



BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

The Case for a Consolidated European Banking Act ("EUBA")

A Reflection Paper

edited by Marco Lamandini, Marino Perassi, Stefania Ceci, Raffaele D'Ambrosio,
Francescopaolo Chirico, Enrica Consigliere, Guido Crapanzano,
Leonardo Droghini and Stefano Montemaggi

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INTRODUCTION

This Reflection Paper on how to streamline and strengthen the regulatory prudential framework for banks in Europe, enhancing its clarity and accessibility, has been prepared by a drafting team composed by senior legal experts of the Bank of Italy (Marino Perassi, Stefania Ceci, Raffaele D'Ambrosio, Francescopaolo Chirico, Enrica Consigliere, Guido Crapanzano, Leonardo Droghini and Stefano Montemaggi) together with professor Marco Lamandini. A previous draft of this Reflection Paper has been submitted for review to a panel of international experts including leading academics and senior legal experts from the International Monetary Fund, the Financial Stability Institute, UNIDROIT and several European and Member States' institutions and authorities. The drafters acknowledge that the opinions expressed in this Reflection Paper are in their personal capacity and do not necessarily reflect those of the Bank of Italy nor those of the members of the panel of international experts who have participated to the discussion of the draft. However, the drafters wish to thank wholeheartedly the members of the panel of experts for their very valuable contributions, that have helped immensely in straightening the text in many aspects. The drafters have also endeavoured to include in the text amendments and revisions to properly respond to specific written comments received by some members of the panel of experts, including in particular the comments by Alessandro Gullo, Ender Emre and Donato Messineo (IMF), Rastko Vrbaski (FSI), Ignacio Tirado and Myrte Thijssen (UNIDROIT), Luis Barroso (Ministry of Finance of Portugal), and professors Filippo Annunziata, Jens-Heinrich Binder, Blanaid Clarke, Christos Gortsos, Bart Joosen, Matthias Lehmann, David Ramos Munoz and René Smits.

The Reflection Paper discusses ways for a possible consolidation of the existing European prudential, conduct and transparency provisions on banking ("the Single Rule Book")¹ into a consolidated European Banking Act (the "EUBA"). Although complexity and fragmentation are equally relevant in other areas of banking regulation, the Reflection Paper defers to a second stage, for practical purposes, the inclusion in the exercise of the provisions on payment systems² and banks' crisis management and deposits guarantee.³ In the same

¹ The exercise includes at this stage the following legislative acts: Regulation (EU) No 575/2013 on capital requirements ("CRR"); Directive 2013/36/EU on capital requirements ("CRD"); Directive 86/635/EEC on the annual and consolidated accounts of banks and other financial institutions ("BAD"); Directive 2002/87/EC on supplementary supervision ("FICOD"); Regulation (EU) No 2017/2402 on simple, transparent and standardised securitisation ("SecReg"); Regulation (EU) No 2019/2033 ("IFR") and Directive 2019/2034/EU ("IFD"); Directive 2019/2162/EU on covered bonds ("CBD"); Directive 2011/83/EU on consumer rights ("Consumer Rights Directive"); Directive 2021/2167/EU on credit servicers and credit purchasers ("CSCPD"); Directive 2023/2225/EU on credit agreements for consumers ("CCD2"); Directive 2014/17/EU on mortgage credit ("MCD") and Regulation (EU) No 1093/2010 ("EBAR").

² Directive 2009/110/EC on electronic money institutions ("EMD") and Directive 2015/2366/EU on payment services ("PSD2"). See also the proposal for a Regulation on payment services ("PSR") (Procedure 2023/0210/COD) and the proposal for a Directive on payment services and electronic money services ("PSD3") (Procedure 2023/0209/COD).

³ Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms ("BRRD"), Directive 2001/24/EC on the reorganisation and winding up of banks ("WUD") and Directive 2014/49/EU on deposit guarantee schemes ("DGSD").

vein, it does not specifically address, at this stage, the harmonisation of Fintech. The way forward advocated by the Reflection Paper is, first, to enhance the uniformity of the prudential Single Rule Book.

This is done by extending the scope of what is currently covered by the CRR, incorporating many maximum harmonisation provisions that would replace a vast array of minimum harmonisation rules currently enshrined in the directives mentioned in footnote 1, through an omnibus regulation of the European Parliament and the Council (the “Omnibus Regulation”) recasting the CRR and leaving in an omnibus directive of the European Parliament and the Council (the “Omnibus Directive”) solely a much narrower set of provisions strictly related to (i) the exercise by the regulated entities of their freedom to establishment and freedom to provide services and (ii) the legal framework on the competent and designated authorities, including their organisation.

Second, and conversely, it is proposed to foster delegation by both the Omnibus Regulation and the Omnibus Directive to implementing and regulatory technical standards drafted by the European Banking Authority (“EBA”) and endorsed by the Commission (the “Level 2 Regulation”)⁴ for a significant number of rules currently set out in directives or regulations of the European Parliament and the Council (the “Level 1 Legislation”), tweaking in parallel the Level 1 Legislation towards a more principles-based approach.

The Reflection Paper is structured as follows. Section I discusses the guiding principles and philosophy of the envisaged exercise, including its legal basis in light of the evolving case law of European courts and the grounds for potential simplification through de-legification. Section II outlines some principles for restating the EU prudential framework, by identifying the content of both an Omnibus Directive and an Omnibus Regulation, as well as the criteria that can be used to delegate the technical rules to Level 2 acts, as exemplified with a test-case. Section III examines the different (and often inconsistent) prudential regimes applicable – both at the individual and super-individual levels – to various categories of supervised entities and proposes some ways forward for harmonisation. It also discusses the most visible paradox of the incomplete Banking Union, and namely the still unachieved objective of creating, through cross-border banking, a true single market for banking commensurate to the political and economic dimension of Europe; in this respect, Section III, building

⁴ This is an old recipe, and yet the ways Level 2 regulation and Level 3 instruments are currently employed in banking regulation and supervision is controversial and raises loaded questions of principle on democratic control and judicial review but also practical questions on how this use can be improved and strengthened (for a recent, and comprehensive discussion originating from industry associations compare *Less is more, Proposals to simplify and improve European Rule-Making in the Financial Services Sector*, Report by an Expert Group, 10 February 2025). However, the Reflection Paper endeavours to develop, and then to exemplify in a practical example used as a test case, the proposed approach of simplification through wider delegation (de-legification, and not deregulation).

on a recommendation of the Draghi report,⁵ discusses how to promote, through a bespoke regulatory reform that would leverage the existing legal framework while introducing selective improvements, the cross-border consolidation of a handful of European banks having the cross-border potential to act as Banking Union's accelerators. Section IV addresses supervisory authorities, their objectives, tasks and powers and the need for further reform. Section V discusses rules of conduct and transparency requirements.

⁵ MARIO DRAGHI, *The future of European competitiveness – A competitive strategy for Europe*, September 2024, p. 289; compare also IGNAZIO ANGELONI, *The Next Goal: euro area banking integration*, EGOV, February 2024; DAVID RAMOS MUÑOZ, MARCO LAMANDINI, MYRTE THIJSEN, *A reform of the CMDI framework that supports completion of the Banking Union*, EGOV, May 2023.

LIST OF ABBREVIATIONS

AMLA Regulation	Regulation (EU) No 2024/1620 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism
BAD	Directive 86/635/EEC on the annual and consolidated accounts of banks and other financial institutions
BRRD	Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms
BTS	Binding technical standards
CCP	Central counterparty
Comitology Regulation	Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers
Consumer Credits Directive or CCD2	Directive 2023/2225/EU on credit agreements for consumers
Consumer Rights Directive	Directive 2011/83/EU on consumer rights
Consumer Protection Cooperation Regulation (also CPC Regulation or CPCR)	Regulation (EU) No 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws
Covered Bonds Directive or CBD	Directive 2019/2162/EU on the issue of covered bonds and covered bond public supervision
CRD	Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms
CRR	Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms
Credit Rating Agencies Regulation	Regulation (EC) No 1060/2009 on credit rating agencies

Crowdfunding Regulation	Regulation (EU) No 2020/1503 on European crowdfunding service providers for business
CSCPD	Directive 2021/2167/EU on credit servicers and credit purchasers
CSD	Central securities depository
CSDR	Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories
DGSD	Directive 2014/49/EU on deposit guarantee schemes
DORA	Regulation (EU) No 2022/2554 on digital operational resilience for the financial sector
EBA	European Banking Authority
EBAR	Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority)
ECB	European Central Bank
EMD	Directive 2009/110/EC on electronic money institutions
EMIR	Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories
EIM	Early intervention measure
EUBA	Consolidated European Banking Act
FICOD	Directive 2002/87/EC on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate
G-SII	Global systemically important institutions
IFD	Directive 2019/2034/EU on the prudential supervision of investment firms
IFR	Regulation (EU) No 2019/2033 on the prudential requirements of investment firms
IPS	Institutional protection scheme

ITS	Implementing technical standards
iMREL	Internal MREL
MCD	Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (mortgage credit)
MiCAR	Regulation (EU) No 2023/1114 on markets in crypto-assets
MiFID II	Directive 2014/65/EU on markets in financial instruments
MiFIR	Regulation (EU) No 600/2014 on markets in financial instruments
MREL	Minimum Requirement for own funds and Eligible Liabilities
NCA	National competent authority
PSD2	Directive 2015/2366/EU on payment services in the internal market
PSD3	Proposal for a Directive on payment services and electronic money services in the internal market (Procedure 2023/0209/COD)
PSR	Proposal for a Regulation on payment services in the internal market (Procedure 2023/0210/COD)
RTS	Regulatory technical standards
SecReg	Regulation (EU) No 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation
SREP	Supervisory review and evaluation process
SSM	Single Supervisory Mechanism
SSMR	Council Regulation (EU) No 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions

SRM	Single Resolution Mechanism
SRMR	Regulation (EU) No 806/2014 on establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms
Takeover Directive	Directive 2004/25/EC on takeover bids
TFEU	Treaty on the Functioning of the European Union
WUD	Directive 2001/24/EC on the reorganisation and winding up of credit institutions

EXECUTIVE SUMMARY

Ten-year experience with the Banking Union shows that Article 4(3) SSMR, and the application of national laws by the ECB, has been a breeding ground of complexities and a source of uncertainty for the functioning of the system. It also shows that, whereas some differences between national laws transposing the CRD may be exceptionally justified, many others (the vast majority) are not, and lead to a balkanisation of the Single Rule Book, and to confusion. **This invites a reconsideration of the respective roles of the CRD and CRR, with a much greater role for the latter, and its directly applicable provisions.**

This also requires reconsidering the ‘constitutional’ basis of those rules; the use of Articles 50, 53 and 59 TFEU should be limited to a narrower set of core rules, while the role of Article 114 TFEU should be expanded. Article 53 TFEU (which we will mainly refer to hereafter, as it is the legal basis of most of the directives examined in this Reflection Paper) allows the harmonisation of the rules relating to the taking up and pursuit of activities as self-employed persons to facilitate freedom of establishment, by enabling the EU legislature to lay down minimum standards and then using the “passport” system, *i.e.*, mutually recognise formal qualifications, licences. However, this is possible *only* by means of directives, not regulations. CRD is grounded on this legal basis alone.

Article 114 TFEU, for its part, applies “save where otherwise provided in the Treaties”, setting out a “general harmonisation competence” which operates as a residual legal basis, to be used where the Treaty does not provide for a more specific legal basis. Unlike Article 53 TFEU (that authorises harmonisation via directives), Article 114 TFEU allows for the use of both directives and regulations.

In the banking context, the European courts held in the past that Article 53 TFEU should be used for legislative measures aiming “to promote the harmonious development of the activities of credit institutions throughout the Union by eliminating any restrictions on the freedom of establishment and freedom to provide services, while increasing the stability of the banking system and the protection of savers”.⁶ However, they also acknowledged in *Tobacco advertising*⁷ that Article 114 TFEU can be used where the measure genuinely intends to improve the conditions for the establishment and functioning of the internal market, and actually has that effect by contributing to the elimination of likely obstacles to the exercise of fundamental freedoms or remove appreciable distortions of competition which are likely to arise from the diverse national rules. The Court also held that Article 114 TFEU may be the legal basis for measures that are legally binding on individuals⁸ and even for the establishment of a

⁶ C-233/94, *Germany v Parliament and Council* [1997] ECLI:EU:C:1997:231, para 13; Opinion AG Jääskinen in C-507/13, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council* [2014] ECLI:EU:C:2014:2481, para 109.

⁷ C-376/98, *Germany v Parliament and Council* [2000] ECLI:EU:C:2000:544.

⁸ C-270/12, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council (hereafter ESMA Shortselling)* [2014] ECLI:EU:C:2014:18, paras 97-117.

Union agency, where harmonisation measures depend on specific professional and technical expertise.⁹ The General Court built on these principles to reiterate the compatibility of the SRMR with Article 114 TFEU.¹⁰ Thus, ideally, the co-legislators could, under Article 296 TFEU decide on a case-by-case the most suitable legal instrument to be adopted, while Courts tend to be deferential when it comes to the selection of the suitable method of approximation for achieving the desired result.¹¹

This view, as developed in the Section I of this Reflection Paper, finds growing support in the literature. It also inspires a recent shift in policy.

First, it explains the **recent trend of EU legislative acts with prudential rules for financial entities that use Article 114 TFEU as legal basis**. This is the case *e.g.*, of Regulation (EC) No 1060/2009 (Credit Rating Agencies Regulation); Directive 2019/2162/EU (Covered Bonds Directive);¹² Directive 2015/2366/EU (PSD2); Regulation (EU) No 2017/2402 (SecReg); Regulation (EU) No 2022/2554 (DORA); Regulation (EU) No 2023/1114 (MiCAR); Regulation (EU) No 2020/1503 (Crowdfunding Regulation) and Regulation (EU) No 2024/3005 (ESG rating). The premise is that a truly integrated financial market for those players needs a consistent and uniform set of rules.

Second, **the subject-matter of the rules covered by regulations based on Article 114 TFEU has also considerably widened up, encompassing uniform rules on the taking up and pursuit of financial activities and governance arrangements**, traditionally a field for Article 53 TFEU. This is the case of the rules for the authorisation, supervision (and governance) of credit rating agencies in the Credit Rating Agencies Regulation, CCPs and trade repositories in Regulation (EU) No 648/2012 (EMIR), Central Securities Depositories (CSD) under Regulation (EU) No 909/2014 (CSDR), crowdfunding under the Crowdfunding Regulation, as well as the entities under DORA and MiCAR.

Third, **experience has shown that the Banking Union's functioning is served well when the institutions are conferred a harmonised set of powers**, as it happens with supervisory 'Pillar 2' powers, under Article 16 SSMR, and, conversely, that some of the shortcomings are due to an insufficient level of harmonisation, *e.g.*, the lack by the ECB of the full set of powers enjoyed by NCAs,¹³ the variability of background rules on fit and proper assessment,

⁹ *ESMA Shortselling*, para 105.

¹⁰ T-405/21, *Dexia Crédit Local v SRB* [2024] ECLI:EU:T:2024:33, paras 49-87.

¹¹ C- 58/08, *Vodafone and Others* [2009] ECLI:EU:C:2009:596, paras 51-52.

¹² In its Opinion on the legal basis, the Committee on Legal Affairs of the European Parliament suggested to delete the reference to Article 53 TFEU, noting that “*access to a profession*” would be “*accessory to the preponderant aim of the proposal, which is the harmonization of the regulatory treatment of covered bonds*”.

¹³ Commission Report to the European Parliament and the Council on the Single Supervisory Mechanism (COM(2017) 591 final), 11.10.2017, p. 8.

sanctioning powers and, at least before the adoption of the AMLA Regulation, anti-money laundering,¹⁴ or the ECB's lack of harmonised powers for early intervention.¹⁵

Thus, there is compelling evidence to base many of the provisions on the taking up and pursuit of financial activities not on a directive based on Article 53 TFEU, but on a regulation based on Article 114 TFEU, since the prevailing objective is to overcome market fragmentation and improve the functioning of the internal market. The co-legislators should strive to reduce as much as possible the “irreducible core of rules”, if any, which *needs* to remain in CRD and based on Article 53 TFEU, which may only include the existing CRD provisions on freedom to establishment and the freedom to provide services, and to widen up the scope of the CRR (under Article 114 TFEU) to include a wide array of provisions currently in the CRD or BRRD or other minimum harmonisation directives to create a level playing field for banks in the Banking Union, **including governance, capital buffers and supervisory powers.**

Conversely, this should come along with a much wider rule-making delegation at the level of implementing and regulatory technical standards drafted by the European Banking Authority (“EBA”) and endorsed by the Commission for a significant number of rules currently set out in the directives and regulations of the European Parliament and the Council, with a strengthening of the related practice¹⁶ and with tweaking in parallel of the Single Rule Book towards a more principles-based approach at Level 1.

Building upon the foregoing, Section II of this Reflection Paper provides key recommendations for **structuring the consolidation of Level 1 Legislation in the Single Rule Book into a European Banking Act (EUBA)**, aimed to streamline and harmonise the banking regulatory framework across the European Union, **composed of an Omnibus Regulation and an Omnibus Directive.**

In the EUBA framework, the Omnibus Regulation would encompass all prudential rules necessary to preserve the stability of the financial institutions and the European financial system, irrespective of whether those institutions engage in cross-border activity. Severe consequences that may be significant for the internal market are not necessarily connected to financial institutions having cross-border activities. When the crisis of those financial institutions affects a Member State's public or real economy, it can quickly propagate to other Member States through the links between their real or public sectors, irrespective of any cross-border

¹⁴ Commission Report to the European Parliament and the Council on the Single Supervisory Mechanism (COM(2023) 212 final), 18.4.2023, p. 20.

¹⁵ Commission Report to the European Parliament and the Council on the BRRD and the SRMR (COM(2019) 213 final), 30.4.2019, p. 6. The proposal to reform the Crisis Management and Deposit Insurance (CMDI) framework (COM(2023) 226 final) 18.4.2023 would replace Article 13 SRMR with a new set of provisions (Articles 13 to 13c).

¹⁶ Compare, under several aspects, *Less is more, Proposals to simplify and improve European Rule-Making in the Financial Services Sector*, cit.

financial connection. Financial instability can also affect monetary conditions and create financial asymmetries in different parts of the internal markets, making any intervention by fiscal or monetary authorities more complex. Harmonising prudential rules and supervisory powers is thus essential to maintaining stability in the European financial system, ensuring equal treatment, and preventing systemic asymmetries. Therefore, we emphasise financial stability as the crucial justification for grounding the EUBA on Article 114 TFEU, and for including the bulk of the prudential rules in a directly applicable regulation such as the Omnibus Regulation.

The Omnibus Regulation would in particular include both the minimum prudential rules applicable irrespective of the supervised entities' specific conditions (Pillar 1 framework) and the rules related to the supervisory powers exercised to address particular risk situations on a case-by-case basis (Pillar 2 framework). The Pillar 1 framework should fully harmonise – in accordance to the principles of neutrality and proportionality – the rules on the categories of supervised entities and levels of application; the accounting rules applicable to financial institutions; the minimum qualitative requirements (such as governance, risk management, and remuneration policies, but also the suitability of managers and qualified shareholders); the minimum quantitative requirements (in terms of financial structure, liquid resources, large exposures); the general reporting and disclosure requirements. The Pillar 2 framework should fully harmonise the most typical supervisory powers and procedures, without prejudice to the – limited – ability of the Member States to confer additional powers to their authorities to pursue legitimate national interests. The supervisory powers harmonised in the Omnibus Regulation should include both “general” powers, namely those that can be exercised *ex officio* when the risk conditions of individual banks or groups or the macro-prudential risks so require, and “special” powers, namely those that are typically – however non-exclusively – exercised upon the request of supervised entities. Directly applicable provisions should identify a “core” of serious and fundamental violations of the European banking legal framework and uniformly regulate the facts in the paradigm of the administrative offences, the types and amount of the sanctions or other enforcement actions, and the procedure for their application, including the investigation and the assessment phases. The regulation should also address supervisory cooperation and the framework for supervision on a consolidated basis.

To comply with the framework provided by the Treaties, in particular under Article 53 TFEU, the Reflection Paper recommends that the EUBA should also be composed of an **Omnibus Directive**, which **should cover two main topics: the general requirements for the organisation of competent and designated authorities; and the rules strictly related to the European passport of licensed institutions**, harmonising the conditions for establishing branches and providing services on a cross-border basis, as well as the powers of host authorities.

The EUBA would make **extensive use of delegation/de-legification** under Articles 290 and 291 TFEU to allow for continuous amendments and updates. This

approach would enable the adoption of technical standards that complement the main legislative framework, ensuring flexibility and adaptability.¹⁷ To simplify the legislative framework, we argue that the EUBA should provide “general” and “special” delegation criteria. On the one hand, the *general* delegation criteria should require that the EBA and the Commission, when exercising the delegation, draft Level 2 Regulation following the available and finalised international standards unless a specific delegation criterion or the language of Level 1 Legislation provides otherwise (there may be indeed instances where, to respond to deviations from international standards in third countries’ jurisdictions that may objectively jeopardise the competitiveness of European banks on a global scale, the European co-legislators may defer or adjust the application of the relevant international standards). The general delegation criteria should also require the Commission to periodically report to the co-legislators, possibly together with a legislative proposal, on any inconsistency between the EU banking framework and the international standards identified in the Level 2 Regulation, as well as on any options or discretions in international standards that could not be implemented given the lack of specific delegation criteria on policy choices. On the other hand, the *specific* delegation criteria should provide for the essential elements of legislation necessary to implement derogations from international standards or any options or discretions in standards. The way forward proposed to make the L1 legislation more principle-based is neutral about the choice of the level of regulatory burden imposed upon the European supervised entities. The same mechanism can be used to amend the principles and delegation criteria in the L1 to lighten or strengthen the regulatory framework for categories of supervised entities, while reserving all technical details for delegated L2 acts.

A test-case of how Level 1 legislation could be redesigned (focusing on the leverage requirements) is provided in Annex II.

Section III discusses the scope of the proposed EUBA from the viewpoint of the regulated entities, which are the addressees of prudential and transparency requirements set out in the Act. It examines the different prudential regimes applicable – at the individual level – to various categories of supervised entities (G-SIIs, O-SIIs, large/“ordinary”/small and non-complex banks; Class 1/Class 1-minus/Class 2/Class 3 Investment Firms); then it examines the different prudential rules applicable – at the super-individual level – to consolidated groups of banks and investment firms, financial conglomerates, and bank networks (central bodies and institutional protection schemes). In all cases, it highlights the main inconsistencies, asymmetries and regulatory cliffs, and proposes some ways forward to foster harmonisation, neutrality and proportionality. Section III also addresses the most visible paradox of the incomplete Banking Union, and namely the still unachieved objective of creating, through cross-border banking,

¹⁷ In the same vein proposed in this Reflection Paper, streamlining the mandates of the EBA for developing implementing rules under the CRR3-CRD6 package is advocated by F. CANNATA and L. SERAFINI, *A pragmatic approach to simplification: the case of banking regulation in the EU*, Banca d’Italia Occasional Papers, No 955, July 2025.

a true single market for banking commensurate to the political and economic dimension of Europe. Building on a recommendation of the Draghi report,¹⁸ Section III discusses how to promote through a bespoke regulatory reform which would leverage existing legal structures while introducing selective improvements the cross-border consolidation of a handful of European banks having the cross-border potential to act as Banking Union's accelerators. In this context, Section III identifies some exemplary obstacles to cross-border consolidation stemming from insufficient harmonisation and offers some initial proposals for a way forward. It advocates a pragmatic and comprehensive framework for European banks having the potential to grow cross-border that addresses the three critical stages of a financial group's lifecycle: birth and growth, adult life, and resolution.

In this context, the Reflection Paper shows possible ways to disentangle the problematic interaction, for cross border banking and financial groups, between national corporate and insolvency laws and the European prudential framework, so as to ensure a safe and effective group-wide capital and liquidity management. Boards often hesitate to approve cross border intragroup transfers due to the entity-centric nature of national company and insolvency laws, which can impose liability risks. Similarly, supervisory authorities grapple with enforcing parent guarantees or other intra-group support mechanisms. Incorporating directly applicable provisions into the EUBA to this effect would enhance certainty and foster trust between home and host authorities. This approach aligns with the CJEU's recognition of the value-enhancing potential of interstate structures¹⁹ and international standards like Principle 5 on the *governance of group structures* of the Basel Committee's Corporate Governance Principles for banks.

It is certainly true that also political obstacles often stand in the way of the process of cross-border consolidation of European banks. Yet this is a reflection of the unfinished work of the Banking Union, mostly due to a lack of trust between Member States on loss mutualisation. This underestimates the benefits associated to the Banking Union and conveys a misleading message of fear, in particular with respect to alleged risks for the financing of local economies or the investment in national sovereign bonds should cross-border banks be able to move freely within the group their assets and most notably savings collected in one or the other Member State. However, the emergence of a handful of big cross-border European banking groups is crucially instrumental (i) to the euro

¹⁸ MARIO DRAGHI, *The future of European competitiveness – A competitive strategy for Europe*, cit., p. 289; compare also IGNAZIO ANGELONI, *The Next Goal: euro area banking integration*, cit.; DAVID RAMOS MUÑOZ, MARCO LAMANDINI, MYRTE THIJSEN, *A reform of the CMDI framework that supports completion of the Banking Union*, cit.

¹⁹ C-528/12, *Mömax*, ECLI:EU:C:2014:51; C-292/16, *A Oy*, ECLI:EU:C:2017:888; C-386/14, *Groupe Steria*, ECLI:EU:C:2015:524; C-524/04, *Test Claimants in the Thin Cap Group Litigation*, ECLI:EU:C:2007:161; C-311/08, *Société de Gestion Industrielle*, ECLI:EU:C:2010:26; C-382/16, *Hornbach Baumarkt*, ECLI:EU:C:2018:366. For an insightful discussion, WOLFGANG SCHÖN, *Organisationsfreiheit und Gruppeninteresse in Europäischen Konzernrecht*, *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, Vol. 48, No 3, 2019, pp. 343-378.

zone financial stability as a mechanism to attenuate and redistribute country specific shocks absent a meaningful centralised fiscal capacity²⁰ and (ii) to the financial needs associated to the massive investments required by the ongoing transformation of the European economy. Moreover, cross-border consolidation would be inevitably limited to the handful of European banks having true potential to grow pan European and thus would not prevent, alongside, the flourishing of local banking. This is a lesson clearly taught by the US experience, where the vast majority of banks remains local, despite the existence of a handful of US giant financial players at global level. Political concerns for the needs of local economies should not prevent interstate consolidation and could be properly addressed by deploying appropriate corrective measures and safeguards, without further delaying a process of growth and internal market integration that is long overdue.

This poses a question on how technically to improve the viability of the contestability of control of European banks. To that aim, the Reflection Paper surmises that for banks and other financial corporates, the break-through rule currently set out as an *optional regime* in Article 12 of the Takeover Directive (Directive 2004/25/EC) should be made mandatory. Yet, even more importantly, **national public law barriers to intra-EU consolidation of banks should be ruled out or at least should be subject to a close list of truly exceptional public interest reasons other than concerns of competitive and micro/macprudential nature that could be activated to block or subject to conditions or undertakings intra-EU acquisitions, ideally to be centrally assessed by the Commission.**

In conclusion, Section III of the Reflection Paper advocates a reform with the EUBA not only to extend capital, liquidity and internal MREL waivers beyond domestic groups and to better harmonise large exposures limits related to holding in financial subsidiaries and related party transactions rules on intragroup transactions, but also to address specifically for banking groups the relevant obstacles under national contract, company and insolvency law. The BRRD made an (only partial) attempt in 2014 to flesh out minimum harmonisation provisions at least for intragroup financial support arrangements, but 10 years of experience (with very few of those arrangements in existence) cast doubts on the success of the experiment through a directive. The Reflections Paper surmises that minimum harmonisation in this context is not enough. Further action is needed and the EUBA would be the proper place to **regulate a comprehensive framework for a supervised regime for capital and liquidity management, subject to maximum harmonisation in the Omnibus Regulation.**

Section IV discusses how the EUBA could better harmonise and rationalise the EU *acquis* for competent and designated authorities and their powers with the Omnibus Regulation, while at the same time pursuing greater harmonisation of their institutional and organisational set-up with the Omnibus Directive.

²⁰ IGNAZIO ANGELONI, *The Next Goal: euro area banking integration*, cit., 16.

The Reflection Paper posits that the EUBA should first address the recognition of the relevant authorities, both at the EU and national level. With respect to the national competent authorities, it should clearly define the objectives and tasks pertaining to their *prudential* supervision mandate, by determining how this should be coordinated with other public mandates, notably *conduct of business* supervision that aims at ensuring transparency and fairness in the relationship between banks and their customers. The Reflection Paper argues that the EUBA, with its Omnibus Directive, should also go further in harmonising the institutional and organisational requirements of the national competent authorities, not only in terms of independence and accountability (moving from the current Article 4 of the CRD VI), but also in terms of the legal protection of the Authority, the members of its governing bodies and its staff.

The Reflection Paper acknowledges that a different approach needs to be followed with respect to the supervisory powers, which are already now at a considerable stage of harmonisation. The Omnibus Regulation should remove the existing scope for national discretion and should harmonise additional supervisory powers, such as those on outsourcing arrangements, on related party transactions as well as on amendments to credit institutions' articles of association. For some of these, relevant EBA Guidelines could serve as a model. With regard to sanctioning powers, the EUBA should include in the Omnibus Regulation – and thus subject to maximum harmonisation – the powers currently regulated by Articles 65 et seq. CRD, which leave undesirable discrepancies in their national implementation. The EUBA should also establish uniform procedural rules for both supervisory and sanctioning proceedings – as allowed under Article 298 TFEU for sector-specific regulations – taking into account the principle of good administration and the fair trial standards (Articles 41 to 47 of the CFREU).

Section IV also offers some seminal reflections on the possibility of harmonising – by means of an ad-hoc directive – the core criminal law rules aimed at safeguarding the exercise of prudential supervisory functions.

Section V posits that time has come to reconsider the EU legislation on banking products and contracts as an essential constituent of the broader EU regulatory framework concerning the exercise of banking activities and the related banking supervision. The Reflection Paper presents three basic ideas: i) the definition of a uniform set of target-oriented rules of conduct, applicable not only to consumers but also, to a certain extent and under certain conditions, to other customers (*e.g.*, micro-enterprises, SMEs) of banking services and activities (not covered by MiFID or PSD2, and looking ahead by PSR) ii) the drawing up of a highly harmonised and dedicated public enforcement toolkit; iii) the development of an EU-regulated private-law enforcement regime.

More specifically, the Reflection Paper posits that the conduct rules should be set out in the Omnibus Regulation, to be complemented with Level 2 Regulation laying down the specificities and technical content of those rules. Likewise, supervisory powers specifically tailored to conduct of business supervision should also be fully harmonised in the Omnibus Regulation, while, consistently

with the conclusions reached in Section IV, the rules governing the status and organisation of the national authorities entrusted with such powers would remain at the level of the Omnibus Directive. As for private-law remedies, they should be ideally included in the Omnibus Regulation, without prejudice to Member States' prerogatives in private contract law. The Reflection Paper finds that the private enforcement of regulatory duties in the banking sector is key, because harmonised private law remedies for the violation of conduct of business rules would not only ensure high and equivalent standards of customer protection, but would also be crucial to enhance the level playing field for financial and banking entities and thereby foster the competitiveness of the internal market for banking products and services.

SECTION I.
THE EUBA: ITS UNDERPINNING PHILOSOPHY AND
QUESTIONS ON THE LEGAL BASIS

1. The need for simplification through maximum harmonisation and rule-making delegation

This Reflection Paper is premised on a clear policy belief: the Banking Union rules need to be simpler, more certain and more harmonised. More than ten years after the adoption of its two fundamental cornerstones, the CRD and CRR, the prudential Single Rule Book is overflowed.²¹ The functioning of the single market in the banking sector would gain considerable benefits from simplification, based on **maximum harmonisation and rule-making delegation**.

The current Single Rule Book is made up of more than one thousand legislative provisions in directives or regulations of the Council and the European Parliament which, in turn, delegate to the European Commission the adoption of more than one hundred implementing or regulatory acts. Although the Level 1 Legislation is clearly over-detailed, legislation is not harmonised, nor harmonious. Fundamental aspects of the prudential framework, including requirements on governance and capital buffers, are still part of the CRD in a way that grants leeway to Member States, and gives rise to many and important differences. This is a source of fragmentation for the single market in banking. This fragmentation is further exacerbated by national options and discretions generously granted by the CRR and CRD.

This state-of-play reflects the stage of development of market integration and of the European Union itself before the establishment of the Banking Union and its single supervisory mechanism (the “SSM”). Ten years after the establishment of the SSM and in light of its experience this has clearly become outdated, and an obstacle to the deployment of the full potential of the Banking Union.

This Reflection Paper posits that time has come (a) to simplify Level 1 Legislation, by reserving it for only a limited number of principles-based rules that effectively shape fundamental policy choices and implement in the European Union international standards, (b) in the context of Level 1 Legislation, to replace as much as possible directives with directly applicable and uniform provisions recast in an Omnibus Regulation of the European Parliament and the Council, using Article 114 TFEU as legal basis and (c) to “surgically” confine the prudential provisions grounded on Article 53(1) TFEU to those much narrower areas that are *stricto sensu* measures to achieve mutual recognition and right of establishment in a cross-border dimension for the regulated entities, (d) to delegate most rule-making to Level 2 Regulation, through regulatory acts of the

²¹ This Reflection Paper focuses at this stage only on prudential, conduct and transparency rules and defers to a second stage the inclusion in the EUBA of provisions on payment systems, banks’ crisis management, and deposits guarantee, as well as the harmonisation of Fintech. In this vein, this Reflection Paper refers to ‘supervised entities’ as basically including credit institutions, (mixed) financial holding companies, investment firms, and investment holding companies; it also discusses uniform conduct rules only related to the granting of credit.

European Commission endorsing, as a rule, technical standards developed by the European Banking Authority.²²

Unlike recent proposals that advocate the introduction of a bespoke and optional regime (“the 28th regime”)²³ for the largest banks, we follow a more path-dependent approach,²⁴ based on the belief that, with no prejudice to the adjustments justified by the proportionality principle, the internal market for financial services should rather be directed towards a single, directly applicable, and unified legal framework.

Key considerations

The EUBA should enhance uniformity and reduce complexity, improving accessibility and consistency of the legal framework; to this aim:

- (i) most of the Level 1 Legislation should be enshrined in a regulation of the European Parliament and of the Council;
- (ii) the Level 1 Legislation should be principles-based and should delegate technical details to Level 2 Regulation through regulatory acts of the Commission, complemented by guidelines and recommendations of the EBA at Level 3, where appropriate.

2. Legal basis for maximum harmonisation: the shrinking role of Article 53 TFEU, and the acknowledgement of Article 114 TFEU as the main constitutional basis

Article 53 TFEU, on which the CRD is based, allows for the use of directives for the harmonisation of rules relating to the taking up and pursuit of activities as self-employed persons. The same applies to the liberalisation of services within the internal market under Article 59 TFEU. The objective of Article 53 TFEU is to facilitate the freedom of establishment by enabling the co-legislators to adopt directives (yet not regulations) to lay down minimum standards to achieve the

²² For proposals to simplify and strengthen Level 2 and Level 3 in the field compare, with a different focus and approach of the Reflection Paper and voicing concerns from the industry, *Less is more, Proposals to simplify and improve European Rule-Making in the Financial Services Sector*, cit.

²³ See, in the field of crisis management and resolution for systemic cross-border banks, International Monetary Fund (IMF), 2010, *Crisis Management and Resolution for a European Banking System*, IMF Working Paper 10/70, Washington, DC; European Commission, 2025, *A Competitiveness Compass for the EU*, COM(2025) 30 final, Brussels.

²⁴ Compare International Monetary Fund (IMF), 2013, *A Banking Union for the Euro Area*, IMF Staff Discussion Note 2013/001, Washington, DC; International Monetary Fund (IMF), 2013, *From Fragmentation to Financial Integration in Europe*, Washington, DC; International Monetary Fund (IMF), 2025, *Euro Area Policies: Financial System Stability Assessment*, IMF Country Report 2025/203, Washington, DC.

mutual recognition of formal qualifications, including licenses, to the effect of “passporting” and mutual recognition.

However, already back in 2018 the European Parliament acknowledged the undesirable complexities which come along with minimum harmonisation in the context of the Banking Union, and stressed “*the need for a coherent and concise set of rules for the proper functioning of the Banking Union, while keeping in mind the importance of proportionality*”. The European Parliament called on “*the Commission, where appropriate, to prioritise regulations over directives as the legislative tool for the Banking Union and to make it a priority to fully ensure that all relevant legislation is fully and correctly implemented in all Member States*”.²⁵

Article 114 TFEU (former Article 95 TEC) sets out that:

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, **adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.**

Article 114 TFEU allows the adoption of all measures suitable for bringing about the approximation of provisions having as their object the establishment and functioning of the internal market, including directives and/or regulations.

Article 114 applies “*save where otherwise provided in the Treaties*”. Thus, it is necessary to properly understand the relationship between Article 114 TFEU and Article 53 TFEU as clarified by the case law of European courts. As a matter of fact, the choice of the legal basis for any EU measure must rest on objective factors amenable to judicial review.

In principle,²⁶ according to the European courts, Article 114 TFEU sets out a “*general harmonisation competence*” and thus offers a residual legal basis which should normally be used where the Treaty does not provide for a more specific legal basis.²⁷ This principle has often informed the positions of the Legal

²⁵ See [here](#).

²⁶ KOEN LENAERTS, PIET VAN NUFFEL, *European Union Law* (Sweet and Maxwell 2011), 300. PAUL CRAIG, GRÁINNE DE BURCA, *EU Law* (OUP 2020), p. 616 (noting that “Article 114 is a residual provision” that “can generate boundary disputes problems about the correct legal basis for EU legislation”; however, “such disputes arose in the past normally because the European Parliament wished to ensure that its legislative rights under Article 114 TFEU were not by-passed by legislation enacted on a different Treaty Article [...]”, a problem that is less likely to arise after the generalization of the ordinary legislative procedure with the Lisbon Treaty).

²⁷ Case C-338/01, *Commission c. Council* [2004] ECLI:EU:C:2004:253, paras 54-60.

Service of the Council in its opinions on the proper legal basis of many legislative measures,²⁸ including those in the area of banking.²⁹

According to the case law of European courts, to identify the right legal basis, the decisive factors are the purpose and content pursued by the legislative act. European courts consider that “*the choice of the legal basis of an act cannot depend solely on an institution’s belief or subjective assessment of the aim purportedly pursued, but must be based on objective elements, amenable to judicial review. Those elements include, in particular, the purpose and content of the act*”.³⁰

Moreover, if a legislative measure pursues different objectives, **the primary objective should be prioritised as the defining factor for the identification of the legal basis.** In line with this, in the field of banking European courts have held that legislative measures the purpose of which was “*to promote the harmonious development of the activities of credit institutions throughout the Union by eliminating any restrictions on the freedom of establishment and freedom to provide services, while increasing the stability of the banking system and the protection of savers*” were rightly based on Article 53 TFEU.³¹

However, European courts have also held that, **if the legislative measures are inspired by a plurality of objectives which can be deemed ‘inseparable from each other, without one of them assuming secondary and indirect importance in relation to the other’, the co-legislators may resort to more than one legal basis** as long as the Treaty provisions referred to as complementary legal bases are compatible with each other.³²

Against this background, a closer look at both legislative practice as it has evolved over time, and at the case law of European courts, offers a mixed picture. **European courts have rejected a strict reading of the residuality clause of Article 114 TFEU and have instead adopted a “centre of gravity” approach,**

²⁸ See Opinion of the Legal Service, 9007/16, 17 May 2016, on the Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services; Opinion of the Legal Service, 10626/21, 7 July 2021, on the Proposal for a Regulation concerning batteries and waste batteries; Opinion of The Legal Service, 14752/12, 9 October 2012, § 19, on the Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

²⁹ Opinion of the Legal Service, 14752/12, 9 October 2012, § 19.

³⁰ PAUL CRAIG, GRÁINNE DE BURCA, *EU Law*, cit., p. 616 (noting that “the general test propounded by the ECJ for the resolution of such boundary disputes was that regard should be had to the nature, aim and content of the act in question. [Case 300/89, *Commission c. Council*; Case C-426/93, *Germany c. Council*; Case C-271/94, *European Parliament c. Council*] Where these factors indicated that the measure was concerned with more than one area of the Treaty, then it might be necessary to satisfy the legal requirements of two Treaty Articles [C-165/87, *Commission c. Council*]”).

³¹ C-233/94, *Germany v Parliament and Council* [1997] ECLI:EU:C:1997:231, para 13; Opinion AG Jääskinen in C-507/13, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council* [2014] ECLI:EU:C:2014:2481, para 109.

³² C-338/01, *Commission v Council* [2004] ECLI:EU:C:2004:253, paras 56-57.

as exemplified in the *Titanium Dioxide* case.³³ There, as it has been duly noted in the literature, “*the Court acknowledged that harmonisation measures would typically have a dual aim, namely an internal market aim as well a specific substantive policy aim. And in deciding whether or not Article 114 or a specific legal competence applies, the Court would have recourse to a ‘centre of gravity’ doctrine. The latter makes the choice of competence dependent of whether the Union measure principally deals with the internal market or with the more specific substantive interest*”.³⁴ This interpretation of Article 114 TFEU seems to also inform the current practice of the Council.³⁵

This raises the question of when a measure can be said to be properly aimed at the establishment or functioning of the internal market. The Court answered this question in *Tobacco advertising*,³⁶ and found that Article 114 TFEU can be used **where the measure genuinely intends to improve the conditions for the establishment and functioning of the internal market**, and actually has that effect by contributing to the elimination of likely obstacles to the exercise of fundamental freedoms or by removing appreciable distortions of competition which are likely to arise from different national rules. More specifically, the Court held that (a) former Article 100a(1), now Article 114 TFEU does not confer on the co-legislators a general power to regulate the internal market, as this reading would run contrary to the express wording of the provision and the principle of conferral; (b) a measure adopted on the basis of Article 114 TFEU must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. The need to avoid future obstacles to trade resulting from a multifarious development of national laws could justify an intervention under Article 114, provided that such obstacles are likely and the measure in question is designed as to prevent them; (c) a mere finding of disparities between national rules and of an abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition is insufficient to justify the use of Article 114 TFEU ‘*with a view to eliminating the smallest distortions of competition*’, because otherwise the powers of the co-legislators

³³ C-300/89, *Commission v Council* [1991] ECLI:EU:C:1991:244.

³⁴ ROBERT SCHÜTZE, *European Union Law* (OUP 2021) (noting that in the *Titanium Dioxide* case (C-300/89) “the Court here acknowledged that harmonisation measures would typically have a dual aim, namely an internal market aim as well a specific substantive policy aim. And in deciding whether or not Article 114 or a specific legal competence applies, the Court would have recourse to a ‘centre of gravity’ doctrine. The latter makes the choice of competence dependent of whether the Union measure principally deals with the internal market or with the more specific substantive interest”).

³⁵ In the Opinion of the Legal Service, 10626/21, 7 July 2021 on the Proposal for a Regulation concerning batteries and waste batteries (based on 114 TFEU) the Council Legal Services – while formally reaffirming the principle of the residuality of Article 114 TFEU – argued that “the fact that a measure deals with environmental matters does not imply that it must necessarily be based on the environmental legal basis, currently Article 192(1) TFEU”. The explanatory memorandum of the proposal explains that “The impact analysis of the proposed measures demonstrates that in most cases the internal market objectives are predominant and that the environmental benefits are complementary. Therefore, it is appropriate to use Article 114 TFEU as a sole legal basis”.

³⁶ C-376/98, *Germany v European Parliament and Council* [2000] ECLI:EU:C:2000:544.

would be practically unlimited, and that would be incompatible with the principle of conferral. Thus, distortions of competition must be appreciable.

It is important to note, however, that the practice of the Court considerably evolved after *Tobacco Advertising*, and in fact, only ten years after it, respected commentators could conclude that, with the benefit of hindsight, the case looks more an exception to the rule than the rule itself.³⁷ Indeed, the Court allowed the internal market competence to be used in other provisions regulating tobacco,³⁸ to prohibit seal products,³⁹ regulate food nutrients,⁴⁰ etc. **More recent case law of the European courts has clarified that Article 114 TFEU may also serve as the legal basis for the adoption of measures that are legally binding on individuals⁴¹ and to justify the establishment of a Union body, such as an agency responsible for harmonisation,** in situations where the measures to be adopted are dependent on specific professional and technical expertise.⁴²

In its *Smoke Flavourings* case⁴³ the Court upheld the use of Article 114 TFEU as a legal basis for a regulation which did not harmonise laws directly but established procedures for the exercise of implementing powers (now delegated acts under Article 290 TFEU). This seems to suggest that **Article 114 TFEU can be used to adopt a measure which merely defines the basic provisions essential for achieving the objective and then confers the power on the Commission to adopt the measures needed for the implementation of the legislative act.** In other words, Article 114 TFEU can be used to establish a “parent” measure which delegates implementing power to the Commission. The Court has in parallel clarified that by the expression ‘*measures for the approximation*’, the authors of the Treaty intended to confer on the EU legislature a certain degree of discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features. This is particularly true where the approximation of laws as such may not be sufficient to ensure the unity of the market.⁴⁴

³⁷ BRUNO DE WITTE, *A competence to protect: The pursuit of non-market aims through internal market legislation*, in PHYLIP SYRPIS, *The Judiciary, the Legislature and the Internal Market* (CUP 2012), p. 28; STEPHEN WEATHERILL, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"*, German Law Journal, Vol. 12, No 3, 2012, p. 827.

³⁸ Case C-491/01, *R v. Secretary of State ex parte Bat and BAT and Imperial Tobacco*, 2002 E.C. R. I-11543.

³⁹ Case T-18/10R, *Inuit Tapiriit Kanatami et al v. Parliament and Council*, order of 30 April 2010.

⁴⁰ Cases C-154/04 & C-155/04, *Alliance for Natural Health v. Secretary of State for Health*, 2005 E.C.R. I-6451. See WEATHERILL *supra*, p. 838.

⁴¹ C-270/12 *Esma Shortselling*, paras 97-117.

⁴² C-270/12, *Esma Shortselling*, para 105.

⁴³ C-66/04, *United Kingdom v European Parliament and Council* [2005] ECLI:EU:C:2005:743, paras 45-50.

⁴⁴ C-270/12, *ESMA Shortselling*, paras 102, 106-107.

These principles have been applied by the General Court in the context of the Banking Union to conclude that Article 114 TFEU was a proper legal basis for Regulation No 806/2014 (the “SRMR”).⁴⁵

Unlike Article 53 TFEU, Article 114 TFEU is a valid legal basis for the adoption of either Council and European Parliament directives or regulations. Under Article 296 TFEU the co-legislators can therefore decide on a case-by-case basis which is the most suitable form of the legal instrument, in light also of the principle of proportionality, assessing whether uniform rules are necessary (through a regulation) to achieve the objective or whether national differences may persist and to what extent (as enabled by directives). However, European courts are in practice reluctant to challenge the compatibility of a Union legislative act with the principles of subsidiarity and proportionality.⁴⁶ They usually grant a quite significant margin of discretion to the co-legislators as regards the method of approximation most appropriate for achieving the desired result, in particular in complex and technical fields, which entail political, economic and social choices. The standard of review applied by the European courts in this domain is limited to ascertain whether a given measure is manifestly inappropriate having regard to the objective that the institution is seeking to pursue.⁴⁷

Conversely, amendments introduced by the Lisbon Treaty are intended to improve the monitoring and enforcement of the subsidiarity and proportionality principle through *ex-ante* controls by national parliaments, rather than by way of an *ex-post* review by the Court. Under Protocol No 2 on the principles of subsidiarity and proportionality, any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality and the reasons why a Union objective can be better achieved at Union level according to well substantiated qualitative and, if possible, quantitative indicators.

In the financial sector the co-legislators have long adopted directives based on Article 53 TFEU. **However, over time Article 114 TFEU has been increasingly used to finally become the standard practice for maximum harmonisation in new areas of regulation in the European law of finance.** Originally, harmonisation in this field was centred on the idea of favouring cross-border activity through passporting and mutual recognition, and relied thus on Article 53 TFEU (Art 47 TEC), which was in fact considered “*the legal basis to adopt Community measures aimed at achieving the Internal Market in financial services*”.⁴⁸

This drastically changed after the great financial crisis exposed the fragility of texts pursuing free movement without guarding against certain financial risks. Post-crisis measures, thus, were adopted with a dual legal basis:

⁴⁵ T-405/21, *Dexia Crédit Local v SRB* [2024] ECLI:EU:T:2024:33, paras 49-87.

⁴⁶ CATHERINE BARNARD, *The Substantive Law of the EU: The Four Freedoms* (OUP 2022), p. 572.

⁴⁷ C-58/08, *Vodafone and Others* [2010] ECLI:EU:C:2010:321, paras 51-52.

⁴⁸ Explanatory Memorandum of Directive 2006/48/EC, Directive 2006/49/EC and Directive 2009/138/EC.

Article 53 TFEU (Art 47 TEC) and Article 114 TFEU (Art 95 TEC),⁴⁹ often in a way that split the legislative proposal in a directive and a regulation, which complemented each other.⁵⁰ **More recently, a number of acts have been adopted solely on the basis of Article 114 TFEU.** This is the case, *e.g.*, of the Credit Rating Agencies Regulation; the Covered Bonds Directive;⁵¹ PSD2; Regulation (EU) No 2017/2402; DORA; MiCAR; the Crowdfunding Regulation and Regulation (EU) No 2024/3005 on ESG ratings.

The underpinning policy premise for this is that for a truly integrated financial market a consistent and uniform set of rules is needed.⁵² According to the Commission, regulations ensure a better level playing field, reduce fragmentation and the complexity and costs for firms while providing at the same time legal certainty: “A *directive would not lead to the same results, as implementation of a Directive might lead to divergent measures being adopted at national level, which could lead to distortion of competition and regulatory arbitrage*”.⁵³ In 2022, the Commission further acknowledged that “*lastly, the Single Rulebook has mostly been developed via regulations, and its update with the digital operational resilience component should follow the same choice of legal instrument*”.⁵⁴

Also the scope of the subject-matter covered by regulations based on Article 114 TFEU has considerably widened, **to ultimately include also harmonised rules on the taking up and pursuit of financial activities and on governance arrangements**, which were in the past traditionally based solely on Article 53 TFEU and thus regulated by directives. For instance, EMIR provides uniform conditions for the authorisation and supervision of CCPs and trade repositories,

⁴⁹ Directive 2007/64/EC (PSD1); Directive 2009/110/EC (E-Money institutions); Directive 2021/2167/EU (Credit servicers and credit purchasers).

⁵⁰ CRD and CRR; IFR and IFD; MiFID and MiFIR. In such cases, while the directive deals mainly with the access to economic activity of businesses and is based on Article 53 TFEU, uniform set of rules on how these economic activities are conducted rely on Article 114 TFEU allowing for the creation of a regulation.

⁵¹ In its Opinion on the legal basis, the Committee on Legal Affairs of the EP suggested to delete the reference to Article 53 TFEU, noting that “even if Article 19 [Permission for covered bond programmes] were to be considered as dealing with the access to a profession, it would be an element that is only accessory to the preponderant aim of the proposal, which is the harmonization of the regulatory treatment of covered bonds. According to the case law, the measure must be based on a single legal basis, namely that required by the main or predominant purpose or component. Since the proposal is made with the express objective of harmonisation in respect of covered bonds within the internal market, its legal basis must be Article 114 TFEU”.

⁵² Compare Regulation (EU) No 2017/2402, Regulation (EU) No 2020/1503, Regulation (EU) No 2023/1114, Regulation (EU) No 2022/2554.

⁵³ Explanatory Memorandum of Regulation (EU) No 2017/2402.

⁵⁴ Explanatory Memorandum of Regulation (EU) No 2022/2554.

including uniform governance arrangements.⁵⁵ Likewise, the CSDR provides uniform conditions for the authorisation and supervision of CSDs, including their governance arrangements.⁵⁶ The same applies to the Crowdfunding Regulation, DORA and MiCAR.

In our view, there is therefore compelling evidence that provisions aimed at regulating the taking up and pursuit of financial activities do not (longer) need to be included in a directive based on Article 53 TFEU, where the prevailing objective and purpose of those rules is to overcome market fragmentation in financial services. Thus, the “irreducible core of rules”, which needs to be founded on Article 53 TFEU, has considerably narrowed down to (solely) those measures whose objective is to address the cross-border operation of regulated entities and to eliminate national restrictions to the right of establishment and free movement by way of passporting and mutual recognition of national requirements. In contrast, measures with the objective to replace national requirements to create a level playing field for banks in the Banking Union may be included in a regulation based upon Article 114 TFEU. This makes the choice of the legal basis more a political one, than a question of legal constraints under the TFEU.

The need for a clear shift toward a full harmonisation of prudential requirements, and business conduct rules applicable to all European banks, coupled as much as possible with further simplification of requirements for smaller banks in

⁵⁵ According to the Explanatory Memorandum, “The proposal is based on Article 114 TFEU as the most appropriate legal basis for a Regulation in this field. A Regulation is considered to be the most appropriate legal instrument to introduce a mandatory requirement directed to all actors to clear standardised OTC derivatives through CCPs and to ensure that CCPs, that will as a consequence assume and concentrate significant risk, are subject to uniform prudential standards in the EU”.

⁵⁶ According to the Explanatory Memorandum, “The proposal is based on Article 114 of the Treaty on the Functioning of the European Union (‘TFEU’) as the most appropriate legal basis in this field. The proposal aims principally at addressing the lack of safety and efficiency of securities settlement and the resulting obstacles to the functioning of the internal market resulting from the divergent national rules regulating securities settlement and the activities of the CSDs, which operate securities settlement systems, by introducing a set of common rules concerning certain aspects of the settlement cycle and discipline, as well as a set of common prudential requirements addressing the resilience of and access to CSDs. In the absence of such common rules and requirements, likely divergent measures taken at national level will have a direct negative impact on the safety, efficiency and competition in the settlement markets in the Union. A regulation is considered to be the most appropriate instrument to ensure that all market participants are subject to uniform and directly applicable obligations regarding the settlement cycle and discipline, and that CSDs are subject to uniform and directly applicable prudential standards in the Union, which should reinforce their resilience and central role in the maintenance of book-entry systems and in the settlement process. As the main purpose of the proposed Regulation is to introduce a number of legal obligations imposed directly on market operators consisting, inter alia, in the recording of virtually all transferable securities in book-entry form in a CSD and a stricter time frame for settlement and as CSDs are responsible for the operation of securities settlement systems and the application of measures to provide timely settlement in the Union, it is essential that all CSDs constantly comply at all times with uniform and stringent prudential requirements provided in the proposal. It is therefore necessary to include in this proposal a set of uniform and directly applicable rules regarding the authorisation and ongoing supervision of CSDs, as a corollary to the legal obligations imposed on market operators”.

accordance with the proportionality principle,⁵⁷ has gained growing consensus also in the literature⁵⁸ and with the Union institutions.⁵⁹ It would certainly be a significant step forward to the achievement of the single market of banking services, because it would foster the cross-border integration of national businesses and would ensure the equal treatment of market players. The full-harmonisation approach would benefit all banks and authorities through a single set of rules that would apply uniformly in the context of the Banking Union (with respect to both significant and less-significant banks), in the context of colleges of supervisors dealing with

⁵⁷ BART JOOSEN, MARCO LAMANDINI, MATTHIAS LEHMANN, KITTY LIEVERSE, IGNACIO TIRADO, *Stability, Flexibility and Proportionality: Towards a Two-Tiered European Banking Law?*, *European Banking Institute Working Paper Series 2018 - No 20*. MATTHIAS LEHMANN, *Single Supervisory Mechanism Without Regulatory Harmonisation? Introducing a European Banking Act and a 'CRR Light' for Smaller Institutions*, *European Banking Institute Working Paper Series 2017 - No 3*.

⁵⁸ CHIARA ZILIOLI, KARL-PHILIPP WOJCIK, *European Banking Union: a giant step towards European integration and a challenge for judicial review*, in CHIARA ZILIOLI, KARL-PHILIPP WOJCIK (eds), *Judicial Review in the European Banking Union* (Edward Elgar 2021). ANNA-LENA HÖGENAUER, DAVID HOWARTH, LUCIA QUAGLIA, *Introduction to the special issue: the persistent challenges to European Banking Union*, *Journal of European Integration*, Vol. 45, No 1, 2023. GIOVANNI BASSANI, *The Centralisation of Prudential Supervision in the Euro area: The Emergence of a New 'Conventional Wisdom' and the Establishment of the SSM*, *European Business Law Review*, Vol. 31, No 6, 2020 (where the conclusion that “in the end, transposition of Directives, ‘national powers’ and ‘options and discretions’ for Member States in a directly applicable Regulation deliver a variable geometry ‘patchwork’ of applicable legal requirements that prevent a true centralisation of prudential powers and impede the establishment of a single prudential supervisory jurisdiction within the Euro area”).

⁵⁹ Exemplary of this trend are (a) the direct conferral to the ECB under Article 16 SSMR of pillar-two powers already provided for in the CRD and already accessible through the general clause in Article 9 of the same regulation; (b) the report of 11.10.2017 from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism (COM(2017) 591 final), where it recommends that “future relevant EU legislation spells out explicitly supervisory powers in directly applicable provisions”; (c) the report of 18.4.2023 from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism (COM(2023) 212 final), where it underlines (p. 20) that “a final area that will require further attention, but which falls outside the control of the SSM itself, concerns the harmonisation of certain legislative areas. The review has highlighted the difficulties that the SSM is facing in the areas of fit and proper assessment, sanctioning powers and anti-money laundering, where the SSM is largely dependent on national law. Supervision would benefit from a more harmonised legal framework as this would address concerns about an unlevel playing field within the SSM”; (d) the report of 30.4.2019 from the Commission to the European Parliament and the Council on the BRRD and the SRMR (COM(2019) 213 final), where (p. 6), it underlines that “with respect to the banking Union, it could be useful to reflect on replicating the provisions on early intervention powers contained in the BRRD also into the SRMR, to avoid recourse to diverging national transposition measures”; (e) the replacement of Article 13 of the SRMR on the EIMs – contained in the proposal of 18.4.2023 for the amendment of the SRMR (COM(2023) 226 final) – by a new set of articles (Articles 13 to 13c) aimed to provide the ECB with a directly applicable legal basis for the exercise of those powers. In addition, over the years, the EBA has frequently pointed out the existence of diversities in the supervisory practices of EU competent authorities, due to divergences in the national transpositions of EU law, either because the legislation is based on directives or because national options and discretions are granted. The EBA’s annual Reports on the convergence of supervisory practices are excellent examples, as they identify several areas where convergence is constraint by normative differences and where several benefits could be derived from uniform legislation. Additional normative constraints are identified in the EBA’s peer-review reports, especially in contexts where the Authority assessed the supervisory practices in the field regulated through directives (*e.g.*, room for improvement has been found in the field of qualifying holdings, authorisations of payment services providers, treatment of mortgage borrowers in arrears under MCD, assessment of O-SIIs, suitability of members of the management body and key function holders).

EU-wide banking groups, but also at the national supervisory level. This would also favour an accelerated process of reduction of options and discretions left to Member States. Those currently provided for in the CRR and CRD should be reduced as much as possible or be given to competent authorities, in this case the ECB, to foster a common prudential approach.

Key considerations

The EUBA, like the current CRD and CRR framework, should rest on two separate instruments, an Omnibus Regulation and an Omnibus Directive, yet should recast all prudential requirements, including governance, fit and proper assessment, internal control, capital buffers and rules of conduct in the Omnibus Regulation because they are instrumental – so long as they govern the way in which banking activities are carried out in order to ensure financial stability and protection of depositors – to the establishment and the functioning of the internal market.

3. Simplification through the rule-making of the European Commission ('de-legification')

In principle, in regulated sectors Level 1 Legislation should flesh out the basic principles underpinning a much wider set of detailed and technical rules adopted by regulatory agencies via Level 2 Regulation. Those technical rules need to be updated frequently, to properly follow market developments and to comply with evolving international standards. This is often at odds with long legislative processes, which need to be followed even when amendments are confined to purely technical aspects.⁶⁰ The European Commission and regulatory agencies can act more swiftly and have informational advantages over co-legislators on technical details, although their current practice would also need to be further strengthened by simplifying and improving the framework for the production of standards (and the timely eliminations of those become obsolete) and by improving the consultation process and the control of Level 2 and Level 3 acts, as advocated by the expert group report mentioned above.⁶¹ The Treaties acknowledge this institutional equilibrium and allow rulemaking to the European Commission pursuant to Articles 290 and 291 TFEU.

⁶⁰ The use of delegated rule-making instead of Level 1 Legislation does not seem likely to substantially increase the risk of litigation. Whilst it is true that, under Article 263(4) TFEU, an action for annulment is possible against a regulatory act that does not entail implementing measures and this requires the applicant only to prove its direct (yet not individual) interest, also Level 1 Legislation is challengeable through a plea of illegality under Article 277 TFEU.

⁶¹ *Less is more, Proposals to simplify and improve European rule-making in the financial services sector*, cit., in particular pp. 46-65.

In the Interinstitutional Agreement of 13 April 2016,⁶² the European Parliament, the Council, and the European Commission acknowledged the critical role played by Article 290 and 291 TFEU in Union law, noting that “*they contribute to simple, up-to-date legislation and its efficient, swift implementation*”. It falls however within the remit of the co-legislators “*to decide whether and to what extent to use delegated or implementing acts, within the limits of the Treaties*”.

a) *Delegation to the Commission under Article 290 TFEU*

Under Article 290 TFEU, Level 1 Legislation may delegate to the Commission the adoption of non-legislative acts of general application to supplement or amend certain non-essential elements of the (delegating) legislative act. The (delegating) legislative act must explicitly define the objectives, content, scope, and duration of the delegation of power. **Essential elements cannot be delegated.**

According to the case law of European courts, Article 290 TFEU aims to enable the co-legislators to focus on the essential elements, while entrusting the Commission with the **task of ‘supplementing’ certain non-essential elements of the adopted legislative act or ‘amending’ such elements** within the framework of the power delegated to it.⁶³

The delegation of a power to ‘*supplement*’ a legislative act authorises the Commission to flesh out and develop in detail non-essential elements. The delegation of a power to ‘*amend*’ a legislative act authorises the Commission to modify or repeal non-essential elements.⁶⁴

According to the European courts, in order to ensure the transparency of the legislative process, the Treaty requires the legislature to determine the nature of the delegation that it intends to confer on the Commission. Moreover, in principle **the essential elements that need to be laid down by Level 1 Legislation are those which imply policy choices.**⁶⁵ Identifying the essential or non-essential character of certain elements of the regulatory framework, however, can be a challenging exercise. **European courts have clarified that the distinction must be based on objective factors amenable to judicial review. However, they have clarified that this also depends on the particular features of each different case.**⁶⁶

⁶² Interinstitutional agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016.

⁶³ C-44/16 P, *Dyson v Commission* [2017] ECLI:EU:C:2017:357, para 58.

⁶⁴ C-286/14, *Parliament v Commission* [2016] ECLI:EU:C:2016:183, paras 41 e 42.

⁶⁵ C-44/16 P, *Dyson v Commission* [2017] ECLI:EU:C:2017:357, para 61; C-286/14. *Parliament v Commission* [2016] ECLI:EU:C:2016:183, para 65. Compare also *Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union* of 18 June 2019, agreed by the European Parliament, the Council and the Commission.

⁶⁶ C-44/16 P, *Dyson v Commission* [2017] ECLI:EU:C:2017:357, para 62.

European courts have held that **a policy choice normally requires the balancing of conflicting interests,⁶⁷ or is such as to impinge on fundamental rights.⁶⁸** However, not every choice implying a technical or political dimension may be regarded as a policy choice for the purposes of Article 290.⁶⁹ For instance, the conferral of enforcement powers to a public authority is an essential element only where those enforcement powers include measures *vis-à-vis* individuals interfering with their fundamental rights,⁷⁰ as it happens with sanctions⁷¹ of (substantive) criminal nature.

Comitology does not apply to the adoption of delegated regulations pursuant to Article 290 TFEU. However, with the Interinstitutional Agreement of 13 April 2016 the Commission committed to consult Member States' experts in a sort of "mild comitology-like process", when preparing delegated acts.⁷²

⁶⁷ C-355/10, *Parliament v Council* [2012] ECLI:EU:C:2012:516, para 76.

⁶⁸ C-696/15 P, *Czech Republic v Commission* [2017] ECLI:EU:C:2017:595, para 78.

⁶⁹ C-363/14, *Parliament v Council* [2015] ECLI:EU:C:2015:579, para 51.

⁷⁰ C-355/10, *Parliament v Council* [2012] ECLI:EU:C:2012:516, paras 76 and 77.

⁷¹ In an earlier case in the field of agricultural policy, it was held that measures consisting of imposing penalties amount to no more than the implementation of the principles established in the basic regulations. Since the Council did not reserve that power to itself, it was properly delegated to the Commission (see Case 240/90, *Germany v Commission* [1992] ECLI:EU:C:1992:408, paras 24-25 and 37), provided however that those sanctions are not of criminal nature.

⁷² According to the Interinstitutional Agreement, "*the Commission shall consult experts designated by each Member State in the preparation of draft delegated acts. The Member States' experts shall be consulted in a timely manner on each draft delegated act prepared by the Commission services. The draft delegated acts shall be shared with the Member States' experts*". Furthermore, "[t]hose consultations shall take place via existing expert groups, or via ad hoc meetings with experts from the Member States. It is for the Member States to decide which experts are to participate. Member States' experts shall be provided with the draft delegated acts, the draft agenda and any other relevant documents in sufficient time to prepare". With specific reference to the financial sector, see also Declaration (No 39) on Article 290 of the TFEU, annexed to the Final Act of the Intergovernmental Conference, where "[t]he Conference takes note of the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice". With respect to the involvement of Member States in the drafting of delegated regulation, it has been noted that "*the greater the formality introduced for the Article 290 committees by the 2016 Common Understanding, the smaller the difference between the decision making process for delegated and implementing acts*": see PAUL CRAIG, *EU Administrative Law* (OUP 2018), p. 131. However, unlike the comitology procedure, opinions of Member State representatives sitting on expert groups can never be legally binding on the Commission. As noted in literature (see SABRINA ROTTGER-WIRTZ, *Delegated and implementing acts in the regulation of pharmaceuticals – an analysis through the lens of subsidiarity*, in *The Legislative Choice Between Delegated and Implementing Acts in EU Law* (Edward Elgar Publishing 2018), pp. 117 and 141), "arguably, the experts groups consulted are not comitology committees. However, given that the introduction of comitology has been argued to have made the Member States less hesitant to accept delegation of power to the Commission, one might argue that the same could be true for the effect of expert group consultation on willingness to confer power to the Commission to adopt delegated acts in an area where sensitive Member States interests are at stake and where the measure affects the general implementation competence usually attribute to the Member States".

b) Implementing powers under Article 291 TFEU

Under Article 291 TFEU, the Commission – and exceptionally the Council⁷³ – may be granted implementing powers where uniform conditions for the implementation of legally binding Union acts are necessary. According to the case law of European courts, implementing powers conferred on the Commission or the Council under Article 291(2) TFEU entail, in essence, the power to adopt measures that are necessary or appropriate for the uniform implementation of the provisions of the legislative act, and which **merely specify the content of the delegating act without amending or supplementing it**, in its essential or non-essential elements.⁷⁴

An implementing measure merely specifies the provisions of the legislative act where it is intended to clarify the scope of those provisions or to determine the detailed rules for their application. In so doing, implementing measures cannot contradict the objectives of the implemented provisions and cannot alter their normative content or their scope of application.⁷⁵

Moreover, according to settled case law, **the “essential elements criterion” expressly set out only in Article 290 TFEU applies also to the conferral of implementing powers**,⁷⁶ because it protects the principle of democracy and the rule of law.⁷⁷

However, the control mechanisms under Article 290 and 291 TFEU are different. Under Article 290 TFEU, control is conferred on the delegating legislature, while Article 291(3) TFEU confers the control of the Commission’s implementation on Member States, in a framework established by the European Parliament and the Council. Such framework is currently set out in Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011, laying down rules and general principles concerning mechanisms for

⁷³ Article 291(2) TFEU requires a detailed statement of the reasons why the Council is entrusted with adopting measures implementing a legally binding act of the Union (see C-695/20, *Fenix International Ltd v Commissioners for Her Majesty’s Revenue and Customs* [2023] ECLI:EU:C:2023:127, para 37).

⁷⁴ In fields characterised by the need for frequent regulatory updating, such as agricultural policy, the Court of Justice has long recognised that the Commission can be entrusted with wide powers of implementation, because the Commission alone can monitor the market closely and react with urgency if the situation so requires (Case T-310/06, *Republic of Hungary v Commission* [2007] ECLI:EU:2007:T:343, para 122).

⁷⁵ C-695/20, *Fenix International Ltd* [2023] ECLI:EU:C:2023:127, paras 46-50, where it is also clarified that in referring both to the Commission or the Council, Article 291(2) TFEU does not distinguish the nature and scope of the implementing powers on the basis of the institution on which they are conferred. In the same vein, see the *Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union* of 18 June 2019, agreed by the European Parliament, the Council and the Commission.

⁷⁶ C-695/20, *Fenix International Ltd* [2023] ECLI:EU:C:2023:127, para 41. This principle applies also when implementing powers are conferred on the Council under the conditions provided for by Article 291(2) TFEU.

⁷⁷ ALEXANDER H. TURK, *Legislative, Delegated Acts, Comitology and Interinstitutional Conundrum in EU Law – Configuring EU Normative Spaces*, European Law Journal, Vol. 26, No 5-6, 2020, p. 419.

control by Member States of the Commission's exercise of implementing powers (the "*Comitology Regulation*").

c) Judicial scrutiny of Articles 290 and 291 TFEU and the elusive boundaries between Level 1 Legislation and Level 2 Regulation in practice

Experience shows that, so far, judicial scrutiny of the limitations resulting from Articles 290 and 291 TFEU has been quite complacent. As a matter of fact, Level 2 Regulation often touches on complex regulatory choices or even policy, while it specifies technical aspects of detail.⁷⁸

Therefore, the red line between Level 1 Legislation and Level 2 Regulation remains elusive in a long spectrum because the criteria on the application of Articles 290 and 291 TFEU "*have remained at a high level of abstraction*"⁷⁹ and have primarily served as a deterrent against abuse rather than as a system of clear constitutional rules.

d) Delegated and implementing acts in the field of banking

Regulation (EU) No 1093/2010 (the "EBAR") has entrusted the European Banking Authority (the "EBA") with the task of developing draft regulatory technical standards to be submitted to the Commission for adoption. Notably, Article 10 EBAR provides that "*the European Parliament and the Council [can] delegate power to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU*", in the matters which fall within the remit of the EBA pursuant to Article 1(2) EBAR. Article 10 also specifies that regulatory technical standards (the "RTS") "*shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based*". As suggested by their name, RTS must be "*technical*", although EBAR does not precisely define the exact meaning of this concept.

In parallel, EBAR confers upon the EBA the power to develop also implementing technical standards (the "ITS"), by means of implementing acts pursuant to Article 291 TFEU. EBAR further specifies that also ITS "*shall be technical*" and "*shall not imply strategic decisions or policy choices*" and that ITS "*shall determine the conditions of application*" of the legislative act they are aimed to implement.

RTS and ITS are hereafter collectively referred to as binding technical standard (the "BTS").

⁷⁸ PAUL CRAIG, *European Administrative Law*, cit., p. 133.

⁷⁹ ALEXANDER H. TURK, *Legislative, Delegated Acts, Comitology and Interinstitutional Conundrum in EU Law – Configuring EU Normative Spaces*, cit., p. 419.

The practice of BTS, that is not uncontroversial,⁸⁰ shows that: (a) As for the control mechanisms provided in the Interinstitutional Agreement of 13 April 2016 for delegated acts and in Article 291(3) TFEU for implementing acts, the EBA's governance and the procedure set out in the EBAR for the adoption of BTS are the tool of choice to ensure, in this context, compliance with the principle of Member States' control of the Commission's exercise of implementing/delegated powers,⁸¹ including the respect of the principle of subsidiarity;⁸² (b) EBA's draft RTS have so far never been used to amend the Level 1 Legislation. **Instead, the power to amend, or derogate from, Level 1 Legislation has been conferred directly on the Commission, according to Article 290 TFEU.**⁸³ In turn, the Commission's implementing decisions that are not based on drafts of the EBA have been used to rule on the equivalence of third-country legal

⁸⁰ For a detailed discussion of the existing limits of the standard setting process at Level 2, and of the contentious issues at Level 3, compare now *Less is more, Proposals to simplify and improve European rule-making in the financial services sector*, cit., in particular pp. 27 and 29, and 46 ff. for "solutions within reach".

⁸¹ Actually, the EBA's control of the Commission's exercise of delegated and implementing powers seems somehow even stronger – at least in theory – than the ordinary comitology procedure, as Recital (23) of the EBAR specifies that the draft technical standards "*should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with the market and knowing best the daily functioning of financial markets*". That Recital also specifies that "*draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation*". The General Court upheld such a restrictive approach to the Commission's power of amendment in its order of 27 November 2013, in the Case T-23/12, *MAF v. EIOPA* [2013] ECLI:EU:T:2013:632, para 42, where it stated that "*le contenu du projet de norms techniques [...] n'est, en principe, pas susceptible de modification*". In the literature it has been argued that "*at least formally the ESAs have not been set up as entities through which Member States (understood as national governments and at least indirectly parliaments) can control the Commission's exercise of implementing powers*" and that "*if the ESAs were to be considered as representatives of the Member States with the task of controlling the Commission in the exercise of the implementing powers, the same would have to be said as regard the relationship between the ESAs and the Commission's exercise of the delegated powers under Article 290*", which in turn "*may be viewed as incompatible with Article 290 TFEU, if it is believed that under Article 290 only the EU Parliament and the Council – and not Member States – may control the Commission*": MATTEO ORTINO, *EU delegation of powers in the field of financial markets regulation*, in ELJALILL TAUSCHINSKY, WOLFGANG WEISS (eds), *The Legislative Choice Between Delegated and Implementing Acts in EU Law* (Edward Elgar Publishing 2018), pp. 145, 170-171. Nevertheless, in the Interinstitutional agreement Member States have secured for themselves considerable influence on the adoption of delegated acts. In light of this, once a de facto control configurable as a mild form of comitology is admitted, it is hard to see what difference there is between the consultation of the group of experts foreseen in said agreement and the participation of the EBA (whose BoS is composed of representatives of NCAs) in the procedure for the adoption of the Commission delegated regulations.

⁸² A too broad delegation could in fact frustrate the subsidiarity check of the member states provided for in Article 6 of Protocol No 2 annexed to the Treaty.

⁸³ See, for instance, the mandates under Articles 145(1) and 151(2) CRD, and under Articles 117(2), 244(6) and 245(6), 456, 457, 459, 460, 461, 461a and 503 CRR.

regimes or supervisory arrangements,⁸⁴ or to assess the existence of extraordinary circumstances that justify extending transitional regimes;⁸⁵ (c) The power to adopt implementing decisions accepting or rejecting some national measures that derogate from harmonised prudential requirements has been conferred either on the Commission⁸⁶ or on the Council;⁸⁷ (d) ITS have been used widely, especially for adopting templates and forms, for establishing procedures for communication, notification or exchange of information, and for adopting common reporting or disclosure formats and rules. Conversely, RTS have been used extensively for all other purposes, including to specify some definitions in greater detail, to establish conditions for applying prudential requirements or permissions, also in exceptional circumstances and (or) on a transitory basis, and to set out procedures for adopting supervisory decisions.

Key considerations

The EUBA should make much broader use of rule-making delegation in the field of banking. This shall be respectful of the “essential elements criterion” set out in Article 290 TFEU, which also applies to implementing regulations under Article 291 TFEU. Level 2 Regulation should aim to supplement non-essential elements of the Level 1 Legislation and should take the form of BTS. However, where Level 1 Legislation needs to be amended or derogated from, the relevant power must be conferred directly on the Commission.

e) A cautious proposal for wider rule-making delegation for technical rules in the field of banking

If Level 1 Legislation focuses, as it is advocated in this Reflection Paper, on principles and policy choices, many technical provisions that are currently

⁸⁴ See, for instance, the mandates under Article 48b CRD (decision on Conditions for ‘qualifying third country branches’), and under Articles 107(4) (exposures to third-country institutions – decision as to whether a third country applies prudential supervisory and regulatory requirements at least equivalent to those applied in the Union), 114(7) (Exposures to central governments or central banks – decision as to whether a third country applies supervisory and regulatory arrangements at least equivalent to those applied in the Union), 116(5), second subparagraph (Exposures to public sector entities – decision as to whether a third country applies supervisory and regulatory arrangements at least equivalent to those applied in the Union), 142(2) (large financial sector entity – decision as to whether a third country applies supervisory and regulatory arrangements at least equivalent to those applied in the Union) and 391 CRR (Definition of an institution for large exposures purposes- Definition of an institution for large exposures purposes). In several cases, reference to Article 464(2) CRR is made, whereby the comitology procedure with the assistance of the European Banking Committee applies.

⁸⁵ See, for instance, the mandate under Article 497(3) CRR.

⁸⁶ See, for instance, the mandate under Article 395(8) CRR.

⁸⁷ See, for instance, the mandate under Article 458(4) CRR (national macro-prudential measures – decision to reject the draft national measures).

enshrined in Level 1 Legislation would better fit in Level 2 Regulation.⁸⁸ The BTS of the EBA are in principle the most suitable tool for rule-making delegation (simplification through “de-legification”). We surmise that, while it is not necessary to have recourse to Article 290 TFEU to empower the Commission also to amend Level 1 Legislation, a more extensive use of Level 2 acts to supplement Level 1 Legislation pursuant to Article 290 TFEU and to adopt implementing acts under Article 291 TFEU is warranted to achieve a simpler and more responsive regulatory framework in the field of banking.

Member State’s control over the respect by Level 2 Regulation of Level 1 Legislation and the fundamental principles of proportionality and subsidiarity, will be conducted in the context of the expert groups provided for in Article 290 TFEU as to delegation, within the Comitology Process as for implementing acts under Article 291, and through the national participation in the EBA’s governance. On top of that, the European Parliament and the Council retain control over the exercise of delegation, first through the objection procedure under Article 13 of EBAR. Such a control mechanism could be usefully extended by Level 1 Legislation, under Article 290(2)(b) TFEU, also to the delegated regulations adopted by the Commission without any involvement of the EBA as part of the Level 2 Regulation. Furthermore, as established by Article 290(2)(a) TFEU, the European Parliament or the Council may revoke the delegation, where needed.⁸⁹ All these accountability checks and balances – which add to the other accountability mechanisms provided for the adoption of the technical standards, like the publication of the impact analyses and the consultation of the Banking Stakeholder Group – appear sufficient, in our view, to justify a much wider use of delegated powers through Level 2 Regulation.

f) EUBA and the allocation of subject matter between Level 1 Legislation and Level 2 Regulation. A tentative plan

Based upon the foregoing, the EUBA, in the spirit of fostering the widest possible rule-making delegation to Level 2 Regulation and, where necessary, also

⁸⁸ Compare however CHRISTOS GORTSOS, *The European Banking Regulation Handbook*, Volume II, *Substantive aspects of European (EU) Banking Law (Regulation)* (Palgrave 2025), who draws the attention to the fact that access to judicial review *vis-à-vis* Level 2 regulation is based on locus standi conditions that are partly different from those applicable to Level 1 legislation (and notes that “after the 2009 Lisbon amendment, Article 263(4) TFEU relating to actions for annulment provides that any ‘natural or legal person may (...) institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures’. This entails that individual concern no longer needs to be proven for an applicant to have locus standi in such cases, thus circumventing the so-called ‘Plaumann test’. The Court swiftly clarified that these regulatory acts do not include legislative acts, meaning that, for the latter, individual concern remains necessary”).

⁸⁹ While the revocation is necessary to respect the authority of co-legislators, its use is admittedly problematic, as an abrupt revocation may likely create legal uncertainty. We therefore advocate that its use should be limited to exceptional circumstances and be quickly complemented by a legislative proposal on the exercise of the revoked rule-making power.

to Level 3 acts such as guidelines, recommendations, policies and supervisory handbooks,⁹⁰ should be drafted in line with the following basic principles.

The essential elements pertaining to requirements which constrain the rights of institutions, including quantitative and qualitative prudential requirements, need to be fleshed out in Level 1 Legislation. This is the case, for instance, for the essential element of the legislative framework concerning: (1) passporting of services under mutual recognition; (2) sound governance arrangements and risk management procedures; (3) minimum quantitative requirements related to financial structure, asset/liability composition, liquid resources, risk and maturity transformation; (4) periodic reporting obligations of prudential and financial information to the competent authority and/or the public; (5) criteria for the identification of the level at which prudential requirements need to be applied.

The implementing technical aspects pertaining to those subject matters should be delegated to Level 2 Regulation, in particular to RTS or ITS which in principle should follow relevant international standards. In this spirit, Level 2 Regulation, through BTS, would *inter alia* identify: (1) the precise perimeter of the passport and the precise conditions to which it is subject; (2) the detailed governance arrangements and risk management procedures; (3) the applicable minimum requirements and the methods for their calculation; (4) the reporting and disclosure formats and schemes; (5) the exact level of application of the prudential requirements and the methods for consolidation.

Any power or discretion of competent and designated authorities should be identified by Level 1 Legislation, yet the conditions and procedures for their exercise may be delegated to RTS or ITS, which in principle should follow relevant international standards.

Definitions may be included or fine-tuned, as the case may be, in Level 2 Regulation, provided that they are consistent with the definitions and further indications, if any, present in Level 1 Legislation.

Whilst the EUBA would consolidate Level 1 Legislation in an Omnibus Regulation and an Omnibus Directive, the parallel consolidation in one single regulation, at least for thematic area, of all relevant Level 2 regulations appear more difficult, if not even hardly feasible with the existing legal bases in the TFEU. Level 2 rules are currently laid down in several instruments, which have different legal bases and follow distinct adoption procedures. This reflects limitations arising from the Treaty, namely the divide between Article 290 and Article 291 TFEU and the nuanced institutional balance that the European legislature has so far achieved with the EBA being part of the adoption process only for certain

⁹⁰ Conversely, in our view, the proposed broader recourse to Level 2 acts, which should include areas currently left to EBA's guidelines and recommendations (and thus to Level 3 acts), would invite a narrowing in scope of the role of guidelines and recommendations, which in principle should be used, together with Q&A tools, only to provide interpretative or applicative guidance on practical aspects.

matters. And quite apart from the question of the appropriate legal basis, we also surmise that the use of multiple Level 2 instruments is the most flexible way to timely adjust the legal framework to the evolution of practice and international standards. Easy accessibility and legal certainty do not necessarily need a single regulation, yet a user-friendly single repository held by the EBA.

A final question pertains to the fate of national options and discretions under the EUBA. We surmise that maximum harmonisation would be jeopardised by an unchecked recourse to options and discretions for Member States. These should therefore be duly restrained to truly exceptional circumstances. Options and discretion for competent authorities may in contrast be confirmed, as an instrument of flexibility for the adaptation of the regulatory framework to factual scenarios.

SECTION II.
THE PRUDENTIAL FRAMEWORK:
A POSSIBLE WAY FORWARD TOWARDS MAXIMUM
HARMONIZATION AND SIMPLIFICATION AND A TEST-CASE

1. The essential content of the Omnibus Directive

This section, building on the findings of the previous one, advocates that the EUBA should be designed in such way that many prudential requirements would be recast in the Omnibus Regulation whilst the Omnibus Directive would solely set out the rules strictly related to the essential requirements of the competent authorities, as well as the freedom of establishment and the freedom to provide services. This section addresses how to properly design this in practical terms, and offers guidance in identifying the principles and rules that need to be “relocated” from the CRD into the Omnibus Regulation and the reasons that justify this, so as to sketch the outline, content-wise, of the EUBA (a provisional table of contents of which is attached hereto as Annex I).

As already noted, the Omnibus Directive would mainly deal with two topics and, as a matter of principle, would widely rely on references to the Omnibus Regulation whenever necessary. For instance, Part One of the Omnibus Directive, covering subject matter, scope and definitions, would build on the objectives, scope, exclusions and definitions in Part One of the Omnibus Regulation.

In the EUBA the objectives should include (i) financial stability, (ii) micro and macro prudential safety and soundness and (iii) client protection,⁹¹ and should clearly spell out that these different objectives are in principle complementary and self-reinforcing, yet are to be balanced when they may compete or conflict in the short run so as to preserve financial stability as an overriding objective.⁹²

The reference in a directive to a set of definitions provided for in another regulation is an already established legislative technique,⁹³ which has the main advantage of making them directly applicable, and thus preventing the occurrence of undesirable differences at the level of Member States’ transposition, thus reducing the risk that the graft into 27 different legal contexts may create, instead of the necessary convergence, interpretative divergences, which may have dangerous ramifications also in the interpretation and application

⁹¹ In our view, client protection should not be limited to safeguarding depositors – the traditional reason for regulating the banking business – but should also be extended to protecting banks customers and investors. In our view, financial stability requires preserving depositors’ confidence to protect the monetary nature of the deposits and prevent the risk of banking runs, yet it also requires the protection of the confidence of banks’ investors and customers, in order to ensure that the financial system smoothly pursues its function of intermediating savings and investments.

⁹² Financial stability is the overriding objective since it orders and harmonises the other objectives of the EUBA (micro- and macro-stability and client protection), which may be considered part of it. In this vein, we posit that the EUBA should explicitly confer upon the authorities the task to balance client protection and (micro and macro) safety and soundness, considering all relevant circumstances, to pursue the overriding objective of financial stability.

⁹³ See, for instance, Article 3 of the CRD.

of the substantive provisions to which those definitions apply. Interpretative divergences may not occur only for provisions subject to national transposition but even for basic definitions included in directly applicable provisions. This may happen when not all terms used in the provisions are clearly defined and may leave room for divergent applications by different (national) authorities, at least until the Court of Justice clarifies the exact meaning of the European law.⁹⁴ Thus, we advocate for a directly applicable and more granular description of the terms used in the Single Rulebook.

a) Legal framework of the competent and designated authorities

The first subject-matter that would need to be dealt with in the Omnibus Directive concerns the requirements of the competent and designated authorities, in particular their organisation. Some reflections on the harmonisation in this field is provided in Section IV.

The identification of the competent and designated authorities in each Member State belongs to the constitutional and administrative legal order of the Member State and is not *directly* nor *exclusively* related to the functioning of the internal market. The same applies to their internal organisation and the exercise of the powers conferred upon them, including checks and balances with the powers of other constitutional/administrative authorities.

Therefore, the rules currently provided under Articles 4 to 6 CRD should remain in the Omnibus Directive, which would also address in a consistent and comprehensive way all other organisational requirements that the Union legislature imposes upon those authorities (see in Annex I, Omnibus Directive, Part One, Title I). For instance, the independence requirements of the authorities (both from the financial industry and from other European or national authorities or constituencies) can be duly designed and implemented at the level of each Member State in line with its constitutional tradition; the requirements of independence may also be differentiated according to the characters of those authorities and the nature of the tasks and powers conferred upon them (with distinct regimes, for instance, depending on whether they are competent or designated authorities).

The Omnibus Directive should also deal with some high-level principles on the tasks and powers conferred upon the authorities (see Annex I, Omnibus Directive, Part One, Title III), which should be consistently identified with the general objectives set out in Part One of the Omnibus Regulation.

a) The tasks should be identified by referencing the Omnibus Regulation's content, to avoid any asymmetries. As already

⁹⁴ This is the case, for instance, of the 'other repayable funds' in the CRR definition of 'credit institution' (see EBA's Opinion No EBA/Op/2014/12 and EBA's Report of 27 November 2014, both available [here](#)). Other examples may be provided at the level of the directive (as in the cases of "acting in concert" or "indirect" qualifying holdings under Article 22 CRD).

mentioned, this Part One, Title III should cover all tasks related to the pursuit of (i) financial stability, (ii) micro- and macro-prudential safety and soundness, and (iii) client protection, and should clearly spell out that these different objectives are in principle complementary and self-reinforcing, yet are to be balanced when they may compete or conflict in the short run, to preserve financial stability as an overriding objective. Special attention should be given to the potential interferences with other Union's objectives, such as price stability.

- b) As to the powers, the Omnibus Directive would confirm the general principle currently provided for under Article 64 CRD, whereby the authorities “*shall be given all supervisory powers [...] that are necessary for the exercise of their function*”, and have to exercise those powers in accordance with their national legal framework. At the same time, however, some “core” supervisory powers currently mentioned in CRD would deserve to be made more uniform and detailed, and thus be relocated into the Omnibus Regulation, so as to allow direct and uniform application in the Union (see Annex I, Omnibus Regulation, Part Three; see also paragraph 2.c) below).

It is our view that the powers conferred upon the competent authorities to pursue the objectives of the EUBA and the procedure for their exercise should be dealt with in a fully-harmonised way in the Omnibus Regulation. Section IV argues that no legal impediments towards such an objective exist. However, in the residual case that some powers may not prove suitable for a fully-fledged harmonisation, we suggest that the Omnibus Directive should codify some fundamental procedural rights, such as due process, that the authorities must safeguard when exercising the powers conferred upon them by national laws to pursue the objectives of the EUBA. In particular, the Omnibus Directive should usefully provide some uniform principles on the application of fundamental procedural safeguards to the powers provided under national laws, by mirroring the safeguards set out in the Omnibus Regulation for the fully-harmonised powers (see Annex 1, Omnibus Directive, Part One, Title II).

As argued in Section IV, a similar approach should be extended to the sanctioning powers of the competent authorities. In particular, the bulk of the violations of the EU banking and financial law should be identified directly in the Omnibus Regulation, which would then entirely regulate the facts in the paradigm of the administrative offences, the types and amount of the sanctions, and the procedure for their application, including the investigation and the assessment phases (see Annex I, Omnibus Regulation, Part Three, Title IV).

At the same time, the Omnibus Directive may reconfirm the general principle whereby Member States may set out rules on administrative penalties

and other administrative measures concerning residual breaches not covered in the Omnibus Regulation, and establish minimum procedural safeguards mimicking those set out in that Regulation (see Annex I, Omnibus Directive, Part Two, Title IV).

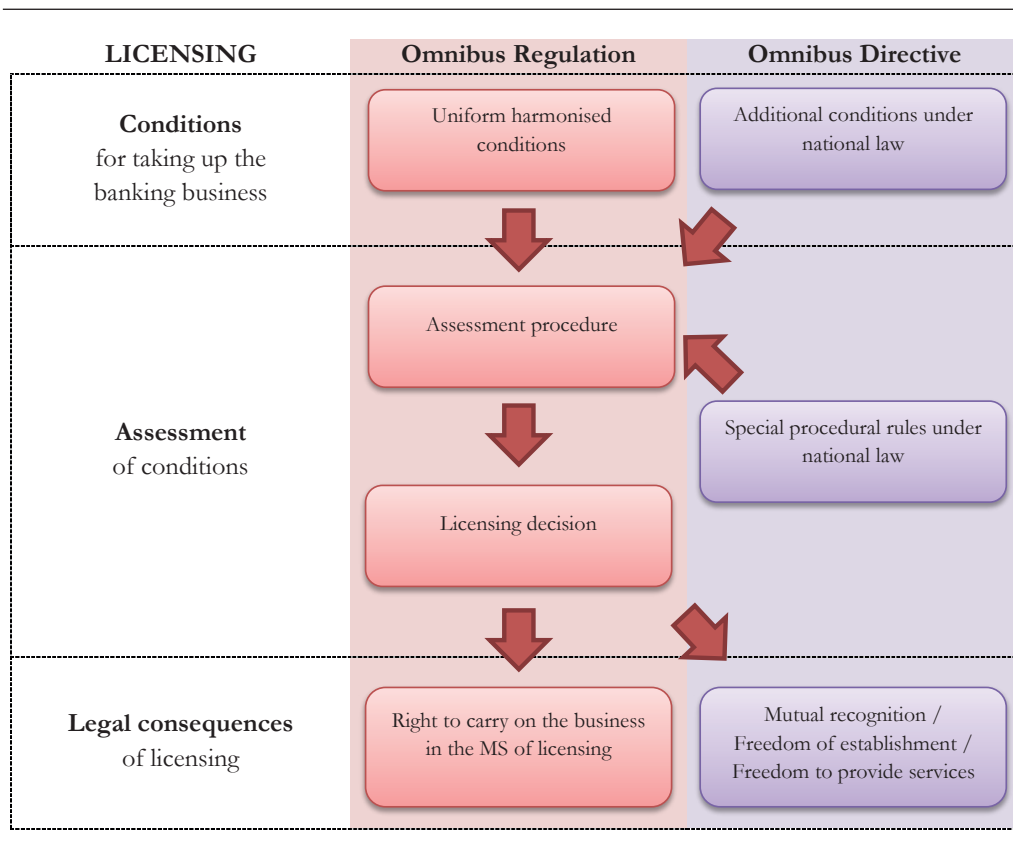
As to criminal sanctions, Article 83(2) TFEU only allows for the adoption of directives to pursue the “*approximation of criminal laws and regulations of the Member States [that] proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.*” Although the EU legislature has never used in the area of banking regulation the power to establish minimum rules concerning the definition of criminal offences and criminal sanctions, the Treaties require that any possible, future development in this field be dealt with through (arguably separated) directives (this is discussed in Section IV). Until the Union decides that harmonisation of criminal offences and criminal sanctions is essential for the establishment and functioning of a unfettered single market in banking, the Omnibus Directive would maintain, consistently with the conferral principle under the Treaties, the rule whereby it is up to the Member States to decide whether the breaches of EU banking law are subject to criminal or administrative sanctions (see Article 65(1) CRD), or both provided that the *ne bis in idem* principle is also respected.

This twofold framing of the supervisory powers and administrative sanctions would preserve the (explicit) ability of the Member States to confer additional powers upon the authorities, thus adapting the range of actions they can exercise in the pursuance of the tasks conferred upon them by European and national law, while introducing a maximum harmonisation of some specific powers and administrative sanctions that are necessary mainly to regulate the internal market for financial services with the aim to preserve its stability.

b) Legal framework of mutual recognition, freedom of establishment and freedom to provide services

The second subject matter that would be dealt with in the Omnibus Directive is the European passport of regulated entities (licensed institutions). As already pointed out in Section I, the Treaties require that freedom of establishment and freedom to provide services are to be attained through directives (see Article 53 TFEU); therefore, even if adopting a narrow interpretation and application of those requirements, the rules *strictly related* to those freedoms should remain in the Omnibus Directive.

We surmise that in the identification of the rules to be allocated to the Omnibus Directive *vis-à-vis* those that can be allocated in the Omnibus Regulation the following approach, which is exemplified using the licensing procedure as a test case, could be adopted. The same approach would apply, *mutatis mutandis*, to the establishment of cross-border branches, cross-border mergers and divisions or cross-border provision of services.



As shown in the table above, the Omnibus Regulation would fully harmonise the conditions for access to the banking business and the procedure for assessing those conditions and granting the banking licence. The Omnibus Directive would in turn allow Member States to introduce (minor) additional conditions and procedural requirements, as long as they remain compatible with the European *acquis* although, as a matter of policy, we also surmise that those conditions are hardly necessary in the internal market while they undermine equal access to the banking license. Be it as it may, so far the ability of Member States to provide additional conditions for banking licensing is an already established principle in the current EU law (see, for instance, Article 18(1), point (e) CRD, Article 14(1) SSMR and Article 74 SSMFR); it allows the competent authorities to take into account not only the requirements imposed under European law to pursue the Union's objectives (especially the stability of its financial system) but also the requirements imposed under national law to pursue legitimate national interests. However, to limit the risk of fragmentation and an un-level playing field in the European banking market, the Omnibus Directive should set strict limits on possible additional conditions established by the Member States (for instance, as Article 11 CRD currently lays out). In addition, those national provisions should never derogate from the harmonised conditions under the Omnibus Regulation, be bounded by strict proportionality and obviously comply with the Treaty

framework on the freedom of establishment and freedom to provide services, so as to avoid any risk that they may create barriers to the internal market.

As to the legal consequence of the banking licence, the Omnibus Directive would provide the framework for exercising across borders the freedom of establishment and to provide services (namely, the previous notification to the host competent authority and the conditions for its opposition), as well as the powers of the host competent authority *vis-à-vis* the licensed institution. In more detail, this translates into the fact that uniform and fully harmonised conditions for the access to and the carrying on of the banking business would be provided in the Omnibus Regulation (see EUBA, Omnibus Regulation, Part Three, Title II, Chapter 2, Section 1). Those conditions should include compliance with the Pillar 1 and Pillar 2 requirements set out in the same Omnibus Regulation (such as minimum capital, financial structure, liquidity and governance requirements) and refer to its relevant provisions (see EUBA, Omnibus Regulation, Part Two and Part Three). The conditions should also include compliance with the other EU acts that the co-legislators consider necessary to exercise the banking business and, thus, to maintain the licence (such as compliance with EU laws on AML/CFT), so that the failure to comply with those provisions would justify revocation of the licence and a failing or likely to fail assessment, which, in turn, would be fully harmonised.

Similarly, the Omnibus Regulation should also fully harmonise the procedure for the competent authorities' assessment of those conditions and the adoption of the licence (see EUBA, Omnibus Regulation, Part Three, Title II, Chapter 2, Section 1). The Omnibus Directive in turn should refer to the harmonised procedure in the Omnibus Regulation and grant Member States the option to introduce additional procedural rules under their national law (for instance, some Member States may require the involvement of some regional or local public authorities in the process of authorising local institutions), provided that those procedural requirements remain compatible with the European framework (see EUBA, Omnibus Directive, Part Three, Title I, Chapter 1).

In this context, the right to take up and carry on the financial business in the Member State where the licence has been granted would stem from directly applicable EU law, namely the Omnibus Regulation. The Omnibus Directive would instead provide the operative framework for the mutual recognition of the European passport on a cross-border basis, setting out the rules for the notification to (and the possible objection of) the host competent authority before the establishment or the provision of services are exercised. The Omnibus Directive would also regulate the exercise of supervisory and precautionary powers of the host competent authorities when licensed institutions established in the host Member State (or institutions providing services on a cross-border basis) may threaten the financial stability of the host Member State, the protection of clients in the host Member State or any other legitimate interests of the host Member State (see EUBA, Omnibus Directive, Part Three, Title I, Chapters 2 and 3, and Title II).

The same approach should be replicated for cross-border branches or conversions, mergers and divisions that may involve the European banking passport and, more generally, the right of establishment of European banks. In the case of the qualifying and material holdings and the material transfers of assets and liabilities, the freedom of establishment is in principle relevant where it limits the acquisition of control of subsidiaries. At the same time, given that the authorisations to acquire qualifying holdings are not subject to passporting in other Member States – as they can be granted only on a case-by-case basis – their legal framework can be widely allocated, on a full harmonised basis, into the Omnibus Regulation. In turn, however, the Omnibus Directive would still focus on the cooperation between the competent authorities involved, so as to allow a mutual regard for their good-standing assessments.

Consistently with Article 53 TFEU, the Omnibus Directive should deal with the rules for the mutual recognition of the qualifications of banks' managers (see EUBA, Omnibus Directive, Part Three, Title III), while the Omnibus Regulation would set out the uniform prudential framework for suitability assessment (see EUBA, Omnibus Regulation, Part Two, Title III, Chapter 2).

Key considerations

The EUBA would include an Omnibus Directive, which would cover two main areas. First, the requirements of the competent and designated authorities, in particular their organisation. Second, the European passport of regulated entities because freedom of establishment and freedom to provide services are to be attained through directives under Articles 50, 53 and 59 TFEU; following, however, a narrow interpretation and application of those requirements, the rules set out in the Omnibus Directive shall be only those *strictly related* to those fundamental freedoms.

2. The essential content of the Omnibus Regulation

The Omnibus Regulation should contain the main body of institutions' prudential rules, comprising those that are already present in other EU regulations adopted under Article 114 TFEU, as well as rules currently present in several directives, which would be relocated into the regulation. However, at the same time the content of the Omnibus Regulation should be simplified, streamlined and made principle-based, relying on extensive delegations empowering the Commission to adopt regulatory or implementing technical standards as Level 2 Regulation.

a) Financial stability as a key element justifying the application of Article 114 TFEU

The main argument that supports and fully justifies at the current stage of evolution of the Banking Union a wide relocation of subject matter from several directives into the Omnibus Regulation and, in parallel, the grounding of the

overall EU prudential framework primarily on Article 114 TFEU relies on the pursuance of **financial stability**. Maintaining financial stability is a key goal of the Union, as it is instrumental to pursuing several (if not all) objectives under Article 3 TEU, as well as the functioning of the internal market. An efficient and smooth-functioning financial system is essential to pursue many fundamental freedoms under the Treaties: it is the facility whereby capital moves and the device that selects the internal market's investments, contributing to the pursuit of sustainable development and balanced economic growth under Article 3(3) TEU. It is also necessary to maintain price stability, as it transmits monetary policy impulses to the real economy.

Conversely, the Great Financial Crisis showed that financial instability can compromise not only individual finances, but also public finances. This is not restricted to financial institutions with cross-border activities. In fact, a substantial threat to the Union economy may originate from domestically-focused financial institutions, and contagion may spread from one Member State's finances or economy to other Member States' finances or economy, regardless of cross-border financial links. Financial instability can also affect monetary conditions, complicating any intervention by fiscal or monetary authorities.

Given the relevance of financial stability for achieving the Union's objectives, the Treaties justify the application of Article 114 TFEU to harmonise in full the prudential rules applicable to institutions, not only to establish equal treatment and a level playing field when licensed institutions provide their services in other Member States, but primarily as an essential condition for maintaining the stability of the European financial system and of the European economy as a whole.

b) Maximum harmonisation of the Pillar 1 framework

The Omnibus Regulation would fully harmonise the entire set of provisions aimed at safeguarding micro- and macro stability of European supervised entities, including both the minimum prudential rules applicable irrespective of the entities' specific conditions ("**Pillar 1 framework**") and the rules related to the supervisory powers exercised on a case-by-case basis ("**Pillar 2 framework**").

In light of the above, the Omnibus Regulation would therefore harmonise the legal regime applicable to the different categories of entities, adjusting the level of application of the prudential requirements to size, complexity and systemic relevance of the institutions concerned, fully embedding the proportionality principle at both the individual and consolidated levels (see Annex I, Omnibus Regulation, Part Two, Title I).

The Omnibus Regulation should set out and simplify the rules applicable to all categories of entities and institutions (such as G-SIIs and O-SIIs, large and small credit institutions, large and small investment firms, credit servicers) in accordance with the principles of **neutrality** and **proportionality**. Under these principles, all supervised entities in the same position and exposed to the same risks should be subject to the same core provisions; deviations from the uniform

rules should be strictly justified by the different conditions of the supervised entities (in terms of the risks they are exposed to or the threat they pose to the financial stability). Simplified and more advanced prudential frameworks (such as the K-factors of investment firms or the internal models) should be available, upon supervisory permission, to all categories of supervised entities under the same conditions.

The same principles should apply to the different super-individual levels of application currently provided in the prudential framework (groups of supervised entities, entities affiliated to central bodies, institutional protection schemes), with the aim to ensure that different legal structures are not used to get access to preferential treatments that are not justified in terms of risks or impact to financial stability. This could involve extending simplified consolidated supervision schemes, upon supervisory permission, to smaller banking groups, and creating uniform network schemes applicable to the whole internal market, with no borders between Member States. Being subject to the same legal and prudential consequences, supervised entities should be otherwise free to arrange their structure in accordance with their legitimate business strategies.

This is particularly the case for financial conglomerates, whose legal regime, identification criteria, and supplementary prudential requirements should be indifferent to the legal structure (for instance, to the fact that: the ultimate EU parent is a regulated entity or an MFHC; the entities belonging to the banking, insurance and investment services sectors are part of completely separate subgroups or, otherwise, their sub-consolidated perimeters overlap; some special prudential regimes, such as Article 49 CRR, apply at different sub-consolidated levels). The Omnibus Regulation should also clarify which entities in the conglomerate are responsible for complying with the supplementary prudential requirements.⁹⁵

Some exemplary reflections on those issues are in Section III. The rules dealing with the categories of supervised entities should also include the general provisions on third-country branches currently laid down in Articles 47 to 48b CRD (see Annex I, Omnibus Regulation, Part III, Title II, Chapter 2, Section 1).

The Omnibus Regulation would also fully harmonise the accounting rules applicable to supervised entities (but for those that apply the IAS/IFRS under Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002), thus incorporating the rules currently under the banks accounting directive (Council Directive 86/635/EEC of 8 December 1986). Complete harmonisation of accounting principles is crucial to have a common basis for basic economic facts and conditions underpinning the application of prudential rules in an unbiased manner. Given the fact that full harmonisation of accounting standards for listed companies is already brought about by Regulation

⁹⁵ See JOHN TAYLOR, RENÉ SMITS, *Bank Holding Company Regulation in Kenya, Nigeria and South Africa: A Comparative Inventory and a Call for Pan-African Regulation* (November 20, 2016). Available at [SSRN](https://ssrn.com/abstract=2888888).

No 1606/2002, using Article 114 TFEU to harmonise accounting standards of supervised entities should not prove controversial. At the same time, to maintain some flexibility and ensure a proportional approach, the Omnibus Regulation may set out the special rules (directly) applicable to financial entities while still relying upon the general accounting frameworks provided by national laws under Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 (see Annex I, Omnibus Regulation, Part Two, Title II). The detailed accounting standards applicable to supervised entities should then be set out by Level 2 Regulation.

The maximum harmonisation via the Omnibus Regulation would be extended to supervised entities' governance and risk management, whose requirements are currently set out in the CRD and IFD.⁹⁶ Application of Article 114 TFEU appears justified here, not only because there are already several examples of governance requirements imposed through directly applicable rules set out in regulations,⁹⁷ but even more importantly because establishing sound governance and risk management is crucial in maintaining the stability of every and each financial institution.⁹⁸ The Omnibus Regulation should seize the opportunity to fully harmonise parts of the European prudential framework that are not yet aligned with international standards, as in the case, for instance, of related-party transactions.⁹⁹ The maximum harmonisation in the Omnibus Regulation should naturally be extended to prudential rules on remuneration policies and practices for the same reasons (see Annex I, Omnibus Regulation Part Two, Title III, Chapters 1 and 2). As mentioned above, only the rules for the mutual recognition of the qualifications of supervised entities' managers should be dealt with in the context of the Omnibus Directive (see Annex I, Omnibus Directive, Part Three, Title III).

The Omnibus Regulation should also deal directly, when addressing the Pillar I framework, with the suitability conditions for qualifying (share)holders of regulated entities (see Annex I, Omnibus Regulation, Part Two, Title III, Chapter 3), to clarify that those conditions represent prudential requirements that have to be complied with at any time, irrespective of any ongoing authorisation in case of acquisitions, which is to be dealt with in the context of the rules on supervisory powers exercised on a case-by-case basis (Pillar 2 framework) (see Annex I, Omnibus Regulation, Part Three, Title II, Chapter 2, Section 2). Remedies for qualifying (share)holders becoming unsuitable or lacking previous authorisation

⁹⁶ See Articles 73 to 96 CRD and, for third-country branches, Articles 48g and 48h CRD. See also Articles 25 to 35 IFD and Articles 9 and 13 FICOD.

⁹⁷ See, for instance, Articles 23 to 29 and 33 to 35 EMIR; Articles 26 to 31 CSDR; Articles 31 to 34, 68 and 71 to 73 MiCAR; Articles 27f to 27i MiFIR.

⁹⁸ For the use of directly applicable provisions on the suitability assessment of banks' managers compare International Monetary Fund (IMF), 2013, *A Banking Union for the Euro Area*, cit.

⁹⁹ International Monetary Fund (IMF), 2025, *Euro Area: Publication of Financial Sector Assessment Program Documentation – Detailed Assessment of Observance – Basel Core Principles for Effective Banking Supervision*, IMF Country Report 2025/215, Washington, DC.

should also be provided in the Omnibus Regulation (see Annex I, Omnibus Regulation, Part Three, Title II, Chapter 2, Section 2 and Title IV).

The Omnibus Regulation would then, quite naturally, deal with the quantitative prudential requirements, as well as with reporting and disclosure requirements, which constitute the bulk of the provisions currently in the CRR (see Annex I, Omnibus Regulation, Part Two, Titles IV to VI). In accordance with the neutrality and proportionality principles outlined above, the consolidated regulation should rationalise the requirements of different categories of supervised entities and their level of application, including the minimum regulatory and reporting requirements applicable to third-country branches under Articles 48e, 48f, 48k and 48l CRD.

c) Maximum harmonisation of the Pillar 2 framework

As mentioned above, the Omnibus Regulation should also fully harmonise the legal framework of the competent and designated authorities' powers including professional secrecy and exchange of information among them and with third parties. Member States should be able, however, to confer additional powers to their authorities to pursue legitimate national interests, subject to conditions set out in the Omnibus Directive.

The use of a regulation to confer powers on supervisory authorities is an already established legislative technique. Furthermore, in this context harmonising the way competent and designated authorities deal with the specific risks of individual banks or the macro-prudential risks is crucial to maintain the stability of the European financial system without creating systemic asymmetries.

The Omnibus Regulation (see Annex I, Omnibus Regulation, Part Three, Title I) should fully harmonise the principles of prudential supervision applicable to *home* competent authorities, as well as the rules on the exchange of information with other authorities and the duties of the persons responsible for the legal control of banks' annual and consolidated accounts.¹⁰⁰ An appropriate revamp (so as to make the relevant rules more consistent across the financial sector)¹⁰¹ of the exchange of information among supervisory authorities and with third parties and of the professional secrecy rules for supervisory authorities would be worth being included in the Omnibus Regulation.

Given that they limit the right of establishment, the principles applicable to the supervisory powers of *host* authorities should instead be dealt with in the Omnibus Directive (see Annex I, Omnibus Directive, Part Three, Title II).

In harmonising supervisory powers, the Omnibus Regulation would distinguish between “general” powers, namely those that can be exercised

¹⁰⁰ Currently under Articles 49 to 63 CRD.

¹⁰¹ See RENÉ SMITS, NIKOLAI BADENHOOP, *Towards a Single Standard of Professional Secrecy for Financial Sector Supervisory Authorities: A Reform Proposal*, European Law Review, Vol. 44, No 3, 2019, pp. 295-318.

ex officio when the risk conditions of individual institutions or groups or the macro-prudential risks so require, and “special” powers, namely those that are typically – however non-exclusively – exercised upon request or application by the relevant institution.

General supervisory powers (see Annex I, Omnibus Regulation, Part Three, Title II, Chapter 1) should include the supervisory review and evaluation process (the “SREP”) and the adoption of supervisory measures following an assessment of the competent authority on the insufficient coverage of risks.¹⁰² They should also include the power to impose buffers or capital conservation measures granted to competent or designated authorities.¹⁰³ The Omnibus Regulation should also harmonise and rationalise the information and investigatory powers of the authorities (similarly to what Articles 10 to 13 SSMR provide), including on-site inspections. The harmonisation of supervisory measures would invite co-legislators to better reclassify some early intervention measures (the “EIMs”) as supervisory measures to avoid repetition and unnecessary confusion (*e.g.*, under article 104 CRD, 16 SSMR and 27 BRRD), leaving EIMs for the more intrusive measures.¹⁰⁴

Special supervisory powers (see Annex I, Omnibus Regulation, Part Three, Title II, Chapter 2) should include all licensing/approval powers,¹⁰⁵ as well as the authorisation of qualifying holdings,¹⁰⁶ material holdings,¹⁰⁷ material transfers of assets and liabilities,¹⁰⁸ and mergers and divisions.¹⁰⁹ The Omnibus Regulation would also fully harmonise and rationalise the validation of models, as the framework of this supervisory power is currently scattered in several pieces of European legislation. According to the principles mentioned above, the Omnibus Regulation would provide the legal framework for the conditions (those not already set out in the Pillar 1 framework), the procedure and the legal consequences of each special supervisory power, excluding only the rules directly connected to the cross-border dimension of the freedoms of establishment and to provide services, which may involve the exercise of supervisory powers by

¹⁰² Those rules are currently provided under Articles 97 to 107 CRD, and, for (systemic) third-country branches, under Articles 48j and 48m to 48o CRD. Some of those rules have been partially reproduced under Article 16 SSMR as directly applicable provisions. See also Articles 36 to 45 IFD.

¹⁰³ Currently under Articles 128 to 142 CRD.

¹⁰⁴ Currently under Articles 27 to 30 BRRD.

¹⁰⁵ Namely, the rules on: the authorisation of banks currently under Articles 8 to 20 CRD; the approval of (mixed) financial holding companies currently under Article 21a CRD; the establishment of intermediate parent undertakings currently under Article 21b CRD; the authorisation of third-country branches currently under Articles 21c, 48c and 48d CRD and the establishment of subsidiaries of third-country groups currently under Article 48i CRD; the rules on authorisation of investment firms under Articles 5 to 8 MiFID II; the rules on authorisation of credit servicers under Articles 4 to 9 CSCP.

¹⁰⁶ Currently under Articles 22 to 27 CRD and Article 10 to 13 MiFID II.

¹⁰⁷ Currently under Articles 27a to 27e CRD.

¹⁰⁸ Currently under Articles 27f to 27g CRD.

¹⁰⁹ Currently under Articles 27h to 27l CRD.

host authorities. The procedural part should be primarily delegated to Level 2 Regulation.

As mentioned above, the Omnibus Regulation would also cover sanctions and enforcement actions (see Annex I, Omnibus Regulation, Part Three, Title IV), with directly applicable provisions identifying the bulk of serious and fundamental violations of the European financial legal framework and uniformly regulating the facts in the paradigm of the administrative offences, the types and amount of the sanctions or other enforcement actions,¹¹⁰ and the procedure for their application, including the investigation and the assessment phases. Such violations should include at least those currently set out under Articles 66(1) and 67(1) CRD, and article 18 IFD. Some reflections on the harmonisations and rationalisation of those powers are in Section IV. The conferral of supervisory and sanctioning powers through directly applicable regulation is a well-established technique in European financial legislation,¹¹¹ so the applicability in this domain of Article 114 TFEU as legal basis should be uncontroversial.

The Omnibus Regulation would also provide for rules related to supervision on a consolidated basis and supervisory cooperation (see Annex I, Omnibus Regulation, Part Three, Title III).¹¹² The recast of the existing provisions would provide the opportunity to rationalise the matter by clearly distinguishing between the (many) competent authorities that are empowered to exercise supervisory powers on different consolidated bases,¹¹³ and the (sole) competent authority that is required to chair the supervisory college and draft the joint decisions (the consolidating supervisor). The current language of the CRR and the CRD is a breeding ground of interpretative uncertainties. The Omnibus Regulation should also harmonise the supervision on a consolidated basis with the supplementary supervision of financial conglomerates under Articles 9a to 19 FICOD.

The rationalisation of macro-prudential powers would also benefit from the empowerment of colleges of designated authorities and joint decisions on the group application of macro-prudential tools, with a possible binding mediation of the EBA. Indeed, the current setting of macro-prudential tools by competent and designated authorities is widely diversified among Member States (see Figure below), so its application to cross-border groups may become complex. We posit that the EUBA should harmonise the macroprudential policy framework, through

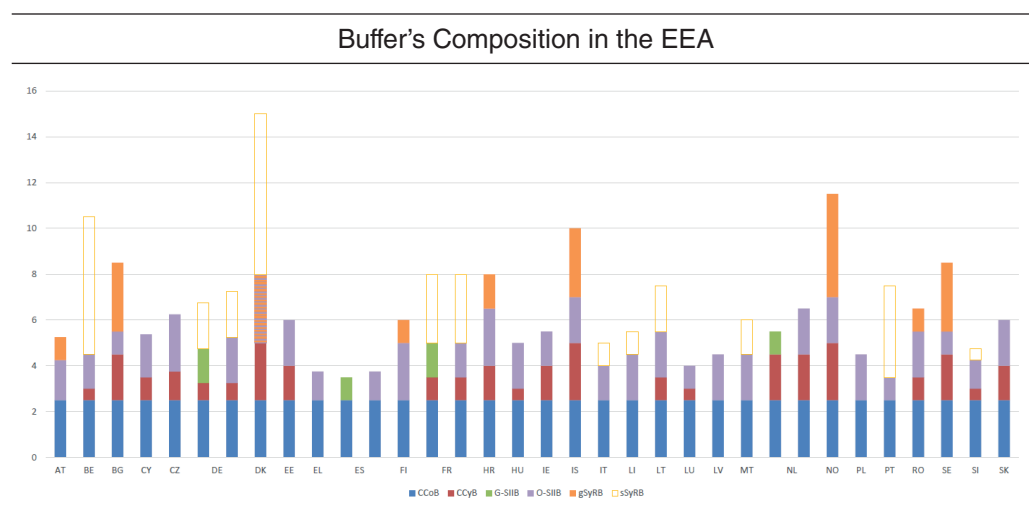
¹¹⁰ Taking stock of the case law of European courts on this: compare judgments of 28 February 2024, in Joined Cases T-647/21 and T-99/22, *Sber* [2024] ECLI:EU:T:2024:127 and Case T-667/21, *BAWAG* [2024] ECLI:EU:T:2024:131.

¹¹¹ See, for instance, the supervisory and/or sanctioning powers granted by the SSMR, SRMR, AMLA Regulation, EMIR, CSDR, CRR, IFR, MiFIR, SecReg, MiCAR, DORA, MMFR, ELTIFR, EuSEFR, and EuVECAR.

¹¹² Currently, under Articles 108 to 127 CRD and, for third-country branches, under Articles 48p to 48r CRD. See also Articles 46 to 56 IFD.

¹¹³ There may well be different levels of (sub-)consolidation in cross-border groups operating in various Member States and, in some cases (see, for instance, Article 22 CRR), even in the same Member State. Therefore, the application of supervisory powers on several (sub-)consolidated bases may be conferred upon different competent authorities.

provisions aiming at (i) coordinating the procedures for the joint adoption of macroprudential tools, especially at the group level, (ii) ensuring that capital buffers are consistently applied across Member States (iii) harmonising the methodology for setting buffers on the O-SIIs (while allowing some flexibility



to reflect country specificities) and (iv) facilitating the early and coordinated activation of countercyclical capital buffers by different authorities.¹¹⁴

In addition, the Omnibus Regulation would directly set out all supervisory disclosure requirements currently enshrined in Articles 143 and 144 CRD (see Annex I, Omnibus Regulation, Part Three, Title V), complementing how competent authorities exercise their Pillar 2 powers.

Finally, the Omnibus Regulation would set out – as outlined in the Section V of this Reflection Paper – the uniform conduct and transparency rules that supervised entities must apply in the carrying on of their business, as well as the supervisory powers that the competent authority may exercise to enforce those rules (see Annex I, Omnibus Regulation, Part Four).

Key considerations

The EUBA would include an Omnibus Regulation, which would set out through uniform and directly applicable provisions the main body of bank prudential rules, comprising those that are already present in other EU regulations adopted under Article 114 TFEU, as well as rules currently present in several directives, which would be relocated into the regulation, including both the minimum prudential rules applicable irrespective of banks' specific conditions ("Pillar 1 framework") and the rules related to

¹¹⁴ For a similar view International Monetary Fund (IMF), 2025, *Euro Area Policies: Financial System Stability Assessment*, cit.

the supervisory powers exercised to address particular risk situations on a case-by-case basis (“Pillar 2 framework”). In so doing, the Omnibus Regulation would harmonise the legal regime applicable to the different categories of banks, adjusting the level of application of the prudential requirements to size, complexity and systemic relevance of the institutions concerned, fully embedding the proportionality principle at both the individual and consolidated levels. The maximum harmonisation via the Omnibus Regulation would be extended, *inter alia*, to banks’ governance and risk management, whose requirements are currently set out in the CRD.

3. A wider use of delegation under the EUBA and a simpler implementation of Basel international standards

a) Identification of the essential elements of the legislation

As already pointed out in Section I, banking law is a regulatory sector marked by the compelling need for continuous amendments and updates. Therefore, this is a domain in which more extensive use of delegation under Articles 290 and 291 TFEU is warranted. In particular, we surmise that a broader use of EBA’s BTS would appear as the most suitable regulatory instrument for a wide array of Level 2 Regulations.

As experience has proven so far, national participation in the EBA’s governance ensures that Member States retain control over the compatibility of Level 2 Regulation drafted by EBA with Treaty and primary law. At the same time, the control mechanisms already provided by the Treaty and the EBAR also apply, allowing the Parliament and the Council to revoke the delegation under Article 290 TFEU at any time or to activate the objection procedure provided under Article 13 EBAR.

However, a much broader use of delegation under EUBA requires identifying a clear and simple dividing line between Level 1 Legislation and Level 2 Regulation compliant with Articles 290 and 291 TFEU. As already highlighted in Section I, distinguishing between the essential and non-essential elements of the regulatory framework may prove challenging in many instances, and the lack of clear guidance by European courts exacerbates this difficulty. An established principle in the case law of European courts is however that policy choices must be reserved for Level 1 Legislation and that the balancing of conflicting interests is always of policy nature. This is, unfortunately, a quite unclear dividing line in many circumstances. For this reason, we have made a pragmatic exercise hereunder, and we have outlined a sample of a possible L1 Legislation’s text of the EUBA, concerning the leverage requirements (currently Articles 92, 429-429g CRR; see Annex II).

The sample is drafted on the premise that not every choice having a technical or political dimension may be regarded as a policy choice under Article 290

TFEU.¹¹⁵ **In our understanding, in the context of prudential requirements, the essential elements reserved to Level 1 Legislation are those aspects of the relevant provisions directly constraining the *rights* of institutions, imposing *obligations or requirements* upon them or providing *powers* (or sometimes imposing requirements) to the competent authority.**

Furthermore, as already mentioned in Section I, we surmise that the **essential elements** that have to be *mentioned* in the language of the L1 Legislation's text are the components of the legal paradigm of the *rights, obligations/requirements or powers* provided by the legislation, as well as the *subjects* that are the addressees of those rights, obligations/requirements or powers. This means, in our view, that Level 2 Regulation can still complement their specific content. Conversely, we also believe that the Level 1 Legislation's text has to provide – also by means of specific delegation criteria – sufficient sense to those essential elements to allow the scrutiny of the European courts. In so doing, European courts would clarify their exact meaning possibly as autonomous notions of EU law and would be able to rule on the lawfulness of any additional specification provided for by Level 2 Regulation, having regard to the overall rationale of the Level 1 Legislation granting those rights or powers, or imposing those obligations and requirements, and in light of the content and rationale of the delegation criteria provided in the Level 1 Legislation.

In practical terms, this would mean that Level 1 Legislation should mention – potentially, also in the specific delegation criteria – all elements that identify and give sufficient sense to the prudential requirements imposed by the legislation *e.g.*, in terms of governance, risk management, financial structure, available liquid resources, reporting or disclosure, their rationale and objectives, as well as the subjects whom they are imposed upon. Technical details that identify exactly those requirements but do not change the sense and the rationale of those prudential provisions can be left to the Level 2 rules. Rules that dictate the consequences for the violation of prudential requirements are also essential elements. In turn, Level 1 Legislation should also flesh out the main elements of the exclusions or waivers that regulated institutions may apply compared to default statutory requirements.

The way forward proposed in this Reflection Paper to make the L1 legislation more principle-based is neutral about the choice of the level of regulatory burden imposed upon the European supervised entities. In fact, it would be easier for the European co-legislator to amend the principles and delegation criteria in the L1 to lighten or strengthen the regulatory framework for categories of supervised entities, while reserving all technical details for delegated L2 acts.

The sample on the leverage requirement in Annex II is drafted according to the principles outlined above. It identifies the leverage requirements imposed on all credit institutions and the special requirements imposed on the G-SIIs (see

¹¹⁵ C-363/14, *Parliament v Council* [2015] ECLI:EU:C:2015:579, para 51.

Annex II, Article X1), as well as the general rules for calculating the leverage ratio (see Annex II, Article X2), including the essential meaning of the ratio's numerator (*i.e.*, the Tier 1) and denominator (*i.e.*, the total exposure measure). Specific delegation criteria are set out for the Level 2 text to specify all other additional elements currently provided in the CRR (see Table, Article X3).

On the side of the competent authority, Level 1 Legislation should establish – also by means of specific delegation criteria – the possible existence of the power to impose a different method of calculation, at least when a heavier economic burden on credit institutions may follow from its application. A cautious approach suggests reserving for Level 1 Legislation, by means of specific delegation criteria, the main elements of the power of the competent authority to apply derogations and exclusions of the applicable prudential requirement or waivers. The identification of the essential elements should follow similarly for the provisions granting rights (as in the case of the right of establishment or to provide services) and those conferring powers upon the authorities (as in the case of part of the consolidated regulation dealing with Pillar 2).

b) Reference to international standards

Self-adaptation of European banking law to international standards, most notably the Basel Committee's international standards, could also facilitate an extensive simplification of Level 1 Legislation. Indeed, in the field of prudential regulation, European law mirrors to a large extent international standards, mainly those set out in the Basel framework, whose rules are often very detailed and such as to comprehensively regulate the prudential requirements to promote stability and level playing field. The European co-legislators have sometimes, albeit exceptionally, deviated from particular aspects of such standards, mainly to take into account the specificities of the European banking system and the interests of Member States or of the Union. However, on the one hand, specific and exceptional deviations from international standards do not call into question the overall commitment of the Member States and of the European Union to build a prudential framework consistent with the Basel Accord. On the other hand, such deviations mainly concern minor technical aspects without questioning the implementation of the relevant prudential requirement in the EU framework.

In Annex II, we also highlight all provisions that are in line with the Basel framework and indicated the cases of derogation in order to provide a rough idea of the degree of alignment of Union law with the Basel criteria concerning the leverage requirement.

In light of the above, a wider rule-making delegation appears particularly justified where the European regulatory framework strives to ensure compliance with international standards elaborated by the Basel Committee. We advocate therefore that compliance with such international standards may work as a fundamental criterion for the decision by the European legislature on the allocation of rule-making between Level 1 Legislation and Level 2 Regulation.

More specifically, whilst the decision to align or not with any relevant international standard needs to be regarded as an essential policy choice and is therefore reserved to Level 1 Legislation, Level 2 Regulation can be entrusted with the adoption of all technical provisions implementing the relevant international standard and thus with the “translation” of the standard, without modification, into directly applicable rules. In other words, the EU legislature should decide with Level 1 Legislation whether it intends to follow one or more relevant international standards, while it can leave the technical implementation of the relevant international standards to Level 2 Regulation.

Our view is that **alignment with international standards should be promoted as a general principle and automatically implemented by Level 2 Regulation to the greatest extent possible**. However, exceptional deviations may still be possible, yet such deviations should be reserved to the co-legislators and adopted in a transparent way.

If the legislature wishes to establish derogations from the international standards, it may either wholly depart from the relevant international standard (fleshing out with Level 1 Legislation a set of entirely divergent rules) or it may establish the conditions under which Level 2 Regulation is authorised to depart from international standards, establishing binding criteria for such derogations so as to identify the essential elements of the derogatory policy choice, leaving the development of the technical details to Level 2 Regulation. In the same vein, Level 2 Regulation may be delegated to gold-plate some provisions, where the co-legislators decide it necessary.

Where the relevant international standard grants an option, if such option implies a balancing between conflicting interests, including the protection of an overriding public interest (such as the smooth functioning of the monetary policy¹¹⁶), the option needs to be exercised by Level 1 Legislation. In that context, Level 2 Regulation may only deal with minor technical details.

International standards evolve over time to reflect changes in the market and the emergence of new prudential risks. Adaptation to updated international standards could be engineered in principle in two alternative ways.

As a first, and in our view preferable, option, any existing reference in Level 1 Legislation to a relevant international standard could be interpreted as “dynamic”, meaning that rule-making delegation also includes the self-adaptation to the revised standards as necessary to ensure the ongoing consistency of the European regulatory framework with the relevant international standard including its evolution and updates. The European Parliament and the Council (also on the Commission’s initiative) would however retain the power to depart from the international standard, adopting derogatory legislation. This option would favour a simpler and efficient alignment with international standards on an ongoing basis. However, it could

¹¹⁶ See, for example, the Basel Committee Standard on Leverage ratio, LEV 30.7.

also entail a legal risk, if one would question the compatibility of a dynamic and “open” reference also to future updates of international standards with the principles governing the delegation of rule-making pursuant to Article 290 TFEU.

A second, and more conservative, option would be to consider that the reference in the Level 1 Legislation to international standards can only be “static”, *i.e.*, limited to the relevant international standard in its precise content at the time of entry into force of the delegating Level 1 Legislation. This would require, however, that Level 1 Legislation is updated and amended to follow the international standards updating process.

When the implementation of an international standard may lead to different implementing solutions, all compliant with the standard, it is necessary to establish whether such choice has to be taken by Level 1 Legislation or may be delegated to Level 2 Regulation. In principle, we favour a cautious approach, and thus that Level 1 Legislation fleshes out the essential elements of such choice.

The test-case on the leverage requirement in Annex II has been drafted according to those principles. It distinguishes between general and specific delegation criteria.

On the one hand, the general criteria require the EBA and the Commission, when exercising the delegations, to draft the Level 2 Regulation following the available and finalised international standards unless a specific delegation criterion or other Level 1 Legislation’s language provides otherwise. The general criteria also require the Commission to periodically report to the co-legislators, possibly together with a legislative proposal, on any inconsistency between the EU banking framework and the international standards identified in the Level 2 Regulation implementation process, as well as on any options or discretions left by the international standards that could not be implemented given the lack of specific delegation criteria on policy choices. This report should benefit from consultations with the EBA and the Banking Stakeholder Group established under the EBAR and should also be complemented by an ex-post impact analysis of the adopted Level 2 Regulation, which would integrate the ex-ante impact analysis performed by the EBA when drafting the technical standards. This mechanism would enhance the accountability of the EBA and the Commission towards the co-legislators, allowing a more effective scrutiny.

On the other hand, the specific delegation criteria provide for the essential elements of legislation necessary to implement any *derogations* from the international standards or any *options or discretions* granted by those standards, being the other specific criteria (that is, the elements of legislation necessary to adopt L2 instruments in line with the international standards) absorbed by the general delegation rules.

Finally, to facilitate easier access to EU financial legislation,¹¹⁷ the Omnibus Regulation should mandate the EBA to publish on its website a database – an expanded version of EBA’s Interactive Single Rulebook – collecting all L1 and L2 provisions, as well as all Guidelines, Opinions, Recommendations, Q&As, and Court decisions related to those provisions. The database should enable browsing through legislation as of a specific date and quickly select provisions applicable to particular categories of institutions.

¹¹⁷ See also, for Level 3 acts, *Less is more, Proposals to simplify and improve European rule-making in the financial services sector*, cit., in particular 58.

SECTION III.
THE EUBA AND ITS REGULATED INSTITUTIONS:
SUPERVISED ENTITIES AT THE (SUPER-)INDIVIDUAL LEVEL
AND CROSS-BORDER CONSOLIDATION

This Section discusses the scope of the proposed EUBA from the viewpoint of the credit institutions and more in general the regulated entities which are the addressees of prudential and transparency requirements set out in the Act. It identifies many policy issues concerning the subjective perimeter of the prudential framework that would deserve consideration, both at individual and super-individual level, and one defining challenge for the internal market stemming from an insufficient harmonisation of the treatment of cross border groups and networks, whose still largely national and fragmented regulation impairs the unleashing of the full potential of the internal market in banking. It offers some ideas for a way forward

1. A taxonomy of supervised entities at the individual level

The ecosystem of banks and financial institutions is complex, and in Europe it is populated by a wide array of regulated entities. A brief taxonomy is offered here below.

Banks are regulated entities that provide services that are essential to the functioning of the real economy, and in particular deposit-taking, the extension of loans and the processing of payments. Banks also play a key role in the transmission of monetary policy. In the current European framework, a bank is defined as a “credit institution”, which means an undertaking the business of which consists either in (a) taking deposits or other repayable funds from the public and granting credits for its own account; or (b) carrying out any of the investment activities (without the concurrent need to take also deposits) referred to in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU (“MiFID II”) of the European Parliament and of the Council. The latter means: dealing on own account; portfolio management; investment advice and underwriting of *financial instruments* and/or placing of *financial instruments* on a firm commitment basis provided that, however, certain conditions and thresholds are met.¹¹⁸

¹¹⁸ Under Article 4(1) CRR, the undertaking must not be a commodity and emission allowance dealer, a collective investment undertaking or an insurance undertaking, and the thresholds are the following: (i) the total value of the consolidated assets of the undertaking is equal to or exceeds EUR 30 billion; (ii) the total value of the assets of the undertaking is less than EUR 30 billion, and the undertaking is part of a group in which the total value of the consolidated assets of all undertakings in that group that individually have total assets of less than EUR 30 billion and that carry out any of the activities referred to in points (3) and (6) of Section A of Annex I to MiFID II is equal to or exceeds EUR 30 billion; or (iii) the total value of the assets of the undertaking is less than EUR 30 billion, and the undertaking is part of a group in which the total value of the consolidated assets of all undertakings in the group that carry out any of the activities referred to in points (3) and (6) of Section A of Annex I to MiFID II is equal to or exceeds EUR 30 billion, where the consolidating supervisor, in consultation with the supervisory college, so decides in order to address potential risks of circumvention and potential risks for the financial stability of the Union. For the purposes of points (ii) and (iii), where the undertaking is part of a third-country group, the total assets of each branch of the third-country group authorised in the Union shall be included in the combined total value of the assets of all undertakings in the group.

In consideration of their importance for the smooth functioning of the economy, it is crucial that credit institutions operate safely and soundly and need therefore to be prudentially regulated and supervised. The bigger they are in size or the more interconnected, the higher the risk that their failure may have a significant impact on depositors, other creditors and borrowers, and implications for the payment system, the interbank market and financial stability. The current European regulatory framework distinguishes therefore between small and non-complex institutions and large institutions.

A small and non-complex institution is defined as an institution that meets all the following conditions: (a) it is not a large institution; (b) the total value of its assets on an individual basis or, where applicable, on a consolidated basis is on average equal to or less than the threshold of Euro 5 billion over the four-year period immediately preceding the last annual reporting period; Member States may lower that threshold; (c) it is not subject to any obligations, or is subject to simplified obligations, in relation to recovery and resolution planning in accordance with Article 4 BRRD; (d) its trading book business is classified as small within the meaning of Article 94(1) CRR; (e) the total value of its derivative positions held with trading intent does not exceed 2 % of its total on- and off-balance-sheet assets and the total value of its overall derivative positions does not exceed 5 %, both calculated in accordance with Article 273a(3) CRR; (f) more than 75% of both the institution's consolidated total assets and liabilities, excluding in both cases the intragroup exposures, relate to activities with counterparties located in the European Economic Area; (g) the institution does not use internal models to meet the prudential requirements in accordance with CRR except for subsidiaries using internal models developed at the group level, provided that the group is subject to the disclosure requirements laid down in Article 433a or 433c on a consolidated basis; (h) the institution has not communicated to the competent authority an objection to being classified as a small and non-complex institution; (i) the competent authority has not decided that the institution is not to be considered a small and non-complex institution on the basis of an analysis of its size, interconnectedness, complexity or risk profile. Compared to the other institutions, small and non-complex institutions are granted some derogations from some liquidity (especially the NSFR), reporting and disclosure requirements.

Conversely, a 'large institution' means an institution that meets any of the following conditions: (a) it is a G-SII; (b) it has been identified as an 'other systemically important institution' (O-SII) in accordance with Article 131(1) and (3) of CRD; (c) it is, in the Member State in which it is established, one of the three largest institutions in terms of total value of assets; (d) the total value of its assets on an individual basis or, where applicable, on the basis of its consolidated situation in accordance with the CRR and the CRD IV is equal to or greater than Euro 30 billion. Large institutions are significant institutions to the effect of the allocation of supervisory competences within the single supervisory mechanism, although the SSMR uses a different terminology (and for different purposes). And namely "significant" and "less significant" credit institutions. Apart from the translation of supervisory competence provided by the SSMR, from a

prudential standpoint, qualification as a large institution entails being subject to some additional disclosure requirements.

Qualification as ‘global systemically important institution’ (‘G-SII’) or ‘other systemically important institution’ (‘O-SII’) – which are subsets of ‘large institutions’ – entails significant prudential differences: O-SIIs are subject to special capital buffer requirements (see Article 131 CRD), while G-SIIs are subject to special capital and leverage buffer requirements (see Article 131 CRD and Article 92(1a) CRR), total loss absorption capacity requirements (see Article 92a CRR) and stricter large exposure requirements (see Article 395(1), fourth subparagraph, CRR), as well as some additional disclosure requirements.

From a corporate law point of view, a credit institution is a legal person and an individual corporate entity that is authorised or licensed under the applicable legal framework. In principle this includes in the European framework any licensed credit institution, including cooperatives, credit unions, building societies, saving banks and others. However, the term credit institution or bank is a regulatory definition. Not surprisingly, whilst in the European Union cooperative banks are licensed as credit institutions, in other jurisdictions (like the US) cooperative banks are subject to a separate regulatory and supervisory framework.

In this Reflection Paper we use the term bank or credit institution to cover all such regulated entities irrespective of their legal form – joint stock company, mutual or cooperative, public entity savings banks or others – their size, their systemic or non-systemic relevance, or their business model. We note that the term ‘credit institution’ is currently defined differently in Member State legislations, while respecting the core defined in [Article 4\(1\)\(a\) CRR](#), which may lead to different kind of entities enjoying the opportunities of the single banking market. This is due to the fact that the expression ‘other repayable funds’ in Article 4(1)(a) CRR is not clearly defined, so there is room for divergent applications by different Member States. The Omnibus Regulation could harmonise the elements of the definition of the term ‘credit institution’.¹¹⁹

Most banks are incorporated as joint stock companies, yet cooperative or savings banks’ structures are important in several Member States, especially among small- and medium-sized banks. This leads to the often-critical importance also for prudential purposes of the way national corporate law organises and regulates those entities.

Conversely, the prudential regulatory framework on banking has evolved over time not only to include as credit institutions also systemically relevant investment companies that do not collect deposits nor extend loans (but may they entail similar risks), but also to encompass within the regulatory perimeter other regulated entities that are not necessarily classified as credit institutions or

¹¹⁹ See the Opinion of the European Banking Authority on matters relating to the perimeter of credit institutions, EBA/Op/2014/12, 27 November 2014 and the accompanying Report to the European Commission on the perimeter of credit institutions established in the Member States, available [here](#).

banks yet are very relevant for regulatory and supervisory purposes, specifically at consolidated level.

The landscape in the investment services sector is not simpler.

An investment firm ('IF') is defined as 'any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis'.¹²⁰ However, as touched upon above, some investment services and activities require being licenced as a credit institution when they entail high risks¹²¹ (so-called "Class 1" IFs), even though they do not involve the collection of deposits or other repayable funds. From a prudential perspective, Class 1 IFs are credit institutions and are subject to CRD/CRR rules, with possible supervision by the ECB when they qualify as significant institutions.

The carrying on of investment services and activities that does not entail high risks requires being licenced as an investment firm and is subject to the prudential regime under IFD/IFR, which is lighter than CRD/CRR. However, upon some conditions, some IFs remain subject to the CRD/CRR regime despite maintaining an IF licence (so-called "Class 1-minus" IFs).¹²²

The other investment firms (so-called "Class 2" IFs) are subject to a bespoke prudential regime in terms of capital, concentration, liquidity and disclosure requirements. In particular, their capital requirement is the higher of: (1) a fixed overheads requirement ('FOR'), equal to a quarter of the annual fixed overheads of the firm; (2) a permanent minimum capital requirement (PMR) of EUR 75 000, EUR 150 000, or EUR 750 000, depending on the activities of the investment firm; and (3) an overall "K-factor" capital requirement, which is the sum of "K-factor requirements" grouped in three categories: Risk-to-Client (RtC), Risk-to-Market (RtM), Risk-to-Firm (RtF).

Some IFs, which qualify as 'small and non-interconnected IFs' (so-called "Class 3" IFs), are subject to an even lighter capital requirement, equal to the higher of their FOR and PMR.¹²³

From this quick (and incomplete) overview, the European financial ecosystem appears complex and populated by several different supervised entities, which can be categorised primarily in terms of the type of licence (credit institutions and IFs) and size (G-SIIs/O-SIIs/large/"ordinary"/small and

¹²⁰ See Article 4(1), point (1), Directive 2014/65/EU on Markets in Financial Instruments ('MiFID II').

¹²¹ This is the case for investment firms that perform dealing on account or underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis and meet a EUR 30 bn threshold for their consolidated assets.

¹²² This is the case for investment firms that perform dealing on account or underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis and meet a EUR 15 bn threshold in terms of their consolidated assets, or meet a EUR 5 bn threshold and are designated by their competent authorities.

¹²³ See Articles 6 and 12 IFR.

non-complex banks; Class 1/Class 1-minus/Class 2/Class 3 IFs). However, not always the difference in the category entails a real difference in the applicable prudential regime. This is particularly the case for banks, which apply – except the G-SIIs – the same prudential regime, with minor differences – mainly in terms of disclosure – for large, “ordinary”, and small and non-complex banks. In contrast, the prudential framework applicable to the IFs appears more differentiated.

This is the result of the layering of several different legislative interventions, which have created asymmetries and regulatory cliffs that do not appear justified in terms of risk or impact on financial stability. We advocate that the EUBA should simplify the framework and make it more harmonious in accordance with the principles of **neutrality** and **proportionality**. Under these principles, all supervised entities in the same position and exposed to the same risks should be subject to the same core provisions; deviations from the uniform rules should be justified by the different conditions of the supervised entities (in terms of the risks they are exposed to or the threat they pose to the financial stability) on an equal footing. For instance, simplified and more advanced prudential frameworks (such as the K-factors of IFs or internal models) should be made available, upon supervisory permission, to all categories of supervised entities that are exposed to the same risks and pose the same threat to financial stability. In parallel, the EUBA should also strive to respond to the need for further simplification of requirements for smaller banks, in accordance with the proportionality principle¹²⁴ and taking into account the super-individual structures in which they operate.

2. A taxonomy of supervised entities at the super-individual level

Irrespective of their size, in most jurisdictions supervised entities operate within group structures or in the context of a network organised around central bodies or institutional protection schemes. Groups active in both financial (namely, banking and investment services) and insurance businesses often qualify as financial conglomerates. These super-individual structures introduce additional complexity and distortions into the European financial ecosystem.¹²⁵

¹²⁴ BART JOOSEN, MARCO LAMANDINI, MATTHIAS LEHMANN, KITTY LIEVERSE, IGNACIO TIRADO, *Stability, Flexibility and Proportionality: Towards a Two-Tiered European Banking Law?*, cit. MATTHIAS LEHMANN, *Single Supervisory Mechanism Without Regulatory Harmonisation? Introducing a European Banking Act and a ‘CRR Light’ for Smaller Institutions*, cit.

¹²⁵ The legal design of banking groups and networks interacts with the design of “resolution groups” under the SRMR and BRRD. The resolution group is relevant not only in the (gone concern) resolution context, but also in the ordinary (going concern) conduct of the business, as it is a key concept for the determination of the MREL by the resolution authorities. For both dimensions and the need of an appropriate definition of group, compare International Monetary Fund (IMF), 2010, *Crisis Management and Resolution for a European Banking System*, cit.

a) *Banking and financial groups*

Banking groups (385 as of March 2024 in the EU¹²⁶) tend to represent a majority of total banking assets; stand-alone banks (2,299 as of March 2024) are mostly small banks and cumulatively they represent a minority of the total banking assets. Banking groups may be located in a single jurisdiction or – typically for larger banks – may have cross-border operations through subsidiaries established in host jurisdictions. The most common structure for banking groups is a corporate structure; however, cooperative structures are also of special importance in many jurisdictions. While banking groups may be headed by either a bank or by a non-bank holding company, group structures with an operating bank as the parent company are common. In the European prudential framework, ‘group’ means a group of undertakings of which at least one is an institution and which consists of a parent undertaking and its subsidiaries, or of undertakings that are related to each other as set out in Article 22 of Directive 2013/34/EU of the European Parliament and of the Council. In turn, control – which is the connecting factor that keeps together all entities affiliated with the group, is defined as the relationship between a parent undertaking and a subsidiary, as defined in Article 1 of Directive 83/349/EEC, or the accounting standards to which an institution is subject under Regulation (EC) No 1606/2002, or a similar relationship between any natural or legal person and an undertaking.

In a group structure, there are thus “subsidiaries”, *i.e.*, subsidiaries undertaking within the meaning of Article 1 and 2 of Directives 83/349/ECC, and a parent undertaking within the meaning of the same two Articles. However, the parent undertaking can take different forms and there may be intermediate parent companies between the ultimate parent and the subsidiaries. In this connection, depending on the structure and geographical reach of the group, the European framework identifies as regulated entities, in addition to credit institutions and other financial institutions: a) the ‘financial holding company’ (‘FHC’), which is a financial institution (and not a credit institution), the subsidiaries of which are exclusively or mainly institutions or financial institutions, and which is not a mixed financial holding company; the subsidiaries of a financial institution are mainly institutions or financial institutions where at least one of them is a credit institution and where more than 50% of the financial institution’s equity, consolidated assets, revenues, personnel or other indicator considered relevant by the competent authority are associated with subsidiaries that are institutions or financial institutions; and b) the ‘mixed financial holding company’ (‘MFHC’), which means mixed financial holding company as defined in point (15) of Article 2 of Directive 2002/87/EC.¹²⁷

¹²⁶ For the updated list of SIs and LSIs in the Banking Union (March 2025) compare [here](#).

¹²⁷ The regulatory landscape also includes the ‘mixed activity holding company’ (‘MAHC’), which means a parent undertaking, other than a financial holding company or an institution or a mixed financial holding company, the subsidiaries of which include at least one institution. Despite not being part of consolidated supervision, MAHCs are considered for the assessment of the eligibility of capital instruments (see Articles 28(1), point (l)(iv), Article 52(1), point (e)(iv), and Article 63, first subparagraph, point (e)(iv), CRR).

Each of these parent undertakings can be either the ultimate parent, or the EU parent or the parent in a Member State.

Moreover, when two institutions (banks and investment firms) in the European Union belong to the same third-country group, they have to establish a single intermediate parent entity (or in certain limited cases, two intermediate parent entities) in the EU, provided that the EU assets of the third-country group they belong to exceed a certain threshold. This intermediate parent entity is called an intermediate EU parent undertaking (IPU). Establishing a single parent entity in the EU allows for single consolidated supervision of the third-country group's EU activities, as opposed to individual supervision of several standalone entities. More specifically, Article 21b CRD requires banks and investment firms in the European Union that are subsidiaries of third-country groups to set up a single intermediate EU parent undertaking. The requirement applies if the third-country group has two or more institutions (banks and investment firms) established in the EU with a combined total asset value, within the EU, of at least €40 billion, including the assets of the third-country group's branches in the EU. Exceptionally, competent authorities can exempt institutions from this requirement and allow two intermediate parent undertakings to be set up, provided that certain conditions set out in the CRD are fulfilled. From a supervisory perspective, establishing an intermediate EU parent undertaking allows all of the third-country group's EU institutions (banks and investment firms) to be consolidated under a common EU parent entity. This means that a consolidating supervisor is able to evaluate the risks and financial safety and soundness of the entire group in the EU and, accordingly, to apply the prudential requirements on a consolidated basis. Article 21b CRD states that an intermediate EU parent undertaking must be a credit institution, a financial holding company or a mixed financial holding company.

The group structures applicable to IFs mimic those available to banks.

Article 4(1), point (25), IFR defines the 'investment firm group' ('IF group') as a group of undertakings which consists of a parent undertaking and its subsidiaries or of undertakings which meet the conditions set out in Article 22 of Directive 2013/34/EU, of which at least one is an IF and which does not include a credit institution. The ultimate parent of an IF group can be either an IF, a MFHC or an 'investment holding company' ('IHC'), which is defined as a financial institution, the subsidiaries of which are exclusively or mainly investment firms or financial institutions, at least one of such subsidiaries being an investment firm, and which is not a FHC.

In summary, when the group only includes IFs and financial institutions, it qualifies as an IF group and is subject to the IFD/IFR framework at the consolidated level, which allows for the application of simplified consolidated requirements (see Articles 7 and 8 IFR); when the group also includes credit institutions, it qualifies as a banking group and is subject to the CRD/CRR framework at the consolidated level.

Similarly to the regime applicable at the individual level, we advocate that the EUBA should simplify the prudential framework applicable to financial groups and networks and make it more uniform and harmonious in accordance with the same principles of **neutrality** and **proportionality**. This could involve extending simplified consolidated supervision schemes, upon supervisory permission, to smaller banking groups.

b) Financial conglomerates

Financial conglomerates are another super-individual structure that applies to groups active in several financial businesses.

Financial conglomerates can be identified when several supervised entities belonging to the banking and/or investment services and insurance sectors are linked together by participation ties.¹²⁸ To be identified as a financial conglomerate, each financial sector in which the group is active must be significant.¹²⁹ Cross-sectoral activities is presumed significant if the balance sheet total of the smallest financial sector in the group exceeds EUR 6 billion.

However, the legal structure of the financial conglomerate may affect the outcome of the identification process. This may occur in the assessment of significance due to the interaction of accounting and prudential rules, and may depend on whether the entities belonging to the banking, insurance, and investment services sectors are part of completely separate subgroups or, alternatively, their sub-consolidated perimeters overlap. In addition, the assessment of significance may be affected by certain special prudential regimes, such as Article 49 CRR, when applied at different sub-consolidated levels.

Once identified, the financial conglomerate is subject to supplementary supervision, which entails: (i) capital adequacy requirements, aimed at ensuring that sufficient own funds are available to cover losses, with no double gearing of capital; (ii) risk concentration and intra-group transactions requirements, which allow the competent authorities to monitor the possible contagion in the conglomerate, the risk of a conflict of interests, the risk of circumvention of sectoral rules, and the level or volume of risks, and to define appropriate thresholds; and (iii) additional internal control and risk management requirements.

However, the prudential framework is unclear about whether the supplementary requirements must be complied with by all regulated entities within the conglomerate or, alternatively, whether responsibility lies with the

¹²⁸ Article 2, point (11), FICOD, jointly read with Article 2, point (2), Directive 2013/34/EU, defines participations as capital rights aimed at contributing to the activities of the undertaking which holds those rights by creating a durable link with other undertakings.

¹²⁹ This means that each financial sector in which the group is active must be at least equal to 10% of the average of (i) the ratio of the balance sheet total of that financial sector to the balance sheet total of the financial sector entities in the group, and (ii) the ratio of the solvency requirements of the same financial sector to the total solvency requirements of the financial sector entities in the group.

ultimate parent only.¹³⁰ It is also unclear how the ultimate parent should implement common risk management and strategies and comply with supplementary supervision when the participation ties do not allow for establishing a dominant influence on some part of the conglomerate.

We advocate that the EUBA should streamline and clarify the prudential regime applicable to conglomerates, with the aim of ensuring that different legal structures are not used to gain access to preferential treatments that are not justified in terms of risk or impact on financial stability.

*c) Banking networks: central bodies and institutional protection schemes.
Towards a proportionate regime for smaller banks*

As touched upon several times, the EUBA should strive to respond to the need of further simplification of requirements for smaller banks in accordance with the proportionality principle. In this context, the EUBA should, in our view, address networks of small institutions (usually cooperative or savings banks) or other entities affiliated to a central body or an institutional protection scheme (IPS), that **may present special features which, in turn, call for targeted adjustments of the prudential (and resolution) framework also based on the principle of proportionality**. The problem in the Banking Union is exacerbated by the fact that horizontal groups of cooperative banks operate similarly to a network and yet, depending on the specific legal structure of the network they belong, may be subject to the stricter regime for groups. Their differential treatment therefore also poses a question of proportionality (and equal treatment) *vis-à-vis* banks affiliated to groups, central bodies or IPS within the Banking Union.¹³¹

More specifically, a central body is an affiliation scheme primarily regulated, from a corporate law perspective, by national laws, aimed at establishing (mainly on a contractual basis) a common (risk) management, a common solvency and liquidity monitoring and a common guarantee for liabilities of the affiliated institutions. The different national legal regimes applicable to such a scheme have no unified structure; for instance, some national laws allow non-financial and even non-profit entities to be affiliated. When the (fairly different, national) schemes satisfy some specific conditions provided under Article 10(1) CRR,¹³² the central body becomes subject to prudential requirements on a consolidated basis (see Article 11(5) CRR). In that case, the affiliated institutions (and, under certain additional conditions, the same central body) can be granted a waiver of their prudential requirements on an individual basis.

¹³⁰ See JOHN TAYLOR, RENÉ SMITS, *Bank Holding Company Regulation in Kenya, Nigeria and South Africa: A Comparative Inventory and a Call for Pan-African Regulation*, cit.

¹³¹ Compare FILIPPO IPPOLITO, PETER HOPE REINDER VAN DIJK, *Institutional Protection Schemes in the Banking Union*, EGOV, April 2022.

¹³² Namely: (a) the commitments of the central body and affiliated institutions are joint and several liabilities or the commitments of its affiliated institutions are entirely guaranteed by the central body; (b) the solvency and liquidity of the central body and of all the affiliated institutions are monitored as a whole on the basis of consolidated accounts of these institutions; and (c) the management of the central body is empowered to issue instructions to the management of the affiliated institutions.

An IPS also operates as a scheme to safeguard the solvency and liquidity of its members (notably, the IPS displays a role of *ex-ante* risk monitoring for the affiliated members and of *ex-post* support in crisis management to prevent the failure of the affiliated members) within the meaning of Article 113(7) of the CRR. For this purpose, dedicated funds are prepositioned through *ex-ante* contributions of the members, which can be further complemented (if need be) by *ex-post* additional calls. These funds are established and managed centrally. IPS may also be recognised as a deposit guarantee scheme. In such case, in the event of failure, the IPS uses the means of the recognised IPS fund to ensure that covered deposits are satisfied. However, the primary objective of an IPS is to prevent failure and to protect its member institutions, in particular to safeguard their liquidity and solvency by supporting timely recovery actions. To do this, the IPS may, in accordance with its rules, access the means of the recognised IPS fund. The means of the IPS are not public funds.

The prudential treatment of an IPS and its affiliated banks is set out Article 113(7) CRR (and the other provisions of the CRR that refer to it). An IPS and its affiliated members present significant intra-network exposures, yet, in contrast to the central body, they are not treated in the prudential (and resolution) context as a consolidated banking group.¹³³

Thus, affiliated members are considered on a stand-alone basis *e.g.*, for (i) G-SII/O-SII designation (which in the end precludes such a designation, even where the entire network, if considered on a consolidated basis, would qualify for such designation), (ii) leverage buffers (pursuant to Article 92(1a) CRR), macroprudential buffers (pursuant to Article 131 CRD) and TLAC/MREL requirements, which are applied to individual institutions only, (iii) EBA stress testing and ECB oversight, including Pillar 2 SREP.

Conversely, however, the members of an IPS enjoy some of the privileges that are typical for consolidated banking groups, *e.g.*, (i) they do not need to deduct own funds holdings in other members affiliated to the same IPS, provided that IPS members meet on an extended aggregated basis, the own funds and leverage requirements pursuant to Article 49(3) CRR, (ii) they are exempted from minorities deduction under Article 84 CRR and may recognise any minority interest arising within the cross-guarantee scheme in full; (iii) with the exception of CET1, AT1 and T2 capital holdings, a 0% risk weight applies to exposures to other members affiliated to the same IPS pursuant to Article 113(7) CRR, possibly by means of the permanent partial use under Article 150(1a) CRR; (iv) they can calculate the service component of the business indicator for operational risk net of any income received from, or expenses paid to, institutions that are members of the same IPS; (v) large exposure limits do not apply to exposures

¹³³ HARRY HUIZINGA, *Institutional Protection Schemes What are their differences, strengths, weaknesses, and track records?*, EGOV, March 2022; RAINER HASELMANN, JAN PIETER KRAHNEN, TOBIAS H. TROEGER, MARK WAHRENBURG, *Institutional Protection Schemes What are their differences, strengths, weaknesses, and track records?*, EGOV, April 2022.

to other members of the IPS pursuant to Article 400(1)(f) CRR; (vi) they enjoy some reliefs in the calculation of the LCR and NSFR; and (vii) the exposures that have been assigned a 0% risk weight are excluded from the total exposure measure for the leverage calculation.

The same approach applies to the resolution context, where affiliation to central bodies receives the same treatment as banking groups, while affiliation to the IPS is considered an element to be taken into account and allows for special reliefs in particular circumstances.

Indeed, the specificities of the IPS translate also into the resolution planning context,¹³⁴ because MREL requirements apply on a stand-alone basis for members of the IPS, and yet in the assessment of whether resolution or liquidation should be the preferred crisis management strategy, a **loaded question is how the public interest assessment of the failure of one or more banks affiliated to the IPS should take account of the role of the IPS, first, in preventing the failure and thus making it less likely, if not impossible and, if the failure nevertheless occurs, in preventing contagion effects to other members of the same IPS.**¹³⁵ In many jurisdictions, and most notably in Germany, history offers a comforting track record of successful recovery actions promoted and supported in the past by IPS, which have so far prevented insolvency and contagion; yet also many examples of extraordinary fiscal costs in connection with the crisis of Landesbanken (West LB, HSH Nordbank, SachsenLB, LBBW, BayernLB).

A quite fundamental question is, thus, how to ensure better consistency (and a proportionate equal treatment, in the end), via maximum harmonisation, in the prudential treatment of horizontal groups and networks of small institutions (mainly cooperatives and savings banks) in good times.

In this context, **the most critical limitation to the use of those networks comes from the fact that the affiliation's prudential effects are recognised by the EU law only if all affiliated members and the affiliation scheme itself (the central body or the IPS) belong to the same Member State.**

We advocate that the EUBA should harmonise the rules applicable to the different networks of small banks, with the aim of ensuring that different legal structures are not used to gain access to preferential treatments that are not justified in terms of risk or impact on financial stability. This could involve

¹³⁴ SRB Appeal Panel, [Case 3/2024](#), decision of 30 October 2024.

¹³⁵ This issue, that was reiterated in case 3/2024 above, was first addressed by the SRB Appeal Panel in Case 3/2022, which clarified in its decision of 13 February 2023 that, in the context of resolution planning, the existence of the IPS is not such as to make unpalatable the assumption that a member of the IPS may fail nonetheless. The Appeal Panel remitted however the SRB decision considering that the reasoning was insufficient in motivating how the failure of an important member of the IPS in a worst case scenario of system-wide events would credibly trigger contagion effects to the other members of the IPS which the IPS could not properly address via recovery actions and how this microsystemic effects would then translate into a financial stability crisis for Germany. The Board adopted an amended decision but the issue was taken again to the Appeal Panel in Case 3/2024.

creating **uniform network schemes** – possibly harmonised also from a corporate and contractual perspective – **that apply to the whole internal market, with no borders between Member States**. Being subject to the same legal and prudential consequences, also on a cross-border basis, supervised entities should be otherwise free to arrange their structure in accordance with their legitimate business strategies.

Yet, also crisis prevention and crisis management may require a pause for thought and further harmonisation. A telling example is the need for cooperative banks to retain a certain number of members to preserve the cooperative form in a recovery plan and in resolution. This may be instrumental to preserve the credit relationship with the members and thus the goodwill, if any, of the going concern. This has company and insolvency law implications. In the event that one or more cooperative banks affiliated to a cooperative banking group, a central body or an IPS becomes troubled or insolvent, the central body of a cooperative group or the IPS may implement a crisis management strategy based upon the upstreaming of losses and the down-streaming of funds to restore the viability of such insolvent or troubled cooperative entities and to manage the losses at group level. The upstreaming of losses requires, however, that all shares of the members of the insolvent cooperative banks are, in the first place, written down (if losses do not equal the entire amount of the bank's common equity tier 1 (CET1) elements) or fully cancelled (if losses equal or exceed the entire amount of the bank's CET1 elements).

However, if the cooperative form is to be retained after the upstreaming of losses as a preferred policy option to protect banking diversity in the relevant market, there is therefore a need, when the capital of the members of the cooperative is cancelled, for this membership to be restored in due course, after the bank is redressed via the down-streaming of the necessary funds from central body or institutional protection scheme.

This invites adjustments *e.g.*, to: (i) the rules for the implementation, after the down-streaming of funds by the central body or protection scheme, of a reserved capital increase of the cooperative bank to the benefit of its members, whose shares were cancelled; something that some jurisdictions already provide, granting to the cooperative bank a reasonable grace period to reach again the required number of members and in this way retain its cooperative form; (ii) the rules on the delegated capital increase, if necessary through the issuance of special shares (which qualify as CET1 capital instruments), servicing the funds' down-streaming by the central body or protection scheme to restore the capital requirements of the insolvent or troubled cooperative once the write-down or cancelation of the equity of the members of the cooperative has been performed (with parallel adjustments to the corporate governance entitlements, under the articles of association of the cooperative bank, to the capital instruments subscribed by the central body or protection scheme); (iii) allow the use also in liquidation of mergers, demergers or other adjusted P&A transactions in a way that members' deposit and loans to members may be more easily allocated to

another recipient cooperative affiliated to the same cooperative group, central body or protection scheme, which can continue to operate with those clients because they also become its members by way of demerger or P&A transaction, provided that the territoriality requirements under the prudential applicable framework are respected; (iv) the SPE strategy for the central body, its possible change of legal form (if it is a cooperative) preserving, however, to the extent possible, the cooperative nature of the affiliated banks.

3. The lack of a single banking market in the euro zone. Obstacles to cross-border consolidation and group-wide capital and liquidity management and a possible way forward

The insufficient harmonisation of cross-border banking groups offers perhaps the most spectacular paradox of the still incomplete Banking Union, and namely the unachieved objective of creating, through cross-border banking, a true single market for banking commensurate to the political and economic dimension of Europe. Building on a recommendation of the Draghi report,¹³⁶ this Reflection Paper discusses here below how to technically address, through a bespoke regulatory reform which would leverage the existing legal framework while introducing selective improvements, the defining (for the success of the Banking Union) issue of the cross-border consolidation of an handful of European banks¹³⁷ having the cross-border potential to act as Banking Union's accelerators. This Reflection Paper advocates a pragmatic and comprehensive framework for European banks having the potential to grow cross-border that addresses the three critical stages of a financial group's lifecycle: birth and growth, adult life, and resolution.

On cross-border banking and financial groups, the interaction between national corporate and insolvency laws and the prudential treatment is problematic. It is also one, if not the most important, of the legal obstacles that stand in the way of pan-European banks' consolidation and thus one of the reasons why European banks often have not yet reached a continental scale and European-wide footprint, as one would expect to be the ripe fruit of the internal market; for this reason, they are still dwarfed by US (which consolidated tremendously after the Riegle-Neal Act 1994) and Chinese big banks. This is something clearly reflected also in the Technical Analysis of the Draghi Report,¹³⁸ at page 289, where it is correctly noted that:

¹³⁶ MARIO DRAGHI, *The future of European competitiveness – A competitive strategy for Europe*, cit., p. 289; compare also IGNAZIO ANGELONI, *The Next Goal: euro area banking integration*, cit.; DAVID RAMOS MUÑOZ, MARCO LAMANDINI, MYRTE THIJSEN, *A reform of the CMDI framework that supports completion of the Banking Union*, cit.

¹³⁷ For their identification, compare IGNAZIO ANGELONI, *The Next Goal: euro area banking integration*, cit.

¹³⁸ MARIO DRAGHI, *The future of European competitiveness – A competitive strategy for Europe*, cit. See also IGNAZIO ANGELONI, *The next goal: euro area banking integration*, cit.

Last but not least, the fragmentation of European banking along national boundaries owes much to the incomplete implementation of the Banking Union. While the euro area has unified bank prudential supervision, it has so far failed to implement a common deposit insurance and the single resolution authority lacks a financial backstop, complicating the resolution of large systemic banks. Absent these reforms, European banks with cross-country operations risk facing regulatory ring-fencing at times of turmoil, which would fragment their internal capital markets along national lines as indeed was the case during the 2011 sovereign debt crisis. Banks have little incentive to engage in cross-border operations if the transfer of resources from healthy to impaired subsidiaries will be prevented in a crisis. Yet, enabling cross-border banks to engage in international risk-sharing on a sufficiently large scale is of crucial importance for the integration of European capital markets. Hence, completing the Banking Union would mitigate the current strong ‘home bias’ of EU banks, and the fragmentation of credit markets along national boundaries that so far has been a hallmark of the European financial system. A minimal reform in this direction might be limited to a small set of banks with cross-border operations, by creating a set of cross-border banking norms specifically suited only for these banks, intended to shield them from regulatory ring-fencing and entrusting their possible resolution to a European resolution authority. Banks with a truly continental span of operations would not only better support European companies that operate in multiple EU Member States, but they are also the necessary players on integrated capital markets, in underwriting securities, taking companies public, and assisting them in M&A operations. Hence, completion of the Banking Union would be complementary to making progress towards the Capital Markets Union in Europe.

This echoes findings of the Commission itself, which in its Report 2023 on the SSM¹³⁹ has fairly acknowledged that *“the SSM impact on the smooth functioning of the internal market remains constrained by the political challenges of the Banking Union. In practice, these translate into some degree of market segmentation along national borders and also into limited consolidation between banks based in different Member States”*. This is problematic also seen from the point of view of the Capital Markets Union (CMU). As the High Level Forum noted¹⁴⁰ a few years ago, a fundamental challenge for European financial markets is represented by *“the obstacles that have discouraged EU financial operators from taking up and scaling up financial activity, especially on a cross-border basis, that have reduced the attractiveness of EU markets for foreign investors and have prevented EU financial operators from competing globally on an equal footing”*.

¹³⁹ Report from the Commission to the European Parliament and the Council, on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013, of 18 April 2023, COM(2023) 212 final, p. 18.

¹⁴⁰ High Level Forum on Capital Markets Union, *A New Vision for Europe’s Capital Markets*, Final Report, June 2020, p. 9.

These obstacles need to be disentangled, so as to ensure cross-border consolidation and in parallel a safe and effective group-wide capital and liquidity management. Boards often hesitate to approve cross-border intragroup transfers due to the entity-centric nature of national company and insolvency laws, which can impose liability risks. Similarly, supervisory authorities grapple with enforcing parent guarantees or other intra-group support mechanisms. Incorporating directly applicable provisions into the EUBA to this effect would enhance certainty and foster trust between home and host authorities. This approach aligns with the CJEU's recognition of the value-enhancing potential of group structures¹⁴¹ and international standards like Principle 5 on the *governance of group structures* of the Basel Committee's Corporate Governance Principles for banks.

It is certainly true that also political obstacles often stand in the way of the process of cross-border consolidation of European banks. Yet, to our mind, this is a reflection of the unfinished work of the Banking Union, mostly due to a lack of trust between Member States on loss mutualisation. This underestimates however the benefits associated to the Banking Union and conveys a misleading message of fear, in particular with respect to alleged risks for the financing of local economies or the investment in national sovereign bonds, should cross-border banks be able to move freely within the group their assets and most notably savings collected in one or the other Member State. In reality, the emergence of a handful of big cross-border European banking groups is crucially instrumental (i) to the euro zone financial stability as a mechanism to attenuate and redistribute country specific shocks absent a meaningful centralised fiscal capacity¹⁴² and (ii) to the financial needs associated to the massive investments required by the ongoing transformation of the European economy. Moreover, cross-border consolidation would be inevitably limited to the handful of European banks having true potential to grow pan-European and thus would not prevent, alongside, the flourishing of local banking. This is a lesson clearly taught by the US experience, where the vast majority of banks remains local, despite the existence of a handful of US giant financial players at global level.¹⁴³ Political concerns for the needs of local economies should, therefore, not prevent interstate consolidation and could be properly addressed by deploying appropriate corrective measures and safeguards, without further delaying a process of growth and internal market integration that is long overdue. Looking from this angle at the unfinished work of the Banking Union one gets the feeling of being roughly 70 years late compared to the US, still at the time of the political debates which in the United States laid the ground for the 1956 Bank Holding Company Act. European fearful approaches echo American taboos of the time against interstate bank branching

¹⁴¹ C-528/12, *Mömax*, ECLI:EU:C:2014:51; C-292/16, *A Oy*, ECLI:EU:C:2017:888; C-386/14, *Groupe Steria*, ECLI:EU:C:2015:524; C-524/04, *Test Claimants in the Thin Cap Group Litigation*, ECLI:EU:C:2007:161; C-311/08, *Société de Gestion Industrielle*, ECLI:EU:C:2010:26; C-382/16, *Hornbach Baumarkt*, ECLI:EU:C:2018:366. For an insightful discussion, WOLFGANG SCHÖN, *Organisationsfreiheit und Gruppeninteresse in Europäischen Konzernrecht*, cit., pp. 343-378.

¹⁴² IGNAZIO ANGELONI, *The Next Goal: euro area banking integration*, cit., p. 16.

¹⁴³ *Ibidem*, p. 24.

and subsidiarisation, motivated by the fear that interstate growth would allow large banks from major states to compete against state banks in minor states and would concentrate too much financial power. Those fears proved mistaken.

This poses, first, a question on the true viability of the contestability of control of European banks, because cross-border banks' consolidation needs an (as much as possible) unfettered market for corporate control (amicable, yet also hostile takeovers should be allowed as in the best interest of the European economy). To that aim, we propose to simplify and rationalise the legal framework on consolidation and control change of banks, with the objective to: (i) open the market for corporate control and safeguard the principle whereby the assessments of economic convenience is entirely left to market players; (ii) concentrate the prudential assessment when several competent authorities are involved; (iii) restrain the ability of European or national authorities to oppose the consolidation or control change only for well-identified relevant public interests.

With respect to point (i), we suggest that the passivity and break-through rules currently set out as an optional regime under Article 12 of the Takeover Directive (Directive 2004/25/EC) should be made mandatory for banks and other financial corporates. Indeed, dual share structures as those currently envisaged by the directive on multiple vote-share structure for the growth market¹⁴⁴ may be helpful to nudge entrepreneurs in other sectors of the economy to go public; **conversely, however, entrenched minority coalitions in European banks would delay or even derail interstate consolidation.** To that aim, a mandatory break through rule confined only to banks and financial corporate would be in line with the objective of promoting cross-border banking consolidation. It should be considered, in this respect, that interstate consolidation offers significant advantages for both financial stability and the deepening of the EU's internal market. By promoting geographical and business model diversification, it helps disperse risks more effectively across the Union, enhancing the resilience of financial institutions to asymmetric shocks and weakening the harmful *sovereign-bank nexus*. This diversification ensures that banks are less exposed to local *economic fluctuations*, making them more stable and reliable contributors for financial stability. From a market standpoint, consolidation fosters healthy competition, improves service quality and breaks down segmentation along national borders. It creates a more integrated and efficient financial ecosystem, which in turn supports the digital transformation of financial services – and imperative for preserving the EU's global competitiveness in an era of rapid technological change. Furthermore, the benefits of consolidation extend beyond traditional banking into adjacent sectors, including asset management, insurance, and private equity. These sectors remain fragmented and lack the scale to compete effectively on a global stage. Unified cross-border banking groups can act as a catalyst for these industries, driving a ripple effect that strengthens the EU's broader financial markets. This

¹⁴⁴ Directive 2024/2810/EU of the European Parliament and of the Council of 23 October 2024 on multiple-vote share structures in companies that seek admission to trading of their shares on a multilateral trading facility (in OJ L, 2024/2810, 14.11.2024).

interconnected approach would not only bolster the internal market but also position the EU as a more competitive player in global finance. This is also reflected in the recent Letta *report* that calls for a new wave of regulatory reform to simplify cross-border transactions and streamline prudential requirements.

With respect to point (ii), we suggest that approvals of qualifying and material holdings involving different competent authorities because of the complexity of the consolidating groups (which may require approval for several subsidiary credit and financial institutions) should be treated through a joint decision adopted in a supervisory college, with possible binding mediation of the EBA.

With respect to point (iii), we suggest that **public law barriers to intra-EU consolidation of banks should be ruled out or further rationalised to spell out a single set of well-identified public interests that may justify the ability of the European and/or national authorities to oppose, or subject to proportionate conditions, the consolidation for policy reasons of overriding public interest.** This should equally work for cross-border acquisitions by a European bank or group in a crisis management context. Ideally, considering that Regulation's (EU) No 2019/452 scope of application is limited to the acquisitions by third country acquirers, also according to the case law of the European courts,¹⁴⁵ we would welcome the insertion of a provision in the EUBA that would either: (i) expressly rule out the right to oppose or subject to conditions or undertakings – for reasons, if any, other than those of competition or micro and macroprudential nature – transactions leading to intra-EU financial consolidation with a European acquirer or, if this proves not politically viable, (ii) confer such powers only upon the European Commission, in line with Article 21 (1) of the Merger Regulation), so as to clearly pre-empt national powers *vis-à-vis* banks and financial conglomerates. However, should retaining national golden powers be deemed politically preferable at this stage of convergence, we suggest predefining a closed list of relevant public interests – other than concerns of competitive or micro and macroprudential nature, if any – that may justify, still under the control of the European Commission (in line with Article 21(4) of the Merger Regulation), Member States' opposition or imposition of proportionate conditions or undertakings, whose compliance should be subject to judicial review, also through preliminary ruling.

In turn, **general company law provisions on cross-border takeovers, cross-border mergers and on the European company (SE) are good in the books but, once put to work as tool of choice to accomplish a complex cross-border bank acquisition, they make the transaction unreasonably difficult, uncertain, and costly.** This is also true, to some extent, for takeover bids offering liquid securities or a combination of securities and cash as consideration (considering also that Article 5(5) of Directive 2004/25/EU allows Member States to require that a cash consideration must be offered, at least as an alternative, in all cases). This encourages the adoption for banks of an additional

¹⁴⁵ Judgment of 13 July 2023, Case C-106/22, *Xella* [2023] ECLI:EU:C:2023:568.

tool, in the form of the US-like share exchange as a fast-track transaction for cross-border banks' consolidation. Share exchanges were studied by the services of the European Commission in the preparation of the 2019 cross-border mergers, demergers and conversions directive, yet, in the end, the draft provision was dropped from the proposal, not to open another front of political discussions. Those preparatory works show, however, that the share exchange could be made available for banks with one single directly applicable provision in the Single Rule Book, and a few selective references to certain aspects already regulated in the 2019 cross-border merger, demerger and conversion directive (now included in the Consolidated directive on company law 1132/2017). Share exchanges would also help addressing the German concerns with employees' participation (*'Mitbestimmung'*), because, unlike in a cross-border merger, in a share exchange the target company remains subject to employees' participation. A share exchange, moreover, would not change the identity of the participating banks, and would thus facilitate the continued use of internal rating models after consolidation: a prudential hurdle to full-fledged banks' mergers.¹⁴⁶

Yet a crux of the problem is also elsewhere, and lies in the fact that **prudential, resolution, company and insolvency law obstacles still prevent, despite the Banking Union, a meaningful group-wide capital and liquidity management, most notably cross-border**. This is economically not desirable¹⁴⁷ and translates into the strikingly parochial footprint of the banking industry in Europe. With few exceptions (of a handful of EU G-SIIs, whose European regulation poses however challenges on its own right for their global competitiveness, the TLAC/MREL add-ons being just the last of many visible examples),¹⁴⁸ banks, as Andrea Enria often noted in the past,¹⁴⁹ *"do not yet consider the Banking Union as a truly domestic market"*. This, as noted above, stands in the way of more risk dispersion (geographically) and of better resilience; but also of better profitability, if banks are truly to reap the fruits of the European single market.¹⁵⁰

For sure, in terms of market structure there are differences across Member States. France, Germany, Italy and Spain are home to the biggest European champions, and these 4 countries account together for over 50% of EU banking assets. Due to this uneven distribution (which does not have necessarily a parallel in the ownership structure, which is growingly international) many of the other Member States, which show a majority of foreign banks dominating their national banking markets, consider the risk of a centralised, group-wide asset and liability management acute, unless there are appropriate safeguards

¹⁴⁶ ECB, *Guide on the supervisory approach to consolidation in the banking sector*, 2020, para 36.

¹⁴⁷ See the then Minister of Economy of France BRUNO LE MAIRE, EUROFI Conference, April 2019.

¹⁴⁸ Compare SRB Appeal Panel, *Case 1/2022*.

¹⁴⁹ ANDREA ENRIA, EDUARD FERNANDEZ-BOLLO, *Fostering the cross-border integration of banking groups in the Banking Union*, Frankfurt am Main, 9 October 2020.

¹⁵⁰ For more granular data, PIOTR BEDNARSKI, BRIAN POLK, *Should supervisors allow capital waivers to be used within European cross-border banking groups?*, SAFE Bank, Vol. 77, No 4, 2019, pp. 25-28.

and counterbalances in place. With group-wide national fragmentation, however, assets trapped at the level of foreign intra EU subsidiaries may be in the hundreds of billions and may risk being idle, when with a properly functioning group-wide asset and liability management those moneys would be put to better use via centralisation.¹⁵¹ Political concerns on cross border consolidation have often related to the lack of protection for host jurisdictions in a context where there is no single EU deposit guarantee scheme, meaning that the resolution or liquidation of a bank could still impose costs on national taxpayers. However, this concern is partly addressed already by the attainment of the target level of MREL/TLAC, including the recapitalization amount, by European banks whose resolution strategy is bail-in (an exercise that has implied an MREL ammunition of more than 1,2 trillion euro on top of own funds requirements) and could be more easily tackled, for the rest, by a more targeted EDIS 2.0 initiative through a dedicated scheme contributed only by cross-border banking groups, whereas the existing deposit schemes would retain their functions with regard to banks having a predominantly or exclusively national business footprint.¹⁵²

From a prudential point of view, group-wide capital and liquidity management is prevented at cross-border level, because individual capital and liquidity waivers are permitted for domestic but not for cross-border subsidiaries, due to the failure of the amendments that the European Commission had tabled in November 2016 to Articles 7 and 8 CRR (which in reality, even if successful, would have only partially equated the situation between domestic and cross-border groups).

From a resolution point of view, when at domestic level capital waivers are (quite exceptionally) granted by the supervisor, those waivers are hardly mirrored in the resolution context by parallel internal MREL (iMREL) waivers. This is so despite the very fact that, from a textual point of view, Articles 7 and 8 CRR in the prudential context and Articles 45(f)(3) BRRD and 12g and 12h SRMR in the resolution context, make the grant of the waiver conditional upon the same finding that “there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities within the group”. However, **in practice, according to the resolution authorities, impediments to asset transferability in a going concern may play out differently than in a gone concern.** A growing number of cases before the SRB’s Appeal Panel and the General Court¹⁵³ has therefore shown that there are visible tensions here, which prevent groups from attaining the value-enhancing organisational gains of interstate group structures, albeit their clear recognition by the European Courts in connection with the objectives of the internal market

¹⁵¹ BRUNO LE MAIRE, EUROFI Conference, cit.

¹⁵² IGNAZIO ANGELONI, *The Next Goal: euro area banking integration*, cit., pp. 8 and 33.

¹⁵³ Compare in particular SRB Appeal Panel decisions in cases 2/2021; 3/2021; 1/2022; 2/2022; 1/2023 and 5/2023 accessible [here](#) and Case T-540/22, *France v SRB* [2024] ECLI:EU:C:2024:459.

and their alignment with Principle 5 of the Basel Committee's Principles on Corporate Governance for banks.¹⁵⁴

The problem is further exacerbated by the serious ambiguities in national contract, company and insolvency laws: the latter are still mostly entity-centric and national safeguards necessary to minimise the risk of abuse of intragroup support are not sufficiently harmonised to unleash the potential of mutual recognition. In turn, due to differences in the judicial domestic practice, the authorities are uncertain on the enforceability of intra-group support in the form of parent guarantees or similar arrangements under national contract, company and insolvency law. These uncertainties amplify tensions between home and host authorities and quite naturally translate into conservative supervisory approaches, ring fencing and in the end insufficient growth and geographical risk dispersion for European banking groups.

Proportionality in this context calls for consistency. This implies that when both supervisory and resolution authorities must assess the feasibility of intra-group support and their implications for capital, liquidity and iMREL waivers, or the likelihood of timely execution of asset transfers in the context of recovery plans and of resolution plans (to the effect of the determination of the resolution entity's size and profile at the point of non-viability), consistency should be the rule and different assessments – although they cannot be entirely ruled out, because what is likely or plausible in a going concern scenario may not equally be such in a gone concern scenario – should be a duly motivated exception. Proportionality alone, however, cannot override the obstacles embedded in the regulatory design.

The EBA and the ECB have been quite recently heralding a reconsideration of prudential policies in this domain, in an attempt to lift prudential barriers. Notable examples are the 2020 ECB Guide on the supervisory approach to consolidation in the banking sector, which has clarified that interstate consolidation does not necessarily require capital adds-on¹⁵⁵ and the EBA mapping exercise of prudential obstacles in 2020.¹⁵⁶ However, reforms of the prudential rules such as waivers and intra-group large exposures can prove effective only to the extent that also their crucial connections with less visible obstacles hidden into national contract, company and insolvency laws are duly accounted for.

In doing so, one should also consider that the harmonisation of general company law could not attain in the past, and is likely not going to achieve in

¹⁵⁴ Basel Committee, *Guidelines on Corporate Governance Principles for Banks*, July 2015.

¹⁵⁵ ECB, *Supervisory Guide*, para 25 ff.; compare however ANNA GARDELLA, MASSIMILIANO RIMARCHI, DAVIDE STROPPA, *Potential Regulatory Obstacles to Cross-border Mergers and Acquisitions in the EU Banking Sector*, EBA Staff Paper Series No 7, February 2020, p. 25 (also as to macroprudential buffers).

¹⁵⁶ ANNA GARDELLA, MASSIMILIANO RIMARCHI, DAVIDE STROPPA, *Potential regulatory obstacles to cross-border mergers and acquisitions in the EU banking sector*, cit.

the mid and long-term future, any significant advance on the harmonisation of the general law of the groups of companies. Despite the valuable efforts of chapter 15 of the EMCA initiative, the question how to regulate intragroup transactions from a general company law perspective, beyond the special context of banks and other regulated financial intermediaries, remains vividly debated.¹⁵⁷

Insolvency law is on its way to achieving greater harmonisation at the European level; however, the EU initiatives towards such harmonisation do not apply to banks.

Contract law regarding first demand parent guarantees or comfort letters is not harmonised and, despite some commonalities, it is dependent on the specificities of national case law.

To conclude on this point, a reform by which the EUBA would relax CRR and BRRD/SRMR requirements would be an important step forward, but would not be enough without a parallel action to remove relevant obstacles for banking groups under national contract, company and insolvency law.¹⁵⁸

There are also additional less visible, yet not less obstructive, obstacles to cross-border consolidation. It suffices to mention two examples here:

a) the prudential treatment of the parent's holdings in financial subsidiaries, which are exempted from deduction from own funds under Articles 36 and 49 CRR and yet cannot rely on parallel, uniform exemptions from large exposures limits. Once the value of the holdings in the subsidiaries exceeds those limits, the exemption from the deduction may therefore prove partially useless. There is still a piecemeal set of transitory national regimes (until December 2028) based upon the discretion granted by Article 493 CRR: some Member States grant a fully-fledged exemption for intra-group exposures for banking groups and conglomerates subject to supplementary supervision; some others do not exempt intra-group exposures within conglomerates; others do not even address the issue. This problem is further exacerbated by the fact that the parallel competent authority power of exemption under Article 400 CRR is pre-empted once the Member State has exercised, fully or in part, its national discretion, until the sunset of Article 493 CRR.

b) limits to related party exposures, which allow for exemptions that are national, thereby adding an additional layer of complexity and fragmentation. Yet, this is an area where clarity and legal certainty is necessary, even if it is difficult to achieve due to the very disparate rules applied by Member States on the treatment of intra-group and related party claims (as a comparison one should consider the

¹⁵⁷ Compare for instance, LUCA ENRIQUES, SERGIO GILOTTA, *The Case Against a Special Regime for Intragroup Transactions*, ECGI Law Working Paper No 641/2022, March 2023.

¹⁵⁸ For similar findings compare IGNAZIO ANGELONI, *The Next Goal: euro area banking integration*, cit.; DAVID RAMOS MUÑOZ, MARCO LAMANDINI, MYRTE THIJSEN, *A reform of the CMDI framework that supports completion of the Banking Union*, cit.

rules on transactions between member banks and their affiliates under Article 23A and 23B of the Federal Reserve Act and Title 12, Part 223 of Regulation W in the United States).¹⁵⁹ Such treatment is of fundamental importance for the certainty of a group-wide asset and liability management because, otherwise, apart from subordination, there is the risk of transaction avoidance. Furthermore, subordination of intra-group claims may have different effects. Intra-group transactions may be necessary to both (i) ensure the upstreaming of losses and/or the down-streaming of funds from the parent company, in which case subordination may be an element to ensure that goal, but also to (ii) facilitate liquidity to the subsidiary, in which case subordination may not be desirable. Thus, the rules applicable to banks' intra-group (and related party) claims should acknowledge this reality and provide exceptions for intra-group support agreements that ensure that the funding arrangements approved by competent authorities (and resolution authorities, in the case of resolution entities) operate as anticipated in the agreements themselves. European case law has already been confronted with related aspects, such as the treatment of instruments issued by a group entity other than the entity under resolution, *i.e.*, whether they may be made subject to write down and conversion powers. This question was at the heart of case T-557/17¹⁶⁰ on the resolution of Banco Popular Español (BPE). The applicant was the owner of a bond issued by BPE Financiaciones, SA, a wholly owned subsidiary of BPE, which according to the SRB qualified as a Tier 2 instrument of BPE. Pursuant to Article 6(1)(d) of the resolution decision, the relevant bonds were converted into shares, which were subsequently transferred to Banco Santander. The case was declared inadmissible by the General Court,¹⁶¹ but the judgment clarified some aspects. The Court dismissed the applicant's arguments that *BPE Financiaciones* was not the subject of a resolution scheme since it did not fall within the scope of the SRMR and confirmed that the power to write down and convert instruments does not depend on the entity which issued the bonds, but on the characteristics of those bonds ('Tier 2 instruments' under the CRR).¹⁶²

In conclusion, a uniform solution is clearly necessary, also in light of Article 507 CRR. The BRRD made an (only partial) attempt in 2014 to flesh

¹⁵⁹ For the Euro zone, compare SRB Insolvency Ranking (2021).

¹⁶⁰ Case T-557/17, *Liaño Reig v SRB* (decision upheld by the Court of Justice, C-947/19 P [2021] ECLI:EU:C:2021:172).

¹⁶¹ The applicant had requested a partial annulment of the SRB's resolution scheme, to the extent it concerned the conversion of specific Tier 2 instruments into new shares of BPE. The Court considered, in short, that such partial annulment was not possible since the provision on the conversion of those Tier 2 instruments was not severable from the resolution scheme as a whole. The Court indicated that the conversion of all Tier 2 instruments was a prerequisite for applying the sale of business tool and for the sale to Banco Santander (that sale could not have taken place under the same conditions if some of the Tier 2 instruments outstanding as at the date of the resolution decision had not been converted). The provision on the conversion of some Tier 2 instruments was therefore intrinsically linked to the very substance of the resolution decision and could not be annulled separately.

¹⁶² Instruments not directly issued by a bank may qualify as Tier 2 instruments. I was relevant in this respect that the applicant had not disputed that the securities issued by BPE Financiaciones constituted Tier 2 instruments of BPE.

out minimum harmonisation provisions at least for intragroup financial support arrangements, but 10 years of experience (with very few of those arrangements in existence) casts doubts on the success of this experiment through a directive. The lesson is clear. Minimum harmonisation in this context is not enough. Further action is needed and it would not even be enough to table again prudential amendments to capital, liquidity and iMREL waivers as well as to intragroup exposures (Articles 7 and 8 CRR, Article 12 h and 12g SRMR and Articles 113(6), 400(2), and 493(3)(c) CRR)¹⁶³ but it is also necessary to clearly identify and then disentangle, with appropriate safeguards, the ‘hidden traps’ disguised in the robes of national contract, corporate and insolvency laws, including the domestic regulation of related party transactions (which are subject to minimum harmonisation under the Shareholders Right II Directive).

A bespoke solution in the banking sector, however, is not out of reach for the EUBA, if only one considers that any supervised regime for capital and liquidity management put forward by the Omnibus Regulation to achieve maximum harmonisation would be implemented under the ongoing control of regulators. Taking the existing intragroup financial support regime in BRRD a step forward, this new regime should ensure smooth group-wide capital and liquidity management in good times and the smooth upstreaming of losses and down-streaming of funds to cover losses in an insolvent or troubled subsidiary in bad times, provided that this is beneficial to the interest of creditors of both the subsidiary bank(s) and of the parent company or in the interest of financial stability. To be justified, it should be subject to disclosure and *ex-ante* approval by supervisory and resolution authorities, based on maximum harmonisation conditions, including its use in bad times (i) when there is a reasonable prospect to redress the viability of the subsidiary; (ii) with the objective of preserving the viability of the group as a whole, to maximise the value of a transfer, or to implement a Single Point of Entry (SPE) strategy; and (iii) the financial support is provided on fair economic terms and in compliance with the group-level resolution or liquidation plan. The details of the assistance should be contemplated in appropriate intra-group financial arrangements, which would complement the corporate dimension of the group with a parallel contractual dimension, one which would address and provide solutions for the challenges which remain unsolved under the uncomplete rules of corporate law.

This would also call for the maximum harmonisation of the definition of the perimeter of the banking and financial groups to which the special regime would apply. This would for instance warrant a reconsideration of the EU notions adopted for prudential purposes of “control” (Article 4(37) CRR), “parent undertaking” (Article 4(15) CRR) and “subsidiary” (Article 4(16) CRR) in their current reference to Directive 83/349/ECC, which, on the one hand, leaves open avenues to hidden national discrepancies due to the minimum harmonisation of the notion of control and, on the other hand, may promote more international

¹⁶³ NIKOS MARAGOPOULOS, *Removing the regulatory barriers to cross-border banking*, August 2020, accessible [here](#) and EBI Working Paper Series No 85/2021.

convergence with IFRS 10 and 11 and also with the more recent US determination of control of a banking organisation under the Federal Reserve System rule of January 30, 2020.¹⁶⁴

Key considerations

The interaction between national corporate and insolvency laws and the prudential treatment of banking and financial groups is problematic. It is also one, if not the most important, of the legal obstacles that stand in the way of European banks' consolidation and thus one of the reasons why European banks often have not yet reached a continental scale and European-wide footprint, as one would expect to be the ripe fruit of the internal market and are still dwarfed by US (which consolidated tremendously after the Riegle-Neal Act 1994) and Chinese big banks. This is something clearly reflected also in the Technical Analysis of the Draghi Report.

The EUBA should make the break-through rule currently set out as an optional regime in Article 12 of the Takeover Directive (Directive 2004/25/EC) mandatory for banks and other regulated entities and should rule out national public law barriers to interstate consolidation of banks. In turn, the EUBA could make available the US-like share exchange as a fast-track transaction for (non-hostile) cross-border banks' consolidation.

Yet the crux of the problem is elsewhere, and lies in the fact that prudential, resolution, company and insolvency law obstacles prevent a meaningful group-wide capital and liquidity management, most notably cross-border. The EUBA should not only to extend capital, liquidity and internal MREL waivers beyond domestic groups and better harmonize large exposures limits related to holding in financial subsidiaries and related party transactions rules on intragroup transactions, but also remove for banking groups the relevant obstacles under national contract, company and insolvency law.

The EUBA should adopt to this aim a bespoke, supervised regime for capital and liquidity management, subject to maximum harmonization in the Omnibus Regulation.

¹⁶⁴ 12 CFR Parts 225 and 238 Regulation Y and LL Docket No R-1662 RIN 7100 AF 49.

SECTION IV.
THE AUTHORITIES AND THEIR POWERS IN THE EUBA

1. Scope and other preliminary remarks

The identification of competent authorities in the banking sector may usefully start from the list set out in Article 4(2) EBAR. However, some further clarifications are needed.

- a) Although the ECB is included in that list, the requirements and tasks provided for the competent authorities in the EUBA would hardly apply to the ECB, as these are defined both by the ESCB and the ECB Statute (which has the *status* of a EU primary law in the same way as the Treaties) and by the SSMR (which, having been adopted under the special legislative procedure provided for in Article 127(6) TFEU, cannot be amended with provisions adopted under the ordinary legislative procedure such as that under Article 114 TFEU). The EUBA should therefore refer to the ECB and its functions as governed by the ESCB, the ECB Statute and the SSMR.¹⁶⁵
- b) The EUBA would also limit itself to merely referring to the EBAR, without recasting it. Although the EBAR and the Omnibus Regulation would be grounded on the same legal basis of Article 114 TFEU, the EBAR already provides a self-contained, detailed and exhaustive framework for the organisation and tasks of EBA, and its inclusion in the EUBA appears therefore unnecessary.
- c) Likewise, the inclusion of resolution and AML/CTF authorities within the list of competent authorities in the EUBA is for the time being postponed, because for resolution authorities the regulatory framework (the CMDI) is undergoing reform and the AMLA is still in its first stage of establishment.

Against this background, we surmise that the EUBA should cover the ‘subject matter’ of the supervisory authorities (as just defined), in all their different aspects (institutional and organisational, supervisory and sanctioning powers, relevant administrative procedures, liability), as follows.

The definition and regulation of the **powers** available to the authorities (both supervisory powers and sanctioning ones) – which are already now at a considerable stage of harmonisation, and will be further enhanced following the implementation of CRD VI – would be included in the Omnibus Regulation. This is in line with the conclusions drawn in Section I and Section II. The rationale for the inclusion of those aspects in the Omnibus Regulation is to be found in the need to ensure, to the highest possible degree, **uniformity** in the rules governing the relationship between the authorities

¹⁶⁵ The provisions of the EUBA on the powers of competent authorities could apply to the ECB in accordance with Article 9 SSMR, within the limits set out by that Regulation.

and the supervised entities in the single market, so as to ensure **equality of treatment** irrespective of the home supervisor. Divergences of supervisory frameworks would translate into higher costs for the regulated entities, legal complexity and uncertainty (and, therefore, risks), thus hampering the smooth functioning of the internal market.

The need for **uniform rules** embraces not only the **powers** conferred upon the competent authorities but also the **procedures** for their use. This would prove of particular importance for the ECB within the SSM, because in the current legal framework, the ECB when called upon to apply national powers under Article 9 SSMR considers it to be subject to national and thus arguably diverging procedural rules.

Level 1 Legislation in neighbouring sectors offers some guidance that may be of use in the design of the relevant provisions in the EUBA. For instance, the Crowdfunding Regulation and the “MiCAR” directly provide for a minimum set of supervisory and investigative powers for competent authorities and require Member States to ensure that “*appropriate measures are in place*” to enable competent authorities to exercise the supervisory and investigative powers necessary to perform their duties.¹⁶⁶ Similar considerations apply to sanctioning powers. Here again, the most recent experience of Level 1 Legislation is that Member States should ensure that competent authorities have the power, *inter alia*, to impose administrative sanctions that are effective, proportionate and dissuasive, with an indication of the “minimum” list of breaches to be sanctioned.¹⁶⁷⁻¹⁶⁸

Conversely, as already noted in Section II, the **institutional and organisational arrangements of national authorities** would need to remain in the Omnibus Directive.

Key considerations

EUBA would identify the competent authorities, building on the list already contained in Article 4(2) of the EBAR. However, the ECB and the EBA,

¹⁶⁶ Article 30 Crowdfunding Regulation and Article 94 (6) MiCAR Regulation.

¹⁶⁷ Article 39 Crowdfunding Regulation and Article 111 MiCAR Regulation; going further back in time, Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories already contained an albeit meagre regulation on administrative sanctions.

¹⁶⁸ However, the most recent AML package makes a different choice: sanctions available to national competent authorities are provided for in a directive (Directive 2024/1640/EU of the European Parliament and of the Council of May 31, 2024, Articles 53 ff.), while the relevant regulation (Regulation (EU) No 2024/1624 of the European Parliament and of the Council of May 31, 2024, ‘AMLR’) contains only provisions on sanctions relating to transparency on beneficial ownership (Article 68 AMLR) and to breaches of limits on cash payments (Article 80 AMLR). The Commission’s proposal does not explain the reasons beyond this different choice: apparently, the only consideration that comes to the fore is to ensure continuity with the current EU AML/CFT legal framework, mainly built on directives (the “*proposal* [of the new AML Directive] ... *builds on Directive (EU) 2015/849...*,” see COM(2021) 423 final, p. 5).

which are also in such list, should continue to be regulated by the SSM Regulation and the EBA Founding Regulation, respectively.

Competent authorities' institutional and organisational aspects would be defined in the Omnibus Directive, while supervisory and sanctioning powers and the procedures for the exercise of such powers would be regulated in the Omnibus Regulation.

2. Institutional and organisational features of the national authorities: mandates; independence and accountability requirements; legal protection

a) Objectives and mandates of the national authorities

Currently, the CRD is silent on the objectives and tasks of national competent authorities (NCAs), nor does it address how the prudential mandate should be coordinated with the tasks of protecting transparency and fairness in the bank/client relationships. This issue is further exacerbated where the prudential authority is also entrusted with the supervision of the rules of conduct and holds enforcement powers in this respect, as is true in most Member States (see, for more details, Section V). We surmise that the EUBA should remedy such deficiency, because the determination of the constituent features of NCAs, which have an essential role within the Banking Union, would deserve more convergence. In this spirit, the objectives and tasks of the national authorities in the area of prudential supervision would be defined in the Omnibus Directive in terms that are as consistent as possible with the principles that guide the actions of the ECB and the EBA in the exercise of their respective tasks and responsibilities.

The formulation of a rule in the EUBA spelling out the goals of prudential supervision of credit institutions – namely ensuring financial stability and protection of depositors – may rely on several Recitals in CRR and CRD which already expressly refer to those goals.¹⁶⁹ The EUBA should then more clearly relate those goals with those of customer/consumer protection in the banking/financial sector. This is further discussed in Section V.

The EUBA would also clearly state that the conferral of prudential supervision and customer protection tasks to an NCA is not incompatible with the conferral of additional mandates, provided that appropriate organisational measures are adopted to ensure the segregation of duties related to these additional functions from those covered in the Omnibus Directive (mimicking what is currently provided for in Article 4(7) CRD regarding the functions relating to resolution).

¹⁶⁹ For the goal of ensuring financial stability or the stability of the financial system see Recitals 3, 14, 16, 20, 31, 51, 76 and 123 CRR as well as Recitals 29, 30, 47, 50, 51, 67 and 81 CRD; as for the protection of depositors see Recitals 7, 76, 123 and 127 CRR as well as Recitals 47 and 91 CRD.

To this end, the Omnibus Directive would specify that the identification of the necessary organisational measures to ensure segregation of duties and management of potential conflict of interests, in case of multiple mandates, is part of the procedural autonomy pertaining to national law. Indeed, the organisational autonomy of national authorities – *i.e.*, their power to regulate their own organisational structure – is a corollary of their independence.

b) Independence and accountability requirements

The new text of Article 4 of CRD VI has recently put forward important changes, which represent a significant step forward in the definition of the independence framework for competent authorities. The new regime stipulates that independence must be safeguarded both from politics and from the industry:

- a) **independence from politics:** Member States are required to establish the necessary arrangements to ensure that competent authorities (including their staff and members of their governance bodies) can exercise their supervisory powers independently and objectively, without seeking or taking instructions from any government of a Member State or anybody of the Union or from any other public body.¹⁷⁰ Of course, independence from politics does not imply withdrawal from democratic accountability mechanisms. According to Article 4, “*Member States shall ensure that competent authorities publish their objectives, are **accountable** for the discharge of their duties in relation to those objectives and are subject to financial control which does not affect their independence*”;
- b) **independence from industry:** Member States are required to establish the necessary arrangements to ensure that competent authorities (including their staff and members of their governance bodies) can exercise their supervisory powers independently and objectively, without seeking or taking instructions from supervised institutions or from any other private body. **Conflicts of interest** are a key issue. On this, Member States shall ensure that NCAs have in place all the necessary arrangements to prevent conflicts of interest of their staff and members of their governance bodies. To this end, Member States shall lay down rules proportionate to the role and

¹⁷⁰ The provision specifies that these arrangements are without prejudice to the rights and obligations of the NCAs arising from being part of the international system of financial supervision, or part of the European System of Financial Supervision (ESFS), or part of the SSM or of the Single Resolution Mechanism. The provision is thus intended to be without prejudice to any obligation to comply with decisions, directives or instructions issued, in accordance with the relevant provisions, by the ECB and the Single Resolution Board. Such an obligation therefore does not constitute an impairment of independence.

responsibilities of such staff and members of the governance bodies, and at a minimum prohibiting them from – *inter alia*¹⁷¹ – being hired by or accepting any kind of contractual agreement for the provision of professional services for a period of time (“cooling off period”) with a certain number of entities.¹⁷²⁻¹⁷³ Finally, the new provision entrusts the EBA with the task of issuing *guidelines* on the prevention of conflicts of interest within the NCAs and on independence in general.¹⁷⁴

In the EUBA, the Omnibus Directive would build on the existing text of Article 4 CRD as recently amended and could further consider **an additional refinement, essentially in two different respects: content and legislative technique.**

¹⁷¹ In addition to that, the new Article 4 also foresees a prohibition on trading in financial instruments issued by (or referring to) supervised entities or their direct or indirect parent undertakings, subsidiaries or affiliates.

¹⁷² In more detail: *i*) institutions in relation to which the member of staff or the member of the governance body has been directly involved with, for the purposes of supervision or decision-making, as well as their direct or indirect parent undertakings, subsidiaries or affiliates; *ii*) entities that provide services to any of these institutions; *iii*) entities conducting lobbying and advocacy activities directed at the competent authority on matters for which the member of staff or the member of the governance body were responsible during their employment. Member States may allow NCAs to extend the cooling-off period to the direct competitors of entities under *i*). The length of the cooling off period varies both depending on the position held by the individual in the NCA (staff or governance body) and on the nature of the entity with which the new relationship is established.

¹⁷³ At first glance, new Article 4 CRDVI is somewhat symmetrical to provisions on independence and accountability of the ECB, albeit with due differentiation. For the ECB, too, the SSMR establishes the principle of functional independence, *i.e.*, it should perform the supervisory tasks conferred on it in full independence, in particular unhindered by undue political influence and by industry (Articles 19 and 26 (1) SSMR). The Codes of conduct for the ECB’s staff and management involved in banking supervision (see Article 20(3) SSMR) as well as cooling-off periods (Recital 76, Article 31(3) and (4) SSMR) constitute means to strengthen the functional independence. Recitals 77 and 78 and Article 30 (1) to (3) SSMR provide for financial independence. Finally, the ECB is accountable to the political institutions of the EU – it submits an annual report on the execution of SSM tasks to the EU Parliament, the Council, the Commission and the Euro Group (see also Recital 55 SSMR) – as well as to the national parliaments (Recitals 55 and 56 and Articles 20 and 21 SSMR). The ECB must also be accountable to the addressees of its regulatory acts as well. A public consultation and a costs-benefits analysis are therefore provided for with regard to the ECB’s regulations under Articles 4(3) SSMR and to any ECB’s legal act concerning the imposition of supervisory fees under Article 30(2) SSMR.

¹⁷⁴ Please note that, in the current framework, EBA regularly conducts reviews of all (or only part of) the activities of the competent authorities so as to strengthen uniformity and effectiveness of supervisory outcomes. These reviews – so-called “peer reviews” – are aimed at assessing, in general, the effectiveness and degree of convergence achieved in the application of the relevant (European and national) legislation and in supervisory practices; but also certain aspects of the competent authorities such as, in particular, the adequacy of the resources at their disposal, their governance, their ability to react to market developments and – today, following the amendments introduced in 2019 – also the degree of independence they enjoy (Article 30(3)(a) EBAR, fully redrafted in 2019). The results of the peer reviews are set out in a report, which also indicates any follow-up measures deemed “*appropriate, proportionate and necessary*”. Such follow-up measures may be taken in the form of guidelines and recommendations, under Article 16, and opinions, under Article 29 (Article 30 (4) (1)) of the ESAs Regulations.

In terms of content, provisions on independence could be further enriched and detailed, drawing from the guidance provided by the European Supervisory Authorities' **criteria on the independence of supervisory authorities**, published on 25 October 2023 ("Joint Criteria"). These criteria provide a common European standard and are intended as a practical tool for supervisory authorities to strengthen their independence. They are based on four principles: operational independence; personal independence; financial independence; transparency and accountability.¹⁷⁵

In this context, operational independence implies, *inter alia*, that national supervisors should define a clear, transparent, and independent decision-making process; moreover, the requirement for competent authorities to conduct public consultations and impact assessments when called to exercise regulatory powers (*e.g.*, when implementing EBA guidelines/soft law) would strengthen confidence in the supervisory process. On **financial independence** the Joint Criteria stipulate (Principle 3) that whatever the method by which the supervisor is funded it must be "*stable, predictable and transparent*" and not subject to "*undue influence from the government, a government body or agency, the parliament or the supervised sector*". As for financial resources, they must be sufficient for the authority "*to fulfil its mandate and carry out its tasks considering the size, complexity and type of markets and entities it oversees or supervises*". This principle would deserve to be enshrined in the EUBA, also taking into account the recommendations on "budgetary processes" under Principle 2 of the *Basel Core Principles for Effective Banking Supervision*.¹⁷⁶

As regards **transparency and accountability**, **Article 4 of the CRD, as amended by CRD VI mentions them in principle, but does not define them in detail. This is undesirable.** A strong framework of public transparency and accountability is essential to minimise the risk of abuse of power: supervisors should carry out their tasks in a transparent and accountable manner. According to the Joint Criteria, competent authorities should report publicly, at least annually, on their objectives, priorities and performance against their strategy and work plan, including the use of financial resources, ensuring transparency of activities undertaken, key supervisory measures, annual budget and audited accounts, available resources and salaries (in aggregate and anonymous terms). The annual report should be submitted to the government, a government agency or parliament. While obvious, it is worth noting that this submission does not imply any kind of request for approval and would therefore in no way jeopardise independence.

We surmise that the EUBA should also entrust **the EBA** with the task of developing **draft RTS** to specify in more detail the contents of independence requirements, in light of the Joint Criteria and of the guidelines on the

¹⁷⁵ More detailed criteria are set out for each principle.

¹⁷⁶ See also the Essential criteria No 6.

prevention of the conflict of interest to be adopted under Article 4 CRD. This would help ensure greater convergence on independence standards and likewise uniform application of the Omnibus Directive at national level.

c) Rules on legal protection

There is a fundamental aspect of independence on which the CRD, including CRDVI, is still completely silent: the legal protection of the national authorities, their governing bodies and their staff. The close interrelation between the supervisor's independence and its legal protection is an established principle in the context of **international standards**. Those standards highlight the need to protect the exercise of discretion in these areas, especially in view of the complexity of the decisions to be taken (see Principle No 2 of the 2012 *Basel Core Principles for Effective Banking Supervision*).¹⁷⁷ This is especially true when the competent authority is given several mandates.

The **Joint Criteria** expressly urge that the legal framework provides the competent authorities with the necessary safeguards *vis-à-vis* legal actions against them as well as against staff members with respect to supervisory actions, inactions and decisions taken in good faith while discharging their duties.¹⁷⁸ The **ECB** itself, in **recent opinions** on draft national laws, has pointed out the importance for the proper functioning of the SSM that national liability regimes offer standards of legal protection for NCAs commensurate with the Basel Core Principles.¹⁷⁹ In many of its assessments of compliance with the Basel Core Principles, the IMF has also repeatedly emphasised the need to ensure adequate legal protection to competent authorities.

Comparative analysis of the national legal frameworks of several Member States shows that, for the time being, in principle competent authorities are shielded

¹⁷⁷ The principle is fully confirmed in the revision to the *Core Principles for effective banking supervision* adopted by the Basel Committee on Banking Supervision in April 2024. With respect to resolution authorities and their staff see the *Financial Stability Board's Key Attributes of Effective Resolution Regimes for Financial Institutions* (October 2014), in particular Key Attribute No 2.6.

¹⁷⁸ See the Joint ESAs' criteria, para 2.9.

¹⁷⁹ See Opinion CON/2019/19 of 21 May 2019, para 2.8.2 (on the revision of the legal framework of the Portuguese financial supervisory system). See, more recently, Opinion CON/2023/41 of 8 December 2023 (on an Italian draft law on measures to support the competitiveness of capital markets). Both the opinions go further by noting that if the legal protection offered to the staff of the NCA is inadequate, the position of any of the NCA's staff members involved in joint supervisory teams (JSTs) within the SSM may be compromised. For further details see footnote No 189.

from specious lawsuits;¹⁸⁰ however, in perspective it remains unfortunate that the criteria for the attribution of liability are not homogeneous and are currently subject to the application and interpretation of national courts in 27 different judicial systems. This leads to quite divergent liability regimes, and this in turn significantly influences supervisory approaches and practices, which is a clear obstacle for the establishment of a fully-fledged Banking Union.

The BRRD (which also covers some micro-prudential supervisory functions, namely those referred to the early intervention measures regulated therein) allows Member States, if they deem fit, to introduce into their domestic legal framework limitations on liability “*of the resolution authority, the competent authority and their respective staff in accordance with national law for acts and omissions in the course of discharging their functions*”, without, however, setting any relevant criteria.¹⁸¹

We surmise that the desirable course of action for the EUBA would be to bring about maximum harmonisation of the criteria for civil liability of NCAs through a set of provisions of general nature, open then to the interpretation and guidance of the European courts via preliminary rulings. In

¹⁸⁰ See RAFFAELE D’AMBROSIO, *The ECB and NCA liability within the Single Supervisory Mechanism*, Quaderni di ricerca giuridica della Consulenza legale della Banca d’Italia, No 78, January 2015; ID., *The liability regimes within the SSM and the SRM*, in ID. (eds), *Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)*, Quaderni di ricerca giuridica della Consulenza legale della Banca d’Italia, No 88, April 2020, p. 503 ff. Liability regimes in EU countries show a clear trend towards a form of legal protection for supervisors, spanning from immunity from investors to limitation of liability to bad faith or gross negligence. In the German literature, supervision of financial institution was traditionally undertaken in the interest of the public at large and not to protect individuals. The underlying idea – the so-called *Schutznormtheorie* – is that liability is to be denied where a particular claimant is not among those whom a specific legal rule is intended to protect, or where the legal rule is intended to protect the interest of the public at large rather than those of any private individual. In light of the above, depositors and investors cannot have any tort claims against supervisors. The German financial legislation confirmed this view. The case of Austria is similar. In *Peter Paul* (judgment of 12 October 2004 in Case C-222/02, [ECLI:EU:C:2004:606](#)) the ECJ ruled that the German liability regime in the exercise of banking supervision was compatible with EU banking law. In the UK, liability of financial supervisors is confined to bad faith. In the BCCI case the claims against the Bank of England were based on the misfeasance in public office tort (House of Lords, *Three Rivers District Council and others v. Governor and Company of the Bank of England*, WLR, 2000, 2 and UKHL, 2001, 16). The focus of the case was upon the untargeted malice. The court ruled that the claimant must show: (i) that the officer acted with a state of mind of reckless indifference to the illegality; (ii) that the public officer acted with a state of mind of recklessness about the consequences of his act in the sense of not caring whether these consequences would happen or not. The regime of supervisor liability in Ireland mimics the English one. Due to the complex and sensitive nature of financial supervision, the case law of the French *Conseil d’État* traditionally requires claimants to show *faute lourde* (gross negligence) in liability actions lodged against the State for the alleged defective financial supervision of the competent public authority. The standard of liability applied by the French Administrative Courts was particularly high. Liability regimes based on the gross negligence requirement were also introduced in most of the EU countries, including, among others, Italy. In the Netherlands, *Artikel 1:25d Wet op het financieel toezicht* (section 1:25d of the Act on Financial Supervision) excludes liability for the Dutch supervisors for damage resulting from the exercise of a statutory task “*unless such damage is largely the result of a deliberately improper performance of a task or a deliberately improper exercise of powers or is largely attributable to gross negligence*”.

¹⁸¹ Reference is to Article 3(12) BRRD.

this respect, European courts have already clarified¹⁸² that EU law precludes the non-contractual liability of a national supervisory authority for breach of EU law from being made subject to conditions which go beyond the standard of the “sufficiently serious infringement of EU law” as elaborated by the court.

In conclusion, the EUBA, with its Omnibus Directive, in our view, should include the rule whereby national supervisory authorities are liable under national civil law for damages resulting from – *i.e.*, causally linked to – the exercise of their powers to the extent that a sufficiently serious breach of their duties under applicable law is demonstrated, provided that the breached rule of law is intended to confer rights on individuals.¹⁸³ An alternative solution would be to identify a common liability regime from the wide spectrum of existing liability regimes applicable in all Member States, finding a reasonable middle way between the two extremes of the bad faith and gross negligence criteria,¹⁸⁴ an exercise in which, however, European courts have not yet ventured so far.

In turn, the EUBA would also include a provision in line with the findings of European courts in *Krohn v Commission*, to exclude the national authority’s liability whenever it has complied with binding instructions of a Union institution/agency, leaving no room for discretion.¹⁸⁵ And also with regard to activities that the national authority carries out in close coordination with an EU institution or agency, with a limited margin for *manoeuvre*, the criterion concerning its non-contractual liability *vis-à-vis* third parties should be specifically framed so as to limit liability only to those cases where the authority has manifestly disregarded the substance of the instructions received from the EU institution/agency.

Conversely, the EUBA may also dictate appropriate safeguards for members of the governing bodies of the competent authorities and their staff against direct actions from natural or legal persons allegedly damaged by supervisory actions or inactions,

¹⁸² See: ECJ, Case C-571/16, *Kantarev v Balgarska Narodna Banka*, EU:C:2018:807; ECJ, Case C-501/18, *BT v Balgarska Narodna Banka*, EU:C:2021:249. Nevertheless, according to the ECJ case law, this does not mean that a Member State cannot incur liability under less strict conditions on the basis of national law (see ECJ, cases C 46/93 and C 48/93, *Brasserie du pêcheur and Factortame*, EU:C:1996:79; ECJ, case C 620/17, *Hochtief Solutions Magyarországi Fióktelepe*, EU:C:2019:630; ECJ, case C 278/20, *European Commission v. Kingdom of Spain*, EU:C:2022:503).

¹⁸³ See General Court, Case T-134/21, *Malacalza Investimenti Srl and Vittorio Malacalza v ECB* (para 34-58) and the case law cited therein.

¹⁸⁴ Indeed, the broad interpretation of the Supreme Court of Ireland of misfeasance in public office approaches the gross negligence criterion as restrictively applied in the French *Conseil d’État*’s jurisprudence.

¹⁸⁵ C-175/84, *Krohn & Co Import Export (GmbH & Co KG) v Commission*, ECR [1986] ECLI:EU:C:1986:85. The CJEU ruled that where EU law empowers the Commission to give mandatory instructions to a national authority and this latter complies with the Commission’s instructions, the Commission and not the national authority is liable in an action for damages.

as they are contemplated in most of the Member States¹⁸⁶ These profiles are crucial to fully ensuring the independence of the competent authorities and more efficient investigative processes and enforcement activities, as the International Monetary Fund,¹⁸⁷ the Organisation for Economic Cooperation and Development¹⁸⁸ and the ECB itself¹⁸⁹ (the latter, with specific reference to the SSM) have recently pointed out.

Key considerations

The Omnibus Directive should clearly set out the mandate of national competent authorities.

It should also frame the independence and accountability requirements of the competent authorities, building on Article 4 of CRD, as amended by CRD VI and taking stock from the European Supervisory Authorities' Joint Criteria, published on 25 October 2023. Delegation to Level 2 Regulation should also be contemplated.

The Omnibus Directive should also set out maximum harmonisation provisions on the legal protection of competent authorities, the members of their governing bodies and their staff.

¹⁸⁶ In a nutshell, in Austria, the law regulating the Financial Markets Authority (FMA) explicitly excludes the direct liability of its governing body and its staff *vis-à-vis* injured third parties (see Section 3(1) of the Finanzmarktaufsichtsbehördengesetz -FMABG). Under Irish law, senior management as well as staff of the Central Bank of Ireland are not liable for damages caused to third parties in the performance of their duties unless it is proven that the act or omission was undertaken with bad faith (the relevant liability regime is governed by paragraph 33AJ(2) of the Central Bank Act No 22 of 1942, as last amended on August 3, 2021). In Germany, Article 34 of the Constitution (*Grundgesetz*) prevents direct compensatory actions against public employees in general. As for Spain, Article 36 of Law 40/2015 (*Régimen Jurídico del Sector Público*) expressly provides – in general terms – that third parties may take action directly by way of compensation only against the authority, which will eventually have recourse against the employee where there is evidence of conduct marked by wilful misconduct or gross negligence. In France, the rule leading to the exclusion of direct liability of the civil servant has been elaborated by the courts, which have over time clarified that a public official who has acted in the performance of his/her function within the ordinary limits of that function, may not be held personally liable *vis-à-vis* third parties.

¹⁸⁷ IMF, Italy, Country Report No 13/353, december 2013, which highlights, *inter alia*, the strong link between the legal protection of the competent authorities' staff and the independence of the authorities themselves (pp. 10 ff).

¹⁸⁸ OECD (2020), OECD Capital Market Review of Italy 2020: Creating Growth Opportunities for Italian Companies and Savers, OECD Capital Market Series, p. 38 (“[...] *Close attention should be given to both regulatory and procedural practices that may impede the regulator’s role in promoting deeper and more effective capital markets. For example, the IMF has pointed out that the current arrangements concerning the protection of staff at [Italian national competent authorities] during the course of lawsuits should be strengthened (IMF, 2013) [...]*”).

¹⁸⁹ Opinion of the European Central Bank of 8 December 2023 on the liability of Banca d’Italia and the members of its decision-making bodies and staff, and the cooling-off/in rules applicable to the members of its management bodies and top managers (CON/2023/41). See in particular, para 2.7, “[w]hile, in principle, it is a matter for national law to determine the scope of liability connected with the performance of the tasks of national competent authorities (NCAs) in the SSM [...], it is also important for the functioning of the SSM that national liability regimes offer standards of legal protection commensurate with the Basel Core Principles. If the legal protection offered to the staff of the BdI is inadequate, the position of any of the BdI’s staff members involved in joint supervisory teams (JSTs) within the SSM may be compromised given that instructions given to such staff by the JST coordinator in line with Article 6(1) of Regulation (EU) No 468/2014 of the European Central Bank¹⁵ may lead to personal liability claims against such staff”.

3. Powers of national authorities: prudential supervisory powers and sanctioning powers

a) Prudential supervisory powers

In the context of the EUBA, prudential supervisory powers should be further harmonised. This is of crucial importance for the Banking Union because the existing *acquis*, engineered under time pressure, at the time of establishment of the SSM in 2013 – *i.e.*, that of vesting the ECB, directly via the SSM regulation, of national prudential powers – has proven to be sub-optimal. Indeed, the empowerment of a single supervisory authority cannot as such remedy the undesirable effects of an uneven playing field, considering that the ECB is nonetheless obliged to apply 20 different national frameworks, which show divergencies also on prudential supervisory powers. Experience has also shown that sufficient harmonisation in this area can barely be achieved by the ECB through soft-law instruments such as guidance or guides, which are not designed for this purpose. This is also in line with the Report of 11 October 2017 from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism (COM(2017) 591 final, p. 8) that invited “*future relevant EU legislation [to] spell out explicitly supervisory powers in directly applicable provisions*”. In turn, the report of 18 April 2023 from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism (COM(2023) 212 final, p. 20) stresses that: “*a final area that will require further attention, but which falls outside the control of the SSM itself, concerns the harmonisation of certain legislative areas. The review has highlighted the difficulties that the SSM is facing in the areas of fit and proper assessment, sanctioning powers and anti-money laundering, where the SSM is largely dependent on national law. Supervision would benefit from a more harmonised legal framework as this would address concerns about an unlevel playing field within the SSM*”.

CRD VI has meanwhile harmonised three matters that were governed by national law under the previous regime: (i) acquisitions of holdings in financial and non-financial sector entities; (ii) material transfers of assets; and (iii) mergers/divisions. Nevertheless, several other national prudential powers remain unharmonised. In particular, the EU Legislator fell short of following the advice in the ECB Opinion of 27 April 2022 on the draft proposal of CRD VI, which called for the harmonisation of additional supervisory powers on: (i) the amendment of credit institutions’ articles of association, (ii) related party transactions, and (iii) material outsourcing arrangements. On that occasion, the ECB pointed out that “*the harmonisation of these powers remains necessary and would help to progress further towards a genuine single rulebook and reduce regulatory fragmentation across the SSM*”.¹⁹⁰

It is noteworthy that on at least two of the powers mentioned by the ECB – namely the outsourcing arrangements and the related party transactions – there are EBA Guidelines that could serve as a valid starting point for this harmonisation

¹⁹⁰ See Opinion CON/2022/16 of 27 April 2022, para 6.

exercise. According to the data published by the EBA, the compliance rate with the “Guidelines on outsourcing arrangements”¹⁹¹ is nearly 100%.¹⁹² As regards the provisions that the EBA Guidelines on internal governance devote to transactions with related parties,¹⁹³ the EBA does not report any non-compliance decisions by national competent authorities.¹⁹⁴

With respect to the rules governing the amendments to the credit institutions’ articles of association, the differences that exist in the company law of Member States concerning the process for adopting similar amendments,¹⁹⁵ do not appear to be such as to prevent the harmonisation of the prudential power to be exercised by the supervisory authority, with the main aim of ensuring compliance with requirements on credit institutions to have in place robust governance structure arrangements, including risk management processes, internal control mechanisms and remuneration policies. Evidence from the so called “Entry point letter” sent by the ECB to significant credit institutions under its remit on 31 March 2017 relating to its exercise of national powers¹⁹⁶ indicates that such prudential power is (or at least was in 2017) in place in 13 of the 19 EU countries participating in the SSM at the time. The circumstance that there are national legal systems that do not provide for such prudential supervisory power ought not to be regarded as an impediment to the harmonisation of the power at EU level, but rather as an additional reason to remove fragmentation and a potential source of regulatory arbitrage. This is also in line with the harmonisation approach followed by CRD VI with regard to the suitability assessment of the members of the management body and of the key function holders of the banks, whereby Articles 91 and 91a have harmonised the key substantive and procedural elements of the relevant supervisory power, leaving though some flexibility on the procedures for appointments.¹⁹⁷

¹⁹¹ EBA/GL/2019/02 of 25 February 2019.

¹⁹² Some minor deviations concern Spain and Poland.

¹⁹³ See para 12.1 and 12.2 of the cited EBA Guidelines.

¹⁹⁴ See the “Compliance Table” available on the EBA’s website.

¹⁹⁵ See RICCARDO GHETTI, *Unification, Harmonisation and Competition in European Company Forms*, European Business Law Review, Vol. 29, No 5, 2018, pp. 813-842. The author notes that the Regulation (EC) No 2157/2001 “on the Statute for a European company (SE)”, where it regulates amendments to an SE’s statutes, makes extensive reference to national laws with regard to the necessary *quorums*: an indirect evidence of the variety that still exists on this point among the national legal systems.

¹⁹⁶ The letter is publicly available on the ECB’s website, [here](#).

¹⁹⁷ The Commission’s initial proposal called for provisions aimed at fully harmonising the procedure for the suitability assessment of managers, in particular by establishing the so called *ex-ante* assessment mechanism (*i.e.*, to be completed before the prospective member of the management body takes up the position under consideration). At the time of that proposal, an *ex-post* assessment procedure of fitness and propriety was in force in Germany, France, Austria, Denmark, Greece, Finland and Estonia and, to some extent, in Italy, Poland, the Czech Republic, Sweden and Slovenia. As a result of the negotiations at Council level, the directive approved on 31 May 2024 the directive approved on 31 May 2024 (see Article 91) contemplates both of these procedural schemes, regulating in detail the effects that result when either of them occurs.

b) *Sanctioning powers. The possibility, and the need, to complete the substantive regime of breaches and corresponding sanctions*

CRD VI has marked a significant step forward in the harmonisation of the sanctioning powers of competent authorities.¹⁹⁸ We surmise, however, that the EUBA should bring about further progress in the area, by providing in the Omnibus Regulation (based on Article 114 TFEU) a fully harmonised regime of the sanctioning powers of the competent authorities. Sanctions concern, in a broad sense, the taking up and pursuit of financial activities and thus, as such, affect the functioning of the internal market. Full harmonisation of sanctioning powers would be essential to ensure the equal treatment of market players.

In this perspective there are two major issues that need to be addressed: a) the possibility (or the need) to complete and/or supplement the current provisions from a substantive point of view and b) whether it is advisable to establish common procedural rules. This subsection addresses the former, while the latter is considered in the next subsection.

Under the EUBA, the Omnibus Regulation would incorporate the provisions currently set out in Articles 65 ff. of the CRD VI, concerning: the minimum list of breaches that need to be sanctioned; the different types of sanctions, periodic penalty payments and administrative measures (with the corresponding maximum limits); the criteria for determining and quantifying the sanctions; the provisions on the *ne bis in idem* principle; and the rules on publication.

However, the Omnibus Regulation, in our view, could and should go a step further, by filling existing loopholes, currently left to the diverging traditions of the legal systems of Member States.¹⁹⁹

¹⁹⁸ With no claim to completeness, CRD VI updates the list of infringements subject to sanctions and other enforcement measures (Article 66 (1)). It also makes an effort at taxonomy: it provides a minimum set of instruments and measures and frames them in a precise category – “*administrative penalties*”, “*periodic penalty payments*” or “*other administrative measures*” (Article 66(2)) – apparently leaving no room to Member States’ discretion. The CRD VI also takes into account the implications of the *ne bis in idem* principle. In this perspective, both substantive and procedural safeguards are introduced. Accumulation of administrative penalties and criminal sanctions (*vis-à-vis* the same breach) is in principle allowed, provided that is strictly necessary and proportionate to pursue different and complementary objectives of general interest (Article 70(3)). To this end, Member States are required to put in place appropriate mechanisms ensuring that competent authorities and judicial authorities are duly informed, in a timely manner, where administrative proceedings and criminal proceedings are initiated against the same natural or legal person that may be held responsible for the same conduct in both proceedings (Article 70(4)). The previous application of criminal sanctions will be an additional criterion to be taken into account by competent authorities when determining the type and level of sanctions and other administrative measures (Article 70 (1)(i)).

¹⁹⁹ Nevertheless, the attempt to impose a single, uniform discipline on a subject as sensitive as sanctions seems inevitably destined to encounter some difficulties. For example, the opening of sanction proceedings is a very delicate issue. In fact, in some jurisdictions the principle of “mandatory” opening of sanctioning proceedings applies every time a (material) breach is ascertained; whereas in other jurisdictions competent authorities enjoy full discretion in such a decision. On this point, the new regulation could try to find a clear and uniform solution in a *tranchant* manner. However, on an issue of such systematic importance, uniformity may not be easy to achieve.

For example, the current *acquis* does not clarify whether the infringement need to be committed intentionally or negligently; *i.e.*, whether a subjective/psychological element is required for the imposition of sanctions. This (essential) clarification is currently left to national law. We surmise that in principle negligence should be sufficient. This would be in line with Article 18(1) SSMR (which concerns sanctions imposed by the ECB for breaches of directly applicable Union law) and with other provisions in EU financial law (see, for example, Article 131 MiCAR). This is also common at national level;²⁰⁰ and is obviously compliant with the principle of culpability, which applies to administrative penalties having a “*coloration pénale*”.²⁰¹

Another area where greater convergence via maximum harmonisation is necessary is the liability regime for natural persons. Under the CRD, legal and natural persons are both sanctionable.²⁰² Nevertheless, the CRD falls short of defining the interplay between the two: complementarity or mutual exclusion? National laws and practices are quite diverging on this point. A recent mapping exercise shows²⁰³ that in a significant number of Member States the responsibility of the natural person is not a precondition for the sanctioning of the legal person and *vice versa*.²⁰⁴ We surmise that the EUBA may follow this path, as a paradigm, ultimately clarifying that the two liabilities may be independent of each other. Such clarification would operate in two directions: uniformity and simplification.

Another thorny issue is the identification of circumstances under which natural persons may be held liable. Whereas CRD IV allowed Member States to impose sanctions on board members and other natural persons “*subject to the*

²⁰⁰ The solutions currently implemented at national level show a tendency to avoid objective (“positional”) liability: in principle, all Member States require a certain degree of psychological responsibility, going beyond the mere fact that the natural person held a specific function in the supervised entity.

²⁰¹ The ‘*Engel* judgement’ of the European Court of Human Rights (ECtHR, June 8, 1976, *Engel and Others v. Netherlands*, ECLI:CE:ECHR:1976:0608) stated that guarantees of a fair trial accorded to the accused in criminal law and procedure (Article 6 ECHR) also apply to administrative proceedings leading to a penalty having a “*coloration pénale*”. In more detail, the ECtHR established the criteria to identify administrative penalties having a “*coloration pénale*”. The “*Engel* criteria” – also adopted by the European Court of Justice (June 5, 2012, *Bonda*, C-489/10) – may be summarized as follows: *i*) the qualification of the offence under national law; *ii*) the actual nature of the offence; *iii*) the degree of severity of the sanction, which must be assessed in relation to the sanction envisaged in the abstract and not the sanction actually imposed.

²⁰² See new Article 65 (2).

²⁰³ Following the establishment of a working group on individuals in SSM sanctioning proceedings, a stocktaking exercise regarding sanctioning proceedings against natural persons in the SSM context (in particular on the legal system, case law, policies and experiences in each Member State) was conducted in April/May 2021 among the members of the working group as well as all Network Members willing to contribute. A total of 18 NCAs eventually submitted answers to the stocktaking exercise.

²⁰⁴ With no claim to completeness, based on the answers collected in the stocktaking exercise mentioned in the previous footnote, many Member States (*e.g.*, Austria, Germany, Spain, Portugal, Finland and Croatia) the liability of the supervised entity is not a precondition for the opening of a sanctioning procedure against a natural person; in a significant number of jurisdictions the legal person may be pursued even if the natural person responsible of the breach is not identified (*e.g.*, Cyprus, Spain, France, Italy Portugal).

conditions laid down in national law”,²⁰⁵ CRD VI no longer refers to national “*conditions*”.²⁰⁶ This paves the way for full harmonisation.²⁰⁷ Building on this, the EUBA could thus more clearly set out the harmonised regime for natural persons’ liability, by clarifying, for example, whether their liability is subject to conditions additional to those provided for the liability of legal persons (*e.g.*, an impact threshold on the organisation or on the legal person risk profiles).²⁰⁸

Furthermore, uniformity in sanctioning practices across the Banking Union would benefit from the definition of time limits for the imposition and collection of sanctions. In this regard, solutions may be tailored to align with the prevailing national practices.

Further inputs may eventually come from the report that the EBA must present to the Commission by 18 July 2029, *inter alia* on the degree of convergence reached among Member States, after the transposition of CRD VI, with regard to administrative measures and sanctions and periodic penalty payments imposed against legal or natural persons.²⁰⁹

c) The procedural regime for the adoption of both supervisory measures and sanctions and the level of Legislation required

The EUBA, in its Omnibus Regulation, would also include procedural provisions for the exercise of investigatory powers as well as for the adoption of supervisory and sanctioning decisions. This would ensure that the powers of the supervisory authority are exercised in practice in the same way and through the same rules of procedure throughout the European Union.

As pointed out since long in the legal scholarship, the EU competence in establishing common administrative procedures with sector-specific regulations is substantially undisputed.²¹⁰ Throughout time, the convergence of administrative law has been visible in many pieces of Level 1 Legislation, which

²⁰⁵ Article 65(2), in the wording before CRD IV.

²⁰⁶ New Article 65(2), as reworded by CRD VI.

²⁰⁷ The use of the conditional tense is obligatory, considering that even the new Article 65 (2) provides for the application of sanctions against natural persons – “*members of the management body, senior management, and key function holders, other staff whose professional activities have a material impact on the institution’s risk profile*” – “*provided they are held liable under national law*”. In other words, even in the new wording of the provision, a reference to national law remains.

²⁰⁸ The aforementioned stock-taking exercise showed that many national systems do not seem to differentiate between conditions of natural and legal persons’ liability. A different experience is the Italian one: natural persons’ liability requires additional conditions, including a significant impact of the breach (ascribed to the natural person) on the corporate organisation or on its risks (Article 144-*ter* Consolidated Banking Law, TUB).

²⁰⁹ Article 70(5)(d) CRD VI.

²¹⁰ PAUL CRAIG, *A General Law on Administrative Procedure, Legislative Competence and Judicial Competence*, European Public Law, Vol. 13, No 3, pp. 508-509; Id., *UK, EU and Global Administrative Law*, The Hamlyn Lectures (CUP 2015), pp. 449 ss. JESÚS FUENTETAJA, *Derecho Administrativo Europeo* 4 ed. (Thompson Reuters 2019), p. 453.

aimed at unifying or harmonising aspects of national administrative decision and procedures in specific EU sectors.²¹¹

A considerable number of sector-specific regulations establish detailed norms governing administrative procedures for national administrations applying EU law in specific areas.²¹² The European courts have never contested this practice to this date. The regulation on rules of procedures on competition,²¹³ the directive on integrated pollution prevention,²¹⁴ the European electronic communications code directive²¹⁵ are all but examples of it.²¹⁶ In addition, all national administrations within the EU are equally bound by general EU law principles of good administration as interpreted and applied by the European courts and enshrined in Article 41 of the EU Charter.²¹⁷

This process is not hindered by Article 298 TFEU either. As neatly shown by the *travaux préparatoires*,²¹⁸ the Lisbon treaty's addition was simply intended to codify the administrative procedures of EU institutions and agencies, rather

²¹¹ ROB J.G.M. WIDDERSHOVEN, *Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity?*, Review of European Administrative Law, Vol. 7, No 2, 2014, pp. 5-17: 10 ss.

²¹² For instance, Article 11, paragraph 4 of Council Regulation (EC) No 1/2003 “No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, [...] the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty”.

²¹³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance).

²¹⁴ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (recast) (Text with EEA relevance).

²¹⁵ Directive 2018/1972/EU of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (Text with EEA relevance).

²¹⁶ The Directive 2018/1972 is one of the main act for the detail of procedural rules imposed upon national administration. Many rules on administrative procedure of national regulatory authority are included in the Articles placed in “Chapter III – Provision of information, surveys and consultation mechanism”. By way of example, Article 22 on “Geographical surveys of network deployments” states that “1. National regulatory and/or other competent authorities shall conduct a geographical survey of the reach of electronic communications networks [...] The geographical survey shall include a survey of the current geographic reach of broadband networks within their territory, as required for the tasks of national regulatory and/or other competent authorities under this Directive and for the surveys required for the application of State aid rules. [...] Such forecast shall include all relevant information, including information on planned deployments by any undertaking or public authority, [...] For this purpose, national regulatory and/or other competent authorities shall request undertakings and public authorities to provide such information to the extent that it is available and can be provided with reasonable effort”.

²¹⁷ See generally TAKIS TRIDIMAS, *The General principles of EU Law* (OUP 2008), pp. 36-50.

²¹⁸ From the Convention on the Future of Europe Final Report of Working Group V on Complementary Competencies, CONV 375/1/02, Brussels 4 November 2002.

than to restrict the procedural authority of the EU in sector-specific regulations.²¹⁹ Despite long-standing debates about the potential for a general administrative code at EU level,²²⁰ Article 298 TFEU does not prevent the application of more specific Treaty provisions, which inherently grant EU institutions the power to establish procedural frameworks for sector-specific regulations.

In light of the above, the EUBA, with its Omnibus Regulation, could therefore provide harmonised rules concerning – besides the time-limits for the adoption of the relevant decisions – the exercise of administrative procedural rights, grading their extent according to the impact of the final measure on the addressee thereof. In this context, the right to be heard and the instrumental right of access to files, applicable to all proceedings, should be provided for and regulated, as well as the additional rights to remain silent and the separation of the investigative and adjudicatory functions (as well as its relationship with the full jurisdiction), applicable to the sanctioning proceedings only, in the assumption of the substantive criminal nature of the administrative pecuniary banking sanctions.²²¹

In addition to ensuring equal treatment of the addressees of supervisory and sanctioning measures across EU member States, a compendium of procedural provisions would have the additional merit of constituting a safeguard at EU level against possible complaints grounded on a violation of the general principle of good administration and – if ever the sanctions provided for in the EUBA are recognised as essentially criminal in nature – of Article 6 ECHR. Again with

²¹⁹ PAUL CRAIG, *A General Law on Administrative Procedure, Legislative Competence and Judicial Competence*, cit., pp. 508-509; LUIGI RAIMONDI, *Articolo 286 TFUE*, in ANTONIO ADAM (eds), *Trattati dell'Unione Europea* 2 ed. (Giuffrè Editore 2014), pp. 2323-2326.

²²⁰ See *inter alia* JACQUES ZILLER, *Is a Law of Administrative Procedure for the Union Institutions Necessary?*, *Rivista italiana di diritto pubblico comunitario*, No 3, 2011, pp. 609 ss.

²²¹ On the right to remain silent see, recently, PAOLO FERNANDES, DANIELE GALLO, ALESSANDRO NATO, *Stocktaking on the principle of nemo tenetur in the case law of the ECtHR and CJE*, *Eurojus*, No 2, 2024, p. 425. According to the ECtHR case-law, the right to remain silent lies at the heart of the notion of a fair trial under Article 6 ECHR. It protects the accused person from abuse and coercion by the investigating authorities and ensures that the prosecution is not based on evidence obtained against the will of the accused, through coercion or pressure. In that perspective, the right to be silent is thus a procedural projection of human dignity and freedom of self-determination and it does entail the right of the (natural) person concerned not to make any declaration which may lead, even indirectly, to self-incrimination (see ECtHR, 25 February 1993, *Funke v. France* (CE:ECHR:1993:0225JUD001082884), para 44; ECtHR, 8 February 1996, *Murray v. the United Kingdom* (CE:ECHR:1996:0208JUD001873191), para 45; ECtHR, 17 December 1996, *Saunders v. the United Kingdom* (CE:ECHR:1996:1217JUD001918791) paras 68 e 69; ECtHR, 19 March 2015, *Corbet and Others v. France* (CE:ECHR:2015:0319JUD000749411), para 34). On the other hand, the ECJ, dealing with undertakings under antitrust investigation (which are not criminal investigations, in either a formal or substantive sense) has held that, for such undertakings, silence is limited in scope. It does not preclude the obligation to answer to “questions of mere fact” posed by the Commission, nor the obligation to provide the Commission with pre-existing documents. For such undertakings, right to silence only entails the right not to answer questions regarding the purpose and motive of their actions or other questions which might positively involve the admission of an infringement (see C-374/87, *Orkem v. Commission* [1989], ECLI:EU:C:1989:387, para 27; C-301/04 P, *SGL Carbon AG* [2006] ECLI:EU:C:2006:432, paras 40 and 44-49).

regard to sanctions, it would also be consistent with national trends. Indeed, as shown by a recent stock-taking exercise, in most Member States some or all the guarantees applicable to criminal proceedings (such as, *inter alia*, the right of defence and right against self-incrimination) are also applicable to administrative offence proceedings.²²²

Key considerations

The EUBA, completing a process already put forward by CRD VI, would ensure maximum harmonisation via its Omnibus Regulation for national supervisory powers and, in turn, would complete the harmonisation with regard to the remaining national supervisory powers, such as those on outsourcing arrangements, on related party transactions and on amendments to credit institutions' articles of association, currently not covered by CRD, building, as to outsourcing arrangements and related party transactions, on the relevant EBA guidelines.

The EUBA, with its Omnibus Regulation, would also provide maximum harmonisation of the competent authorities' sanctioning powers, building on Articles 65 ff CRD and taking the harmonisation exercise to completion in this area.

The EUBA may also establish – Article 298 TFEU allows it for sector specific regulations – uniform procedural rules for both supervisory and sanctioning proceedings, in light of the principle of good administration (as a general principle of EU law) and the fair trial standards (Article 6 ECHR).

4. Harmonisation of criminal offences in the banking sector

Enforcement of supervisory actions may need, in exceptional cases, the support of criminal sanctions. There is very little harmonisation in this area. However, **Article 83(2) TFEU in principle allows harmonisation of criminal sanctions, through a separate directive having that article as its legal basis, and the banking sector may prove a quite appropriate environment where to give effect to that Treaty provision** to safeguard the exercise of banking supervisory tasks and the general interests underpinning them, within the constitutional framework of the Member States.

Under Article 83(2) TFEU *“if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such*

²²² This should be the situation, among others, in Belgium, Austria, Germany, Italy, Spain, Greece, Lithuania, Slovenia and Portugal.

directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question [...]”.

In its communication “Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law” (COM(2011) 573 final of 20.9.2011, p 10 and p. 12) the Commission – consistently with its previous communication “Reinforcing sanctioning regimes in the financial services sector” (COM(2010) 716 final) of 8.12.2010, p. 14) – included within the fields of EU policy, where it assessed an enforcement deficit, requiring the application of criminal law measures to ensure the protection of the functioning of the financial sector.

Following the abovementioned Communication, a directive on criminal sanctions for market abuse (Directive 2014/57/EU – Market Abuse Directive) was adopted, supplementing the relevant administrative rules contained in a separate regulation adopted on the basis of Article 114 TFEU. Recital 5 of said directive requires that *“the adoption of administrative sanctions by Member States has, to date, proven to be insufficient to ensure compliance with the rules on preventing and fighting market abuse”*.²²³

In light of the above and subject to a “necessity and proportionality” test,²²⁴ criminal sanctions could also be introduced for some extremely serious violations of the prudential framework. Clear examples are offered by the criminal offences of (a) obstruction of the supervisory functions exercised by the NCA or by the ECB in its supervisory capacity, resulting in considerable difficulty or a serious slowdown in the performance of supervisory activities, or (b) unauthorised exercise of the banking activity. These offences do not find any uniform sanctioning treatment in the Member States, despite their proven European dimension (undoubtedly extended to the entire SSM due to the centralised competence of the ECB with regard to the authorisation of banking activities and its supervision of all significant credit institution). This divergence

²²³ See the Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), which highlights that *“[t]he Directive was introduced with a view to reinforcing the integrity of financial markets and to enhancing investor protection and trust in those markets. Overall, the Directive provides added value by buttressing these goals through criminal law and by ensuring the effective implementation of the [MAR] Regulation for at least serious cases of market abuse offences. With the exception of Article 5 (market manipulation), the large majority of the Member States has correctly transposed the provisions of the Directive on criminalisation of market abuse offences, on criminal penalties and the liability of legal persons. For some articles, like the provisions on jurisdiction, no transposition issues were found at all. [...] The assessment shows that the application of the Directive could still be improved: while most of the Directive’s provisions have each been transposed by a large majority of the Member States, in total 11 Member States had transposition issues with one or several provisions [...]”*.

²²⁴ See p. 7 of the above mentioned Communication, where it requires that *“the legislator needs to analyse whether measures other than criminal law measures, e.g., sanction regimes of administrative or civil nature, could not sufficiently ensure the policy implementation and whether criminal law could address the problems more effectively”*.

undermines the internal market and leaves a certain scope for perpetrators of said misconducts in jurisdictions which do not even provide for criminal sanctions for these offences.

As recalled by the communication from the Commission (p. 7) “*EU legislation regarding the **definition of criminal offences and sanctions** is limited to ‘**minimum rules**’ under Article 83 of the Treaty. This limitation rules out full harmonisation. At the same time, the principle of **legal certainty** requires that the conduct to be considered criminal must be defined clearly*”. Moreover, (p. 8) “*regarding **sanctions**, ‘minimum rules’ can be requirements of certain sanction types (e.g. fines, imprisonment, disqualification), levels or the EU-wide definition of what are to be considered aggravating or mitigating circumstances. In each case, the EU instrument may only set out which sanctions have to be made ‘at least’ available to the judges in each Member State*”.

Key considerations

The EUBA may include a separate minimum harmonisation directive based on Article 83(2) TFEU to set out the key essential features of criminal offences with an EU dimension such as the obstruction of supervisory functions and the unauthorised exercise of banking activities.

SECTION V.
THE EUBA AND THE PUBLIC AND PRIVATE ENFORCEMENT
OF TRANSPARENT AND FAIR BANK-CUSTOMER
RULES OF CONDUCT

1. The problem and how to fix it

a) *The state of the art: a fragmented consumer-centric regulatory puzzle*

The European Supervisory Authorities noted in their **Joint Report of July 2019**,²²⁵ that “*there is no general Level 1 text harmonising the conduct rules that are applicable to the provision of banking activities*”: “[w]hile a number of directives include conduct rules for specific banking activities and products, i.e. PSD2, the MCD, the PAD and the Consumer Credit Directive (CCD), or only for specific circumstances, such as the Distance Marketing of Financial Services Directive (DMFSD), there are no generally applicable provisions applying to the offering of banking services to customers”.²²⁶ According to the Report, such a situation creates the “*risk of regulatory arbitrage*”; hence the call for the EU co-legislators to consider “*reinforcing the harmonisation of the Level 1 provisions governing conduct of business rules in the banking sector and clearly setting out and allocating responsibilities between the home and the host CAs with regard to the application of consumer protection and conduct of business provisions*”.²²⁷

This call was echoed in the **EU Parliament Resolution of 5 July 2022 on Banking Union**,²²⁸ where, *inter alia*, it was noted that: i) “*the ultimate beneficiaries of the Banking Union should be consumers and businesses in the real economy*”; ii) “*despite strong EU consumer protection rules, national rules implementing EU consumer protection requirements vary across the Banking Union, and further harmonisation is therefore required*”.²²⁹

Despite such stances, no significant progress has been made so far, with the prominent exception of payment services, for which PSD2 sets out a well-coordinated framework of rules of conduct that licensed entities must comply with *vis-à-vis* users. Otherwise, there is still a lack of a harmonised set of conduct rules for the offer and provision of banking services and products to customers (including, but not limited to, consumers). The CCD and MCD have been mostly conceived as sectoral consumer protection instruments primarily grounded on the legal basis of Article 169 TFEU, confined to financing contracts only, with weak coordination with the remaining banking legislation (CRD, CRR, EBAR). The result is a fragmented consumer-centric regulatory puzzle.²³⁰

More specifically, Directive 2008/48 (CCD1) did indeed dictate a number of pre-contractual and contractual duties upon the creditors, designed to regulate

²²⁵ ESAs, *Report on cross-border supervision of retail financial services*, 9 July 2019 (JC/2019-22).

²²⁶ See the cited *Report*, para 62.

²²⁷ See the cited *Report*, para 75.

²²⁸ European Parliament resolution of 5 July 2022 on Banking Union – annual report 2021 (2021/2184(INI)) (2023/C 47/06).

²²⁹ See the cited *Resolution*, Consideration No 25.

²³⁰ A similar conclusion has been already formulated by FILIPPO SARTORI, *Vigilanza di tutela e trasparenza*, *Rivista Trimestrale di Diritto dell'Economia*, Suppl. No 3 to No 1, 2022, p. 2 and ff.

the lending activities *vis-à-vis* consumers, but it did not include a harmonisation framework for the public enforcement of those duties, merely providing (Article 20) that “*Member States shall ensure that creditors are supervised by a body or authority independent from financial institutions, or regulated*”, “*without prejudice to Directive 2006/48/EC*”, with broad discretion to States also regarding the sanctions to be eventually imposed (Article 23).

The MCD itself – which explicitly states (in its Recitals)²³¹ the aim to pursue protection goals together with those of stability and enhanced efficiency in the mortgage credit market, in response to the serious weaknesses uncovered by the global financial crisis of 2007-2008 – does not go beyond the consumer perimeter and contains a still quite basic harmonisation of the objectives of public supervision over creditors as well as of the tasks to be fulfilled by supervisors, and their related powers. Indeed, especially with specific regard to the activities performed by credit institutions under the MCD, Article 5 of the Directive grants Member States large leeway as to the authority/ies to be entrusted with supervisory tasks as well as in respect to the investigating and enforcement powers to be conferred upon it/them.²³² Even less does the MCD seek to harmonise the private remedies that can be used to enforce the rules set out therein.

The powerful synergy, and occasional friction, between the objectives of consumers’ protection, on the one hand, and of stability, competitiveness, efficiency of the credit market, on the other – already witnessed in the preamble of the MCD – is now reflected in the Recitals of the new Consumer Credit Directive 2023/2225 (CCD2), of 18 October 2023. CCD2 – after having expressly recalled, in Recital (11), Article 169 TFEU on the protection and promotion of consumers’ interests – significantly refers in Recital (82) also to the goals of market transparency and stability, in relation to which Member States should ensure “*that appropriate measures are in place for the regulation or supervision of creditors*”. However, non-consumers’ contracts remain outside the scope of CCD2 and there is still very little harmonisation of the supervisory architecture and, in particular, of supervisory powers in this respect.²³³ Similarly to the MCD, the CCD2 does not regulate the consequences under private law of a breach of the rules it lays down and is thus silent on private enforcement and private causes of action.

²³¹ See, in particular, Recitals 3 and 4, as well as also 58 and 59.

²³² Under Article 5(3) MCD, Member States are given the choice of whether to empower:
(a) either one of the competent authorities as defined in Article 4(2) of Regulation (EU) No 1093/2010;
(b) or (alternatively or concurrently) to authorities other than the competent authorities referred to in point (a) “*provided that national laws, regulations or administrative provisions require those authorities to cooperate with the competent authorities referred to in point (a) whenever necessary in order to carry out their duties under this Directive, including for the purposes of cooperating with the European Supervisory Authority (European Banking Authority) (EBA)*” as required under the directive. The supervisory toolkit *vis-à-vis* credit institutions, for the purposes of compliance with MCD, is not detailed by the directive, which conversely is more focused on the distribution of tasks between home and host authorities in case of cross-border activities (see Article 34).

²³³ See, in particular, Articles 37 and 41.

Level 1 Legislation has so far consolidated in a single regulation – the Consumer Protection Cooperation Regulation (Regulation (EU) No 2017/2394, also known as the CPC Regulation-CPCR), adopted under Article 114 of the Treaty – the harmonised framework of so-called “minimum powers” of investigation and enforcement to be conferred on national authorities in order to identify and contrast cross-border infringements of the many consumer protection-oriented EU Directives and Regulations listed in the CPC Regulation, including both the CCD2 and the MCD.

In a broadly similar vein, Level 1 Legislation – with the dual objective of contributing to the functioning of the internal market and to the achievement of a high level of consumer protection – with Directive 2020/1828 has harmonised some substantive and, even more, procedural aspects of the private enforcement of a long list of consumer directives and regulations, including the CCD and the MCD, by introducing the so-called “*representative actions for the protection of the collective interests of consumers*”. In particular, as stated in the Recitals,²³⁴ the Directive enables qualified entities that represent the collective interests of consumers to bring representative actions for both injunctive measures and redress measures against traders that infringe those EU provisions, so as to “*boost consumer confidence, empower consumers to exercise their rights, contribute to fairer competition and create a level playing field for traders operating in the internal market*”.

However, such a cross-cutting approach – whose ambition is to have in place sufficient public and private enforcement measures in response to any breach of an extremely broad range of consumer protection rules resulting from the directives and regulations falling within the scope either of the CPCR or the Directive 2020/1828 – seems to overlook the specificities of banking activity, which is now largely harmonised at EU level (for micro-prudential purposes), and it risks further weakening the tenuous link that exists between the MCD and CCD2 and CRD/CRR/EBAR. It goes without saying that the banking business is to a large extent conducted through banking contracts and banking contractual relationships with end customers, so that the rules of conduct that banks must observe and implement in that context, and in particular the measures (both public and private enforcement) that can be taken in the event of a breach of those rules, may have a material impact on the risks matrix of the bank(s), which is relevant for prudential supervision.²³⁵

²³⁴ See Recitals 6, 7, 8 and 9.

²³⁵ Significantly CRR3 (see Article 4(1) subparagraphs (52) and (52a)) encompasses within the “*operational risk*”, relevant for micro-prudential purposes, also the “*legal risk*”, defined as “*the risk of loss, including, expenses, fines, penalties or punitive damages, which an institution might incur as a consequence of events that result in legal proceedings, including (..) misconduct events, which are events that arise from wilful or negligent misconduct, including inappropriate supply of financial services*”.

The Court of Justice in *Grande Chambre*, with its judgment of 15 July 2021²³⁶ on the preliminary ruling requested by the French *Conseil d'État* on the EBA Guidelines of 22 March 2016 on product oversight and governance, has in fact suggested a way forward for an integrated and complementary reading of the objectives of consumer/customer protection and of safety and soundness and financial stability. Notably, in dismissing the doubts raised by the national court as to whether the EBA might have acted *ultra vires* with the adoption of such Guidelines, the Grand Chamber finds that “*the conduct of financial institutions, including as regards retail sales, concerns regulatory authorities not only from a consumer protection perspective, but also from a prudential perspective and in relation to the objective of promoting market confidence, financial stability and the integrity of the financial system at the national and European levels*”.²³⁷

The same philosophy – according to which the concurrent objectives of sound and prudent management, market stability, efficiency/competitiveness of the market and consumer protection need to be reconciled – appears also to be at the heart of the extension of the EBA’s remit in the area of consumer protection, as set out in Regulation (EU) No 2019/2175, amending EBAR. The 2019 amendment, on top of conferring on the EBA the task of analysing market practices and risks for consumers in the banking sector (Article 9(1) EBAR), provides for: i) the establishment within the EBA of the “*Committee on consumer protection and financial innovation*” (Article 9(4)); ii) the assignment of product intervention powers to the EBA (under the conditions laid down in the legislative acts referred to in Article 1(2), which expressly encompass both the CCD and the MCD) with respect to financial products, instruments or activities that have the potential to threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, but alternatively even when they may potentially “*cause significant financial damage to customers or consumers*” (Article 9(5)).²³⁸ It remains the case that neither the CCD2 nor the MCD set out the conditions for the EBA to exercise such

²³⁶ Case C-911/19, *Fédération bancaire française* (FBF).

²³⁷ See para 105. Indeed, the cited consideration echoes the EBA’s words as resulting directly from the contested Guidelines (on product oversight and governance arrangements for retail banking products – EBA/GL/2015/18), where it is noted that “[d]evelopments in the markets for financial services in recent years have shown that failures in the conduct of financial institutions towards their customers can, not only cause significant consumer detriment, but also undermine market confidence, financial stability and the integrity of the financial system” (p. 3).

²³⁸ On this see RAFFAELE D’AMBROSIO, STEFANO MONTEMAGGI (eds), *Private and public enforcement of EU investor protection regulation – Conference papers*, Quaderni di ricerca giuridica della Consulenza legale della Banca d’Italia, No 90, October 2020, which highlight, among other things, that “[...] also after the reform, Article 9(5) continues to be a not self-standing empowerment clause, as it refers to cases provided for under different specific provisions of directly applicable EU law. In other words, it is still true that the powers under Article 9(5) may only be exercised if specified in the sectorial legislative acts referred to in Article 1(2) [...] This does not mean that Article 9(5) does not have any prescriptive content at all. Prescriptive provisions are those identifying the interests protected and those imposing the obligation to review the adopted measures at appropriate intervals. These prescriptions set out some general principles applicable to all specific cases provided for in other EU legislative acts, unless the latter explicitly derogate said principles [...]” (p. 65).

powers of intervention in relation to unsafe products,²³⁹ nor – and this is where the gap with micro-prudential EU legislation is most apparent – do they use the EBA’s regulatory powers to harmonise, as via Level 2 Regulation, the conduct of business rules covered by them.

b) The fundamentals of the proposal

Against this background, the EUBA could reshape the current *acquis* on banking products and contracts as an essential part of the broader EU regulatory framework concerning the exercise of banking activities and the related banking supervision. To this aim we surmise that **stronger and more efficient coordination between the two areas of banking law should be established with Level 1 legislation, while recognising their respective distinctive features.** This is not to argue that the objectives of customer protection as reflected in the rules of conduct for banks in their relations with their customers should be subordinated to the objectives of micro and/or macro-prudential stability; nor is it to advocate that rules of conduct supervision should be part of prudential supervision. Except in very extreme circumstances, where potential frictions need to be solved, in accordance with the case law of European courts,²⁴⁰ giving high priority to financial stability, as a matter of principle customer protection and safety, on the one hand, and financial soundness, on the other, are complementary and self-reinforcing values, which should be given equal priority.

In light of the above, the EUBA could advance the existing *acquis* as follows:

- i. ***a uniform set of target-oriented rules of conduct:*** by defining and incorporating within the Omnibus Regulation a set of rules of conduct for banks in their relationships with customers, governed by a general rule which explicitly states their ultimate purpose,

²³⁹ EBA has been granted temporary product intervention powers under Article 41 of the Regulation (EU) No 600/2014 on markets in financial instruments (MiFIR). Under this provision – which cross-references to Article 9(5) EBAR – the EBA may, under certain circumstances, prohibit or restrict the marketing, distribution or sale of structured deposits in the Union not only in case of threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union, but in alternative to address “*a significant investor protection concern*”. The entities to which these powers can be applied are credit institutions authorised under CRD and firms authorised under Directive 2014/65/EU (MiFID). Temporary product intervention powers are also granted to the EBA under MiCAR (Article 104). In addition, it is worth highlighting that the Commission’s *Proposal for a Regulation of the European Parliament and of the Council on payment services in the internal market* vests EBA with product intervention powers to temporarily prohibit or restrict in the Union a specific type or a specific feature of a payment service or an electronic money service identified as potentially causing harm to consumers or threatening the orderly functioning and integrity of financial markets (see [here](#), Recital 140 and Article 104).

²⁴⁰ See *Banco Santander, SA c. J.A.C. and M.C.P.R.*, C-410/20, ECLI:EU:C:2022:351; *Novo Banco SA and a. c. C.F.O. and a.*, C-498, 499 and 500/22, ECLI:EU:C:2024:686. In its recent preliminary ruling in the case C-324/23, *Myszak* (ECLI:EU:C:2025:324), the Court of Justice once again addressed the complex relationship between consumer protection legislation and rules on the crisis of credit institutions, by clarifying that the principles set out in *Banco Santander* and *Novo Banco* apply with reference to the “*entities created after the resolution procedure had been initiated*”, not with respect to the “*residual institution*”.

i.e., to ensure transparency and fairness in bank-customer relations in order to protect customers, and in particular consumers, also in the interests of the competitiveness and efficiency of the banking market and with due regard, at the same time, to the interests in the soundness of the market participants and of its overall stability; therefore a sort of *Grundnorm* suitable to provide guidance for the interpretation of the specific rules of conduct;

- ii. ***a highly harmonised and dedicated public enforcement toolkit:*** by harmonising as far as possible with the Omnibus Regulation the public enforcement powers and tools aimed at providing a uniform and appropriate response to breaches of the conduct rules referred to in point (i), consistently with the steering objectives also recalled in point (i). At the same time, the Omnibus Directive, should lay down the requirements to be met by the national authorities entrusted with exercising such specific powers, particularly where an authority other than that responsible for prudential supervision is designated, with strong coordination mechanisms to be ensured, in that case, by the Member State.
- iii. ***an EU-regulated system of private enforcement:*** by aligning, with the Omnibus Regulation, private-law remedies for violation of the rules of conduct under point (i).

The legal basis for the whole exercise would be Article 114 TFEU, on the grounds that there can be no proper functioning of the internal market for banks without a robust approximation of the rules governing the conduct of banks in their relations with customers and the relevant framework of public and private enforcement, in strict coordination with the prudential rules on the exercise of banking activity. This is supported by experience in neighbouring areas.

In the MiFID context, this has been the regulatory path for twenty years now as regards the provision of investment services.²⁴¹

MiCAR is another paradigmatic example of a regulation under Article 114 TFEU which also regulates the conduct of business rules that licensed entities must follow in their relationship with “*retail holders*”.

Likewise, in June 2023, the Commission presented a proposal for a Regulation on payment services under Article 114 TFEU, the so-called PSR, which is intended to bring together the Union’s rules on the conduct of payment services activities, including the rights and obligations of the parties involved: *i.e.*, payment services providers, on the one hand, and users, on the other. The text adopted by the Parliament at first reading in April 2024 confirms this design.

²⁴¹ However, in the different field of prospectuses’ legislation, see ESMA’s Final Report of 12 June 2025 concerning civil prospectus liability, which takes note that harmonisation would require deep comparative analysis and could not be achieved in the short-term (see p. 6). The Report is available [here](#).

It is noteworthy that the draft regulation, in accordance with the principle of proportionality, provides for differentiated and progressive levels of protection: *i)* rules that are mandatory regardless of the subjective characteristics of the user; *ii)* rules that can be waived by agreement between the parties only on the condition that the user does not have the *status* of a consumer (rules that are therefore mandatory only in consumer relations).²⁴² In addition, there is a sort of “opting-in mechanism” for the protection of micro-enterprises, whereby each Member State has the option of applying the rules of Title III of the PSR, which deals with “rights and obligations in relation to the provision and use of payment services”, also to micro-enterprises (as defined in Commission Recommendation 2003/361/EC), in the same way as to consumers.²⁴³

We surmise that also for banking contracts (other than those relating to payment services and which shall fall within the scope of the PSR), time has come to **establish, with Level 1 Legislation, rules that would define uniformly:**

- a) the conduct duties (pertaining both the pre-contractual and the contractual phase) that banks must respect in their relations with customers, irrespective of the subjective quality of the latter;
- b) the conduct duties in relations with consumers only;
- c) the organisational measures/procedures that banks must adopt (including the remuneration policy not only for their managers and staff, but also for their distribution networks) in order to ensure that at every step of their client-oriented activities, starting from product design, there is regular and specific attention devoted to the transparency of the conditions that will be offered in the market and to the fairness of conduct towards customers and, in particular, consumers.

Such rules should have the nature and the force of a regulation and should therefore be included in the Omnibus Regulation. The decision on whether or not to extend the rules under *b)* to micro-enterprises should be taken once and for all at the level of Union law, without leaving to the individual Member States an option which could have the effect of maintaining an uneven playing field. The more technical content of the rules of conduct would be then detailed by **Level 2 Regulation**. It is beyond the scope of this Reflection Paper to go into a detailed examination of all the possible non-essential technical content. By way of example, one could however consider the content of the annexes to both the CCD2 and the MCD, which mainly concern the mathematical formula for calculating the annual percentage rate of charge (APRC) and the specific elements

²⁴² See Article 27(1) of the draft regulation, European Parliament legislative resolution of 23 April 2024 on the proposal for a regulation of the European Parliament and of the Council on payment services in the internal market and amending Regulation (EU) No 1093/2010 (COM(2023)0367 – C9-0217/2023 – 2023/0210(COD)).

²⁴³ See Article 27(3) of the draft regulation.

of the main pre-contractual information instruments provided for by the two directives (the so-called SECCI in the case of the CCD2 and the so-called ESIS in the case of the MCD).²⁴⁴ Likewise, organisational rules – concerning, *inter alia*, the internal policies and procedures that banks must adopt to design, distribute, monitor and review the products, the policies that they are required to implement for the remuneration of management/staff involved in these tasks as well as of third parties engaged in the sales and distribution network, and the procedures for handling customer complaints – should be detailed by Level 2 Regulation.

Also supervisory powers relating to the public enforcement of conduct of business rules should be included in the Omnibus Regulation.

Conversely, the rules governing the *status* and organisation of the national authorities entrusted with such powers, and in particular the coordination mechanisms in the event that these authorities are not the same as those responsible for prudential supervision, would remain at the level of the Omnibus Directive, taking into account the room for *manoeuvre* to be left to the Member States in this respect.

Finally, as far as private enforcement is concerned, it is our view that the relevant provisions could be part of the Omnibus Regulation: as will be further discussed in the last part of this Section, this should not be deemed precluded by the persisting Member States' prerogatives in private contract law.

Key considerations

The EUBA would reshape the current EU legislation on banking products and contracts – which currently appears as a fragmented consumer-centric regulatory puzzle – as an essential pillar of the broader EU regulatory framework on the exercise of banking activities, with strong synergies with prudential supervision.

In particular, the EUBA would: i) define in the Omnibus Regulation a uniform set of target-oriented rules of conduct, applicable not only to consumers but also, to a certain extent and under certain conditions, to customers of banking services and activities (not covered by the PSR) ii) draw up in the Omnibus Regulation a highly harmonised and dedicated public enforcement toolkit, and would complement this, in the Omnibus Directive, with organisational and coordination rules for the authorities to which supervision of conduct is conferred; iii) develop in the Omnibus Regulation a harmonised private-law enforcement regime.

²⁴⁴ Currently the CCD2 (Article 30(5) and Article 45) essentially delegates to the Commission the power to modify certain elements of the formula for calculating the APR, subject to the occurrence of contingencies affecting the formula, but no delegation is granted with regard to the content of the SECCI. Similarly, the MCD limits the delegation of powers to the Commission to the updating of the formula (Article 17(8)) or to the updating of the ESIS, but only in connection with the emergence of new products (Article 14(9)).

2. Towards the harmonisation of public enforcement: authorities and powers

a) Competent authorities: where we are now and future perspectives

First of all, the EUBA should establish the essential features of “conduct supervision”, laying down the main requirements to be met by the national authorities responsible for consumer/customer protection in the field of banking activities and services.

In this respect, it should first be recalled that, in the Euro area and within the SSM, consumer/customer protection is not among the supervisory tasks which can be conferred on the ECB, considering that (similarly to AML supervision) it is related to micro-prudential supervision, but is not part of it.²⁴⁵

Against this backdrop, the EUBA should be aligned with the prevailing model of authorities operating in this field in the Member States based on comparative analysis. **Such analysis shows that the micro-prudential supervisory authority is best placed to enforce transparent relationships between credit institutions and their customers.**²⁴⁶⁻²⁴⁷

²⁴⁵ See Article 127(6) TFEU as well as Recital 28 SSMR. See, recently, also the ECB opinion CON/2023/25 on a Belgian draft law aimed at introducing two new obligations for credit institutions: (1) to provide a universal banking service; and (2) to collectively guarantee a minimum spread of automated teller machines (ATMs), self-banking machines and systems for printing bank statements. According to the draft, these new obligations should have fallen within the framework of the Belgian banking law, by attracting them to the general enforcement and supervisory system envisaged therein with reference to the prudential supervision, which in turn identifies the ECB and the NBB (National Bank of Belgium) as competent authorities. The ECB’s replied that: “the ECB understands that the new obligations do not relate to the prudential supervision of credit institutions. In accordance with Article 127(6) of the Treaty, the SSM Regulation confers tasks on the ECB concerning the prudential supervision of credit institutions. In this respect, the SSM Regulation clarifies that supervisory tasks not conferred on the ECB, including consumer protection, should remain with the national authorities¹⁵. Therefore, the ECB understands that the draft law cannot include any role for the ECB in its prudential supervisory function. (...) In the interest of legal certainty regarding the role of the prudential supervisors under the SSM Regulation, the ECB recommends keeping the new obligations under the draft law separate from those on prudential supervision, and hence not to include the new obligations in the Banking Law”.

²⁴⁶ This institutional model is currently adopted in Italy, France, Spain, Portugal, Ireland, Germany, Luxembourg, Finland, Lithuania, Croatia, Estonia, Slovenia, Slovakia, and Greece.

²⁴⁷ Therefore, the practical experience confirms that there is indeed a very tight relationship between the different goals of supervision already highlighted above (see previous para 1.1). Prudential supervision has as its ultimate goal the safe and sound management as well as the stability of the credit institution (and, more generally, that of the financial system). Fair and conflict-free customer relationships also underpin this stability. A clear framework of transparency rules and effective compliance contribute to reducing the credit institutions’ legal, reputational, and liquidity risks, and thus benefits their safety and soundness. Customer protection, in turn, is strengthened by capital and robust organisational arrangements.

Comparative analysis also shows, however, that some national legislators have made a different choice and have identified a different competent authority.²⁴⁸ When the authority entrusted with consumer/customer protection tasks is different from the prudential supervisor, a need for strong coordination arises. This need is already recognised by the MCD and the CCD2 with regard to their respective scope of application, but the two directives defer the coordination procedural mechanisms to national legal framework (*e.g.*, mandatory consultation, issuance of an opinion, *etc.*).²⁴⁹

We surmise that, building on the current CCD and MCD provisions, the EUBA should establish, as a default rule, that the authority responsible for consumer protection in the banking sector coincides with the authority responsible for prudential supervision (“*one authority scenario*”). At the same time, it should grant Member States the option to adopt different institutional solutions (*i.e.*, multiple authorities), provided that strong coordination mechanisms are put in place (“*multiple authorities scenario*”).

These rules should be included in the Omnibus Directive and should also spell out the independence and accountability requirements of the designated national authorities.²⁵⁰ In the “one authority scenario”, the authority responsible for consumer/customer protection would obviously be required to comply with the same independence and accountability standards as provided for the authority in charge of prudential supervision, as discussed in Section IV.²⁵¹

²⁴⁸ Examples come from Belgium (the National Bank of Belgium (NBB) is the prudential supervision authority, but it does not have any competences regarding the consumer protection in the field of financial services); Cyprus; and Austria (the *Finanzmarktaufsicht* (FMA) is competent authority for conduct-based financial market rules such as MiFID II and PSD II, but not for the CCD and only partly for the MCD). Even if it is no longer a Member State, it is relevant to mention the case of United Kingdom (UK). As a result of the 2008 financial crisis, the single financial regulatory body that existed at the time, (FSA) was replaced by two different authorities in 2013, one in charge of the conduct-of-business supervision (Financial Conduct Authority, FCA), and the other agency responsible for the prudential supervision (PRA). For a comparison between the two different models referred to in the text, within a wider description of the three models of financial supervision being practised in Europe, please see EDDY WYMEERSCH, *The structure of financial supervision in Europe: about single financial supervisor, Twin Peaks and multiple financial supervisors*, European Business Organization Law Review (EBOR), Vol. 8, No 2, 2007, pp. 15 and 16; see also *Economic Theories and Institutional Design*, in KERN ALEXANDER, *Principles of Banking Regulation* (CUP 2019), pp. 33-60.

²⁴⁹ It should be noted that even in systems where the prudential supervisor is responsible for consumer/customer protection in the banking market, there are often other authorities whose mandate is to address unfair commercial practices. MCD and CCD2 also fail to address this coordination issue.

²⁵⁰ Please note that, at present, pursuant to Articles 41 CCD2 and MCD Member States have to ensure that designated competent authorities fulfil the criteria set out in Article 5 of Regulation (EU) No 2017/2394 (CPC Regulation-CPCR), mainly focused on adequate resources, which is pivotal to ensure performance of tasks without undue influence (“*Member States shall ensure that competent authorities and single liaison offices have the necessary resources for the application of this Regulation, including sufficient budgetary and other resources, expertise, procedures and other arrangements*”).

²⁵¹ The conferral of prudential and conduct supervision to the same institution might give rise to possible conflict of interest, to be properly managed.

In the “multiple authorities scenario”, the directive would ask Member States to ensure that the competent authority has the expertise, resources, operational capacity, powers and independence that are necessary to carry out the functions relating to conduct supervision, leaving some room for national discretion. This solution seems to be more in line with the possibility for the Member States to choose, at their discretion, among different institutional architectures.

In parallel, the Omnibus Directive should define in detail the coordination mechanisms to be put in place in the “multiple authorities scenario” such as exchange of information (derogating from the restrictions imposed by their respective professional secrecy regime), mandatory consultation of the micro-prudential supervisory authority (*i.e.*, through mandatory opinions to be released by the prudential supervisor) and a mediation mechanism in case of diverging positions (more precisely, on the interpretation and practical implementation of the rules of conduct under discussion), also leveraging on EBA’s role under Article 19 EBAR.²⁵² This mandate could also be extended by the EUBA to disagreements without cross-border elements, *i.e.*, related solely to the national context (micro-prudential supervisory authority *v.* the authority mandated with conduct supervision). Indeed, such a task could easily be included in the EBA’s more general task of promoting the consistent application of legally binding Union acts, in particular by contributing to a common “supervisory culture”, for both prudential and conduct supervision.

A final difficult issue that remains in the background is the relationship between the rules of conduct in the banking sector (currently laid down in the CCD/CCD2 and MCD, and forward-looking in the proposed EUBA) and the general rules on unfair commercial practices (Directive 2005/29/EU on unfair business-to-consumer commercial practices). Both sets of rules aim to protect consumers, as the weakest part of the relationship, and they sometimes overlap. In other words, a breach of a sectoral rule of conduct may also result in an unfair commercial practice.

In order to regulate the interrelationship between these rules,²⁵³ Article 3(4) of Directive 2005/29/EC establishes its own primacy in case of “conflict” with the provisions of “*other Community rules regulating specific aspects of*

²⁵² Currently, a competent authority may request the EBA to assist in reaching an agreement between it and another competent authority. If such a request is made, there is an initial period during which the EBA seeks to facilitate conciliation between the competent authorities. If no agreement is reached within this conciliation period, Article 19 empowers the EBA to adopt a decision requiring the competent authorities to take specific action or to refrain from taking specific action in order to settle the matter, with binding effects on the authorities concerned, in order to ensure compliance with Union law.

²⁵³ Directive 2005/29/EC was designed as a “framework directive” which, not surprisingly, was built around a single “general prohibition” of unfair practices that harm consumers, whether they are investors, savers, insureds, customers or users. This was exactly why it was important to coordinate the “general” rules it imposed with the “specific” rules contained in other sectoral directives.

unfair commercial practices”.²⁵⁴ The possible clash of provisions often brings with it a clash of competences, whenever the competence to intervene on unfair commercial practices (put in place by a credit institution) is entrusted to national authorities other than those in charge of conduct supervision: a situation that is far from rare, as an analysis of Member States’ experiences indicates. Specifically, the question arises as to which authority (with what powers and on the basis of which legal framework), should target the credit institutions that, by violating rules of conduct, also engages in one or more unfair commercial practices. The issue is thorny and sensitive,²⁵⁵ and is also conditioned by the choices made by Member States in transposing the relevant EU Directives and goes beyond the scope of this Reflection Paper. Suffice it to say that an EUBA should not ignore this issue. In particular, it could take the opportunity to clarify the relationship between these different regulatory frameworks and the relationship between powers entrusted to the various competent authorities in this peculiar field.

b) A uniform set of powers for conduct supervision in the banking sector

For purposes of maximum harmonisation and to contribute to a level playing field, the EUBA would harmonise in the Omnibus Regulation the powers available to the competent authorities in order to ensure compliance with the rules of conduct and to “react” with respect to possible violations.

As already mentioned, MCD and CCD/CCD2 vest national competent authorities with very general and vague investigating and enforcement powers.²⁵⁶ Indeed, these provisions have to be read in combination with the list of harmonised “minimum powers” of investigation and enforcement provided in Article 9 of the CPC Regulation, which are to be conferred on national authorities to detect and counter cross-border violations of the many consumer protection-oriented EU pieces of legislation listed therein, including both CCD2 and MCD.

Against this background, the EUBA would draw up a common, harmonised set of administrative powers, using Article 9 of the CPC Regulation as a starting point.

²⁵⁴ The primacy is somehow limited: in fact “[i]n the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects”. As is well known, in its judgment of September 13, 2018 – in Joined Cases C-54/17 and C-55/17, *Wind Tre Vodafone Italia* – the Court of Justice ruled that term ‘conflict’ refers to a relationship which goes beyond a mere disparity or a mere difference, resulting in a divergence which cannot be overcome by a unifying formula enabling both situations to exist alongside each other. Accordingly, “a conflict such as that envisaged in Article 3(4) of Directive 2005/29 is present only where provisions, other than those of Directive 2005/29, which regulate specific aspects of unfair business practices, impose on undertakings, in such a way as to leave them no margin for discretion, obligations which are incompatible with those laid down in Directive 2005/29” (paras 60 and 61).

²⁵⁵ Sometimes even more slippery, due to the *ne bis in idem* concerns.

²⁵⁶ Articles 41 (1) and 44 CCD2 and Articles 5 (1) and 38 MCD.

Moreover, as outlined in Section IV (see par. 3.c), there would be legal grounds for regulating the essential elements of the administrative procedures for exercising those harmonised powers at the level of the Omnibus Regulation, in line with what has already been proposed for exercising powers pertaining to prudential supervision.

In more detail, the framework of national competent authorities' powers could be structured as follows:

- i. **investigative powers:** *e.g.*, power to access any relevant document, data or information relating to an infringement, in any form or format and irrespective of its medium or location; the power to require any public authority, body or agency or any legal or natural person to provide any relevant information, data or document; the power to carry out necessary on-site inspections. The range of powers could also be broadened to include newly minted investigative actions, such as mystery shopping or surfing;²⁵⁷
- ii. **enforcement powers:** such as, the power to adopt *interim* measures to avoid the risk of serious harm to the collective interests of consumers/customers; the power to order, in writing, the cessation of the infringements; the power to prohibit the continuation of the activity, even of single areas of business or branches; the power to restrict access to online contents; and, last but not least, the power to impose fines and penalties.

The EUBA could usefully add some additional powers as follows:

- iii. **product intervention powers**, already foreshadowed by CCD2, which allows Member States to grant competent authorities “*product intervention powers [...] to withdraw credit products in justified cases*”,²⁵⁸ *i.e.*, “*when credit products are detrimental to consumers*”.²⁵⁹ Of course, these powers should be very carefully designed, starting from the conditions for their exercise. On these aspects, the Omnibus Regulation could take as a reference model, with due adaptations, the rules on product intervention powers contained in Articles 40-43 of the MiFIR or Articles 103-106 of the MiCAR. Under MiFIR, product intervention powers are

²⁵⁷ Mystery Shopping (MS) is carried out through visits by individuals (Mystery Shoppers) who, impersonating a specific consumer profile, present themselves to a company as potential customers in order to simulate a specific customer request. The tool has long been used in the retail sector, mainly to verify the quality of the service offered. More recently, mystery shopping has been used in the financial sector, both by supervisors and by the intermediaries themselves, as a tool for monitoring the behavior of distribution networks. Mystery Surfing (MSu) is a mystery shopping applied to telematic channels. Please note that, after the 2019 ESAs reform, EBA also has the task of “*coordinating mystery shopping activities of competent authorities, if applicable*” (Article 9 (1)(g) EBAR).

²⁵⁸ Article 41 (9) of CCD2.

²⁵⁹ Recital 89.

allocated between ESMA and (for structured deposits only) EBA, on the one hand, and national competent authorities, on the other hand, according to the following key rule. The national competent authorities are the first in line to act, while ESMA and EBA are called upon to intervene in exceptional cases, to remedy deficiencies in the action of the national competent authority/ies, *i.e.*, where the latter have not acted or have acted inadequately to address “*a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union*”, or have taken inadequate action. ESMA, EBA and national competent authorities are all entitled – under different conditions – to temporarily prohibit or restrict (in the Union or in the relevant Member State, respectively): *i*) the marketing, distribution or sale of certain financial instruments or structured deposits, or of financial instruments or structured deposits with certain specified features; *ii*) a type of financial activity or practice.²⁶⁰ As a necessary counterbalance, MiFIR requires, *inter alia*, that intervention powers be exercised in accordance with the principles of proportionality and non-discrimination and having regard to level-playing field considerations.²⁶¹ The discretion of authorities (European and national) is further reduced by Commission delegated acts, specifying criteria and factors to be taken into account in assessing whether the conditions for the exercise of the powers are met.

Similar provisions are set out in MiCAR.

Against this background, the MiFIR and MiCAR seem to provide a sufficiently articulated model to be taken as a reference for the EUBA to shape product intervention powers with regard to the banking contracts and services. MiFIR and MiCAR are flexible in tailoring the exercise of powers to properly respond to the specific goals to be pursued. To give an example, the prohibition adopted by the competent authority could relate to the sale of certain products to certain customers (*e.g.*, consumers); or to certain specific products’ features (*e.g.*, level of complexity); or it could even be a request of additional information

²⁶⁰ In addition, MIFIR require EBA and ESMA are required to play a facilitating and coordinating role in relation to product intervention powers exercised by national competent authorities, ensuring that action taken by the latter is justified and proportionate and that, where appropriate, a consistent approach is taken by competent authorities (Article 43 MIFIR).

²⁶¹ See Articles 40(3), 41(3), 42(2) (c) and (e) MIFIR. Please note that a similar framework on ESMA’s powers of intervention is contained in Articles 16-18 of Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

or warnings relating to certain products. In contrast, CCD2 is overly rigid, and foresees only the withdrawal of credit products in justified cases.²⁶²

- iv. **redress powers:** more specifically, the power to order the restitution to consumers/customers of sums unduly received by credit institutions (as a result of a breach of the rules of conduct). Some national systems are already familiar with this power, such as the Italian²⁶³ and Irish²⁶⁴ ones.²⁶⁵ The adoption of a restitution order requires a delicate balancing between the different interests at stake, because in exceptional situations it may jeopardise the stability of the credit institution. Such a balancing would certainly be easier in the “one authority” scenario; while in the “multiple authorities scenario”, the mechanisms of coordination and liaising between the different authorities should be particularly strong and well-tested, to ensure that discretion is well-exercised. Notwithstanding this,²⁶⁶ several arguments seem to militate in favour of granting such a power.

²⁶² At the same time, it should be borne in mind that, while these powers represent an important safeguard for consumers/customers, especially in the case of even very complex banking and financial product and services (which are rarely designed or marketed to meet the real interests of the end customers), they must also be designed and managed with the utmost care. Not only do they represent a significant interference in the autonomy of the credit institution, but they can also have repercussions on contracts already signed.

²⁶³ Article 128-ter of the Italian Consolidated Banking Law (TUB). Even though it does not originate in the CCD, the Banca d'Italia was granted this power when the CCD was transposed. For the sake of completeness, it should be noted that Article 128-ter TUB also provides for the power to prevent credit institutions from continuing their activities.

²⁶⁴ Also the Central Bank of Ireland has a so-called “customer redress power” (S43 of the 2013 Central Bank (Supervision and Enforcement Act)). According to the outcome of a recent survey performed at the ECB level in the field of consumer right protection, this power is designed to provide redress where there have been widespread or regular defaults, rather than issues at an individual consumer level.

²⁶⁵ It is also worth mentioning the UK experience, which provides a different redress model. Here, the national competent authority (FCA) is empowered to require the relevant credit institutions to adopt and operate a “consumer redress scheme” (Section 404 of the Financial Services and Markets Act), i.e., a “scheme under which the firm is required to take one or more of the following steps in relation to the activity: [...] The firm must first investigate whether, on or after the specified date, it has failed to comply with the requirements ... that are applicable to the carrying on by it of the activity [...] determine whether the failure has caused (or may cause) loss or damage to consumers”. If this is the case, “it must then (a) determine what the redress should be in respect of the failure; and (b) make the redress to the consumers [...]”. This solution would leave the credit institution with the task of carrying out, self-responsibly, the ascertainment of any violations committed, their extent and consequential effects, and identifying the redress measures to be awarded to the consumers involved, albeit within the framework of general counting rules and methodologies predetermined by the authority. This power has not been used by the FCA that frequently; however, it has been exercised very recently to provide compensation for consumers given unsuitable advice to transfer out of the British Steel Pension Scheme (BSPS), (see [here](#)).

²⁶⁶ A further issue to bear in mind is that the redress power may be considered as sitting somewhat on the border, so to speak, between administrative and judicial power: the redress order adopted by the competent authority (in the exercise of an administrative enforcement power) could directly affect one or more contractual relationship(s) established between two parties in the exercise of their contractual freedom, therefore, slipping into the traditional domain of civil remedies, the application of which usually requires the intervention of a court.

First, the national competent authority's power to proactively offer (where appropriate) redress to "harmed" retail customers could be seen as a crucial element in ensuring that credit institutions integrate into their safe and sound prudent management the task of fostering the transparency and the fairness in their relationships with customers.²⁶⁷

Second, it could help addressing the consumers' "redress vulnerability", long highlighted by scholars. Over the last few years, several studies, also commissioned by the European Union, have shown that consumers may struggle to enforce their rights: they may lack confidence, time or resources to start a legal proceeding, and these barriers particularly affect disadvantaged groups such as low-income consumers whose over-indebtedness may in turn become a source of instability for credit institutions. Evidence shows that consumers usually decide not to take any legal action when they believe this will take too long, when a (simple) complaint will not lead to a satisfactory solution, or when the sums involved are too small. The latter situation is particularly problematic where the total loss for all consumers concerned is significant, but where each individual consumer suffers only a small loss.

The recent Directive 2020/1181 ("Representative Actions Directive") fits right in this groove, introducing a collective redress mechanism to be activated before the courts or administrative authorities.

The possible conferral of such a redress power to the designated authority is in line with this and could further strengthen the protection offered to the consumers (and, more generally, to the customers), also marking an important anticipation of the protection.

Finally, the inclusion of the redress power in the toolbox of national competent authorities could generate positive externalities. For example, effective redresses enforced by the national competent authority would likely help to reduce judicial proceedings brought by consumers/customers against credit institutions before civil courts.²⁶⁸ Moreover, even if not exercised, such an incisive power could strengthen, in terms of moral suasion, the authority's requests or recommendations *vis-à-vis* credit institutions.

²⁶⁷ It is no coincidence that with reference to the UK system – albeit characterized by a "soft" redress power of the FCA, better described in footnote 41, it was highlighted the increasing FCA's "*appetite to secure redress for consumers*" in the light of some recent cases (e.g., *the Bluecrest case*), appetite apparently reinforced by the recent 'Consumer Duty', which came into force on 31 July 2023 (RHYS CORBETT, *A renewed vigour to secure redress?*).

²⁶⁸ As it was noted, "[i]n mass harm situations, the multiplication of many similar individual claims can put the functioning of the whole judicial system at risk. For example, in Germany, the *Deutsche Telekom case* gathered more than 15,000 individual claimants and more than 700 counsels and overwhelmed the Frankfurt Trial Court. In the United States, a judge involved in the management of a class action in the 1970s calculated that adjudicating separately and individually all pending cases would approximately require 182 years of his time. The detrimental consequences associated with the treatment of similar lawsuits generally focus on courts' congestion and waste of human, material, and financial resources in already-tight budgets" (BEUC – European Consumer Organisation, *Collective Redress Theoretical background document 2022-2023*).

Key considerations

The EUBA would define the essential requirements for competent authorities vested with conduct supervision. Leaving aside the ECB, considering the legal constraints to its role in this sector, a prominent role should be given to national authorities and the EBA. With regard to the authorities to be designated at national level, the EUBA, with the Omnibus Directive, should establish a default regime whereby responsibility for conduct supervision is allocated to the same authority in charge of prudential supervision; the Omnibus Directive could, however, leave an option to Member State to choose otherwise, provided that if a different authority is designated, strong coordination mechanisms are put in place with the prudential authority.

The EUBA, with its Omnibus Regulation, would identify a fully-harmonised set of powers, specifically tailored to conduct supervision, building on the experience of the Enforcement Regulation (Regulation (EU) No 2017/2394), but also including product intervention powers to be coordinated with those already available to EBA as well as redress powers. Similarly, the Omnibus Regulation should provide the essential elements of the administrative procedures for exercising those harmonised powers.

3. The complex interplay between the conduct of business rules and private law

a) Private-law remedies as a missing piece of the EU banking law

Different sets of EU legal acts identify rules on conduct of business between financial entities and their customers. The nature of such rules and the consequences stemming from their violation are vividly debated among legal scholars. While EU financial law mainly focuses on the perspective of public enforcement by supervisory authorities through administrative tools, it often remains unclear at European level whether and how affected parties may react to infringements of conduct of business rules via private causes of actions, which are in principle governed by the principle of procedural autonomy of each Member State, provided that effectiveness and equivalence are also respected.

The lack of harmonisation of private law remedies at European level can be explained by the EU's limited competence in the area of private law and by the functionalist approach of the whole EU financial legislation: traditionally, EU legal acts in this field prescribe regulatory duties, also affecting relations between private parties, with a view to achieving objective rather than subjective goals (although, as well known, this kind of distinction is not explicitly articulated in the referred EU legal sources), that is to say it does not need to guarantee subjective rights and interpersonal justice, but aims to prioritise the functioning of the internal market. In this vein, in the EU legal order, private law is an instrument for achieving the objective of an integrated EU internal market. This results in a gap between regulatory strategy (which focuses on market-oriented policy goals and public enforcement) and rules (which are also relevant for private law relationships) and such a gap inevitably raises a number of questions concerning

the nature of conduct of business rules, the types of private law remedies available and the interaction between public and private enforcement.

From a general perspective, under the current EU legislation there are cases of reference to private law of Member States²⁶⁹ or of express provisions for a private law remedy for breaches of conduct of business rules.²⁷⁰ This is however the exception rather than the rule: in the law of finance in general and in consumer credit in particular, legislative silence remains the default option. The ordinary course for Level 1 Legislation is to impose requirements of conduct without making any reference to the type of remedy that may be available in case of breach. The consequence arising from this is that private law remedies remain dependent on national laws, and ultimately on the interpretative stance of national courts.

In the literature, the topic has been traditionally investigated with reference to the MiFID rules.²⁷¹ In this field, building on the premise that the aim of financial regulation, and in particular of conduct of business rules, is to protect investors, national courts have a tendency to recognise private law effect but with significant divergences as to the remedies (ranging from compensation to invalidity of contracts).²⁷²

Equally non-harmonised is the interplay between public and private enforcement. From a systemic standpoint, it has been correctly observed that there is no necessary correlation between the enforcement means and the

²⁶⁹ Article 11(2) of the Regulation (EU) No 2017/1129 requires MS to lay down civil liability rules applicable to the persons responsible for the prospectus. Article 6 of Council Directive 93/13/EEC on unfair terms in consumer contracts introduces an obligation for MS to render an agreement non-binding on the consumer.

²⁷⁰ This is provided, for example, in relation to anti-competitive agreements, which pursuant to Article 101(2) TFEU are automatically void. Article 35a of Regulation No 1060/2009 provide for a specific civil liability regime of credit rating agency. Similarly, under Articles 15, 26 and 52 of Regulation No 2023/1114 (MiCAR) purchasers of cryptos have a liability claim against the provider (and other parties involved) if the white paper does not meet MiCAR's requirements and the holder of the cryptos has suffered damage as a result. Detailed provisions on remedies – in the form of financial compensation – are also included in the Payments Services Directive II (PSD II), Articles 73 *et seq*; 89 *et seq*.

²⁷¹ FEDERICO DELLA NEGRA, *MiFID II and Private Law: Enforcing EU Conduct of Business Rules* (Hart Publishing 2019). MARNIX W. WALLINGA, *MiFID I & MiFID II and private law: towards a European principle of civil liability?*, in OLHA O. CHEREDNYCHENKO, MADS ANDENAS (eds), *Financial Regulation and Civil Liability in European Law* (Edward Elgar Publishing 2020).

²⁷² The CJEU provided little guidance in the *Genil v Bankinter* case, which briefly touches upon the issue of the civil law effects of MiFID rules, but stops short of clarifying whether EU law require Member States to provide contract law remedies, alongside administrative sanctions, for a firm's breach of national laws transposing MiFID rules. The current Article 69(2), last paragraph, MiFID II states that "Member States shall ensure that mechanisms are in place to ensure that compensation may be paid or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive or of [MiFIR]". This requirement is laid down in a provision on supervisory powers which competent authorities have to be provided with and, as such, does not deal with enforcement of the conduct of business rules through private law means. Instead, it seems to requires Member States to provide for an administrative mechanism that would enable competent authorities to ensure investor redress.

enforcement objectives, meaning that regulatory duties may also be enforced by private individuals, via private law action, and, conversely, public authorities can be vested with powers to ensure that consumers and clients are protected and compensated for losses suffered.²⁷³ In the latter regard, considering the powers available to competent authorities, different models can be identified: the separation model, where agencies do not have any role to play in the provision of redress to private parties; the complementarity model, in which agencies are entrusted with the power to take positive steps to ensure that in cases of violation of EU private law rules compensation is paid to aggrieved individuals, *e.g.*, the power to initiate redress settlements and/or to bring a collective action for damages before private law courts; the integration model, where within their arsenals of enforcement powers, agencies have some form of discretionary power to impose redress measures.²⁷⁴

Within this multifaceted landscape, academics have underlined the downsides for customers arising from the lack of harmonised private law remedies²⁷⁵ and have advocated the need for a more holistic approach to EU financial regulation and private law that would allow the complex interplay between the regulatory dimension, contractual settings and private law remedies to be unveiled. A better understanding of this complexity is needed in order to be able to better regulate financial markets.²⁷⁶

This is the direction that the EU legislators have taken in the context of the Prospectus Regulation, where a possible harmonisation of prospectus liability and related causes of actions is currently being considered,²⁷⁷⁻²⁷⁸ as well as in the context of the civil liability of credit rating agencies.²⁷⁹

b) Civil law implications of EU banking law

In the context of EU banking consumer law, namely CCD2 and MCD, also these directives, even though they provide detailed pre-contractual and contractual obligations and, more in general, rules on how financial entities must behave in the relationship with their clients, do not, however, deal

²⁷³ FEDERICO DELLA NEGRA, *Financial Services Contracts in EU Law* (OUP 2023), p. 38.

²⁷⁴ OLHA O. CHEREDNYCHENKO, *Regulatory Agencies and Private Damages in the EU: Bridging the Gap between Theory and Practice*, Yearbook of European Law, Vol. 40, 2021.

²⁷⁵ MADS ANDENAS, *Foreword*, in RAFFAELE D'AMBROSIO, STEFANO MONTEMAGGI (eds), *Private and public enforcement of EU investor protection regulation – Conference papers*, cit.

²⁷⁶ OLHA O. CHEREDNYCHENKO, *Two Sides of the Same Coin: EU Financial Regulation and Private Law*, European Business Organization Law Review, Vol. 22, 2021.

²⁷⁷ The need for greater harmonisation in this field is well explained by Danny Busch, Matthias Lehmann, Uniform Prospectus Liability Rules for Europe, Journal of European Tort Law, Vol. 14, No 2, 2023.

²⁷⁸ Article 48(2a) Regulation (EU) No 2017/1129, as amended by Regulation (EU) No 2024/2809. On 28 October 2024, ESMA launched a call for evidence to gather input on potential further steps towards harmonising rules on civil liability pertaining to securities prospectuses. A Final Report has been published by ESMA on 12 June 2025 (see [here](#)).

²⁷⁹ Article 35 of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies. Consolidated text available [here](#).

with private law consequences of their breach. CCD2 leaves this topic in its entirety to Member States: “*It is possible for Member States to offer consumers the possibility to pursue proportionate and effective remedies against creditors or credit intermediaries in the event of non-compliance with this Directive in accordance with national law. Those remedies could entail compensation for damages and a reduction in the total cost of the credit to the consumer or the termination of the credit agreement*” (Recital 52). Even though the MCD does not contain a similar statement, it is obvious that also in the field of mortgage credit the choice of private law remedies rests with Member States.

The mentioned Recital should be read in conjunction with the case law of the CJEU, which on several occasions has been asked by means of preliminary ruling whether civil remedies, set out in national consumer credit law, can be considered effective, dissuasive and proportionate as required by Article 23 CCD. In the leading case *Le Crédit Lyonnais*, the CJEU acknowledged that the CCD grants individual consumer protection with civil law implications that must be commensurate with the seriousness of the infringement.²⁸⁰ More importantly, the Court suggested that the mere existence of administrative sanctions is not sufficient to ensure the protection of consumers, in so far as sanctions have no effect on the individual situation of the affected consumer.²⁸¹ Moreover, according to the CJEU, differentiation of the penalties is permissible in national law, meaning that the failure to comply with different obligations may well be accompanied by different civil sanctions, taking into account the importance and the objective of the infringed rule.²⁸²

Within those general limits and subject to the principles of effectiveness and equivalence, the choice of civil remedies remains within the discretion of Member States, which are essentially free to opt for different kinds of redress measures, such as compensation for damages, price reduction or contract termination with or without retroactive effects.

The current *status quo* where civil remedies differ significantly across the Union can be hardly considered an optimal outcome. In fact, lack of harmonisation in this area leads to legal fragmentation that risks hindering the implementation

²⁸⁰ *LCL Le Crédit Lyonnais*, C-565/12, EU:C:2014:190, paras 43, 52-55 and, *Home Credit Slovakia*, C-42/15, judgment of 9 November 2016, EU:C:2016:842, para 63.

²⁸¹ Case C-679/18, *OPR-Finance s r o* and Case C-303/20, *Ultimo Portfolio Investment*, para 32, both concerning the infringement of the creditworthiness obligation laid down in Article 8 CCD.

²⁸² In Case C-339/23 the Court came to the conclusion that a penalty implemented in the event of a failure to comply with the obligation to assess the consumer’s creditworthiness, provided for in Article 8(1) of that directive, might differ from the penalty provided for in the event of a failure to comply with other, potentially equivalent, obligations provided for in that directive, in particular the obligation referred to in Article 10(2) thereof concerning the information to be included in consumer credit agreements. In the Court’s view, the consequences of a failure to comply with the obligations to provide information may vary considerably according to the specific obligation at issue, the seriousness of the breach depending, moreover, in practice on the number and significance of the missing items of information in that credit agreement.

of a level playing field for financial and banking entities. In this respect, it is worth recalling that the Commission, in the impact assessment accompanying the CCD2, underlines that the competitiveness of the internal market for consumer credit is not fully achieved: *‘Despite a high level of harmonisation of the prudential framework under which banks operate and the creation of the Banking Union in the Euro Area, the consumer credit market has remained highly fragmented. Direct cross-border activities in consumer credit, by a legal entity established in another Member State, remain low’*.

This also derives from *‘different consumer protection rules, linked also to the way the Directive has been implemented at national level (regulatory choices, vagueness of some provisions)’*.

The Commission further notes that with regard to penalties, Member States have generally established civil and administrative sanctions for infringements of the national provisions transposing the Directive and, all in all, there is considerable disparity in the types and levels of those “sanctions”.

c) The private enforcement perspective. “Harmonising” the remedies

Alongside public enforcement, private enforcement of regulatory duties is an essential component of the EU law enforcement architecture: not only do private remedies serve as a compensatory mechanism for the affected party, they also play a deterrence function against violations of the standards set by the EU legislator with a view to achieving certain policy goals.²⁸³ The relevance of private enforcement is clearly embedded in EU law, which also in the field of financial consumer law requires Member States to introduce private enforcement through out-of-court dispute resolution procedures for the settlement of disputes arising out of rights and obligations relating to credit agreements (see directive 2013/11/UE as well as Article 40 CCD2 and Article 39 MCD).²⁸⁴

However, as seen above, the EU legislators have so far been reluctant to promote a consistent set of harmonised rules on private law remedies for violations of EU banking consumer law, a shortcoming that hinders competitiveness of the internal market for consumer credit, which currently still features a high degree of fragmentation, inviting regulatory arbitrage, and unjustified different protection across Europe. Such discrepancies are unfair,

²⁸³ See Case C-618/10; Case C-174/12; Joined Cases C-154/15 and C-307/15.

²⁸⁴ It should also be noted that Directive 2013/11/UE on consumer ADRs – insofar as it establishes a common framework within which also specialist ADRs in the banking segment must operate, by enhancing *inter alia* coordination between them – makes these ADRs a particularly viable platform for the enforcement of the proposed harmonised set of private law remedies in case of violation of the conduct of business rules in the banking sector. Since 2001 the Commission has set up a network of national organisations responsible for settling consumers’ complaints in the area of financial services out of court settlement (FIN-NET), also aimed at identifying and sharing best practices between the participating ADR schemes.

discriminatory and at odds with the goal to ensure a high and *equivalent* level of customer protection.

These undesired effects could be mitigated if the EUBA would lay down harmonised private law remedies for the violation of conduct of business rules. There are already cases of EU common private law rules in the financial sector, which are good examples.²⁸⁵

As known, there is no express legal basis allowing the EU to harmonise rules on private law remedies and procedures in general. However, to the extent necessary and proportionate to achieve the smooth functioning of the internal market, Article 114 TFEU can be used.²⁸⁶ Not surprisingly, Directive 2020/1828/EU on representative actions for the protection of the collective interests of consumers is based on Article 114 TFEU, on grounds that harmonisation of injunctive measures and other redress measures for the violation of specific legal acts (including the CCD and MCD) would boost consumer confidence, empower consumers to exercise their rights, contribute to fairer competition as well as create a level playing field for traders operating in the internal market.

In order to respect Member States' competence in the field of private law, the EU intervention in that area should strive to identify remedies independently from national taxonomies, looking at their effect and consequence. The type of remedies settled at EU level should be compensation or the unenforceability (*ex tunc* or *ex nunc*) of the contract or of a single contractual clause. However, experience has shown that loosely worded provisions should likewise be avoided, considering the risk of ambiguity and vagueness, as we have seen in the context of Directive 93/13/EEC (UTD), where national courts keep seeking clarifications from the CJEU on the precise consequences of declaring a contractual clause as unfair. To avoid this, it has recently even been proposed to replace the directive with an Unfair Terms Regulation that could set out in more detail the consequences of unfairness beyond the vague provision included in Article 6 UTD.²⁸⁷

Based upon the foregoing, we surmise that the EUBA could harmonise private remedies following these guiding principles:

²⁸⁵ See in particular Article 35a of the Credit Rating Agencies Regulation No 1060/2009 as amended. Financial law aside, Directive 2014/104/EU on competition law has harmonised rules on actions for damages so that anyone who has suffered harm caused by an infringement of competition law can effectively exercise the right to claim full compensation for that harm. By ensuring equivalent protection throughout the Union for anyone who has suffered such harm, the Directive fosters undistorted competition in the internal market and remove obstacles to its proper functioning.

²⁸⁶ RAFAŁ MAŃKO, *EU Competence in Private Law: The Treaty Framework for a European Private Law and Challenges for Coherence*, EPRS - European Parliamentary Research Service, 2015.

²⁸⁷ MATTHIAS LEHMANN, DANNY BUSCH, *Make It Stringent: A Plea for an Unfair Terms Regulation*, European Review of Private Law, Vol. 31, No 6, 2023.

- i. first, individual rights should in principle be recognised with respect to all conduct rules that impose a clear and sufficiently precise obligation whose purpose is client protection. This is the case for many, if not all, pre-contractual and contractual obligations under the current CCD2 and MCD.²⁸⁸
- ii. second, the choice of the remedies, *i.e.*, the means of redress for the violation of a right, should be guided by the principle of effectiveness and proportionality, considering the seriousness of the infringement, so as to ensure a genuinely deterrent effect without going beyond what is necessary to achieve the objectives pursued by the relevant obligation.
- iii. third, in order to ensure proportionality, different types of specific civil remedies, depending on the duty that has been violated, could be defined. In this vein, termination of the contract should be confined to the violation of key duties, while cost reduction and compensation could be an appropriate remedy for the majority of other infringements.²⁸⁹

An example taken from the case law of the European courts may help in further illustrating the proposed way forward.

a. Failure to indicate / incorrect indication of the APRC in the credit agreement. According to the CCD and MCD, the credit agreement is to specify, in a clear and concise manner, the ‘annual percentage rate of charge’ (the “APRC”), that is, the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit. By bringing together all the costs and charges for the loan, the APRC helps borrowers to understand overall loan costs and compare the offers from different providers.

As clarified by the CJEU, the inclusion of the APRC in a credit agreement is vitally important, in so far as it enables the consumer to be aware of the extent of his or her liability.²⁹⁰ Failure to include the APRC in the contract may be penalised, under national law, by the credit granted to become free of interest and charges. Such a penalty of forfeiture by the creditor of entitlement to interest and charges is considered by the Court to be proportionate, within the meaning of Article 23

²⁸⁸ This does not mean that the EU legislators should set out remedies for each and every obligation. An approach consistent with the subsidiarity and proportionality principles could be to focus on the most relevant conduct rules that warrant EU harmonised remedies, leaving the rest to the Member States.

²⁸⁹ Compensation could be in particular an appropriate remedy for infringement of pre-contractual obligations and of general conduct rules, such as those included in Article 32 CCD2 that are similar to the rules of conduct in securities regulation and other financial regulations: ‘Member states shall require the creditor and the credit intermediary to act honestly, fairly, transparently and professionally taking into account the rights and interests of the consumer’.

²⁹⁰ *Home Credit Slovakia*, C-42/15, EU:C:2016:842, paras 67 and 70.

of Directive 2008/48.²⁹¹ In a recent judgment, the CJEU further held that an indication of an APRC that does not accurately reflect all of those costs deprives consumers of the possibility of assessing the extent of their liability in the same way as a failure to include that rate. Consequently, where an incorrect APRC is reported, *i.e.*, one that does not include all those costs, a penalty of forfeiture by the creditor of entitlement to interest and charges reflects the seriousness of such an infringement and is dissuasive and proportionate.²⁹²

b. Creditworthiness assessment. The purpose of the obligation to assess the creditworthiness of the consumer is to protect consumers against the risks of over-indebtedness and bankruptcy, as well as to hold creditors accountable and to prevent the granting of loans to consumers who are not creditworthy. This dual purpose reveals the vital importance of that obligation. Based on this premise, the CJEU held that in the case of the lender's failure to assess the consumer's creditworthiness, Member States are allowed to provide for the termination of the contract, which entails forfeiture of the creditor's entitlement to payment of the agreed interest and an obligation on the consumer to return only the principal sum to the creditor.²⁹³ In the Court's view, the loss for the creditor of contractual interest appears to be commensurate with the seriousness of the infringements. The same conclusions should be deemed valid *a fortiori* for the MCD's creditworthiness obligation, which specifies in more detail the conduct that must be followed by lenders to assess a consumer's creditworthiness. It is also worth recalling that according to the CJEU, the penalty of forfeiture of entitlement to contractual interest cannot be regarded as being genuinely deterrent if the creditor is nonetheless entitled, under national law, to interest at the statutory rate to an amount similar to that it could have received had it complied with its obligation to assess the borrower's creditworthiness.²⁹⁴

Regardless of the two aforementioned examples, in which the ECJ was asked to provide guidance on the compatibility of specific national legal remedies with EU law in relation to infringements of vitally important obligations, it is our view that, with regard to other duties, a proportionate private-law penalty should, in principle, be compensatory. This applies, for instance, to pre-contractual obligations and general conduct rules, such as those set out in Article 32 of the CCD2, which, not too dissimilarly to the rules of conduct enshrined in EU securities and financial market law, requires 'the creditor and the credit intermediary to act honestly, fairly, transparently and professionally, taking into account the rights and interests of the consumer'.

²⁹¹ *Pohotovost'*, C-76/10, EU:C:2010:685, para 77 and *Home Credit Slovakia*, C-42/15, EU:C:2016:842, paras 67 to 71.

²⁹² *Profi Credit Bulgaria*, C-714/22, ECLI:EU:C:2024:263, paras 55-56. See also *Lexitor sp. z o.o.*, C-472/23, ECLI:EU:C:2025:89, paras 52-58.

²⁹³ *OPR-Finance*, C-679/18, EU:C:2020:167, para 30. *Ultimo Portfolio Investment* (Luxembourg), C-303/20, EU:C:2021:479, paras 39 and 40. *Nárokuj s.r.o.*, C-755/22, EU:C:2024:10.

²⁹⁴ *LCL Le Crédit Lyonnais*, C-565/12. In the Court's reasoning, the substitution of the contractual interest with the statutory interest is compatible with the CCD only when this kind of penalty result in an amount of interest significantly lower than the one agreed in the contract.

Key considerations

The EUBA should complement the conduct of business rules with the harmonisation of relevant private law causes of actions. A consistent set of private law remedies would be crucial in order to enhance the level playing field and to ensure effective and equivalent standards of consumer protection.

The harmonisation of private law remedies should be part of the Omnibus Regulation and should be guided by the principle of effectiveness and proportionality: redress measures need to ensure a genuine protection and deterrence without unreasonably penalising, beyond what it is necessary, credit institutions and the interest of an efficient and competitive credit market. Termination or invalidity of contracts should be confined to the violation of key obligations, while cost reduction and compensation would generally apply.

ANNEX I.
A PRELIMINARY OUTLINE OF THE EUBA

I. OMNIBUS DIRECTIVE

Part One – Subject matter, scope and definitions (reference to the Omnibus Regulation)

Part Two – Competent (and designated) authorities

Title I – Independence and organisational requirements

Title II – Due process principles and judicial review (reference to the Omnibus Regulation)

Title III – Tasks and powers of the authorities (reference to the Omnibus Regulation)

Title IV – Sanctioning powers and coordination with criminal proceedings (reference to the Omnibus Regulation)

Part Three – Provisions concerning the freedom of establishment and the freedom to provide services

Title I – Passport and mutual recognition

Chapter 1 – Licensing, qualifying holdings, material holdings, material transfers of assets and liabilities, mergers and divisions (reference to the Omnibus Regulation)

Chapter 2 – Establishment by means of branches

Chapter 3 – Freedom to provide services

Title II – Powers of host competent authorities

Title III – Mutual recognition of managers' qualifications

Part Four – Delegated and Implementing Acts (reference to the Omnibus Regulation)

Part Five – Transitional and final provisions

II. OMNIBUS REGULATION

Part One – Subject matter, scope and definitions Objectives of the EUBA and their hierarchy

Part Two – Pillar I

Title I – General provisions

Categories of supervised entities

Levels of application and financial conglomerates

Title II – Accounting

Title III – Qualitative prudential requirements

Chapter 1 – Arrangements, processes and mechanisms of supervised entities

Chapter 2 – Governance arrangements, suitability of managers and remunerations

Chapter 3 – Suitability of qualifying (share)holders

Title IV – Quantitative prudential requirements

Chapter 1 – Financial Structure requirements

Section 1 – Own Funds [and Eligible Liabilities]	
Section 2 – Capital Requirements (Credit, Operational, Market, Settlement and CVA Risks)	
Section 3 – Leverage requirements	
Chapter 2 – Large Exposures	
Chapter 3 – Liquidity requirements	
Title V – Reporting requirements	
Title VI – Disclosure requirements	
Part Three – Pillar II	
Title I – Principles of prudential supervision	
[Due process principles]	
Exchange of information	
Title II – Supervisory powers and related procedural rules	
Chapter 1 – General Supervisory powers	
Section 1 – Information and investigatory powers	
Section 2 – Supervisory Review	
Section 3 – Supervisory measures	
Section 4 – Buffer requirements and capital conservation measures	
Section 5 – Early intervention measures	
Chapter 2 – Special Supervisory powers	
Section 1 – Licensing	
Authorisation (Conditions for authorisation and withdrawal; licensing procedure) Approval of (Mixed) Financial Holding Companies Intermediate Parent Undertakings Third-Country Branches	
Section 2 – Acquisition of qualifying holdings	
Section 3 – Material holdings	
Section 4 – Material transfers of assets and liabilities	
Section 5 – Mergers and divisions	
Section 6 – Models validation	
Title III – Supervision on a consolidated basis and supervisory cooperation.	
Supervision of financial conglomerates	
Title IV – Sanctioning powers and related procedural rules	
Title V – Disclosure by competent authorities	
Part four – Conduct of business rules in the provision of banking products and services	
Title I – General principles and objectives	
Title II – Rules and remedies [<i>pertaining the pre-contractual, contractual and post-contractual phases</i>]	

Chapter 1 – Rules of general application	
Chapter 2 – Rules for consumer contracts	
Section 1 – Consumer credit contracts	
Section 2 – Credit agreements for consumers relating to residential immovable property	
Section 3 – Consumer contracts concluded at a distance	
<i>[to be continued]</i>	
Title III – Organisational and governance requirements	
Chapter 1 – Product governance	
Chapter 2 – Internal controls systems	
Chapter 3 – Remuneration policies	
<i>[to be continued]</i>	
Title IV – Banking conduct supervision: tasks and powers	
Chapter 1 – Investigative powers	
Chapter 2 – Product interventions powers	
Chapter 3 – Redress powers	
<i>[to be continued]</i>	
Title V – Sanctioning powers	
Part Five – Delegated and Implementing Acts	
Part Six – Transitional provisions	
Part Seven – Reports, Reviews, Implementation of Rules and Amendments	
Part Eight – Final Provisions and Annexes	

ANNEX II.

A TEST-CASE ON HOW TO REDESIGN LEVEL I LEGISLATION IN THE EUBA

This Annex outlines a test-case of a possible L1 text of the EU Banking Consolidated Law, focusing on prudential requirements. The selected area is that of the leverage requirements, which appears suitable for the purpose.

The first part of the Annex outlines the test-case, while the second part analyses the current text of the CRR.

In the second part, we have highlighted the fundamental principles governing the leverage requirements **in red**. Those principles are reproduced in the L1 text outlined in the test-case in Articles X1 and X2.

The lines that remain **in black** in the current text of the CRR are considered suitable for delegation, and have been translated into delegation criteria in Article X3.

In the current text of the CRR, we have highlighted the choices granted to the institutions (**in yellow**), and the powers conferred and the obligations imposed upon the competent authorities (**in blue**). They have all been translated into specific delegation criteria in Article X3.

In the test-case, all references to the current text of the CRR have been reported **in green**.

In the current text of the CRR, we have also **highlighted in grey** provisions clearly implementing the relevant international standard, that is reported in **blue** (as “[**LEV X**]”). When the provision departs from the relevant international standard, the latter is reported in **purple**.

Part I.
Regulatory Sample.
Leverage

Article X1

Leverage requirements

1. Subject to Articles [93 and 94 CRR], institutions shall at all times satisfy a leverage ratio requirement of 3%. *[CRR – Article 92(1)(d)]*
2. In addition to the requirement referred to in paragraph 1, a G-SII shall maintain a leverage ratio buffer equal to its total exposure measure multiplied by 50 % of the G-SII buffer rate applicable to that G-SII in accordance with Article [131 CRD]. *[CRR – Article 92(1a)]*

A G-SII shall meet its leverage ratio buffer requirement with Tier 1 capital only. *[CRR – Article 92(1a), second subpara]*

Article X2

Calculation of the leverage requirements

1. For the purposes of Article X1, the leverage ratio shall be calculated as the institution's Tier 1 capital divided by that institution's total exposure measure and shall be expressed as a percentage. [CRR – Article 429(2) and (3)]
2. For the purposes of paragraph 1, the total exposure measure shall be the sum of the exposure values of the institution's assets, on-balance-sheet and off-balance-sheet derivatives, add-ons for counterparty credit risk of securities financing transactions, off-balance-sheet items and regular-way purchases or sales awaiting settlement. [CRR – Article 429(4), first subpara]
3. Unless otherwise expressly provided for in the delegated regulation adopted in accordance with Article X3, institutions shall calculate the total exposure measure in accordance with the following principles: [CRR – Article 429(7)]
 - a) physical or financial collateral, guarantees or credit risk mitigation purchased shall not be used to reduce the total exposure measure; *[CRR – Article 429(7)]*
 - b) assets shall not be netted with liabilities. [CRR – Article 429(7)]

Article X3

Specific delegation criteria

1. EBA shall develop draft regulatory technical standards to specify:
 - a) the possible inclusion of long settlement transactions in the calculation referred to in Article X2; *[CRR – Article 429(4), second subpara]*
 - b) the conditions upon which institutions are allowed to reduce the exposure values referred to in Article X2(2) by the corresponding amount of general credit risk adjustments to on- and off-balance-sheet items; *[CRR – Article 429(4), third subpara]*
 - c) the conditions upon which the off-balance-sheet items referred to in Article X2(2) or the institution's guarantees of its client's exposures to a CCP arising from a derivative transaction is subject to the treatment of derivatives; *[CRR – Article 429(5)]*
 - d) the conditions upon which, by way of derogation from Article X2(3), point (b), institutions are allowed to reduce the exposure value of a pre-financing loan or an intermediate loan by the positive balance on the savings account of the debtor to whom the loan was granted; *[CRR – Article 429(8)]*
 - e) the categories of assets excluded from the calculation of the total exposure measure, and the possible conditions upon which an institution is allowed to apply those exclusions, including: *[CRR – Article 429a(1)]*
 - i) items deducted from CET1 or Tier 1 capital; *[CRR – Article 429a(1), points (a) and (b)]*
 - ii) exposures to undertakings that are part of the same group or institutional protection scheme and that are assigned a risk weight of 0 %; *[CRR – Article 429a(1), points (c) and (ca)]*
 - iii) exposures arising from assets that constitute claims on central governments, regional governments, local authorities or public sector entities in relation to public sector investments, general interest investments or promotional loans, and exposures arising from passing-through promotional loans to other credit institutions; *[CRR – Article 429a(1), points (d), (e) and (j)]*
 - iv) the institution's exposures to its shareholders; *[CRR – Article 429a(1), point (da)]*
 - v) the guaranteed parts of exposures arising from export credits; *[CRR – Article 429a(1), point (f)]*

- vi) the trade exposures of an institution in its quality of a clearing member of a QCCP or in its quality of a higher-level client of a clearing member within a multi-level client structure; *[CRR – Article 429a(1), points (g) and (h)]*
 - vii) fiduciary assets that meet the criteria for non-recognition and non-consolidation in accordance with the IFRS; *[CRR – Article 429a(1), point (i)]*
 - viii) the excess collateral deposited at tri-party agents; *[CRR – Article 429a(1), point (k)]*
 - ix) the variation margin paid in cash to a counterparty and recognised as a receivable asset under the applicable accounting framework; *[CRR – Article 429a(1), point (l)]*
 - x) securitised exposures from traditional securitisations that meet the conditions for significant risk transfer; *[CRR – Article 429a(1), point (m)]*
 - xi) coins and banknotes constituting legal currency in the jurisdiction of the central bank, and assets representing claims on the central bank; *[CRR – Article 429a(1), point (n)]*
 - xii) the institution's exposures due to banking-type ancillary services listed in point (a) of Section C of the Annex to Regulation (EU) No 909/2014; *[CRR – Article 429a(1), points (o) and (p)]*
- f) for the purposes of point (e)(iii), the conditions applicable to the possible power of the competent authority, upon request of an institution, to treat an autonomous unit of that institution as a public development credit institution, and to the possible obligations of the competent authority to notify the Commission and EBA of any decision to treat a unit of an institution as a public development credit institution, and to annually review such a decision; *[CRR – Article 429a(2), third subpara]*
- g) for the purposes of point (e)(xi), the possible application of an adjusted leverage ratio requirement aimed at the reducing the risk of excessive leverage for the duration of the exclusion; *[CRR – Article 429a(7)]*
- h) the methods and the conditions upon which the exposure value of the assets is calculated in the total exposure measure, including: *[CRR – Article 429b]*
- i) the principles whereby the exposure values of the assets means the exposure value as referred to in [reference to the credit risk], and whereby securities financing transactions are not netted; *[CRR – Article 429b(1)]*

- ii) by way of derogation from Article X2(3), point (b), the specific conditions upon which assets and liabilities related to cash pooling arrangement offered by an institution can be netted, possibly including that the competent authority of the institution considers that the frequency by which the balances of all original accounts are transferred is adequate; *[CRR – Article 429b(2) and (3)]*
 - iii) the specific conditions upon which exposure value of cash receivable and cash payable under securities financing transactions with the same counterparty can be calculated on a net basis; *[CRR – Article 429b(4) and (5)]*
- i) the methods and the conditions upon which the exposure value of the on-balance-sheet and off-balance-sheet derivatives is calculated in the total exposure measure, including: *[CRR – Articles 429c and 429d]*
- i) the conditions upon which institutions may take into account the effects of contracts for novation and other netting agreements; *[CRR – Article 429c(1), second subpara]*
 - ii) the conditions upon which institutions have to include sold options in the total exposure measure; *[CRR – Article 429c(1), third subpara]*
 - iii) the conditions upon which institutions have to reverse the reduction of the amount of the assets provided by the applicable accounting framework in the case of provision of collateral related to derivative contracts; *[CRR – Article 429c(2)]*
 - iv) the conditions upon which institutions calculating the replacement cost of derivative contracts may recognise only collateral received in cash from their counterparties as the variation margin; *[CRR – Article 429c(3)]*
 - v) the principle whereby institutions cannot include in the calculation of the total exposure measure the collateral received in the calculation of NICA; *[CRR – Article 429c]*
 - vi) the conditions upon which an institution may recognise any collateral received from a client for a derivative contract cleared by the institution on behalf of that client; *[CRR – Article 429c(4a)]*
 - vii) the conditions upon which institutions have to set the value of the multiplier used in the calculation of the potential future exposure in accordance with Article [278(1) CRR] to one; *[CRR – Article 429c(5)]*
 - viii) the principle whereby institutions have to include in the calculation of the exposure value of written credit derivatives the effective notional amounts referenced in the written credit derivatives

- reduced by any negative fair value changes that have been incorporated in Tier 1 capital; *[CRR – Article 429d(2)]*
- ix) the conditions upon which institutions may reduce the exposure value calculated in accordance with point (viii) by the effective notional amount of purchased credit derivatives; *[CRR – Article 429d(3) to (7)]*
 - j) the conditions and the methodology for calculating an add-on for the counterparty credit risk related to all on- and off-balance-sheet securities financing transactions, including: *[CRR – Article 429e(1) to (4)]*
 - i) the conditions upon which institutions are allowed to use the [Financial Collateral Simple Method for the Credit Risk CRM], subject to a specific floor for the applicable risk weight, to determine the add-on for the counterparty credit risk related to on- or off-balance-sheet securities financing transactions; *[CRR – Article 429e(5)]*
 - ii) the treatment applicable to the case in which a sale accounting is achieved for a repurchase transaction under the applicable accounting framework; *[CRR – Article 429e(6)]*
 - iii) the treatment applicable to the case in which the institution acts as an agent between two parties in a securities financing transaction; *[CRR – Article 429e(7)]*
 - k) the conditions and methodology for calculating the exposure value of off-balance-sheet items, excluding those referred to in points (i) and (j), including: *[CRR – Article 429f(1) and (3)]*
 - i) the conditions upon which institutions are allowed to reduce the credit exposure equivalent amount of an off-balance-sheet item by the corresponding amount of specific credit risk adjustments; *[CRR – Article 429f(2)]*
 - l) the treatment of cash related to regular-way purchases awaiting settlement and financial assets related to regular-way sales awaiting settlement, including: *[CRR – Article 429g(1)]*
 - i) the methodologies applicable to institutions that apply trade date accounting and those that apply settlement date accounting; *[CRR – Article 429g(2), first sentence and Article 429g(3), first subparagraph]*
 - ii) the conditions upon which institutions that apply trade date accounting are allowed to offset cash receivables and cash payables; *[CRR – Article 429g(2), second sentence]*

- iii) the conditions upon which institutions that apply settlement date accounting are allowed to offset the full nominal value of the commitments to pay related to regular-way purchases by the full nominal value of cash receivables related to regular-way sales; *[CRR – Article 429g(3), second subparagraph]*.

EBA shall submit those draft regulatory technical standards to the Commission by [•].

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

Article X4

General delegation criteria

1. The power to adopt delegated acts is conferred upon the Commission subject to the conditions laid down in this Article.
2. Unless stated otherwise in this Regulation, including any provisions laying out specific delegation criteria, the Commission shall exercise its power to adopt a delegated act in accordance with the available and finalised international standards adopted by the Basel Committee on Banking Supervision.
3. The Commission shall, by 31 December of each year, after consulting the EBA and the Banking Stakeholder Group established according to Article 37 of Regulation (EU) No 1093/2010, report to the European Parliament and to the Council, together with any appropriate proposals and review of the impact analysis, on the adopted delegated acts and on any incompatibility between the EU banking framework and the international standards adopted by the Basel Committee on Banking Supervision that has been identified in the preparation of the delegated acts, as well as on any options or discretions granted by those international standards that could not be implemented given the lack of specific delegation criteria on policy choices.

Part II.
Analysis of the CRR – Current text
(updated to the CRR3)

162,833 MM[...]

PART THREE
CAPITAL REQUIREMENTS

TITLE I
GENERAL REQUIREMENTS, VALUATION AND REPORTING

CHAPTER 1
Required level of own funds
Section 1
Own funds requirements for institutions

Article 92

Own funds requirements

1. Subject to Articles 93 and 94, institutions shall at all times satisfy the following own funds requirements:

[...]

d) a leverage ratio of 3 %. [LEV 20.7]

1a. In addition to the requirement laid down in point (d) of paragraph 1 of this Article, a G-SII shall maintain a leverage ratio buffer equal to the G-SIIs total exposure measure referred to in Article 429(4) of this Regulation multiplied by 50 % of the G-SII buffer rate applicable to the G-SII in accordance with Article 131 of Directive 2013/36/EU [LEV 40.2]

A G-SII shall meet the leverage ratio buffer requirement with Tier 1 capital only. [LEV 40.1] Tier 1 capital that is used to meet the leverage ratio buffer requirement shall not be used towards meeting any of the leverage based requirements set out in this Regulation and in Directive 2013/36/EU, unless explicitly otherwise provided therein. [LEV 40.5]

Where a G-SII does not meet the leverage ratio buffer requirement, it shall be subject to the capital conservation requirement in accordance with Article 141b of Directive 2013/36/EU. [LEV 40.4]

Where a G-SII does not meet at the same time the leverage ratio buffer requirement and the combined buffer requirement as defined in point (6) of Article 128 of

Directive 2013/36/EU, it shall be subject to the higher of the capital conservation requirements in accordance with Articles 141 and 141b of that Directive. [LEV 40.4]

[...]

PART SEVEN

LEVERAGE

Article 429

Calculation of the leverage ratio

1. Institutions shall calculate their leverage ratio in accordance with the methodology set out in paragraphs 2, 3 and 4.

2. The leverage ratio shall be calculated as an institution's capital measure divided by that institution's total exposure measure and shall be expressed as a percentage. [LEV 20.3]

Institutions shall calculate the leverage ratio at the reporting reference date. [LEV 20.6]

3. For the purposes of paragraph 2, the capital measure shall be the Tier 1 capital. [LEV 20.4]

4. For the purposes of paragraph 2, the total exposure measure shall be the sum of the exposure values of:

- a) **assets**, excluding derivative contracts listed in Annex II, credit derivatives and the positions referred to in Article 429e, calculated in accordance with Article 429b(1);
- b) **derivative contracts** listed in Annex II and credit derivatives, including those contracts and credit derivatives that are off-balance-sheet, calculated in accordance with Articles 429c and 429d;
- c) **add-ons for counterparty credit risk of securities financing transactions**, including those that are off-balance-sheet, calculated in accordance with Article 429e;
- d) **off-balance-sheet items**, excluding derivative contracts listed in Annex II, credit derivatives, securities financing transactions and positions referred to in Articles 429d and 429g, calculated in accordance with Article 429f;
- e) **regular-way purchases or sales awaiting settlement**, calculated in accordance with Article 429g. [LEV 20.5 + LEV 30.10]

Institutions shall treat long settlement transactions in accordance with points (a) to (d) of the first subparagraph, as applicable. [FAQ1 under LEV 30.1]

Institutions **may** reduce the exposure values referred to in points (a) and (d) of the first subparagraph by the corresponding amount of general credit risk adjustments to on- and off-balance-sheet items, respectively, subject to a floor of 0 where the credit risk adjustments have reduced the Tier 1 capital. [LEV 30.9 and 30.48]

5. By way of derogation from point (d) of paragraph 4, the following provisions shall apply:

- a) an off-balance-sheet item in accordance with point (d) of paragraph 4 that is treated as a derivative in accordance with the applicable accounting framework shall be subject to the treatment set out in point (b) of that paragraph [LEV 30.45];
- b) where a client of an institution acting as a clearing member enters directly into a derivative transaction with a CCP and the institution guarantees the performance of its client's trade exposures to the CCP arising from that transaction, the institution shall calculate its exposure resulting from the guarantee in accordance with point (b) of paragraph 4, as if that institution had entered directly into the transaction with the client, including with regard to the receipt or provision of cash variation margin. [LEV 30.28]

The treatment set out in point (b) of the first subparagraph shall also apply to an institution acting as a higher-level client that guarantees the performance of its client's trade exposures. [LEV 30.26 and 30.28]

For the purposes of point (b) of the first subparagraph and of the second subparagraph of this paragraph, institutions **may** consider an affiliated entity as a client only where that entity is outside the regulatory scope of consolidation at the level at which the requirement set out in point (d) of Article 92(4) is applied. [LEV 30.29]

6. For the purposes of paragraph 4, point (e), of this Article and Article 429g, "regular-way purchase or sale" means a purchase or a sale of a financial asset under contracts for which the terms require delivery of the financial asset within the period established generally by law or convention in the marketplace concerned. [LEV 30.10 footnote3]

7. Unless otherwise expressly provided for in this Part, institutions shall calculate the total exposure measure in accordance with the following principles:

- a) physical or financial collateral, guarantees or credit risk mitigation purchased shall not be used to reduce the total exposure measure;
- b) assets shall not be netted with liabilities. [LEV 30.2]

8. By way of derogation from point (b) of paragraph 7, institutions **may** reduce the exposure value of a pre-financing loan or an intermediate loan by the positive

balance on the savings account of the debtor to which the loan was granted and only include the resulting amount in the total exposure measure, provided that all the following conditions are met:

- a) the granting of the loan is conditional upon the opening of the savings account at the institution granting the loan and both the loan and the savings account are regulated by the same sectoral law;
- b) the balance on the savings account cannot be withdrawn, in part or in full, by the debtor for the entire duration of the loan;
- c) the institution can unconditionally and irrevocably use the balance on the savings account to settle any claim originating under the loan agreement in cases regulated by the sectoral law referred to in point (a), including the case of non-payment by or the insolvency of the debtor.

‘Pre-financing loan’ or ‘intermediate loan’ means a loan that is granted to the borrower for a limited period of time in order to bridge the borrower’s financing gaps until the final loan is granted in accordance with the criteria laid down in the sectoral law regulating such transactions.

Article 429a

Exposures excluded from the total exposure measure

1. By way of derogation from Article 429(4), an institution **may** exclude any of the following exposures from its total exposure measure:

- a) the amounts deducted from Common Equity Tier 1 items in accordance with point (d) of Article 36(1); [\[LEV 30.3\(2\)\]](#)
- b) the assets deducted in the calculation of the capital measure referred to in Article 429(3); [\[LEV 30.3\]](#)
- c) exposures that are assigned a risk weight of 0 % in accordance with Article 113(6) or (7);
- ca) where the institution is a member of the network referred to in Article 113(7), the exposures that are assigned a risk weight of 0% in accordance with Article 114 and arising from assets being an equivalent of deposits in the same currency of other members of that network stemming from legal or statutory minimum deposit in accordance with Article 422(3), point (b). In such a case exposures of other members of that network being legal or statutory minimum deposit are not subject to point (c);
- d) where the institution is a public development credit institution, the exposures arising from assets that constitute claims on central governments, regional governments, local authorities or public sector entities in relation to public sector investments, and promotional loans;

- da) the institution's exposures to its shareholders, provided such exposures are collateralised to the level of at least 125% by assets referred to in Article 129(1), points (d) and (e) and those assets are accounted for in the shareholders' leverage ratio requirement, where the institution is not a public development credit institution but it meets the following conditions:
 - i.) its shareholders are credit institutions and do not exercise control on the institution as defined in Article 4(1), point (37);
 - ii.) it complies with points (a), (b), (c), (e) of paragraph 2;
- e) where the institution is not a public development credit institution, the parts of exposures arising from passing-through promotional loans to other credit institutions;
- f) the guaranteed parts of exposures arising from export credits that meet both of the following conditions:
 - i) the guarantee is provided by an eligible provider of unfunded credit protection in accordance with Articles 201 and 202, including by export credit agencies or by central governments;
 - ii) a 0 % risk weight applies to the guaranteed part of the exposure in accordance with Article 114(2) or (4) or Article 116(4);
 - iii) its exposures are located in the same Member State;
 - iv) it is subject to some form of oversight by a Member State's central government on an ongoing basis;
 - v) its business model is limited to the pass-through of the amount corresponding to the proceeds raised through the issuance of covered bonds to its shareholders, in form of debt instruments;
- g) where the institution is a clearing member of a QCCP, the trade exposures of that institution, provided that they are cleared with that QCCP and meet the conditions set out in point (c) of Article 306(1); [\[LEV 30.26\]](#)
- h) where the institution is a higher-level client within a multi-level client structure, the trade exposures to the clearing member or to an entity that serves as a higher-level client to that institution, provided that the conditions set out in Article 305(2) are met and provided that the institution is not obligated to reimburse its client for any losses suffered in the event of default of either the clearing member or the QCCP; [\[LEV 30.26\]](#)
- i) fiduciary assets which meet all the following conditions:
 - i) they are recognised on the institution's balance sheet by national generally accepted accounting principles, in accordance with Article 10 of Directive 86/635/EEC;
 - ii) they meet the criteria for non-recognition set out in International Financial Reporting Standard (IFRS) 9, as applied in accordance with Regulation (EC) No 1606/2002;

- iii) they meet the criteria for non-consolidation set out in IFRS 10, as applied in accordance with Regulation (EC) No 1606/2002, where applicable; [\[LEV 30.8, footnote1\]](#)
- j) exposures that meet all the following conditions:
 - i) they are exposures to a public sector entity;
 - ii) they are treated in accordance with Article 116(4);
 - iii) they arise from deposits that the institution is legally obliged to transfer to the public sector entity referred to in point (i) for the purpose of funding general interest investments;
- k) the excess collateral deposited at tri-party agents that has not been lent out; [\[LEV30.37\(2\)\]](#)
- l) where under the applicable accounting framework an institution recognises the variation margin paid in cash to its counterparty as a receivable asset, the receivable asset, provided that the conditions set out in points (a) to (e) of Article 429c(3) are met; [\[LEV30.25\(2\)\]](#)
- m) the securitised exposures from traditional securitisations that meet the conditions for significant risk transfer set out in Article 244(2); [\[LEV 30.5\]](#)
- n) the following exposures to the institution's central bank, subject to the conditions set out in paragraphs 5 and 6:
 - i) coins and banknotes constituting legal currency in the jurisdiction of the central bank;
 - ii) assets representing claims on the central bank, including reserves held at the central bank; [\[discretion exercised under LEV 30.7\]](#)
- o) where the institution is authorised in accordance with Article 16 and point (a) of Article 54(2) of Regulation (EU) No 909/2014, the institution's exposures due to banking-type ancillary services listed in point (a) of Section C of the Annex to that Regulation which are directly related to the core or ancillary services listed in Sections A and B of that Annex;
- p) where the institution is designated in accordance with point (b) of Article 54(2) of Regulation (EU) No 909/2014, the institution's exposures due to banking-type ancillary services listed in point (a) of Section C of the Annex to that Regulation which are directly related to the core or ancillary services of a central securities depository, authorised in accordance with Article 16 of that Regulation, listed in Sections A and B of that Annex;
- q) the exposures that are subject to the treatment set out in Article 72e(5), first subparagraph.

For the purposes of point (m) of the first subparagraph, institutions shall include any retained exposure in the total exposure measure. [\[LEV 30.5\]](#)

2. For the purposes of points (d) and (e) of paragraph 1, ‘public development credit institution’ means a credit institution that meets all the following conditions:

- a) it has been established by a Member State’s central government, regional government or local authority;
- b) its activity is limited to advancing specified objectives of financial, social or economic public policy in accordance with the laws and provisions governing that institution, including articles of association, on a non-competitive basis;
- c) its goal is not to maximise profit or market share;
- d) subject to Union State aid rules, the central government, regional government or local authority has an obligation to protect the credit institution’s viability or directly or indirectly guarantees at least 90 % of the credit institution’s own funds requirements, funding requirements or promotional loans granted;
- e) it does not take covered deposits as defined in point (5) of Article 2(1) of Directive 2014/49/EU or in national law implementing that Directive that may be classified as fixed term or savings deposits from consumers as defined in point (a) of Article 3 of Directive 2008/48/EC of the European Parliament and of the Council.

For the purposes of point (b) of the first subparagraph, public policy objectives may include the provision of financing for promotional or development purposes to specified economic sectors or geographical areas of the relevant Member State.

For the purposes of points (d) and (e) of paragraph 1, and without prejudice to the Union State aid rules and the obligations of the Member States thereunder, **competent authorities may**, upon request of an institution, treat an organisationally, structurally and financially independent and autonomous unit of that institution as a public development credit institution, provided that the unit fulfils all the conditions listed in the first subparagraph and that such treatment does not affect the effectiveness of the supervision of that institution. **Competent authorities shall** without delay notify the Commission and EBA of any decision to treat, for the purposes of this subparagraph, a unit of an institution as a public development credit institution. The **competent authority shall** annually review such decision.

3. For the purposes of points (d) and (e) of paragraph 1 and point (d) of paragraph 2, ‘promotional loan’ means a loan granted by a public development credit institution or an entity set up by the central government, regional government or local authority of a Member State, directly or through an intermediate credit institution on a non-competitive, not-for-profit basis, in order to promote the public policy objectives of the central government, regional government or local authority in a Member State.

4. Institutions shall not exclude the trade exposures referred to in points (g) and (h) of paragraph 1 of this Article, where the condition set out in the third subparagraph of Article 429(5) is not met. [LEV 30.29]

5. Institutions may exclude the exposures listed in point (n) of paragraph 1 where all of the following conditions are met:

- a) the institution's competent authority has determined, after consultation with the relevant central bank, and publicly declared that exceptional circumstances exist that warrant the exclusion in order to facilitate the implementation of monetary policies;
- b) the exemption is granted for a limited period of time not exceeding one year;
- c) the institution's competent authority has determined, after consultation with the relevant central bank, the date when the exceptional circumstances are deemed to have started and publicly announced that date; that date shall be set at the end of a quarter. [discretion exercised under LEV 30.7]

6. The exposures to be excluded under point (n) of paragraph 1 shall meet both of the following conditions:

- a) they are denominated in the same currency as the deposits taken by the institution;
- b) their average maturity does not significantly exceed the average maturity of the deposits taken by the institution. [discretion exercised under LEV 30.7]

7. By way of derogation from point (d) of Article 92(1), where an institution excludes the exposures referred to in point (n) of paragraph 1 of this Article, it shall at all times satisfy the following adjusted leverage ratio requirement for the duration of the exclusion:

$$aLR = 3\% \cdot \frac{EM_{LR}}{EM_{LR} - CB}$$

where:

aLR = the adjusted leverage ratio;

EM_{LR} = the institution's total exposure measure as calculated in accordance with Article 429(4), including the exposures excluded in accordance with point (n) of paragraph 1 of this Article, on the date referred to in point (c) of paragraph 5 of this Article; and

CB = the daily average total value of the institution's exposures to its central bank, calculated over the full reserve maintenance period of the central bank immediately preceding the date referred to in point (c) of paragraph 5, that are eligible to be excluded in accordance with point (n) of paragraph 1. [discretion exercised under LEV 30.7]

Article 429b
Calculation of the exposure value of assets

1. Institutions shall calculate the exposure value of assets, excluding derivative contracts listed in Annex II, credit derivatives and the positions referred to in Article 429e in accordance with the following principles:

- a) the exposure values of assets means an exposure value as referred to in the first sentence of Article 111(1); [LEV 30.9]
- b) securities financing transactions shall not be netted. [LEV 30.37(1)]

2. A cash pooling arrangement offered by an institution does not violate the condition set out in point (b) of Article 429(7) only where the arrangement meets both of the following conditions:

- a) the institution offering the cash pooling arrangement transfers the credit and debit balances of several individual accounts of entities of a group included in the arrangement ('original accounts') into a separate, single account and thereby sets the balances of the original accounts to zero;
- b) the institution carries out the actions referred to in point (a) of this subparagraph on a daily basis.

For the purposes of this paragraph and paragraph 3, cash pooling arrangement means an arrangement whereby the credit or debit balances of several individual accounts are combined for the purposes of cash or liquidity management. [LEV 30.12]

3. By way of derogation from paragraph 2 of this Article, a cash pooling arrangement that does not meet the condition set out in point (b) of that paragraph, but meets the condition set out in point (a) of that paragraph, does not violate the condition set out in point (b) of Article 429(7), provided that the arrangement meets all the following conditions:

- a) the institution has a legally enforceable right to set off the balances of the original accounts through the transfer into a single account at any point in time;
- b) there are no maturity mismatches between the balances of the original accounts;
- c) the institution charges or pays interest based on the combined balance of the original accounts;
- d) the competent authority of the institution considers that the frequency by which the balances of all original accounts are transferred is adequate for the purpose of including only the combined balance of the cash pooling arrangement in the total exposure measure. [LEV 30.12]

4. By way of derogation from point (b) of paragraph 1, institutions may calculate the exposure value of cash receivable and cash payable under securities financing

transactions with the same counterparty on a net basis only where all the following conditions are met:

- a) the transactions have the same explicit final settlement date;
- b) the right to set off the amount owed to the counterparty with the amount owed by the counterparty is legally enforceable in the normal course of business and in the event of default, insolvency and bankruptcy;
- c) the counterparties intend to settle on a net basis or to settle simultaneously, or the transactions are subject to a settlement mechanism that results in the functional equivalent of net settlement. [LEV 30.37(b)]

5. For the purposes of point (c) of paragraph 4, institutions **may** consider that a settlement mechanism results in the functional equivalent of net settlement only where, on the settlement date, the net result of the cash flows of the transactions under that mechanism is equal to the single net amount under net settlement and all the following conditions are met:

- a) the transactions are settled through the same settlement system or settlement systems using a common settlement infrastructure;
- b) the settlement arrangements are supported by cash or intraday credit facilities intended to ensure that the settlement of the transactions will occur by the end of the business day;
- c) any issues arising from the securities legs of the securities financing transactions do not interfere with the completion of the net settlement of the cash receivables and payables.

The condition set out in point (c) of the first subparagraph is met only where the failure of any securities financing transaction in the settlement mechanism may delay settlement of only the matching cash leg or may create an obligation to the settlement mechanism, supported by an associated credit facility.

Where there is a failure of the securities leg of a securities financing transaction in the settlement mechanism at the end of the window for settlement in the settlement mechanism, institutions shall split out this transaction and its matching cash leg from the netting set and treat them on a gross basis. [LEV 30.37(b)]

Article 429c

Calculation of the exposure value of derivatives

1. Institutions shall calculate the exposure value of derivative contracts listed in Annex II and of credit derivatives, including those that are off-balance-sheet, in accordance with the method set out in Section 3 of Chapter 6 of Title II of Part Three. [LEV 30.13]

When calculating the exposure value, institutions may take into account the effects of contracts for novation and other netting agreements in accordance with Article 295. Institutions shall not take into account cross-product netting, but may net within the product category as referred to in point (25)(c) of Article 272 and credit derivatives where they are subject to a contractual cross-product netting agreement as referred to in point (c) of Article 295. [LEV 30.17]

Institutions shall include in the total exposure measure sold options even where their exposure value can be set to zero in accordance with the treatment laid down in Article 274(5). [??]

2. Where the provision of collateral related to derivative contracts reduces the amount of assets under the applicable accounting framework, institutions shall reverse that reduction. [LEV 30.21 and 30.22]

3. For the purposes of paragraph 1 of this Article, institutions calculating the replacement cost of derivative contracts in accordance with Article 275 may recognise only collateral received in cash from their counterparties as the variation margin referred to in Article 275, where the applicable accounting framework has not already recognised the variation margin as a reduction of the exposure value and where all the following conditions are met:

- a) for trades not cleared through a QCCP, the cash received by the recipient counterparty is not segregated from the assets of the institution;
- b) the variation margin is calculated and exchanged at least daily based on a mark-to-market valuation of derivatives positions;
- c) the variation margin received is in a currency specified in the derivative contract, governing master netting agreement, credit support annex to the qualifying master netting agreement or as defined by any netting agreement with a QCCP;
- d) the variation margin received is the full amount that would be necessary to extinguish the mark-to-market exposure of the derivative contract subject to the threshold and minimum transfer amounts that are applicable to the counterparty;
- e) the derivative contract and the variation margin between the institution and the counterparty to that contract are covered by a single netting agreement that the institution may treat as risk-reducing in accordance with Article 295.

Where an institution provides cash collateral to a counterparty and that collateral meets the conditions set out in points (a) to (e) of the first subparagraph, the institution shall consider that collateral as the variation margin posted with the counterparty and shall include it in the calculation of the replacement cost.

For the purposes of point (b) of the first subparagraph, an institution shall be considered to have met the condition set out therein where the variation margin is exchanged on the morning of the trading day following the trading day on which the

derivative contract was stipulated, provided that the exchange is based on the value of the contract at the end of the trading day on which the contract was stipulated.

For the purposes of point (d) of the first subparagraph, where a margin dispute arises, institutions **may** recognise the amount of non-disputed collateral that has been exchanged. [LEV 30.24]

4. For the purposes of paragraph 1 of this Article, institutions shall not include collateral received in the calculation of NICA as defined in Article 272, point (12a). [LEV 30.27]

4a. By way of derogation from paragraphs 3 and 4, an institution **may** recognise any collateral received in accordance with Part Three, Title II, Chapter 6, Section 3 where all of the following conditions are met:

- a) the collateral is received from a client for a derivative contract cleared by the institution on behalf of that client;
- b) the contract referred to in point (a) is cleared through a QCCP;
- c) where the collateral has been received in the form of initial margin, that collateral is segregated from the assets of the institution.

5. For the purposes of paragraph 1 of this Article, institutions shall set the value of the multiplier used in the calculation of the potential future exposure in accordance with Article 278(1) to one, except in the case of derivative contracts with clients where those contracts are cleared by a QCCP.

6. By way of derogation from paragraph 1 of this Article, institutions **may** use the method set out in Part Three, Title II, Chapter 6, Section 4 or 5 to determine the exposure value of the following:

- a) derivative contracts listed in Annex II and credit derivatives, where they also use that method for determining the exposure value of those contracts for the purposes of meeting the own funds requirements set out in Article 92(1), points (a), (b) and (c);
- b) credit derivatives to which they apply the treatment set out in Article 273(3) or (5), where the conditions to use that method are met.

Where institutions apply one of the methods referred to in the first subparagraph, they shall not reduce the total exposure measure by the amount of margin they have received.

Article 429d

Additional provisions on the calculation of the exposure value of written credit derivatives

1. For the purposes of this Article, ‘written credit derivative’ means any financial instrument through which an institution effectively provides credit protection

including credit default swaps, total return swaps and options where the institution has the obligation to provide credit protection under conditions specified in the options contract. [LEV 30.32]

2. In addition to the calculation laid down in Article 429c, institutions shall include in the calculation of the exposure value of written credit derivatives the effective notional amounts referenced in the written credit derivatives reduced by any negative fair value changes that have been incorporated in Tier 1 capital with respect to those written credit derivatives.

Institutions shall calculate the effective notional amount of written credit derivatives by adjusting the notional amount of those derivatives to reflect the true exposure of the contracts that are leveraged or otherwise enhanced by the structure of the transaction. [LEV 30.31]

3. Institutions may fully or partly reduce the exposure value calculated in accordance with paragraph 2 by the effective notional amount of purchased credit derivatives, provided that all the following conditions are met:

- a) the remaining maturity of the purchased credit derivative is equal to or greater than the remaining maturity of the written credit derivative;
- b) the purchased credit derivative is otherwise subject to the same or more conservative material terms as those in the corresponding written credit derivative;
- c) the purchased credit derivative is not purchased from a counterparty that would expose the institution to Specific Wrong-Way risk, as defined in point (b) of Article 291(1);
- d) where the effective notional amount of the written credit derivative is reduced by any negative change in fair value incorporated in the institution's Tier 1 capital, the effective notional amount of the purchased credit derivative is reduced by any positive fair value change that has been incorporated in Tier 1 capital;
- e) the purchased credit derivative is not included in a transaction that has been cleared by the institution on behalf of a client or that has been cleared by the institution in its role as a higher-level client in a multi-level client structure and for which the effective notional amount referenced by the corresponding written credit derivative is excluded from the total exposure measure in accordance with point (g) or (h) of the first subparagraph of Article 429a(1), as applicable. [LEV 30.31]

For the purpose of calculating the potential future exposure in accordance with Article 429c(1), institutions may exclude from the netting set the portion of a written credit derivative which is not offset in accordance with the first subparagraph of this paragraph and for which the effective notional amount is included in the total exposure measure. [LEV 30.35]

4. For the purposes of point (b) of paragraph 3, ‘material term’ means any characteristic of the credit derivative that is relevant to the valuation thereof, including the level of subordination, the optionality, the credit events, the underlying reference entity or pool of entities, and the underlying reference obligation or pool of obligations, with the exception of the notional amount and the residual maturity of the credit derivative. Two reference names shall be the same only where they refer to the same legal entity. [LEV 30.31 and 30.33]

5. By way of derogation from point (b) of paragraph 3, institutions may use purchased credit derivatives on a pool of reference names to offset written credit derivatives on individual reference names within that pool where the pool of reference entities and the level of subordination in both transactions are the same. [LEV 30.31, see FAQ]

6. Institutions shall not reduce the effective notional amount of written credit derivatives where they buy credit protection through a total return swap and record the net payments received as net income, but do not record any offsetting deterioration in the value of the written credit derivative in Tier 1 capital. [LEV 30.34]

7. In the case of purchased credit derivatives on a pool of reference obligations, institutions may reduce the effective notional amount of written credit derivatives on individual reference obligations by the effective notional amount of purchased credit derivatives in accordance with paragraph 3 only where the protection purchased is economically equivalent to buying protection separately on each of the individual obligations in the pool. [LEV 30.33]

Article 429e

Counterparty credit risk add-on for securities financing transactions

1. In addition to the calculation of the exposure value of securities financing transactions, including those that are off-balance-sheet in accordance with Article 429b(1), institutions shall include in the total exposure measure an add-on for counterparty credit risk calculated in accordance with paragraph 2 or 3 of this Article, as applicable.

2. Institutions shall calculate the add-on for transactions with a counterparty that are not subject to a master netting agreement that meets the conditions set out in Article 206 on a transaction-by-transaction basis in accordance with the following formula: [LEV 30.37 (2)]

$$E_i^* = \max \{0, E_i - C_i\}$$

where:

$$E_i^* = \text{the add-on;}$$

i = the index that denotes the transaction;

E_i = the fair value of securities or cash lent to the counterparty under transaction i ; and

C_i = the fair value of securities or cash received from the counterparty under transaction i .

Institutions **may** set

E_i^* equal to zero where E_i is the cash lent to a counterparty and the associated cash receivable is not eligible for the netting treatment set out in Article 429b(4).

3. Institutions shall calculate the add-on for transactions with a counterparty that are subject to a master netting agreement that meets the conditions set out in Article 206 on an agreement-by-agreement basis in accordance with the following formula: [LEV 30.37 (2)]

$$E_i^* = \max \left\{ 0, \sum_i E_i - \sum_i C_i \right\}$$

where:

E_i^* = the add-on;

i = the index that denotes the netting agreement;

E_i = the fair value of securities or cash lent to the counterparty for the transactions that are subject to master netting agreement i ; and

C_i = the fair value of securities or cash received from the counterparty that is subject to master netting agreement i .

4. For the purposes of paragraphs 2 and 3, the term counterparty includes also tri-party agents that receive collateral in deposit and manage the collateral in the case of tri-party transactions. [LEV 30.37 (2)]

5. By way of derogation from paragraph 1 of this Article, institutions **may** use the method set out in Article 222, subject to a 20 % floor for the applicable risk weight, to determine the add-on for securities financing transactions including those that are off-balance-sheet. Institutions **may** use that method only where they also use it for calculating the exposure value of those transactions for the purpose of meeting the own funds requirements as set out in points (a), (b) and (c) of Article 92(1).

6. Where sale accounting is achieved for a repurchase transaction under the applicable accounting framework, the institution shall reverse all sales-related accounting entries. [LEV 30.40]

7. Where an institution acts as an agent between two parties in a securities financing transaction, including an off-balance-sheet transaction, the following provisions shall apply to the calculation of the institution's total exposure measure:

- a) where the institution provides an indemnity or guarantee to one of the parties in the securities financing transaction and the indemnity or guarantee is limited to any difference between the value of the security or cash the party has lent and the value of collateral the borrower has provided, the institution shall only include the add-on calculated in accordance with paragraph 2 or 3, as applicable, in the total exposure measure;
- b) where the institution does not provide an indemnity or guarantee to any of the involved parties, the transaction shall not be included in the total exposure measure;
- c) where the institution is economically exposed to the underlying security or the cash in the transaction to an amount greater than the exposure covered by the add-on, it shall include in the total exposure measure also the full amount of the security or the cash to which it is exposed;
- d) where the institution acting as agent provides an indemnity or guarantee to both parties involved in a securities financing transaction, the institution shall calculate its total exposure measure in accordance with points (a), (b) and (c) separately for each party involved in the transaction. [LEV 30.41 – 30.44]

Article 429f

Calculation of the exposure value of off-balance-sheet items

1. Institutions shall calculate, in accordance with Article 111(2), the exposure value of off-balance-sheet items, excluding the derivative contracts listed in Annex II, credit derivatives, securities financing transactions and the positions referred to in Article 429d. [LEV30.45 and 30.49 to 30.53]

Where a commitment refers to the extension of another off-balance sheet item, Article 111(3) shall apply. [LEV30.55]

2. By way of derogation from paragraph 1, institutions may reduce the credit exposure equivalent amount of an off-balance-sheet item by the corresponding amount of specific credit risk adjustments. The calculation shall be subject to a floor of zero. [LEV30.48]

3. By way of derogation from Article 495d, institutions shall apply a conversion factor of 10% to off-balance sheet items in the form of unconditionally cancellable commitments. [LEV30.54]

Article 429g

Calculation of the exposure value of regular-way purchases and sales awaiting settlement

1. Institutions shall treat cash related to regular-way purchases and financial assets related to regular-way sales which remain on the balance sheet until the settlement date as assets in accordance with Article 429(4), point (a). [LEV30.10]

2. Institutions that, in accordance with the applicable accounting framework, apply trade date accounting to regular-way purchases and sales which are awaiting settlement shall reverse out any offsetting between cash receivables for regular-way sales awaiting settlement and cash payables for regular-way purchase awaiting settlement allowed under that framework. After institutions have reversed out the accounting offsetting, they **may** offset between those cash receivables and cash payables where both the related regular-way sales and purchases are settled on a delivery-versus-payment basis. [LEV 30.10]

3. Institutions that, in accordance with the applicable accounting framework, apply settlement date accounting to regular-way purchases and sales which are awaiting settlement shall include in the total exposure measure the full nominal value of commitments to pay related to regular-way purchases. [LEV 30.11]

Institutions may offset the full nominal value of the commitments to pay related to regular-way purchases by the full nominal value of cash receivables related to regular-way sales awaiting settlement only where both of the following conditions are met:

- a) both the regular-way purchases and sales are settled on a delivery-versus-payment basis;
- b) the financial assets bought and sold that are associated with cash payables and receivables are fair valued through profit and loss and included in the institution's trading book. [LEV 30.11 and 30.49(3)]

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