Conduct Risk: Meaning, Interpretation and Dissension

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(*Forthcoming in European Business Law Review 2019, do not quote or cite without the author's permission*)

Abstract

Following serious and widespread episodes of misconduct in the financial services industry, regulators, international standard-setting bodies and financial institutions worldwide have been discussing opportune approaches to deal with conduct risk. Identifying, analysing and tackling this risk have become the keywords to make financial firms take proactive steps against a common problem. Significantly, the way misconduct risk is understood will determine the ways for dealing with it properly. Given the incentives and guidelines that regulators and policymakers have so far provided within the conduct risk debate, it is natural to review their own review of such a risk. In practice, this paper addresses the question of whether their interpretation constitutes a solid, clear and consistent basis for financial institution proper understanding and management.

Keywords: Risk; loss; misconduct; conduct risk; consumer protection; market integrity; firm-based definition; operational risk; subset; standalone risk.

1. Introduction

Since the recent financial crisis, regulators have devoted considerable efforts to fortifying the resilience of financial markets and infrastructures.[1] Along with this objective, they have placed closer scrutiny on market participants' behaviour, in particular, the impact that financial transactions have on consumers and market integrity. This emphasis is then the rationale behind specific regulatory intervention named as conduct of business (COB) regulation. The COB regulation has a broad scope. As Tuch observes, the regulation considers financial institution conduct broadly, not only in relation to the transactions that the firm enters into for or on behalf of its clients, but also when it acts as the principal or counterparty in capital markets transactions.[2] Consequently, the COB regulation applies across the financial services industry (securities, banking and insurance sectors) to serve the purpose of ensuring consumer protection and the integrity of financial markets. In turn, much of the reasoning behind the COB regulation is traced back to the fact that the reputability of the financial services industry has been affected by a wave of wrongdoings committed by major financial institutions, whether before or after the recent financial crisis.[3] Within this context, the COB regulation is not exclusively concerned with guaranteeing an

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[1] *See* Bank for International Settlement (BIS), *Building a Resilient Financial System*, Keynote Speech by Jaime Caruana (2012) <https://www.bis.org/speeches/sp120208.pdf> (accessed 04.08.2018).

[2] Andrew F Tuch, *Conduct of Business Regulation* Ch 8, 538, Niamh Moloney, Eilis Ferran and Jennifer Payne eds, *The Oxford Handbook of Financial Regulation* (OUP 2015).

[3] Iain MacNeil, *Rethinking Conduct Regulation*, University of Glasgow WP (2015) <http://eprints.gla.ac.uk/120459/1/120459.pdf> (accessed 13.09.2018).

adequate level of firms' responsibility and accountability. Mitigating the risk of poor conduct is also a key objective.

Conduct risk is, therefore, another essential feature of the current post-crisis debate on conduct and culture in the financial sector. Currently, regulators and international standard-setting bodies worldwide have been urging financial firms to incorporate conduct risk management (CRM) into their own risk management framework.[4] In particular, the Financial Stability Board (FSB) has elaborated a toolkit of measures to mitigate conduct risk through the act of strengthening a firm governance framework. Among others, these measures include improving corporate culture, identifying collective and individual responsibilities across every business line and monitoring employees with a history of misconduct. Likewise, the COB regulation should address conduct of risk through rules that reinforce firms' internal governance and risk management practices.[5] Unquestionably, conduct risk has become a priority in the regulatory and financial institutions agenda.

The aim of this paper to analyse the emergence and importance of the concept of conduct risk in the financial services sector. In this regard, the focus is not on the viability of the conduct risk mitigating strategies that have been so far suggested by regulators, policymakers and practitioners. Rather, the analysis investigates the current understanding of conduct risk proposed by the mentioned actors. In particular, against the argument of the absence of a specific, univocal, definition of conduct risk, it questions whether the way regulators and policymakers introduce and interpret conduct risk lead to a consistent picture of the nature and scope of conduct risk, as well as its relationship with other risks. Based on this approach, the main argument that this paper asserts is that, at this stage, there are two conflicting views on conduct risk: as a standalone risk or a subcategory of other risks. This conflict is not only indicative of inconsistency as to its understanding but also carries the potential to make its management somehow nebulous across firms, despite the efforts envisaged by the FSB for better coordination in the understanding and dealing with this risk. Accordingly, this paper intends to enhance the current literature on conduct risk by highlighting the need to give it what it lacks, that is, a more robust identity.

To this end, the reminder of this paper is structured as follows. The second section explains the root causes and drivers that shape the concept of conduct risk and the ensuing regulatory debate. The third section examines the regulators' definitions of conduct risk. Therein, the scope of conduct risk is reviewed with the view to understanding its nature and relation to other risks, specifically, operational risk. The choice of operational risk is justified by the fact that some regulators qualify it as a subcategory of this risk. Accordingly, this section critically analyses this categorisation against those views claiming a standalone nature of conduct risk. The fourth section discusses the outcomes of the analysis by arguing that the current understanding of conduct risk does not help financial institution elaborate a firm-specific definition. Then, some final reflections conclude the paper.

2. Root Causes and Determinant Factors

2.1. Why Conduct Risk?

The term risk is always associated with negative outcomes. As such, it is widely interpreted and not univocally defined. Different definitions result from the various angles through which the term risk

[4] Group of 20 (G20), *G20 High Level Principles on Financial Consumer Protection* (2011) <https://www.oecd.org/daf/fin/financial-markets/48892010.pdf> (accessed 15.09.2018).

[5] Financial Stability Board (FSB), *Strengthening Governance Framework to Mitigate Misconduct Risk: A Toolkit for Firms and Supervisors* (2018) <http://www.fsb.org/wp-content/uploads/P200418.pdf> (accessed 05.05.2018).

is analysed. Accordingly, there can be definitions based on probabilities, uncertainty, expected values or objectives.[6] For instance, where an emphasis is put on probability, the term risk is defined as 'the expression of influence and possibility of an accident in the sense of the severity of the potential accident and the probability of the event'.[7] Clearly, a definition of risk based on probability implies an analysis of the status quo and perception of how this may be affected in connection with some events. The perspective changes where risk is defined as 'a situation or event where something of human value (including humans themselves) has been put at stake and where the outcome is uncertain'.[8] Herein, uncertainty implies a lack of perception as to future results. Consequently, it can be seen how the use of these parameters can give the term risk either a concrete meaning or random connotation and thus be the source of different definitions. Besides, this results in different ways of measuring risk according to whether the emphasis is on probability or uncertainty. In any case, the proposed definitions are strictly linked with detrimental outcomes, which are likely or not likely to happen. In this regard, the risk literature uses the word 'losses'.[9] This term is widely recurrent when risk is addressed in the financial world. In this regard, Moosa underlined how the terms 'risk' and 'loss' are conceptually different and, therefore, should not be used interchangeably. Specifically, the author underlined that while the former is a source of potential loss the latter depends on the financial institution level of exposure to risk.[10] Under this perspective, a loss is also the outcome of a risk that the post-crisis regulatory debate has brought to attention and named as conduct risk.

The concept of conduct risk arose in connection with high-profile cases of misbehaviour that recently affected the financial services industry worldwide, in particular, the banking sector. Predatory lending practices, mis-selling of financial products, the manipulation of interbank offered rates, as well as tax evasion and violation of anti-money laundering rules determined a widespread use of the term 'misconduct'.[11] This word indicates a phenomenon of systematic wrongdoings. These were either localised, such as the mis-selling of Payment Protection Insurance (PPI) products in the UK, or spread worldwide such as the manipulation of the London Interbank Offered Rate (LIBOR). In either case, they were stigmatised as the symptom of an unhealthy culture among banks and other financial institutions, as entrenched in governance, remuneration, risk management and tone from the top.[12] Generalised bad behaviours in the financial sector are therefore the first pillar of the conduct risk concept.

The flurry of consequences deriving from this phenomenon constitutes the second underpinning. In this respect, we need to consider the serious escalation of effects that widespread episodes of misconduct may have. Firstly, they undermine the reputation of the involved institutions. This finally hampers consumer trust and confidence in the financial sector. Indeed, it is well demonstrated how the above-mentioned facts, prior to and after the recent 2007-2009 financial

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[6] Aleksandar Sotic & Radenko Rajic, *The Review of the Definition of Risk*, 3 Official Journal of Applied Knowledge Management 3, 18 (2015).
[7] *Ibid*.
[8] *Ibid.*
[9] Paul Hopkin, *Fundamentals of Risk Management* (5th ed Kogan Page 2018).
[10] Imad A Moosa, *Quantification of Operational Risk under Basel II. The Good, Bad and Ugly*, 1 (Palgrave Macmillan 2008).
[11] RepRisk, *2006-2016: Ten Years of Global Banking Scandal* (2016) <https://www.reprisk.com/content/5-publications/1-special-reports/51-ten-years-of-global-banking-scandals/repriskreport-banking.pdf> (accessed 25.09.2018).
[12] Andrew Bailey, *Culture in Financial Services-A Regulator's Perspective* (2016) <https://www.bankofengland.co.uk/speech/2016/culture-in-financial-services-a-regulators-perspective> (accessed 28.09.2018).

crisis, severely affected the reputation of banks and other financial institutions.[13] Consequently, the question of how to restore consumer trust and confidence is, among others, of paramount importance within the ongoing debate on cultural reforms in finance.[14] Secondly, misconducts are costly given their potential to escalate into private litigation or regulatory sanctions. In the first scenario, financial institutions will be liable for the damages their customers suffered because of their poor conduct; while in the latter, their loss relates to the fines or other financial penalties imposed by regulatory authorities following investigations.[15] Once again, benchmark interest rate rigging, mis-selling of financial products and anti-money laundering rules violations are the most noteworthy episodes of misconduct, giving rise to sanctions and redress costs. In this regard, it is estimated that in the decade following the recent financial crisis the UK banks have paid £71 billion in fines, legal fees and compensation for misconduct.[16] Similarly, fines imposed on banks by US and EU regulators would amount to $342 billion.[17]

The combination of loss of trust, and fines or redress costs may also pose a systemic threat. This is another significant aspect underlining the concept of conduct risk. With specific reference to the European banking sector, the European Systemic Risk Board (ESRB) elaborated on this issue. On the one hand, the ESRB has recognised the potential discouraging effect that redress costs, fines, and other financial penalties may exercise with regard to the reiteration of misconduct. On the other hand, the ESRB warns as to a downsize effect, that is, financial penalties may weaken the whole banking sector to the extent that an illegal behaviour from one institution may be perceived by market participants as a common practice in the entire sector. This perception not only weakens trust and confidence but can also create a ‘withdraw effect’.[18] By way of example, where the banking sector is perceived as prone to misconduct and affected by sanctions, market participants may lose interest in engaging and competing in that sector. Under this scenario, the functioning of that market and its provision of services will be seriously impaired. Similar effects can occur when financial penalties are not in the form of monetary sanctions but result in restrictions such as a prohibition on engaging in certain business practices following episodes of misconduct. The concerned financial institution will be prevented from participating in that specific market. Even in this case, the functioning of that market will be jeopardised with repercussions on its users.[19] Accordingly, the ESRB stresses how the link between misconduct and financial penalties can have systemic implications. In practice, while misconduct affects a financial system’s confidence,

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[13] House of Lords House of Commons, *Changing Banking for Good* HL Paper 27-II (2013) <https://www.parliament.uk/documents/banking-commission/Banking-final-report-vol-ii.pdf> (accessed 04.10.2018).
[14] David T Llewellyn, *Reforming the Culture of Banking: Restoring Trust and Confidence in Banking* 2 Journal of Financial Management, Markets and Institutions 2, 221 (2014).
[15] Andrea Resti, *Fines for Misconduct in the Banking Sector-What is the Situation on the EU?* European Parliament IPOL EGOV (2017) <http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/587400/IPOL_IDA(2017)587400_EN.pdf> (accessed 10.08.2018).
[16] Jamie Nimmo, *£71 Billion…The Cost of Our Banks' Misconduct: our Investigation Reveals the Fines, Fees and Compensation Since 2008 Crisis* (2018) <https://www.thisismoney.co.uk/money/markets/article-6097965/71-billion-cost-banks-misconduct.html> (accessed 11.08.2018).
[17] Reuters, *U.S., EU Fines on Banks' Misconduct to Top $400 Billion by 2020: Report'* (2017) <https://uk.reuters.com/article/us-banks-regulator-fines/u-s-eu-fines-on-banks-misconduct-to-top-400-billion-by-2020-report-idUKKCN1C210B> (accessed 11.10.2018).
[18] European Systemic Risk Board (ESRB), *Report on Misconduct Risk in the Banking Sector* (2015) <https://www.esrb.europa.eu/pub/pdf/other/150625_report_misconduct_risk.en.pdf> (accessed 15.10.2018)
[19] *Ibid*, at 19.

financial penalties may impact on the users of the financial system. This is finally detrimental to the purpose of finance to benefit the real economy and spur economic growth.[20]

The ESRB's warnings have received considerable scholarly attention. Recently, by analysing a dataset of 671 financial penalties imposed on 68 international banks between 2007 and 2014, Koster and Pelster found evidence of how financial penalties following misconduct cases affect banks' profitability and stock performance.[21] Among other examples, this confirms the high level of attention by regulators, policymakers, scholars and practitioners on the issue of conduct risk. As shown below, this close review is traced back to its potential to impinge on consumer protection and the fair and safe operations of markets, in both retail and wholesale sectors.[22] As such, conduct risk implies a broad analytical scope in relation to those who can commit misconduct and those who can suffer from misconduct. In the first case, not only a financial institution employee but also senior managers, agents and everyone acting on behalf of the institutions. In the second case, the spectrum is wide, ranging from individual customers, professional clients, shareholders, and so on.[23]

Overall, the concept of conduct risk originates from systematic and generalised episodes of wrongdoings across the financial services industry, in particular, in the banking sector. The magnitude and resonance of these events paved the way for the use of the term conduct risk and are at the heart of the ensuing debate on how to tackle this risk.

2.2. Conduct Risk Catalysts

Serious conduct-related events happening before and after the recent crisis are essential but not exhaustive. The conduct risk concept needs to be further explained by reviewing the key factors that originate this risk. The former UK Financial Services Authority coined the term 'conduct risk'. Afterwards, its successor, the Financial Conduct Authority (FCA), discussed the drivers of the so-called 'wholesale conduct risk' vis-à-vis 'retail conduct risk'.[24] 'Wholesale and 'retail' are domains for identifying different contexts and actors. Wholesale conduct risk refers to the way firms behave with each other. As such, it arises in the context of the business transactions among wholesale parties and may include market abuse practices as examples of misconduct. Retail conduct risk addresses a firm behaviour to its retail customers and is mainly explained in relation to the mis-selling of financial products.[25] In either case, the drivers are the same and with the potential to affect consumer protection and market integrity. For instance, the manipulation of interbank offered rates carries the risk of threatening both market integrity and consumer protection. Market integrity is affected to the extent that the manipulation erodes the credibility of the interest rate benchmark.

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[20] *See* also FSB, *Stocktake of Efforts to Strengthen Governance Frameworks to Mitigate Conduct Risk* (2017) <http://www.fsb.org/wp-content/uploads/WGGF-Phase-1-report-and-recommendations-for-Phase-2.pdf> (accessed 20.08.2018).

[21] Hannes Koster & Matthias Pelster, *Financial Penalties and Bank Performance*, C Journal of Banking and Finance 79, 57 (2017).

[22] Financial Conduct Authority (FCA), *Risks to Customers from Financial Incentives* (2013) <https://www.fca.org.uk/publication/finalised-guidance/fsa-fg13-01.pdf> (accessed 15.10.2018).

[23] Management Solutions, *Conduct Risk Framework: Industry Trends and Challenges* (2016) <https://www.managementsolutions.com/sites/default/files/publicaciones/eng/conduct-risk-framework.pdf> (accessed 15.10.2018)

[24] FCA, *Risk Outlook 2013* (2013) <https://www.fca.org.uk/publication/business-plans/fca-risk-outlook-2013.pdf> (accessed 03.11.2018).

[25] FCA, *supra* n 22.

On the other hand, consumer protection is undermined to the extent that financial products will be determined in accordance with a manipulated benchmark.[26]

On top of these effects are the catalysts of conduct risk. Accordingly, it is possible to distinguish between factors that originate, crystallise, normalise and increase conduct risk. Market failures, in particular, information gaps between financial firms and their clients explain the first category. They are conduct issues generators in both wholesale and retail markets. Speaking of retail markets, firms often exploit their superior knowledge and understanding of the features of financial products and services. This means that unsuitable products are sold taking advantage of the counterparty's unavailability or lack of understanding of crucial pieces of information, such as the product design, risk characteristics and future performance. Indeed, notable cases of mis-selling of financial products to retail customers denote not only illegal exploitation of information asymmetries between transacting parties but also exploitation of a customer's poor financial capability, meant as the ability to understand and interpret the available information.[27] Financial institutions often (and wrongly) assume that their customers have sufficient financial capability, or take advantage of their poor literacy. Consequently, the risk of misconduct is concrete whenever this disequilibrium is not tackled appropriately.

Even though adequate information disclosure and improvement of financial literacy are fundamental, they may not be sufficient. Consumers' irrational behaviours may also play a decisive role in driving conduct risk. This aspect is quite complex because relates to the role that social, cognitive and emotional factors play in people's economic decisions, and the extent to which they lead them to wrong choices. Under this perspective, unconscious factors such as heuristics and cognitive biases are the root causes of erroneous decisions. Heuristics are usually explained as mental shortcuts through which the decision-making process is shortened. Cognitive psychology recognises that heuristics are helpful in making judgements and decisions more quickly and efficiently. Nonetheless, they can also be the source of the so-called cognitive biases, which arise when heuristics result in wrong decisions or choices.[28] In the financial services context, for instance, the choice of a product that is based exclusively on the financial institution's very well-known brand is regarded as 'driven by heuristics' given the lack of consideration for the most important terms or characteristic of the product.[29] Consumer biases are drivers of conduct risk as firms can exploit them to manipulate the quality and price of products to their own advantage, so that consumer protection, effective competition, and market integrity may be seriously hindered.[30]

Overall, the combination of information problems and consumer behavioural weaknesses facilitate the conduct risk probability. Such a likelihood is then aggravated where conflict of interest situations materialise. It is acknowledged that the exploitation of information asymmetries provides incentives for firms to act at the expense of their clients' interests. This can take place in various ways: by privileging the interest of the firm over that of clients, by serving the interest of some customers over those that are regarded as less profitable, or when employees advantage their own interests to the detriment of those of the firm of its clients.[31] Further examples could be brought forward. In any case, it must be emphasised how the interaction between information problems and

[26] FCA, *supra* n 24.
[27] Arjan Reurink, *Financial Fraud-A Literature Review*, 16 Max Planck-Institut Fur Gesellschaftsforschung 5, 63 (2016).
[28] Dan Lockton, *Cognitive Biases, Heuristics and Decision-making in Design for Behaviour Change* (2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2124557> (accessed 10.11.2018).
[29] FCA, *supra* n 24.
[30] Ibid, at 14.
[31] Carlo V di Florio, *Conflict of Interest and Risk Governance*, National Society of Compliance Professionals (2012) <https://www.sec.gov/news/speech/2012-spch103112cvdhtm> (accessed 16.11.2018); *see* also Eugene N White, *Can the Market Control Conflicts of Interest in the Financial Industry?* (2004) (accessed 18.11.2018).

conflict of interest situations may exacerbate poor outcomes for consumers. In essence, while information problems coupled with consumers' shortcomings facilitate conduct risk, such drivers are then reinforced when a conflict of interest is effective. Their interaction consolidates conduct risk. Accordingly, originating factors (information problems/ consumer biases) mark the development stage of conduct risk while crystallising factors (conflict of interest) identify the stage in which conduct risk is more concrete and thus opportune management strategies need to be in place.

Moreover, where firms are structured and managed in ways that are detrimental to their customers' interests, the collective values, beliefs and principles underlying the organisation and operation of firms come under the spotlight. In one word, poor conduct across the financial services industry is always associated with poor firm culture.[32] In practice, where leadership, business strategies, behavioural norms and reward policies are more profit-oriented misconduct is highly likely to flourish. For instance, a sales policy based on rewarding staff in connection with the volume of sales increases the risk of selling or cross-selling unsuitable products.[33] Poor culture is therefore regarded as a driver of conduct risk. However, compared to the factors discussed earlier, this driver has an inherent 'normalisation' danger, that is, the risk that poor conduct behaviours become so embedded into an organisation that they are finally accepted as permissible. Crucially, at this stage misconduct may become a normal thing or 'routine'.[34] For these reasons, a re-focus on values and principles putting the benefit of customers at the centre stage of every business strategy is now recognised as a fundamental objective by regulators and policymakers at all levels.[35]

Finally, technological developments are also identified as conduct risk determinants. Unquestionably, technological progress has brought numerous advantages to market participants. Among others, firms can now store and dispose of a larger volume of data relating to their customers. This enables firms to design and target their products more efficiently, as well as to price risks more accurately to individual customers. Equally, consumers benefit from easier and faster access to products and services.[36] On the other hand, firms' IT reliance poses numerous challenges. The constant and rapid pace of technological progress may affect the ability of firms to ensure efficient control over transactions that take place through digital systems. Undoubtedly, there is an inherent risk of security breaches and financial crime.[37] Nonetheless, conduct issues may also arise because of a firm failure to ensure updated and correctly installed IT devices. For example, back in 2014, the FCA fined some major UK banks for an IT incident that caused serious disruptions to their customers.[38] The incident prevented customers from utilising the Banks' online facilities and thus from accessing current accounts, making payment transfers and drawdown operations. In addition, they discovered that the banks did not process or record other important transactions, or applied the wrong credit and debit interest to their own accounts. Significantly, these disruptions affected the banks' customers in the UK and abroad, as well as individuals who were not customers,

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[32] Group of 30 (G30), *Banking Conduct and Culture-A Permanent Mindset Change* (2018) <https://www.oliverwyman.com/our-expertise/insights/2018/dec/banking-conduct-and-culture-the-g30-report.html> (accessed 04.12.2018); *See* also Salz Review, *An Independent Review of Barclays' Business Practices* (2013) <https://online.wsj.com/public/resources/documents/SalzReview04032013.pdf> (accessed 04.12.02018).

[33] Francesco De Pascalis, Sales Culture and Misconduct in the Financial Services Industry: An Analysis of Cross-selling Practices, 39 Business Law Review 5, 12 (2018).

[34] FSB, *supra* n 20.

[35] *See* G30 *supra* n 32.

[36] Marek Dabrowski, *Potential Impact of Financial Innovation on Financial Services and Monetary Policy*, CASE Reports 488 (2017); *see* also Allen N Berger, *The Economic Effects of Technological Progress: Evidence from the Banking Industry,* 2 Journal of Money, Credit, and Banking 35, 141 (2003).

[37] FCA, *supra* n 24.

[38] FCA, *Final Notice* (2014) (accessed 06.12.2018).

and who finally were unable to receive money or payments from the banks' customers. The causes of the IT incident were traced back to a compatibility issue between the 'old' software and the 'new' (upgraded) one, which ultimately led the banks' online services to a halt. The IT incident made the banks responsible for inadequate IT risk exposure management.[39] Hence, IT failures are regarded as drivers of conduct risk to the extent that they have the potential to impair the reputation of financial institutions and escalate into financial penalties.[40]

To summarise, episodes of misconduct depend on the combination and interaction of factors such as information asymmetries, consumer irrational decisions and conflict of interest. In between, new technologies can also increase conduct risk where a firm system is not resilient enough and is therefore vulnerable to failures and distortions that finally escalate into losses.

3. Defining conduct risk: subcategory or standalone

3.1. Scope and overlapping issues

Root causes, drivers and implications of conduct risk are accepted and widely discussed among regulators and policymakers. Within this debate, an evolution should be noted. Some authorities at the EU and international level are using the term 'misconduct risk'.[41] Conduct and misconduct risk are used interchangeably to indicate the same phenomenon. Nonetheless, it appears that there is not a single, univocal definition. The former FSA in the UK, which first shared the term conduct risk always declined to define conduct risk. Likewise, the FCA, which underlined how financial institutions have different conduct risk profiles, and thus there can be different conduct risk assessment frameworks.[42] This means that the definition of conduct risk is a financial institution task. Currently, some financial institutions either have a working definition or struggle with defining conduct risk.[43] The task of a firm-specific definition cannot be de-linked from the understanding provided by regulators and policymakers. In fact, despite the lack of a specific definition, financial regulators and supervisory authorities have provided general definitions or explanations that should guide financial institutions in the elaboration of their own firm-based definition. Under this perspective, it is worth analysing the conduct risk understanding landscape. This term refers to the degree of consistency in the understanding of the phenomenon in question by the involved actors: regulators, international standard-setting bodies and financial institutions so that the nature and scope of conduct risk are clear enough to result in a firm-specific definition.

In the UK, the FCA explains conduct risk by emphasising the cause-and-effect relationship between a firm poor conduct and poor outcomes for its customers.[44] This is the basis for further (but similar) definitions from other authorities. For instance, the Central Bank of Ireland refers to conduct risk as the risk arising from a financial services firm's direct interaction with its

[39] *Ibid*.
[40] FCA, *supra* n 24.
[41] *See* ESRB *supra* n 18; *see* also FSB, *supra* n 20.
[42] FCA, *Building a Common Language in the Mortgage Market* (2013) <https://www.fca.org.uk/news/speeches/building-common-language-mortgage-market> (accessed 12.12.2018).
[43] Stacey English, Susannah Hammond & Ashley Kovas, *Conduct Risk Report 2015/16* <risk.thomsonreuters.com/en/resources/infographic/conduct-risk-2015-16.html> (accessed 15.12.2018). *Id, Culture and Conduct Risk 2018: Benchmarking Five Years of Implementation*,< https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/reports/culture-and-conduct-risk-2018.pdf> (accessed 04.01.2019).
[44] FCA, *Retail Conduct Risk Outlook 2011*(2011) <https://www.fca.org.uk/publication/business-plans/fsa-rcro.pdf> (accessed 15.12.2018).

customers.[45] Both definitions are generic because they only introduce conduct risk as the equation between bad behaviour and customer detriment. Accordingly, they are narrow definitions that leave open the quest for the scope of conduct risk and interplay with other risks. In other words, they stimulate to question whether conduct risk is a standalone risk or is a category of other risks. This depends strictly on the understanding brought forward by regulators. At the EU level, the ESRB expands into the cause-and-effect nexus and concludes that from the conduct of supervision perspective, conduct risk is a very broad concept. Specifically, this broadness results from the undesirability to provide a single, narrow definition of misconduct given the endless list of types of misconduct that could be mentioned.[46] Essentially, the ESRB does not argue that it is impossible to define misconduct, but that it is not convenient. This justifies its view of conduct risk as too broad a concept to be defined, at least from the conduct of supervision perspective. Where submitted that it is not desirable to define misconduct and therefore embark on a specific definition of conduct risk, such a conclusion paves the way for firm-based definitions that replicates generic regulatory definitions.[47] However, things may have a different perspective where a definition of 'misconduct' is provided. The FSB qualifies misconduct as the 'conduct that falls short of expected standards, including legal, professional and ethical standards'.[48] On the one hand, the FSB recognises that this definition can capture a wide taxonomy of events. In this respect, it is in line with the ESRB's view that it is challenging to define conduct risk because of the wide variety of events that constitute misconduct. On the other hand, the FSB indicates the domains where misconduct events may arise: internal fraud, execution delivery and process management, business disruption and damages to assets, clients, products and business practices, employment practices and workplace safety.[49] Different events can be grouped under each domain. For instance, insider trading, tax evasion, data falsification, forgery and unauthorised transactions pertains to internal fraud, mis-selling, market manipulation, money laundering/terrorist financing are included within the client, products and business practices domain, while misconduct causing damages to IT assets relate to the business disruptions and damage to assets area.[50] Notwithstanding, a definition of conduct risk is still lacking. In essence, the taxonomy provided by the FSB delineates the contours of the scope of conduct risk, but once again, the provision of a definition is something the standard-setting bodies do not engage in.

Should a firm-specific definition be elaborated on with this taxonomy, the potential for confusion could arise. By comparison, the misconduct events and their areas are the same as the ones that the Basel Committee on Banking Supervision (BCBS) specifies for operational risk.[51] Besides, the type of effects deriving from these events, among others, legal liability, restitution or regulatory actions are the same.[52] Consequently, this FSB determination of the scope of conduct risk through a list of misconduct events and domains where they can arise affects the identity of conduct risk, in the sense of potential overlapping with other risks, in this case, operational risk. This potential seems to be more apparent where the definition of operational risk provided by the BCBS, as the 'risk of loss resulting from inadequate or failed internal processes, people and systems

[45] Central Bank of Ireland (CBOI), *Prism Explained How the Central Bank of Ireland is Implementing Risk Based Regulation* <https://www.centralbank.ie/docs/default-source/Regulation/supervision/prism/gns-4-1-2-2-5-prism-explained-feb-2016.pdf?sfvrsn=2> (accessed 18.12.2018).
[46] ESRB *supra* n 18, at 5.
[47] *See* below section 4.
[48] FSB, *supra* n 20, at 6.
[49] *Ibid*.
[50] *Ibid*.
[51] Basel Committee on Banking Supervision (BCBS), *Operational Risk* (2001) <https://www.bis.org/publ/bcbsca07.pdf> (accessed 20.12.2018).
[52] *Ibid*.

or from external events',[53] is compared with another definition of conduct risk set out at the EU level. With regard to the banking sector, the European Banking Authority (EBA) defines conduct risk as the 'the current or prospective risk of losses to an institution arising from inappropriate supply of financial services, including cases of wilful or negligent misconduct'.[54] They seem to have the same core elements. First, the risk of loss affecting the concerned institution. Second, the fact that the potential for loss derives from conduct. Third, as mentioned above, the types of conducts are the same and can be either wilful or negligent. For instance, the internal fraud area relates to losses deriving from acts intended to defraud or circumvent regulations, the law or company policy, while the clients and products and business practices area refers to losses that are consequential to unintentional breaches of professional obligations relating to specific clients, or to obligations concerning the design and characteristic of a financial product.[55]

These similarities raise an identity issue for conduct risk, which finally results from the way conduct risk is defined and interpreted. Consequently, such a scenario brings into question whether conduct risk overlaps with operational risk or is encompassed by operational risk. There may be different implications. Overlapping may mean a strong level of coincidence between the components of two risks so that one could be regarded as superfluous; or may be the result of a definition that still needs further elaboration and clarity. In this case, it can be assumed that the two risks are independent and therefore it is necessary to set out a definition of conduct risk that leaves no doubt about a potential overlapping with operational risk. However, where the EBA's definition is accepted, another conclusion can be that conduct risk does not overlap but is a type of operational risk. Significantly, the BCBS has so far not officially recognised conduct risk as opposed to the mentioned supervisory authorities. Indeed, conduct issues are treated within the operational risk framework.[56] This reinforces the above questions and makes further investigation worthwhile.

3.2. Conduct risk as a subset of operational risk

In reality, the argument of a potential overlapping with operational risk could be contradicted in the light of further clarifications provided by the European supervisory authorities. Even though the ESRB has pointed out the difficulties in defining conduct risk from a conduct supervision perspective, it then qualified it as a 'subset of operational risk' from a prudential perspective.[57] The EBA echoes this interpretation as its definition regards conduct risk as a 'subcategory' of operational risk.[58] Consequently, overlapping issues would have no reason to exist. Where conduct risk does not overlap with operational risk, it may be a subcategory or subset of the latter. It is worth reflecting over these qualifications. Theoretically, a subcategory qualification would imply a type of relationship in which operational risk is the parent category and conduct risk is a narrower category. In other words, where a category is defined as a collection of objects, and objects are the elements of the category, a subcategory is itself a category whose objects are a restriction of the

[53] *Ibid.*
[54] European Banking Authority (EBA), *Guidelines on Common Procedures and Methodologies for the Supervisory Review and Evaluation Process (SREP)* <https://www.eba.europa.eu/documents/10180/935249/EBA-GL-2014-13+(Guidelines+on+SREP+methodologies+and+processes).pdf> (accessed 21.12.2018). Although this definition was elaborated for the banking sector, it is generally recognised as a template definition applying across the whole financial services industry.
[55] *See* BCBS, *QIS2-Operational Risk Loss Data* (2001) <https://www.bis.org/bcbs/qisoprisknote.pdf> (accessed 21.12.2018).
[56] *See* Antje Hargarter & Gary van Vuuren, *Assembly of a Conduct Risk Regulatory Model for Developing Market Banks*, 1 South African Journal of Management Studies 20,1 (2017).
[57] ESRB, *supra* n 18.
[58] EBA, *supra* n 54.

parent category's objects.[59] Logically, there is a hierarchical relationship between the parent category and the subcategory. Assuming that conduct risk is a subcategory of operational risk, this raises the question of which elements determine operational risk as the parent category and conduct risk as a subcategory. As pointed out, the two risks have the same trigger events, but their respective scopes may differ in consideration of their relationship with other risks. In this regards, the BCBS definition of operational risk specifies that it includes legal risk[60] but excludes strategic risk[61] and reputational risk.[62] On the other hand, absent a specific definition of conduct risk, commentators interpret conduct risk as including strategic and reputational risk other than legal risk.[63] Once again, this is sufficient to exclude an overlapping between the two risks, but leads to verifying whether what they include and exclude can still determine a category/subcategory relationship. To this end, it may be helpful to analyse the meaning of the term 'subset' used by the ESRB. Under the set theory, a subset should include all or some of the elements of a set, which is also defined as the superset.[64]

To define conduct risk as the subset of operational risk, the ESRB refers to the definition of operational risk under the so-called 'CRD-IV package', namely the definition incorporated in the EU Regulation No 575/2013. This replicates the BCBS's definition, but without the specification of the exclusion of strategic and reputational risk.[65] Assuming that a superset/subset relationship can be determined through equality ('all elements') of elements, we might conclude that conduct risk is a subset of operational risk in that equality would be determined by the same events that lead to a financial institution's loss. However, where other risks are also part of the concept of operational risk, there can be further causes for reflection. As mentioned above, the BCBS definition of operational risk states that it 'includes legal risk and 'excludes strategic and reputational risk', while it is argued that conduct risk includes these two risks. According to the set theory, conduct risk could be still regarded as a subset of operational risk even under the perspective of the risks they include or exclude. Indeed, 'some' of the elements the categories include can also determine a superset/subset relationship. Consequently, legal risk is the determinant of equality in addition to the trigger events. Strategic and reputational risk, however, are not found in the superset operational risk. This would not mean that the hierarchical relationship is doubtful. Again, the set theory explains that, in addition to the elements in common with the superset, a subset also includes elements that are not found in the superset.[66] For this reason, it is defined as a proper or strict subset. Hence, conduct risk might be regarded as a strict or proper subset of operational risk to the extent that it has in common with the latter trigger events and legal risk, and also includes strategic and reputational risk that are not found in operational risk.

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[59] Tom Leinster, *Basic Category Theory* vol. 143 Cambridge Studies in Advanced Mathematics, 9 (Cambridge University Press 2014).

[60] 'Legal risk includes, but is not limited to, exposure to fines, penalties, or punitive damages resulting from supervisory actions, as well as private settlements', *see* BCBS, *International Convergence on Capital Measurement and Capital Standards-A Revised Framework* (2004) <https://www.bis.org/publ/bcbs107.pdf> (accessed 21.12.2018).

[61] 'Strategic risks is the current or prospective risk to earnings and capital arising from changes in the business environment and from adverse business decisions, improper implementation of decisions or lack of responsiveness to changes in the business environment', *see* EBA, Guidelines On *The Application of the Supervisory Review Process under Pillar 2* (2006) <https://eba.europa.eu/documents/10180/585173/GL03.pdf/9705f895-fbfa-4e39-bac9-3def3127f545> (accessed 23.12.2018).

[62] 'Reputational risk means the current or prospective risk to the institution's earnings own funds or liquidity arising from damage to the institution's reputation, *see* EBA, *supra note* at 17.

[63] English, Hammond and Kovas, *supra note*

[64] Charles C Pinter, *A Book of Set Theory*, 15 (Dover Publications, Inc 2014).

[65] *See* Article 4(52) Regulation (EU) No 575/2013, 2013 OJEU (L176/1).

[66] Pinter, *supra* n 64.

A strict subset relationship supposes that the subset has fewer elements than the superset. Quantitatively, conduct risk appears to include more risks than operational risk where we read the BCBS definition of operational risk. Nonetheless, studies on operational risk bring to attention the complexity of this risk and the fact that, on its own, encompasses a wide variety of other types of risks in addition to legal risk: liquidity risk, Hersttat risk, compliance risk, processing risk, system risk, human resources risk, disaster risk, fiduciary risk, model risk.[67] Furthermore, other scholars contend the exclusion of strategic risk based on the argument that strategic management is connected with the areas where operational risk arises.[68] Likewise, others underline the reputational impact of large operational risk events and their substantial damages, which are often higher than the cost of the direct event.[69] Even though there is not an exhaustive list of subcategories, this understanding of operational risk places it as the parent category of other categories of risks.

Overall, it is highly recognised that operational risk has risen as 'a key component of the global financial industry regulation'.[70] By reviewing the terminology used by the European supervisory authorities to categorise conduct risk and the BCBS definition of operational risk, a recalibration of the nature of conduct risk, as a subcategory of operational risk, might be supported.

3.3. Conduct risk as a standalone risk

The qualification of conduct risk as a subset of operational risk, however, is not entirely accepted against the backdrop of a stark difference between them. While operational risk appraises potential damages to a financial institution consequently to internal and external factors, conduct risk relates to potential damages to consumers and market integrity.[71] This argument is worthy of analysis. Under this perspective, conduct risk undertakes a new dimension, namely as a standalone risk. Indeed, the hierarchical dimension that characterises the connection between the two risks within the superset/subset argument is contradicted by the wider repercussions of conduct risk. In terms of the effects, operational risk would be confined to the concerned financial institution, while conduct risk would have wider implications due to its potential impact on financial stability.[72] Within this context, there is also a major difference between the events underlining the two risks, though they are the same. Operational risk loss events would remain circumscribed to the affected firm, while conduct risk loss events have implications for the financial system. Under this angle, it is hard to relegate conduct risk as a subset of operational risk. Overall, this argument emphasises how the potential economic impairment to the system is the distinguishing characteristic of conduct risk so that it must be qualified and analysed as a standalone risk.[73] Accordingly, conduct risk neither overlaps with operational risk nor is its subset, it is a distinguishable risk. This view is also reinforced by those scholars stressing that operational risk does not address those misbehaviours that have the potential to create market distortions and thus 'is an antiquated view of misconduct

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[67] Imad A Moosa, *supra* n 10, at 9.
[68] Madhusudhan Acharyya, *The Role of Operational Risk and Strategic Risk in the Enterprise Risk Management Framework of Financial Services Firms*, 1 International Journal of Services Sciences 3, 79 (2009).
[69] Philippa X Girling, *Operational Risk Management: A Complete Guide to a Successful Operational Risk Framework,* 255 (Wiley 2013)
[70] *See* Michael Power, *The Invention of Operational Risk*, ESRC Centre for Analysis of Risk and Regulation (2003).
[71] Deloitte, *Management Information for Conduct Risk. Underpinning Better Decision-making* <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/deloitte-uk-management-information-for-conduct-risk.pdf> (accessed 04.01.2019).
[72] I*bid*.
[73] *See* Tata Consultancy Services, *Conduct Risk Management: The Journey Ahead*, White Paper <https://www.tcs.com/content/dam/tcs/pdf/Industries/Banking%20and%20Financial%20Services/Conduct%20Risk%20Management%20-%20The%20Journey%20Ahead.pdf> (accessed 04.01.2019).

that has not been updated to reflect the post-crisis macro-prudential approach'. For this reason, they urge a measure of reform of the Basel framework to include conduct risk as a 'priority risk' and the adoption of supervisory requirements tailored to this risk.[74]

These interpretations reflect the widely accepted perception of operational losses as firm-specific, that is, purely idiosyncratic with no systemic implications. However, these views are debatable as recent studies argue in favour of the systemic implications of operational events.[75] There is, in fact, a new strand of literature demonstrating systemic contagious effects of operational losses in the context of pre-crisis and post-crisis wrongdoings involving major banks worldwide. For instance, by analysing significant operational loss events across European banks some authors found empirical evidence of spill-over effects of operational loss announcements from the interested firm to the European banking industry.[76] The same conclusions have been asserted with regard to US banking organisations. In particular, with reference to operational losses following event types such as internal fraud, client products and business practices, as well as execution, delivery and process management, other studies showed the association between large operational losses and systemic risk across the US banking industry.[77] Moreover, some scholars refer to the UK PPI scandal as an example of 'systemic operational risk' by underlining how the sale of unsuitable products to customers by bank staff was detrimental in terms of consumer protection, escalated into heavy regulatory sanctions and finally prompted some banks to exit the PPI market.[78]

Within this context, it can be seen how operational loss events have the same effects of conduct risk loss events. Consequently, the line of demarcation between them is rather blurred. These studies have not only the potential to influence the regulation and supervision of financial institutions but also to shed new light that makes the nature and limits of operational risk, above all, its idiosyncratic nature highly debatable. On the other hand, within the debate on the qualification of conduct risk, they may reshape the power relationship between conduct and operational risk. Where it is submitted that operational risk poses systemic threats, it is no longer an 'antiquated' risk vis-à-vis conduct risk. Similarly, the assumption that operational losses events may be 'systemic operational losses' reignites the discussion on what conduct risk is and how relates to other risk, that is, whether and to what extent distinguishes from others, whether and why is a subcategory of other risks, or finally has the potential to overlaps with other risks.

4. Where does it fit?

The question of whether conduct risk is a duplication, a subset of operational risk or a standalone risk is only an example of the problems surrounding the definition of this risk. The discussion could go beyond operational risk as some scholars qualify conduct risk as a 'form of legal risk',[79] while some firms subsume it under compliance risk.[80] It may be argued that as operational risk encompasses these two risks, conduct risk may appear as the subset of the operational risk's subsets.

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[74] Christina Parajon Skinner, *Misconduct Risk*, 4 Fordham Law Review 84, 1593 (2016).
[75] Moosa, *Misconceptions About Operational Risk,* 4 Journal of Operational Risk 1, 97 (2007).
[76] Thomas Kaspereit, Kerstin Lopatta, Suren Pakhchanayan, Jorg Prokop, *Systemic Operational Risk: Spillover Effects of Large Operational Losses in the European Banking Industry,* 3 The Journal of Risk Finance 18, 252 (2017).
[77] Allen N Berger, Filippo Curti, Atanas Mihov, John Sedunov, *Operational Risk is More Systemic than you think: Evidence from U.S. Bank Holding Companies* (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3210808> (accessed 07.01.2019).
[78] Patrick McConnel & Keith Blacker, *Systemic Operational Risk: The UK Payment Protection Insurance Scandal*, 1 The Journal of Operational Risk 7, 79 (2012).
[79] Roger McCormick & Chris Stears, *Legal and Conduct Risk in the Financial Markets* (Oxford University Press 2018).
[80] FSB *supra* n 20.

Similarly, a recent study ranks conduct risk as fifth within a classification of ten major operational risks.[81] In this regard, however, it is noted how some of the risks ranked before, such as for example cyber risk and data security, regulation or outsourcing have some conduct risk characteristics.[82] This once again proves that the way conduct risk is interpreted does not lead to a solid, clear and, above all, univocal understanding. This also influences the way that financial institutions define conduct risk.

As mentioned above, some institutions have a definition while others have explicitly declared their difficulties in providing even a working definition. By referring to the institutions that brought forward a definition of conduct risk, different emphasis can be noticed. For examples, some banks define conduct risk as the detriment deriving to customers, clients, counterparties, the institution and its employees because of poor judgement in the execution of business activities.[83] This definition resembles the understanding provided by the FCA, which regards the connection between poor outcomes and poor conduct as the building blocks of the concept of conduct risk. Other institutions rephrase this connection by underlining the violation of regulations, laws, or the failure to meet customers' expectation as the cause of misconduct and ensuing detriment.[84] In between, some other firms entangle the term conduct risk to culture so that they are defined as one word, 'conduct risk and culture', referring to as a 'shared set of behavioural norms' that ensure customer and shareholder protection, as well as market integrity.[85] Furthermore, other financial institutions categorise conduct risk as 'brand risk' or 'reputational risk'.[86] Finally, there are those firms that simply explain the conduct risk assessment and management strategies, but decline to provide any specific definition.[87]

Significantly, all these definitions are modelled upon some of the characteristics and effects that the regulators have so far indicated as components of the concept of conduct risk. However, grounds for ambiguity remain to the extent that these definitions bring the same problems of clarity as the regulator general definitions. Alike, the firm context is only sufficient to grasp where conduct risk originates and why there is a conduct risk debate, but finally they do not offer significant elements to understand the nature of conduct risk, that is, as a standalone risk or subcategory of another risk. At this stage, it can be said that there is not a definitive answer to the questions posed above. Among the arguments brought forward, the overlapping issue with operational risk appears to be a stretch to the extent that the EBA's definition and the ESRB's interpretation place conduct risk under the realm of operational risk as a subcategory. This, however, is the source of conflict with those views claiming the autonomy of conduct risk. In between, further cause for reflections is offered by other views of conduct risk as a kind or type of other risks, or even encompassing other risks. These ultimately add confusion to the already nebulous nature of conduct risk. Finally, financial institutions reflect this confusion in their own definitions. Consequently, the main problem is not the existence of different definitions of conduct risk but the lack of a clear identity of this risk. Establishing with certainty this nature is crucial against the current debate aiming at ensuring better coordination in the assessment and management of this risk.

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[81] *See* Risk.net, *Top 10 Operational Risk for 2017* (2017) <http://www.risk.net/risk-management/operational-risk/2480528/top-10-operational-risks-for-2017> (accessed 07.07.2018).

[82] *See* Tom Butler, Patrick O'Sullivan, Dzmitry Yahoudzik Peter Cowap, Mary Daly, *A Systematic Approach for Managing and Supervising Conduct Culture and Risk, Governance Risk & Compliance Technology Centre (GRCTC)*, 2 (accessed 07.07.2018).

[83] English, Hammond, Kovas, *supra* n 43.

[84] *Ibid*.

[85] *Ibid*.

[86] *Ibid*.

[87] *Ibid*.

5. Concluding Remarks

Definitions are essential to stimulate discussions and create convergence on meanings. Conduct risk is a new concept that emerged in the wake of collective conduct failures in the financial services industry. As such, it lacks a specific definition because a one-size-fits approach in its management is not possible as firms have different conduct risk profiles.[88] Nonetheless, it is also submitted that convergence on its characteristic of risk affecting consumer protection and market integrity is *per se* sufficient to give a solid knowledge of this risk.[89] In reality, this agreement is only sufficient to justify the existence of conduct risk. This paper argues that the way conduct risk is interpreted by regulators is far from an offer of clarity. Until now, regulators have been reluctant in bringing forward any specific definition. This may depend on several reasons, among others, the fact that conduct risk has emerged very recently and thus further research is needed. At this stage, there are only generic definitions that indicate how regulators interpret or consider this risk. Even these generic understandings are not definitive as to the nature and scope of conduct risk. Critically, the paper shows that conduct risk is trapped between its being considered as the subset of operational risk or as a standalone risk. Under the first dimension, conduct risk is encompassed within another risk; while the second dimension gives conduct risk its own autonomy. Both arguments appear to have strengths and weaknesses and therefore there is nothing conclusive. However, they represent the starting point for widening the debate towards the identity of conduct risk. There can be multifaceted approaches for the management of conduct risk, but the question of whether conduct risk stands needs an answer. This question cannot be ignored for several reasons. First and foremost, coordination across the financial services industry is urged with regard to the mitigation and management of conduct risk. Thus, a univocal understanding of the nature and scope of conduct risk underpins the achievement of this objective. Second, its clear deconstruction permits better predictions on how this risk will evolve. Consequently, the awareness of the existence of conduct risk needs to be completed with an answer to the fundamental question of where it stands.

[88] FCA, *supra* n 42.
[89] Management Solution, *supra* n 23.