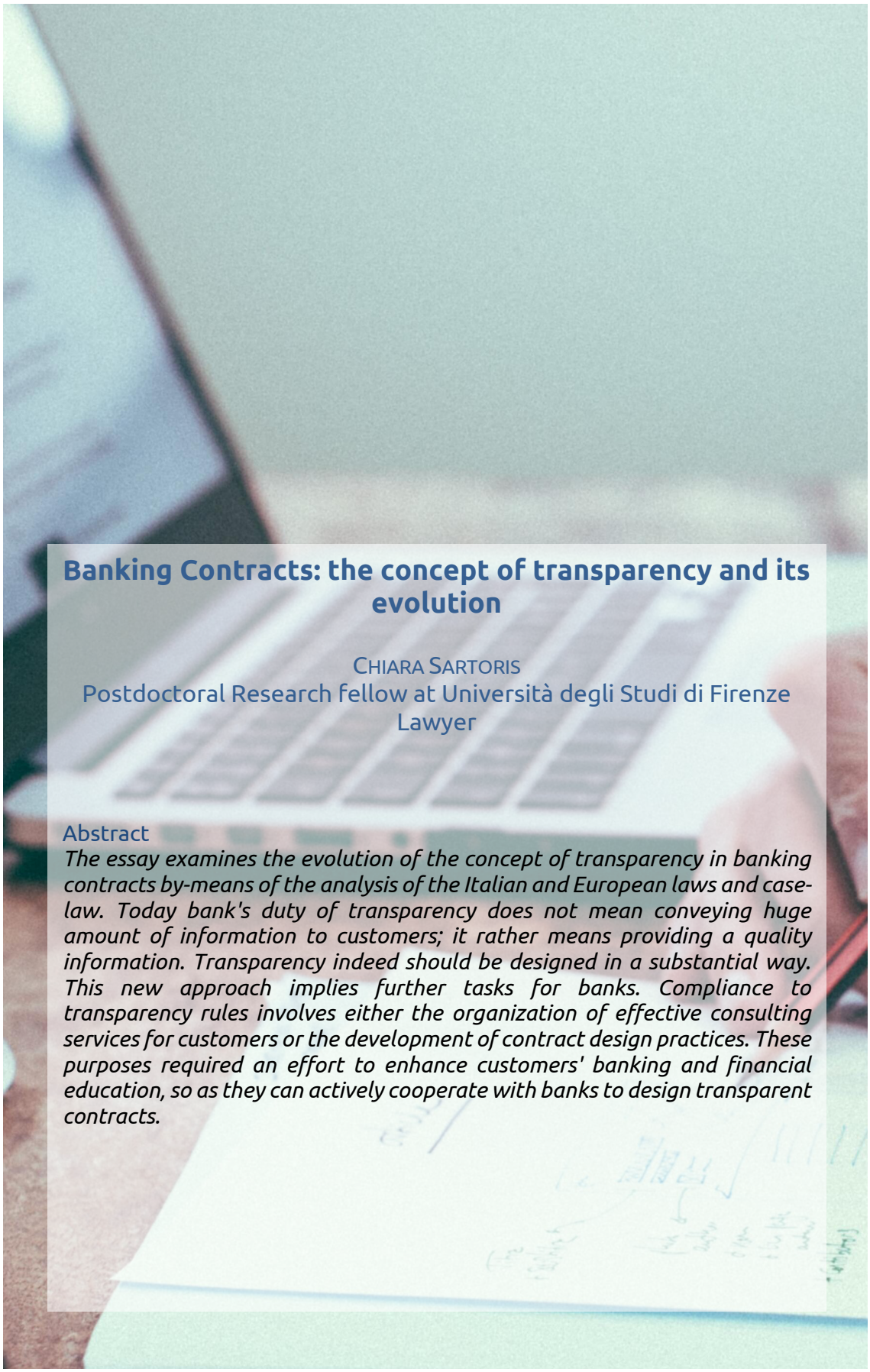
Sartoris C., 'Banking Contracts: the concept of transparency and its evolution' (2021) 2 EJPLT, Available at : www.ejplt.tatodpr.eu

EJPLT
ISSN 2704-8012



Banking Contracts: the concept of transparency and its evolution

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Abstract

The essay examines the evolution of the concept of transparency in banking contracts by-means of the analysis of the Italian and European laws and case-law. Today bank's duty of transparency does not mean conveying huge amount of information to customers; it rather means providing a quality information. Transparency indeed should be designed in a substantial way. This new approach implies further tasks for banks. Compliance to transparency rules involves either the organization of effective consulting services for customers or the development of contract design practices. These purposes required an effort to enhance customers' banking and financial education, so as they can actively cooperate with banks to design transparent contracts.

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Keywords: banking contracts; transparency; consulting service; contract design; duty of information; banking education; financial education.

Summary: Introduction. – 1. The rules of transparency in banking contracts. – 2. Transparency and European case-laws in matter of mortgage loans. – 3. A new design for bank-customer relationship. – Conclusions.

Introduction.

Transparency in asymmetric contracts is a complex issue since it involves opposite interests: customers' interest to a complete intelligibility of contractual content, on the one hand; and general interest to market functioning, on the other hand. Such an issue assumes crucial importance with particular reference to banking contracts, whose contents are technically complex and imply relevant financial risks for customers[1]. These latters need to access to information concerning contractual terms and conditions in order to be aware of costs and characteristics of the banking services they are going to activate, as well as to make mindful choices among different banking offers.

In particular, the most important aspect of a banking contract is represented by economic terms and conditions, such as: rate interests for each banking operation, how to calculate interests, interests' frequency, indexing criteria, fees and costs of a service. These conditions, indeed, tend to be on behalf of professionals and to the detriment of customers. Thus, it is extremely important that these latters are able to understand what economic consequences they are going to deal with,

In the last three decades the Euro-unitarian Law and the EU Court of Justice have often provided or strengthen banks' duties of information towards customers. The transfer of information and data is considered the primary tool to overcome informative asymmetries which characterize a contractual

[1] The mentioned issue is object of several studies by the Italian and European scholars: P Schlesinger, 'Problemi relativi alla "trasparenza bancaria"' (1989) Corr. Giur., 230 ff.; P Rescigno, '"Trasparenza" bancaria e diritto "comune" dei contratti', (1990) I, Banca, borsa, tit. Cred., 297 ff.; PL Carbone, 'La trasparenza bancaria e la tutela del risparmiatore', (1992) I Corr. Giur., 479 ff.; G Alpa, 'La "trasparenza" del contratto nei settori bancario, finanziario e assicurativo' (1992) IV, Giur. it., 409 ff.; Id, *La trasparenza nei contratti bancari* (Cacucci, 2003); Id, 'La trasparenza delle operazioni bancarie e la tutela del risparimiatore' (2004) 210, Quad. dell'Ass. per lo Sviluppo degli Studi di Banca e Borsa, 48 ff.; G Carriero, 'Trasparenza bancaria, credito al consmo e tutela del contraente debole' (1992) V, Foro it., 354 ff.; A Nigro, 'La nuova normativa sulla trasparenza' (1993) 4 Nuove leggi civ. comm., 571 ff.; A. Maisano, *Trasparenza e riequilibrio delle operazioni bancarie. La difficie transizione dal diritto delle banche al diritto bancario* (Giuffrè, 1993); A Tidu, 'Trasparenza delle condizioni dei contratti bancari e finanziari', Enciclopedia giuridica (Treccani, 1994) XXXI, E Minervini, 'La trasparenza delle condizioni contrattuali (contratti bancari e contratti con i consumatori)' (1997) 1 Banca, borsa e tit. cred., 94 ff.; AA Dolmetta, 'Normativa di trasparenza e ruolo della Banca d'Italia' (1998) 1 Dir. banc. e merc. fin., 29 ff.; D Rufini, 'Banche (trasparenza delle condizioni contrattuali)', *Dig. Comm.* (Utet, 2000), 93 ff.; E Capobianco, 'I contratti delle banche: trasparenza ed equilibrio dei rapporti con la clientela' (2002) II Dir. banc. merc. fin., 198 ff.; M Caratelli, *La trasparenza tra banche e clienti. Fabbisogni informativi e intervento pubblico* (Franco Angeli, 2006); V Calandra Buonaura, 'La trasparenza nei servizi bacari di investimento' (2008) Giur. Comm., 220 ff.; E Quadri, 'Trasparenza nei servizi bancari e tutela del consumatore' (2011) Nuova giur. civ. comm., 90 ff.; A Mirone, *La trasparenza bancaria* (Cedam, 2012); G De Nova, 'La trasparenza bancaria: lex generalis o lex specialis?' (2014) 3 Bancaria, 59 ff.; G Mucciarone, 'La trasparenza bancaria', in V Roppo (ed.), *Trattato Roppo dei contratti*, V, Mercati regolati (Giuffrè, 2014), 663 ff.; A. Barenghi, 'Appunti sulla trasparenza bancaria venticinque anni dopo' (2017) 3 Quest. Giust., 115 ff.

relationship between banks and customers. The result, however, is that customers are usually required to subscribe contracts whose contents are excessively complex and detailed and thus unintelligible. Consequently today the traditional informed-consent method is not the solution for all the problems concerning informative asymmetry.

Not surprisingly recent European case-law shows a new approach to transparency issues: what really matter is not the amount of information that banks convey to customers, instead it is crucial the quality of information. Therefore, as it will be shown, the attention has to be focused on a substantial concept of transparency. At the same time, it is necessary to wonder which tools ensure an adequate standard of transparency.

From this point of view, the present research aims at analysing the evolution of the concept of transparency in banking contracts on the basis of both the recent frameworks in such a matter and the European case-law concerning mortgage loan agreements. The purpose of the studdy is to show how the transparency rule should be designed and which role customer should have in order to acquire a suitable and effective level of information.

1. The rules of transparency in banking contracts.

Within the Italian legal system transparency in banking contract is regulated by the d.lgs. n. 385/1993 (the so-called T.U.B.), which has been modified several times in the light of the evolution of the Euro-unitarian framework in this matter. According to this law, the rule of transparency operates in every step of a contractual relationship between a bank and a customer: from the pre-contractual moment to the signature of the contract and finally to the execution of the contract.

With particular reference to the contents of the mentioned rules, two are the possible declinations of the concept of transparency.

On the basis of a primary meaning, the word "transparency" points out the need that contractual content is drafted in a clear and understandable way. Actually, the crucial requirement to ensure the intelligibility of contractual terms and conditions is represented just by the way they are formally and grammatically written. This is confirmed also by the article 35 of the Italian Consumer Code, which refers the word transparency to clearness and intelligibility of contractual draft[2].

However, over the years, such a word tends to be designed in a more extensive meaning. Transparency is declined in a series of rules which concern written form of the contract, contractual contents, as well as professionals'

[2] According to article 35 of the Italian Civil Code: 'In case of doubts about the meaning of a clause, the interpretation which is more favourable for consumer prevails'. See: P Forchielli, 'Clausole abusive e disciplina gidente dell'interpretazione', in CM Bianca and G Alpa (eds.), *Le clausole abusive nei contratti stipulati con I consumatori. L'attuazione della direttiva comunitaria del 5 aprile 1993* (Cedam, 1996), 462 ff.; V Rizzo, *Trasparenza e "contratti del consumatore. La novella al codice civile"* (Esi, 1997); G Stella Richter, 'L'interpretazione dei contratti dei consumatori' (1997) Riv. trim. dir. proc. civ., 1028 ff.; M Pennasillico, 'L'interpretazione dei contratti del consumatore', in P Perlingieri and E Caterini (eds.), *Il diritto dei consumi* (Esi, 2004) I, 157 ff.; S Martuccelli, *L'interpretazione dei contratti del consumatore* (Giuffrè, 2004); A Genovese, *L'interpretazione del contratto standard* (Giuffrè, 2008).

behavioral duties towards customers, in particular informative duties. Basically, the Banking Law has turned from an idea of "informative-transparency" to an idea of "conformative-transparency", because the duty of transparency does not only imply the transfer of information towards customers, but it also influences rules about contractual form and content. It is the so-called contractual "neo-formalism"[3].

With reference to form, within the Italian legal system transparency is declined in two rules: on the one hand, banking contracts must have a written form according to article 117, 1st paragraph, of d.lgs. n. 385/1993[4]; on the other hand, a copy of the contract must be submitted to the customer who subscribes it. The importance of these rules is embodied by the provisions of the pathological consequences in case of breach: article 117, 3rd paragraph, of d.lgs. n. 385/1993 statues the nullity of the contract. Moreover, this nullity has a peculiar function of protection in favour of customers, consequently these latters are the only subjects who are legitimated to activate the remedy in front of a judge (article 127, 2nd paragraph, of d.lgs. n. 385/1993)[5].

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[3] For a study of the phenomenon of the so-called "neo-formalism" see: E Morelato, *Nuovi requisiti di forma del contratto. Trasparenza contrattuale e neoformalismo* (Cedam, 2006); L Modica, *Vincoli di forma e disciplina del contratto. Dal negozio solenne al nuovo formalismo* (Giuffré, 2008); Id, 'Formalismo negoziale e nullità: le aperture delle Corti di merito' (2011) Contr. e impr., 27 ff.; V Scalisi, 'Forma solenne e regolamento conformato: un ossimoro del nuovo diritto dei contratti?' (2011) I Riv. dir. civ., 415 ff.; E Fazio, *Dalla forma alle forme. Struttura e funzione del neoformalismo negoziale* (Giuffrè, 2011); S Pagliantini, 'Neoformalismo contrattuale', *Enciclopedia del diritto – Annali* (Giuffrè, 2011) IV, 772 ff.; Id, 'Il neoformalismo contrattuale dopo i d.lgs. n. 141/10, n. 97/11 e la dir. 2011/83/UE: una nozione (già) *vieille renouvelée'* (2021), Nuove leggi civ. comm., 327 ff.; Id, 'L'incerto incedere del formalismo di protezione tra usi e abusi' (2013) Contr. e impr., 299 ff.; F Addis, '"Neoformalismo" e tutela dell'imprenditore debole' (2012) Obbl. e contr., 9 ff.; C Maradei, "Il neoformalismo negoziale nei contratti di intermediazione finanziaria", in O Calliano (ed.), *Informazione e trasparenza nei contratti asimmetrici bancari, finanziari e assicurativi, e diritti del consumatore europeo* (Giappichelli, 2013), 68 ff.; M Girolami, 'Una pura formalità. Dalla struttura alla funzione del neo-formalismo contrattuale' (2017) Banca, borsa, tit. cred., 543 ff.; P Gaggero, 'Neoformalismo negoziale di "protezione" e struttura della fattispecie contrattuale' (2016), Contr. e impr., 1463 ff.; E Tosi, *Forma informativa nei contratti asimmetrici. Contributo allo studio della forma funzionale nei contratti asimmetrici, bancari e di investimento* (Giuffrè, 2018).

[4] The United Section of the Supreme Court of Cassation clarified the extend of the written form requirement. For the validity of the contract is not necessary that it is subscribed by both the contractual parties, but it is sufficient the customer's signature, because this latter is the party seeking for protection by-means of the written form. Even if the judgement concerns the interpretation of the formal requirement for financial contracts ex article 23 d.lgs. n. 58/1998 (the so-called T.U.F.), the Supreme Court has then statued that this decision can be extended also to banking contracts. Cfr. Cass., Sez. Un., 16 January 2018, n. 898. For notes or comments about this decision see, *ex multis*: A Di Majo, 'Contratto di investimento mobiliare: il "balletto" delle forme'(2018) 3 Giur. it., 568 ff.; C Colombo, 'La forma dei contratti quadro di investimento: il responso delle Sezioni Unite' (2018) 2 Giur. it., 133 ff.; G D'Amico, 'La forma del contratto-quadro ex art. 23 T.U.F. Non è prescritta *ad substantiam actus',* (2018) 2 Contr., 133 ff.; G La Rocca, 'Interessi contrapposti e "conseguenze opportunistiche" nella sentenza delle sezioni unite sulla sottoscrizione del contratto' (2018) Foro it., 1289 ff.; C Sartoris, 'Contratti di intermediazione finanziaria: il vincolo di forma *"ad substantiam"* è unilaterale', [2018] Persona e mercato <http://www.personaemercato.it/contratti-di-intermediazione-finanziaria-il-vincolo-di-forma-ad-substantiam-e-unilaterale-di-chiara-sartoris/>

[5] *Ex multis*: G Passagnoli, 'Nullità speciali' (Giuffrè, 1995); Id, 'Le nullità di protezione', in F Ruscello (ed), *Studi in onore di Davide Messinetti* (ESI, 2009); F Di Marzio, 'Forme della nullità nel nuovo diritto dei contratti' (2000), Giust. Civ., 475 ff.; S Monticelli, 'Nullità, legittimazione relativa e rilevabilità d'ufficio' (2002) 4 Riv. dir. priv., 685 ff.; L Valle, 'L'inefficacia delle clausole vessatorie e la nullità a tutela della parte deboe del contratto'(2005) 1 Contr. e impr., 149-199; M Girolami, *Le nullità di protezione nel sistema delle invalidità negoziali. Per una teoria della moderna nullità relativa* (Cedam, 2008); Id, 'Le nullità dell'art. 127 T.U.B. (con l'obiter delle Sezioni Unite 2014)' (2015) I Banca, borsa e tit. cred., 172 ff.; G De Cristofaro, 'Le invaidità negoziali "di protezione" nel diritto comunitario dei contratti', in S. Pagliantini (ed.), *Le forme della nullità* (Giappichelli, 2009); S Pagliantini, 'Nullità di protezione, integrazione dispositiva e massimo effetto utile per il consumatore: variazioni sul tema dell'asimmetria contrattuale' (2012) 4 Nuova giur. civ. comm., 751 ff.; I

With reference to contractual content, article 117, 4th paragraph, of d.lgs. n. 385/1993 provides a series of elements which must be specified into the contract, such as interests rate, amortization plan, costs and conditions charged by the bank. Moreover article 119 lists a series of informative duties for banks towards customers. In particular, professionals are required to handle with two main tasks: on the one hand, they have to collect information about the characteristics and the quality of each single customer they are dealing with; on the other hand, on the basis of the information previously collected, they have to inform the customer about the economic risks she/he exposes, the economic consequences of the contract, the main characteristics of the service or product she/he acquires[6].

According to the Euro-unitarian framework, banks have to comply to their informative duties on the basis of a graduated approach: the standard of information varies in relation to the typology of customer, depending on whether she/he is a simple consumer or a retailed customer or a qualified customer[7]. Obviously, the maximum grade of informative protection must be ensured in favor of simple consumers.

The application of the above-mentioned rules if, on one side, has the merit of ensuring the balance between asymmetric contractual positions, on the other side, however, poses a problem of effective protection[8]. It is clear that

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Prisco, *Le nullità di protezione. Indisponibilità dell'interesse e adeguatezza del rimedio* (ESI, 2012); U Malvagna, 'Le Sezioni Unite e la nullità di protezione ex ar. 127 TUB' (2015) Riv. dir. banc., 1 ff.

[6] If professionals do not perform the duties of information, they meet the civil liability and therefore have to compensate customers' damages, according to the distinction between behavioural rules and validity rules set by the United Section of the Supreme Court of Cassation of 19 December 2007, n. 26724-26725. Cfr. G Vettori, 'Regole di validità e di responsabilità di fronte alle Sezioni Unite. La buona fede come rimedio risarcitorio', (2008) Obbl. e contr., 104 ff.; V Mariconda, 'L'insegnamento delle Sezioni Unite sulla rilevanza della distinzione tra norme di comportamento e norme di validità' (2008) Corr. Giur., 230 ff.; V Sangiovanni, 'Commento a Cass. S.U. 19 dicembre 2007, n. 26724 e 26725' (2008) Contr., 231 ff.; E Scoditti, 'La violazione delle regole di comportamento dell'intermediario finanziario e le Sezioni Unite' (2008) I, Foro it., 784 ff.; C Scognamiglio, 'Regole di validità e di comportamento: I principi e I rimedi' (2008), Eur. dir. priv., 599 ff.; IA Caggiano, 'Gli obblighi di informazione nei servizi d'investimento tra nullità e responsabilità', in G Gandolfi (ed.), *Codice europeo dei contratti*, Libro II. *Dei singoli contratti* (Giuffrè), 2017, 20-30.

[7] See: L Frumento, 'La valutazione di adeguatezza e di appropriatezza delle operazioni di investimento nella Direttiva MIFID' (2007) Contr., 583 ff.; P Fiorio, 'La nozione di operatore qualificato per l'investitore persona giuridica' (2008), Giur. it., 2241 ff.; V Sangiovanni, 'L'adeguatezza degli investimenti prima e dopo la MIFID' (2010) Corr. giur., 1385 ff.; A Antonucci, 'Declinazioni della suitability rule e prospettive di mercato' (2010), 6 (I) Banca borsa, 728 ff.; V Santocchi, 'Le valutazioni di adeguatezza e di appropriatezza nei rapporti contrattuali tra intermediario e cliente', in E Gabrielli, R Lener (eds.), *I contratti del mercato finanziario* (Giappichelli, 2011); A Tucci, 'La classificazione dei clienti', in R Lener (ed.), *Diritto del mercato finanziario – Saggi* (Giuffrè, 2011), 87 ff.; U Minneci, 'Servizi di investimento in favore del cliente professionale: dal regime del rapporto alla disciplina dell'attività' (2012) I, Banca borsa e tit. cred., 568 ff.; R Natoli, *Il contratto "adeguato". La protezione del cliente nei servizi di credito, di investimento e di assicurazione* (Giuffrè, 2012); L Purpura, 'L'evoluzione "fiduciaria" dei doveri di comportamento dell'intermediario nella prestazione dei servizi di investimento alla clientela al dettaglio', (2013) 2(I), Banca borsa, 225 ff.; D Imbruglia, *La regola di adeguatezza e il contratto* (Giuffrè, 2017).

[8] The importance of the principle of effectivity in contract law is highlighted by: N Trocker, 'Dal giusto processo all'effettività dei rimedi: l'"azione" nell'elaborazione della Corte Europea dei diritti dell'uomo (parte prima)' (2007) 1 Riv. trim. dir. proc. civ., 35 ff.; N Irti, *Significato giuridico dell'effettività* (ESI, 2009); C Mak, 'Rights and remedies – Article 47 EUCFR and effective judicia protection in european private law matters', in HW Micklitz (ed.), *Constitutionalization of european private law* (Oxford University Perss, 2014), 236 ff.; S Pagliantini, 'Diritto giurisprudenziale e principio di effettività' (2015) 4 Pers. e merc., 112 ff.; G Vettori, 'Contratto giusto e rimedi effettivi' (2015) 1 Pers. e merc., 5 ff.; Id, 'Il diritto a un rimedio effettivo nel diritto privato europeo', (2017) 1 Pers. e merc., 15 ff.; Id, *Effettività tra legge e diritto* (Giuffrè, 2020); D Imbruglia,' Effettività della tutela: una casistica', (2016) 2 Pers. e merc., 62 ff.; I Pagni, 'Effettività della tutela giurisdizionale', *Enciclopedia del diritto – Annali* (Giuffrè, 2017), 355 ff.

whenever a customer receives a huge amount of information, she/he is not able to completely understand every aspect of the contract is part of. Consequently, she/he is not able to express an aware consent to the contract. Excessive information is bound to produce no information.

These are the reasons way, in the last few years, the European Union has changed its approach towards banking contracts. The purpose of the new framework is a process of "simplified disclosure"[9]. The tool to achieve this purpose is represented by the role of mediation that banks are expected to act towards customers. According to this new legal approach, what really matter is not only the transfer of information from professionals to customers, but also the arrangement of consulting services to help customers understand contractual contents and, consequently, make aware decisions[10].

In particular, the Directive 2014/65/EU (the so-called MiFID II)[11] strengthens professionals' duties of information by-means of the introduction of a specific duty of consulting and assistance in favour of customers. A such new framework is translated in a set of rules which modify the d.lgs. n. 385/1993. For example: article 120 *novies*, 2nd paragraph, provides the duty to convey tailored information; article 120 *undecies* provides rules in order to verify customer's creditworthiness; article 124, 5th paragraph, allows customers to ask for adequate explanations concerning the granting of a credit; article 124 *bis* provides consulting duties. According to the described rules, today transparency also stands for consulting and assistance duties in favour of customers[12].

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[9] Cfr. Barenghi, "Appunti sulla trasparenza bancaria venticinque anni dopo" 120.

[10] This leads to the problem of defining the liability rules in case banks breach the consulting duties they are burdened. Think, for instance, to the case of a bank that makes a customer buy a financial product which is not suitable for her/him or to a case of abusive granting of credit. See: A Nigro, 'La responsabilità della banca per concessione "abusiva" del credito', Giur. comm. (1978) I, 219 ff.; Id, 'Note minime in tema di responsabilità per concessione "abusiva" dei crediti e legittimazione del curatore fallimentare' (2002) Dir. banc. merc. finanz., 294 ff.; F Anelli, 'La responsabilità risarcitoria delle banche per illeciti commessi nell'erogazione del credito' (1998) I, Dir. banc. merc. fin., 137 ff.; B Inzitari, La responsabilità della banca nell'esercizio del credito: abuso nella concessione e rottura del credito (2001) I Banca, borsa e tit. cred., 265 ff.; A Castiello D'Antonio, 'La responsabilità della banca per "concessione abusiva del credito"' (2002) I Dir. fall., 1077 ff.; A Viscusi, *Profili di responsabilità della banca nella concessione del credito* (Giuffrè, 2004); G De Nova, 'La responsabilità dell'operatore finanziario per esercizio di attività pericolosa' (2005) Contr., 709 ff.; G Piazza, 'La responsabilità della banca per acquisizione e collocamento di prodotti finanziari "inadeguati" al profilo del risparmiatore' (2005) Corr. Giur., 1031 ff.; V Sangiovanni, 'Inadeguatezza delle operazione finanziaria, risoluzione del contratto per inadempimento e risarcimento del danno', (2006) 11 Corr. giur., 1569 ff.; C Colombo, 'Adeguatezza, appropriatezza e mera esecuzione nell'offerta di servizi di investimento', in V Troiano, R Motroni (eds.), *La MiFID 2. Rapporti con la clientela. Regole di governance. Mercati* (Padova, 2016).

[11] *Ex multis*: F Scacchi – G Zaghini, MiFID II. *Le nuove regole dei mercati e degli strumenti finanziari. Verso la Capital Market Union* (Ecra, 2015); F Capriglione, 'Prime riflessioni sulla Mifid II (Tra aspettative degli investitori e realtà)' (2015) Riv. Trim. Dir. econom., 72 ff.; V Troiano, R Motroni (eds.), *La MiFID 2*; D Busch, G Ferrarini, *Regulation of the EU Financial Markets –MIFID and MiFIR* (Oxford Press, 2017); R Costi, *Il mercato mobiliare: aggiornamento alla mifid II* (Giappichelli, 2018); F Annunziata, 'Il recepimento di Mifid II: uno sguardo di insieme tra continuità e discontinuità' (2018) 4 Riv. soc., 1110 ff.; F Della Negra, *MiFID II and Private Law: enforcing EU conduct of business rules (Hart Publishing*, 2018); E Pezzutto, R Razzante, *MiFID II: le novità per il mercato finanziario* (Giappichelli, 2018); C Robustella, 'La tutela rafforzata dell'investitore nella MIFID II' (2019) 1 Jus civile, 48 ff.

[12] See: MT Paracampo, 'Le società di consulenza finanziaria: una disciplina in itinere' (2009) Soc. , 1459 ff.; M Scolari, 'Il valore della consulenza finanziaria' (2010) 4 Banca finanza, 20 ff.; A Nigro, 'Linee di tendenza delle nuove discipline di trasparenza. Dalla trasparenza alla "consulenza" nell'erogazione del credito?', in Aa.Vv., *Nuove regole per le relazioni tra banche e clienti. Oltre la trasparenza?* (Giappichelli, 2011), 29 ff.; A Mascio, *La consulenza finanziaria. Regolamentazione, modelli di servizio e pianificazione finanziaria* (Egea, 2011); F Civale,

Such a different approach has precise consequences for banks. In order to comply with the new duties, banks are required to adopt a series of organizational measures suitable to ensure consulting and assistance services to customers, such as the development of internal dedicated structures and the training of a qualified staff.

However the described evolution of the concept of transparency seems not to be completed yet. Other new aspects emerge from the European case-law.

2. Transparency and European case-laws in matter of mortgage loans.

In order to understand the last step of evolution of transparency in banking contract, it is interesting to analyse some recent European case-laws in matter of mortgage loan agreements.

One of the he most recent judgments concerns the case of a mortgage loan agreement denominated in a foreign currency (Swiss francs) and repayable in euro (BNP Paribas case)[13]. A contract so contrived implies a risk of exchange connected to the euro currency fluctuation compared with Swiss francs fluctuation. The problem is that such a risk is not explicitly mentioned into the contract.

Beyond the abusiveness issue of the contractual term concerning the risk of exchange, the referring court asks also to clarify whether such a term fulfills the requirement of transparency set by article 4, 2nd paragraph, of the Directive 1993/13/EEC. In order to answer that question, the EU Court of Justice reflects upon the meaning of the requirement of transparency in the light of its case-law.

In general, according to European judges, information provided before the conclusion of a contract is of fundamental importance for a consumer. On the basis of information on contractual terms and consequences of a contract, a customer decides whether she/he wants to be bound to a seller or supplier. Such a principle is constantly statued by the EU Court of Justice. In this mind, it provides that the requirement of transparency cannot be merely reduced to intelligibility of terms and conditions at a formal and grammatical level. On the contrary, the idea of transparency behind the system of protection introduced by the Directive 1993/13/EEC 'must be understand in a broad sense'. This implies that 'an average consumer, who is reasonably well informed and reasonably observant and circumspect, is in a position to understand the specific functioning of that term and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term for his or her financial obligations'[14].

L Zitiello, 'Consulenza e Mifid II: il nuovo assetto a "geometria variabile"' (2015) Dir. banc., 1 ff.; F Di Ciommo, 'La consulenza finanziaria alla luce della MiFID 2', (2017) Riv. trim. dir. econom., 39 ff.; N Michieli, 'La consulenza: le nuove frontiere dei servizi di investimento' (2020) 3 Banca, impresa e società, 521 ff.

[13] Cfr. Judgement of 10 June 2021, *BGL BNP Paribas SA*, C-548/18, EU:C:2019:848.

[14] Cfr. judgement of 21 March 2013, *RWE Vetrieb*, C-92/11, EU:C:2013:180, paragraph 44; judgement of 30 april 2014, *Kàsler*, C-307/13, EU:C:2014:282, paragraph 70; judgement of 21 December 2016, *Gutiérrez Naranjo*, C154-/15, EU:C:2016:980, paragraph 50; judgement of 20 September 2017, *Andriciuc*, C-186/16, EU:C:2017:703 paragraph 48; judgement of 3 October 2019, *Dziubak*, C-260/18, EU:C:2019:819.

In the BNP Paribas case, in particular, the Court of Justice statues that the requirement of transparency cannot be satisfied by communicating information to the consumer, if that information is based on the assumption that the Euro-Swiss francs exchange rate will remain stable. The result is that the consumer is not clearly warned if she/he is exposing her/himself to a certain foreign exchange risk, that may be economically difficult to bear in the event of a depreciation of the currency in which the borrower receives her/his income.

Moreover, in another case concerning a variable-interest-rate mortgage loan (Moral Guasch case)[15], judges provides that national courts have the task to carry out the necessary checks in order to verify whether all the information likely to have bearing on the extent of her/his commitment have been communicated to the consumer. Thereby it is possible to enable her/him to estimate the total cost of the loan.

In conclusion, on the basis of the European case-law, two are the crucial aspects that judges should check with reference to banking contract: on a first level, if contractual terms are drafted in a plain and intelligible language, so as to enable an average consumer to estimate such a cost; on a second level, if the loan agreement mentions the essential information with reference to the nature of the goods or services, which are the subject matter of that agreement. It is evident that both of the described elements play a decisive role in consumer's assessment.

3. A New Design for the Bank-Customer Relationship.

In the light of the described European case-law in matter of mortgage loan, two observations can be developed.

First of all, it is clear that transparency is to be considered in a substantial meaning. Professionals do not simply have to convey complete information to customers, but they have to enable them to understand the specific economic consequences of the obligations they are binding to. Thus, it is not sufficient that banks provide information, on the contrary it is necessary that such an information is provided by-means of suitable tools with reference to both its drafting and its procedure of communication.

Secondly – and consequently – the traditional principle of informed consent should be revised because, on the one hand, it does not ensure the substantial meaning of transparency and, on the other hand, it tends to deprive professionals of responsibility towards customers.

Another aspect is worth to be highlighted. According to the new substantial meaning of transparency, banks should improve contract design techniques. Indeed, the purpose of a substantial transparency in banking contracts may be

[15] Cfr. judgement 3 March 2020, *Moral Guasch*, C-125/2018, EU:C:2020:138, paragraph 56: 'Information that is particularly relevant for the purposes of the assessment to be carried out by the national court in that regard include (i) the fact that essential information relating to the calculation of that rate is easily accessible to anyone intending to take out a mortgage loan, on account of the publication of the method used for calculating that rate, and (ii) the provision of data relating to past fluctuations of the index on the basis of which that rate is calculated'.

achieved also by the development of new drafting practices[16]. In recent times, it is increasing legal professionals' attention for the legal design in general, since several multidisciplinary studies show the importance of visual design in order to prevent future disputes. The more a contract is projected and designed in a simple way and with an appealing layout, the more the document becomes readable and intelligible[17]. Therefore, banks should take into account these studies and develop a more efficient contractual drafting method in order to fulfil the legal transparency standard.

Two are the tools suitable to pursue this goal.

Firstly the graphic drafting of the agreement can be improved in order to facilitate its reading. From this point of view, there are several tecniques to be implemented. Here are the most useful: the font of the contractual text should be drafted with proper dimension; it should be ensured an adequate distance between each line; it should be highlighted, possibly with different colours, the parts which imply the assumption of specific obligations by customers.

Secondly the intelligibility of contractual content can be reached also by-means of the inclusion, within the document, of tables, charts or diagrams, so as to complement the contractual text and to explain it. As psychology studies demonstrate, sometimes an image can be more powerful and efficient to convey a message. Therefore, visual design can be a useful and challenging tool to draw customers' attention to the most relevant aspects of the agreement.

A better-designed contract can certainly contribute to the transparency goal, but it obviously implies an effort of organization for banks. Legal design, indeed, is a multidisciplinary matter, which requires to engage a team-work with lawyers, designers, psychologists and computer programmers. The result can be particularly positive for banks, also from a cost-saving point of view: the more the requirement of transparency is fulfilled, the less is the risk of litigation with customers. However, it is obviously important that such an organizational activity does not end to become a considerable additional charge for customers.

Last but not least, there is something more to consider.

The above-mentioned European case-law also shows that banks' duties of transparency do not imply a passive role for customers. On the contrary, a new

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[16] Studies on contract and legal design are quite recent, but full of interesting implications for the problems of transparency in banking contracts. In general, see the following studies: N Argyres, KJMayer, 'Contract design as a firm capability: an integration of learning and transaction cost perspectives' (2007) 32(4) Academy of management review, 1060-1077; TD Barton, 'Collaborative contracting as preventive/proactive law', in G Berger-Walliser, K Østergaard (eds.), *Proactive law in a business environment* (DJOF Publishing, 2012), 107-127; H Haapio, 'Making contracts work for clients: towards greater clarity and usability', in E Schweighofer et al. (eds.), *Transformation of legal languages. Proceedings of the 15th international legal informatics symposium IRIS 2012* (Österrichische Computer Gesellschaft), 389-396; H Haapio, TD Barton, 'Business-friendly contracting: how semplification and visualization can helo bring it to practice', in K Jacob, D Schindler, R Strathausen (eds.), *LiqquidLegal. Transforming legal into a business savvy, information enabled and performance drivend industry* (Springer International Publishing, 2015), 371-396; S Passera, 'Beyond the wall of text: how information design can make contracts user-friendly', in A Marcus (ed.), *Design, user experience and usability; users and interactions* (Springer International Publishing, 2015), 341-352; A Keating, CB Andersen, 'A grafic contract. Taking visualization in contracting a step further' (2016) 2 (1-2) Journal of strategic contracting and negotiation, 10-18; S Passera, A Smedlund, M Liinasuo, 'Exploring contract visualization: clarification and framing strategies to shape collaborative business relationships' (2016) 2(1-2) Journal of strategic contracting and negotiation, 69 ff.

[17] See in particular S Passera, 'Beyond the wall of text', 341-352; M Hagan, Law by design, <http://www.lawbydesign.co>

tendency is in place in banking contract matter. Customers, especially when they are consumers, are required to actively cooperate with banks for the purpose of transparent terms and conditions. Indeed, some scholars[18] invite to reflect upon the existence of a self-information duty for customers with particular reference to the economic consequences of the banking contract they enter into (for example the method of functioning or of calculation of interests rates, the cost of the banking service, and so on).

The importance of such a new approach to transparency design is demonstrated by the shaping of a different role for consumers within an asymmetric relationship. Think, for instance, to the Italian law that enforces the Directive 2019/770/EU on certain aspects concerning contracts for the supply of digital contente and digital services[19]: this law not only imposes duties of information for professionals, but also provides specific consumer's duties of self-information and of cooperation with professional. In addition think to the Directive 2018/2001/EU (c.d. RED II – Renewable Energy Directive)[20]: as a result of the process of liberalization of the energetic sector, the Directive assigns relevant tasks to consumers, promoting the role of their self-determination whenever they contribute to the production of renewable energy by-means the use of self-energy-supply systems[21].

Even if the above-mentioned laws refer to matters far different from banking contracts, they express a general tendency, at an Euro-unitarian level, to enhance an active role for consumers in asymmetric contracts for the purpose to increase their participation in the design of contractual contents. Such a pro-active role is the natural corollary of the goal pursued by the European laws to enhance banks' consulting activities towards their customers. The more these latters stimulate the demand of information, explanation or advice, the more banks can provide contracts which are really drafted in a transparent way. This means that the link between banks' consulting services

[18] See: MR Zorino, *Il consumAttore* (CLEUP, 2006); C Fuchs, E Prandelli, M Schreier, 'The psychological effects of empowerment strategies on consumers'product demand' (2010) Journal of marketing, 65-79; L Ammannati, 'La disciplina europea sull'efficienza energetica e il modello italiano: discrezionalità e vincoli per gi stati membri', in P Biandrino, M De Focatiis (eds.), *Efficienza energetica ed efficienza del sistema dell'energia: un nuovo modello?* (Giuffrè, 2017), 30 ff.;

[19] Cfr. D.lgs. 4 November 2021, n. 173, which has entered into force since 1 January 2022. For a study of the Directive 2019/770/EU see: C Camardi, 'Prime osservazioni sulla Direttiva (UE) 2019/770 sui contratti per la fornitura di contenuti e servizi digitali. Operazioni di consumo e circolazione di dati personali' (2019) 3 Giust. civ., 499 ff.; K Sein, G Spindler, 'The new directive on contracts for supply of digital content and digital services – Conformity criteria, remedies and modifications', (2019) 3-4 ERCL, 257-279 (part 1) and 365-391 (part 2); J Morais Carvalho, 'Sales of goods and supply digital content and digital services. Overview of Directives 2019/770 and 2019/771' (2019) 8(5), Journal of European consumer and market law, 173 ff.

[20] The RED II Directive is part of a larger package of normative acts, the so-called Winter Package or Clean Energy Package, which was submitted by the Commission on 30th November 2016. See: R Miccù (ed.), *Multilevel regulation and government in energy market. Implementation of the "third package" and promotion of renewable energy* (Jovene, 2016); L Ammannati, 'La disciplina europea sull'efficienza energetica', 30 ff.; F Scalia, 'L'efficienza eneregetica nell'ambito del "Clean energy for all europeans package" e della Strategia energetica nazionale' (2017) 6 Dir. e giurisp. agr. alim. e dell'amb., 1 ff.; L Carbone, G Napolitano, A Zoppini (eds.); *Annuario di diritto dell'energia 2019. La strategia energetica nazionale. Governance e strumenti attuazione (*Il Mulino, 2019); E Cusa: 'Sviluppo sostenibile, cittadinanza attiva e comunità energetiche' (2020) 1 Orizzonti del diritto civile, 78 ff.

[21] According to the European Parliament, ITRE Commission, communication n. 339/2015 of 28.04.201, it is necessary to 'ensure an energy system that should be inclusive and put citizens in the condition to accomplish an active role in the energetic transition process, to produce their own renewable energy and to become efficient from an energetic point of view'.

and consumers' cooperation can realize a virtuous cycle, which is worth to be empowered.

In conclusion, today transparency has become a relational concept, because it is also the result of the cooperation between banks and customers.

Conclusions.

The present study shows that today transparency is no more to be assumed as a mere synonym of the word information. The concept of transparency in banking contract – and, in general, in asymmetric contracts – ought to be considered in a broad sense, with reference to the whole set of fairness rules concerning the relationship between banks and customers.

Without any doubts, the transparency rules have the purpose to overtake informative asymmetry in banking contract and thus allow either to increase customers' self-determination or to ensure market competition. According to this double purpose, bank can not simply convey information to customers, but has to contribute to make them informed and aware of the characteristics and the economic consequences of the specific contract they enter into. In this perspective, transparency should be designed in a substantial way, enhancing the possibility for a reasonably well-informed and observant consumer to understand, on the basis of clear and intelligible criteria, the significant economic consequences and risks for her/his obligations.

In the light of the above-mentioned considerations, the contractual relationship between bank and customer is a crucial factor. As previously said, transparency is the result of an activity of necessary cooperation between contractual parties. Customers are expected to cooperate with the bank to satisfy the goal of transparent terms and conditions by-means of a proactive approach. They have a sort of burden of self-information on the characteristics and the functioning of the banking contract. Whereas banks have to aid them in the construction of a positive contractual relationship.

In order to ensure an active participation of customers to banks' duties of transparency design, two other aspects ought to be taken into consideration. On the one side, banks should improve their internal organization system, so as to be able to provide adequate consulting services. On the other side, they should develop or improve contractual design techniques in order to make documents more understandable and clear.

Finally, it cannot be ignored that at the basis of the described evolution of transparency there is a crucial factor, that is education. The more banking professionals develop their competences in transparency matter, the more they are able to fulfil their informative duties. At the same time, the more customers receive a suitable financial education, the more they are able to contribute to the transparency standard of the agreement they are part of and, thus, take aware decisions[22].

[22] Psychology studies demonstrate that people's decisioning process in economic and financial context is affected by several *bias* and cognitive mistakes. Education to the making of correct and rational decision can be provided by-means of the so-called debiasing practice, which can contribute, together with bank's informative duties, to the empowerment of consumers' self-determination. See the studies of: D

Therefore, the legal system should meet this challenge and contribute to improve the development of policies of banking and financial education for customers, as it is a fundamental tool to ensure either the correct functioning of the banking market or the growth of a climate of trust towards the banking system. In addition, the educational factor is increasingly crucial in connection with the spread of the digital dimension of banking activities (the so-called FinTech)[23], which implies more competences and efforts from both of the contractual parties.

It is clear, indeed, that the complexity of the transparency rules in banking contracts can be handled only with a complex coordination and harmonization of several and different tools suitable to ensure, at different levels, such a standard of transparency. Only if transparency is perceived as a value by banks, it can be realized a virtuous cycle in which customers have trust in the banking system and this latter works in a correct way.

Kahneman, A Tversky, 'Prospect Theory: an analysis of decision under risk', (1979) 47 (2) Econometrica, 263 ff.; H Shefrin, *Beyond greed and fear: understanding behavioural finance and the psichology of intesting, financial management association surveys and synthesis series* (Harvard Business School Press, 2000); T Gilovich, D Griffin, 'Introduction – Heuristics and biases: then and now', in T Gilovich, D Griffin, D Kahneman (eds.), *Heurisics and biases: the psychology of intuitive judgement* (Cambridge University Press, 2002), 1 ff.; J Morton, 'The interdependence of economic and personal finance education,' (2005) 69 (2), Social education, 66 ff.; N Linciano, 'Errori cognitivi e instabilità delle preferenze nelle scelte di investimento dei risparmiatori retail', (2010) Consob – Quad. di finanza, 66; G Tavaglini, B Ronchini, 'Uno studio empirico circa il livello di educazione finanziaria in Italia' (2011) Banca impr. Soc., 49 ff.; M Novarese, 'Educazione finanziaria e regolamentazione: riflessioni di economica cognitiva' (2012) An. giur. ec., 97 ff.; FP Patti, 'L'educazione finanziaria e la direttiva 2014/17/UE (sui contratti di credito ai consumatori relativi ai beni immobili residenziali)' (2015) 6 Contr. e impr., 1425 ff.; U Morera, 'Nuove prospettive per l'educazione finanziaria' (2015) Foro it., 125 ff.; I Sabbatelli, 'Educazione finanziaria e credito responsabile', (2016) 3 Riv. trim. dir. proc. civ., 282 ff.; E Righini, *Educazione finanziaria. Uno strumento per cittadini, risparmiatori e mercati* (FrancoAngeli, 2020).

[23] Cfr. DW Arher, J Barberis, RP Buckley, 'The evolution of Fin Tech: a new post crisis paradigm?' (2016) Georgtown journal of international law, 1271 ff.; R Ferrari, *L'era del fintech: la rivoluzione digitale nei servizi finanziari* (FrancoAngeli, 2016); M Bofondi, G Gobbi, 'The big promise of FinTech', (2017) European economy – Banks, regulation and the real Sector, 2 ff.; S Mocetti, M Pagnini, E Sette, 'Information technology and banking organization' (2017) 51 Journal of financial services research, 313 ff.; G Ferrarini, 'Regulating FinTech: crowfunding and beyond', (2017) European economy – Banks, regulation and the real sector, 2 ff.