediary in Lithuania are currently applied only in relation to commercial banks (special institution of bank secrecy), while they are not applied to other financial intermediaries, i.e. financial brokerage firms. Both banking secrecy and professional secrecy regimes in Lithuania are evaluated negatively as their regulation is too vague and liberal.

13. It is recomended for the EU legislator to directly and fully regulate in the EU financial law the conditions for rise of civil liability of the financial intermediary, the grounds for exemption from civil liability (affirmative defences) and features of the application of civil liability. In case of delay of the regulation of this issue in the EU

statutory law, it is suggested that the ECJ in its MiFID case law would at least on very limited basis should try to harmonize and develop the institute of civil liability of the financial intermediary. However, it is recommended to assess problems already identified and take into consideration the effective guidelines of the system of civil liability of the financial intermediary. For this purpose, it is recommended to seek to establish the system of civil liability of the financial intermediary in the supranational level, which would be integrated (combining the aspects of public and private law), autonomous (which would not rely on national law) and effective (operative, flexible and balanced). Rational normative response to the dynamics and uncertainty in the financial markets should be the multifunctional civil liability regime; therefore, in order to reach the efficiency of investor protection it is suggested to interpret the aims and functions of civil liability more broadly so that it could be applied for the financial intermediary to effectively enforce all his main duties, to cover not only the cases on intentional wrongs and to make possible to award different types of damages. It is suggested *inter alia* to harmonize the limitation period for the damages claim of the investor and third parties, and relate its commencement not only with sole manifestation of wrong but with the establishment of all the necessary conditions for rise of civil liability. The harmonized regulation of the EU financial markets should help to mitigate negative externalities of investment services for third parties; therefore, it is recommended to regulate civil liability of the financial intermediary against third parties as well. It is recommended to close loopholes of the EU financial regulation by establishing the duty of professional confidence for the financial intermediary in the provisions of MiFID, where the content and duration period of duty as well as features of the disclosure of information should be defined. In order to increase the efficiency of the EU financial markets and bring more legal certainty about the rights of investors, it is suggested that the EU law on financial markets, apart from the duty not to misrepresent and the duty to provide primary information, should *expressis verbis* introduce the contractual duty to warn about material facts known (or should have been known) to the financial intermediary, applied universally for all types of investment services.

14. While civil liability of the financial intermediary is not regulated in the EU law, the efficiency of investor protection system in Lithuanian law could be developed in two ways: first, the features of civil liability of the financial intermediary could be specified in the statutory law, or, second, it could be done by the creative case law. The first way would mean that a legislator does not wait until case law exploits *per se* flexible and balanced legislation on civil liability in the Civil Code and develops progressive case law, but starts himself to regulate *in concreto* the actual and problematic issues of civil liability; e.g. in Article 92 of Lithuanian Law on Markets in Financial Instruments. The second method suggests leaving the development of civil liability of the financial intermediary for the creative case law. That would be more gradual decision (giving time for market participants to adjust to legal innovations), adapted to realities of the practice of investment services in Lithuania, meaning it would be relatively safer option. However, the doctoral student would recommend considering the first method, which would be more direct, clearer, systematic and faster way to strengthen and balance investor protection system, under the condition that the previously identified problems of investor protection are being taken in to account, as well as the effective guidelines of the system of civil liability of the financial intermediary. In any case, it is recommended for courts to take into consideration these problems and guidelines. It is suggested *inter alia* to resolve the problem of uncertain factual causation under the doctrine of loss of chance, which, according to the doctoral student, facilitates best the adaptation of the application of civil liability to the dynamics and uncertainty of the financial markets, as well as allows avoid the negative consequences of all-or-nothing principle. In the application of the loss of chance it is necessary to assess the reality of a chance, the actual loss of this chance and factual causation between unlawfulness and the loss of chance.

It is recommended to national legislator to improve the financial and private law of Lithuania by considering these aspects. First of all, the aforementioned contradictions of the national law with the EU law have to be removed. Secondly, the validity and

constitutionality of the rules regulating the disclosure of banking secrecy in Lithuania have to be reviewed and the professional confidence regime targeted to all financial intermediaries have to be established. Thirdly, contributory fault defense in contractual and tortious liability should be harmonized. In addition, the issue of the separate legislation on quasi-contractual civil liability for awarding restitutionary damages in Lithuanian law of obligations should be considered.

It is recommended to the professional organizations and associations unifying the financial intermediaries and financial specialists to qualitatively update their ethical codes for financial intermediaries and to remove its inconsistencies with the positive law.

THESIS RELATED PUBLICATIONS

1. DIDŽIULIS, Laurynas. *Markets in Financial Instruments Directive (MiFID) as a legal source of civil liability*. Teise. 2012, No. 83.
2. DIDŽIULIS, Laurynas. *Legal nature and significance of financial assets and financial instruments.* Teise. 2012, No. 84.

PERSONAL DETAILS

Laurynas Didžiulis started taking interest in the commercial disputes during his law studies at Faculty of Law of Vilnius University. In 2007 he published an article about anticipatory breach of contract in the scientific journal *Teisės problemos*. In 2008 L. Didžiulis graduated from the Faculty of Law of Vilnius University (commercial law specialization) and obtained his Master of Law degree. The master thesis analyzed legal problems of the protection of corporate creditors. During the rise of the financial crisis in 2008 m. L. Didžiulis took an extract from the master thesis titled "Civil liability of directors against creditors" and published it in the legal journal *Justitia*. In 2008, after nearly one year of work experience at the attorney's office, L. Didžiulis started legal practice at the Supreme Court of Lithuania as an internal counsel of private law and later on as a justice assistant.

Next year, L. Didžiulis was admitted to the doctoral studies at the Faculty of Law of Vilnius University, the Department of Private Law. During the study year of 2009–2010 L. Didžiulis has been a lecturer at the Faculty of Law of Vilnius University, delivering seminars on Property law and Law of Obligations. In the year of 2011 he was a visiting scholar at the Gent University Law Faculty in Belgium, where he found a rich library, helpful academic personnel and insightful works of the Financial Law Institute of Gent University. Also, during his study period L. Didžiulis delivered several lectures and seminars to judges, attorneys and government lawyers on the protection of property rights, corporate disputes, tortious liability and subrogation. Later on, due to the doctoral studies L. Didžiulis focused his academic and practical attention almost solely on financial law and practice; therefore, he published several academic articles on financial law as well as served for several years as the legal expert in the main national financial disputes at the Supreme Court of Lithuania.

DISERTACIJOS REZIUMĖ

Disertacijos problematika siejama su civilinės atsakomybės nereglamentavimu ES finansų rinkų teisėje ir su sisteminiais (ne) suderinamumais tarp viešosios teisės ir privatinės teisės normų. JAV patirtis parodė, kad egzistuojant specifinėms investuotojų apsaugos problemoms, įprastinio teisinio reglamentavimo nepakanka. Todėl netrukus JAV buvo sukurtas investuotojų apsaugą įtvirtinantis specialusis finansų rinkų teisinis reguliavimas. Tačiau problema ta, kad skirtingai nei JAV finansų rinkų teisėje, vienos fundamentalios investuotojų apsaugos priemonės klausimas ES Finansinių priemonių rinkų direktyvoje (MiFID) nebuvo tiesiogiai paliestas – joje nereglamentuojama finansų tarpininkų profesinė civilinė atsakomybė prieš investuotojus. Pažymėtina, kad Europos Komisija 2010 m. konsultacijoje dėl MiFID reformos kėlė civilinės atsakomybės reglamentavimo MiFID normomis klausimą, tačiau dėl labai skirtingų valstybių pozicijų ir kai kurių valstybių kategoriškų prieštaravimų naujosios MiFID redakcijos tekste ši iniciatyva nebuvo įtvirtinta. Šiuo metu Europoje esanti situacija, kai ES finansų rinkų teisėje iš esmės nereglamentuojami finansų tarpininko civilinės atsakomybės klausimai, disertacijoje panaudota kaip pradinis atskaitos taškas atliekant tyrimą. ES teisėkūros subjektas iki šiol nesiėmė, nors svarstė ir turėjo tam progą, spręsti finansų tarpininko civilinės atsakomybės klausimo, todėl tyrimo tikslais, visų pirma, hipotetiškai buvo preziumuota, kad esamomis aplinkybėmis tai yra pats geriausias ir su finansų rinkų teisinio reguliavimo tikslais suderinamas teisėkūros sprendimas. Disertacijoje, be kita ko, buvo siekiama įvertinti šios hipotezės teisingumą, t. y. ją argumentuotai patvirtinti arba paneigti.

Disertacijoje siekiama išanalizuoti finansų tarpininko civilinės atsakomybės reikšmę ir vietą investuotojų apsaugos sistemoje. Joje stengiamasi akcentuoti finansų tarpininkų veiklą teikiant investicines paslaugas kaip savarankišką šiuolaikinę profesiją, su visais jai būdingais bruožais, todėl disertacijos pavadinime specialiai pažymima, kad nagrinėjama būtent profesinė atsakomybė, tačiau ne visa, bet tik profesinė civilinė atsakomybė. Taip

pat identifikuoti finansų tarpininko civilinės atsakomybės šaltinius nagrinėtų jurisdikcijų teisėje, nustatyti finansų rinkas reglamentuojančių viešosios teisės aktų santykį su konkrečioje jurisdikcijoje galiojančia privatine teise ir jų reikšmę civilinės atsakomybės atsiradimui bei taikymui. Disertacijoje siekiama išnagrinėti aktualius finansų tarpininko civilinės atsakomybės atsiradimo ir taikymo finansų tarpininkui aspektus. Nagrinėjant šiuos aspektus, tiriama finansų tarpininko civilinės atsakomybės specifika lyginant su bendraisiais civilinės atsakomybės atvejais ir identifikuojamos nagrinėtų klausimų teisinio reglamentavimo bei aiškinimo teismų praktikoje problemos, taip pat siekiama pateikti argumentuotus jų sprendimo būdus ir pasiūlymus teisėkūrai bei teismų praktikai.

Disertacijos struktūrą sudaro dvi susijusios, tačiau kartu ir santykinai savarankiškos dalys. Pirmoji darbo dalis skirta finansų tarpininko civilinės atsakomybės ir jos atsiradimo sąlygų analizei. Joje analizuojami patys bendriausi su finansų tarpininko civiline atsakomybe prieš investuotoją susiję klausimai: pirmiausiai apibūdinama finansų tarpininkų atliekama ekonominė funkcija, investicinės paslaugos, investuotojų apsaugos sistemos ir pagrindiniai jų modeliai, tuomet civilinė atsakomybė lyginama su kitomis investuotojų apsaugos priemonėmis ir taip nustatoma civilinės atsakomybės vieta investuotojų apsaugos sistemoje. Šioje dalyje taip pat analizuojama MiFID ir kiti finansų tarpininkų civilinės atsakomybės šaltiniai, nagrinėjamos civilinės atsakomybės prievolės šalys, pagrindžiamas profesinis finansų tarpininkų veiklos teikiant investicines paslaugas pobūdis. Didžiausias dėmesys pirmojoje darbo dalyje skiriamas finansų tarpininko civilinės atsakomybės sąlygoms – kaltei, žalai, priežastiniam ryšiui ir ypač neteisėtumui – atsakomybės sąlygai, kuri dėl masyvaus finansų tarpininkų veiklos teisinio reguliavimo, apima plačiausią klausimų spektrą. Antroji disertacijos dalis skiriama aktualiems civilinės atsakomybės taikymo klausimams analizuoti. Todėl joje nagrinėjami įstatymo ar sutarties nustatyti atvejai, kai net ir egzistuojant visoms civilinės atsakomybės sąlygoms, finansų tarpininkas nuo atsakomybės gali būti atleidžiamas, todėl atsakomybė jam netaikoma. Tačiau

didžiausias dėmesys antrojoje darbo dalyje skirtas praktiniu požiūriu bene aktualiausiam šios disertacijos klausimui – nuostolių priteisimui.

Disertacijoje naudojami teisės mokslo pripažįstami ir plačiai paplitę teisinės analizės metodai, o ypač lyginamosios analizės metodas, kuris naudojamas siekiant kuo universalesnio, įvairiapusiškesnio ir geografiškai neangažuoto supratimo, nes lyginamoji analizė į finansų tarpininkų civilinę atsakomybę leidžia pažvelgti iš skirtingų teisės sistemų pozicijų. Dėl gana sudėtingo ir persipynusio finansų tarpininkų veiklos teisinio reguliavimo, lyginamoji analizė atliekama dviem pjūviais: viešosios ir privatinės teisės. Viešosios teisės aspektu analizuojamos didžiausias pasaulyje finansų rinkas turinčios ES ir JAV. ES viešoji teisė analizuojama todėl, kad Lietuvos Respublika yra šios tarptautinės organizacijos nare ir jos leidžiami teisės aktai Lietuvai yra privalomi. JAV teisinio reguliavimo analizė vertinga tuo, kad tai puikiai išplėtotas, solidžią teisės aiškinimo ir taikymo praktiką turintis bei istoriškai pirmesnis teisinis reguliavimas, kuriuo nemaža dalimi sekta kuriant finansų rinkų teisinį reguliavimą ES, todėl naudinga palyginti JAV ir ES investuotojų apsaugos sistemas ir pasinaudoti JAV teisėkūros bei teismų praktikos patirtimi reglamentuojant ir taikant finansų tarpininko civilinę atsakomybę. Privatinės teisės aspektu analizuojama Lietuvos teisė, taip pat doktriniškai įtakingiausių pasaulio jurisdikcijų – Prancūzijos, Vokietijos, Anglijos ir JAV teisė. Analizuojama ir Olandijos teisė, kuria iš dalies remtasi reglamentuojant civilinės atsakomybės sąlygas Lietuvos teisėje. Privatinė teisė lyginamuoju metodu analizuojama siekiant nustatyti pagrindinius JAV ir ES egzistuojančius finansų tarpininko civilinės atsakomybės modelius, įvertinti jų potencialą spręsti konkrečias investuotojų ir trečiųjų asmenų teisių gynimo problemas ir taip pasinaudoti vertinga užsienio jurisdikcijų patirtimi formuluojant rekomendacijas ES ir Lietuvos teisėkūrai bei teismų praktikai.

Disertacijoje daroma išvada, kad optimaliausia privatine investuotojų apsaugos priemone, leidžiančia efektyviai ir nedestruktyviai ginti investuotojo teises, laikytina civilinė atsakomybė. Tačiau civilinės atsakomybės veiksmingumą finansų rinkose riboja faktiniai

aspektai susiję su šių rinkų dinamika ir prekybos jose rizikingumu. Atskirose jurisdikcijose finansų tarpininkų civilinės atsakomybės individualiosios funkcijos efektyvumo problemos paprastai kyla dėl grynosios turtinės žalos nepriteisimo, fiduciarinių pareigų ar joms užtikrinti skirtų efektyvių teisių gynimo būdų nebuvimo, nesugebėjimo įrodyti investuotojo negautų pajamų, būsimos žalos, finansų tarpininko informacinių pareigų pažeidimų ir kitų negatyviųjų faktų. Didžioji dalis finansų tarpininko pareigų – informacinės, tačiau civilinės atsakomybės už jas taikymas yra problematiškas dėl to, kad sudėtinga įrodyti kaip investuotojas būtų elgęsis, jei būtų tinkamai informuotas. Disertacijoje argumentuojama, kad siekiant spręsti šias problemas, būtina atsiriboti nuo siauro, nelankstaus ir laikmečio dvasios neatitinkančio išimtinai kompensacinio civilinės atsakomybės supratimo ir civilinės atsakomybės funkcijas aiškinti plačiau. Efektyvi civilinės atsakomybės sistema šias problemas turi spręsti, todėl turi būti atlyginama grynoji turtinė žala, pripažįstamos fiduciarinės pareigos ir už jų pažeidimą priteisiami restituciniai nuostoliai, nustatomas žemesnis įrodinėjimo standartas objektyviai sunkiai įrodomoms žalos rūšims – negautoms pajamoms ir būsimai žalai, negatyvių faktų įrodinėjimo našta perkeliama finansų tarpininkui, vengiant „viskas, arba nieko“ principo sprendžiama neapibrėžto faktinio priežastingumo problema, priteisiama žala už finansų tarpininko *erga omnes* profesinių pareigų pažeidimus ir kt. Finansų tarpininkų civilinė atsakomybė turi tarnauti teisingumo atkūrimui, o tam ji turi būti ne tik lanksti bei efektyvi, bet ir subalansuota. Problema ta, kad šiuo metu ES investuotojų apsaugos sistema intensyviai vystoma viešojo apsaugos įgyvendinimo kryptimi, tačiau beveik neskiriamas dėmesys privataus apsaugos įgyvendinimo krypčiai. ES finansų rinkų teisė, visų pirma, MiFID normos, įtvirtina šiuolaikišką, sistemišką ir detalų investuotojų apsaugos teisinį reglamentavimą, tačiau nereguliuoja šio rėžimo civilinių teisinių padarinių ir neįtvirtina investuotojo civilinių teisių gynimo būdų. Akivaizdu, kad privačioji ES investuotojų apsaugos sistema, susidedanti iš supranacionalinio viešojo finansų rinkų teisinio reguliavimo ir 28 skirtingas tradicijas įkūnijančių privatinės teisės sistemų, yra vienpusė, neintegruota ir nepakankamai efektyvi sistema. Šie argumentai, ypač turint omenyje, kad

finansų tarpininko civilinė atsakomybė yra būtina sąlyga saugant investuotojus, leidžia vienareikšmiškai paneigti disertacijos hipotezę. Lietuvos privatinės teisės efektyvumas investuotojų apsaugos požiūriu gali būti įvertintas dviem kokybiniais aspektais: norminiu ir praktiniu. Žvelgiant norminiu aspektu galima pastebėti, kad Lietuvos civilinės atsakomybės sistema kokybiniu požiūriu yra pakankamai lanksti ir efektyvi tam, kad galėtų aptarnauti ambicingų ES finansų rinkų teisinio reguliavimo instrumentų taikymo poreikius. Tačiau teismų praktika išnaudoja ne visas ganėtinai lankstaus ir subalansuoto civilinės atsakomybės reglamentavimo pozityviojoje teisėje galimybes, nes nėra pakankamai plėtojamas profesinių, fiduciarinių ir konfidencialumo pareigų aiškinimas, trūksta aiškumo ir nuoseklumo paskirstant civilinės atsakomybės sąlygų, pavyzdžiui, kaltės, įrodinėjimo naštą, nėra diferencijuojamas įrodinėjimo standartas skirtingoms žalos rūšims įrodyti, nesprendžiama neapibrėžto faktinio priežastingumo problema arba jei ir bandoma spręsti, tai laikantis kategoriško principo „viskas, arba nieko“, itin mažai dėmesio skiriama skirtingų turtinių interesų apskaičiavimo ypatumams. Dideliu Lietuvos teismų praktikos trūkumu laikytina tai, kad joje nepripažįstama savarankiška finansų tarpininko pareiga įspėti investuotoją, kuri yra itin svarbi saugant investuotoją. Disertacijoje siūloma spręsti šias problemas.