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A Legal Analysis of Exchange-traded Products

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Abstract: In the financial markets, an increasing attention is being paid to the exchange-traded products (ETPs). An ETP is a derivatively priced security which trades during the day on a national stock exchange. ETPs are typically benchmarked to indices, stocks, commodities, or may be actively managed. There are several different types of ETPs: most common are ETFs (exchange-traded funds); ETCs (exchange-traded commodities); ETNs (exchange-traded notes). First, this work aims to analyze the differences between ETFs and traditional investment funds. An ETF is an investment fund traded on stock exchanges like stocks. Then, specific attention is drawn on the strict connection between some types of ETPs (i.e., ETCs and ETNs), derivatives and asset-backed securities. ETCs and ETNs are debt securities issued by the financial practice of securitization by a special purpose vehicle. Finally, this paper focuses about problems relating to securities derivatives in Italian law.

Key words: exchange-traded products; exchange-traded funds; exchange-traded commodities; status in law; derivatives

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1. The Financial Instruments Named Exchange-traded Products

The term exchange-traded products (ETPs) means the macro-family of financial index instruments listed and traded on a regulated market. This category includes exchange-traded funds (ETFs) — the most popular ETPs in the market, divided into traditional ETFs and actively-managed ETFs — exchange-traded commodities (ETCs) and exchange-traded notes (ETNs). Only recently these products established themselves in the financial markets and their genesis is the effect of the innovative process that involved over the financial system in the last few decades and which covered products, technical structures, intermediaries and markets and that was mostly accompanied spread and development of the asset management industry.

Although they show differences, all products that are part of the ETPs macro-family are characterized by common elements of indexation, passive management (by which is meant a faithful *replica* of the underlying reference) and trading on a market.

Briefly describing the various types of ETPs, we can distinguish between ETFs (which are open-end index UCITSs); actively managed ETFs, which are UCITS ETFs, the manager of which has discretion over the composition of its portfolio, subject to the stated objectives and investment policies; and the category of securitized derivatives, within which there are ETCs (which passively replicate the performance of commodities, commodity indices or of derivatives on commodities) and ETNs (which replicate passively performance of

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underlying different from commodities such as, for example, indexes of currencies, stock indices or debts), which are financial instruments issued against a direct investment by the issuer in the underlying or in derivatives on the same. This definition is not describing the purpose of the search for a common definition of ETPs. In fact, only ETFs are investment funds, while other instruments have special features that cannot be traced to that category.

Despite ETCs and ETNs are not investment funds, they are traded in the same market of ETFs for the communion of the purposes of use and logical investment.

A push in the direction of a precise definition of the various ETPs has been provided in recent times by ESMA, which, while notices that all kind of ETPs are often categorized as ETFs — with all the critical issues that can it achieve in terms of transparency — and that it's necessary to bring a harmonized definition not only of ETFs, but of all ETPs, it has not issued guidelines in this perspective, limited only to provide a definition of ETFs.

2. Exchange-traded Funds

The first legal definitions regarding ETPs are found in ESMA's Guidelines on ETFs and other UCITS issues (ESMA/2012-832) of 18 December 2012. According to this source, an ETF is "a UCITS at least one unit or share class of which is traded throughout the day on at least one regulated market or Multilateral Trading Facility with at least one market maker which takes action to ensure that the stock exchange value of its units or shares does not significantly vary from its net asset value and where applicable its Indicative Net Asset Value".

An actively-managed ETF, however, is "a UCITS ETF, the manager of which has discretion over the composition of its portfolio, subject to the stated investment objectives and policies (as opposed to a UCITS ETF which tracks an index and does not have such discretion). An actively-managed UCITS ETF generally tries to outperform an index".

By Section 4(1.46) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID 2) "exchange-traded fund" means a fund of which at least one unit or share class is traded throughout the day on at least one trading venue and with at least one market maker which takes action to ensure that the price of its units or shares on the trading venue does not vary significantly from its net asset value and, where applicable, from its indicative net asset value.

ETF is an investment fund traded on stock exchanges, like stocks, that combines transparency and flexibility of these financial instruments to diversify its portfolio of investment funds. ETFs can be considered funds dressed like stocks (Girino, 2002).

ETFs are index funds in which the performance is directly related to a financial index. Unlike these, however, are negotiable securities in real time and can also be sold without waiting time of subscription and redemption, as if they were normal stocks. These are securities representing portfolios that replicate specific indexes and baskets of indexes on the stock exchange. They are issued by financial intermediaries operating as market makers that constitute an underlying portfolio corresponding, to a point of view of quality and quantity, to the benchmark at that time. ETFs are characterized by a higher level of transparency and flexibility, as it is possible to constantly monitor the performance of the investment and the current market price unlike traditional investment funds are less risky, as they reflect the performance of an index and not a portfolio (Bianchi-Loddo-Miele, 2011).

The distinctive feature of these financial instruments consists in the ways in which the portion of the fund is purchased by the investor, because of which there are two distinct markets: a primary market, intended only to qualified intermediaries who subscribe, in the launch phase of the fund, the units in fixed quantities (creation shares) taking the title of market makers in the successive phase of the trading of these shares on the markets listing; a secondary market for individual investors who are buying/selling fund shares, less than the creation shares, in the opening hours of the stock exchange. It is true that the retail investor, unlike the professional investors, does not participate *pro rata* at the investment on fund's shares, but buys fund's shares already issued, an indistinct fraction of that investment to profit from fluctuations in the value of the share by virtue of the negotiating variable: in fact, the value of an ETF (but similar considerations may be relevant for other ETPs), unlike that of the other units in investment funds, does not depend only intrinsic value of the share of assets under management, but also by the variable trading dictated by the pattern of demand and supply. The practical purpose pursued by the investor with these financial instruments is therefore the same. As brilliantly highlighted by an author, is thus made a securitization of the second degree and a substantial extraction of the instrument compared to their issue and subscription. All ETPs are characterized by a passive management. In contrast with investment funds, which are managed in an effort to outperform the benchmark, issuers of ETFs simply align the composition of the underlying portfolio to an index set, which greatly reduces transaction cost and responsibilities of the fund manager. The situation is different for actively managed ETFs, which are characterized by an active management. An actively-managed ETF, like traditional investment funds, generally tries to outperform an index. More comparisons can be made with the index futures. These financial instruments have a similar purpose, but an antithetical structure (Sharpe, 1991; Braga, 2011).

While taking a financial index as a benchmark, the materialization of the investment in ETFs takes place by "copying" the index structure, through the acquisition of the values that constitute it, in the index futures, the underlying is abstract, and the instrument reflects on the financial capital the performance of the index.

3. Securities Derivatives: Exchange-traded Commodities and Exchange-traded Notes

In the absence of a legal definition, we focus our discussion on securitized derivatives included among ETPs. ETCs are securities issued by a special purpose vehicle (SPV) — a company set up specifically to carry only one or more operations to issue financial instruments — to finance direct investment of the issuer in commodities or in derivatives on commodities (Mignarri, 2009; Paltrinieri, 2013). In ETNs, however, the SPV makes a direct investment in underlying or indices different from commodities such as indexes of currencies, stock indices or bond. ETCs and ETNs replicate directly or indirectly the underlying through passive management and are traded on the stock exchange as a stock. ETCs and ETNs must be distinguished from other securitized derivatives such as covered warrants and certificates, both because it is not expected a subscription or a reimbursement on an ongoing basis through the delivery of the underlying securities or commodities or equivalent cash, and because they are issued by entities other than those that are allowed to issue ETCs and ETNs.

Securitized derivatives are those financial instruments whose value is linked to the price of the underlying assets, whose price or value measure is available to the public reliably and up to date. Among the main features of these financial instruments we can list the following: a) the assets purchased with proceeds from the subscription of the securities must be segregated assets in all respects from that of the issuer; b) the assets purchased with the proceeds from the subscription, as well as income generated by the same assets, must be used exclusively to satisfy the rights incorporated in the financial instruments and possibly to cover the costs of the operation (collateral); c) the assets purchased with the proceeds from the subscription shall not be permitted actions by creditors other than the holders of the related financial instruments.

Among other requirements for the identification of these financial instruments, it should be noted the provision of settlement in cash or by physical delivery of the underlying asset and a maturity of the security not exceeding five years. It can also be expected to subscription or reimbursement, on a continuous basis, through the delivery of the securities or commodities (or an equivalent amount of money) which has invested the issuing company. The same SPV can issue multiple classes of ETCs, each with a different underlying, constituting a separate asset for each of them: this is because the commodities or the underlying assets are used exclusively to meet the demands of investors or creditors of the same class.

As for ETFs, the securities issued are entered in a primary market, accessible only to authorized participants, which allowed the subscription and reimbursement of lots of securities on a daily basis to the official value of ETC/ETN, to a payment in cash or in a corresponding amount of the underlying commodities (for ETCs physically-based). Subsequently, the securities are entered in the secondary market, accessible to any investor through an intermediary or through the home banking service.

ETCs and ETNs enable investors to expose themselves on the commodities or derivatives markets without having to buy the physical commodity of the investment or having to directly contract derivatives. The owner of the underlying is only the issuing company: for that reason, in case of loss, damage or theft of property, the issuer would not be able to meet its obligations in relation to securities issued and no right will boast by the investor. In fact, he holds only securities that derive their value from the underlying and he does not boast into matters relating to the latter.

Among the main features of these financial instruments**,** it emerges that, like zero-coupon bonds, they are not interest bearing and which give the investor the right to request reimbursement of the title and receive the settlement date an amount of money equal the value of the ETC/ETN or, in the case of precious metal ETCs, an amount equal to the title of the underlying commodity of metal on that date. The passive management investment, replicating the performance of a particular index, allows a strong containment of operating costs and, consequently, of the commission to the client.

The analysis on the differences between the two figures must therefore move in terms of the underlying investment. UCITSs invest in financial instruments, loans, or other real or personal property. ETCs, as highlighted, have a direct investment in a single commodity or in derivatives on commodities. These investment activities, as they are compatible with each of the underlying UCITS, however, cannot be brought within the roots of those allowed to investment funds, on the basis of the EU law [Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) — called UCITS IV — and Commission Directive 2010/43/EU of 10 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organizational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company. See also CESR’s guidelines (CESR’s guidelines concerning eligible assets for investments by UCITS-CESR/07-044; CESR’s Guidelines concerning eligible assets for investment by UCITS — The classification of hedge fund indices as financial indices — CESR/07-434; CESR’s Guidelines on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS-CESR/10-788]. In particular, ESMA’s guidelines 2012/832 (§48-50), point out that if a UCITS intends to replicate its portfolio with the composition of an index (Section 53 UCITS IV Directive), this composition should be heterogeneous (it is not acceptable a composition greater than 20% or 35% of the portfolio) and clearly indicated in the prospectus, if needed be also described the exceptional market conditions that justify such an investment.

Expressed rules are then dictated in the case of an investment that wants to replicate the indices of commodities: the UCITS cannot replicate an index that is not based on different commodities, not even noting that the index is composed of subcategories of the same commodities: §50 ESMA's guidelines 2012/832 states that the sub-categories of the same commodity (e.g., categories of commodities from different regions or markets or derived from the same primary products through an industrialized process) should be considered as if they were the same commodities for the purpose of calculating the limits diversification. In light of such considerations, it must be excluded traceability of ETCs and ETNs within the category of the investment funds because the activity of underlying investment goes beyond the logic of diversification and spreading risk. Nevertheless, it must be noted that many concerns arouses the fact that, in the statement of some ETCs, under "risk factors" is clearly evident the possibility that it may be a possible redevelopment of the ETCs as investment funds shares.

4. The Securitization of Assets in the Issues of ETCs and ETNs

The doctrine developed in civil law jurisdictions is dubious about the eligibility and legality of those instruments that do not securitize a claim, so that all securitization transactions involving assets other than monetary claims should be analyzed considering it to be a securitization by an economic and financial point of view, that is to transform an undivided asset in a divided and salable securities.

Generally, this financial technique is put in place with the establishment of a SPV — different from the company that originated the operation — which has as its sole purpose the issue of financial instruments and the acquisition, holding and management of the underlying assets with the proceeds of the issue. With this technique, the entity that gives rise to the securitization (called originator) transfers one or more goods and/or assets or risks to a securitization SPV in exchange for money. The SPV finances this investment by issuing securities backed by assets and/or assets transferred (Messina, 2009; Sepe, 2009).

With the establishment of the SPV, some assets are segregated and intangible returns from possible aggression of creditors of the originator (Sepe, 2009) and, at the same time, investors have a collateral consisting precisely in such goods. This reflects in a substantial absence of the insolvency risk of the issuer. Investors, however, will remain exposed to three types of risk: market (relative to the performance of the underlying), exchange (being the reference currency mainly the dollar) and counterparty (especially in the case of ETC on derivatives materials). Upon completion of this transaction, the originator can still take advantage of the assets sold, but transfers the risk arising from such assets on investors, removing the same from its budget.

The analysis must begin with the remarks made by who have analyzed collateralized debt obligations (CDOs), asset-backed securities related to ETCs with specific financial assets, a portfolio of investments or various securities as underlying and collateral (Messina, 2009).

In order to get the segregation of the assets of the SPV, which allows to separate the assets to each securitization transaction and making them unavailable to creditors' enforcement other than the holders of the securities issued to finance the purchase of the receivables, in the financial market practices this is given by the legal structure of the issuer (Luxembourg securitization law) or is obtained by contract. The securitization transactions undergo both an economic and legal fragmentation, due to the need of the subject generator to perform individual steps in several jurisdictions, primarily to adjust the operation in systems that allow the segregation of the assets (and its destination on the fulfillment of investors) and that they know both the appropriate structures and the securities generated with the issue.

In fact, the securitization of assets under Luxembourg law — governed by the *loi du 22 mars 2004 relative à la titrisation* — is based on the concept of fiduciary property. More specifically the legal provisions existing in that legislation allow, through the SPV, to securitize any type of activity — as well as any risk having certain and reasonably value — which aims to generate future income.Nevertheless, it expressly included personal property (Section 53(1), Luxembourg securitization law of 22 march 2004: "*Sontsusceptibles de faire l'objetd'unetitrisation, les risquesliés à la détention de tousbiens, mobiliersouimmobiliers, corporelsouincorporelsainsiqueceuxrésultantd'engagementsassumés par des tiers ouinhérents à tout oupartie des activitésréalisées par des tiers*").

Ultimately, Luxembourg law provides two types of securitization vehicle: securitization companies (generally made in the form of a *sociétéanonyme* or *société à responsabilitélimitée*) and securitization funds, made in the form of contract and without legal personality, managed by a company management having legal personality.

Each vehicle may provide various assets assigned to each securitization. The property and business activities of each asset can only be used to satisfy the rights of investors or to satisfy the creditors related to the same section (Panico, 2012).

Looking at the English law experience, the segregation of assets given by contract is instead achieved with the adoption of the trust, which - given its assurance functions and the exclusion of the competition of further creditors - is now frequently used also in the financial sector.

The SPV is framed as a trustee of the operation and the cash flows arising from the issue of securities and investment activities are segregate assets enforceable against third parties.

With this structure, subscribers provide money to the SPV-trustee, which issues securities that incorporate the rights of the beneficiary of the trust.

The element of segregation of assets is closely connected to the hypothecation of assets that constitute the same budget, which must be directed solely to the realization of the purpose for which the trust was established. With this aim, it is important to highlight how the assets that may be part of the segregate asset does not have to be exclusively in the ownership of the settler on the establishment of the trust, but also assets of which he has not yet own or future assets, purchased with the amounts of money that are the budget of the trustee, on the purchase of the assets to which the assets are allocated.

Added to this is the duty of the trustee to act in the interests of the beneficiaries, remaining bound exclusively against them.

5. Securitised Derivatives and Derivatives: A Focus about Problems Relating to Securitised Derivatives in Italian Law

In this context, the qualification of ETCs as derivatives seems expected. For the Italian jurist this conclusion is not immediate. In fact, it sets two problems: the first is that the Italian securitization law no. 130/1999 admits only the securitization of monetary claims (Messina, 2009); the second is that a textual interpretation of t.u.f. (Italian financial law, d.lgs. 58/1998) does not allow to consider securities derivatives like derivatives. This representation focuses on the topic of investigation the issue of the incorporation or not of ETCs — as well as of all securitized derivatives — into the genus of derivatives. This incorporation has important consequences, particularly about the advertising of intermediaries or about the issuing, trading or bankruptcy proceedings.

Incorporation or not in derivatives is first evaluated on the basis of the interpretation that is given to the expression “any other title that carries a cash settlement determined by reference to the securities referred to in previous letters, in currencies, interest rates, yields, commodities, indices or measures” [Section 1(1-bis.d)t.u.f.] and financial derivatives [Section 1(1.d)t.u.f.] or commodities derivatives [Section 1(1.e)t.u.f.] “that may be settled physically or through the payment of cash differentials”. Particularly, we need to understand if the two formulas express the same concept or emphasize a diversity that is reflected on the obligation of the individual parts.

The emphasis placed on the difference of meaning between the two terms is justified by the statement “payment of cash differentials”. This is the principle of balance of the derivative contract to which it is not possible to predetermine nor who is intended to receive the payment nor the quantum that the debtor must pay. In contrast, the “cash settlement” which is referred by the Section 1(1-bis.d)t.u.f., would be a statement “limited to a method of determining and extinction of the obligation, which is charged from the beginning on only one of the parties and in particular on the issuer and the investor does not”, as the latter out their obligations by paying the title, while the issuer is — abstractly, because the measure of its performance is uncertain and may also be nothing — the only subject liable for payment (Ciocca, 2012).

This effect shifts the investigation on the differences between the two figures of the structural level. Indeed, it is on this level that moves are the major objections about the amenability of securitized derivatives in the category of derivatives. The absence of an uncertainty as to which subject will be responsible for payment of a debt and indefinite entity would make such instruments other than derivatives.

This approach starts from the definition given by a certain doctrine to derivatives, according to which if at first it doesn’t seems to be a common denominator between the various types of derivatives, with a more careful analysis considers that commonness of derivatives element of differential, founding therefore the analysis not on derivatives contract, but on the category of derivative contract, the category into which are incorporated all those “financial contracts involving the trading of an autonomous entity of the differential arising from the comparison between the ‘price’ of the entity at the time of the conclusion and its value at the due date for the execution” (Girino, 2011). Derivative, for this approach, is not the contract, but the financial instrument that derives from this.

The connection to other assets underlying financial, such as securities, commodities, interest rates, indexes etc., does not collide with the character of the derivative contract, because, creating the differential, derivatives give life to operations that are not operations insistent on any fundamental, but they are operations characterized by financial function. This would be an inherent element of the contract in question: every financial instrument requires the construction and operation of a contract, but only the derivative contract combines contract and financial function: derivatives are the only contracts that are both financial instruments and not a means to acquire another. And this unique structure makes it possible to include, within the contract, the financial component: it is not a contract that must search elsewhere its financial function, because contains it in itself because object of the exchange is not an underlying, but the only differential (Girino, 2011).

In light of this, this approach has some difficulties to bring securitized derivatives in the category of derivatives, because securitized derivatives are made for listing (Girino, 2011). In fact, the gap between the contractual structure typical of derivatives and securitization creates a financial instrument embedded in the title, autonomous, distinct and independent from the original contract between issuer and authorized participant (Girino, 2011). The securitization would lead to very important consequences: in fact, securitized derivatives constitute bearer securities, whose circulation is free and is therefore not subject to the formalities necessary to transfer the contract. In addition, the rights which it grants are not only completely divorced from the legal fate of the contractual relationship, but also transcend the same contract that originated the title. Finally, the incorporation of the right in the securities does not produce a possible invalidity of the contract that is the basis of the operation.

The above-mentioned arguments lead to some objections. First, it is necessary to start from the literal data provided by primary and secondary legislation. Section 1(2), from letter d) to letter j) t.u.f., as well as the supervisory instructions for banks of the Bank of Italy, provide a summary definition of derivatives, providing, as reference discipline, a contractual category and not the individual figures to it incorporated, whether atypical or typical (or rather, named atypical).

Enhance the existence of the differential as a characterizing element for the incorporation to the category of derivatives seems secondary to the much more significant element of the derivation of the value of the financial instrument from the underlying. We must place the emphasis on what is the underlying of ETCs: commodities (or commodities derivatives).

The reform of t.u.f. as a result of MiFID has given a poignant relief to commodities such as derivative's underlying, so it could be considered a derivative in any manner whatsoever with underlying commodities, which are be found elements of financialization of the same. These are, firstly, those instruments congenitally liable to form a differential value.

It is also the possibility to adjust the contract through delivery of the underlying, but then only if the derivative is traded on a regulated market or a MTF [Section 1(2.f)t.u.f.]. If there are not these requirements, are considered commodity derivative instruments that do not have commercial purposes and which have the characteristics of other derivatives, particularly those to be cleared and settled through recognized clearing houses or are subject to regular margin calls [Section 1(2.g)t.u.f.]. If that condition appears elusive, because these instruments must be identified by regulation of the Minister of Economy and Finance [Section 1(2-bis)t.u.f.], the first is easily recognizable in a transaction other than the mere supply of commodities.

Even though we accept the guidelines developed among Scholars as regards the denial of categorization of securitized derivatives as subcategories of the derivatives so far examined, securitized derivatives could be subsumed within the category encompassing "other derivative contracts relating to assets, rights, obligations, indices and measures, other than those mentioned in the preceding points, have the characteristics of other derivative financial instruments" in Section 1(2.j)t.u.f.

This group of derivatives, in fact, appears to be an open category that include the most modern instruments of financial result. For a correct interpretation of that category — introduced by Directive 2004/39/EC — and of the financial instruments related to it, it is necessary to use a technique that hermeneutics refer to EU law.

In particular, we must invoke the provisions of Section 38(3) Commission Regulation (EC) No. 1287/2006 of 10 august 2006 (implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive) — EU source whose characteristics, as is known, consist in general, in the integral mandatory and directly applicable in all member states, under which it is considered that a derivative contract relating to the group of "new derivatives" shall be considered to have the characteristics of other derivative financial instruments if one of the following conditions is satisfied: «(a) that contract is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of a default or other termination event; (b) that contract is traded on a regulated market or an MTF; (c) the conditions laid down in paragraph 1 are satisfied in relation to that contract». It seems almost superfluous to point out that at least one of those characteristics is own of the ETCs.

ETCs can therefore be attributed to the category of derivatives for a double order of reasons. First, the reference to the cash settlement allows no doubt attributable to the category of derivative the securities mentioned in Section 1(1-bis.d)t.u.f., with the purchase of which the investor would exhaust its payment obligation. Then, even if we do not want incorporate ETCs within the category of securitized derivatives, the second of the above criteria can absolutely consider ETCs like derivatives, because are financial instruments with the characteristics mentioned in Section 1(2.j)t.u.f. and traded on a regulated market.

6. Membership of ETCs in the Category of Derivatives

Between the two thesis analyzed, the first appears to be more persuasive. Removed any doubt about the scope of the expression “cash settlement” and considered the peculiarities of ETCs, these financial instruments can be classified within the definition of Section 1(1-bis.d)t.u.f.

Cash settlement, in fact, is a feature of another type of derivative too which does not exclude the category membership: we are talking about option. In fact, even in this class of derivative contracts the buyer pays a price (premium) at the time of conclusion of the contract in order to ensure the right to buy or sell an underlying asset or instrument at a specified strike price on or before a specified date or to exchange the difference between that price and the value of the underlying assets at the expiration date.

This negotiation mechanism allows to state that the advance payment from the investor does not exclude, but rather confirms that with ETCs investors want the pursuit of the differential value, achieved through the delivery of the underlying, which in turn allows a monetary gain by his immediate sale on the market.

All derivative financial instruments have the common feature of establishing their value on their underlying assets. We mislead if we consider the differential like subject of the contract, because this is only a mere mode of payment.

On the other hand, as has been clearly detected from a dating author (Boselli, 1948), in certain contracts random single payment, either in advance (for example, the capital in life annuity) that arrears, in response to the event (for example, the sum insured in insurance), does not exhaust nor can identify with the performance covered by the obligation of each subject, but it represents only a initial or final “moment” of the overall performance.

Nevertheless, it seems appropriate to envisage fully the irrelevance of equality in the risk exposure of each contractor. These amounts should not be confused with the performance object of the obligation of each party, but only as a function of the true performance, because they intended to change the measurement with the change of the underlying’s trend (in the case of ETCs, for example, the change of a commodity index). Ultimately, the advanced capital is merely the upper limit of the loss of the investor (Boselli, 1948).

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