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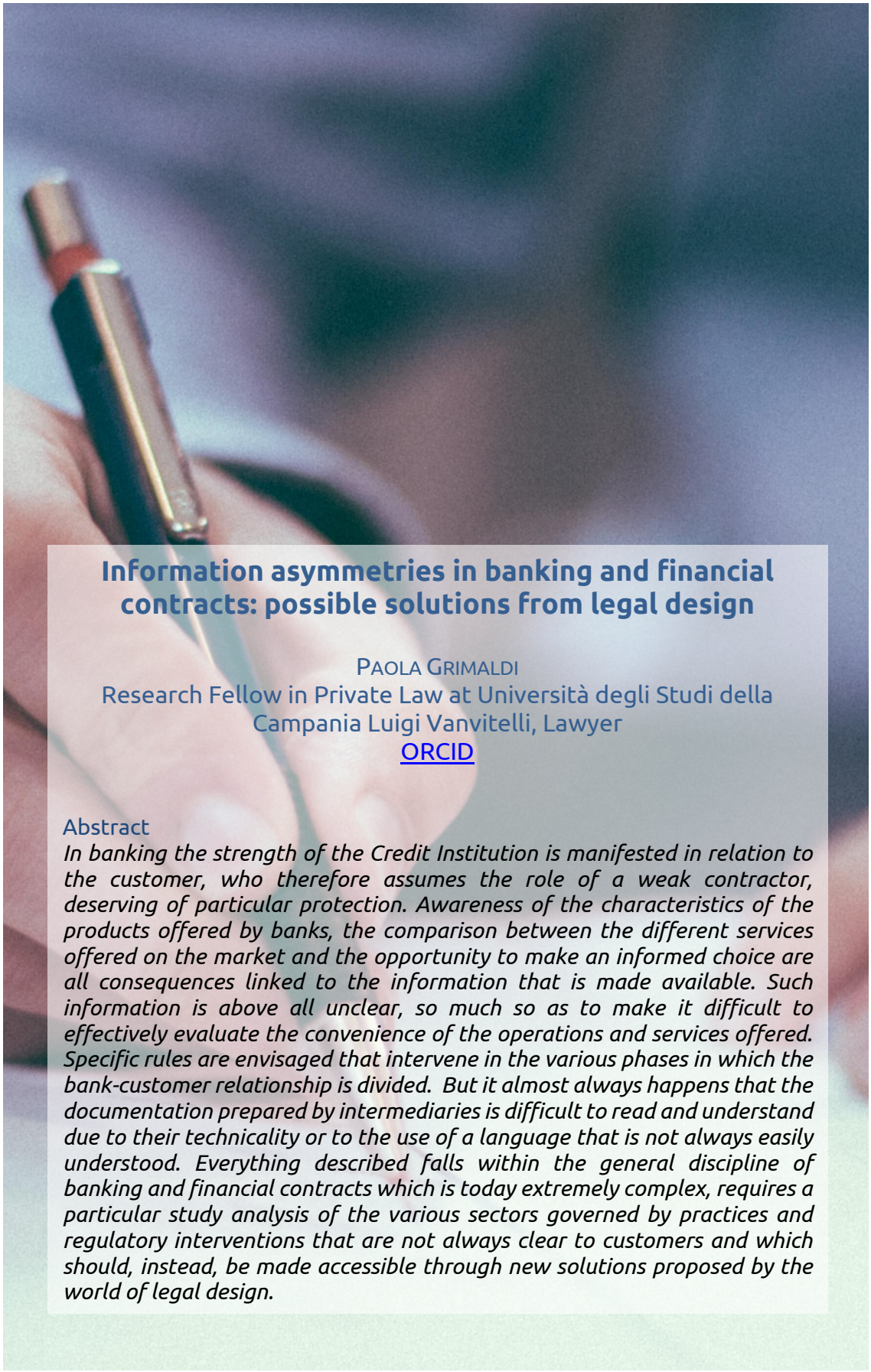

Information asymmetries in banking and financial contracts: possible solutions from legal design

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Abstract

In banking the strength of the Credit Institution is manifested in relation to the customer, who therefore assumes the role of a weak contractor, deserving of particular protection. Awareness of the characteristics of the products offered by banks, the comparison between the different services offered on the market and the opportunity to make an informed choice are all consequences linked to the information that is made available. Such information is above all unclear, so much so as to make it difficult to effectively evaluate the convenience of the operations and services offered. Specific rules are envisaged that intervene in the various phases in which the bank-customer relationship is divided. But it almost always happens that the documentation prepared by intermediaries is difficult to read and understand due to their technicality or to the use of a language that is not always easily understood. Everything described falls within the general discipline of banking and financial contracts which is today extremely complex, requires a particular study analysis of the various sectors governed by practices and regulatory interventions that are not always clear to customers and which should, instead, be made accessible through new solutions proposed by the world of legal design.

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Keywords: banking contracts; bank-customer relationship; information asymmetries; responsibility; legal design.

Summary: Introduction. – 1. Banking transparency and information adequacy. – 2. Legal Design to support information tools aimed at guaranteeing banking transparency. – Conclusions.

Introduction.

Banking contracts are evidently characterized by uniformity from an objective and content point of view[1]. Precisely the uniformity of contractual arrangements in the banking sector[2] it is proof of the regulatory power of the company, in fact exercised by banks in the relationship with customers who are unlikely to be given the opportunity to 'negotiate on the content of the clauses' being able at most to make a 'simple choice' of the services offered[3]; in this sense, customers therefore assume the role of contractors deserving of particular protection in the face of the phenomenon of standardized banking contracts, in the event of the presence of clauses considered to be sources of significant imbalance in contractual positions and failure to comply with the rules of transparency[4].

There is a widespread assertion that the rules of transparency are nothing more than an application of the principle of good faith[5]; after all, good faith has always been used, in a perspective of protection of the weak contractor, both to emphasize the duty of the contractor to make the contractual conditions well known, and to affirm the importance of always offering the possibility of an easy control of the contents and also as a source of the duty of the clare loqui[6].

Remaining in the specific context of banking negotiations, the application of the principle of good faith emerges with regard to the protection obligations which, in the wake of the German example on the subject[7], in cases of false information or a tacit information contract'[8] make it possible to identify a contractual basis for the liability of the bank towards the customer and qualified third parties damaged by the lack of information, regardless of the

[1] E Capobianco, 'Profili generali della contrattazione bancaria', in E. Capobianco (ed.), *I contratti bancari* (Utet Giuridica, 2016), 13.
[2] On the unilateral banking contractual arrangement, reference is made, for a general study, also to F Longobucco, 'La regola contrattuale tra testo e controllo', in P. Perlingieri (ed.), *Sulle tecniche di redazione normativa nel sistema democratico* (ESI, 2010), 225.
[3] N Irti, 'L'ordine giuridico del mercato' (2003) PeM 97.
[4] For everyone V Roppo, *Contratti standard. Autonomia e controlli nella disciplina delle attività negoziali di impresa* (1st edn, Giuffrè 1975)184.
[5] Tra gli altri, A Di Majo, 'La correttezza nell'attività di intermediazione mobiliare' (1993) Banca borsa 294; E Minervini, 'La trasparenza delle condizioni contrattuali (contratti bancari e contratti con i consumatori)' (1997) Banca borsa 96.
[6] C Grassetti, *L'interpretazione del negozio giuridico con particolare riguardo ai contratti* (Cedam, 1983) 217.
[7] Reference is made to the identification by the German authors of a *Treupflicht* charged to the credit institution, i.e. an obligation of loyalty and collaboration that allows the bank to be held liable in cases of so-called *Kundigung << zur Unzeit >>* that is the prejudicial withdrawal to the accredited entrepreneur. For a precise reference to German doctrine and jurisprudence on this point, si veda G Portale, 'Tra responsabilità della banca e <<ricommercializzazione>> del diritto commerciale', (1981) Jus, 141.
[8] ibid 144.

specific provision of an information contract or an ancillary service. A dynamic conception of the banking contract therefore follows[9], which necessarily takes into account all the peculiarities of the bargaining, accompanied by the obligations of information and protection in every phase, starting from the one that precedes it to the one that follows its conclusion and which is filled with a series of specific obligations violation of which can only give rise to contractual liability of the bank towards the contracting customer and qualified third parties in relationship with the same[10].

The weak position of the customer is aggravated when his generic qualification as a customer is specified in that of consumer of the banking or financial service to be understood, according to the reference discipline, as "the person who acts for purposes unrelated to the business entrepreneurial or professional activity possibly carried out "; so much so that today we talk about "consumer banking contracts" [11] to apply, in conjunction, both the general banking regulations and the specific one for consumer protection.

In particular, faced with the changes brought about by the regulation of consumer contracts, the need for banks to take into account the quality of the counterparty at the time of conclusion of the contract and, consequently, the need to prepare contractual schemes immediately arose. different depending on whether the customer holds the quality of consumer or not; on this point, ABI has left the individual associates the choice whether to operate with a double contractual form (for the various cases of consumer counterpart or non-consumer counterpart), or with a single standardized form 'to indifferent subject' [12] (which therefore extends to each type of customer the most favorable legislation dictated for contracts with consumers) [13] . This last solution seemed to be the preferable one first of all to avoid the problem of the actual verification of the quality of consumer for the contractor and then for the evident simplification in terms of preliminary work.

Subsequently, however, with the entry into force of the Instructions of the Bank of Italy on the subject of banking and financial transparency, in application of the principles of proportionality and non-discrimination, there was a reversal of the trend in the sense that the obligations of banking institutions in relation to the different characteristics of the services offered to the various recipients, divided into categories.

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[9] The general regulation on banking contracts is represented by Title VI of the Consolidated Law on Banking rubricated <<*Trasparenza delle condizioni contrattuali e dei rapporti coi clienti*>> whose purpose is precisely to ensure the customer clear and comprehensive information on the conditions and characteristics of the transactions and services offered by the bank as well as to improve the efficiency and competitiveness of the financial system, through the comparability of the various offers available on the market. For a detailed analysis on this point, see A Nervi, 'La trasparenza bancaria', in A. Urbani (ed.) *L'attività delle banche* (Cedam, 2010), 34.

[10] For an overview of the various cases in which the protection obligations have been implemented, see *ex plurimis* Cass. 15 aprile 1992, n. 4571 in Giur. it., an. (1994) 1089; Cass. 13 gennaio 1993, 343 su https://www.contenzioso-bancario.it/documento/it/documentazione/stato/cassazione.civile/1993/343/rv48024701;
Cass. January 8 1997, 72 in Mass. Giur. it. (1997); Cass March 30 2005, 6732 (2006) Banca borsa, 699; Cass November 10 2010, 22819 (2010) Rep. Foro it., 498; in all the judgments indicated it was deemed necessary to judge the bank's behavior in a more rigorous and specific way, requiring a high degree of diligence necessary to avoid the occurrence of events harmful to customers.

[11] V Buonocore, 'Contrattazione d'impresa e nuove categorie contrattuali' (2000) Quad. dir. comm. 115.

[12] G Carriero, 'Trasparenza delle condizioni contrattuali' (2003) Dir banca e mercato fin. 4.

[13] Circolare ABI 23 febbraio 1996, n. 17 che può leggersi in Banca borsa (1996) 585.

1. Banking transparency and information adequacy.

Chapter I of Title VI (Articles 115 and following) of the Consolidated Banking Act is entitled "Transparency of contractual conditions and customer relations"[14].

This discipline is an extremely articulated, fragmented, detailed and constantly evolving regulatory complex.

The matter of banking transparency is made up of the complex of active and passive contractual operations between the intermediary and the customer and should, therefore, always aim for clarity, comprehensibility, correctness and truthfulness of the information, pre and post negotiation, in in order to allow the customer, potential or current, to easily grasp the risk profiles by limiting the error as much as possible and thus allowing him to make the most appropriate choice for his own interests.

Of great importance in this context is Article 116 of the Consolidated Law on Banking. which governs the advertising of banks and financial intermediaries, referring to the entire pre-negotiation, promotion and information phase; also dealing with the form and methods of advertising communication. The advertising discipline, it is well understood, is of fundamental importance because it affects the willful formation of the contractor and, consequently, on the contractual regulation, and therefore an information or advertising defect can generate vices of will[15].

However, the pre-contractual information obligations are distinguished according to whether they are aimed at consumers or professionals, specifying them for each of the two areas.

In general, therefore, banking bargaining, especially when it is aimed at consumers, is governed by a general principle of transparency based on necessary information tools and information mechanisms aimed at ensuring that the customer has effectively understood the content of the rights and duties deriving from it. from the contractual relationship, in view of a free and informed consent[16].

Specifically, it would seem that, in the event that the banking negotiation takes place with consumers, the legislator has provided for a particular protection ratio, wanting that they are put in a position to be fully aware of the contractual conditions and the consequences that derive from them. , and who not only know but above all adequately understand the rights and obligations

[14] With reference to contract law, at first the term "transparency" indicated the use by banks, in relations with customers, of clauses containing the reference to banking practices (the so-called uniform banking rules) or even of conditions general contract pursuant to articles 1341 and 1342 of the civil code. Subsequently, a broader notion of "transparency" was established, concerning the problems of the information asymmetry between the professional / dominant party and the consumer / weak party of the relationship, the clarity of the contractual clauses, the inclusion of unfair clauses in contracts of consumers, of the use of potentially unfair terms in the contract, but also of the correctness in the phase of negotiations and the conclusion of the contract that is not already prepared.

[15] D Valentino, *Obblighi di informazione, contenuto e forma negoziale*, (Esi 1999) 225.

[16] Cass. May 7 1992, 5421: 'The so-called the diligence of the Bonus argentarius qualifies the highest degree of prudence and attention that the professional connotation of the agent requires. It must be applied not only with reference to banking contracts in the strict sense but also to any type of deed or operation put in place, in the exercise of its business, by the bank which must provide any suitable means to avoid the occurrence of events prejudicial in any case foreseeable' in R Caratozzolo, *La responsabilità delle banche per la violazione degli obblighi contrattuali* (Giuffré, 2007), 12.

deriving from the contract[17]; ' another is to make it clear to those who (...) already possess technical skills on the subject (...). Another thing is to make it clear to those without such a wealth of knowledge '[18]. In fact, bank contracts often contain agreements that are not immediately understandable for subjects without legal-economic skills, placing the consumer in a position of psychological subjection and obvious inferiority compared to the professional operators with whom he enters into a relationship, from the point of view of both competences. technique, both of the information that can be acquired, both of the choices, and of the control and contractual power (...)'[19].

In this perspective, the compensatory remedy in the case of the proposal of unintelligible or illegible clauses that do not allow the consumer to adequately know the rights and obligations deriving from the contract is absolutely undisputed; but even excessively detailed information certainly does not constitute a fulfillment of the information obligations; on the contrary, it could be said that indeed they represent a non-fulfillment of the same, leading to confusion the consumer without allowing him to make an informed choice.

Think of the bank loan (mortgage or land) which obviously represents an extremely complex contract. It is made up of clauses, quibbles and terms that are often incomprehensible to those unfamiliar with banking techniques. The same legislator, Italian and European[20], and the competent Credit Authoritie[21]

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[17] E Brodi, 'Dal dovere di far conoscere al dovere di far comprendere: l'evoluzione del principio di trasparenza nei rapporti tra impresa e consumatori' (2011) Banca borsa 246.

[18] P Sirena, D Farace, 'I contratti bancari del consumatore', in E. Capobianco (ed.), *I contratti bancari* (Utet Giuridica, 2016), 288.

[19] G Alpa, P Gaggero, 'Profili generali dei contratti del consumatore per la fruizione di servizi bancari, finanziari, di investimento ed assicurativi', in G. Alpa (ed.), *I contratti del consumatore* (Giuffrè 2014), 827.

[20] The DPR June 27, 1985 n. 350 represents the start of the transformation process of the banking system by implementing the first Community directive on credit in the Italian system: directive 77/80 of 12 December 1977. The novelty of Presidential Decree 350/1985 is given by the right to enter the market banking to any person who has the qualities required by law to be able to carry out credit activities. The transformation process continues with the law of 30 July 1990 n. 218 which sees the transformation of the public bank into a publicly controlled joint stock company, ceasing to be a public economic entity. With the legislative decree 20 November 1990 n. 356, public credit institutions will be allowed to extend their operations to the entire area of medium and long-term credit. Another phase of change is marked by d. lgs. December 14, 1992 n. 481 which gave access to the system, alongside the multifunctional bank the so-called "Universal bank": the distinction between companies and credit institutions is definitively abolished. In the nineties the moment came to implement the second directive 89/646 / EEC and this took place through the Community law 142/1992 which gave the Government two powers: one to transpose the entire second directive into domestic law, the another to reorganize the whole banking discipline in a single text. The new organic body of rules will be able to bring together and coordinate some of the most recent legislative measures such as Legislative Decree 481/1992 on the recognition of the "universal bank", Legislative Decree no. lgs. 356/1990 on banking groups, the rules on the transparency of banking operations pursuant to law 154/1992 and those on consumer credit pursuant to law 142/1992: with d. lgs. 1 September 1993 n. 385, the Consolidated Law on banking and credit is thus issued.

[21]The Consolidated Law on Banking often refers to the regulatory power of the so-called Credit Authorities. Thus we find art. 25 and 26 which refer to the Ministry of Economy and Finance the task of regulating the criteria and requirements of integrity and professionalism of the representatives of banks and financial intermediaries (articles 108 and 109), as well as determining the criteria and limits of the interventions of the Interbank guarantee fund (art. 45 c. 2). There are also numerous delegations to the ICRC and to the Bank of Italy and CONSOB. As for the ICRC regulatory power, of all, the ICRC resolution of 9 February 2000 undoubtedly deserves particular attention, the regulatory power of which finds its regulatory source in art 120 c. 2 of the Consolidated Law on Banking as amended by D.L. 342/1999 art. 25, which granted the ICRC the power to regulate the method of calculating interest on interest; as well as the ICRC resolution of 4 March 2003 on the subject of transparency and discipline of contractual conditions and services and relating to Bank of Italy instructions; and, moreover, the CICR decree of 3 February 2011 on consumer credit which implemented Chapter II of Title VI of the Consolidated Law on Banking.

have spoken several times on the matter. There is a need to ensure the transparency of the conditions applied by the banks because very often the relationship between the credit institution and customers is unbalanced to the detriment of the latter in so-called conditions information asymmetry.

2. Legal Design to support information tools aimed at guaranteeing banking transparency.

As already stated, very often, if not as a rule, banking contracts in general and specifically individual clauses of the same or various information documents, adopted by the sector, are not easily accessible to the end user.

The need therefore emerges to renew the existing methods of drafting contracts in the sector, given that it is necessary to intervene on how these are visually presented to the reader; and the major benefits of this change on the editorial level would mainly concern the weaker parties of the banking contracts, such as customers.

On this point, in fact, some studies have focused precisely on contract visualization[22] as a tool to improve understanding of contracts.

A solution that can reconcile the need for clarity for the customer on the one hand and avoid liability of the banks for inadequate information on the other, could derive from the multidisciplinary tool of Legal design[23] which reduces the complexity of legal communication, making it understandable and immediately useful for the final interlocutor, who does not have to worry about decoding it because the information will be accessible to as many users as possible (even and above all without legal skills), easily usable and susceptible to applications that were originally foreign to it (think digital ones); on the lexical level, in fact, Legal Design requires to go beyond the technical language (and at times also technical) to move towards plain language or even to move towards images or coding; on a structural level, Legal Design is above all a way of structuring information according to a very simple process which consists in removing the complexity of the user's final experience to provide what they really need: the answer to a very specific question; on the formal level, Legal Design is projected to present the legal content in a different form from the one we are normally used to.

The structure and visualization of information should play a key role in supporting understanding of the text[24] also through the adoption of concept maps, videos, icons, texts with images or other visual means.

Therefore, the form of the documents and contracts of the banking sector

[22] S Passera, E Haapio, M Curtotti, 'Rendere visibile il significato dei contratti: automatizzare la visualizzazione dei contratti', in E. Schweighofer (ed.), *Trasparenza. Atti del 17° Simposio internazionale di Informatica Giuridica IRIS 2014* (OCG, 2014), 443.

[23] For an overview on the subject cfr L Aulino, 'Consenso al trattamento dei dati e carenza di consapevolezza: il legal design come rimedio ex ante', Dir. Inform. (2020) 303.

[24] As described, also taking into account the theory of cognitive load ("Cognitive Load Theory"), developed in 1991 by the psychologist John Sweller, which was defined as "the load imposed on working memory by the information presented". This theory postulates that learning occurs best when information is presented taking into account human cognitive structures and thus minimizing their working memory load.

should be completely rethought in order to allow the customer to facilitate their understanding and compilation, to easily identify the key points of the contract, to identify entire parts or individual clauses that are not properly adequate in terms of disclosure.

Conclusions.

The solution of the *legal design* tool, proposed in this paper, in order to give substance to the evident need to make clear all the documentation of the banking sector to protect the customer in the face of frequent situations of information asymmetry, constitutes full implementation of the examined banking legislation. in terms of transparency and clarity of the contractual texts and certainly represents an effective response to the need to reduce the dispute between users and banking institutions which, in most cases, are to be linked to misunderstandings, incorrect interpretations and above all to the lack of description clear, understandable and accurate in the context of the contract or reference document.

As has already been pointed out above, the adequacy and asymmetry of information in the bank-customer relationship has been discussed for years; but, despite this, no effective solution has been undertaken and / or only tested to date by the credit institutions.

Today we talk about legal design; the tool is clear; for the reasons set out, the solution offered by the same could be effective in solving the now traditional dyscrasia in the system of relations between bank and customer and, in the opinion of the writer if, despite everything, banking and financial intermediation institutions were to continue to pursue, in a conscious, rigid and even a little apathetic way, the path of the information inadequacy of one's information tools, a new legislative provision on the subject would appear appropriate that could further strengthen the compensation remedy to protect the customer who finds himself in situations of risk or in conditions of error that could have been avoided by offering the same a clear and understandable view of the document, perhaps redesigned according to the innovative standards of visual law offered by legal design.