CHAPTER 27
FINANCIAL MARKET REGULATION AND SUPERVISION

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1. Introduction

The basis of the EU legal framework regarding the financial markets is formed by the Treaty objective of constructing an internal market (Art. 3(3) TEU) and the fundamental freedoms, free movement of capital and services (Art. 26(2) TFEU).[1] This internal market objective and these freedoms have resulted in a legal framework that is thoroughly harmonized and sometimes even unified. But it has not been the consequence of a gradual process; perhaps no other area of law has witnessed such huge changes, as the area of financial markets.

This chapter deals with the European legal framework regarding financial markets.[2] It is a vast topic on which, moreover, numerous separate volumes have been written. In the context of this book, it seemed rational to concentrate on the institutional set-up in which European rules regarding the financial markets are created, applied and enforced, rather than on their substantive content. Also, we have chosen to focus on the application of European law at the European level, rather than at the national level. Consequently, we have divided this chapter into sections on regulation (section 3), supervision and enforcement (section 4), and legal protection (section 5). These sections are preceded by section 2, which provides an introduction to the institutional set-up of the European rules regarding the financial markets and explains it from a historic perspective.

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1. See, e.g., N. Moloney, *EU Securities and Financial Markets Regulation*, 3rd ed. (OUP, 2014), at 9; Ch. 12, "The functioning of the internal market" and Ch. 14, "Free movement of services, establishment and capital", of this book.
2. The pace and depth of the developments discussed in this chapter make it important to note that our research closed on 9 Apr. 2018. We have not been able to take into account any draft legislation published after that date. Moreover, given the large amount of (delegated) regulation in the field of law discussed in this chapter, relevant pieces have been taken into account, but in order to keep this chapter within manageable proportions not all drafts of regulations yet to be enacted could be included.

2. Institutional structure and its development[3]

2.1 Lamfalussy Report: 2001

European financial market regulation is created in accordance with the so-called "Lamfalussy process", which resulted from the Lamfalussy Report.[4] This report was drafted by Baron Alexandre Lamfalussy and the group he chaired in 2000–2001. This group was appointed by the European Council and was entrusted with assessing the efficiency of the legislative progress in the financial sector. They concluded that the current legislative process was too slow and rigid to accomplish the European Commission's Financial Services Action Plan (FSAP)[5] in time. This plan aimed at stimulating European financial integration by means of, *inter alia*, harmonization of financial regulation. Consequently, the Lamfalussy Report details a set of recommended guidelines conducive to a more efficient lawmaking process in the Union. The EU legislature has embraced the recommended process, which is therefore now commonly referred to as the Lamfalussy process.

The Lamfalussy process discerns the following four levels of regulation:

– *Level 1:* The adoption of framework Directives or Regulations by the EU, in accordance with the co-decision procedure, currently: the ordinary legislative procedure.[6] This level expresses the more fundamental policy choices on the topic in question. The Level 1 instrument Markets in Financial Instruments Directive II ("MiFID II"),[7] for example, gives the following general rule: "An investment firm shall, when holding funds belonging to clients, make adequate arrangements to safeguard the rights of clients and, except in the case of credit institutions, prevent the use of client funds for its own account".[8]

– *Level 2:* The implementation of additional legislation at EU level, so-called Delegated and Implementing Directives/Regulations, the purpose of which is to fill in the details of the framework Directives and Regulations. Under Articles 290(1) and 291(2) TFEU, the European Commission can adopt "delegated acts" of general application to supplement or amend certain non-essential elements of legislative acts and "implementing acts" where uniform conditions for implementing legally binding Union acts are needed. Two types of delegated and implementing acts can be distinguished: delegated and implementing acts made by the European Commission, and delegated and implementing acts made by the European Commission in cooperation with the European Supervisory Authorities (ESAs).[9] With regard

3. Part of this section has been based on M. Haentjens and P. de Gioia-Carabellese, *European Banking and Financial Law* (Routledge, 2015), 4–14.
4. Lamfalussy Report, Final Report of the Committee of the Wise Men in the Regulation of European Securities Markets, 15 Feb. 2001 <ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf>.
5. Communication of the Commission, Financial Services: Implementing the Framework for Financial Markets: Action Plan, COM(1999)232 final.
6. Art. 289 TFEU.
7. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, O.J. 2014, L 173 ("MiFID II").
8. Art. 16(9) MiFID II.
9. See, with regard to delegated acts, E. Wymeersch, "The European Financial Supervisory Authorities or ESAs" in E. Wymeersch, K.J. Hopt and G. Ferrarini (Eds.), *Financial Regulation and Supervision. A*

to the latter category, so-called regulatory technical standards and implementing technical standards (RTSs and ITSs, respectively) are proposed by one of the ESAs and submitted to the European Commission for endorsement.[10]

Building on the above example of MiFID II and the general rule given therein, this rule has been further specified/substantiated in the accompanying Level 2 instrument, the MiFID II Delegated Directive 2017/593,[11] stating: "1. Member States shall require that investment firms comply with the following requirements: (a) they must keep records and accounts enabling them at any time and without delay to distinguish assets held for one client from assets held for any other client and from their own assets; […]."

– *Level 3:* A focus on cooperation among national supervisors, so as to accomplish "[e]nhanced cooperation and networking among EU securities regulators to ensure consistent and equivalent transposition of Level 1 and 2 legislation".[12] This supervisory convergence is to be achieved by "soft law" instruments made by the ESAs, such as recommendations and guidelines,[13] Q&A's, interpretations, opinions, positions, supervisory briefings and reports.[14]

Recommendations and guidelines address market participants and supervisors and are issued to ensure consistent and uniform implementation and cooperation between the Member States.[15] Formally, they are not legally binding, but if the addressed parties are not willing to comply, they have to explain their reasons ("comply or explain" mechanism).[16] Thus, they often function as hard law in practice. Again building on the above example of the MiFID, ~~the~~ ESMA had published guidelines and recommendations on MiFID's suitability requirements under Article 19 of MiFID II's predecessor, MiFID, in 2012,[17] but many other example could be referred to.

Post-Crisis Analysis (OUP, 2012), 250. Wymeersch calls them "Commission-only acts" and "ESA plus Commission acts".

10. See Arts. 10 and 15 ESA Reg. (Reg. (EU) 1093/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/78/EC, O.J. 2010, L 331; Reg. (EU) 1095/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC, O.J. 2010, L 331; and Reg. (EU) 1094/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/79/EC, O.J. 2010, L 331).
11. Art. 2 of Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Dir. 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits, C/2016/2031, O.J. 2017, L 87.
12. Lamfalussy Report, cited *supra* note 4, 19.
13. Art. 8(2)(c) and (d) ESA Reg.
14. E. Wymeersch, op. cit. *supra* note 9, 249.
15. <ec.europa.eu/finance/insurance/solvency/solvency2/index_en.htm>.
16. Art. 16(3) ESA Reg.
17. *Final report. Guidelines on certain aspects of the MiFID suitability requirements*, ESMA/2012/387. On 13 July 2017, ESMA published a consultation paper with a draft new version of these Guidelines, which are to be updated in conformity with MiFID II. A "Final report" was expected in Q1/Q2 2018.

Q&A's are specifically meant to ensure "consistent and effective application" of European financial market regulation.[18] They answer questions of the general public and the competent authorities on the practical application of European financial market regulation. Although Q&A's are not legally binding and the "comply or explain" mechanism does not apply, they can have significant relevance in practice. An example of a Q&A with great significance in practice is the Q&A on the Prospectus Directive.[19]

– *Level 4:* A more effective enforcement of the EU legislation by the Commission by checking Member States' compliance with Union law and by launching infringement procedures against a Member State which is suspected of a breach.

2.2 De Larosière Report: 2009

In October 2008, Jacques de Larosière de Champfeu was entrusted to draft a report with practical proposals in the area of financial regulation and supervision. The report was commissioned against the backdrop of the euro area crisis and the sovereign debt crisis in 2009.[20] The De Larosière Report essentially emphasized three steps to guard against a future collapse: (a) a new regulatory agenda; (b) stronger coordinated supervision; and (c) effective crisis management procedures.

The De Larosière Report emphasized that the regulatory framework in place prior to the crisis lacked "cohesiveness". As the EU Member States were afforded a significant degree of leeway over the extent to which they could implement and enforce the Directives, such "options [led] to a wide diversity of national transpositions related to local traditions, legislations and practices".[21] The reason for this lack of harmonization was the vagueness that characterized the first level of legislation where the national legislator had a multitude of options at his disposal. As a result, at Level 3 in the Lamfalussy structure, it was very difficult, if not impossible, to "impose a single solution", i.e. a sufficiently harmonized regime.[22]

First and most significantly, the report has resulted in the creation of a European System of Financial Supervision (ESFS). The ESFS consists of three European Supervisory Authorities: the European Banking Authority having its seat in London (but to be relocated to Paris) (EBA), the European Securities Markets Authority having its seat in Paris (ESMA) and the European Insurance and Occupational Pensions Authority seated in Frankfurt (EIOPA).[23] The relevant national supervisors participate in these authorities and, unlike their predecessors, the ESAs are empowered to issue binding Regulatory Technical Standards and Implementing Technical Standards in addition to non-binding guidelines and recommendations. Also, for specific instances, ESAs have been granted direct supervisory powers. ESMA, for instance, has been made exclusively responsible for the direct oversight of credit rating agencies and trade repositories.[24] As another example, on 27 March 2018, ESMA has partly prohibited the provision of contracts for differences and binary options

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18. See <www.eba.europa.eu/single-rule-book-qa>.
19. ESMA/2016/1674.
20. De Larosière Report, The High-Level Group on Financial Supervision in the EU, 25 Feb. 2009 <ec.europa.eu/info/system/files/de_larosiere_report_en.pdf>.
21. See De Larosière Report, cited *supra* note 20, 27.
22. Ibid.
23. See, respectively, Reg. (EU) 1093/2010, Reg. (EU) 1095/2010 and Reg. (EU) 1094/2010.
24. See also *infra*, section 4.2.1.

to retail investors.[25] Also, a European Systemic Risk Board (ESRB) forms part of the ESFS, which is "responsible for the macro-prudential oversight of the financial system within the Union in order to contribute to the prevention or mitigation of systemic risks to financial stability in the Union that arise from developments within the financial system and taking into account macroeconomic developments, so as to avoid periods of widespread financial distress".[26]

Many areas of financial law underwent significant change so as to limit the level of discretion in the hands of each Member State. For instance, the deposit guarantee scheme which was previously based on a minimum harmonization Directive[27] and which thus left relative discretion to each Member State on the level of protection afforded to the depositor, has been replaced by a maximum harmonization Directive[28] where this discretion is significantly curtailed, if not entirely removed. In other cases, such as the Market Abuse Regulation replacing the Market Abuse Directive,[29] Directives have been or will be replaced by Regulations, so as to accomplish unification. Also, where no harmonization instrument was to be found,[30] a legislative framework is being, or has recently been, drafted and shall be announced to be published in the future. For an instrument that has recently been enacted for which there was no statutory predecessor, reference can, for instance, be made to the Regulation on Central Securities Depositories.[31]

2.3 Banking Union, single supervision and crisis management: 2014–present

2.3.1 Banking Union

As a consequence of the financial crisis, the European legislature considered that coordination between supervisors be vital but that there was no sufficient coordination yet. Especially in the context of a single currency, there was also a need for centralized decision-making.[32] In 2012 the European Commission concluded that the interdependency between the euro area Member States requires another approach to prudential banking supervision. Mere coordination between national supervisors through the ESAs would not suffice to

25. See <www.esma.europa.eu/press-news/esma-news/esma-agrees-prohibit-binary-options-and-restrict-cfds-protect-retail-investors>.
26. Art. 3(1) Reg. (EU) 1092/2010 of the European Parliament and of the Council of 24 Nov. 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, O.J. 2010, L 331.
27. Dir. 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, O.J. 1994, L 135.
28. Dir. 2009/14/EC of the European Parliament and of the Council of 11 Mar. 2009 amending Dir. 94/19/EC on deposit-guarantee schemes as regards the overage level and the payout delay, O.J. 2009, L 68.
29. Reg. (EU) 596/2014 of the European Parliament and of the Council of 16 Apr. 2014 on market abuse (market abuse regulation) and repealing Dir. 2003/6/EC of the European Parliament and of the Council and Commission Dir. 2003/124/EC, 2003/125/EC and 2004/72/EC, O.J. 2014, L 173.
30. For instance, a guarantee scheme in the insurance industry.
31. Reg. (EU) 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Dir. 98/26/EC and 2014/65/EU and Reg. (EU) 236/2012, O.J. 2014, L 257.
32. Communication from the European Commission to the European Parliament and the Council, A roadmap towards a Banking Union, COM(2012)510 final, 3.

effectively monitor and strengthen financial stability in the euro area.[33] In addition, merely harmonizing banking regulation would not reduce the presence of regulatory arbitrage and the risks associated with it. The European Banking Union has been designed as the solution to these issues.

More specifically, since so-called Super Tuesday 15 April 2014, a dramatic step was taken in the institutional landscape of the EU. On that date, measures were adopted that have created what is commonly referred to as the Banking Union. These measures specifically concern the euro area, but some apply to the Union as a whole. In general, the Banking Union, as initially envisaged by the European Commission, would consist of three pillars: (i) the Single Supervisory Mechanism (SSM); (ii) the Bank Recovery and Resolution framework and Single Resolution Mechanism (SRM); and (iii) the EU Deposit Guarantee Scheme (which is not in place yet).

2.3.2 Single supervision

Despite the tumultuous evolution of the financial sector over the past 30 years, prior to the recent financial crisis a truly European integration of supervisors had remained conspicuous by its absence. Therefore, until relatively recently, a paradox of sorts prevailed within the EU where, on the one hand, a fully integrated market of credit institutions reaped the benefits of a single market which afforded them the tools to expand and operate at a greater pace across the EU, while, on the other hand, the fragmented subsistence of a body of supervisors as numerous as the various countries constituting the EU was evident. This asymmetry, in hindsight may have been a contributory factor in the collapse of several major financial institutions in the late 2000s, too vast and pan-European to be supervised by the assemblage of authorities existing in each respective country. This flaw in the architecture of the EU banking system has recently been revisited by the creation of the SSM, the first pillar of the Banking Union.[34] The SSM has three main objectives: to ensure the safety and soundness of the European banking system, to increase financial integration and stability and to ensure consistent supervision.[35]

This first pillar is based on the Single Supervisory Mechanism Regulation (SSM Regulation),[36] transferring the prudential supervision of credit institutions within the euro area to the European Central Bank (ECB).[37] The ECB is responsible for the functioning of the SSM as a whole, although the direct supervision of credit institutions is divided between the ECB and the national competent authorities (NCAs) of participating Member

33. Communication from the European Commission to the European Parliament and the Council, A Roadmap towards a Banking Union, COM(2012)510 final, 3.
34. By virtue of Council Reg. (EU) 1024/2013 of 15 Oct. 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, O.J. 2013, L 287.
35. European Central bank, Guide to Banking Supervision, available at <www.bankingsupervision.europa.eu/press/publications/html/index.en.html>, at 5; Art. 1 SSM Reg.
36. Council Reg. (EU) 1024/2013 of 15 Oct. 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, O.J. 2013, L 287. The Regulation entered into force on 3 Nov. 2013.
37. On the ECB and its monetary function, see Ch. 26, "Economic and Monetary Union", of this book.

States.[38] The ECB is the main supervisor of the so-called "significant credit institutions"[39] incorporated in the participating Member States, i.e. all EU Member States that use the euro as their currency and all other states that wish to accede to the SSM.[40] The NCAs are responsible for the direct supervision of the "less significant credit institutions".[41]

2.3.3 Crisis management

As the disorderly failure of the Fortis group has shown, cooperation between the relevant national authorities is critical when a cross-border operating bank fails.[42] Yet it is also fraught with conflicts, as the same authorities are expected to protect different (national) interests. The Banking Union's second pillar therefore brings about, for the Member States that use the euro as their currency and any other country that wishes to accede, the Single Resolution Mechanism (SRM).

The SRM is built on a Regulation and an intergovernmental agreement.[43] The Regulation has the same scope as the SSM Regulation, in that it also applies to credit institutions of the euro area, and it is characterized by the same distinction between "significant" and "less significant" banks. Substantively it forms the SSM's corollary, for it was argued that credible single supervision of banks would require common crisis management of the same.[44] The intergovernmental agreement was a political emergency solution: certain Member States argued that there was no basis in the Treaties for an EU instrument to accomplish a Single Resolution Fund (SRF) as it is now established on the basis of the agreement. Consequently, the instrument of intergovernmental agreement was resorted to.[45]

As a result, credit institutions in Member States participating in the SSM and the SRM have become subject to unified and centralized supervision and resolution and enjoy a financial backstop arrangement at a European level in the form of the SRF, while credit institutions in Member States outside the SSM and the SRM are subject to national – albeit

38. Depending on the way in which financial supervision is structured in a given Member State, the "competent authority", i.e. the authority responsible for prudential supervision of credit institutions in a Member State, can, for instance, be a central bank.
39. On the definition of "significant", see also more extensively *infra,* section 4.3.1.
40. E. Ligere, "Quo vadis, Europe?", (2015) JIBLR 30, 407–411.
41. See on the definition of "less significant", more extensively *infra,* section 4.3.1. European Central bank, Guide to Banking Supervision, available at <www.bankingsupervision.europa.eu/press/publications/html/index.en.html>, at 11.
42. See The Basel Committee on Banking Supervision, Report and Recommendations of the Cross-border Bank Resolution, June 2010, 10 et seq.
43. Reg. (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Reg. (EU) 1093/2010, O.J. 2014, L 225; Agreement on the transfer and mutualization of contributions to the Single Resolution Fund of 14 May 2014 (8457/14).
44. See, e.g., Y. Mersch, "Europe's ills cannot be healed only by monetary innovation", *Financial Times*, 25 Apr. 2013.
45. See, more extensively, e.g. G.S. Zavvos and S. Kaltsouni, "The single resolution mechanism in the European Banking Union: Legal foundation, governance structure and financing" in M. Haentjens and B. Wessels (Eds.), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar, 2015), 141 et seq.

harmonized – arrangements for supervision and resolution under the Bank Recovery and Resolution Directive (BRRD).[46]

Within the SRM, the SRM Regulation[47] and the BRRD are applied by a new European resolution authority, viz. the Single Resolution Board (SRB). Thus, this SRB has become responsible for the resolution of cross-border and significant banks in the euro area. Together, the SRM and BRRD aim to prevent or minimize the negative effects of a disorderly liquidation of credit institutions. More generally, it was hoped that with the harmonized and modernized bank insolvency regime established by means of the BRRD and SRM, the financial support as was previously provided by Member State governments to failing banks could be avoided in the future. Thus, the so-called "doom-loop" or "vicious circle" between banks and sovereign debt was hoped to have been broken.[48]

2.4 *Future developments*

As the Banking Union's third pillar, the European Commission originally envisaged to create a common deposit guarantee scheme (DGS).[49] This common DGS would provide the euro area with a single backstop that would uniformly, and on the basis of the combined euro area Member States' finances, guarantee all depositors' claims on a bank to a certain amount in circumstances where his deposits are not available for retrieval. However, this common DGS proved to be politically too ambitious at the time so that the most recent legislative framework in this area is the recast Deposit Guarantee Scheme Directive of 16 April 2014 (DGS Directive),[50] which now mainly further harmonizes the payout time and the way national Member States' DGSs are funded. Yet the original plan does not seem to have been definitively shelved and a renewed proposal for a common DGS has been published under the name of the European Deposit Insurance Scheme.[51]

Regarding current and future developments, mention must be made of the latest Commision Action Plan for the establishment of a "Capital Markets Union". More specifically,

46. Dir. 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Dir. 82/891/EEC, and Dir. 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regs. (EU) 1093/2010 and (EU) 648/2012, of the European Parliament and of the Council, O.J. 2014, L 173.
47. The SRM Reg. applies as of 1 Jan. 2016. Some provisions, including certain provisions related to the powers of the Single Resolution Board to collect information and to cooperate with the national authorities, have applied since 1 Jan. 2015; Art. 88 SRM Reg.
48. See, e.g., M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 94; E. Wymeersch, "The Single Supervisory Mechanism or 'SSM', Part One of the Banking Union", (2014) *Financial Law Institute Working Paper Series*. For more information about the "vicious circle", see Memo European Commission, "Banking union: restoring financial stability in the Eurozone", 9 Mar. 2015.
49. Proposal for a Regulation of the European Parliament and of the Council amending Reg. 806/2014 in order to establish a European Deposit Insurance Scheme, COM(2015)586 final.
50. Dir. 2014/49/EU of the European Parliament and of the Council of 16 Apr. 2014 on Deposit Guarantee Schemes (recast), O.J. 2014, L 173.
51. See the Proposal for a Reg. of the European Parliament and of the Council amending Reg. (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM(2015)586 final – 2015/0270 (COD). This proposal is yet to be enacted; and on 11 Oct. 2017 the Commission published a Communication on completing the Banking Union in which it proposed options to facilitate progress on the dossier. See also <www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-economic-and-monetary-union/file-european-deposit-insurance-scheme-(edis)>.

in September 2015, the Commission adopted an Action Plan "setting out a list of over 30 actions and related measures to establish the building blocks of an integrated capital market in the EU by 2019".[52] Where the Banking Union project focused on (strengthening) the EU's banking sector, the measures under this Action Plan mainly address the capital markets.

The institutional structure of European financial regulation and supervision has been one of increasing integration, and in that development, various milestones can be discerned. But these steps have – at least until now – never proven to be fully adequate to keep pace with the integration at a practical level. Where the Lamfalussy process, for instance, introduced the possibility to sidestep "cumbersome" parliamentary involvement, the set-up that followed from the De Larosière report resulted in the possibility to minimize "cumbersome" EU Commission involvement by means of RTSs and ITSs. In parallel, the European legislator introduced ever more statutory instruments in areas that were left unregulated before, while areas in which Directives of minimum harmonization existed, these were replaced by maximum harmonization Directives and Regulations replaced Directives. This has not been changed since the financial crisis.[53] As a great unknown, it remains to be seen what the consequences will be of the UK leaving the EU for the pace of the future integration of the EU's financial regulation

3. Regulation

3.1 Introduction

A discussion of the existing body of European financial market regulation can be organized in various ways. This section employs the European sectoral approach. This is the traditional way to organize financial markets regulation and supervision, and accords with the structure of the ESFS. The ESFS consists of EBA, ESMA and EIOPA, which all regulate different parts of the financial sector: banks (section 3.2.), securities and markets (section 3.3.) and insurers and pension funds (section 3.4.), respectively.

A discussion of European financial market regulation could, however, also have been structured in other ways. Moreover, the current financial markets, products and institutions cannot always be classified in a strict sectoral way.[54] Investment insurance products and bank insurer groups, for example, could be classified as falling under the remit of both ESMA and EIOPA, and of both EBA and EIOPA, respectively. Therefore, in respect of financial regulation and supervision, not only a sectoral but also a functional approach can be used. In this functional approach, financial regulation is classified by determining whether the rules at stake establish prudential or conduct requirements.[55] Prudential rules include, *inter alia*, capital requirements for financial institutions in order to make the financial system resilient to shocks, and to enhance financial stability both on micro and macro, i.e. systemic,

52. See <ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-action-plan_en>.
53. Cf. N. Moloney, op. cit. *supra* note 1, 9.
54. See also V. Colaert, "European banking, securities, and insurance law: Cutting through sectoral lines?" (2015) CML Rev., 1579–1616.
55. Another manner – and also a functional approach – to categorize financial regulation would be to distinguish between the two main categories of addressees of the instruments, i.e. whether public institutions or private parties should enforce the rules.

level.[56] Conduct rules regulate the "behaviour" of financial institutions. They aim to create orderly and transparent markets, to enhance integrity between market participants and to enhance consumer and investor protection.[57]

Since the body of European financial market regulation is enormous, this section 3 can only concentrate on the most important (framework) Regulations and Directives. Where relevant, a reference to Level 2 or Level 3 acts will be made.[58]

3.2 *Banks*

In the aftermath of the financial crisis the need for a deeper integration of the regulation and supervision of the banking system at the European level became clear. To that end, the European Commission took legislative initiatives "to create a safer and sounder financial sector".[59] More than ten years after the beginning of the financial crisis, these initiatives have resulted in a Single Rulebook for all Member States, which forms the basis of the European Banking Union. In short, the Commission's initiatives focused on the prevention of bank crises, the improvement of depositors' protection, and the proper management of bank failures.[60] The legislative instruments relating to these three topics will be discussed hereafter in more detail.

First, the prudential requirements for the banking sector have been increased under the legal framework of the Capital Requirements Regulation (CRR)[61] and the ancillary Capital Requirements Directive IV (CRD IV),[62] together often referred to as "CRD IV".[63] The CRD IV package forms "the legal framework governing the access to banking activities, the supervisory framework and the prudential rules" for credit institutions and investment firms.[64] Under Articles 8(1) and 9(1) CRD IV, banking is considered a reserved business on the

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56. Notable examples of European directives and regulations that codify prudential rules, i.e. capital and liquidity requirements, are: CRR and CRD IV; Solvency II; and the IORP Directive.
57. Notable examples are: MiFID II, MiFIR, the Prospectus Directive, the Regulation on key information documents for packaged retail and insurance-based investment products (PRIIPs), EMIR, CSDR, the UCITS V Directive, the AIFMD and the CRA Regulation.
58. On Level 2 and 3, and on the Lamfalussy process, see *supra* section 2.1.
59. European Commission, "Updated version of first memo published on 15/04/2014 - Banking Union: restoring financial stability in the Eurozone", 24 Nov. 2015.
60. Cf. European Commission, "Updated version of first memo published on 15/04/2014 - Banking Union: restoring financial stability in the Eurozone", 24 Nov. 2015.
61. Reg. (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Reg. (EU) 648/2012, O.J. 2013, L 176.
62. Dir. 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Dir. 2002/87/EC and repealing Dir. 2006/48/EC and 2006/49/EC, O.J. 2013, L 176.
63. The CRD IV framework calls for the adoption of delegated and implementing acts. Over the years, various Level 2 acts have been established. Also, the EBA proposed many RTSs and ITSs – overview of which can be found on <ec.europa.eu/internal_market/bank/docs/regcapital/acts/overview-crr-crdiv-rts_en.pdf> and <ec.europa.eu/internal_market/bank/docs/regcapital/acts/overview-crr-crdiv-its_en.pdf>. The delegated and implementing acts cover a wide range of topics, such as supervisory disclosures, passporting notifications, disclosure template of leverage ratios, and the authorization of credit institutions.
64. Recital 5 CRR. See also N. Moloney, op. cit. *supra* note 1, 381 et seq. On CRD IV, see extensively, R. Theissen, *EU Banking Supervision* (Eleven Publisher, 2013).

ground that the typical banking activities such as money-lending and ancillary services are not available to anyone, "but rather exclusively to those who/which [...] are permitted to commence such a business by means of a license or authorization".[65] If such licence/authorization has been given in one Member State, the bank is allowed to conduct its businesses in all other Member States without further limitations ("passporting") as long as the relevant authorities in other Member States have been notified.[66]

Also, CRD IV implements capital and liquidity requirements that were established in Basel III.[67] Capital and liquidity requirements aim to avoid that, in times of financial instability, a bank ends up in a solvency or a liquidity crisis. Capital requirements specify the minimum amount of capital (for example, equity and subordinated loans) that banks have to hold against their risk-weighted assets.[68] The riskier the asset, the more capital the bank is required to hold against it.[69] If a bank suffers losses "on the asset side of its balance sheet", the capital can "absorb" them.[70] Examples of capital requirements are the standard total capital ratio of 8% of risk weighted assets, the capital conservation buffer and the capital surcharge for globally systemically important banks.[71] Liquidity requirements aim to protect a bank against sudden liquidity demands of depositors and other creditors of the bank. To that end, banks are, for instance, obliged to hold certain amounts of high-quality liquid assets which can be sold quickly if the bank suddenly needs cash to meet liquidity demands.[72]

Second, the legislative initiatives of the European Commission aimed to improve the protection of depositors. To that end, in 2014, Directive 94/19/EC on Deposit Guarantee Schemes was amended.[73] When a bank has failed, deposit guarantee schemes guarantee the (partial) compensation of depositors who lost their savings.[74] These schemes have two objectives: to protect depositors and to preserve financial market stability.[75] The underly-

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65. M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 11.
66. Cf. M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 8–10. The regime of passporting has already been introduced in the Second Banking Dir., Art. 18 of the Second Council Dir. 89/646/EEC of 15 Dec. 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Dir. 77/780/EEC, O.J. 1989, L 386. See also on "passporting" more in general: N. Moloney, op. cit. *supra* note 1, 396 et seq.
67. See European Commission, "Updated version of first memo published on 15/04/2014 – Banking Union: Restoring financial stability in the Eurozone", 24 Nov. 2015. Basel III is one of the Basel Accords produced by the Basel Committee on Banking Supervision in Dec. 2010. The Basel Committee sets global standards for the prudential regulation of banks in the Basel Accords. The standards are not legally binding, but nevertheless have a large influence on many legal systems worldwide.
68. E.g., commercial loans provided by the bank. In Dec. 2017, the Basel Committee on Banking Supervision published standards on the calculation of risk-weighted assets, see in detail <www.bis.org/bcbs/publ/d424_hlsummary.pdf>.
69. M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 103.
70. Cf. recital 72 CRR. Cf. also J. Armour, D. Awrey, P. Davies et al., *Principles of Financial Regulation* (OUP, 2016), 296 and M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 103.
71. See further, M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 104 et seq., and J. Armour, D. Awrey, P. Davies et al., op. cit. *supra* note 70, 290 et seq.
72. Cf. J. Armour, D. Awrey, P. Davies et al., op. cit. *supra* note 70, 316–317 and 322–323. See further, M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 105 et seq.
73. Dir. 2014/49/EU.
74. See <ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/managing-risks-banks-and-financial-institutions/deposit-guarantee-schemes_en>.
75. Cf. recital 3 Directive on Deposit Guarantee Schemes.

ing theory is that, as depositors are (at least partly) protected under the deposit guarantee schemes, they can be certain that their deposits are guaranteed (because they will be reimbursed) and would have less incentives to withdraw their deposits.[76] A key condition for deposit guarantee schemes to work, is that depositors have confidence in the financial safety net provided. Therefore, the amendments of 2014 have introduced rules that establish, *inter alia*, a higher minimum level of coverage for deposits and a faster payout.[77]

In addition to depositors, investors are protected under the Investor Compensation Scheme Directive (ICSD).[78] The ICSD offers protection to investors by requiring Member States to ensure an investor-compensation scheme is in place in case an investment firm is unable "to meet its obligations to its investor clients".[79] The ICSD does not offer protection against investment risks, but rather against situations in which the inability to return assets is caused by fraud at the investment firm or in which there are errors or problems in the investment firm's systems.[80] In 2010, the European Commission adopted a proposal to amend the ICSD establishing rules on, *inter alia*, a higher minimum level of coverage and a faster payout.[81] However, in March 2015, the European Commission withdrew the proposal as part of a more general operation to reduce the regulatory burden under its Work Programme 2015.[82]

The third purpose of the legislative initiatives developed by the European Commission, was to prevent and manage bank failures. Therefore, a single mechanism to deal with bank failures (a Single Resolution Mechanism (SRM)) within the Banking Union has been created.[83] In this regard, three pieces of legislation are vital: the Winding Up Directive,[84] the BRRD[85] and the SRM Regulation.[86]

The Winding Up Directive has already been introduced in 2001.[87] It entails that, if a bank with branches in other Member States fails, reorganization measures and winding-up proceedings (bankruptcy proceedings) will be controlled by only one Member State, i.e.

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76. Cf. M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 124 et seq. See also on this topic in general: R.A. Eisenbeis and G.G. Kaufman, "Deposit Insurance Issues in the Post 2008 Crisis World" in A.N. Berger, P. Molyneux and J.O.S. Wilson (Eds.), *The Oxford Handbook on Banking* (OUP, 2014).
77. Arts. 6, 8 and recital 7 Directive on Deposit Guarantee Schemes.
78. Dir. 97/9/EC of the European Parliament and of the Council of 3 Mar. 1997 on investor-compensation schemes, O.J. 1997, L 084.
79. Art. 2(2) and recital 4 and 5 Directive on investor-compensation schemes.
80. See, for the examples referred to, <europa.eu/rapid/press-release_MEMO-10-319_en.htm?locale=en> and N. Moloney, op. cit. *supra* note 1, 839.
81. See the amendments proposed to Art. 2, 4(3) and 9(2) in Proposal for a Directive of the European Parliament and of the Council amending Dir. 97/9/EC of the European Parliament and of the Council on investor-compensation schemes COM(2010)371, and, for a more detailed explanation, 8–9 and 11–12 of the Proposal.
82. See O.J. 2015, C 80/17, O.J. 2015, C 80/21 and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2015, COM(2014)910 final, 4.
83. See also *supra*, section 2.3.3, and *infra*, section 4.3.2, and extensively M. Haentjens and B. Wessels, op. cit. *supra* note 45.
84. Dir. 2001/24/EC of the European Parliament and of the Council of 4 Apr. 2001 on the reorganization and winding up of credit institutions, O.J. 2001, L 125.
85. Dir. 2014/59/EU.
86. Reg. (EU) 806/2014.
87. See, extensively, G. Moss, I. Fletcher and S. Isaacs (Eds.), *The EU Regulation on Insolvency Proceedings*, 3rd ed. (OUP, 2016), 222 et seq.

the home Member State.[88] The home Member State is the state where the bank has been authorized and has its registered office.[89] With regard to reorganization measures, under Article 3 of the Winding Up Directive, "the administrative or judicial authorities of the home Member State are empowered to decide on the implementation of reorganization measures with respect to a bank, including branches established in other Member States". In addition, under Articles 9 and 10 of the Winding Up Directive, the decision to open winding-up proceedings can solely be made by the administrative or judicial authorities of the home Member State that are responsible for winding up the bank and the winding-up proceedings will be governed by the laws, regulations and procedures applicable in the home Member State. Hence, bankruptcy proceedings will be governed by one single national bankruptcy regime.

More recently, in 2014, the BRRD and the SRM Regulation were adopted.[90] Whereas the Winding Up Directive concentrates on coordination and conflict of laws rules, the legal frameworks of the BRRD and the SRM Regulation provide harmonized rules on the prevention and management of bank failures and rules on the European institutional structure to apply the rules of the BRRD, respectively.[91] The BRRD has introduced rules to deal with banks in financial distress in order to "avoid destabilizing financial markets and minimize the costs for taxpayers".[92] It has established rules for banks in different stages of financial distress and involves "three pillars": (i) preparation (Title II of the BRRD); (ii) early intervention (Title III of the BRRD); and (iii) resolution (Title IV of the BRRD).[93] As part of the prevention of bank failures, banks and the resolution authorities are, for example, obliged to create "living wills" (recovery and resolution plans[94]) which provide an *ex ante* planning of how a bank in financial distress should be handled.[95] Furthermore, under Title III of the

88. Since the introduction of the BRRD, the Winding Up Directive also applies to investment firms, G. Moss, I. Fletcher and S. Isaacs (Eds.), op. cit. *supra* note 87, 223.
89. Art. 2 Winding Up Directive and Art. 6(2) of Dir. 2000/12/EC of the European Parliament and of the Council of 20 Mar. 2000 relating to the taking up and pursuit of the business of credit institutions, O.J. 2000, L 126.
90. See, extensively, G. Moss, I. Fletcher and S. Isaacs (Eds.), op. cit. *supra* note 87, 248 et seq. On 23 Nov. 2016, the European Commission issued a package of proposals to amend the CRR, the CRD, the BRRD and the SRM Reg. As regards the BRRD and SRM Reg., the package consisted of two draft Directives. Commission proposal 2016/0362 (COD), COM(2016)852 final, focuses on the "Minimum Requirement for own funds and Eligible Liabilities" (MREL) and aims to incorporate the global standard for "Total Loss Absorbing Capacity", which is similar, but not identical to MREL, into MREL as codified in the BRRD. Also, this draft Directive provides for a new moratorium tool to be employed in the pre-resolution phase, as an additional early intervention power. In Apr. 2018, this proposal was still being discussed within the Council. Moreover, the second Commission proposal 2016/0363 (COD), COM(2016)853 final was approved and resulted in Dir. (EU) 2017/2399 of the European Parliament and of the Council of 12 Dec. 2017 amending Dir. 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy, O.J. 2017, L 345. Under this Directive, Art. 108 BRRD on the ranking in insolvency hierarchy has been amended. Member States must now amend their national insolvency laws so that a category of ordinary unsecured claims have a higher priority ranking than that of unsecured claims resulting from debt instruments, provided they meet certain conditions.
91. G. Moss, I. Fletcher and S. Isaacs (Eds.), op. cit. *supra* note 87, 249.
92. Recital 5 BRRD.
93. G. Moss, I. Fletcher and S. Isaacs (Eds.), op. cit. *supra* note 87, 249.
94. Arts. 5 and 10 BRRD.
95. Cf. J. Armour, D. Awrey, P. Davies et al., op. cit. *supra* note 70, 356. In Mar. 2016, a Level 2 Delegated Regulation has been adopted specifying, *inter alia*, the content of recovery plans, resolution plans and group resolution plans and the minimum criteria that the competent authority is to assess as regards

BRRD, supervisors can exercise early intervention powers as to be able to remedy the deterioration of a bank's financial and economic situation before that bank "reaches a point at which authorities have no other alternative than to resolve it".[96] Under Article 27(1)(a) and (d) of the BRRD, early intervention measures involve, for example, the power to require the bank to implement (parts of) the recovery plan and the power to replace members from the management body.[97] Finally, under Title IV of the BRRD, if the conditions for resolution under Article 32(1) of the BRRD and Article 18(1) of the SRM Regulation have been complied with,[98] the resolution authority can apply the resolution tools listed in Article 37(3) of the BRRD and Article 22(2) of the SRM Regulation.[99] The resolution tools are: the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool.

Finally, the SRM Regulation not only harmonizes substantive rules on bank resolution, but also centralizes resolution decisions with the SRB. It has introduced the institutional framework of the SRM, the SRB and the SRF for the Banking Union.[100] The SRB is the central power of the SRM and bears responsibility for the effective and consistent functioning of the SRM.[101] It prepares resolution plans and may eventually employ the resolution tools listed in Article 37(3) of the BRRD and Article 22(2) of the SRM Regulation.[102] Furthermore, the SRM Regulation established the SRF, a fund financed by the banking sector to secure funding for the resolution of failing banks.[103]

3.3 *Securities and markets*

In a nutshell, financial instruments such as securities (shares and bonds) and derivatives are traded in the financial markets after being issued by issuers. This section explains the different legal instruments regulating the financial markets and the parties involved in transactions of financial instruments.

In general, investment firms and regulated markets are regulated by the Directive on Markets in Financial Instruments II (MiFID II)[104] and the Regulation on Markets in Financial Instruments (MiFIR).[105] They comprise a "regulatory framework for investment services in financial instruments by banks and investment firms" and a regulatory framework

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recovery plans and group recovery plans (Commission Delegated Reg. (EU) 2016/1075, O.J. 2016, L 184).

96. Recital 40 BRRD. See also G. Moss, I. Fletcher and S. Isaacs (Eds.), op. cit. *supra* note 87, 252.
97. See also G. Moss, I. Fletcher and S. Isaacs (Eds.), op. cit. *supra* note 87, 252–253.
98. In short, the conditions for resolution are: (1) "the institution is failing or is likely to fail"; (2) "there is no reasonable prospect that any alternative private sector measures [...] would prevent the failure of the institution within a reasonable timeframe"; and (3) "a resolution action is necessary in the public interest". G. Moss, I. Fletcher and S. Isaacs (Eds.), op. cit. *supra* note 87, 253.
99. G. Moss, I. Fletcher and S. Isaacs (Eds.), op. cit. *supra* note 87, 253.
100. Art. 42 et seq. SRM Reg.
101. Cf. Art. 7(1) SRM Reg and recital 11 SRM Reg.
102. Arts. 8 and 22(1) SRM Reg.
103. Arts. 67, 70 and 71 SRM Reg.
104. Dir. 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Dir. 2002/92/EC and Dir. 2011/61/EU, O.J. 2014, L 173. See also D. Busch, G. Ferrarini, *Regulation of the EU financial markets: MiFID II and MiFIR* (OUP, 2017) and D. Busch, *MiFID II/MIFIR: Nieuwe regels voor beleggingsondernemingen en financiële markten*, Preadvies van de Vereniging voor Financieel Recht (Kluwer, 2015).
105. Reg. (EU) 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Reg. (EU) 648/2012, O.J. 2014, L 173.

for the operation of traditional stock exchanges (regulated markets) and alternative trading venues.[106] In 2004, MiFID I already introduced rules on investment services concerning financial instruments provided by banks and investment firms (e.g., investment advice) and rules on the operation of trading platforms.[107] In 2014, the rules of MiFID I were updated and further developed in MiFID II and MiFIR. The majority of these new rules became applicable as from January 2018.[108]

MiFID II contains harmonized rules on the authorization of investment firms and regulated markets[109] and on the operating conditions of investment firms.[110] As part of these operating conditions, conduct of business rules have been harmonized in order to provide a high level of investor protection.[111] Regarding the provision of investment services, MiFID II distinguishes three categories of clients, viz. retail clients, professional clients and eligible counterparties. With regard to each of its clients, an investment firm must "act honestly, fairly and professionally in accordance with the best interests of its clients".[112] Furthermore, investment firms have to comply with the "principles" set out in Articles 24 and 25 MiFID II. To that end, under Article 25(2), when providing investment advice or portfolio management, the investment firm must conduct a suitability test, i.e. an investment firm must obtain information "regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, that person's financial situation including his ability to bear losses, and his investment objectives including his risk tolerance". Under Article 25(3), when providing "execution only" investment services, the investment firm shall conduct a less strict appropriateness test, i.e. an investment firm must ask the client "to provide information regarding that person's knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded".[113]

In response to the financial crisis, MiFID II aims to strengthen the regulatory framework of markets in financial instruments and "to increase transparency, better protect investors, reinforce confidence, address unregulated areas, and ensure that supervisors are granted adequate powers to fulfil their tasks".[114] In order to achieve these objectives, MiFID II and MiFIR, *inter alia*, aim to ensure that trading in financial instruments "as far as possible" takes place at markets which are subject to regulation (whether stock exchanges or alternative trading systems).[115] Therefore, MiFID II and MiFIR have extended the scope of MiFID I

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106. Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast), COM(2011)656 final, 1.
107. Cf. Proposal for a Dir. of the European Parliament and of the Council on markets in financial instruments repealing Dir. 2004/39/EC of the European Parliament and of the Council (Recast), COM(2011)656 final, 1.
108. Art. 93(1) MiFID II.
109. Art. 5 MiFID II and 44 MiFID II, respectively.
110. As from Art. 21 MiFID II.
111. As was already arranged for under MiFID I, cf. Recitals 1–2 MiFID I.
112. Art. 24(1) MiFID II.
113. An exception to carry out the appropriateness test can be made if the conditions under Art. 25(4) MiFID II are met.
114. Recital 4 MiFID II. See also D. Busch, op. cit. *supra* note 104.
115. Recital 6 MiFIR. See also recital 13 MiFID II and M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 206.

by introducing a new type of trading venue: the organized trading facility (OTF).[116] Furthermore, MiFID II strengthens investor protection by introducing more stringent rules on corporate governance,[117] more stringent organizational rules[118] and more stringent operating conditions for investment firms.[119] The MiFID II framework also codifies new rules on product governance, including the requirement for investment firms to identify the target market for each product and to ensure all relevant risks of the product are assessed and understood.[120]

The second category of legislative instruments that should be discussed in this section are concerned with the requirements for issuers who intend to offer financial instruments to investors on regulated markets: the Listing Directive, the Transparency Directive, the Prospectus Directive (as from 21 July 2019 onward, the Prospectus Regulation) and the Regulation on key information documents for packaged retail and insurance-based investment products (the PRIIPs Regulation).

Whenever an issuer wishes to have its securities traded on a regulated market (such as a stock exchange), the requirements as set by the Listing Directive[121] must be fulfilled.[122] The Listing Directive thus creates a level playing field with regard to the admission of securities to an official stock exchange and with regard to securities that have already been admitted to an official listing.[123]

In addition, the Transparency Directive and the Prospectus Directive are concerned with the provision of information to investors and the financial markets. Under the Transparency Directive,[124] issuers whose securities have been admitted to trading on an EU regulated market (the access to which is thus governed by the rules of the Listing Directive), are obliged to disclose information about their business.[125] The underlying rationale of the Transparency Directive is that if issuers are obliged to provide investors with "a regular flow of information" and thus provide investors with insight into their business, investor protection and market efficiency will be enhanced.[126] Under the Transparency Directive, issuers

116. Recital 8 MiFIR.
117. Recital 5 MiFID II.
118. Art. 16 MiFID II.
119. Art. 21 et seq. MiFID II.
120. Arts. 16(3) and 24(2) MiFID II.
121. Dir. 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, O.J. 2001, L 184.
122. Art. 5 Listing Directive.
123. Cf. M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 27.
124. Dir. 2004/109/EC of the European Parliament and the Council of 15 Dec. 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Dir. 2001/34/EC, O.J. 2004, L 390, in conjuction with Dir. 2013/50/EU of the European Parliament and of the Council of 22 Oct. 2013 amending Dir. 2004/109/EC of the European Parliament and of the Council on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Dir. 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Dir. 2007/14/EC laying down detailed rules for the implementation of certain provisions of Dir. 2004/109/EC, O.J. 2013, L 294.
125. Cf. Recital 1 Transparency Directive.
126. Recitals 1–2 Transparency Directive.

must, for instance, comply with periodic information requirements requiring the publication of annual financial reports[127] and half-yearly financial reports.[128]

Furthermore, issuers will often have to comply with the requirements of the Prospectus Directive.[129] A prospectus is a document required by law which contains information on (the securities offered by) the issuer that helps investors to decide whether or not to invest in the securities offered.[130] The Prospectus Directive *inter alia* sets rules on when the publication of a prospectus is required,[131] on the information that shall be included in a prospectus[132] and the approval of a prospectus and the corresponding "passporting" regime.[133] The rules of the Directive have been specified in various delegated and implementing acts[134] and, in addition, the Level 3 Q&A on the Prospectus Directive is of great practical significance.[135]

Yet, change is at hand, as, from 21 July 2019 onward, a new Prospectus Regulation will apply and will repeal the Prospectus Directive currently applicable.[136] The Prospectus Regulation aims to reduce the administrative burden placed on issuers by creating specific rules for specific types of issuers.[137] For instance, small and medium-sized entreprises (SMEs) are provided with the opportunity to draw up an EU Growth prospectus, which is a standard prospectus that SMEs can supposedly complete easily.[138] As another example, frequent issuers, who wish to issue securities several times a year, can draw up a universal registration

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127. Art. 4 Transparency Directive.
128. Art. 5 Transparency Directive.
129. Dir. 2003/71/EC of the European Parliament and of the Council of 4 Nov. 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Dir. 2001/34/EC, O.J. 2003 L 345 in conjuction with Dir. 2010/73/EU of the European Parliament and of the Council of 24 Nov. 2010 amending Dir. 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, O.J. 2010, L 327. See extensively: M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 31 et seq., R. Veil, *European Capital Markets Law*, 2nd ed. (Hart Publishing, 2017), 281 et seq. and T.M.C. Arons, *Cross-border Enforcement of Listed Companies' Duties to Inform: A Comparative Research into Prospectus Liability Regimes and Private International Law Problems Arising in Collective Proceedings* (Diss. Rotterdam, Kluwer, 2012).
130. COM(2015)583 final, 1.
131. Arts. 3 and 4 Prospectus Directive.
132. Art. 5 et seq. Prospectus Directive.
133. Arts. 17 and 18 Prospectus Directive. See also M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 35–36.
134. For an oversight, see <ec.europa.eu/info/law/prospectus-directive-2003-71-ec/amending-and-supplementary-acts/implementing-and-delegated-acts_en>. See e.g. Commission Reg. (EC) 809/2004, O.J. 2004, L 149. Amended by Commission Delegated Reg. (EU) 2016/301, O.J. 2016, L 58; Commission Delegated Reg. (EU) 759/2013, O.J. 2013, L 213; Commission Delegated Reg. (EU) 862/2012, O.J. 2012, L 256; and Commission Delegated Reg. (EU) 486/2012, O.J. 2012, L 150.
135. ESMA-31-62-780.
136. Reg. (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Dir. 2003/71/EC, O.J. 2017, L 168. The new Prospectus Regulation has been developed in the context of the Capital Markets Union, COM(2015)583 final, 1 and Recital 1 Prospectus Regulation.
137. COM(2015)583 final, 1–2.
138. Art. 15 Reg. (EU) 2017/1129.

document presenting relevant information on the issuer. When new securities are to be issued, the frequent issuer can then benefit from a faster approval track for the prospectus.[139]

Finally, issuers offering certain complex financial products to retail investors ("packaged retail and insurance-based investment products" or PRIIPs, such as structured deposits) are required to publish Key Information Documents (KIDs) under the PRIIPs Regulation.[140] The PRIIPs Regulation's main objective is to enable retail investors to understand and compare PRIIPs through key information documents. To that end, its provisions lay down in detail what information shall be provided and in what format that information shall be presented.[141]

Furthermore, as a third category, European rules have been established on the integrity and transparency of the (secondary) markets[142] in order to protect investors and to improve market efficiency. In this regard, the Market Abuse Regulation, the Benchmark Regulation and the Directive on Short Selling should be mentioned.[143]

In July 2016, the EU regulatory framework on market abuse and market manipulation changed. The old Market Abuse Directive[144] and its Implementing Directive (level 2)[145] were replaced by the Market Abuse Regulation (MAR)[146] and the new Market Abuse Directive.[147] The rationale of the new regulatory framework however remained the same: the Market Abuse Regulation (MAR), together with the Market Abuse Directive (MAD), is to establish rules against insider dealing, unlawful disclosure of inside information, and market manipulation in order to ensure market integrity and investor protection and confidence.[148] The MAR and the MAD aim to address problems that were not, or insufficiently, addressed by the old regulatory framework, such as the emergence of new markets, platforms, and over-the-counter instruments, the gap of regulation for commodity markets and related derivative markets, and the tools to ensure effective enforcement by supervisors.[149]

139. Art. 9 Reg. (EU) 2017/1129 and COM(2015)583 final, 15.
140. Art. 1–2 Reg. (EU) 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), O.J. 2014, L 352. See in detail V. Colaert, "The Regulation of PRIIPs: Great ambitions, insurmountable challenges?" (2016) *Journal of Financial Regulation*, 203–224.
141. Art. 5 et seq. PRIIPs Regulation.
142. In the financial sector, the primary market and the secondary market have to be distinguished. When securities are issued and sold for the first time to investors, they are said to be traded in the primary market. The secondary market concerns the trade of securities which have already been issued and may be traded in a regulated market among investors.
143. In conjunction with the Transparency Directive mentioned *supra*.
144. Dir. 2003/6/EC of the European Parliament and of the Council of 28 Jan. 2003 on insider dealing and market manipulation (market abuse), O.J. 2003, L 96.
145. Commission Dir. 2003/124/EC of 22 Dec. 2003 implementing Dir. 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation, O.J. 2003, L 339. See also N. Moloney, op. cit. *supra* note 1, 538 et seq.
146. Reg. (EU) 596/2014. See extensively N. Moloney, op. cit. *supra* note 1, 699 et seq., F.G.H. Kristen, H.J. de Kluiver, N. Lemmens, *Market abuse regulation: van Europese kaders naar uitleg en toepassing in Nederland: preadviezen voor de Vereniging voor Financieel Recht 2017* (Kluwer, 2017) and R. Veil, op. cit. *supra* note 129, p. 183 et seq.
147. Dir. 2014/57/EU of the European Parliament and of the Council of 16 Apr. 2014 on criminal sanctions for market abuse (Market Abuse Directive), O.J. 2014, L 173.
148. Art. 1 MAR. M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 43. See in more detail L. Gullifer and J. Payne, *Corporate Finance Law. Principles and Policy* (Hart Publishing, 2015), 578.
149. Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM(2011)651 final - 2011/0295 (COD), 3. See also M. Haentjens and P.

The ~~first edition of the~~ Regulation on benchmarks became applicable as from 1 January 2018 onward.[150] Benchmarks - LIBOR and EURIBOR are probably the most well-known examples - are indices "used as a reference price for a financial instrument or a financial contract".[151] The manipulations of LIBOR and EURIBOR revealed the vulnerability of benchmarks and caused the EU to take action in this field.[152] The Benchmark Regulation's main objective is to ensure the integrity of indices used as benchmarks, which should enhance the functioning of the internal market and the protection of consumers and investors.[153] To that end, the regulatory framework involves *inter alia* requirements with regard to the strengthening of the governance, and the avoidance of conflicts of interests for persons involved with the benchmark,[154] and rules on the methodology for determining a benchmark.[155]

Furthermore, the Regulation on Short Selling has restricted and set rules for the practice of short selling.[156] Short selling involves the sale of securities "which the seller does not own at the time of entering into the agreement to sell" – under Article 2(1)(b) of the Regulation on Short Selling. When the sale is concluded, the seller might have borrowed the securities from another investor (the actual owner). Alternatively, however, short selling can also be "uncovered" or "naked" without the seller having borrowed securities at the moment of entering into the agreement to sell.[157] Short sellers hope that the price of the securities decreases – as opposed to ordinary investors who hope the securities price increases – to make a profit out of the difference between the price for which they sold the borrowed securities initially and the price for which they have to buy the securities back in order to deliver them to the actual owner. In the aftermath of the financial crisis, short selling was thought to be able to aggravate the downward spiral in share prices "in a way which could ultimately threaten their viability and create systemic risks".[158] Therefore, the Regulation on Short Selling has established rules on the process of short selling in order to protect investors and to ensure the proper functioning of the financial markets.[159] As part of these rules, for example, naked short selling has been banned completely under Article 12 of the Regulation on Short Selling.[160]

In addition to the legislative instruments listed above, several European legislative instruments regulate the infrastructure of the "post-trading area", i.e. the clearing and

de Gioia Carabellese, op. cit. *supra* note 3, 43.

150. Reg. (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Dir. 2008/48/EC and 2014/17/EU and Reg. (EU) 596/2014, O.J. 2016, L 171, in particular, Art. 59. See in detail R. Veil, op. cit. *supra* note 129, p. 692 et seq.
151. Impact Assessment, SWD(2013) 336 final, 1.
152. Cf. recital 1 Benchmark Regulation.
153. Cf. Art. 1 Benchmark Regulation.
154. Art. 4 Benchmark Regulation.
155. Art. 12–13 Benchmark Regulation.
156. Reg. (EU) 236/2012 of the European Parliament and of the Council of 14 Mar. 2012 on short selling and certain aspects of credit default swaps, O.J. 2012, L 86. See extensively N. Moloney, op. cit. *supra* note 1, 538 et seq.
157. Cf. N. Moloney, op. cit. *supra* note 1, 539. See also in detail J. Armour, D. Awrey, P. Davies et al., op. cit. *supra* note 70, 194 et seq.
158. Recital 1 Reg. on Short Selling.
159. Cf. recital 2 Reg. on Short Selling.
160. See also recital 18 Reg. on Short Selling and N. Moloney, op. cit. *supra* note 1, 555 et seq.

settlement of transactions.[161] In this regard, the Settlement Finality Directive, the Regulation on OTC Derivatives, Central Counterparties and Trade Repositories (better known as the European Market Infrastructure Regulation or EMIR) and the Regulation on Central Securities Depositories will be discussed.

To begin with, the Settlement Finality Directive,[162] which was introduced in 1998, established European rules guaranteeing transfers and payments of financial products in order to minimize systemic risk.[163] To that end, the Directive entails that transfer orders and netting are legally enforceable even if participants of payment and securities settlement systems such as banks and central securities depositories[164] enter into insolvency proceedings.[165]

Furthermore, in 2012, the European Market Infrastructure Regulation (EMIR)[166] established rules on (reporting requirements for) derivative contracts and on central counterparties to be used in the clearing of derivatives transactions.[167] Very importantly, EMIR introduced mandatory centralized clearing for derivatives, meaning that the parties involved in a derivatives transaction must make use of a central counterparty to facilitate the clearing of the transaction.[168] This mechanism aims to reduce operational and systemic risk, as the central counterparty takes over the default risk of the original counterparties.[169] EMIR also establishes rules on the authorization and supervision of and organizational, business conduct and prudential requirements for ~~these~~ central counterparties.[170] Due to the great importance of central counterparties in the post-trading area, the European Com-

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161. See, in detail on how clearing and settlement work precisely, M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 165–166 et seq.
162. Dir. 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, O.J. 1998 L 166 in conjuction with Dir. 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Dir. 98/26/EC on settlement finality in payment and securities settlement systems and Dir. 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims, O.J. 2009, L 146.
163. Cf. recitals 2, 4 and 9 Settlement Finality Directive and M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 166–167.
164. Cf. Arts. 2(b) and (f) Settlement Finality Directive.
165. Art. 3 Settlement Finality Directive. See also M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 167.
166. Reg. (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, O.J. 2012, L 201. Level 2 acts further detail the rules of ~~the~~ EMIR. The European Commission has endorsed technical standards on, *inter alia*, the prudential requirements for central counterparties (Commission Delegated Reg. (EU) 152/2013, O.J. 2013, L 52), detailed rules on the clearing obligation (Commission Delegated Reg. (EU) 149/2013, O.J. 2013, L 52) and, more recently, rules on over the counter (OTC) interest rate derivative contracts that have to be cleared centrally (Commission Delegated Reg. (EU) 2015/2205, O.J. 2015, L 314 and Commission Delegated Reg. (EU) 2016/1178, O.J. 2016, L 195). It must be noted that, in May 2017, the European Commission adopted a proposal to simplify the current legal framework established by EMIR as part of the Regulatory Fitness and Performance (REFIT) programme. See Proposal for a Reg. of the European Parliament and of the Council amending Reg. (EU) 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories, COM(2017)208, 3.
167. Art. 1 EMIR.
168. See M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 205.
169. See M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 206.
170. Art. 14 et seq., recital 49 and Art. 26 et seq. EMIR, respectively.

mission adopted a legislative proposal to arrange for the recovery and resolution of central counterparties in financial distress in November 2016.[171]

In addition, the Regulation on Central Securities Depositories (CSDR)[172] has introduced European rules on central securities depositories, i.e. central institutions where securities can be held and which operate securities settelement systems.[173] The CSDR aims to increase the safety, efficiency and smoothness of settlements by establishing an internal market for the operations of central securities depositories[174] and by introducing organizational, conduct of business and prudential requirements for central securities depositories.[175]

As final part of this section on securities and markets, European rules have been developed for collective investment schemes – for instance, regarding UCITSs (Undertakings for Collective Investment in Transferable Securities), AIFMs (Alternative Investment Fund Managers) and MMFs (money market funds) – and for market facilitators such as credit rating agencies.[176]

The UCITS V Directive[177] and the Directive on Alternative Investment Fund Managers (AIFMD)[178] are at the core of the European regulatory framework with respect to collective asset management.[179] As from 21 July 2018, this framework will be complemented by the new Regulation on money market funds.[180] Investment funds – UCITSs, AIFs (Alternative Investment Funds) and MMFs – raise assets from retail and/or professional investors (the clients of the investment fund) and, afterwards, invest these assets into the financial markets. Investment funds perform an important role in channeling assets to projects and parties in need of funding.

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171. Proposal for a Reg. of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regs. (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365, COM(2016)856 final - 2016/0365 (COD).
172. Reg. (EU) 909/2014.
173. Cf. Recital 1 CSDR.
174. Art. 1 CSDR.
175. Recital 20 CSDR.
176. Under the sectoral approach, it is difficult to put this kind of European regulation in one of the three categories (banking, markets or insurance/pension funds). But as these market participants are being supervised by ESMA, we will discuss their regulation in this section.
177. Dir. 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Dir. 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, O.J. 2014, L 257. See also M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 144 et seq. and N. Moloney, op. cit. *supra* note 1, 200 et seq.
178. Dir. 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Dir. 2003/41/EC and 2009/65/EC and Regs. (EC) 1060/2009 and (EU) 1095/2010, O.J. 2011, L 174. See also M. Haentjens and P. de Gioia Carabellese, op. cit. *supra* note 3, 148 et seq., N. Moloney, op. cit. *supra* note 1, 269 et seq., L. van Setten and D. Busch (Eds.), *Alternative Investment Funds in Europe* (OUP, 2014), E. Wymeersch (Ed.), *Alternative Investment Fund Regulation* (Kluwer, 2012) and D.A. Zetzsche (Ed.), *The Alternative Investment Fund Managers Directive* (Kluwer, 2012).
179. The frameworks are similar in many aspects, however, some important differences remain, see N. Moloney, op. cit. *supra* note 1, 283.
180. Reg. (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds, O.J. 2017, L 169.

UCITSs have been regulated at the EU level already since 1985,[181] but in the aftermath of the financial crisis, the rules for UCITSs at the European level were changed, *inter alia*, because of the complexity of the financial products offered by UCITSs and because of the conflicts of interest that these funds and, more in particular, their managers have to deal with.[182] Conflicts of interest can arise in the course of investment decisions, for instance, if the manager can make "a financial gain, or avoid a financial loss" at the expense of a UCITS (and its clients) or if the manager "has an interest in the outcome of a service provided" to a UCITS (and its clients) which differs from the interest of the UCITS (and its clients).[183] In brief, the UCITS V Directive establishes, *inter alia*, rules on the authorization of UCITSs and passporting,[184] general conditions to take up business,[185] operating conditions (for instance rules on conflicts of interest),[186] remuneration principles applying to fund managers[187] and rules on depositaries of UCITSs.[188]

The AIFMD contains rules for the managers of collective investment funds that cannot be qualified as UCITSs, for instance, for hedge fund managers and private equity fund managers that were not subject to regulation before the introduction of the AIFMD in 2011.[189] Officially, the AIFMD does not entail maximum harmonization, but the AIFMD has es-

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181. Council Dir. 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), O.J. 1985, L 375.
182. Cf. Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, COM(2012)350 final, 2–3, which resulted in Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Dir. 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, O.J. 2014, L 257.
183. See also the Financial Conduct Authority's Handbook of rules and guidance, Ch. 10 Conflicts of interest, available at <www.handbook.fca.org.uk/>.
184. Art. 5 UCITS V.
185. Art. 6 et seq. UCITS V.
186. Art. 10 et seq. UCITS V.
187. Art. 14a UCITS V.
188. Art. 22 et seq. UCITS V. See in detail: Commission Delegated Reg. (EU) 2016/438, O.J. 2016, L 11. The regulatory framework of UCITSs has been extended by two Implementing Directives, two Implementing Regulations and one Delegated Regulation – still under Directive 2009/65/EC, which has now been amended by the UCITS V Directive. The Implementing acts cover requirements on key investor information (Commission Reg. (EU) 583/2010 of 1 July 2010, O.J. 2010, L 176), details on the notification procedure to competent authorities (Commission Reg. (EU) 584/2010, O.J. 2010, L 176), rules on the merger of UCITS (Commission Dir. 2010/44/EU, O.J. 2010, L 176) and detailed rules on organizational requirements, conflict of interests, conduct of business risk management and content of the agreement between a depositary and a management company (Commission Dir. 2010/43/EU, O.J. 2010, L 176).
189. European Commission, "Directive on Alternative Investment Fund Managers ('AIFMD'): Frequently Asked Questions", MEMO/10/527, 11 Nov. 2010. From 2013 to 2015, the regulatory framework was complemented with three regulations which particularly focused on rules regarding European venture capital funds (Reg. (EU) 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds, O.J. 2013, L 115), European social entrepreneurship funds (Reg. (EU) 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, O.J. 2013, L 115) and European long-term investment funds (Reg. (EU) 2015/760 of the

tablished a high level of harmonization and its rules are extremely detailed.[190] The AIFMD has introduced requirements on the authorization of AIFMs and passporting,[191] operating conditions (for instance rules on best execution and conflicts of interest),[192] remuneration principles applying to fund managers,[193] organizational requirements[194] and rules regarding depositaries of AIFs.[195]

The Regulation on money market funds creates a legal framework for investment funds specialized in collecting and investing in short-term assets. According to the recitals of the Regulation, the key features of MMFs are that they "have the objective of offering returns in line with money market rates, or of preserving the value of the investment, and that seek to achieve those objectives by investing in short-term assets such as money market instruments or deposits, or entering into reverse repurchase agreements or certain derivative contracts with the sole purpose of hedging risks inherent to other investments of the fund".[196] MMFs shall not be understood as being different from UCITSs and AIFs. On the contrary, UCITSs and AIFs that comply with the key features of MMFs set out above, shall comply with the rules of the new Regulation in addition to the already existing regulatory framworks.[197] The Regulation on money market funds provides for rules on *inter alia* the authorization of MMFs[198] and the investment policies adopted by MMFs.[199]

Also, European rules with regard to market facilitators such as credit rating agencies have been adopted. Credit rating agencies issue credit ratings on the creditworthiness of states, companies, financial institutions and financial instruments. They are market facilitators (also called gatekeepers or information intermediaries) in the sense that they provide market participants with information on issuers and their financial instruments, which enhances price forming mechanisms.[200] In response to the malpractices of credit rating agencies that were discovered in the aftermath of the financial crisis, the Regulation on Credit Rating Agencies (CRA Regulation)[201] provides a regulatory framework that aims "to enhance the integrity, transparency, responsibility, good governance and independence of credit rating activities".[202] To that end, rules have been established in order to manage and

European Parliament and of the Council of 29 April 2015 on European long-term investment funds, O.J. 2015, L 123).

190. N. Moloney, op. cit. *supra* note 1, 284. The rules have been further detailed in various Level 2 acts. See, e.g., Commission Delegated Reg. (EU) 231/2013 of 19 Dec. 2012, O.J. 2013, L 83.
191. Arts. 6–8 AIFMD.
192. Arts. 12 and 14 AIFMD.
193. Art. 13 AIFMD.
194. Art. 18 et seq. AIFMD.
195. Art. 21 et seq. AIFMD.
196. Recital 13 Regulation on money market funds.
197. Cf. Recital 11–12 Regulation on money market funds.
198. Art. 4 Regulation on money market funds.
199. E.g. Art. 8 et seq. and Art. 17 et seq. Regulation on money market funds.
200. Cf. J. Armour, D. Awrey, P. Davies et al., op. cit. *supra* note 70, 34.
201. Reg. (EC) 1060/2009 of the European Parliament and of the Council of 16 Sept. 2009 on credit rating agencies, O.J. 2009, L 302 (CRA Reg.). This Regulation has been amended twice by Reg. (EU) 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Reg. (EC) 1060/2009 on credit rating agencies, O.J. 2011, L 145 (CRA II) and Reg. (EU) 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Reg. (EC) 1060/2009 on credit rating agencies, O.J. 2013, L 146 (CRA III).
202. Art. 1 CRA Reg.

avoid conflicts of interest,[203] to increase the competition between credit rating agencies,[204] to reduce the over-reliance on credit ratings,[205] and to reduce (and eventually eliminate) the use of credit ratings for regulatory purposes.[206]

3.4 *Insurers and pension funds*

Insurers and pension funds collect assets (premiums and contributions) from their policy holders and members and pay out reimbursements and pensions to their beneficiaries. Insurers and pension funds can be considered financial intermediaries, as are banks. They owe obligations to many consumers, as they have promised to make payments to them upon the occurrence of certain future events.[207] At the same time, they are institutional investors that collectively invest and manage the assets provided to them by policy holders and members. Due to their key function in society and because their mismanagement could cause severe damage to many consumers, insurers and pensions funds have been made subject to European regulation.[208]

The EU regulatory framework of insurers was established in the Solvency II Framework Directive.[209] The Directive entered into force in January 2016[210] and was amended by the Omnibus II Directive[211] in order to implement the powers of EIOPA.[212] The main purpose of Solvency II is to protect policy holders and beneficiaries and to protect financial stability.[213] To that end, Solvency II includes rules on the authorization of insurers and a corre-

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203. Art. 1 CRA Reg.
204. Recital 11 CRA III.
205. Recital 9 CRA III.
206. Recital 8 CRA III. With regard to the removal of references to credit ratings in legislation, ~~the~~ ESMA has remarked in an evaluation in 2015 that "[t]he process to reduce reliance on ratings in a European context can […] be said to be at an early stage", see ESMA/2015/1471, 36. The approach of CRA Reg. has been criticized for following a double strategy: on the one hand, the CRA Reg. includes provisions in order to improve the quality and reliability of credit ratings, while, on the other hand, the CRA Reg. attempts to reduce the overreliance on credit ratings by financial markets and legislators. See F. Amtenbrink and K. Heine, "Regulating credit rating agencies in the European Union. Lessons from behavioural science" (2013) *The Dovenschmidt Quarterly*, 10 et seq.
207. Cf. with respect to insurers J. Armour, D. Awrey, P. Davies et al., op. cit. *supra* note 70, 493–494. See, on whether systemic risk is involved with the insurer business, also ibid., 495 et seq. and F. Hufeld, R.S.J. Koijen and C. Thimann, *The Economics, Regulation, and Systemic Risk of Insurance Markets* (OUP, 2017).
208. Cf. Proposal for a Dir. of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance Solvency II, p. 2 and Proposal for a Dir. of the European Parliament and of the Council on the activities of institutions for occupational retirement provision COM(2000)507 final - COD 2000/0260.
209. Dir. 2009/138/EC of the European Parliament and of the Council of 25 Nov. 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), O.J. 2009, L 335.
210. Dir. 2013/58/EU of the European Parliament and of the Council of 11 Dec. 2013 amending Dir. 2009/138/EC (Solvency II) as regards the date for its transposition and the date of its application, and the date of repeal of certain Directives (Solvency I), O.J. 2013, L 341.
211. Dir. 2014/51/EU of the European Parliament and of the Council of 16 Apr. 2014 amending Dir. 2003/71/EC and 2009/138/EC and Regs. (EC) 1060/2009, (EU) 1094/2010 and (EU) 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), O.J. 2014, L 153.
212. Cf. recital 7 Omnibus II Directive.
213. Recital 16 Solvency II Framework Directive.

sponding "passporting" regime,[214] conditions governing the insurer business (for instance, on governance and public disclosure)[215] and prudential requirements for insurers.[216] The European Commission has adopted an extensive Delegated Regulation which forms "the core of the single prudential rulebook for insurance and reinsurance undertakings".[217]

The European regulatory framework of institutions for occupational retirement provisions (IORPs), i.e. pension funds, has been established in the IORP Directive of 2003.[218] A Commission proposal to amend the IORP Directive was adopted by the European Parliament and approved by the Council of the EU in December 2016,[219] and resulted in the IORP Directive (recast),[220] which must be implemented by the Member States before 13 January 2019.[221] The IORP Directive establishes rules regarding the taking-up and pursuit of activities carried out by pension funds,[222] thereby aiming to protect the interests of future pensioners and to enhance the efficient management of collective occupational pension schemes.[223] To that end, for instance, under Article 18 IORP Directive (Art. 19 IORP Directive (recast)), European pension funds must invest contributions as a prudent person would do so (the so called "prudent person" rule). With regard to the IORP Directive (recast), four main objectives have been formulated in the Commission proposal: to remove the remaining prudential barriers for cross-border IORPs; to ensure good governance and risk management; to improve the provision of information to members and beneficiaries; and to provide supervisors with tools to supervise IORPs effectively.[224]

In addition to the regulatory framework for occupational pension funds, in June 2017, the European Commission launched a legislative proposal for a Regulation creating a new pan-European Personal Pension Product (PEPP).[225] As appears from the proposal, PEPPs are meant as an additional mode of pension saving for consumers introduced as part of the European Commission's Action Plan on the Capital Markets Union.[226]

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214. Arts. 14 and 15 Solvency II Framework Directive.
215. Art. 40 et seq. Solvency II Framework Directive.
216. Art. 128 et seq. Solvency II Framework Directive.
217. European Commission – Fact Sheet. Solvency II Overview, MEMO 15-3120, 12 Jan. 2015, 2. Commission Delegated Reg. (EU) 2015/35, O.J. 2015, L 12 as amended by Commission Delegated Reg. (EU) 2016/467, O.J. 2016, L 6. In 2017, further amendments to the Delegated Regulation have been proposed (Commision Delegated Reg. (EU) 2017/1542 of 8 June 2017 amending Delegated Reg. (EU) 2015/35 concerning the calculation of regulatory capital requirements for certain categories of assets held by insurance and reinsurance undertakings (infrastructure corporates)).
218. Dir. 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, O.J. 2003, L 235.
219. Proposal for a Dir. of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision (recast), COM(2014)167.
220. Dir. (EU) 2016/2341 of the European Parliament and of the Council of 14 Dec. 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (recast), O.J. 2016, L 354.
221. Art. 64 IORP ~~II~~ Directive.
222. Art. 1 IORP Directive.
223. Recital 7 IORP Directive.
224. The Proposal for a Dir. of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision (recast), COM(2014)167, 3–4.
225. Proposal for a Reg. on a pan-European Personal Pension Product (PEPP), COM(2017)343 final.
226. COM(2017)343 final, 2–3.

4. Supervision and enforcement

4.1 Introduction

The regulatory dimension of the European financial markets has been sketched in brief in section 3. As shown, a high level of harmonization, and on some points even unification, has been achieved in EU financial regulation, both as regards prudential and conduct of business rules. However, to speak with the words of Moloney: "Regulation does not operate in a vacuum: it must be operationalized through supervision".[227] This quote underlines the traditional and fundamental distinction between regulation and supervision. Regulation refers to the applicable legal provisions which regulate financial activities, whereas supervision concerns enforcement of these legal provisions including monitoring, taking decisions and (criminal and administrative) sanctioning. Such strict distinction does not mirror practice as the border is regularly blurred, but will prove effective to understand the relation between sections 3 and 4.

To return to Moloney's quote: Regulation would remain a mere toothless tiger without effective supervision and enforcement, as the global financial crisis has painfully demonstrated. National procedural autonomy of the Member States lies at the heart of enforcing substantive Union law.[228] Therefore, Member States have been left a large degree of discretion as regards selecting enforcement instruments and supervisory approaches to apply EU legislation. The same applies to supervision and enforcement of financial regulation. As a result of national procedural autonomy in applying and enforcing EU financial regulation, a lack of consistent supervisory and sanctioning powers has continued (and still continues) to exist across the different Member States.[229] However, even if financial legislation is harmonized, financial supervisory practice remains characterized by wide discretionary powers of the supervisory authorities and national supervisory traditions of the Member States. Moreover, a great amount of financial regulation has been enacted in Directives which have to be implemented in the national laws of the Member States. The exercise of supervision, therefore, is not exhaustively determined by identical pan-European "hard rules", i.e. legislation. So even extensively harmonized financial regulation, such as current EU banking law, did not prevent fragmentation of supervisory practices across the EU.[230]

These inconsistencies in national supervisory regimes ultimately undermine financial stability in both Member States and the EU. Ineffective enforcement with regard to one or more individual financial institutions could lead to financial instability in one Member State and could ultimately spill over to financial stability in another. Moreover, such inconsistencies in supervisory regimes may also be a stimulus for "regulatory arbitrage", so that financial institutions elect the State with the most favourable and lax regime to do business in, ultimately undermining financial stability. The conclusion which should be drawn from the above, is that merely harmonizing financial regulation, without having regard to the financial supervisory practice, will not be sufficient to reduce the risk of regulatory arbitrage.[231]

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227. N. Moloney, op. cit. *supra* note 1, 944.
228. However, once a particular procedural matter is regulated at Union level, the Member States lose their "procedural competence" with regard to this matter, see W. van Gerven, "Of rights, remedies and procedures", (2000) CML Rev., 502.
229. De Larosière Report, cited *supra* note 20, 28 and 41; Communication from the European Commission, Reinforcing sanctioning regimes in the financial services sector, COM(2010)716, 5–7.
230. E. Wymeersch, op. cit. *supra* note 48, 5.
231. Also E. Wymeersch, op. cit. *supra* note 48, 5.

To overcome these inconsistencies in supervisory regimes, the De Larosière Report recommended to complement the EU regulatory framework with a new supervisory architecture by means of a European System of Financial Supervision (ESFS).[232] All 28 Member States of the EU fall within the scope of the ESFS. As of 4 November 2014, the ECB, and as of 1 January 2016 the SRB, also form part of the financial supervisory architecture. The remit of both the ECB and the SRB covers the "participating Member States", which are currently only the 19 Member States within the euro area.[233] The ESAs, the ECB and the NCAs are primarily engaged in micro-prudential supervision: supervision that focuses on the stability of individual institutions. The ESRB in collaboration with the ECB has the responsibility for macro-prudential oversight, i.e. of the financial system's stability as a whole, with the aim of monitoring systemic risk. The SRB fulfils the role of centralized resolution authority with regard to euro area credit institutions.

This section will have its focus on the organization of supervision and enforcement of EU financial regulation by the ESAs, the ECB and the SRB. We understand "enforcement" here in a broad sense, so as to also include the SRB's application of EU law, mainly the SRM Regulation. The following subsections aim to provide an overview of the current supervisory structure and its key players, including the relevant national authorities.

The structure of this chapter could suggest that the ESAs are the main supervisory authorities within the European supervisory architecture. However, as will be elaborated on hereafter, the ESAs' primary task is of a regulatory, rather than of a supervisory nature. Within the SSM, it is the NCAs together with the ECB which should be regarded as the main supervisory authorities. In other sectors, for instance those concerning non-euro area banks or conduct of business supervision of (both euro area and non-euro area) banks, the national authorities have remained primarily responsible for financial supervision.

4.2 *European Supervisory Authorities*

As discussed above, in section 2.2, the three ESAs have been established as a result of the recommendations in the De Larosière Report. The ESAs are successors of the former "level 3 committees": the Committee of European Banking Supervision (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), and the Committee of European Securities Regulators (CESR).[234] The De Larosière Report considered the structure and competences of the Level 3 committees not sufficient to ensure financial stability in the EU and its Member States,[235] mainly because these networks of supervisors acted merely as advisory bodies to the European Commission and their actions did not have legally binding effects.[236] At first glance, the ESAs essentially followed in the footsteps of their predecessors with regard to the competences of the latter.[237] However, the ESAs

232. See also *supra*, sections 2.2 and 3.1.
233. Therefore Bulgaria, Czech Republic, Croatia, Denmark, Hungary, Poland, Romania, Sweden, United Kingdom fall outside the scope of the Banking Union.
234. Recital 10 ESA Reg.
235. De Larosière Report, cited *supra* note 20, 46–47.
236. De Larosière Report, cited *supra* note 20, 47.
237. Recital 10 ESA Reg.; Art. 8 ESA Reg.; De Larosière Report, cited *supra* note 20, 2; E. Ferran, "Understanding the New Institutional Architecture of EU Financial Market Supervision" in E. Wymeersch, K.J. Hopt and G. Ferrarini (Eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis* (OUP, 2012), 137.

have been fitted with additional legally binding powers, which clearly distinguishes them from the former Level 3 committees.[238]

The De Larosière Report emphasizes the fact that the formation of ESAs does not intend to transfer competences from the NCAs, including the day-to-day supervision, to the ESAs, while referring to the principles of subsidiarity and proportionality as enshrined in the Treaty on the Functioning of the European Union.[239] The relationship between the ESAs and the NCAs is sometimes referred to as a "hub-and-spoke" model; the ESAs as hubs in their regulatory capacity and the NCAs as spokes in their capacity as implementers.[240] However, this hub-and-spoke system does not prevent any hierarchy from existing in their relation.[241] The hierarchal structure, with the ESAs as higher-ranked, is reflected in their supervisory powers as will be described below.

Following the 2017 review of the ESAs,[242] the European Commission identified various problems and published on 20 September 2017 a proposal for a Regulation amending the ESAs' framework.[243] This proposes amendments to the ESA Regulations and to, *inter alia*, MiFIR and the Prospectus Regulation. The amendments concern: (i) the ESAs' powers in certain areas; (ii) the governance framework; and (iii) the funding framework. Where relevant for this section, reference will be made to specific proposed amendments.

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238. E. Ferran, op. cit. *supra* note 237, 138.

239. De Larosière Report, cited *supra* note 20, 47; Recital 9 ESA Reg. Ferran however argues that the step-by-step assumption of supervisory responsibilities by pan-European authorities is very likely to lead to the emergence of powerful European supervisory authorities and a "full federalization of supervisory responsibility", see E. Ferran, op. cit. *supra* note 237, 111–158. See also: E. Wymeersch, "The institutional reforms of the European financial supervisory system", (2010) *European Company and Financial Law*.

240. E. Wymeersch, op. cit. *supra* note 9, at 235 and 317; J. Black, "Restructuring global and EU financial regulation: Character, capacities and learning" in E. Wymeersch, K.J. Hopt and G. Ferrarini (Eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis* (OUP, 2012), 32.

241. J. Black, op. cit. *supra* note 240, 32.

242. See European Commission, Staff Working Document, Impact Assessment accompanying a proposal for a Reg. of the European Parliament and of the Council amending Reg. (EU) 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Reg. (EU) 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Reg. (EU) 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Reg. (EU) 345/2013 on European venture capital funds, Reg. (EU) 346/2013 on European social entrepreneurship funds, Reg. (EU) 600/2014 on markets in financial instruments, Reg. (EU) 2015/760 on European long-term investment funds, Reg. (EU) 2016/2011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, Reg. (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, SWD(2017)308 final (hereinafter: "ESAs Impact Assessment").

243. European Commission, Proposal for a Reg. of the European Parliament and of the Council amending Reg. (EU) 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Reg. (EU) 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Reg. (EU) 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Reg. (EU) 345/2013 on European venture capital funds, Reg. (EU) 346/2013 on European social entrepreneurship funds, Reg. (EU) 600/2014 on markets in financial instruments, Reg. (EU) 2015/760 on European long-term investment funds, Reg. (EU) 2016/2011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, Reg. (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, COM(2017)536 final (hereinafter: Proposal to amend the ESAs' framework).

4.2.1 Supervisory powers

As explained, as a matter of principle, the day-to-day supervision remains a competence of the NCAs. Moreover, the ESAs' primary task is of a regulatory nature aiming at supervisory convergence.[244] Under certain circumstances, however, they have also been entrusted with supervisory powers which may be legally binding towards either NCAs, or towards supervised institutions directly. First, the ESAs may have legally binding powers towards the NCAs in question in case of "breach of Union law",[245] in an emergency situation,[246] or if a disagreement continues to exist between NCAs in cross-border situations.[247] Second, the ESAs have the power to take legally binding decisions towards supervised institutions directly.[248] This competence is emergency-driven and only materializes in exceptional circumstances. Third, the ESAs have the power to temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the financial system.[249] These legally binding supervisory powers will be discussed in more detail below. It will be shown that these competences predominantly have a "last resort" character, which is expressed in the conditions which have to be met in order to use them.[250]

The major supervisory decisions, including the above-mentioned categories, are taken by the main decision-making body of the ESAs, their respective Boards of Supervisors (BoSs).[251] These BoSs are composed of the representatives of the 28 respective NCAs as voting members.[252] The European Commission, the ECB, the ESRB and the two other ESAs each provide one representative, which together with the ESA non-voting Chairperson constitute the non-voting part of the BoSs.[253] Decisions are in general taken by simple majority.[254] With regard to most decisions[255] of ~~the~~ EBA, a so-called "double majority" system of voting has been implemented as a consequence of the Banking Union.[256] This system aims at safeguarding non-euro area Member States, particularly the United Kingdom, against a decision-making process which could be dominated by the 19 euro area Member States.

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244. See more extensively on these regulatory powers, section 3.
245. Art. 17 ESA Reg.
246. Art. 18(3) ESA Reg.
247. Art. 8(1)(e) jo. Arts. 18(3) and 19(3) ESA Reg.; Art. 17(1)(2)(3) ESA Reg. Both illustrative for the "last resort" character of the legal binding powers of the ESAs.
248. Art. 8(1)(f) jo. Arts. 17(6), 18(4) and 19(4) ESA Reg.
249. Art. 9(5) ESA Reg.
250. E. Ferran, op. cit. *supra* note 237, 138.
251. Art. 43(1) ESA Reg.
252. Recital 52 ESA Reg.; Art. 40 ESA Reg.
253. Art. 40(1)(c)(d)(e) ESA Reg.
254. Art. 44(1) ESA Reg.
255. Decisions concerning breaches of Union law (Art. 17), settlement of disagreements (Art. 19) and actions in emergency situations (Art. 18) are taken by a simple majority including the double majority system. Decisions on technical standards (Arts. 10–16) and on measures and decisions concerning the prohibition and restriction of financial activities (Art. 9(5)) are taken by a qualified majority including the double majority system.
256. Art. 44(1) EBA Reg. as amended by Reg. (EU) 1022/2013 of the European Parliament and of the Council of 22 Oct. 2013 amending Reg. (EU) 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Reg. (EU) 1024/2013, O.J. 2013, L 287.

Part of the European Commission's proposal to enhance the governance structure of the ESAs is the establishment of Executive Boards within the ESAs. The Executive Board's main function will be preparing decisions to be taken by the BoS.[257] In addition, the Executive Boards are envisaged to have decision-making powers concerning certain non-regulatory tasks currently within the remit of the BoSs. Although the proposal still refers to the BoSs as the main body of the ESAs,[258] the Executive Boards will be granted decision-making powers in, among others, the areas of breach of Union law and settlement of disputes between NCAs.[259] As it is these areas where "incentive misalignments", between the EU and national interests, "are most problematic".[260] In other words: the composition of the BoSs, comprising representatives from the 28 NCAs as voting members, leads, in the view of the Commission, to a governance arrangement that is "dominated by national authorities and so does not foster effective and efficient decision making on matters where there is a strong EU interest."[261] The Executive Boards will therefore be composed of a Chairperson and a number of full-time members who are externally appointed.[262]

Breach of Union law (Art. 17 ESA Regulations)

If an NCA has incorrectly or insufficiently applied Union law, a "three-step mechanism"[263] applies aiming to resolve such breach: (i) the ESAs are empowered to investigate the alleged breach[264] and may address a recommendation to the NCA concerning measures to end this breach;[265] (ii) if the NCA does not comply with the recommendation, the European Commission is empowered to issue a formal opinion requiring the NCA to comply with Union law;[266] and (iii) in case of continual inaction, the ESAs may take an individual decision addressed towards a supervised institution, provided that such decision "is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system".[267] Such individual decision directed towards a supervised institution prevails over any previous decision adopted by the NCA on the same matter.[268] This action is sometimes referred to as the "knight's move", for it is as if the ESA jumps over, i.e. bypasses, the NCA. Such breach of "Union law" comprises Level 1 and Level 2 legislation, as well as the general principles of the TFEU, but probably also soft law instruments issued

257. Proposal to amend the ESAs' framework, 22.
258. Proposal to amend the ESAs' framework, 23.
259. Proposal to amend the ESAs' framework, 20, 22–23.
260. Proposal to amend the ESAs' framework, 275.
261. ESAs Impact Assessment, 160.
262. Proposal to amend the ESAs' framework, 22–23.
263. Recital 28 ESA Reg. Although Ferran distinguishes four "stages" by dividing step i. in two stages, E. Ferran, op. cit. *supra* note 237, 145.
264. Art. 17(2)-(3) ESA Reg.
265. Art. 17(3)-(4) ESA Reg.
266. Art. 17(4)-(5) ESA Reg.
267. Art. 17(6) ESA Reg.
268. Art. 17(7) ESA Reg. Moloney points at the "invidious position" of a supervised entity if it is confronted with conflicting decisions of the ESA on the one hand and the NCA on the other, see N. Moloney, "The European Securities and Markets Authority and institutional design for the EU financial market – A tale of two competences: Part (2) rules in action", (2011) EBOR, 202.

by the respective NCA, such as guidelines and recommendations.[269] Including the latter in the definition of Union law will therefore result in ESAs enforcing NCAs to correctly apply their own NCA-issued rules. Hence, these supervisory powers may cover a wide range of breaches.

It follows from the regime described above that the competence to take an individual decision addressed to a supervised institution is only activated if the NCA does not comply with the European Commission's formal opinion and if the individual decision is necessary to remedy non-compliance in a timely manner in order to maintain or restore neutral conditions of competition or ensure the orderly functioning and integrity of the financial system. Ferran and Wymeersch both argue that step (iii) is most likely to be rarely used. Ferran highlights that this competence will only materialize in the unusual instance that the NCA does not comply with the European Commission's formal opinion.[270] She also emphasizes that the principle of "sincere cooperation" and the obligations of NCAs to share information and assist the ESAs in carrying out their tasks[271] will prevent escalating enforcement to the third step.[272] Wymeersch believes that enforcement actions on the basis of this provision will probably be uncommon due to the emergency-driven component.[273]

Another important limitation to the power to direct an individual decision towards a supervised institution, is the condition that ESAs in their capacity as "knights" may only apply directly applicable legislation. In other words: ESAs will remain powerless to apply EU legislation that must first be implemented in national law, such as Directives and Member States' options in Regulations. A more practical restraint to this competence is the absence of an enforcement power in cases where a supervised institution fails to comply with a decision addressed to it by an ESA.

In the Commission's proposal to amend the ESAs' Framework, the Commission has proposed to broaden the ESAs' investigatory powers under Article 17 ESA Regulations to increase its effectiveness. The proposed amendment will empower the ESAs to request information not only from the NCA allegedly in breach of EU law, but also from other competent authorities, financial institutions and financial market participants.[274]

Action in emergency situations (Art. 18 ESA Regulations)

In an emergency situation, the ESA Regulations provide for a "two-step mechanism" to respond: (i) the ESAs have the power to take decisions addressed to an NCA;[275] and (ii) if the NCA does not comply with that decision, the ESA may take a decision directly addressed to a supervised institution.[276] For the "knight's move" competence of step (ii) to materialize, the NCA must be in breach of its legislative obligations and "urgent remedying is necessary to restore the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union".[277] Again, in this capacity ESAs are only empowered to apply directly applicable EU legislation.

269. E. Wymeersch, op. cit. *supra* note 9, 257.
270. E. Wymeersch, op. cit. *supra* note 9, 262.
271. Recital 46 ESA Reg.; Arts. 2(4), 17(2) etc. ESA Reg.
272. E. Ferran, op. cit. *supra* note 237, 146.
273. E. Wymeersch, op. cit. *supra* note 9, 262.
274. Proposal to amend the ESAs' framework, 20.
275. Art. 18(3) ESA Reg.
276. Art. 18(4) ESA Reg.
277. Art. 18(4) ESA Reg.

The power to address an "emergency decision" to an NCA materializes in two situations: after a formal declaration of emergency has been taken by the Council of the EU in consultation with the European Commission and the ESRB and, where appropriate, the ESAs;[278] and without such formal declaration, "in exceptional circumstances where coordinated action by national authorities is necessary to respond to adverse developments which may seriously jeopardize the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union".[279]

A decision triggered by a (formal or informal) emergency situation must encompass an obligation for the NCA "to take the necessary action in accordance with the legislation referred to in Article 1(2) to address any such developments by ensuring that financial market participants and competent authorities satisfy the requirements laid down in that legislation".[280] Article 1(2) refers to the relevant Level 1 legislation, "all directives, regulations, and decisions based on the mentioned Level 1 legislation" and "any further legally binding Union Act which confers tasks on the Authority": *inter alia*, Level 1 instruments, Level 2 instruments and RTSs/ITSs. The scope of this competence therefore is dependent on the obligations of the NCAs laid down in the relevant EU legislation.[281]

Settling disagreements between competent authorities (Art. 19 ESA Regulations)

A "two-step mechanism" has also been introduced to resolve issues as regards disagreements between NCAs in cross-border situations.[282] This mediatory function of the ESAs may result in (i) a decision addressed to the NCAs in question,[283] and (ii) a decision directly addressed to supervised institutions.[284]

The ESAs' competence to take a "mediatory" decision addressed to NCAs is activated, if the NCAs in question do not reach an agreement within the so-called conciliation period.[285] Legislation as mentioned in Article 1(2) needs to provide for this "mediation" competence and determines its conditions and scope.[286] The aim of such decision is to require the relevant NCAs to take or refrain from action in order to settle the matter "in order to ensure compliance with Union law".[287] If an NCA is in breach of such "mediatory" decision and as a result fails to ensure the compliance of a market participant with directly applicable legislation, the relevant ESA may, again, use its "knight's move" to directly address a decision to a supervised institution.[288]

In the Commission's proposal, amendments have been proposed to ensure that the ESAs may act and intervene decisively if a disagreement occurs. The amendments seek to clarify, *inter alia*, that settlements may also be triggered on initiative of the ESAs "where on the basis of objective criteria a disagreement can be determined" between NCAs.[289]

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278. Art. 18(2) ESA Reg.
279. Art. 18(3) ESA Reg.
280. Art. 18(3) ESA Reg.
281. E. Wymeersch, op. cit. *supra* note 9, 245.
282. Art. 19 ESA Reg.
283. Art. 19(3) ESA Reg.
284. Art. 19(4) ESA Reg.
285. Art. 19(2)-(3) ESA Reg.
286. Art. 19(1) ESA Reg.; E. Wymeersch, op. cit. *supra* note 9, 266.
287. Art. 19(3) ESA Reg.
288. Art. 19(4) ESA Reg.
289. Proposal to amend the ESA Regulations, 20.

Financial activities (Art. 9 ESA Regulations)

A different type of supervisory powers is the power of the ESAs to act against dangerous financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the financial system by either temporarily prohibiting or restricting them.[290] This tool may only be used by the ESAs in cases where legislation, as mentioned in Article 1(2) provides for it, or in the case of a formal emergency situation.[291] The power to prohibit or restrict certain financial activities may possibly qualify as an EU decision which is legally binding to the parties addressed, either NCAs or both NCAs and all supervised institutions involved.[292]

An example of the power to act against such dangerous financial activities has been provided for in Article 40 MiFIR, which confers on ~~the~~ ESMA "temporary intervention powers", under certain conditions. On 27 March 2018, ESMA exercised this power by introducing measures concerning a temporary prohibition on the marketing, distribution or sale of binary options to retail investors and a temporary restriction on the marketing, distribution or sale of contracts for differences (CFDs) to retail investors.[293]

Exclusive supervisory powers: ESMA

~~The~~ ESMA has a special position among the other two ESAs, as it has been entrusted with direct and exclusive supervisory powers in relation to credit rating agencies (CRAs).[294] The contribution of CRAs to the global financial crisis has received extensive coverage in the political debate. Matters such as conflicts of interest embedded in the issuer-pays business model and the lack of market transparency led to the EU Regulation on credit rating agencies (CRA I) in 2009.[295] Whereas CRA I primarily allocated supervision of CRAs established in the Member States to the NCAs, the De Larosière Report advocated a centralized supervisory model.[296] This recommendation has been implemented in the Regulation amending CRA I (CRA II), which entrusts ESMA with the exclusive supervision of CRAs.[297] The supervisory competences include the registration of CRAs, ongoing monitoring of CRAs and sanctioning powers.[298] In the meanwhile, and as discussed above under section 3.2.2, CRA III has been adopted.[299]

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290. Art. 9(5) ESA Reg.
291. Art. 9(5) ESA Reg.
292. E. Wymeersch, op. cit. *supra* note 9, 274.
293. ESMA, Additional information on the agreed product intervention measures relating to contracts for differences and binary options, 27 March 2018, ESMA35-43-1000, available at <www.esma.europa.eu/document/additional-information-agreed-product-intervention-measures-relating-contracts-differences>.
294. ~~The~~ ESMA also has direct and exclusive supervisory powers in relation to trade repositories under ~~the~~ EMIR, see Art. 55 et seq. EMIR.
295. Reg. (EC) 1060/2009 of the European Parliament and of the Council of 16 Sept. 2009 on credit rating agencies, O.J. 2009, L 302 (CRA I). See *supra*, section 3.2.2.
296. De Larosière Report, cited *supra* note 20, 19–20.
297. Reg. (EU) 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Reg. (EC) 1060/2009 on credit rating agencies, O.J. 2011, L 145 (CRA II).
298. Arts. 5, 15–21, 24, 36a, b et seq. CRA II.
299. See also *supra*, section 3.3.2., Reg. (EU) 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Reg. (EC) 1060/2009 on credit rating agencies, O.J. 2013, L 146 (CRA III).

The Commission's proposals to amend the ESAs' framework aim to expand ESMA's exclusive supervisory powers significantly. The proposals include designating ESMA as the competent authority for administrators of critical benchmarks, for benchmarks used in the EU but administered outside the Union, for data reporting service providers, and with regard to certain categories of prospectuses.[300]

4.2.2 *Joint Committee of the ESAs*

The regulatory and supervisory functions of the ESAs have been divided by sector, symbolizing the classic organization of the financial industry: banks, markets and securities and insurers and pension funds.[301] However, this traditional division has been increasingly blurred since the end of the 20th century.[302] Notwithstanding this development, one fully integrated "super ESA"[303] nor setting up all ESAs in one Member State to further integration proved politically feasible. As a result, cross-sectoral issues are dealt with at the level of the individual ESAs. To (partly) fill in this supervisory gap of cross-sectoral issues a coordinating Joint Committee has been established, the successor of the former "Three Level 3 Committees" at the time of the Level 3 committees.[304] Recalling the blurring of sectors, it seems almost all issues in one sector will in one way or the other affect another.[305] A small amount of these cross-sectoral issues will however be dealt with at joint level.[306] Article 54(2) ESA Regulations illustrates the range of possible cross-sectoral issues which may be dealt with at the level of the Joint Committee, including: financial conglomerates, accounting and auditing and retail investment products. As the Joint Committee does not have the competence to take binding decisions, the Joint Committee will either result in reaching "joint positions" of the involved ESAs, or in measures which are "adopted in parallel" with regard to such issues.[307]

The Commission's proposal to amend the ESAs' framework includes amendments expanding the remit of the Joint Committee, so as to also include consumer and investor protection issues.[308]

4.3 *Banking Union*

4.3.1 *Single Supervisory Mechanism: ECB*

The SSM was established by the SSM Regulation, which centralizes prudential supervision of credit institutions in both the euro area Member States and other Member States that have elected to accede to the SSM (hereinafter together: "participating Member States") under the ECB.[309]

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300. Proposal to amend the ESAs' framework, 28–30.
301. Even though the De Larosière Report emphasizes the future merits of a more functional approach to financial supervision, see De Larosière Report, cited *supra* note 20, 58.
302. See V. Colaert, op. cit. *supra* note 54, 1579–1616. See section 3.1.
303. E. Wymeersch, op. cit. *supra* note 9, 288.
304. Arts. 54–57 ESA Reg.
305. E. Wymeersch, op. cit. *supra* note 9, 289.
306. E. Wymeersch, op. cit. *supra* note 9, 289.
307. Art. 56 ESA Reg.
308. Proposal to amend the ESAs's framework, 24.
309. See, more extensively, E. Wymeersch, op. cit. *supra* note 48; E. Wymeersch, "The Single Supervisory Mechanism: Institutional aspects" in D. Busch and G. Ferrarini (Eds.), *European Banking Union* (OUP,

Scope: Prudential supervision of credit institutions

Article 4(1) of the SSM Regulation confers on the ECB the exclusive competence to carry out the tasks relating to credit institutions "for prudential supervisory purposes". Other financial institutions, shadow banking activities,[310] the prevention of money laundering and terrorist financing, consumer protection, the financial markets and conduct supervision with respect to credit institutions are not within the scope of the SSM and will therefore remain with the national authorities.[311] However, as the SSM Regulation does not contain a definition of what constitutes prudential supervision, the exact scope of the ECB's supervisory competences is not entirely clear. Will the ECB for instance be unable to enforce rules on money laundering, even though a violation of these rules often goes hand in hand with violation of prudential provisions on risk management?[312] These blurred lines are likely to cause tensions and uncertainties as to whether certain issues fall within the remit of the national authorities, or of the ECB.

As a truly revolutionary new feature of the SSM, the ECB applies "all relevant Union law", which explicitly includes national legislation that transposes either Directives or Member States' options in Regulations, to carry out its supervisory tasks.[313] Although "relevant Union law" has not been specified in the SSM Regulation, the ECB's supervisory task is to ensure that credit institutions comply with the Single Rulebook, i.e. CRD IV and CRR, which comprises most of the relevant banking regulation. The ECB is responsible for, *inter alia*, the authorization and withdrawal of authorizations of credit institutions, ensuring compliance with the rules imposing prudential requirements in several areas and to have robust governance arrangements in place, carrying out supervisory reviews and supervisory tasks in relation to so-called recovery plans, which set out the bank's arrangements and measures in case of financial difficulties, and certain early intervention measures.[314] The ECB may also instruct the NCAs to make use of their additional national powers in accordance with the conditions as set out in national law.[315] Such instructions must fill in the competence gap which may emerge if the SSM Regulation does not provide the ECB with the power to carry out one of its tasks.

2015), 93–117; E. Ferran and V. Babis, "The European Single Supervisory Mechanism", (2013) *Journal of Corporate Law Studies*, 255–85; G. Ferrarini and L. Chiarella, "Common banking supervision in the Eurozone: Strengths and weaknesses", (2013) *ECGI Law Working Paper No 223*.

310. The Financial Stability Board ("FSB") defines shadow banking as follows: "credit intermediation involving entities and activities (fully or partially) outside the regular banking system", see FSB, Transforming Shadow Banking into Resilient Market-based Finance, An Overview of Progress, 12 Nov. 2015, 1, available at <www.fsb.org/wp-content/uploads/shadow_banking_overview_of_progress_2015.pdf>. Examples of shadow banking activities are: securitization transactions and collateralized finance transactions, such as repurchase agreements (repos) and securities lending.
311. Recital 28 SSM Reg.
312. Example derived from E. Wymeersch, op. cit. *supra* note 48, 13.
313. Art. 4(3) SSM Reg.~~Se also: g Paper ervision in the Eurozone: Strengths and Weaknesses (2013) ks, s and whre~~ See, more extensively, A. Witte, "The application of National Banking Supervision Law by the ECB: Three parallel modes of executing EU law?" (2014) MJ, 105 et seq. ~~Se also: g Paper ervision in the Eurozone: Strengths and Weaknesses (2013) ks, s and whre~~As opposed to the ESAs, whose power to take decisions towards supervised institutions only materializes if the relevant legislation is directly applicable, i.e. Regulations, see section 4.2.1.
314. Art. 4(1) SSM Reg.
315. Art. 9(1) SSM Reg.

Direct and indirect supervision

The SSM is composed of both the ECB and the NCAs and puts a strong emphasis on their cooperation.[316] The allocation of supervisory competences between the ECB and the NCAs is stipulated in the SSM Regulation and the SSM Framework Regulation.[317] Important to note is that, even though the SSM framework provides for an allocation of prudential supervisory responsibilities divided between the ECB and the NCAs, the General Court (GC) held on 16 May 2017 in *Landeskreditbank Baden-Württemberg – Förderbank v. ECB* that the ECB must be regarded as exclusively competent in respect of *all* euro area credit institutions.[318] In this view, the exclusive supervisory competences are conferred on the ECB and implemented in a decentralized manner by the "assisting" NCAs within the framework of the SSM.[319]

With regard to the prudential supervisory tasks of the ECB listed in Article 4(1) SSM Regulation, except for the competence to authorize and to withdraw authorizations of credit institutions and the competence to assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, the responsibilities of the ECB and the NCAs are allocated on the basis of significance of supervised credit institutions: significant credit institutions (SIs) are "directly" supervised by the ECB, whereas less significant credit institutions (LSIs) are "indirectly" supervised by the ECB.[320] The significance of a credit institution is determined on a consolidated basis and is assessed based on the following criteria: (i) size; (ii) importance for the economy of the Union or any participating Member State; and (iii) significance of cross-border activities.[321] An NCA may also notify the ECB that it considers a certain credit institution of significant relevance with regard to the domestic economy. The ECB takes a decision confirming or rejecting such significance.[322] Even if none of these criteria have been met, the ECB may yet declare a credit institution significant "to ensure the consistent application of high-quality supervisory standards".[323] This assumption of power may be of great significance, because the ECB lacks disciplining competences in relation to the NCAs.

Common procedures

This differentiation of supervisory responsibilities on the basis of significance does not apply to the competence to authorize and to withdraw authorizations of credit institutions, and to the competence to assess notifications of the acquisition and disposal of qualifying

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316. Art. 6~~(1)~~ SSM Reg.
317. Reg. (EU) 468/2014 of the European Central Bank of 16 Apr. 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities, O.J. 2014, L 141.
318. *Landeskreditbank Baden-Württemberg – Förderbank v. ECB* (Case T-122/15). See, more extensively, R. Smits, "Competences and alignment in an emerging future. After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop", (2017) *Ademu Working Paper Series*.
319. Case T-122/15, *Landeskreditbank Baden-Württemberg*, paras. 50–64.
320. Art. 6(4) SSM Reg.
321. Art. 6(4) SSM Reg.
322. Art. 6(4) SSM Reg.
323. Art. 6(5b) SSM Reg.; ECB, Guide to Banking Supervision, Sept. 2014, 9, available at <www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf>.

holdings in credit institutions, known as the "common procedures".[324] Both are exclusive tasks of the ECB.[325] This exclusiveness does not exclude the NCAs from any involvement in these procedures; they have an important preparatory and assisting role. For instance, the NCAs assist the ECB in the authorization procedures by taking final decisions rejecting authorization and by drafting decisions granting authorization which are ultimately confirmed by the ECB.[326]

Day-to-day supervision

The principal method of supervision under the SSM is of an ongoing and preventive nature with the objective of preventing a bank failure by ensuring banks meet the regulatory requirements and that they are managed prudently. The ECB has general and broad investigatory powers to carry out its designated tasks as the direct supervisor of SIs, including information requests,[327] general investigations[328] and announced and unannounced on-site inspections.[329] To conduct these on-site inspections, the ECB appoints on-site inspection teams, which are separate from the Joint Supervisory Teams (JSTs).[330]

The day-to-day supervision of SIs is conducted by JSTs of the ECB, consisting of staff from both the NCAs and the ECB.[331] Each SI has its own JST, which is led by a coordinator at the ECB.[332] The coordinator is responsible for the implementation of the supervisory tasks and activities, as included in the so-called Supervisory Examination Programme for each individual institution. The supervisory tasks of the JSTs include, *inter alia*, performing the supervisory review and evaluation process (SREP), participating in the preparation and implementation of a supervisory examination programme and implementing any ECB decisions with respect to SIs.[333]

Administrative measures

In case irregularities are detected in the course of day-to-day supervision, the ECB has the power to impose specific supervisory measures for the purpose of its supervisory tasks.[334] This power materializes in the following circumstances: (i) the credit institution is not meeting the requirements of the relevant legislation or is likely to breach these requirements in the future; and (ii) based on determination in the framework of a supervisory review the arrangements, strategies, processes and mechanisms implemented by the credit institution and the own funds and liquidity held by it do not ensure a sound management and

324. ECB, Guide to Banking Supervision, Sept. 2014, 26, available at <www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf>.
325. Art. 6(4) SSM Reg.
326. Art. 16 SSM Reg.
327. Art. 10 SSM Reg.
328. Art. 11 SSM Reg.
329. Art. 12 SSM Reg.
330. Art. 12(1) SSM Reg.; Art. 143(1) SSM Framework Reg.
331. Art. 3(1) SSM Framework Reg.; ECB, Guide to Banking Supervision, Sept. 2014, available at <www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf>, at 10 and 15.
332. ECB, Guide to Banking Supervision, Sept. 2014, available at <www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf>, at 16–17.
333. Art. 3(2) SSM Framework Reg.
334. Art. 16 SSM Reg.

coverage of its risks.[335] Article 16(2) SSM Regulation lists possible measures, including the competence to require institutions to hold own funds in excess of the capital requirements laid down in the relevant legislation, to require the reduction of risk inherent in the activities, products and systems of institutions, and to remove members from the management body. The objective of these corrective measures is to require credit institutions to take the necessary measures at an early stage.

Administrative penalties

A sanctioning regime forms part of the ECB's enforcement mechanism as well. The SSM Regulation entrusts the ECB with the power to impose pecuniary penalties if an SI breaches a requirement of directly applicable Union law, provided that administrative pecuniary penalties are available to the NCAs under the relevant Union law.[336] In situations not covered by this sanctioning power, the ECB may require NCAs to initiate sanctioning proceedings provided for in Union or national law.[337] The types of sanctions available to the ECB are: (a) a pecuniary penalty up to twice the amount of the profits gained or losses avoided; (b) up to 10% of the total annual turnover, as defined in the relevant Union law;[338] or (c) any other pecuniary penalty as provided for in the relevant Union law.[339]

4.3.2 *Single Resolution Mechanism: SRB*

The SSM constitutes the preventative phase of potential crisis management. However, these supervisory activities may not always prevent a bank from failing. Therefore, the SRM Regulation has been enacted, which became operational on 1 January 2016 and has resulted in the establishment of the SRB and the SRF. The ultimate decision-making with regard to the resolution of SIs and cross-border groups in the euro area has now been centralized with the SRB. The resolution tools provided for in the SRM Regulation, and which may be applied singularly or jointly, are: (a) the sale of business tool, (b) the bridge institution tool, (c) the asset separation tool (good bank-bad bank), and (d) the bail-in tool.[340] Tools (a), (b), and (c) result in a "gone concern scenario", in which the bank as an entity disappears. Tool (d) aims at preservation of the entity and therefore involves a "going concern scenario".[341]

The SRB is directly responsible for drawing up resolution plans and taking resolution decisions with regard to SIs and other cross-border groups in the euro area.[342] The resolution of LSIs and non-cross-border entities and groups falls within the resolution competence of the national resolution authorities (NRAs).[343] The BRRD complements the SRM Regulation, in that it covers the resolution of LSIs, credit institutions in non-participating Member

335. Art. 16(1) SSM Reg. These measures may be complemented with the ECB's competence to take "early intervention measures" under the BRRD, see Art. 27 et seq. BRRD.
336. Art. 18(1) SSM Reg.
337. Art. 18(5) SSM Reg.
338. If a subsidiary has committed the breach, the annual turnover will be calculated on the basis of the group's turnover which could lead to a large penalty, see Art. 18(2) SSM Reg.
339. Art. 18(1) SSM Reg.
340. Art. 22(2) SRM Reg.
341. G. Boccuzzi, *The European Banking Union. Supervision and Resolution* (Palgrave Macmillan, 2016), 78–79.
342. Art. 7(2) SRM Reg.
343. Art. 7(3) SRM Reg. The NRAs are, among others, responsible for adopting resolution plans and carrying out assessments of resolvability, adopting measures during early intervention, waiving the

States and in the States of the European Economic Area (EEA). The BRRD harmonizes resolution tools, but does not constitute a centralized resolution mechanism, therefore leaving discretion to the national authorities as regards resolution.

Resolution Decision: SRB, ECB, European Commission, Council and NRAs

A decision to put a failing credit institution "in resolution" and to apply one or more resolution tools may have dramatic consequences for the various relevant stakeholders, i.e. the respective credit institution, its shareholders, bondholders, depositors, other financial institutions and the financial system as a whole. The complex decision-making process of the resolution procedure within the SRM reflects this potential impact by numerous checks and balances, and is a result of political compromises.[344] Its complexity is primarily caused by the sheer number of participants in the decision structure, viz. the SRB, the ECB, the European Commission, the Council of the EU, and the NRAs. This system therefore entrusts the resolution decisions to the discretion of these authorities, "soft triggers" rather than to quantitative parameters, "hard triggers".[345]

More specifically, the SRB has the power to take a resolution decision, either on its own initiative after an assessment by its Executive Board,[346] provided that the conditions for resolution have been met, or after a communication from the ECB.[347] The cumulative conditions for resolution are: (a) the bank is failing or is likely to fail; (b) with regard to timing and other relevant criteria, there is no reasonable private sector alternative; and (c) a resolution is necessary in the public interest.[348]

Whether a credit institution is failing or is likely to fail, i.e. condition (a), must be determined by a detailed list of circumstances to be found in the SRM Regulation.[349] This assessment will be carried out by the ECB after consultation of the SRB.[350] The Executive Board of the SRB may also assess this condition, but only after informing the ECB of its intention to do so.[351] The ECB may supersede this intention by conducting the assessment itself within three calendar days after being notified of the intention.[352] If the ECB deems that the credit institution meets condition (a), it shall communicate this to the European Commission and the SRB.[353]

The assessment whether there is a reasonable private sector alternative or whether supervisory measures may prevent the credit institution from failing, i.e. condition (b), must be made by the SRB.[354] "Where applicable", it must be made by the NRAs in close coopera-

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obligation to draft a resolution plan and setting the level of minimum requirements for own funds and eligible liabilities.

344. G.S. Zavvos and S. Kaltsouni, op. cit. *supra* note 45, 127, 136–137.
345. G. Boccuzzi, op. cit. *supra* note 341, 73.
346. Art. 53 et seq. SRM Reg.
347. Art. 18(1) SRM Reg.
348. Art. 18(1) SRM Reg.; G.S. Zavvos and S. Kaltsouni, op. cit. *supra* note 45, 129.
349. Art. 18(4) SRM Reg.
350. Art. 18(1) SRM Reg.; Zavvos and Kaltsouni argue that this central role for the ECB is consistent with the ECB's supervisory powers under the SSM; in this capacity the ECB will have access to the relevant tools, information and data, see G.S. Zavvos and S. Kaltsouni, op. cit. *supra* note 45, 130.
351. Art. 18(1) SRM Reg.
352. Art. 18(1) SRM Reg.
353. Art. 18(1) SRM Reg.
354. Art. 18(1) SRM Reg.

tion with the ECB. The ECB may inform the SRB or the NRAs if it considers condition (b) to be met.

The SRB is exclusively responsible for the assessment whether the resolution action is in the public interest, i.e. condition (c). The SRB shall deem a resolution action necessary in the public interest if: (i) it is necessary for the achievement of one or more of the resolution objectives (Art. 14 SRM Regulation); (ii) it is proportionate to one or more of the resolution objectives; and (iii) the winding up of the entity under normal insolvency proceedings would not meet those resolution objectives.[355] It has been argued, however, that this condition (c) will virtually always be met, for normal insolvency proceedings have distinctively different objectives than the resolution objectives of the BRRD and SRM Regulation.[356]

Once the SRB has adopted a "resolution scheme", it must be transmitted to the European Commission immediately.[357] Within 24 hours after transmission, the European Commission must either endorse the resolution scheme or object to its "discretionary aspects", i.e. aspects which are characterized by a margin of political judgment, including the assessment whether the resolution is in the public interest.[358] If the European Commission endorses the resolution scheme, it will be deemed to be adopted. Within twelve hours from the transmission, the European Commission may propose to the Council either to object to the resolution scheme on the ground that it does not fulfil condition (c), or to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme.[359] If the Council deems the resolution not to be necessary in the public interest, the credit institution will be wound up in accordance with the applicable national (insolvency) law.[360] The European Commission may only object to the remaining discretionary aspects of the resolution scheme.[361] If either the European Commission has objected to its discretionary aspects or if the Council has approved the proposed modification of the scheme, the SRB must modify the resolution scheme in accordance with the reasons expressed within eight hours.[362]

If within 24 hours after transmission of the resolution scheme by the SRB there has been no objection by the Council or the European Commission, or if the scheme has been modified, the scheme may enter into force.[363] The adopted resolution scheme is addressed to the relevant NRA, which must then carry out the scheme taking all necessary measures to implement it in accordance with the implementation of the BRRD in national law.[364]

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355. Art. 18(5) SRM Reg.; G.S. Zavvos and S. Kaltsouni, op. cit. *supra* note 45, 130.
356. See M. Haentjens, "National insolvency law in International Bank insolvencies" in B. Santen and D.H. van Offeren (Eds.), *Perspectives on International Insolvency Law: A Tribute to Bob Wessels* (Kluwer, 2014), 78.
357. Art. 18(7) SRM Reg.
358. Art. 18(7) SRM Reg. Pursuant to the Meroni doctrine, the SRB in its capacity as EU agency, may not decide on such "discretionary aspects", see G.S. Zavvos and S. Kaltsouni, op. cit. *supra* note 45, 133.
359. Art. 18(7) SRM Reg.
360. Art. 18(8) SRM Reg.
361. Art. 18(7) SRM Reg.
362. Art. 18(7) SRM Reg.
363. Art. 18(7) SRM Reg.
364. Art. 18(9) read with Art. 29 SRM Reg. For an example of such a resolution decision, see the SRB resolution decision of 7 June 2017 concerning Banco Popular Español S.A., available at <srb.europa.eu/sites/srbsite/files/resolution_decision.pdf>.

5. Legal protection

5.1 Introduction

This section maps out, in broad brushstrokes, the mechanisms for judicial redress regarding decisions of European financial authorities. So as to allow for legal protection, parties affected by decisions of European financial authorities may challenge these decisions, both in the form of judicial review of the decision and in the form of civil liability for damages. Under the so-called *locus standi* requirements of EU judicial review regimes, not only addressees may challenge a decision, but also parties who can demonstrate that the decision is of direct and individual concern to them.[365]

In this section, "judicial" is understood in the broadest sense, as we also include "administrative" appeal with the ECB's Administrative Board of Review. The scope of this administrative review pertains to the "procedural and substantive conformity" of the ECB's supervisory decisions with the SSM Regulation. In the following, judicial redress against decisions by the ESAs on the one hand, and by the ECB (in its role as prudential bank supervisor) and the SRB on the other are distinguished.[366] As the ECB's remit is identical to the SRB's, and the mechanisms of judicial redress against their decisions are similar, they are discussed together.

5.2 ESAs

As explained above in section 4.2.1., the three ESAs have been empowered to take decisions towards NCAs, and, in exceptional cases, towards supervised financial institutions. An appeal against these decisions is possible under certain circumstances. A joint Board of Appeal has been created to facilitate such an appeal under Articles 58 and 59 of the ESA Regulations. The CJEU has held that this Board of Appeal must be considered as an internal body of the relevant ESA.[367]

Pursuant to Article 60(1) of the ESA Regulations natural or legal persons, including competent authorities, may appeal against an ESA decision if they are the addressee, or if the decision is of direct and individual concern to them.

As stated in section 4.2.1., under Articles 17, 18 and 19 of the ESA Regulations,[368] an ESA can take legally binding decisions towards an NCA and, where this authority does not comply with this decision within the period of time specified therein, the ESA may adopt an individual decision addressed to a financial market participant[369] or financial institution.[370] Furthermore, appeal can be brought against other decisions of the ESAs taken within the

365. See e.g. Art. 263(4) TFEU, Art. 24(5) SSM Reg., Art. 60(1) ESA Reg., Art. 85(3) SRM Reg. In the *Plaumann* case, howevr, the ECJ held that the *locus standi* requirement should be applied in a very restrictive manner, leaving little room for parties to challenge a decision not addressed to them, the so-called *Plaumann* test; Case C-25/62, *Plaumann v. Commission*.

366. On the role of the SRB, see *supra*, section 4.3.2.

367. GC 9 Sept. 2015, T-660/14, *SV Capital OÜ v. EBA*, no. 62. More extensively on judicial protection against ESA decisions, see P. Van Cleynenbreugel, *Market Supervision in the European Union: Integrated Administration Constitutional Context*, (Brill Nijhoff, 2015), 152–161.

368. Arts. 17(4)(6), 18(3)(4) and 19(3)(4) ESA Reg.

369. In accordance with the meaning of "financial market participant" under Art. 4(1) ESMA Reg.

370. In accordance with the meaning of "financial institutions" under Art. 4(1) EBA Reg. and EIOPA Reg.

scope of their powers,[371] such as decisions taken under Article 9(5) of the ESA Regulations, to temporarily prohibit or restrict certain financial activities.[372]

Under Article 60(3) of the ESA Regulations, an appeal lodged with the Board of Appeal does not have suspensive effect, but "the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision". Sections (4) and (5) of the same Article provide that the Board must first determine whether the appeal is admissible, and thereafter whether it is well-founded. The Board of Appeal may then confirm the decision taken by the relevant ESA, or remit the case back to the ESA.

Pursuant to Article 60(2) and (3) of the ESA Regulations, Member States and the Union institutions, as well as any natural or legal person, may institute proceedings before the ~~GC~~ against decisions of the ESAs, also if an ESA has an obligation to act and fails to take a decision.[373] Pursuant to Article 61 of the ESA Regulations, if there is no right of appeal before the Board of Appeal, an action for annulment against an ESA decision may be brought directly before the ~~General Court (~~GC~~)~~ in accordance with Article 263 TFEU.[374] But where an ESA decision is open to appeal before the Board of Appeal, it follows from Article 61(1) ESA Regulations that such an appeal is obligatory, i.e. such an appeal before the Board of Appeal is a mandatory requirement for any subsequent challenge with the GC. Thus, decisions taken by the Board of Appeal itself may be challenged with the GC. In turn, decisions of the GC can be appealed before the Court of Justice.[375]

5.3 *ECB and SRB*

Regarding the ECB in its role as single prudential supervisory authority for credit institutions and the SRB, similar mechanisms for judicial redress have been introduced. The appropriate route to challenge *ex post*[376] a decision taken by the ECB or the SRB in the context of prudential supervision or resolution of a credit institution, respectively, depends on the category of credit institution in question. In the case of, in short, significantly important and cross-border operating banks,[377] the ECB and SRB are empowered to take decisions that

371. Art. 1(2) ESA Reg.
372. E.J. van Praag, "Het grensoverschrijdend financieel toezicht loopt tegen grenzen aan", (2011) *Tijdschrijft voor Financieel Recht*, 266.
373. On 9 Sept. 2015, the first case against a Board of Appeal decision was rendered by the General Court (GC 9 Sept. 2015, T-660/14, *SV Capital OÜ v. EBA*). The appeal challenged the decision of ~~the~~ EBA not to initiate an investigation into the Finnish and Estonian supervisory authorities. The GC found that the challenge against the EBA decision was inadmissible, but the challenge against the Board of Appeal decision admissible. In that appeal, it found that the Board had no competence to decide as it did. On the more general issue of the admissibility requirements under Art. 263(4) TFEU, see Ch. 26, "Economic and Monetary Union", of this book.
374. Art. 256(1) TFEU jo. Art. 51 Statute CJEU.
375. Art. 256(1) TFEU jo. Art. 51 Statute CJEU.
376. Pursuant to Art. 86(1) BRRD, the decision to employ a "resolution tool" (as defined under the BRRD) may be challenged *ex ante* in court provided the relevant Member State has opted in to that possibility. Pursuant to Recital 92 BRRD, such a challenge should be adjudicated within 24 hours of the resolution authority decision. In as far as the SRM Reg. applies and the SRB takes the relevant decisions (i.e. in case of significantly important and cross-border banks), there is not such an option.
377. Art. 6(4) SSM Reg. sets out the criteria that determine whether a credit institution qualifies as "significant". Also, certain tasks, such as the authorization of credit institutions and the withdrawal of such authorization, are the ECB's responsibility, regardless of the relevant credit institution's qualification. The SRM follows the same division of powers: Art. 7(2) SRM Reg.

directly address these institutions, while for other banks, the relevant national authority is initially responsible.[378]

If a national authority has taken the relevant decision, appeal must be lodged under national administrative law.[379] If a decision is taken by the ECB or SRB, appeal can be lodged with the internal ECB Administrative Board of Review or the SRB Appeal Panel, respectively. The cases in which appeal with this Board of Review and Appeal Boards are opened, are listed in Article 24(1) SSM Regulation and Article 85(3) SRM Regulation, respectively. Interestingly, under the SSM Regulation, preliminary appeal with the ECB Administrative Board of Review is not required to be allowed appeal with the GC, and the party in question is therefore free to decide whether to lodge (administrative) appeal with the ECB, or to forego that appeal and initiate proceedings with the GC directly. In contrast, an appeal with the SRB Appeal Panel must be lodged and decided first, so as to be admissible to appeal with the CJEU.[380]

The SRB Appeal Panel must be composed of five individuals of high repute from the Member States and with a proven record of relevant knowledge and professional experience, who are not working for authorities involved in the performance of resolution tasks.[381] The ECB Administrative Board is set up in a similar way.[382]

Pursuant to Article 24(7) SSM Regulation, the ECB Administrative Board of Review shall express an "opinion" no later than two months from the receipt of the appeal and remit the case for preparation of a new draft decision to the Supervisory Board of the ECB. The Supervisory Board shall then take into account the opinion of the Administrative Board of Review and shall promptly submit a new draft decision to the Governing Council of the ECB. The new draft decision shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision. The new draft decision shall be deemed adopted unless the Governing Council objects within a maximum period of ten working days. Under Article 85(4) and (8) SRM Regulation, the SRB Appeal Panel shall decide upon the appeal within one month after the appeal has been lodged, while the Appeal Panel may confirm the decision taken by the SRB, or remit the case to the latter.

If the SRB has an obligation to act and fails to take a decision, proceedings for failure to act may be initiated before the CJEU.[383] Also in other cases, direct appeal at the CJEU may be admissible under Article 263 TFEU[384] in several instances, the ECB and the SRB instruct the national resolution authority to carry out certain measures regarding a specific credit institution. Pursuant to existing case law of the CJEU, it would probably depend on the margin of discretion the ECB's or SRB's instruction has left for the national authority where and under what law the credit institution in question should challenge the subsequent measures taken by the national authority. If the ECB's/SRB's instruction to the national authority does not leave much margin of discretion for the national authority, appeal must

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378. See also *supra*, sections 4.3.1 and 4.3.2.
379. See, e.g., Art. 85(2) BRRD.
380. Art. 86(1) SRM Reg.
381. See Art. 85 SRM Reg.
382. Art. 24(2) SSM Reg.
383. Art. 86(3) SRM Reg. A similar rule for the ECB may be assumed.
384. See, e.g., recital 120 SRM Reg. and S.M.C. Nuijten, "Legal protection against actions under the Single Resolution Mechanism – or the lack of it", (2015) *NautaDutilh paper*, available at <www.nautadutilh.com/>, 18–19 and 21.

probably be lodged with the CJEU directly.[385] Hence, one could argue that such instruction, not leaving discretion to the national authorities, is of "direct and individual concern" to the institution which is addressed by the ultimate national decision. If, conversely, the ECB's/SRB's instruction to the national authority would leave the national authority a substantial margin of discretion, the national authority would probably be the appropriate forum to challenge it.[386] It has been argued that the complexity of this regime alone hampers effective legal protection.[387] Moreover, this situation could lead to parallel procedures at both national and Union level.

As a result of broad discretion conferred upon both the ECB and the SRB, and the complex assessments which characterize their decision-making, the Court will, when reviewing the decision under Article 263 TFEU, apply a standard of review that takes into account that broad discretion. When reviewing the substance of such decision, the Court will thus only assess whether there is a manifest error, misuse of power, or clear excess in the bounds of discretion.[388] Review of compliance with procedural guarantees, such as the right to be heard, is therefore of fundamental importance for judicial protection against ECB and SRB decisions, as was also reiterated by the ECJ in *Gauweiler*.[389]

The SRB's contractual liability is governed by the law applicable to the contract in question, and its non-contractual liability is subject to the general principles common to the laws concerning the liability of public authorities of the Member States.[390] In the event of the latter, the SRB must, in accordance with such general principles, compensate any damage caused by it or by its staff in the performance of their duties.[391] For the ECB, a similar obligation applies.[392] The ECB's non-contractual liability could either be the consequence of inadequate (prudential) supervision which has resulted in depositors seeking to cover their financial losses, or of a wrongful decision addressed towards a credit institution which as a result has incurred losses.[393]

The CJEU has exclusive jurisdiction over any dispute relating to contractual or non-contractual liability of the SRB.[394] The SSM Regulation does not provide for such exclusive jurisdiction. Therefore, in legal disputes regarding the non-contractual liability of the ECB the competent court must be determined by the conflict of laws rules of the (recast) Brussels

385. See, e.g., G.J.S. ter Kuile, L. Wissink and W.H. Bovenschen, "Tailor-made accountability within the single supervisory mechanism" (2015) CML Rev., 184; S.M.C. Nuijten, "Rechtsbescherming bij toezicht onder het SSM", (2014) *Tijdschrift voor Financieel Recht*, 471; A. Witte, "The application of National Banking Supervision Law by the ECB: Three parallel modes of executing EU Law?", (2014) MJ, 102; T.M.C. Arons, "Judicial protection of supervised credit institutions in the European Banking Union" in D. Busch and G. Ferrarini (Eds.), *European Banking Union* (OUP, 2015), 459–460.
386. Parliamentary Proceedings, *Tweede Kamer*, 2014–2015, 34 208, no. 3, 31–33. See also, S.M.C. Nuijten, op. cit. *supra* note 385, 20 et seq. and T.M.C. Arons, op. cit. *supra* note 385, 433 et seq.
387. M. Haentjens, "'Judge-made law has played its part'; The changing role of the judiciary in bank insolvencies" in INSOL Europe Academic Forum Conference Proceedings, (2017) forthcoming.
388. P. Craig, *EU Administrative Law* (OUP, 2012), 408.
389. *Gauweiler and Others v. Deutscher Bundestag* (Case C-62/14).
390. Art. 87(1)(3) SRM Reg.
391. Art. 87(3) SRM Reg.
392. Recital 61 SSM Reg., which refers to Art. 340 TFEU.
393. T.M.C. Arons, op. cit. *supra* note 385, 469; E.J. van Praag, "Aansprakelijkheid van financiële toezichthouders naar Europees recht", (2014) SEW, 215.
394. T.M.C. Arons, op. cit. *supra* note 385, at 472; Art. 87(2) and (5) SRM Reg.

I Regulation.[395] Disputes relating to the non-contractual liability of an NCA or NRA are within the jurisdiction of the relevant national court. Pursuant to the SRM Regulation, the SRB must compensate an NRA for the damages which it has been ordered to pay by a national court, or which it has agreed to pay pursuant to an amicable settlement agreement.[396] An exception applies when the NRA's act or omission constituted an infringement of the SRM, other EU law, a decision of the SRB, the Council, or the European Commission, and committed intentionally or with manifest and serious error of judgement.[397]

It follows from the above that both the SRB and the ECB can be held liable on the basis of the criteria for non-contractual liability of the EU laid down in Article 340(2) TFEU, which comprise the following:

- the rule of law infringed must be intended to confer rights on individuals;
- the breach must be sufficiently serious; and
- there must be a direct causal link between the breach of the ECB's or SRB's obligation and the loss or damage sustained by those affected (*condicio sine qua non*).

The requirement that the rule of law infringed must be intended to confer rights on individuals may cause difficulties for third parties, such as depositors of a failed bank, to claim damages from the ECB or the SRB. This is a result of the *Peter Paul* case of the ECJ in 2004, in which the ECJ held that the former Banking Directives and the DGS Directive did not intend to confer rights to depositors, so that the claimants did not meet the first requirement for non-contractual liability.[398] This case has since been used as a benchmark for liability of financial supervisory authorities for inadequate (prudential) supervision towards third parties. However, credit institutions to whom the ECB has addressed a wrongful decision directly, may hold the ECB liable.[399]

Further reading

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Haentjens, M. and P. de Gioia-Carabellese, *European Banking and Financial Law* (Routledge, 2015).

395. T.M.C. Arons, op. cit. *supra* note 385, at 472; Council Reg. (EC) 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2001, L 12 (Brussels I Reg.). As from 10 Jan. 2015 Reg. (EU) 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2012, L 351 (recast Brussels I Reg.) applies.

396. Art. 87(4) SRM Reg.

397. Art. 87(4) SRM Reg.

398. Case C-222/02, *Peter Paul and Others*.

399. T.M.C. Arons, op. cit. *supra* note 385, at 471.

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