10. Financial services and regulation

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1 INTRODUCTION

In English law the most significant tort in the financial services area is that created by section 138D of the Financial Services and Markets Act 2000 (FSMA). This is a tort which incorporates a significant amount of European Union (EU) law into English law. The result is an important body of law which grants significant protection to purchasers of financial products. Given the importance of this topic as a matter of consumer protection and the fact that some parts of the law in this area are not the product of EU requirements, it seems highly unlikely that Brexit will result in major changes in the law. Indeed, the role of EU law has rarely been mentioned in financial services litigation in the UK. In spite of the June 2016 Brexit vote, the Financial Conduct Authority (FCA) is currently in the process of implementing the Markets in Financial Instruments Directive II (MiFID II) which is scheduled to be brought into operation in 2018.

Section 138D is in the following terms:

1 This version of the legislation is derived from amendments introduced by the Financial Services Act 2012 when the functions of the Financial Services Authority (FSA) were split between new bodies (the Prudential Regulation Authority and the Financial Conduct Authority). Prior to the amendments, the governing provision, relating to the FSA’s Handbook had been s 150, FSMA. Section 150 was repealed and replaced by s 138D. Prior to the FSMA, the governing provision was s 62 of the Financial Services Act 1986. Under the 1986 Act, the actionable rules were those laid down by a number of Self Regulating Organisations.


138D Actions for damages

(1) A rule made by the PRA (the Prudential Regulation Authority) may provide that contravention of the rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

(2) A contravention by an authorised person of a rule made by the FCA (the Financial Conduct Authority) is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

(3) If rules made by the FCA so provide, subsection (2) does not apply to a contravention of a specified provision of the rules.

(4) In prescribed cases, a contravention of a rule which by virtue of subsection (1) or (2) would be actionable at the suit of a private person is actionable at the suit of a person who is not a private person, subject to the defences and other incidents applying to actions for breach of statutory duty.

(5) In subsections (1), (2) and (3) ‘rule’ does not include –
   (za) rules under section 64A (rules of conduct);
   (a) Part 6 rules;
   (b) rules under section 137O (threshold condition code);
   (c) rules under section 192J (provision of information by parent undertakings);
   (d) a rule requiring an authorised person to have or maintain financial resources.

(6) ‘Private person’ has such meaning as may be prescribed.4

Section 138D therefore makes actionable as a species of the tort of breach of statutory duty breaches of some of the rules5 laid down in the

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4 Defined by the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2001/2256) as: ‘any individual, except when acting in the course of carrying on a regulated activity; and any person who is not an individual, except when acting in the course of carrying on business of any kind; but does not include a government, a local authority or an international organisation’. See *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB) (a private company claiming mis-selling of interest rate swaps by a bank held to be excluded from the protection of the section). There is ongoing litigation on whether a company is acting in the course of its business when entering into transactions such as swaps which are not part of its core business. See *MTR Bailey Trading Limited v Barclays Bank plc* [2015] EWCA Civ 667 and *Titan Steel Wheels Limited v Royal Bank of Scotland plc* [2010] EWHC 211 (Comm); [2010] 2 Lloyd’s Rep 92.

5 But not other content of the *Handbook*. For example, guidance provisions (those marked G) are not actionable under the section.
handbooks issued by the bodies which regulate the industry: the Prudential Regulation Authority (PRA) and the FCA. In practice, the bulk of the PRA's rulebook is not actionable. The position concerning the FCA's Handbook is more complex. Significant areas of the FCA's Handbook are not classified as rules and some rules are excluded from actionability under section 138D(3). Nonetheless, although the Handbook contains a considerable number of actionable rules which are not derived from EU legislation, significant areas of EU legislation on the provision of financial services are rendered actionable in tort in the UK as a result of incorporation in the FCA's Handbook.

It should be noted that many of these rules lay down procedures, such as record-keeping and disclosure requirements, with which an authorised person must comply. Breach of these rules has the capacity to result in the regulator imposing a penalty even though no loss has been caused to clients. This chapter concentrates on those rules which are most likely to result in losses suffered by a client and thus to form the basis of a tort claim under section 138D. It is not a comprehensive survey of all the provisions of the FCA Handbook which are derived from EU law.

2 IMPLEMENTING DIRECTIVES

The most significant EU legislation on financial services implemented in this way is the Markets in Financial Instruments Directive (MiFID) and the MiFID implementing Directive; the Undertakings for Collective Investment in Transferable Securities Directive (UCITS) and the

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6 There are also evidential and guidance provisions. These are not actionable in tort.
7 In particular, the Principles for Businesses (which are actually high level rules) laid down in PRIN 2.1 of the FCA Handbook, accessed 29 May 2017 at https://www.handbook.fca.org.uk/handbook.
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UCITS implementing Directive;\(^{11}\) the Alternative Investment Fund Managers Directive (AIMFD);\(^{12}\) the Solvency II Directive;\(^{13}\) the Insurance Mediation Directive;\(^{14}\) the Distance Marketing Directive;\(^{15}\) the E-Commerce Directive;\(^{16}\) the Mortgage Credit Directive\(^{17}\) and the Consumer Credit Directive.\(^{18}\)

The contexts in which these measures can give rise to damages claims in tort are now considered.

### 2.1 Markets in Financial Instruments Directive\(^{19}\) and the MiFID Implementing Directive\(^{20}\)

The MiFID is the directive which, to date, is of the greatest importance in tort litigation under section 138D in the UK. It is the modern basis of actions for damages in areas of mis-selling of financial products, such as pensions,\(^{21}\) hedges and swaps.\(^{22}\) It now provides the consumer facing rules laid down in the ‘Conduct of Business Sourcebook’ (COBS) section of the FCA’s *Handbook*. A large number of the rules contained in the COBS are derived from MiFID and the MiFID Implementing Directive. The COBS governs a wide range of investment business including life

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insurance. The Markets in Financial Instruments Directive business, which covers the narrower area of the provision of investment services within the European Economic Area, falls within the COBS. The most important areas covered by the MiFID are the provision of investment advice, execution of orders on behalf of clients, management of portfolios and dealing with investments on a firm’s own account. Although it is established that the mode of enforcement of these directives is a matter for individual states, the rules which they lay down establish a common market for the provision of financial services which aims to provide an equivalent level of protection for purchasers throughout the EU. The COBS implements this policy in the UK.

The COBS enacts a wide range of MiFID-derived obligations which are capable of giving rise to a damages remedy under section 138D. These range across such matters as ensuring that recommendations of investments are ‘suitable’ for the client, acting in the client’s best interests, communications with clients, financial promotions and record-keeping.

23 COBS 1.1.1R.
24 The 28 EU members plus Iceland, Norway and Liechtenstein.
25 For the full list of activities covered, see MiFID (n 19), Annex I, s A.
26 In Case C-604/11 Genil 48 SL and Comercial Hostelera de Grandes Vinos SL v Bankinter SA and Banco Bilbao Vizcaya Argentaria SA ECLI: EU:C:2013:344, the European Court of Justice held that: ‘It is for the internal legal order of each Member State to determine the contractual consequences where an investment firm offering an investment service fails to comply with the assessment requirements laid down in Article 19(4) and (5)’ of the MiFID. Art 51 of the MiFID requires the imposition of administrative measures or sanctions against the parties responsible for non-compliance with the provisions of that directive. However, the issue of compensation is left to the internal legal order of the member states. Lord Hodge in Grant Estates Ltd v Royal Bank of Scotland Plc [2012] CSOH 133, paras 33–48 held that the MiFID places no obligation on a domestic system to give a right of compensation.
28 COBS 2.1R, Art 19(1) of the MiFID and Art 14(1)(a) and (b) of the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive, 2009/65/EC.
29 COBS 2.2.1R, Art 19(3) of the MiFID. Rubenstein v HSBC Bank PLC [2012] EWCA Civ 1184.
30 COBS 4.3R, Art 19(2) of the MiFID and Art 77 of the UCITS Directive.
31 COBS 3.8R (this relates to the categorisation of clients, fourth paragraph of sII.2 of annex II to the MiFID and Art 51(3) of the MiFID implementing Directive. Rubenstein v HSBC Bank PLC [2012] EWCA Civ 1184.
2.1.1 Best interests
Conduct of Business Sourcebook 2.1 states the client’s best interests rule. The Conduct of Business Sourcebook 2.1.1R(1), breach of which is actionable in tort, states in relation to ‘designated investment business’ simply that: ‘A firm must act honestly, fairly and professionally in accordance with the best interests of its client.’ This is obviously a wide obligation. However, it creates a very high threshold of dishonesty before a breach can be established. In *MTR Bailey Trading Limited v Barclays Bank plc* it was invoked to support an allegation that a bank was liable to a company under section 138D for requiring a customer to transfer a disadvantageous swaps contract to the company. At first instance, HH Judge Keyser QC had held that a mere mistake by a bank as to its contractual rights under an agreement would not constitute a lack of professionalism, honesty and fairness such as is required to establish a breach of this rule. However, the Court of Appeal subsequently permitted the claimant to appeal this decision.

2.1.2 Suitability
The most significant of these rights is that established by rules contained within chapter 9.2 of the COBS. This applies to a firm which makes a personal recommendation in relation to a designated investment and to a firm which manages investments. Conduct of Business Sourcebook 9.2 (Assessing suitability: The obligations) provides at COBS 9.2.1R:

1. A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.
2. When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client’s:

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32 Implementing Art 19(1) of the MiFID and Art 14(1)(a) and (b) of the UCITS Directive.
33 [2015] EWCA Civ 667.
34 The claim was held by the Court of Appeal to be arguable.
35 The company also argued that it was a ‘private person’ for these purposes as it was no part of its business to enter into contracts for hedging products. This issue is under appeal at the time of writing.
38 COBS 9.1.1R.
39 COBS 9.1.3R.
40 Implementing Art 19(4) of the MiFID, and Art 12(2) of the Insurance Mediation Directive, 2002/92/EC.
(a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;
(b) financial situation; and
(c) investment objectives;
so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.

The suitability of a product for a customer can only be judged in the light of a fact-find relating to that customer. Rule 9.2.2R\(^{41}\) makes it a requirement that such a fact find be conducted.

(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent\(^{42}\) of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:

(a) meets his investment objectives;
(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

(2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

(3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

Conduct of Business Sourcebook 9.2.3R\(^{43}\) further provides that:

The information regarding a client’s knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:

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\(^{41}\) Implementing Arts 35(1), (3) and (4) of the MiFID implementing Directive.

\(^{42}\) Excessive leverage may render a loan transaction ‘unsuitable’: *Zaki v Credit Suisse (UK) Ltd* [2013] EWCA Civ 14, para 89.

\(^{43}\) Implementing Art 37(1) of the MiFID implementing Directive.
(1) the types of service, transaction and designated investment with which
the client is familiar;
(2) the nature, volume, frequency of the client’s transactions in designated
investments and the period over which they have been carried out;
(3) the level of education, profession or relevant former profession of the
client.

These provisions create rules establishing a basic obligation not to
mis-sell a financial product. Section 138D adds to this, to provide a
tortious damages remedy when such a product has been mis-sold to a
private customer. In tortious terms, this is a strict liability statutory tort
which gives recovery for pure economic loss. The references to the
incidents of the tort of breach of statutory duty effectively ensure that
the liability is classified as tortious in English law even though many of
the situations giving rise to it arise in a contractual context. The tortious
characteristic may be of significance in circumstances in which third
parties, such as beneficiaries of pensions, are interested in a financial
product or where recommendations have been made outside of a
contractual relationship with a view to achieving a sale.

Viewed as a piece of consumer protection legislation, this tort is a
close relation to the implied terms of quality incorporated by statute into
a sale of goods contract. Given the sums of money which may be
involved in the sale of investments, pensions and insurance, it is not
surprising that claims under this provision are now a familiar part of
modern tort law. In practice, the reported litigation in this area has
concerned both the classification of customers (and thus the level of
advice they are entitled to) and the suitability of the product sold for the
particular customer.

44 The qualification of reasonableness relates to the steps to be taken by
the firm, not to the suitability of the recommendation. In *Zaki v Credit Suisse (UK)
Ltd* [2013] EWCA Civ 14, para 59, it was held that a defendant would not be in
breach of the ‘suitability’ requirement if the product sold was ‘suitable’, even if
there had been failures in the procedure which had been used prior to the sale.

45 See further Keith Stanton, ‘Legislating for economic loss’ in T.T. Arvind

46 *Genil* (n 26).

47 See, for example, *Zaki v Credit Suisse (UK) Ltd* [2013] EWCA Civ 14;
[2013] 2 All ER (Comm) 1159 in which it is stated (at para 27) that the products
were purchased ‘in part for succession purposes’.

48 Ss 9 and 10 of the Consumer Rights Act 2015.
The leading case of *Rubenstein v HSBC Bank plc*[^49] is an example of liability based (*inter alia*) on a recommendation of an unsuitable investment given the client’s attitude to risk[^50] and of a failure by the adviser to conduct a fact find. The claimant had wanted an investment equivalent to cash as the money being invested was the proceeds of a house sale that was intended to be used to purchase a new property. The product sold in fact exposed the claimant to market movements and proved illiquid for a period during the 2008 crisis before it was finally sold at a loss. The older case of *Seymour v Ockwell*[^51] is a similar example, decided under section 62 of the FSA 1986 of a high-risk and unsuitable product being recommended to customers who wanted no or minimal risk. In both cases, liability was established both at common law in negligence and under the statute[^52].

2.1.3 Appropriateness

Whereas COBS 9 creates the suitability duty when financial products have been recommended or where clients’ investments are being managed, COBS 10, which is also derived from the MiFID[^53], creates a different level of duties when ‘complex’ financial products (such as derivatives, options or swaps) have been supplied to a person who has received no such recommendation or management services. In such a case, the firm conducting the trade is required to consider whether the purchase is ‘appropriate’ for the client[^54] and to warn if they believe that this is not the case[^55]. Breach of this obligation is actionable under section 138D if the claimant is a ‘private person’. The ‘appropriate’ criterion requires the firm merely to inquire as to the client’s experience and


[^50]: It was a ‘packaged’ product and was not the most suitable one available to satisfy the client’s needs.


[^52]: Cf *O’Hare v Coutts* [2016] EWHC 2224 (QB) in which it was held that the product sold was ‘suitable’ for a high net worth client who was prepared to take risks whilst seeking a high rate of return and who had been counselled as to the risks. See also *Al Sulaiman v Credit Suisse (Europe) Ltd* [2013] EWHC 400 (Comm).

[^53]: Art 19(5) of the MiFID and Art 36 of the MiFID implementing Directive.

[^54]: COBS 10.2.1R. For exceptions to this see COBS 10.4.

[^55]: COBS 10.3.1R. If the required information is not supplied the client must be warned that a decision as to appropriateness will not be possible COBS 10.3.2R.
knowledge of the form of investment being purchased.\textsuperscript{56} It is thus significantly less demanding than the ‘know your customer’ obligation imposed by COBS 9 in the case of advised sales as there is no need to inquire into the client’s means or investment objectives.

2.1.4 Best execution

A further related MiFID-derived rule\textsuperscript{57} which has the potential of giving rise to a tort claim is found in COBS 11. This relates to ‘execution only’ dealings; that is, those where the decision to trade and what to trade is made by the client in the absence of any advice. The core obligation, the ‘best execution’ rule, owed by a trader in such a case is contained in COBS 11.2.1R. It is that: ‘A firm must take all reasonable steps to obtain, when executing orders, the best possible result for its clients taking into account the execution factors.’ It is clearly established that: ‘The duty of best execution has to do with the mechanics of acquiring or selling securities, not the merits or otherwise of the trade.’\textsuperscript{58}

Conduct of Business Sourcebook 11.2.6R details the criteria which are relevant to determining whether the ‘best execution’ standard has been achieved. They are: the characteristics of the client including the categorisation of the client as retail or professional; the characteristics of the client order; the characteristics of financial instruments that are the subject of that order and the characteristics of the execution venues to which that order can be directed. Conduct of Business Sourcebook 11.2.7R makes explicit provision that it is the total cost of a deal to a client (that is, the price of the investment and the costs of executing the deal) which are to be considered in relation to the best execution criterion.

2.1.5 Information disclosure

The MiFID is also the basis for a number of FCA Handbook rules which deal with the disclosure of information to a client, breach of which is actionable under section 138D.

Conduct of Business Sourcebook 2.2.1R\textsuperscript{59} deals with the information which is to be provided to a client before services are provided. It is that:

\begin{itemize}
\item \textsuperscript{56} COBS 10.2.2R.
\item \textsuperscript{57} Implementing Art 21(1) of the MiFID and Art 25(2) first sentence of the UCITS implementing Directive.
\item \textsuperscript{58} \textit{Blair J. Första AP-fonden v Bank of New York Mellon SA/NV} [2013] EWHC 3127 (Comm) para 274.
\item \textsuperscript{59} Implementing Article 19(3) of MiFID.
\end{itemize}
(1) A firm must provide appropriate information in a comprehensible form to a client about:
(a) the firm and its services;
(b) designated investments and proposed investment strategies; including appropriate guidance on and warnings of the risks associated with investments in those designated investments or in respect of particular investment strategies;
(c) execution venues; and
(d) costs and associated charges;
so that the client is reasonably able to understand the nature and risks of the service and of the specific type of designated investment that is being offered and, consequently, to take investment decisions on an informed basis.

(2) That information may be provided in a standardised format.

Once the client relationship is ongoing, more detailed rules apply. Conduct of Business Sourcebook 4.2.1R\textsuperscript{60} lays down the ‘fair, clear and not misleading’ rule:

(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading.

(2) This rule applies in relation to:
(a) a communication by the firm to a client in relation to designated investment business other than a third party prospectus;
(b) a financial promotion communicated by the firm that is not:
(i) an excluded communication;
(ii) a non-retail communication;
(iii) a third party prospectus; and
(c) a financial promotion approved by the firm.

This rule does more than simply require provision of information and warnings as to risks. The requirement to ensure that information is not ‘misleading’ effectively creates a statutory misrepresentation remedy. In \textit{Rubenstein v HSBC Bank PLC}\textsuperscript{61} it was held that advice that an investment was as ‘safe as cash’ when it was not was actionable.\textsuperscript{62} An equivalent provision in Insurance Conduct of Business Rules (ICOB)\textsuperscript{63}

\textsuperscript{60} Implementing Article 19(2) of MiFID, Recital 52 to the MiFID implementing Directive and Article 77 of the UCITS Directive.

\textsuperscript{61} [2011] EWHC 2304 (QB), per HH Judge Havelock-Allen QC. This finding, which was based on the older version of the rule (COB 2.1.3R), was not appealed.

\textsuperscript{62} Cf \textit{Worthing v Lloyds Bank plc} [2015] EWHC 2836 (QB), para 63.

\textsuperscript{63} ICOB 2.2.3(1)R. The current provision is ICOBS 2.2.2R.
was held to have been infringed in *Figurasin v Central Capital Ltd*\(^{64}\) when a sales person failed to make clear to a prospective client that the sum quoted as the cost of a loan included a substantial PPI premium.

However, in contrast with COBS 2.2.1R, tort claims for a breach of COBS 4.2.1R are dependent on proof of negligence as COBS 4.2.6 provides a defence if reasonable steps have been taken to ensure compliance. ‘If, in relation to a particular communication or financial promotion, a firm takes reasonable steps to ensure it complies with the fair, clear and not misleading rule, a contravention of that rule does not give rise to a right of action under section 138D of the Act.’

An additional and important anti-misrepresentation provision operates in relation to information concerning investment business that is likely to be received by a retail client.\(^{65}\) In such a case COBS 4.5.2R\(^{66}\) states that:

A firm must ensure that information:

1. includes the name of the firm;
2. is accurate and in particular does not emphasise any potential benefits of relevant business or a relevant investment without also giving a fair and prominent indication of any relevant risks;
3. is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received; and
4. does not disguise, diminish or obscure important items, statements or warnings.

Given the nature of this important consumer protection rule it is not surprising that it is not qualified by a defence of reasonableness.

There are supplementary rules concerning the provision of information comparing products and businesses\(^{67}\) and the tax treatment of products.\(^{68}\)

\(^{64}\) [2014] EWCA Civ 504.

\(^{65}\) Defined by COBS 3.4.1R as a ‘retail client is a client who is not a professional client or an eligible counterparty’.

\(^{66}\) Art 27(2) of the MiFID implementing Directive.

\(^{67}\) COBS 4.5.6R. Implementing Article 27(3) of the MiFID implementing Directive.

\(^{68}\) COBS 4.5.7R. Implementing Article 27(7) of the MiFID implementing Directive.
2.1.6 MiFid II
The new MiFID II Directive\(^{69}\) and the associated Regulation\(^{70}\) (which will have direct effect) will make changes to detail but not the substance of the law in this area. Few of the changes will be on matters which are likely to cause damage to retail customers. They are therefore not likely to have any impact on tort litigation under section 138D.

2.2 Undertakings for Collective Investment in Transferable Securities Directive (UCITS)\(^{71}\) and the UCITS Implementing Directive\(^{72}\)

Breaches of the rules laid down for investment schemes by the Collective Investment Schemes specialist sourcebook (COLL) are actionable by a private person under section 138D. These implement the UCITS Directive and the UCITS implementing Directive which regulate the marketing undertaken by those running collective investment schemes such as unit trusts.\(^{73}\) The obligations most likely to give rise to tortious liability under these provisions relate to the general duties owed to unit holders and the specific obligations concerning prospectuses and the key information to be provided to investors.

The COLL 6.6A establishes rules which place a number of important actionable duties on those who manage a UCITS scheme. These are (\textit{inter alia}) to act in the best interests of the scheme and its unitholders (who should be treated ‘fairly’); to act honestly, fairly, professionally and independently; and solely in the interests of the UCITS scheme and its unitholders\(^{74}\) and to ensure a high level of diligence in the selection and ongoing monitoring of scheme property.\(^{75}\)

Other key provisions which are imposed by the COLL are COLL 4.2.3R which governs the provision and filing of the prospectus\(^{76}\) and


\(^{70}\) Regulation 600/2014. This came into force in January 2017.


\(^{72}\) Directive 2010/43/EU OJ 2010 L 176/42. See also Undertakings for the Collective Investment in Transferable Securities (UCITS V) Directive 2014/91/EU which deals with remuneration, custody of assets and transparency issues.


\(^{74}\) Art 22 of the UCITS Implementing Directive and Art 25(2) first paragraph of the UCITS Directive.

\(^{75}\) Implementing Art 23 of the UCITS implementing Directive.

\(^{76}\) Implementing Art 74, 75(1) and 75(2) of the UCITS Directive.
COLL 4.7.2R which requires the fund manager to draw up a key information document for investors.\textsuperscript{77} The form and content of such a document is governed by the directly applicable Commission Regulation (EU) No 583/2010, which specifies the form and contents of the key investor information. In relation to pre-contractual information COLL 4.7.5R provides that the key investor information document must: (1) constitute pre-contractual information; (2) be fair, clear and not misleading; and (3) be consistent with the relevant parts of the prospectus.\textsuperscript{78} It should be noted however, that any section 138D tort action based on a breach of the key investor information requirement is qualified by section 90ZA of the FSMA which provides that a person will not incur civil liability solely on the basis of the key investor information document, unless it is misleading, inaccurate or inconsistent with the relevant parts of the prospectus.\textsuperscript{79}

2.3 Alternative Investment Fund Managers Directive (AIMFD)\textsuperscript{80}

A further directive, the Alternative Investment Fund Managers Directive (AIMFD), introduced in 2011 and implemented in the UK by means of the Investment Funds sourcebook (FUND) brings hedge funds, private equity funds, real estate funds and other ‘alternative investment fund managers’ within the scope of EU regulation.

The content of the FUND section of the FCA’s Handbook, which implements the AIMFD, includes information to be given to investors in the fund,\textsuperscript{81} liquidity\textsuperscript{82} valuation of the fund’s assets\textsuperscript{83} and risk management.\textsuperscript{84} Breach of the provisions of FUND is actionable by a private person under section 138D.

\textsuperscript{77} Implementing Art 78 of the UCITS Directive.
\textsuperscript{78} Art 79(1) of the UCITS Directive.
\textsuperscript{79} Art 79(2) of the UCITS Directive. Art 20 of the Key Information Implementation Regulation prescribes the wording of a warning to investors that must be included in the ‘practical information’ section of the key investor information document. It states that an authorised fund manager may be held liable solely on the basis of any statement contained in the document that is misleading, inaccurate or inconsistent with the relevant parts of the prospectus for the UCITS scheme.
\textsuperscript{81} FUND 3.2R.
\textsuperscript{82} FUND 3.6R.
\textsuperscript{83} FUND 3.9.3R.
\textsuperscript{84} FUND 3.7.
2.4 Solvency II Directive

This Directive concerns the insurance and reinsurance business (other than life insurance). Much of it is concerned with the conditions for authorisation and supervision of firms trading in this area. However, it does contain requirements concerning disclosure of information to customers and cancellation rights which are incorporated into UK law as part of the Insurance Conduct of Business Sourcebook (ICOBS) section of the FCA’s Handbook, breach of which is actionable in tort by a private person under section 138D.

2.5 Insurance Mediation Directive

Conduct of Business Sourcebook 7.2 contains actionable rules based on this Directive concerning the information which must be provided by an insurance intermediary to a customer when concluding a life insurance contract. Any recommendation of such a policy to a client stated to be on the basis of a fair analysis of the market, must be based on an analysis of a sufficiently large number of life policies available on the market to enable the firm to make a recommendation, in accordance with professional criteria, regarding which life policy would be adequate to meet the client’s needs.

Substantial reform of this area will occur in 2018 when the Insurance Distribution Directive comes into force as replacement for the Insurance Mediation Directive. This is a comprehensive reform which aims to extend controls to insurance firms which sell directly to the public, including travel agents and car rental companies. The information and conduct rules laid down in the Directive are very similar to MiFID rules and will create tort rights for private persons under section 138D based on failures to act in the customer’s best interests, or the provision of inadequate information. In addition, Article 20 will require a firm

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86 ICOBS 6.2.1R-5R, 6.3.1R incorporating Art 183-5 of the Directive (on information) and ICOBS 7.1.1R (on cancellation rights).
88 This has an extended meaning for these purposes. It covers long term care insurance and a pension policy.
89 COBS 7.2.3R implementing Arts 12(1) and (2) of the Insurance Mediation Directive.
91 Ibid, Art 17(1).
92 Ibid, Art 17(2).
selling insurance to first acquire information on the demands and needs of the customer and then to provide objective information so as to allow the customer to make an informed choice on whether to proceed. Advice supplied prior to the conclusion of the contract will have to explain why the product recommended would best meet the customer’s demands and needs. Advice given in relation to insurance based investment products will, applying the MiFID approach, be subject to a ‘suitability’ test based on a full fact find.93

2.6 Distance Marketing Directive94

The Distance Marketing Directive creates a number of obligations relating to the information which must be supplied to a customer when such a contract is entered into. These obligations are incorporated as rules into chapter 5.1 of COBS and into a number of the specialist Conduct of Business Sourcebooks which regulate particular parts of the industry.95

For example, COBS 5.1.2R96 makes provision for both the form of distance marketing information and subjects the use of that information to an overriding requirement of good faith. Breach of these requirements is an actionable tort. The rule states that:

A firm must ensure that the distance marketing information, the commercial purpose of which must be made clear, is provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the legal principles governing the protection of those who are unable to give their consent, such as minors.

This rule is repeated in a number of the specialist Conduct of Business Sourcebooks.97

93 Ibid, Art 30.
95 Insurance Conduct of Business Sourcebook (ICOBS) 3.1, Banking Code of Business Sourcebook (BCOBS) 3.1., Consumer Credit sourcebook (CONC) 2.7. See also Mortgages and Home Finance: Conduct of Business sourcebook (MCOB) 6 Annex 1.
96 Implementing Art 3(2) of the Distance Marketing Directive.
97 Insurance Conduct of Business Sourcebook (ICOBS) 3.1.5R, Banking Code of Business Sourcebook (BCOBS) 3.1.3R, Consumer Credit sourcebook (CONC) 2.7.3R (in slightly amended form).
2.7 E-Commerce Directive

Similarly, the E-Commerce Directive regulates the information which must be given to customers in relation to such transactions, including details on the receipt and placing of orders and the terms on which any contract is made.

These requirements are incorporated into UK law by COBS 5.2. This is another set of rules which is repeated in a number of the specialist Conduct of Business Sourcebooks.

2.8 Mortgage Credit Directive

Some of the provisions in the Mortgages and Home Finance: Conduct of Business sourcebook (MCOB) incorporate this Directive into UK law. Basic protection for consumers who use such a product to purchase property is created in this way. For example, MCOB 2.5A.1R implements the important general rule that: ‘A firm must act honestly, fairly and professionally in accordance with the best interests of its customer’ and MCOB 3B.1.2R stipulates that ‘A firm must make available clear and comprehensible information about MCD regulated mortgage contracts at all times on paper, or on another durable medium or in electronic form.’

The most important of the EU-derived consumer protection provisions is MCOB 11.6.2R which incorporates into English law rules contained in Article 18 of the Directive which require a lender to assess whether its customer will be able to afford to make repayments if a mortgage is granted.

Breach of all of these rules is actionable under section 138D.

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99 COBS 5.2.8R implementing Article 10(3) of the Directive.
100 Insurance Conduct of Business Sourcebook (ICOBS) 3.2, Banking Code of Business Sourcebook (BCOBS) 3.2, Consumer Credit sourcebook (CONC) 2.8.
102 Implementing Art 7(1) of the Mortgage Credit Directive.
103 Implementing Art 13 of the Mortgage Credit Directive. See also MCOB 2A.2R, 3A.2.4R and 3A.5R for further rules on the provision of information which are derived from the Directive.
104 MCOB Sch 5.
The implementation of this directive is in a slightly different form to the others discussed in this chapter. Regulation of consumer credit was passed to the FCA from the Office of Fair Trading (OFT) in 2014. The FCA Handbook rules on this topic which were introduced in 2014 are contained in the Consumer Credit sourcebook (CONC) chapter. These rules are heavily based on the terms of the Consumer Credit Act 1974, regulations made under it and the OFT’s publications \textit{Irresponsible Lending}\footnote{Office of Fair Trading, \textit{Irresponsible lending – OFT Guidance for Creditors}, March 2010 (updated February 2011), OFT 1107.} and \textit{Credit Brokers and Intermediaries OFT Guidance}.ootnote{Office of Fair Trading, \textit{Credit Brokers and Intermediaries – OFT Guidance for Brokers, Intermediaries and the Consumer Credit and Hire Businesses Which Employ or Use Their Services}, November 2011, OFT 1388.} The incorporation of these rules in the FCA Handbook makes them actionable under section 138D.ootnote{Except that the ‘clear, fair and not misleading rule’ in relation to financial promotions established by CONC 3.3.1R is not actionable if the firm has taken ‘reasonable steps’ to ensure compliance, CONC 3.3.1R.(2). That is, a claimant seeking compensation under this provision would have to meet a slightly higher standard of proof to succeed than is normal under s 138D.} Changes made to English law as a result of the Consumer Credit Directive were introduced by a series of statutory instruments in 2010.ootnote{See Department of Business, Innovation and Skills (BIS), \textit{Consumer Credit Regulations: Guidance on the Regulations Implementing the Consumer Credit Directive}, August (BIS, London 2010).} The result is that English law complies with the requirements of the Directive, but provisions are not always specified as complying as they are placed in a statutory framework which dates back to 1974.

The substance of the Directive relates to the information to be contained in advertising and in pre-contractual information given to customers contemplating concluding a consumer credit agreementootnote{CONC 3 and 4. Arts 4–7 of the Consumer Credit Directive.} and requires the creditor to make a proper assessment of the consumer’s creditworthiness before the conclusion of the agreement.ootnote{CONC 5.2.1R implementing Article 8 of the Consumer Credit Directive.}
3 CONCURRENT REMEDIES

The right of action under section 138D must not be seen in isolation. Claims made under it against investment advisers are commonly combined with a common law professional negligence claim and there is evidence that the statutory requirements have been regarded as setting the standard of care required by the common law. In addition, compensation claims brought by individuals for sums up to £150,000 may be satisfied by use of the Financial Ombudsman Service although such claims are technically based on an ombudsman’s determination of what is fair and reasonable rather than on a breach of a provision of the FCA Handbook derived from an EU directive.

4 CONCLUDING REMARKS

It seems unlikely that Brexit will have a substantial impact on this area. The reality is that EU law has here glossed an area of domestic law which can be traced back to the Financial Services Act 1986 and to the Gower Report of 1984. The first important impact of EU law on this subject came with the Conduct of Business Rules introduced by the FSA into its Handbook in order to implement the Investment Services Directive of 1993. Even though the FCA Handbook spells out the EU origin of provisions there have been only passing references in decided cases to this. There appear to be no references made to Court of

\[113\] A claimant can decline an award made by the Ombudsman and proceed to litigation under either common law or a section 138D claim. However, acceptance of such an award blocks any further attempt to litigate. This can be of importance given the financial limit (£150,000) placed on the Ombudsman’s award. Attempts to top up accepted awards by recourse to litigation have failed. See Clark v In Focus Asset Management and Tax Solutions Ltd [2014] EWCA Civ 118; [2014] 3 All ER 313.
\[115\] 93/22/EEC. These were the predecessors of the current COBS rules.
Justice of the European Union (CJEU) case law or to cases decided in other EU jurisdictions.

Although the body of law is complex, it provides an important component of consumer protection law which the UK is likely to wish to retain. There is likely to be pressure for the UK to adopt generally recognised standards if it wants firms based in the country to be able to trade elsewhere in the world. Any arguments in favour of deregulation and thus sacrificing consumer interests in this area post Brexit are therefore likely to attract substantial opposition. There is, on the other hand, a real possibility that the area will slowly diverge from EU law once the compulsion to enact the latest directive is removed.