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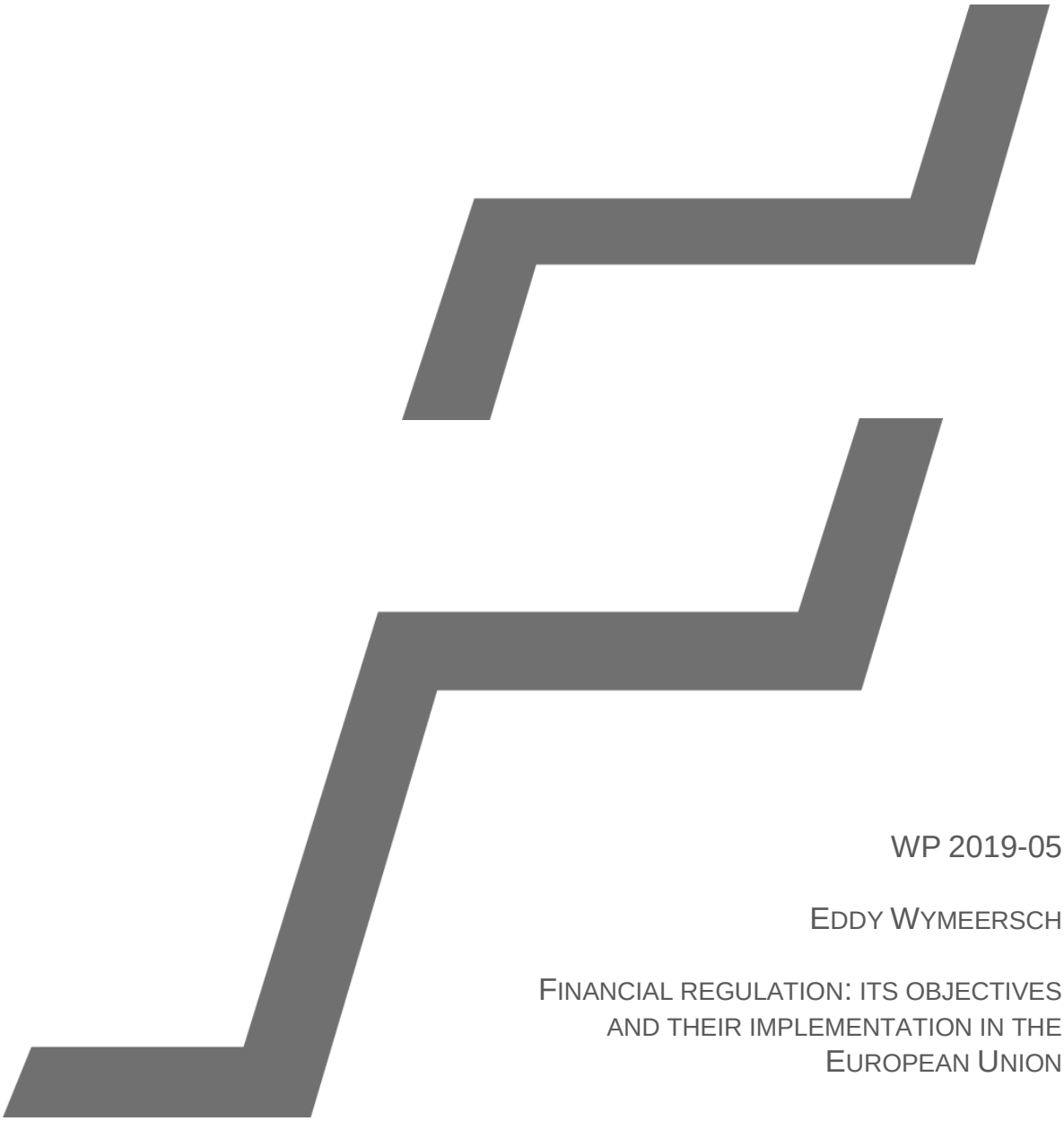

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EDDY WYMEERSCH

FINANCIAL REGULATION: ITS OBJECTIVES AND THEIR IMPLEMENTATION IN THE EUROPEAN UNION

GHENT UNIVERSITY

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On the basis of an analysis of the objectives of financial regulation, this paper analyses the extent to which these principles are implemented in the European Union, considering the specific legal structure of its financial regulation and the implementation by national competent authorities. The resulting landscape is one of considerable diversity and complexity, creating inefficiencies and distortions. The effect of this diversity on the integration of the financial markets should not been underestimated. The European Supervisory Authorities or ESA make serious efforts to reduce the level of diversity, but more in-depth exercises are needed.

The author welcomes your comments at Eddy.Wymeersch@Gmail.com.

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Financial regulation: its objectives and their implementation in the European Union[1]

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The financial activity in all its diversity and complexity is subject to an elaborate system of regulation and supervision. It is one of the most heavily regulated industries in our economies, as it touches on so many interests, whether at the individual level, or as part of the functioning of our economic systems and more generally, in today's worldwide economic and political relations. Interdependence of these different levels of regulation is an important feature and requires regulatory conditions to be analysed from different perspectives. The analysis should therefore first deal with the objectives of financial regulation in general, to be further supplemented and detailed with respect to the specific objectives in the European financial markets.

Describing the goals of financial regulation is therefore a quite complex, multidimensional exercise, whereby the objectives of each level should be connected to the other levels.[2]

One could state that the overall objective of financial regulation aims at guaranteeing the efficient and effective functioning of the financial system and this in the interest of society in general and of all participants in particular. Efficiency aims at allocating the available means to the most productive, or highly rated uses, as defined by the economic and political system. This includes the optimal generation of savings and their use for maximum value-adding investments as the instruments for achieving efficiency. Both sides of this balance are realised through market mechanisms, which are supposed to achieve optimal outcomes on the basis of perfect competition. Regulation influences this mechanism by creating the conditions for optimal competition, while correcting its functioning for other goals aimed as insuring fair distribution or avoiding damaging externalities. The latter objective calls for regulatory measures, which may limit the benefits of perfect competition. Financial regulation attempts to establish a balance between these objectives. An essential precondition is however that the participants have sufficient confidence in the system, allowing them to take part in it, to safely entrust their savings to the intermediary institutions, and belief in the promises made. These objectives are pursued by a diversity of instruments: consumer and investor protection, transparency, efficiency, enforceability, public interest, financial stability, competition, and judicial protection all aim at ensuring effectiveness of the regulation and are present, at different intensities, in the different components of the financial system. In most cases they are supported by, or are the outcome of, regulatory provisions and processes, addressing the behaviour of the market participants, and more particularly regulating the conduct of the financial institutions on which the functioning of the system is based.

A. General objectives of financial regulation.

The financial activity of markets participants[3] takes places within the context of different levels of legal provisions, some of which are contractual hence voluntary, other regulatory, hence mandatory. These provisions establish a multi-layered legal regime aimed at protecting the efficiency of the financial system and its participants.

The first layer governs the relationship of a market participant with an institution: the latter can be a bank, an investment firm, a financial market infrastructure, a collective savings entity, an insurance company, a pension

[1] To be published in V. Colaert, D. Busch and T. Incalza, *European Financial Regulation: Levelling the cross-sectoral playing field* (Bloomsbury Hart 2019).

[2] See for a systematic overview and analysis: J. Armour, D. Awrey, P. Davies, L. Enriques, J. Gordon, C. Mayer and J. Payne, Principles of Financial regulation, OUP, 2016; Lamandini and Ramos, EU Financial Law, An Introduction, Wolters Kluwer, 2016

[3] For a detailed analysis of the different functions in the financial systems, their legal status and resulting risks, see: M. Marcinkowska, Functioning of the financial industry, further in this volume

funds or residually a non-categorised institution[4]. The relationship will firstly be contractual, and therefore be embedded in national law. To a certain extent, freedom of contract will apply, and choice of law will allow for flexibility. But regulatory provisions will often intervene, dictating certain behaviour or imposing certain prohibitions. This is quite frequently the case in order to safeguard fairness and avoid negative externalities not only for the protection of the contractual parties but more generally for defending the confidence in the individual institutions or more generally in the financial system as a whole. The rules on investor protection, on financial disclosure, on certain types of transactions – e.g. the distribution of credits - on market transparency, on payments are examples of provisions serving in different degrees the mentioned – individual and collective - objectives. Underlying, these regulatory provisions are even embedded in local traditions, in local legal provisions relating to the conduct of market participants, but also in specific national market structures. The internationalisation of the market has resulted in an increasing number of similar requirements being applicable in the national, but also applicable in a cross-border context.

The second layer of regulatory provisions addresses the position of the financial institutions as such, whether individually or as a class of similar institutions. Although there are significant differences between the type of institutions and their obligations – banks, insurance companies, investment firms, investment funds, etc. - the base objective and obligation are their ability to meet their obligations at all times.

At the level of the individual institution, a whole range of measures apply, essentially aimed at insuring that objective, here referred to as the "solvency" of the institution, but more precisely, the ability to honour their obligations. These measures are mostly imposed by government regulation as a counterbalance for the privilege of "receiving funds" from the public, in fact for the financial institution to deal with the public for financial matters. Therefore, public confidence becomes a public good and deserves to be strongly protected as the basis for collective trust and stability. This protective regime is often- but imprecisely- called prudential regulation: it refers to a complex set of regulatory provisions aimed at securing the institution's ability to meet its obligations.

The prudential regime is composed of a wide range of prescriptions among which the own fund requirements, the governance rules, the management rules, including risk management, and the remuneration restrictions play the main role. Respecting the provisions applicable according to the first transaction-related layer, will often be relevant in the application of the second layer: lack of respect of depositors' rights may be a warning signal for the institutions' solvency. Proper accounting and auditing are instruments allowing to communicate with market participants, but also to inform supervisors of deficiencies or illegal activities. Supervision is exercised on a stand-alone basis, for company groups complemented by a consolidated approach. In many cases, supervision will also serve to enforce the regulatory provisions applicable under the first layer of objectives.

The position of an institution will normally depend on its own proper characteristics, essentially its business model and its solvency. However, there is a third, collective dimension which should not be neglected: the financial problems affecting one bank may reverberate on other banks in the same jurisdiction, in the same branch of activity, or further in the financial system in general. Reputation and contagion risks are external factors which are very difficult to control. Events on one stock exchange, or in one class of assets, may reverberate worldwide. The suspension of redemptions in one investment fund triggered the 2007 financial crisis initial contractions. Individual risks become collective risks.

In these cases, the confidence shock leads to calls for collective protection mechanisms: a collective safeguard is to be found in the deposit guarantee or insurance systems, based on the contributions or liabilities of the participating institutions. Less known is the liquidity support granted by the central banks. Recovery and resolution mechanisms are important instruments supporting confidence in the financial system: by eliminating institutions which may not be able to meet their liabilities, the development of further risks is avoided, parts of the insolvent firm rescued, while market participants previously at risk may be protected, whether by obtaining a privileged treatment, or by being able to avail themselves of the deposit guarantee

[4] Former "shadow banking", but better called resilient market-based finance, see: FSB, Transforming Shadow Banking into Resilient Market-based Finance: An Overview of Progress, 12 November 2015.

system, or other support systems. Investment firm clients enjoy some protection by an investor-compensation scheme.

Financial stability crises are most of the time local and have been effectively dealt with by the local supervisory authorities, often with Treasury intervention. Depending on the nature of the deficiencies, they may become international: excessive risk exposures, supervisory weaknesses, deficiencies in some market segments or a general confidence crisis may explain the root causes of international financial crises. In these cases, few legal mechanisms are available. International financial cooperation, based on agreements between central banks, or between resolution authorities may help to mitigate some of the consequences, often with the help of international financial institutions such as the IMF, Central banks, and the World bank. At the end of the analysis, only governments are able to shoulder the consequences of the downfall.

In a more regulatory approach, financial stability is approached from a Europe-wide, and from an international angle, developing instruments or models to avoid wider financial crises. At the level of the EU, measures have been adopted to ensure the orderly resolution of a failing bank, further implemented for the Euro area in the context of a Single resolution mechanism. Support to Member States or indirectly to individual financial institutions will also be made available by the European Stability Mechanism[5].

The analysis presented above essentially applies to the banking sector: it is the most sensitive in terms of risks and liabilities – especially in terms of liquidity as deposits are generally on sight or on a very short term, while concentrated risks may accumulate on the asset side. But the phenomenon is also present in other parts of the financial system, such as the securities markets or in the collective investment or pension funds sector.

This multiple level structure is also applicable to the insurance sector: the contract terms for most insurance products are subject to quite detailed regulation and national law, while some of their assets – e.g. as part of their lending activity – are subject to the same contractual provisions as applicable to banks. The activity of insurance companies is subject to extensive regulation aimed at safeguarding their long-term solvency, while reinsurance will offer an instrument for introducing a collective coverage for certain risks, broadening the basis on which the liabilities can be established. In some jurisdictions there are also insurance guarantee systems in place.

This three-layered system identifies the individual's interest, the position of the intermediary institution and the societal interest: it captures the basic scheme and interests pursued by the regulatory regimes. It stands for the overall framework, within which the detailed models and regulations will operate. Each of the layers has its own objectives, its own dynamics. It is important to point to the relationship between the three layers, as they support each other in an organic way[6]. They all form part of one single financial system which is of crucial importance to our economies and our societies.

This scheme is common to most financial systems. It is also the central framework on which EU regulation is based and shapes a large part of its regulatory and supervisory structure. Fundamental changes such as a shift from micro to macro supervision and the consequences of the internationalisation of the financial and economic activity are the main drivers which created the principal characteristics of today's financial regulatory system[7].

B. Regulation in the European Union

The firms pointed to the negative effects of local regulations, with differences on consumer protection requirements, gold plating, tax laws, local networks for insurance claims and divergent interpretation of

[5] It is planned that the European Stability Mechanism will be the common backstop to the Single Resolution Fund; see: EUROSUMMIT 2 TSGC 9, 29 June 2018, euro 502IS

[6] Whether this three-pillar approach with its regulatory and institutional implications is the only, even the right way to organise financial supervision is debatable, as it limits oversight of cross-sectoral matters, may extend risks throughout the system while preventing - efficiency in dealing with common issues.

[7] See The fundamental principles of financial regulation, Geneva Reports on the World Economy 11, 2009, https://www.princeton.edu/~markus/research/papers/Geneva11.pdf ,dealing essentially with systemic risk, its causes and characteristics. In the same sense: Armour, Awrey, Davies, Enriques, Gordon, Mayer and Payne Conclusion, Principles of financial regulation, nt 1.

money laundering requirements, Consumer organisations suggested focusing on better enforcement of existing EU consumer protection rules.

In the EU, as in all large financial markets, the above principles are largely applied, with the necessary differences, the Union covering 28 – of 27 after Brexit – different member states and different markets, and their different financial and legal traditions. However, the operation of these principles in the EU take place through a complex mechanism of political, structural and regulatory systems, which lead to an overall quite complex outcome and shapes the form and the content of the regulatory provisions. This diversity gives a unique twist to the implementation of the above principles.

1. The integration of the financial market as an overall objective

The objectives as outlined above have to be developed against the background of an overarching political objective which is the creation of a Europe-wide integrated financial market. Due to the historical structure of the EU, this market is a composite structure, with 28 – 27 after Brexit - Member states: one of the objectives of the creation of the Union has been the integration of their economies including their national markets into one single market, in this case a single financial market. This objective presupposes a certain number of prerequisites, the most important ones being free access to each other national markets, and equal rights to offer products on these markets. For goods, this has been decided since the landmark ECJ decision of Cassis de Dijon[8]. In the financial field the same principles apply and are further rooted in the Treaty's freedom of capital movements and freedom of establishment, or of services[9]. The basic reasoning is that if freedom of access to the neighbour's markets has to be achieved, access restrictions have to be eliminated to the greatest extent possible and operators have to abide by the same rules in all jurisdictions, and this to satisfy the general objectives of financial regulation as outlined above, mainly in terms of investor protection, solvency and financial stability. At the same time, adequate measures have to guarantee that the regulations are effectively applied and the objectives achieved. The legal and administrative processes through which these objectives are pursued are quite complex due to the multinational and cross-border aspects of the subject matter.

Access to the financial market was historically governed by national regulations which determined the conditions of establishment of intermediaries but also outlines the characteristics of the products or services on offer. These requirements served at securing the solvency, financial stability and investor or consumer interests. Access to another EU market would normally require operators to meet the requirements of that market: this would result in operators to meet the regulations of 28 states, clearly contrary to the integration objective. Therefore, starting in the mid 90s, a technique was developed, called "mutual recognition" whereby operators meeting the conditions in one member state – the "home" state - could access other states without meeting substantial additional conditions: only the rules of the" home" state would suffice. This system has been designated as the "European passport" which offer free access to all Member states. The passport for financial services only applies to activities which are subject to EU regulation, and are effectively supervised in the home state. As the regulation primarily aims at pursuing the general objectives of financial regulation, complying with the passport conditions implies that the operators will also conform to the said general objectives. At the same time, the financial market will, legally at least, become fully operational as an internal market, guaranteeing the same protection to depositors and investors.

In order to become operational, this free access regime applies to activities which are subject to EU regulation, and for which the necessary authorisations have been granted by the home state supervisor. These conditions will guarantee that the same legal regime is applicable in all EU states and that the market participants can expect the same protection as in their home state. The EU regulations take the form of directives – which being addressed to the national legislators - have to be transposed into national laws – and EU regulations which are directly applicable in the national legal order, and therefore are directly binding on the national supervisors and the entities subject to their supervision. Freedom of access is guaranteed by these legal instruments: for financial intermediaries, this takes the form of freedom to access the other states' markets by opening a branch in that market, or by providing services across member states. In both cases, the passport would allow to undertake these activities without an authorisation procedure in the host state: only some information procedures between supervisors will apply. Different from branches, subsidiaries are separate

[8] ECJ, Case 120/78, 20 February 1979. - Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon").
[9] Articles 49,56,63 TFEU

legal entities[10] and therefore separate authorisation procedures will have to be followed, but once authorised the subsidiary, recognized as a local operator, will be entitled to prevail itself of the passport. These facilities have resulted in financial institutions, especially banks, to be present in many EU member states, thereby guaranteeing that the objectives of the integrated market are achieved.
Non-EU operators can also become active in the EU: in many cases they establish a subsidiary which will be governed by the rues applicable in the state of establishment. These rules will be governed by the EU regulations and therefore will put the operator at the same level as any other local entity, also in terms of authorisation and supervision. The same freedom does not apply to branches: here the authorisation can only be granted by the local supervisor, and according to his conditions. Also, the activity of the branch is limited to the host state.

2. Equal regulation and competition

The passport regime is conditioned by the strict application of the EU regulation which by being similarly applicable in all member states, will create equal conditions (level playing field objective) and will avoid competition between regulatory systems (regulatory competition and regulatory arbitrage concerns). This is one of the core internal market objectives pursued by the EU regulations and directives, in the latter case by the national laws transposing these directives. It is essential that the application of the EU regulation and the application of the national transposing laws should – effectively- be the same in all Member states. Whether this result is achieved depends on many factors. With respect to regulations, this effect is largely guaranteed by the principles of EU law[11], as regulations are directly applicable in the national legal systems and this with the same authority as national law. The principle also applies to national laws transposing EU directives, although in the transposition, due to the national freedom of formulation, local characteristics may appear, such as additional conditions, complementary supervisory processes, language or translation differences, and in some cases more substantial differences, because directives may allow Member states the choice between different options for the transposition [12]. Some of these differences may be based on the intention of the national regulator to better protect investors in its jurisdiction, but they may also cover the intention to make access to its market more difficult, or more attractive, leading to a form of fragmentation which is not compatible with the integrated EU financial market. This is often referred to as “goldplating”.

Differences between national and European legal regimes may also be due to diversity at the level of the underlying approaches to contract, company, bankruptcy and other part of national law. In many fields, national laws remain applicable to private law relations, possibly creating tension with the EU requirements. These conflicts are probably more frequent in the fields of regulated contracts, e.g. consumer credit or payment services, although recent ECJ cases illustrate a similar phenomenon in company and banking law[13]. This observation indicates that there may be three layers of legal provisions applicable: EU regulations, national legislation transposing directives, and general national law. Nevertheless, all should meet the requirements of applicable EU law.

Differences between national law and the directives will be identified by the national supervisors, or may be the subject of remarks formulated by the European Supervisory Authorities or by the Commission, the latter having the right to bring the case before the ECJ[14]. [The ECJ case law makes it clear that not only this conformity check is not limited to differences in the formulation between these two levels, but that the

[10] Article 11 e.s CRR and article 111 e.s.CRD IV outline the rules applicable to consolidation supervision.
[11] Article 288TFEU
[12] These are the “options and discretions”; See on the Options and Discretions in the banking field : Regulation (EU) 2016/445 of the European Central Bank of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4;) ECB Guide on options and discretions available in Union law, Consolidated version, November 2016 ; Recommendation of the ECB of 4 April 2017 on common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institution (ECB/2017/10)Guideline (EU) 2017/697 of the ECB of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9 ECB Guide on options and discretions available in Union law, Consolidated version, November 2016)
[13] See also ECJ,C 604-11 , 30 May 2013 Genil, and the analysis by D. Busch,The private law effect of Mifid I and Mifid II: the Genil case and beyond, in: Busch and Ferrarini, (Eds), Regulation of the EU Financial Markets, MiFID II and MiFIR, OUP 2017, p. 567-585.
[14] TFEU article 258 e.s. The State will have to comply with the ECJ decision, and if not the Commission can impose a penalty: article 260 TFEU

national law has to be appreciated considering the overall purpose of the EU regulatory provisions which ultimately will prevail[15].

The optimal solution for creating a fully integrated European financial market might consist of having all Member states adopt the same legal system, not only in terms of regulation but also as far as private law is concerned. Except perhaps in the wholesale financial markets, which function on a worldwide basis, this solution is unachievable. It does not mean however that one should not strive for more uniformity, starting with offering similar or identical solutions in the different regulations for largely identical matters[16].

3. The structure of financial supervision

The implementation of the legal requirements applicable to the different categories of financial institutions and transactions is supervised by public bodies, the so-called Competent National Authorities (NCAs). They are structured along the same lines as the regulations, i.e. banking, insurance and securities regulations are addressed by different supervisory bodies, not necessarily housed in the same institutions: in some jurisdictions, one supervisor is in charge of the three domains, in several states insurance and securities are supervised by one entity, in a limited number of states there is a supervisor per type of financial activity. Their total number is difficult to determine and has substantially changed over time, especially as a consequence of the decision to centralise banking supervision in the euro area [17]. This wide diversity is mainly due to differences in the subject matters to be supervised, but also to historical factors, while different national policies may play a role in maintaining their historical structure.

At the European level, the activity of the NCAs is coordinated by the ESAs, the European Supervisory Authorities, each of which is active in one of the three pillars of financial activity. Their creation in 2010 was intended to deal with the "shortcomings in the areas of cooperation, coordination, consistent application of Union law and trust between national supervisors"[18]. The ESAs are mainly in charge of developing overall policies in their respective sectors, contributing to the drawing up of regulatory standards, coordinating the supervisory activities of the NCAs and supporting the respect of EU law, and when needed, resolving conflicts between NCAs. From the angle of integrating financial markets, the ESAs develop an indispensable action in developing common instruments to be used in actual supervision, and striving at convergence of national supervisory practices[19]. They have become leading players in their respective fields, also contributing to the development of common approaches and more coherence in their attributed fields of action.

Notwithstanding the terminology used, the ESAs generally are not engaged in actual supervision addressing individual financial firms, but exercise their supervisory tasks in a more general, sectoral approach. Most of these activities are limited to their respective sector of financial institutions, or transactions, coordinating the activities of their members, the NCAs, and advising the Commission on regulatory initiatives. They have significantly stepped up their efforts in the development of supervisory convergence activities[20] and in

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[15] See e.g. in ECJ Case T-133/16 to T-136/16 , 24 April 2018, where the decision was based on the rationale of the provision. The Court refrained from interpreting national law.

[16] See in this volume xxx

[17] See Wymeersch, The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors, EBOR, 2007,237

[18] ESMA Reg Recital 2 The three ESAs were originally created by three identical EU regulations. Later on, some amendments have introduced some changes.

[19] Joint Guidelines on the convergence of supervisory practices relating to the consistency of supervisory coordination arrangements for financial conglomerates, 22 December 2014
https://eiopa.europa.eu/publications/eiopa-guidelines/guidelines-on-the-conv-of-supervisory-practices-rltng-to-theconsistency-of-supervisory-coord
Guidelines on Facilitating an Effective Dialogue between Insurance Supervisors and Statutory Auditors, 2 February 2017
https://eiopa.europa.eu/Pages/Guidelines/Guidelines-on-Facilitating-an-Effective-Dialogue-between-Insurance-Supervisors-and-Statutory-Auditors.aspx
EIOPA Joint Guidelines Compliance Table, 22 December 2015, JC 2015, 087.

[20] EBA published an annual report on REPORT ON THE CONVERGENCE OF SUPERVISORY PRACTICES EBA/GL/2019/03 6 March 2019;dealing i.a., with the SREP guidelines(SREP guidelines Supervisory Review and Evaluation process) EBA-Op-2017-14, of 21 November 2017; Report on the functioning of supervisory colleges in 2017, 16 march 2018, dealing i.a. with the EBA College monitoring activity; EIOPA Annual report, 2017, "Strengthening supervisory convergence, enhancing consumer protection and maintaining financial stability were the focus of our activities in 2017."

development, the monitoring, assessment and implementation of common guidelines.[21]. Cross-sectoral activities have been reported by each of the ESAs[22].

Of the three ESAs, ESMA has been the one which, after the financial crisis, was put in charge of supervision of specific activities which previously were outside its remit, i.e. the supervision of the Credit rating agencies and of the Trade repositories, i.e. bodies to which derivatives transactions have to be notified. The ESA regulation allows it to act in cases of breach of EU law by an NCA[23]. Proposals to extend a centralized supervisory function per domain have not been successful[24].

The way financial regulation has been framed in each of the respective three fields is to a certain extent comparable. The basic provisions have been laid down in a regulation, or in one or several directives. These have been further implemented in a series of regulations, adopted either by the Parliament and Council, the Union legislator[25], or by the Commission pursuant to a delegation by the legislator. Further levels of more detailed regulation are the regulatory or implementing technical standards, which have been prepared by the respective ESAs and formally adopted by the Commission as regulations. In addition, the ESAs may develop "guidelines and recommendations" which are binding on a 'comply-and-explain" basis[26]. They may also develop Q and As and opinions establishing a common view which, although not legally binding, may under peer pressure result in some de facto harmonisation.

4. Sectoral financial regulation and supervision

The EU system of regulation and supervision is carried out in a clearly defined model in which the three main financial activities have been subject to their own specific regulatory regimes. Although these regimes may appear to be different, they share a considerable number of common issues, and structural challenges.

(a) The banking area

In line with the international standards, banking regulations and supervision essentially deals with the solvency of individual banks, thereby supporting the financing of the economies. To secure the banks' solvency, a complex system of regulations and directives have been adopted following the international guidelines as developed on the basis of standards developed by the Basel Committee on Banking Supervision. On that basis, the national banking supervisors exercise their prudential supervision on a largely comparable basis applying the EU rules and sometimes additional national provisions. This feature inspires confidence to depositors and investors in each of the Member States. The supervision of the institutions is organized on a national basis, the NCAs coordinating their action at the level of the European Banking Authority or EBA. The EBA has developed

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[21] See for the list of Peer Reviews, the EBA Review Panel, On the peer review of the Guidelines on the criteria to determine the conditions of application of Article 131(3) of Directive 2013/36/EU (CRD) in relation to the assessment of other systemically important institutions (O-SIIs), November 2017.

[22] See as recent examples: In the field of ESMA-EIOPA: Final Report following joint consultation paper concerning amendments to the PRIIPs KID, 8 February 2019 , and COMMISSION DELEGATED REGULATION (EU) .../... of .... amending Delegated Regulation (EU) 2017/653 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents , 8 March 2019, submitted by the Joint Committee; Report on FinTech: Regulatory sandboxes and innovation hubs, JC 2018, 74; ESAS Joint Opinion on the risks of money laundering and terrorist financing affecting the Union's financial sector (JC-2017-07); The cross-selling of financial products – request to the European Commission to address legislative inconsistencies between the banking, insurance and investment sectors, 26 January 2016, ESAs 2016-07

[23] Allowing the ESA to directly address itself to a financial institution in case the NCA does not take action within the specific period of time (article 17 (4) ESA reg.

[24] See however with respect to CCP, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, providing a new supervisory function for ESMA; Compare for a different pattern; Commission, Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions, Brussels, 12.9.2018 COM(2018) 645 final

[25] Specifically for the SSM regulation, in which the Parliament was technically not involved.

[26] Article 16, EBA Reg.

an “interactive single rulebook” where the main regulatory instruments and their implementing regulations have been included.

On the other hand, banking supervision is less involved in the surveillance of the individual transactions of bank clients: the EBA regulation describes its missions relating to “consumer protection and financial activities”, referring to tasks which are more in line with its prudential objectives than the protection of the individual position of consumers. Also, its powers to prohibit or restrict certain financial activities are related to the orderly functioning of the markets and their stability, not to the protection of the individual investor.[27]

The supervisory structure has been considerably modified in the field of banking supervision when on November 4, 2014, the European Central Bank was put in charge of banking supervision in the now 19 euro area Member states within the framework of the Single Supervisory Mechanism on the basis of a Council Regulation[28]. From then onwards, the ECB has exercised direct banking supervision of the larger banks in the euro area, while the smaller institutions (the less significant institutions or LSIs v. the significant ones or SIs [29]) will continue to be supervised by the NCAs in charge of – mostly local - banking supervision, however under the overall guidance of the ECB.[30] The non-euro area banks in the EU will remain subject to their own national banking regulatory regime which will be largely similar as subject to the same EU regulations.

With respect to the application of Union law, the ECB will be governed by all relevant Union law and especially the SSM regulation in which its supervisory tasks have been listed[31]. It will apply the EU regulations, including the regulations developed by the EBA, its Guidelines and Recommendations, including its European Supervisory Handbook[32]. On the other hand, the ECB has limited regulatory power of its own, the SSM regulation confining its regulatory action to the tasks which that regulation conferred to it, being the main domains of prudential supervision[33]. Up to now the ECB has adopted a prudent approach to develop its own regulations in the field of supervision, although many of its “opinions” cannot be disregarded as indications of its supervisory action[34].

This specific approach has been conceived to guarantee the level playing field between the institutions, irrespective of the supervisory regime, thereby avoiding the SI supervision to become a different or a superior one. This view is also expressed in the statement that the ECB shall be considered, as appropriate, the competent authority for the tasks of prudential supervision in the euro states[35]. By tying the supervisory action of the ECB to the regulatory and other developments at the EBA level – where the national supervisors are the decision makers – one may wonder whether on the longer term that approach establishes the right balance, most of the EBA members being also members in the ECB’s Supervisory board, and the non-members not likely to become the representative leaders in the field of prudential supervision. One day, this structure will be up for reform.

At the same time, the NCAs will *assist* the ECB with respect to the preparation and implementation of supervisory acts relating to *all* credit institutions[36]. The LSIs will be supervised by the NCA of the State where the institution has is registered office or head office [37], but the ECB has a right of “higher” supervision, allowing it at adopt “regulations, guidelines and general instructions” addressed to the NCAs or to take over direct

[27] Article 9, EBA Reg. Compare the recent decisions on binary option and contracts for difference, adopted by ESMA, xxx
[28] Council regulation 1024/2013, of 15 October 2013, SSM Reg.
[29] Usually referred to as SIs and LSIs. These are defined on the basis of the criteria mentioned in the SSM Eg, article 6 (4), the most important one being total value of assets, exceeding 30 Bn euro.
[30] ECJ Landeskreditbank Baden Wuertemmberg – Foederbank v ECB T -122/15 of 16 May 2017 (53), /n.38 and further stating : “the SSM is not a system of distribution of competences but allow the exclusive competences delegated to the ECB to be implemented within a decentralized framework” (54) …. “ the NCAs are assistants the ECB, but do not exercise autonomous competences” (58) . Also SSM Reg art xxx
[31] Article 4(1) SSM Reg; see article 9(1) where the ECB is considered” the competent authority … in the member States as established by relevant Union law”
[32] On the basis of article 8 (1) (aa) EBA reg. EBA has developed common standards, but not yet a Handbook.
[33] As mentioned in article 4 (1) SSM Reg. It means that the ECB will be treated as an NCA foe the application of the provisions of article 4(1) and 4(2) and 4 (2), the latter dealing with macroprudential issues
[34] See ECB: All ECB opinions.
[35] Article 9 (1) SSM Reg
[36] Article 6(3) SSM Reg
[37] Article 13(2) CRD IV

supervision of an individual institution in case the "consistent application of standards" raises the need for the ECB to exercise direct supervision[38]. This relationship between the two levels of supervision has been defined by the European Court of Justice as follows: "the [ECB] shall be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to *all* institutions established in the participating member States…." [39] This list of tasks has been detailed in the SSM regulation[40], and includes almost all activities relevant to banking supervision.

The introduction of centralised banking supervision has contributed to the integration of the financial markets as all Eurozone banks are subject to the same rules, applied in the same manner. Moreover, the ECB analyses the way the NCAs apply the rules with respect to the LSIs subject to their supervision. Only the ECB is entitled to appreciate whether the decision by NCAs have rightly been adopted[41], subject to ECJ review[42]. On the other hand, the ECB is only involved in prudential supervision: matters relating to protection of consumers or investors have been left in the hand of the NCAs, the ECB cooperating with them.[43]

In the field of recovery and resolution, as similar regulatory structure as in prudential supervision applies. In the euro area a separate institution has been designated to adopt resolutions decisions for SIs, while the NCAs will remain in charge of the LSIs.

Financial stability objectives are of paramount importance in banking: the EBA, acting with the European Systemic Risk Board, has been mandated to identify criteria for the identification and measurement of systemic risk, undertake the necessary stress testing and develop effective instruments to determine the resilience of financial institutions. Risks of this nature may be addressed by the resolution mechanism and the deposit guarantee or insurance scheme - although both also serve to protect the individual bank client. Special powers have been granted to the NCAs and the ECB to adopt macroprudential measures with a view of avoiding financial stability risks, or if needed, systemic developments[44].

(b) The securities area

The approach to regulation and supervision in the securities are is to facilitate the financing of mostly long-term investments, with a view of creating economic welfare, mainly through facilitating the creation of an efficient market for financing through securities issues, in competition with bank lending.

Substantially different from the banking field is the risk distribution: in the securities area, the risks are ultimately supported by the investor, not by the intermediary who intervened in the issuance or the trading of the security. Therefore, the regulations pay much attention to the conditions in which the investors acquire the securities, i.e. by providing adequate information, at issuance in the prospectus, or by providing continuous disclosure afterwards. The conditions of trading, and especially of safekeeping are also strictly regulated: trading is widely concentrated in regulated markets, e.g. on stock exchanges, while the depositories are held to strict segregation. In comparison with banking regulation, in securities matters, safety wins from solvency. Also different from the banking sector is the diversity of the institutions intervening in the securities business: each function in this market is the subject of specific regulation, often carried on by different specialised institutions, subject to a broad range of different legal regimes. Furthermore, there is separation

[38] Article 6(5) (a) and (b) SSM Reg; in fact this relates to cases in which the NCA has not, or has not been able to implement the banking supervisory principles and regulations.
[39] ECJ Landeskreditbank Baden Wuertemmberg – Foederbank v ECB T -122/15 of 16 May 2017 (53) See also the quote in n. 29.
[40] See article 4(1) SSM Reg.
[41] See ECJ, C-219/17, Berlusconi, 19 December 2018
[42] See ECJ, Societe generale, T.757/16 and Banque postale v ECB , T-733/16 of 13 July 2018 where the Court annulled the ECB decision on the basis of an error of law, the provision of the French law being clear.
[43] See Rec 28, SSM reg indicating these fields of supervision. In a certain number of court cases, the conflict between national law and EU law was raised: ECJ, UBS Judgments, 13 September 2018, Cases C-358/16 UBS Europe and Others v A. Hondequin a.o. and in C-594/16 Enzo Buccioni v Banca d'Italia, where the court analysed the professional secrecy in civil proceedings obligation should be interpreted on the basis of the claimants position and his rights of defense and the relevance in the proceedings. In other cases, the NCA was not involved: ECJ, C 156/15 of 10 nov 2016, 'Private Equity Insurance Group' SIA v Swedbank' AS, ; ECJ, C-51/17 20 September 2018, OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt. v Teréz Ilyés and Emil Kiss.
[44] See article 22 e.s., EBA Reg, article 5, SSM Reg

of retail and wholesale activity in which mainly professionals intervene, and where the risk distribution is organised differently, often by offsetting risks against liabilities of other intermediaries[45].

The investment funds are an important group of participants in the securities business: they hold and trade securities for numerous individual investors who are the beneficial owners of the common portfolio which legally belongs to the fund, a separate legal entity. There are many forms of investment funds: actively managed, index funds, exchange traded funds, money market funds, private equity or hedge funds, etc. Some of these funds offer insurance coverage, others are used as pension funds, triggering the application of the insurance or pension fund regulations. The regulations applicable to these different types of intermediaries aim at avoiding or reducing risks for the beneficiaries, often by holding a diversified portfolio. Regulation will therefore determine how the portfolios have to be invested and managed.

Differently from the banking field, there is no overarching regulatory system: the main instrument deals with markets in financial instruments[46], but for many topics, or for different classes of intermediaries, separate regulations have been enacted. Most of these regulations have been adopted at the EU level, some on the basis of comparable international standards (IOSCO) as the activity addressed is often of a very international nature. These regulations will be applied by the national supervisors, their supervisory activity being coordinated at the ESMA level, where the 28 / 27 national authorities are represented. The large diversity of regulations will make it quite difficult to put together a single rulebook. Actual practices may lead to more diversity.

The supervisory structure is based on the intervention of national securities supervisors, in each of the 27 /28 member states; there is no separate regime for the euro member states, as there is no coordinating central supervisory authority. ESMA plays a significant role in coordinating the implementation by the NCAs, and develop common guidelines or standards allowing to better harmonise their action.

Financial stability issues in the securities business come in a different format: they often manifest themselves as market developments, resulting in a sudden lack of trust, leading to great imbalances in the markets, and creating a scare in the entire financial system. Resilience of the systems and orderly trading, adequate liquidity provision instruments are among the objectives of this part of the regulation. Market supervisors will have the power to stop trading or to impose restrictive measures. Specific measures are being considered for the derivatives which are transferred to CCPs to reduce risks for the parties to the derivative.

(c) The insurance area

The third pillar of EU financial regulation relates to insurance activities. The basic regulatory scheme is based on an elaborate prudential regime, laid down in the 2009 directive Solvency II, applicable since 2016 [47]. These measures lay down the core capital requirements, risk management rules and the supervisory regime including the authorisation conditions and procedures. It includes winding up of insurance undertakings. These measures apply to the different activities in the field of insurance, such as life and non-life insurance, and reinsurance. A directive has laid down the regime on institutions for occupational retirement provision (IORP)[48]. The Commission has adopted a long list of implementing and delegated acts dealing with numerous, especially technical aspects of the insurance regime[49]. In parallel to the prudential regime, another directive deals with the distribution of insurance products[50]. A regulation has been issued by the Commission listing in

[45] See for the CPPs: article 4, EMIR, article 29, Mifir.
[46] Directive 2014/65 of 15 May 2014, Mifid II
[47] Solvency II Directive (Directive 2009/138/EC [recast]) was adopted in November 2009, and amended by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 (the so-called "Omnibus II Directive"; Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
[48] Directive 2003/41 Directive 2003/41 of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, See: implementing and delegated act 634/2014; https://ec.europa.eu/info/sites/info/files/iorp-directive-level-2-measures-full_en.pdf
[49] See; https://ec.europa.eu/info/sites/info/files/solvency2-directive-level-2-measures-full_en.pdf
[50] Directive 2016/97 on insurance distribution; with implementing and delegated acts; https://ec.europa.eu/info/law/insurance-distribution-directive-2016-97-eu/amending-and-supplementary-acts/implementing-and-delegated-acts_nl; https://ec.europa.eu/info/sites/info/files/idd-level-2-measures-full_en.pdf

detail the items on which the subscribers of insurance have to be informed[51]. In the fields of PRIIPS, a regulation establishes a comparable questionnaire such as requirements for insurance -based investment products.[52]

Institutionally, the supervisory regime for the insurance activity is based on the presence of multiple national supervisory bodies, who exercise their functions alongside with the national ministries of finance or of economic affairs[53]. In a few jurisdictions, the central bank is involved as well[54] . Strikingly, the European Central Bank is not involved in the insurance activities nor in their supervision, due to an exception in the TFEU[55].

The relevance of insurance in terms of financial stability has been recognized by including the European Insurance and Occupational Pensions Authority (EIOPA) in the European Systemic Risk Board [56] and is receiving additional attention at the Council level.

There is no EU wide insurance protection scheme, but some states have introduced local guarantees schemes[57].

[except with respect to the proposal to create a Pan-European Personal Pension Product (PEPP), which is seen as a tool to activate and support financing of European enterprises[58].

Comparable to the two other sectors, an ESA (i.e. EIOPA) is in charge of dealing with insurance and occupational pensions issues coordinating the action of the NCAs[59]. EIOPA has defined its mission mostly in terms of protection of consumers, while the development of a common supervisory culture is being pursued by strengthening regulation, supervision and harmonization[60].

EIOPA stated that it intends to pay stronger priority to supervisory convergence than to regulatory convergence. Significant work is undertaken on convergence in conduct, and on the conduct related risk. Common templates for PRIIPS are being considered.[61]
Another workstream deals with consumer protection issues related to monetary incentives and remuneration between providers of asset management services and insurance undertakings[62]. EIOPA has published an opinion on this subject, on the basis of an EU wide thematic review. This general mission is based on provisions

[51] COMMISSION IMPLEMENTING REGULATION (EU) 2017/1469
of 11 August 2017
laying down a standardised presentation format for the insurance product information document
[52] COMMISSION DELEGATED REGULATION (EU) 2017/653 of 8 March 2017 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents. it is equally applicable to investment funds. A regulation has been issued by the Commission listing in detail the items on which the subscribers of insurance have to be informed[52]. In the fields of PRIIPS, a regulation establishes a comparable questionnaire like requirement for insurance -based investment products
[53] See: List of insurance and pension authorities https:/ /ec.europa.eu/info/business-economy-euro/banking-and-finance/insurance-and-pensions/insurance-pensions-authorities-and-organisations_nl. .
[54] Only in the Czech Republic, in the Netherlands, and in Slovakia, does the central bank exercise direct supervisory powers
[55] The TFEU excludes the ECB to deal with insurance supervision, see article 126 (6) TFEU. The ECB is not represented on the Board of EIOPA. EBA and ESMA are.
[56] See REGULATION (EU) No 1092/2010 of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.
[57] See: https://ec.europa.eu/info/system/files/insurance-guarantee_schemes-oxera-study_en.pdf: Oxera: Insurance guarantee schemes in the EU - November 2007
[58] See Commission Proposal on a Pan-European Personal Pension product (PEPP), 29 June 2017, 2017/343 Final
[59] See EIOPA governed by a largely identical regulation as applicable to EBA and ESMA
[60] See EIOPA , A Common Supervisory, Key characteristics of high-quality and effective supervision culture, issues of consistent application of Union law and developing trust between national supervisors are elements of this debate
https://eiopa.europa.eu/Publications/Speeches%20and%20presentations/A%20Common%20Supervisory%20Culture.pdf, 2017.
EIOPA's Strategy for Conduct of Business Supervision- next Steps, 23 April 2018
https://eiopa.europa.eu/Publications/Speeches%20and%20presentations/A%20Common%20Supervisory%20Culture.pdf
[61] Opinion on monetary incentives and remuneration between providers of asset management services and insurance undertakings;
https://eiopa.europa.eu/Publications/Opinions/Opinion%20on%20monetary%20incentives%20and%20remuneration%20between%20providers%20of%20asset%20management%20services%20and%20insurance%20undertakings.pdf
[62] Opinion on monetary incentives and remuneration between providers of asset management services and insurance undertakings;
https://eiopa.europa.eu/Publications/Opinions/Opinion%20on%20monetary%20incentives%20and%20remuneration%20between%20providers%20of%20asset%20management%20services%20and%20insurance%20undertakings.pdf, 11 December 2017.

in the ESA regulation[63] and on its specific duties under the PRIIPS regulation and the IDD directive. EIOPA's concerns relate essentially to the choice of insurance undertaking for investment vehicles on the basis of the highest remuneration for the insurance undertaking, thereby neglecting the consumers' interests.

5. Diversity and coordination

Regulatory diversity is relatively high in the EU financial regulatory system, while harmonisation of the regulatory requirements is now pursued very actively. Diversity can be attributed perhaps less to the lack of harmonisation than to the divided structure of the supervisory system.

A significant harmonisation effort has been undertaken in the past with the intention of replacing the diverse existing national laws or regulations by Union legal acts, thereby reducing the wide diversity that existed between the Member states. These efforts were undertaken in the numerous harmonisation directives, in fields such as banking law or company law, to name a few. This streamlining eliminates the most significant distortions, but inevitably left many issues open as no agreement could be reached among the Member states for a single common approach. Some of these issues are still on the agenda today, and lead to distortions in the level playing which should not be expected in the integrated internal market. In order to reduce this diversity, the Union legislature is now almost exclusively using regulations, but differences have subsisted.

Streamlining the requirements in specific fields is also the result of the activity of the ESA in preparing the draft technical or implementing standards. These are the result of the consultations on the proposed actions and the subsequent collective efforts of the NCAs within the ESAs: they will normally result in common positions, or at least in common decisions. As the standards have to be adopted by the Commission, changes to the ESA draft should not intervene except after prior coordination. These and other procedural guarantees[64] should ensure that the regulation adopting the standards generally meet the common views of the NCAs concerned. A similar streamlining effect is likely to be achieved in the ex post monitoring of the implementation of the standards through the peer reviews. These not only reveal differences in implementation and practice but also provide an overview of the state of compliance - or non-compliance - of the individual NCAs. Peer reviews are therefore powerful instruments to achieve the overall objectives of the regulation.

Apart from diversity between the Member states, there is also diversity in the EU regulatory instruments, and diversity in the implementation of these instruments. Different solutions are formulated in EU instruments for dealing with the same or similar questions: coherence should be an objective[65]. Diversity also occurs in the way the NCAs apply the provisions for which they are responsible: these differences may be due to differences in national laws transposing directives, or in general national law – e.g. company law, contract law, etc. - which remains applicable to the underlying legal structures or contractual relations. In the present state of development of European financial regulation, concepts or rules are included in European harmonisation directives or in regulations which may be interpreted in different ways at the national level: one can refer to examples as different formulations of the "fit and proper" test in prudential regulations[66], or the conditions to be respected under the PRIIPS regime[67]. These differences negatively influence the integration of the financial markets, lead to national bias or regulatory competition.

Also, differences in national laws applicable to the entities supervised – e.g. national company law – or to the contractual relations governed by an EU regulation – consumer credit, payments, etc. – often lead to a type of

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[63] Article 9(1) EIOPA Regulation; and Product Oversight and Governance requirements under the IDD Article 25(1) of the IDD and Articles 5 and 7 of the Commission Delegated Regulation (EU) .../... of 21.9.2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to product oversight and governance requirements for insurance undertakings and insurance distributors (C (2017) 6218 final), as endorsed by the European Commission.

[64] See article 10 of the ESA Reg.

[65] Examples in this volume are: xxx ….

[66] See in this volume, xxx ; add: ECJ, T-133/16 to T-136/16,Credit agricole, 24 April 2018; comp. Case T-712/15,Credit mutual Arkea, 13 December 2017; Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders, applicable to bank and investment firms, 21 March 2018, ESMA71-99-598; DECISION (EU) 2017/933 OF THE ECB of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40). See: 0. Voordeckers, How to Handle Normative Divergence within a Single Rulebook? An Analysis of the Implementation of Fit and Proper Requirements within the Single Supervisory Mechanism, EBI 2019 Conference

[67] See for these topics the chapters xx and yy in this volume.

diversity which is not neutralised in the applicable financial regulations. It reduces cross- sectoral comparability, or leads to cross-border differences, negatively – and often surreptitiously - influencing market participants' choice intending to engage in cross-sectoral or cross border activity. But any appreciation will always be subject to a check on its conformity with the higher European standard.[68]

The causes of diversity may go deeper and be due to the diverse structure of supervision: for most financial regulations, the implementation is in the hands of the NCAs who often develop their own interpretation of the regulation, or add national application provisions, and this notwithstanding the principle of direct effect of the regulations. In other cases, NCAs have a genuine different reading of a regulatory provision: this practice is not strictly incompatible with EU law, provided the EU rule is respected.

Introducing additional local requirements to regulations or even applying additional local supervision may lead to diversity and possibly to fragmentation of the market: local requirements are sometimes imposed to better protect local investors or consumers. However, these additional requirements may bar access to investors from other EU jurisdictions, if some of these local requirements e.g. on additional disclosure have not been met. Therefore, EU supervisors should keep a close watch on these practices, and test the genuineness of the reasoning and the rationale for introducing these additional conditions. Cases of discrimination on the basis of nationality have been reported. Keeping a close watch should essentially be the task of the ESAs, who have been empowered with the necessary instruments and contribute to realise this part of the level playing field, without however endangering the fundamental characteristics of the regulation e.g. in terms of investor protection. They might also become points of contention triggering litigation, especially if the national rule conflicts with the European one.

For reducing these types of diversity, several solutions can be considered. The action of a central authority, with powers to impose a single interpretation, is the approach followed in the SSM, although not without difficulty. Another one, found in regulatory practice, is a wider application of the home state rule: as the applicable regulatory regime will be the one of the home state, it makes the same regulation - including its interpretation - applicable wherever the financial transaction or business is located. This regime has been successfully applied in passporting e.g. for branches of banks, of investment firms, investment funds, but also for prospectuses, etc. Delegation of tasks and responsibilities among NCAs could also contribute to develop a commonality in the rules to be applied[69].

Due to the role of the NCAs as members of the ESAs boards, the ESAs play an important role in developing common views among the NCAs. They determine the decisions and policies developed by the ESAs, and in so doing contribute to develop common views on subjects nationally dealt with by the ESA. This experience is further contributing to the preparatory work for Commission regulations. The development of common standards or methods with respect to their supervisory actions have contributed to streamlining the supervisory practices and the creation a more level regulatory playing field.

The cross-sectoral cooperation was first developed in the field financial conglomerates, involving supervision of banking and insurance groups. Since then cooperation between the three ESA has been stepped up, and since then numerous initiatives have been undertaken[70]. The divergence of the requirements for PRIIPs and the KID are high on the agenda[71], but other topics are mentioned as well, such as the treatment of money laundering[72], a project on relative cost and performance of retail investment products, while more prudential orientated research is undertaken especially by EBA on debt financial instruments.

[68] See ECJ, 24 April 2018, T-133/16 to T-136/16,Credit Agricole c ECB, on the basis of the separation of executive and non-executive or oversight function.

[69] See article 8 (1) (c) EBA Reg; also article 28, ESA Reg for delegation among NCAs and to ESAs. This instrument has not been frequently used.

[70] ESMA Supervisory Convergence Work Programme 2019, 6 February 2019 ESMA 42-114-647_2019; See also: the Statement by Steven Maijoor, ECON Hearing, J.C. 2018 36; on a different topic: also Guidelines on complaints-handling for the securities and banking sectors 04 October 2018 JC 2018 35 developed with the overall aim to achieve a consistent standard of application across the EU. Disclosure requirements for EU securitisations and consolidated application of securitisation rules for EU credit institutions, 30 November 2018, JC 2018 70

[71] See the ESA Joint letter containing the three ESAs response to Commission request to develop guidance on facilitating the production and distribution of information on investment funds as of 1 January 2020, 1 October 2018, JC 2018-55, calling for a public consultation to try to bridge the gap between PRIIPs KID and UCITS KID.

[72] Where EBA will take the lead: AML/CFT

Conflicts between European law, and national provisions or interpretations will sometimes lead to legal action, depending on the case, first to be decided at the national level[73], further to be submitted to the ECJ by way of a preliminary ruling. In the SSM context, some of these cases in which national law confronted EU law, are the direct consequence of decisions of the ECB as the EU supervisory authority with direct supervisory powers. In these cases, the ECB was challenged by the supervised institution with respect to the position which the financial institutions had adopted in reliance of the NCAs analysis, although the NCA is not a party to the litigation[74]. Indirectly the procedures have the effect of an appeal of the NCA decision. Recently, the number of cases so decided has increased[75], pointing towards a more active relationship between the NCAs and the ECB. These cases stand for important steps in the roll-out of the Single Supervisory Mechanism towards a more homogenous regulatory system.

This unifying role could probably also be exercised by the ESAs by using their powers in case of breach of Union law by an NCA[76]. The ESA could investigate the breach on its own initiative, or act pursuant to a request from the Union institutions[77]. On the basis of this investigation the breach, and if the NCA does not act to address the recommendations of the ESA, the Commission could issue a formal opinion to the NCA urging it to comply. Only if no compliance with the directly applicable act takes place, may the ESA address a decision to the individual financial institution. This decision could be challenged before the Joint ESA Board of Appeals. In a case in which a plaintiff objected to the appointment of bank directors for not being "fit and proper", stating that the EBA refused to investigate the case, the plaintiff appealed to the ECJ from the decision of the Board of appeal, but was dismissed on the basis that as an individual, he had no locus standi not belonging to one of the categories entitled to request action from the ESA, while action was within the discretion of the ESA ("may").[78]

The ESAs have been empowered to play an important role in pursuing a more homogeneous regulatory regime not only within their sector, but also on a cross-sectoral basis. and have received ample competences to that effect. The ESA regulations provide that they have been mandated to "contribute to the establishment of high quality common regulatory and supervisory standards" and to "contribute to the consistent application of legally binding Union acts… "[79]. This would include the verification of the extent to which these additional national requirements are (in)-compatible with the Union standards or as the case may be, do not contribute to the overall objectives of the internal market. As mentioned above, the ESAs could also start an enforcement procedure for breach of Union law by an NCA. However, this procedure is quite weak, and only addresses the financial institution concerned, if any, but does not ensure compliance by the ESA, or with the national practice or legislation. For the latter, only the ultimate procedure on the basis of article 258 TFEU could be put at work, submitting the matter to the ECJ, which will be able to deliver a final, binding order. Only the Commission is entitled to exercise this "disciplinary mission" against a Member state which is "failing to fulfil a Treaty obligation"[80]. However, the issue may also be raised before the ECJ at the request of an individual institution, as is evidenced by the cases involving the EBA and ECB[81].

The regulatory diversity could also be approached by using the existing instruments provided in the ESA regulation which may lead to reduce diversity or if possible to common positions. The ESAs regulation provide for several instruments to enhance the coordination of the supervisory activity, not only among their constituent members, the NCAs, but also with the other ESAs and their members, the NCAs. Among the

[73] Published national case law indicates that a certain number of cases are submitted to the national supreme courts. Preliminary review applications seem to be rather rare.
[74] Comp the Societe generale and Banque Postale cases,n 41, in fact opposing the ECB to the French ACPR
[75] See ECJ, T-712/15, 13 December 2017, Credit Mutuel Arkea v. ECB; ECJ, T-122/15, ECJ, T -122/15, Landeskreditbank Baden-Wuerttemberg- Foerderbank v. ECB.n. 38
[76] See article 17, ESA Reg
[77] Parliament, Council, Commission, but also the Stakeholders group of the ESA, but not interested third parties.
[78] Articles 17(6) EBA Reg, 18 and 19 of Regulation No 1093/2010 ECJ, 9 September 2015, ECJ, Case T-660/14, SV Capital OÜ v. EBA; Board of Appeal. Boa 2014- C1-02 of 14v July 2014; see for the cases rendered by the Joint ESA Board of Appeal, https://eba.europa.eu/about-us/organisation/joint-board-of-appeal/decisions. Many of these cases were unsuccessful. See: however BoA, 27 February 2019, , where the Board considered that the different Nordic banks involved had not acted negligently on Nordic banks for having published credit assessments, in accordance with their national tradition, and having been unaware of t the application of the CRA regulation. These cases started with ESMA imposing fines for circulating ratings without authorisation: see ESMA: Convergence – enforcement actions.
[79] Article 8 (1), (a) and (b) ESA
[80] See article 258, TFEU
[81] See ECJ, Case T-660/14, SV Capital OÜ v. EBA, where an individual opposed the appointment of a bank director on the basis of "fitness and propriety".

techniques which may contribute to higher consistency in the regulatory practice one could mention the development of "guidelines and recommendations "with a view of establishing consistent, efficient and effective supervisory practices" not only among the NCAs active in the ESA but on an cross-sectoral EFSF[82] wide basis, including with the other supervisory bodies[83] These guidelines and recommendations apply on a "comply-and-explain" basis: the ESAs have adopted many of these instruments[84]. In addition, the ESAs will develop a general "coordination function" in order to be able to deal jointly with "adverse" situations[85]. The regulations set up a "Joint Committee of the ESAs", a forum dealing i.a. with selected list of subjects, and developing joint positions and common acts, to be adopted in parallel by the three ESAs[86]. Finally, a Joint Board of Appeal has been created for the three ESAs[87].
Inconsistency may also be the consequence of the continued application of national law resulting in conflicts with EU law. Th resulting conflicts are first decided at the national level[88] and may be submitted by the parties to the ECJ by way of a request for a preliminary ruling, in several against opposing a decision adopted by an NCA or by the ECB in its supervisory capacity. Recently the number of cases so decided have increased, contributing to the uniform interpretation of Union law where the national legal provision is incompatible with the ECB's reading of Union law, but also point to stronger enforcement willingness of the ECB.

6. The effect of regulation on the integration of the EU financial markets

What is the effect of the regulatory and supervisory system on the integration of the EU financial markets? Would a different regulatory scheme, or changes in the present scheme improve cross–border integration? To what extent is the present regulatory scheme to stronger and faster integration of the EU markets?

Theoretically, if the conditions under which market participants could engage in financial affairs were increasingly similar in the EU Member states, they would be able to compare the services offered in the different jurisdictions and after comparison, take advantage of the better conditions offered in another state. This is what happens continuously in other markets segments, e.g. for foodstuff or drinks. If that facility would be offered, competition would play a stronger role, and market integration would result in more efficiency, offering a wider choice most of the time at more favourable conditions. Generally, the overall objectives of financial regulation would be better served. The first question is therefore, what has been the impact of the present regulatory system on the structure of financial services and to what extent have financial consumer reacted on the evolving regulatory system? In the present state of available information, to measure this impact is an exercise of approximation.

In banking, the composition of the population might give some indication about the regional footprint of the largest banks. Of the 118 significant institutions supervised by the ECB[89], most focused their activity on the jurisdiction of the parent company, although the largest banking groups[90] are more active through subsidiaries

[82] The ESFS comprises, according to article 2 of the ESA regulation, the three ESAs, the ESRB, the Joint Committee, the ECB, and the other 'competent or supervisory authorities referred to in other Union acts. Its mission shall "shall be to ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services."
[83] See about the composition of the EFSF' article 2 of the EBA Reg. "and this with a view of "common, uniform, and consistent application of union law".
[84] Different institutions have different definitions of guidelines and recommendations. According to ESMA , guidelines aim to ensure a common, uniform and consistent implementation" …. :" also aim to achieve a convergent approach in the supervision " … and lead "to improved investor protection (consumer outcomes). See for the guidelines// the recommendations defined by the Commission as" allowing the EU institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed. They have no binding force". See on the EBA guidelines and recommendations: ECB compliance with EBA guidelines and recommendations, https://www.bankingsupervision.europa.eu/legalframework/regulatory/compliance/html/index.en.html
[85] See article 31, ESMA Reg
[86] Article 54 e.s., with special reference to the Joint Committee dealing with financial conglomerates, created by the Directive 2002/87/EC of 16 December 2002, consolidated version. This was one of the first cross-sectoral committees. There is also **an** Anti- Money Laundering Committee, A subcommittee of the Joint Committee of the three ESAs.
[87] Article 58 ESA Reg; Between 2013 and 2019 it has rendered nine decisions at the request of individual firms or complainants, many having been dismissed on procedural grounds. These decisions related to complaints against one of the ESA, mostly on the basis of article 60, ESA Reg, or opposing direct supervisory powers by an ESA (e.g. in the field of CRAs). See ECJ, T-660/14 , 9 September 2015 SV Capital OU v EBA ; see for its decisions: https://eba.europa.eu/about-us/organisation/joint-board-of-appeal/decisions; see n 66.
[88] Published national case law indicates that a certain number of cases are submitted to the national supreme courts, in some cases leading to preliminary review applications.
[89] See for the 2018 list: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.list_of_supervised_entities_201802.en.pdf
[90] E.g. the Dutch, French, Spanish banking groups seem to have established more subsidiaries in other jurisdictions.

located in other states, mostly their neighbouring states. The largest groups show a net preference for locating subsidiaries in Luxembourg with some interest for Belgium, Germany and Italy. The picture is however imprecise as it only refers to subsidiaries in the SSM jurisdictions and does not refer to branches.

As to cross-border transactions, it seems likely that these are better developed in the field of cross-border payments, a field which is receiving attention from the European Commission[91]. Many payments are executed through other means, especially by using credit cards and through other third-party intermediaries. The involvement of the banks is therefore cross-border in a bank-to-bank sense.

In the investment fund sector, available data indicate that the cross-border activity is quite substantial, as illustrated by the information on the in- and outflows from investment funds, with Luxembourg (+62 Bn) and Ireland (+47Bn) attracting the largest volumes of incoming investment in 2018[92]. Per hypothesis, these flows represent cross-border net investments. In terms of assets, these trends have resulted in considerable, total asset positions for the investment funds domiciled in the same countries: Euro 4.065 Bn for Luxembourg and Euro 2.421 Bn for Ireland, followed by the UK (1.493 Bn) [93]. These figures give some idea about the volumes of cross border financial flows in two sectors where largely comparable regulations have been adopted.

More precise information in individual behaviour can be derived from a Commission led research, as part of its Consumer Financial Services Action Plan, conveying some insights on the factual situation per regulatory domain. In a study of April 2016[94], the European Commission published a large-scale public opinion survey about the use of financial products in the different Member states, including their use in a cross-border context. The Eurobarometer[95] survey related to the following products or services: current bank accounts, car insurance, savings accounts, credit card, life or private health insurance, mortgage or personal loan, shares or bonds, investment funds, and other insurance products and services. The use of these products by individuals in all Member States was analysed, identifying significant differences between the Member states for all products and services tested. With respect to the cross-border use, the research indicated that 7% of all respondents have used a product or service in another Member state, younger users or higher educated users being more active, and certain progress being noted with the previous 2011 survey[96]. The more active users were located in Luxembourg, Ireland and Romania, with the lowest percentages for Denmark, the Netherlands, France, Spain and Greece. Per product, the interest for life insurance, investment funds[97] or mortgage loans were found to be very small (between 0% and 3%)[98] . Noteworthy are the reasons for this limited interest for foreign services and products: most answers indicated that users did not see the need for going abroad, their needs being met locally (33%). Other explanations were: the absence of information (17%), concern about fraud or crime (16%), concerns about the way to deal with possible problems (13%) and the language barrier (12%). Complexity, extra costs, lack of consumer protection, too high fees, and refusal to contract with a party from another state are also mentioned. The firms from their side pointed to the negative effects of local regulations, with differences of consumer protection requirements, gold plating, tax laws, local networks for insurance claims and divergent interpretations of money laundering requirements, Consumer organisations suggested focusing on better enforcement of existing EU consumer protection rules. Better access to cross-border financial services including portability of products including cross-border; transparency and comparability of products; access to bank accounts abroad and no unjustified discrimination on the grounds of residence; insurance protection scheme in insolvency cases and better access to compensation.

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[91] Commission: Consumer Financial Services Action Plan: Better Products, More Choice, COM/2017/0139 final, 23 March2017; see also: Summary of contributions to the Green Paper on retail financial services: Better products, more choice and greater opportunities for consumers and businesses
COM(2015) 630 final ., http://ec.europa.eu/finance/consultations/2015/retail-financial-services/docs/summary-of-responses_en.pdf

[92] See EFAMA, Net Sales by Country of Domiciliation and Investment Type, p. 5
https://www.efama.org/Publications/Statistics/Quarterly/Quarterly%20Statistical%20Reports/190308_Quarterly%20Statistical%20Release%20Q4%202018.pdf

[93] EFAMA, Net Assets by Country of Domiciliation, 2018, UCITS and AIFs; in euro. The use of ISIN codes in each of these jurisdiction is likely to confirm these figures.

[94] Special Eurobarometer 446 - April 2016 “Financial Products and Services” , EV-04-16-507-EN-N

[95] See about the Eurobarometer, starting 1974, and its methodology: http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm; compare for payment services: Commission, Consumer Financial Services Action Plan, 2017, factsheet-consumer-financial-services-action-plan-23032017_en.pdf , with an action plan for 2018, pointing to the need for a deeper Single Market for consumer credit.

[96] There are no data available from more recent surveys.

[97] The figure for investment funds seems difficult to reconcile with the data made available by the fund sector itself.

[98] Table Q c 1

The report attributes to the lack of cross-border competition that investors and consumers do not get the best deal in these cases.

As evidenced by the figures comparing 2011 to 2016, it is likely that the interest in cross-border financial activity has further increased. It is important to mention that the survey relates to the conduct of individual citizens in the different Member States and not to the action of commercial firms which are likely to have a different approach, more focused on cross-border activity.

This factfinding overview could be read as evidence for the lack of interest for more uniformity in financial regulation in a cross-border context but points to a week interest as far are consumers are concerned. However, this view does not respond to todays need for a more efficient financial system, an important support for the activity of the economic actors who should be enabled to operate on a Europe wide basis. As the financial activity becomes increasingly based on information technology, more transparent, with a wider offering of products, less dependent on localisation and widely available throughout the Union, the reliance on a more uniform legal regime – including the contractual conditions under national law – would contribute to the development of the EU internal market, and support the cross-border exchange of goods and services. At the same time, more competition, better safeguards for participants, but also more attractive fees would strengthen this evolution and increase its benefits. As is already the case, language differences are less relevant due to already available translations, and if not, of on the spot automated translation. In order to eliminate the remaining distrust from users[99], a more uniform legal regime in which users could expect to have the same legal position and the same protection, while producers of financial services could take advantage of the uniform requirements. These elements would be a significant factor in strengthening the EU's internal market, while rendering EU financial services more attractive to non-EU based users.

With respect to the subjects discussed here, the Commission drew a double conclusion:(a) increase consumer trust and empower consumers, and (b) reduce legal and regulatory obstacles affecting businesses.

7. Conclusion

This overview of the financial regulatory system in Europe conveys a message of complexity, a characteristic which is not proper to the EU, if one compare with the similarly if not more complex American regulatory landscape.

Europe's financial regulatory system, like all comparable systems in developed economies, generally succeeds at meeting the general objectives of financial regulation, and in most fields, it has been quite successful. These objectives are embedded in a complex framework aimed at integrating the financial markets in the 27 / 28 Member states, allowing participants to have equal access to all markets and services in the Union. The structure developed to achieve this objective has significantly influenced the structure of the applicable regulation, which is based on at least two superimposed layers – European and the 27 / 28 national legal systems – applicable with some differences in the three sectors of financial activity – banking, insurance and securities. Notwithstanding these considerable differences in regulatory characteristics, these sectoral regulations have largely achieved the general objectives of regulation. Inevitably, the outcome has sometimes been quite confusing, based on different formulations for identical issues, thereby rendering their application unpredictable, and needing considerable administrative – and judicial - efforts and costs. It is important to mention that this unsatisfactory status of the European financial regulation is largely due to its organisational structure and to the difficulty to coordinate between the different decision-making levels. Considerable efforts are now being undertaken to achieve a higher level of convergence and coherence between the different supervisory bodies who are daily confronted with the resulting complexity, and these efforts should be strongly supported.

But changes are necessary. A first series of changes may consist of better organizing the regulatory function and its accessibility. At present financial regulation in the EU is spread over thousands of pages, with

[99] Under the heading of increasing trust the Commission mentioned in its press release " we want to make it easier for drivers to take their no-claims bonus ('bonus-malus') abroad. We also want to reduce fees for cross-border transactions involving non-Euro currencies and we will be taking steps towards more transparent pricing of car rental insurance", It also proposed to "Reduce legal and regulatory obstacles affecting businesses when seeking to expand abroad. This will include working on common creditworthiness assessment criteria and facilitating the exchange of data between credit registers"

documents of different legal status, available on many websites at the Commission, at the ESAs, the ECB, the ESRB etc. The idea of the "Single Rulebook" in its widest sense has been lost since a long time: it should be replaced by "the common rulebook", made accessible in an interactive website where the different levels of regulations are accessible through links. The individual instruments should be made available in coordinated format, and at least available on the sites of the bodies which are expected to apply them, as unfortunately, this is not always the case today. Duplicative or largely similar provision should be merged, and differences in the numerous definitions brought together in one single definitions article, of course after having been checked as to their content. The sanctioning or secrecy provision e.g. are also among the candidates for coordination, touching on Human Rights issues[100].

Substantive coordination is not absent from the agenda of the ESAs, as they are more engaged in regulatory convergence and in Joint Committee work, but a wider, Commission led initiative would be welcome: the confusion is some fields – the PRIIPs being an example [101]– should be clarified by following a more integrated approach. Coordination is especially important when fundamental changes are introduced: repositioning a well-known product is a new perspective call for special attention in terms of coherence.[102][103].

The NCAs from their side could also contribute on a regional basis, especially if they belong to the same legal tradition: harmonisation of national law, e.g. provisions of contract law or tort rules should be considered, to safeguard the level playing and avoid jurisdictional arbitrage. The latter question leads to a more fundamental issue: in fields which are the subject of tight regulation, especially for reasons of investor protection, is it acceptable that different national contract rules still apply, and should these not be replaced by a common Uniform Financial Contracts code[104]? These could offer a better protection and shield against unilateral, or divergent interpretations. In the wholesale markets, this outcome is largely achieved by having standard contracts referring to uniform contract rules, made by professional organisations.

Therefore, initiatives, presented i.a. in this book, to identify further regulatory similarities and propose how these can be harmonised is a step in the right direction. It would be useful to broaden the perspective to subjects for which uniform regulatory provisions could be developed and this across the entire regulator spectrum. The further pursuit of this project should preferably be undertaken with the support of the ESAs, and their constituent members. The general objectives of financial regulation remain fully applicable.

In some fields, a common core of identical provisions could be developed: there are several types of investment funds, and these are governed by largely identical provisions. Why not develop a common core of rules, to be supplemented by specific provisions for the different types of funds? More ambitiously, could one not try a similar exercise for the provisions on credit institutions and investment firms, which share many characteristics, governance being a well-known example? A comparable analysis may be undertaken for the company disclosure rules, or the rules governing the distribution of financial products. Developing common legal provisions would lead to common administrative practices and contribute to simplify the application of this complex regulatory apparatus.

Over time, deeper reforms are necessary. The relationship between national and EU law has become a point of contention. Most ECJ cases in these fields are driven by the technical divergence of national law, and the ECB's overriding reading of the general purpose of EU prudential supervision. This tension is unlikely to go as long as the relationship between the ECB and the NCAs remains based on an unclear form of co-decision. But more

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[100] See: ECJ, C-358/16 13 September 2018, UBS Europe SE and Alain Hondequin a.o v. DV a.o

[101] See n. 70

[102] This is the case with the extension of the planned prudential regime to certain investment funds: see: OPINION OF THE EUROPEAN CENTRAL BANK of 22 August 2018 on the review of prudential treatment of investment firms (CON/2018/36)\; DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the prudential supervision of investment firms and amending Directives 2013/36/EU and 2014/65/EU, 20 December 2017, COM(2017) 791 final ; Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the prudential requirements of investment firms and amending Regulations (EU) No 575/2013, (EU) No 600/2014 and (EU) No 1093/2010 , COM(2017) 790 final ; EFAMA: EFAMA calls for legal certainty and a compatible approach between the provisions of the new regime for investment firms and relevant existing provisions already applying to investment firms
The European Supervisory Authorities (ESAs) submitted to the European Commission, draft regulatory technical standards to amend the Delegated Regulation covering the rules for the Key Information Document (KID) for Packaged Retail and Insurance-based Investment Products (PRIIPs).

[103] EFAMA welcomes the preliminary agreement in trilogue on the proposal on facilitating cross-border distribution of funds. extension of two years (until December 2021) of the UCITS exemption in the PRIIPs Regulation.

[104] Compare the success of the UCC in the US.

efficient and speedy ways of solving these tensions may be developed, whereby protection of individual rights might usefully be strengthened.

The core question in this field has been the restructuring of the ESAs, which recently has been hotly debated. As the question was posed in terms of centralisation, the answer was inevitably negative, both from the ESAs but mainly from the NCAs. This failure is partly due the too ambitious nature of the objectives pursued[105]. At the same time, alternatives to more efficiency should be considered: the home country technique as a centralizing technique was mentioned above. The ESAs themselves should investigate where they can cooperate without losing their specificity to the extent that this is linked to their different missions. Centralisation could be limited to some functions e.g. on data collection or integrating parts of their internal organization, but also coordination of decision making could help reduce the burden, and be beneficial to their budgets. One could see a mandate by the Commission to investigate the fields in which effective coordination could help simplify the present structure.

These few remarks should not reduce the merit of the distance which has been covered in EU financial regulation, especially in supervision over about the last 20 years.

[105] The outcome of the reform initiative is rather limited: see: Council presidency and Parliament reach provisional deal on supervisory framework for European financial institutions, 21 3 2019. See European Parliament, ESA Reform REPORT on the proposal for a regulation of the European Parliament and of the Council amending Regul.pdf; Report 14 January 2019, PE 625.358v02-00; ESMA will further be in charge of direct supervision over third country critical benchmark administrators.

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