



The regulation of inducements in Spain

Working Paper No. 4/2015

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This working paper corresponds to the pre-print of the article published at the International Journal for Financial Services. Suggested citation: Simón Moreno, H. (2015). 'The regulation of inducements in Spain'. *International Journal for Financial Services*, No. 2/2015, pp. 24-29.

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Key words: MiFID, inducements; investment firms; independent advice; private law effects; conflicts of interest

Introduction

The Directive 2014/65/EU, of 15 May 2014, on markets in financial instruments¹ (MiFID II) introduces far-reaching changes to the existing legal framework. Amongst the measures taken, the aim of which is to make financial markets more efficient, resilient and transparent, one may highlight the duty of providers of investment services to inform investors about whether or not they provide investment advice on an independent basis (article 24.4.(a).(i)). Should they act with such independence, the consequences are basically twofold: a) they would be bound to assess a sufficient range of different product providers prior to making a personal recommendation (art. 24.7.a); and b) they would be prohibited from accepting and retaining fees, commissions or any monetary or non-monetary benefits paid or provided by any third party, or a person acting on behalf of a third party, in relation to the provision of their services to clients (art. 24.7.b). Only minor non-monetary benefits shall be accepted (e.g. learning courses). The prohibition of retrocessions or “inducements” also applies to portfolio/asset management (art. 24.8). The underlying idea is to strengthen investors’ protection by moving from a commission-based model towards a fee-based model². Investment firms, however, may decide to act on a dependent basis, in which case inducements are allowed against the meeting of certain requirements³. As a result, Spanish providers of investment services will have to decide whether or not operate in the market on an independent basis. The following sections will briefly discuss the current Spanish legal framework on inducements and the expected impact of the implementation of MiFID II into Spanish law.

I. Current regulation of inducements in Spanish law

The initial aim pursued with the enactment of the Act 47/2007, of 19 December⁴, which reformed the Act 24/1988, of 28 July, on the securities market⁵, was the implementation of the following European Directives on markets in financial instruments into Spanish law⁶: a) Directive 2004/39/EC (MiFID Level I); b) Directive 2006/73/EC (MiFID Level II); and c) Directive 2006/49/EC. Nevertheless, it was the Royal Decree (RD) 217/2008, of 15 February, on legal regulation of investment services and other investment services entities⁷, that actually implemented MiFID Level

¹ DOL 12 June 2014, num. 173, p. 349.

² COMMISSION STAFF WORKING PAPER IMPACT ASSESSMENT. Accompanying the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Markets in financial instruments, 55.

³ The “inducement” should be designed to enhance the quality of the relevant service to the client and should not impair compliance with the investment firm’s duty to act honestly, fairly and professionally in accordance with the best interest of its clients. In addition, investment firms must inform investors properly about the nature and amount of the payment or benefit.

⁴ BOE (Official Spanish Gazette) 20 December 2007, num. 304, p. 52335. An overview of this rule may be found at G. ARRANZ PUMAR, “Comentario a la Ley 47/2007, de 19 de diciembre, por la que se modifica la Ley 24/1988, de 28 de julio, del Mercado de Valores”, in *Derecho de los Negocios*, 209, 2008, 85 *et seq.*

⁵ BOE 29 July 1988, num. 181, p. 23405.

⁶ Available at: http://ec.europa.eu/finance/securities/isd/index_en.htm (last visit 5-3-15).

⁷ BOE 16 February 2008, num. 41, p. 8706. A general analysis of this rule may be found at G. B. DE QUIRÓS

II into Spanish law.

As a result, articles 79 and 79.bis Act 24/1988 lay down the obligation of diligence and transparency for investment services providers as well as their duty to keep their clients appropriately informed at all times. These firms must behave diligently and transparently in the interests of their clients, safeguarding such interests as if they were their own. With reference to inducements, article 79.2 Act 24/1988 establishes that the above-mentioned duties shall be deemed to be breached if, in relation to the provision of an investment or ancillary service to the client, providers of investment services pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than as established in the secondary legislation (*cf.* article 26 MiFID Level II). Therefore, this rule does not lay down in which cases these fees or commissions are paid or are provided within the legal framework. This has been established by article 59 RD 217/2008. As the Spanish Act reproduces to greater or lesser extent the wording of MiFID Level II, the Recommendations issued by the CESR on inducements⁸ are fully applicable to the interpretation of RD 217/2008.

Accordingly, fees, commissions or non-monetary benefits paid or provided to or by the client, or any person on his behalf, are admitted, along with those provided to or by a third party or a person acting on his behalf, where the following two cumulative conditions are fulfilled: (i) the existence, nature and amount of those fees commissions or benefits -or where the amount cannot be ascertained, the method of calculating that amount- must be clearly disclosed to the client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary service; and ii) the payment of them must be designed to enhance the quality of the relevant service to the client and not impair compliance with the firm's duty to act in his best interests. It is worth highlighting that the Spanish legislator has adopted the possibility foreseen in article 26 MiFID Level II of entitling investment services providers to disclose the essential terms in summary form, provided that it undertakes to disclose further details at the request of the client. As a matter of fact, it is common practice nowadays that they make available to their clients a general policy of incentives where the most relevant aspects are indicated, so information on incentives is only provided for a specific operation if it is specifically requested by the client, which rarely happens in practice⁹. This duty is deemed to be satisfied when the firm makes the required information available to the client through the distribution channels of the company or on its website, provided that the client has consented to that form of provision of information.

Lastly, proper fees that enable or are necessary for the provision of investment services are also admitted. These include custody costs, settlement and exchange fees, regulatory levies or legal fees which, by their nature, cannot give rise to conflicts with the firm's duties to act honestly, fairly and professionally in accordance with the client's best interests.

In addition, firms providing investment services have more duties. In fact, they must: a) maintain records of information provided to or requested by clients about inducements (register number 20); b) keep a registry of clients in which information on inducements must be included (register number 2) and a register on potential conflicts of interests (register number 15)¹⁰; c) provide information with

CABRERA, "El nuevo régimen jurídico de las empresas de servicios de inversión. Principales novedades del real decreto 217/2008, de 15 de febrero", in *Revista de Derecho del Mercado de Valores*, 3, 2008. Online Database La Ley.

⁸ *Inducements under MIFID, Recommendations*, CESR/07- 228b, May 2007; *Inducements: Report in good and poor practices*, CESR/10- 295, April 2010.

⁹ G J. SASTRE CORCHADO, "La reforma de la MiFID (MiFID 2) en materia de distribución de productos de inversión. La protección de los inversores", in *Revista de Derecho del Mercado de Valores*, 12, 2013. Online database La Ley.

¹⁰ Annex of the Resolution of 7 October 2009 of the Spanish Regulatory Agency for Securities Market –CNMV- on the

the CNMV -the agency in charge of supervising and inspecting the Spanish Stock Markets and the activities of all the participants in those markets- about inducements by completing the so-called “T-5” form¹¹ (the information to be provided is the inducement not only received or paid to a third party but also, where applicable, the amount of inducements received that have been also retroceded to the clients in relation to several items¹²); and d) include, in standard agreements, the description of the procedure to reveal the existence, nature and amount of inducements -or if not possible, their method of calculation- to their customer at the outset, along with how the client would be able to request further information¹³.

The open-ended collective investment schemes that fall outside the scope of the Directive 2011/61/EU, of 8 June, with regard to regulatory technical standards determining types of alternative investment fund managers (AIFMD)¹⁴ -which has been implemented into Spanish law through the Act 22/2014, of 12 November¹⁵- are regulated in the Act 35/2003, of 4 November, on Collective Investment Schemes¹⁶. Article 8 of the latter lays down the commissions and fees to which these companies are entitled. This article was amended by the Act 31/2011, which implements into Spanish law the Directive 2009/65/CE, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)¹⁷. In this respect, management companies may take management and deposit fees from these funds as well as subscription and redemption fees from the unit holders (in an explicit manner). Underwriting discounts and reimbursement for the funds themselves may also be established. Such fees shall be fixed as a percentage of the assets or fund performance, or on a combination of both variables, or if applicable, on the net asset value of the investment, and they may not exceed the limits established by article 5.3 Royal Decree 1082/2012, of 13 July¹⁸ (which further develops Act 35/2003).

minimum records to be maintained by undertakings that provide investment services (BOE 21 October 2009, num. 254, p. 88085). See A. AGUILAR FERNÁNDEZ, “The record-keeping obligations of supervised entities”, in *CNMV Bulletin*, Quarter IV, 2009, 121 *et seq.* Available at: http://www.cnmv.es/DocPortal/Publicaciones/Boletin/BulletinQIV_weben.pdf (last visit 5-3-2015).

¹¹ The investment firms concerned (the EAFIs are the only ones exempted from this duty) must provide information about inducements on an annual basis within two months following the end of the year, see Third Rule and Annex of the Circular CNMV 1/2010, of 28 July, on reserved information of entities providing investment services (BOE 16 August 2010, num. 198, p. 72356), amended by the Circular CNMV 3/2014, of 22 October (BOE 7 November 2014, num. 270, p. 91915). See *CNMV, Manual de cumplimentación de la información reservada de las entidades que prestan servicios de inversión, Departamento de Supervisión de ESI y ECA, November 2012, 12*. Available at: <https://www.cnmv.es/cnmvdia/dececes/ManualCumplimentacionESI.pdf> (last visit 5-3-2015).

¹² With regard to Marketing Collective Investment Schemes, for instance, the inducements received from third parties for marketing investment funds among customers of the credit institution.

¹³ Article 7.1.d Circular CNMV 7/2011, of 12 December, on fees prospectus and content of standard agreements (BOE 24 December 2011, num. 309, p. 141676).

¹⁴ OJ L 174/1, 8 June 2011.

¹⁵ BOE 13 November 2014, num. 275, p. 93215.

¹⁶ BOE 5 November 2003, num. 265, p. 39220.

¹⁷ OJ L 302/32, 17 November 2009.

¹⁸ BOE 20 July 2012, num. 173, p. 52108.

Since the reform in 2011, the simplified prospectus foreseen in article 17.1 Act 35/2003 has been replaced by the key investor information (which are publicly issued by the management companies so as to inform potential investors) due to the fact that it failed in its original purpose¹⁹. The new document, which must be provided by Spanish collective investment institutions, including the ones with non-financial nature and free investment regime, as well as foreign non-harmonized UCITS that intend to sell their shares in Spain, must indicate the method of calculation and the ceiling of the committees, the fees that are actually charged and the beneficiary of his collection. The CNMV Resolution 20 February 2006²⁰ stated that inducements received by a management company must be for the express benefit of collective investment schemes and the shareholders, and they cannot be received by the management companies of those undertakings.

In light of the foregoing it can be concluded that the current Spanish legal system allows investment firms to charge inducements. This practice, however, is not free from problems related to conflict of interests, which have been pointed out by the CNMV on several occasions²¹.

II. The transition towards MiFID II

1. The current role of Spanish investment firms in the financial market

The above-mentioned rules shall be applied to the following entities²²: a) investment services firms, whose principal activity consists of providing investment services, on a professional basis, to third parties, such as broker-dealers, brokers, portfolio management companies and financial advisory firms (EAFIs, created by the Circular CNMV 10/2008, of 30 December, on Financial Advisory Firms²³); b) credit institutions that provide investment services; and c) collective investment undertaking management companies which are authorised to engage in discretionary and individualised investment portfolio management activities, advice in the investment field, custodianship and administration of holdings in investment funds or of shares in investment companies as the case may be.

Not all these investment firms, however, play an equally important role in financial markets. According to the III *Barómetro del Ahorro of the Observatorio Inverco* 4 November 2013²⁴, 54% of Spanish investors trust the advice provided by credit institutions (despite still being the first option,

¹⁹ E. HERNÁNDEZ SAINZ, “El documento con los datos fundamentales como instrumento esencial de información para el inversor minorista en instituciones de inversión colectiva”, in *Revista de Derecho del Mercado de Valores*, 10, 2012. Online Database La Ley.

²⁰ Available at: <http://www.cnmv.es/cnmvdia/noticiascnmv/docs/ComunicadoIIC.pdf> (last visit 5-3-2015).

²¹ Its Annual Report on Stock Markets and its activity of 2008 (163 and 169, available at <https://www.cnmv.es>) detected as an incident “Charging of fees for investment services provided to clients without properly inducements disclosing such fees”, and also that “A very common inducement is the retrocession of marketing fees by UCITS managed by operators outside the marketer’s group”; the same Report of 2011 (173 and 174) also detected several significant incidents concerning the marketing of financial products by credit institutions and investment firms, among which it is worth to be highlighted the lack (in some cases) of enough information provided to the client about the incentives received by the marketing entity and the existence of unresolved conflicts of interest; and the same Report issued in 2013 (172) stated that some entities breach the duties foreseen in article 59.b.ii) RD 217/2008 in relation to the classes of shares of foreign collective investment schemes due to the fact that they recommended investors the share classes which involved higher distribution or management fees than in the case of other share classes in the same compartment of the collective investment schemes that the client could have accessed. The entities received from the corresponding management companies incentives in the form of a percentage of the management and distribution fee.

²² See articles 64 *et seq.* Act 24/1988 and article 1 RD 218/2007.

²³ BOE 14 January 2009, num. 12, p. 4411.

²⁴ Available at: <http://www.jubilaciondefuturo.es/recursos/doc/pensiones/20131003/posts/iii-barometro-del-ahorro-del-observatorio-inverco.pdf> (last visit 5-3-2015).

in 2011 the percentage amounted to 76%), while 41% prefer to do that through a financial advisor. In a similar vein, it has been said²⁵ that more than 90% of financial advice is provided in Spain by credit institutions nowadays. In fact, they play a relevant role as far as the marketing of mutual funds is concerned according to data provided by the CNMV²⁶, by virtue of which the Spanish mutual fund industry displayed the following features between 1995 and 2010: a) there is a prevalence of retail investors (77.1% of the mutual funds assets); b) they are the ones that charge higher fees in retail funds; and c) most funds and their assets are mainly managed by fund managers belonging to credit institutions (between 91% and 95%), which means that credit institutions use closed architecture product platforms. In this same respect, it has been stated, in regard to the distribution channels of fund assets, that agents tied to banks and financial institutions were the primary method of distribution in Spain in 2013²⁷.

While the importance of credit institutions is true, there is strong evidence suggesting that Spanish EAFIs are gaining the investors' confidence little by little²⁸. In fact, at the end of 2014²⁹ there were up to 138 credit institutions (Spanish firms), 143 EAFIs (Spanish firms and branches), 62 broker-dealers (Spanish firms and branches), 57 brokers (Spanish firms and branches) and 11 portfolio management companies (Spanish firms and branches). In addition, it should be borne in mind that there has been a sharp increase in retail clients in 2014 compared to the previous year (14% in assets managed), professional clients (22% in assets managed) and eligible counterparties (an 80% of the number of contracts) of EAFIs³⁰.

2. The expected impact of MiFID II on investment firms

As it has been said, credit institutions play a relevant role in both the provision of financial advice as well as the distribution of investment funds among investors. One point that deserves particular attention is the wide perception among Spanish investors that financial advice is free of charge for the client, due to the fact that profits stem from indirect commissions (retrocessions, brokerage fees and collection of dividends³¹). Indeed, widespread practices of Spanish investors³² consist, on the one hand, in paying lower discretionary portfolio management fees in relation to those charged in other countries and, on the other, in not paying for advice fees as a general rule. Furthermore, it is

²⁵ A. PEDRAZA ALBA, President of Edesa and of the *Consejo Nacional de Economistas Asesores Financieros*, Sep/Oct 2014. Available at: <http://www.antoniojedrazaalba.com/docs/up/2Numero21vidaeconomica.pdf> (last visit 5-3-2015).

²⁶ See M^a ISABEL CAMBÓN & R. LOSADA, "Evolución de las sociedades gestoras de fondos de inversión y de su oferta desde 1995 hasta 2010", in *CNMV Bulletin Quarter I/2012*, 96 et seq.

²⁷ CFA INSTITUTE, *RESTRICTING SALES INDUCEMENTS. Perspectives on the Availability and Quality of Financial Advice for Individual Investors*, December 2013, 18.

²⁸ In this sense, it has been argued that Spanish EAFIs "laid the foundations for the development of a new form of investing, based on independent, transparent, objective and personalized financial advice, as well as open architecture networking, something investors are seeking and demanding increasingly as a result of their discontent with their investment portfolios' performance and the lack of objectivity of the advice they get from financial institutions. Independent financial advisors have satisfied Spanish investors need to get unbiased advice, something hard to achieve in the Spanish financial system, where commercial banks perform many functions, as manufacturers, distributors and "advisors", at the same time", see C. LASSALA & A. MOMPALER & P. CARMONA, "Determinants of performance of independent financial advisors", in *International Entrepreneurship and Management Journal*, 9, 2013, 583.

²⁹ See CNMV, *Bulletin Quarter IV/2014*, 145. Available at: <https://www.cnmv.es> (last visit 5-3-15).

³⁰ Source: Funds Society, 20-2-15 (<http://www.fundssociety.com/es/noticias/private-banking/las-eafis-aceleran-su-crecimiento-e-incrementan-su-volumen-asesorado-un-21>, last visit 5-3-15).

³¹ G. J. SASTRE CORCHADO, cit.; and R. RUIZ HUERGA, "Asesoramiento y planificación financiera", in M. García Olalla & F. J. Martínez García (dirs.), *Manual del asesor financiero*, Paraninfo, 2014, 562.

³² According to F. J. ALONSO CABORNERO & S. FRANCO HIDALGO & I. GALLEGO TORTUERO, "MiFID II. Novedades en relación con las normas de conducta. Especial referencia al asesoramiento de inversiones", in *icade. Revista cuatrimestral de las Facultades de Derecho y Ciencias Económicas y Empresariales*, 89, 2013, 99 -100.

not customary amongst the Spanish retail investors to pay no subscription or redemption fees to collective investment institutions. Consequently, **MiFID II will have a significant impact on credit institutions** due to the fact that investors could be reluctant to pay directly for the services provided by them whilst acting on an independent basis. Indeed, it has been said that on the one hand, the establishment of this system in Spain would be difficult to implement³³, and on other, that this system would result in a reduction of profits for financial institutions³⁴.

The decision to act on an independent basis could lead to further consequences: the underwriting of the cheapest type of share for the final investor; the reduction in the offer of foreign distributors³⁵ i.e. credit institutions will tend to offer in-house funds since buying third-party funds would provide a lesser advantage; the need to assess a sufficient range of different products (it remains to be seen the final scope of this rule once it is implemented into Spanish law) could affect the usual way in which Spanish credit institutions operate with closed architecture product platforms; and the specific training needed will increase the training costs³⁶.

This impact of the new provisions on inducements will not, however, be the same on other providers of investment services. As a matter of fact, the market quota of independent financial advisory firms, which act as a general rule with open architecture product platforms, is very low (1%) in comparison with credit institutions, but it is nonetheless true that their profits stemming from inducements amounts only to the 20% of their total income. As a consequence, a great percentage of commissions charged by EAFIs are paid directly by the client (fee only)³⁷. In this respect, currently there are only 62 EAFIs that charge inducements while 289 charge the client directly; however, the amount generated by the first concept (45.4 million euros last year) is higher than in the second one (34.4 million)³⁸. Therefore, Spanish EAFIs seem to be better prepared prima facie than credit institutions to act on an independent basis. For its part, portfolio management companies (0,4%) and foreign entities (0,7%) have little presence on the market.

Finally, the implementation of MiFID II into Spanish law could lead to further far-reaching consequences. Should the cost of providing the service be charged directly to the client, this could lead to the provision of the service to be uneconomical to a number of investment firms due to the high competitiveness in the sector, the higher costs related to the provision of services and the subsequent low profitability margins³⁹. Therefore, this could lead to two different scenarios: a battle of prices between entities regarding commissions; or the confirmation that below certain assets

³³ IE BUSINESS SCHOOL, *MiFID 2: un desafío para las entidades financieras*, June 2011, 3. Available at: http://csf.ie.edu/sites/default/files/informe_mifid_2_final.pdf (last visit 5-3-2015).

³⁴ The amount of inducements currently charged by credit institution is 2,000 billion euros. Source: Feel Capital, 6-11-14 (<http://blog.feelcapital.com/los-costes-invisibles/>, last visit 5-3-2015).

³⁵ According to J. LUIS BLÁZQUEZ & E. ANDREU, *Funds people*, 31-12-2011 (<http://www.fundspeople.com/gente/j-l-blazquez-y-emilio-andreu-10552/blog/mifid-ii-se-acabaron-los-rebates-llega-la-estabilidad-en-los-modelos-de-asesoramiento-30026>, last visit 5-3-2015).

³⁶ The Judgement of the Provincial Court of Alava 7 April 2009 (ECLI: ES:APVI:2009:61; available at: <http://www.poderjudicial.es/>) showed that even the director of the bank office could not explain some of the clauses of a swap.

³⁷ In accordance with the declarations of A. MORENO, director of the Office of Companies Authorization and Registration of the CNMV, *Funds people*, 12-06-2014 (<http://www.fundspeople.com/noticias/el-80-de-las-retrocesiones-por-asesoramiento-en-espana-lo-aglutinan-una-docena-de-cafi-141711>, last visit 5-3-2015).

³⁸ In accordance with the declarations of L. MOSQUERA, technician of the Office of Companies Authorization and Registration of the CNMV, *Funds people*, 14-06-2013 (<http://www.fundspeople.com/noticias/mifid-ii-obligara-a-las-entidades-que-asesoran-a-ajustar-su-modelo-de-negocio-94518>, last visit 5-3-2015).

³⁹ I. RODRÍGUEZ-SASTRE & J. GÁLVEZ PASCUAL, “MiFID II: El coste del asesoramiento Financiero Independiente”, in *Boletín Informativo, Fundación de Estudios Bursátiles y Financieros*, 239, 2014, 12-13.

managed, the increased costs generated by the new regulation makes the service less profitable for the traditional private banking. This could result in mergers or less efficient institutions or their exit from the market⁴⁰. Should providers of investment services, however, decide to act on a dependent basis, they will have to face a large increase in management costs due to the fact that they will not be able to provide the information on inducements in a summarised form. This requires management control systems that are absent in the vast majority of credit institutions. It could additionally affect their reputation or image in front of investors.

3. Private law effects of MiFID rules

European legislation on financial instruments provides for information duties on inducements for the benefit of investors in the field (e.g. art. 24.4.c Directive 2014/65/EU lays down the duty to inform investors about all costs and associated charges, and the key investor information required by Act 35/2003 is deemed to be pre-contractual information). Nevertheless, MiFID Directives are not aimed at harmonising the private law effects of the non-fulfilment of these duties, which depend in the end on the internal provisions of each legal system (judgement of the European Court of Justice 30 May 2013⁴¹). It has been stated, however, that the violation of MiFID rules on conduct could be the basis for a claim of damages, and the lack of provision of information to the client could lead to the contract being declared void⁴².

From a Spanish law perspective, financial services rules do not specify the private law effects of non-compliance with these rules⁴³; only administrative fines (in this vein, the judgment of the National High Court of Spain of 14 December 2012⁴⁴ imposed a fine of 14 million euros on Santander Asset Management for a very serious offense in contravention of the income, fees and expenses rules attributable to the collective investment schemes administered by this entity). Regardless of the kind of contract concluded between the investor and the provider of investment services (it could a business agency contract -article 244 Spanish Commercial Code 1885- according to the Judgment Supreme Court 20 January 2003⁴⁵), the contract is governed by general contract law rules laid down in the Spanish Civil Code of 1889 (CC). In fact, the *Supreme Court judgments of 11 June 2010*⁴⁶ and *19 November 2008*⁴⁷ have established that the breach of administrative rules may result in the total or partial invalidity of a civil contract (art. 6.3 CC), and several Spanish courts judgments have also put an end to contracts concluded between investment firms and investors (even professionals⁴⁸) because of the non-performance of the information duties on the ground of mistake (art. 1265 CC). This article could be applicable not only in case of lack of provision of information on inducements but also in case of lack of delivery of the key investor information by the investment fund management firm or the inclusion in this document of false or misleading information, or the

⁴⁰ AFI & ACCENTURE, *Banca Privada: Forward*, 38-40. Available at: <http://www.afi.es/afi/libre/pdfs/grupo/documentos/estudio-banca-privada-forward.pdf>, last visit 5-3-15).

⁴¹ Case C-604/11.

⁴² See M. KRUIFTHOF, "A differentiated approach to client Protection: The Example of MiFID", in S. GRUNDMANN & Y. M. ATAMER (Ed.), *Financial Services, Financial Crisis and General European Contract Law*, Kluwer Law International, 2011, 159 and 160.

⁴³ See about this problem in Spanish and Italian legal systems, F. DELLA NEGRA, "The private enforcement of the MiFID conduct of business rules", in *European Contract Law Review*, 4, 2014, 574 *et seq.*

⁴⁴ ECLI: ES:AN:2012:5287. The court maintained the administrative fine imposed by the CNMV (available at <http://www.boe.es/boe/dias/2012/05/19/pdfs/BOE-A-2012-6678.pdf>, last visit 5-3-15).

⁴⁵ ECLI: ES:TS:2003:162.

⁴⁶ ECLI: ES:TS:2010:3061.

⁴⁷ ECLI: ES:TS:2008:6456.

⁴⁸ Judgment Supreme Court of Spain 7 July 2014 (ECLI:ES:TS:2014:2659).

omission of essential data⁴⁹. However, the mistake must be about the substance of the thing that constituted the subject matter of the contract, or about the conditions thereof which should have been the main reason for the entering of the agreement (art. 1266 CC). In the case of a swap, the Supreme Court judgements 10 September⁵⁰ and 20 January 2014⁵¹ have considered that article 1266 CC may be applied if there is no information about the risks associated with the financial instruments. Therefore, it remains to be seen whether or not an inducement may be deemed to be the subject matter of a contract. Should the court not accept the mistake, the contract shall be deemed to be valid, but the injured party would be entitled to claim damages⁵².

⁴⁹ E. HERNÁNDEZ SAINZ, *cit.*

⁵⁰ ECLI: ES:TS:2014:4339.

⁵¹ ECLI: ES:TS:2014:354.

⁵² This is accepted in case of fraudulent misrepresentation (article 1270 CC), see Judgment Supreme Court 18 January 2007 (ECLI: ES:TS:2007:176).