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ARTICLE

The Banking Union Translated into (Private Law) Duties: Infrastructure and Rulebook

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Abstract This article starts out from the general question of how fields of regulation have impacted on the private law relationships between individuals, i.e., in competition law and capital market law. It states that the impact is sometimes more direct, as in capital market law, sometimes less direct and felt only after much more time, like in competition law, but that it is always present. Hence, the first result is obvious: the new Banking Union scheme *will* impact also on private law relationships. While this is already discussed in some specific areas—namely organisation of banks and recovery and resolution of banks (with the bail-in mechanism)—and while these areas are addressed in this article as well, the question most thoroughly dealt with here is whether such impact will be felt more generally and how it should be shaped. It concerns all bank-client relationships—mostly contract law—, the question of how much influence is welcome, and in which ways it can be channelled. The article provides ample material as to where similar questions have already been discussed in neighbouring fields of law and sees the regulatory package introduced under the term 'Banking Union' as one which will have a considerable amount of private law repercussions.

Keywords Bank-client relationship · Regulatory private law · Banking contracts · Governance of banks · Stability · Market integrity · Resolution of banks

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1 The Question of Translation into Duties

The European Banking Union, operational since November 2014, does not focus on private law, at least not primarily—and the cross-roads between Banking Union and private law constitutes no general topic either. Only sub-areas of the topic are addressed, namely (private law) questions of banking recovery and resolution ('Single Resolution Mechanism') as well as directors' duties which the regulatory regime triggers, and potentially completely re-adjusts (for instance, duties with respect to compliance or fundamentally distinct banking corporate governance). If, however, a discussion of a translation of the European Banking Union's regulatory regime into individual duties is asked for, as in this Special Issue of EBOR, private law may well be at the focus. Of course, one could also discuss duties and rights in the supervision relationship, but this would involve less of a 'translation'. Therefore, the question asked in the present contribution is what rights and duties can be derived from the regulatory regime already now and potentially in the future, also *among private law subjects*. A translation into private law (rights and) duties can be considered mainly in three situations: between actors in credit institutions (organisations), between actors on markets, the latter in collective procedures, and in individual client relationships.

This question of translating a regulatory regime into (private law) rights and duties is, of course, not completely new. It can be asked in the context of any regulatory order—of markets or of core institutions in markets—and therefore also with regard to the regulatory order gathered under the term European Banking Union. The more general question is how a regulatory order relates to (traditional) private law dealing with the individual relationships (rights and duties) between private law subjects. It can, for instance, be asked in regard to different private law subjects who are affected by the recovery or resolution of a credit institution, for the rights and duties of creditors or shareholders, for decision-making within the credit institution or for contractual relationships with clients. The topic 'Banking Union and individual duties' thus encompasses broadly the question of how the regulatory order of the Banking Union may potentially impact on such individual duties and rights, i.e., on private law in general.

To answer this question, one possible starting point might be the position—taken prominently and early on by the ordo-liberal school—that a regulatory order has to safeguard the 'level playing field' where (party-) autonomous decision-taking can take place, for instance, within organisations (voting, etc.) or between parties to a contract. In this perspective, a regulatory order is not exclusively and not even primarily conceived as a limit to party autonomy, but as a tool upholding it, empowering private parties to use it in a meaningful way, making it available to them also de facto and not only formally.[1] And not only regulation theory is based

[1] Groundbreaking, Mestmäcker (2012); and very early already, *idem* (1968), esp. at pp. 240, 252, 255 and 262; this idea is rooted in the writings of Böhm (1989), longer (original) version: *idem* (1966), esp. at pp. 85, 88 and 138 et seq.; Eucken (1990), esp. at pp. 241–250 et passim; from a classical private law perspective, rather similar (and in part even explicitly following Böhm and Mestmäcker): Canaris (2000), at pp. 277 et seq.; see also Kennedy (2011); similar for consumer law: Drexl (1998), at pp. 282 et seq.; and for disclosure and information duties, i.e., key in this respect: Grundmann (2002).

on this understanding of mutual dependence of regulatory order and classical private law (with an 'enabling' function). Also for the dynamism of integration—which is a second highly important feature when conceptualising the European Banking Union—a similar line of ideas and concepts is appealing: the fundamental freedoms—as the core primary law principles of integration—can be seen in intimate relationship with private law and in particular with party autonomy. Indeed, their basic thrust has convincingly been described as extending party autonomy across borders.[2] As the lead decision—in *Cassis de Dijon*—[3] was formally about a public law rule establishing requirements for labelling, i.e., a market order, the question to be asked already in this case—as in many others which followed and also applied the fundamental freedoms to 'private law'—was whether and in how far a (primarily public law) market order should impact on private law. While today this impact of fundamental freedoms on private law and the general application of these freedoms to national public law are not questioned in principle, the development described was fundamental—and even unexpected—in 1979.

The European Banking Union only became operational when the new EU Commission had already made a proposal that went even further: a European Capital Market Union.[4] The fact that capital market law—thus announced as the next reform step—constitutes *the* area where the tension between regulatory order and private law individual rights and duties is discussed most intensively and where, to this end, individual protection and functional market protection are most prominently distinguished (*Funktionsschutz* and *Individualschutz*) is meaningful for our inquiry as well: this fact gives the question of the relationship between the Banking Union's regulatory framework—as the most important reform element in the regulation of credit institutions in the aftermath of the financial crisis—and private law additional importance and appeal.

2 Survey on Substantive Laws (Including the Rulebook) and Institutions

2.1 Substantive Laws

The term 'European Banking Union' denotes the most important reform package in the supervision of credit institutions in the last decades. It became operational only a few months ago, on 4 November 2014; the 'Single Supervisory Mechanism' under the lead of the European Central Bank was, at that moment, only a first step. The second centrepiece, the 'Single Resolution Mechanism' (on recovery and resolution of credit institutions) is still to become operational or (in the case of the BRRD) to be transposed into national law during the publication process of this paper. Only

[2] Early in this sense, Müller-Graff (1993), at pp. 14; on the key role private autonomy plays as one of the four cornerstones in a European economic constitution, see Basedow (1996), at pp. 1179 et seq. and 1181–1184.

[3] ECJ 20.2.1979, Case 120/78 *Cassis de Dijon* [1979] ECR 649.

[4] See, in particular, Green Paper 'Building a Capital Markets Union' of 18 February 2015, COM(2015) 63 final.

the third centrepiece, a complete Europeanisation/supranationalisation also of the deposit insurance scheme (intimately linked to recovery and resolution of credit institutions), has not reached the point originally envisaged: the endeavour stopped at a not very far-reaching reform of the already existing harmonised scheme. Finally, the fourth centrepiece, the so-called Single Rulebook, is in the process of further elaboration.

The importance of this reform becomes even more palpable considering that only 3 years earlier, in 2011, the architecture of European banking supervision had already undergone fundamental reform, based on the thorough discussion of the de Larosière report of the High-Level Group on Financial Supervision (on this 2011 reform, parts of which were adopted by June 2013 (CRD IV, CRR), see below Sect. 2.2). What was the subject of the legislative measures adopted mid-October 2013 (and, in the case of the SRM Regulation and the BRRD, in 2014) constitutes nothing less than the second large wave of 'full' integration (after antitrust law) in which *both* a (largely) unitary regulatory regime *and* unitary administration at EU level were put in place. As this fact (of double transfer of decision-making to EU level) has caused antitrust law to serve as one of the main drivers of integration and was the subject of many of the lead decisions on Community law in the 1960s and 1970s, a similar push towards integration might be foreseen to be triggered by the European Banking Union. It may even affect all business law more broadly, because it concerns the core factor of capital. This dimension (as well as that of democratic legitimacy) should, however, not form the focus of this paper;[5] this should rather be the Banking Union's impact on private law.

Typically, the Banking Union is seen to rest on four pillars:[6] the Single Supervisory Mechanism (SSM),[7] the Single Resolution Mechanism (SRM),[8] a reshaping of the deposit guarantee scheme at supranational level,[9] and the Single

[5] On this question, see Culpepper et al. (2015/2016, forthcoming).

[6] In this sense, for instance, see the Austrian Parliament (at http://www.parlament.gv.at/PERK/GL/EU/B.shtml) summarising the so-called Four Presidents' Paper of 2012 (EU/ECB/IMF/Eurogroup) which proposed the following structure: the European Banking Union encompasses (1) the SSM, (2) the SRM, (3) the harmonised deposit guarantee scheme and (4) the Single Rulebook.

[7] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ 2013 L 287/63 [based on Art. 127(6) TFEU]. On the legal basis (in my view not doubtful), see the convincing argument by Ruthig (2014), esp. at pp. 450–460.

[8] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ 2014 L 225/1 (based on Art. 114 TFEU). Positive on the possibility to create new regulatory authorities (in the case of the European Banking Union: the Single Resolution Board in Brussels with the Single Resolution Fund) on the basis of Art. 114 TFEU: ECJ, 22.1.2014, Case C-270/12 *United Kingdom* v *Parliament and Council* [2014] EU:C 2018:18 (on ESMA and its regulatory powers, namely with respect to short-selling). It is in regard to this part of the European Banking Union system in particular that the legal basis is considered sceptically and that an amendment of the Treaties is called for, because decisions on resolution of banks are likely to provoke more actual litigation in courts, see, for instance, Vice-President of the German Central Bank (*Bundesbank*) Sabine Lautenschläger in: Bundesbank of 10.02.2014, Europäische Bankenunion—ein Großprojekt.

[9] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ 2014 L 173/149.

Rulebook (on supervision and recovery/resolution). The first three constitute instruments and pieces of *regulation for the following three sub-areas of supervision*: (1) current supervision (SSM); (2) recovery and/or resolution of credit institutions whenever—exceptionally—such an incisive measure becomes necessary (SRM); and (3) (linked to the second) the question of which deposits remain secured even in such a situation of resolution (for this third area, however, centralisation of the scheme at eurozone level failed). Single Rulebooks (4), on the other hand, rather constitute a new *regulatory technique*—cross-cutting all these areas—which, on the basis of EU regulations and directives, is aimed at a truly uniform supervisory practice, like a handbook on uniform supervision practice. The Single Rulebook discussed here includes the substantive rules of prudential regulation and resolution of credit institutions, but also the Single Handbook on supervision to be elaborated by the European Banking Authority (EBA). Its relationship with the European Banking Union will be discussed below, but already at this point reference should be made to one crucial point: while the SSM and the SRM (pillar I and II) are, for the time being, limited to the eurozone, and pillar III would have been as well had centralisation of the scheme at EU/eurozone level been successful, the Single Rulebook reaches further in its territorial scope of application: it is aimed at rendering more uniform the application and interpretation of harmonised substantive law, for instance, on prudential supervision in banking as outlined in CRD IV and CRR (see *infra* n. 11), which cover the whole of the EU and are even based on a set of principles or rules that are applied worldwide in a similar way. Indeed, not the ECB but the European Banking Authority is responsible for developing the Rulebook(s)—for the whole of the EU. In different areas, the Rulebook can adopt rather different forms—as will be shown below. What is common though is the aim to warrant reliable and uniform practical implementation and application of the standards in the Member States, followed by an evaluation of whether uniformity has been achieved. The criticism expressed when the SSM was adopted—that this could constitute but a first step—[10] has largely been rendered obsolete by the subsequent steps within just 1 year.

The first, most general and probably most prominent, 'pillar', i.e., the Single Supervisory Mechanism (adopted and implemented in 2013/14), has two characteristic structural features (which then re-appear in the second 'pillar'): firstly, it applies (only) to the core of the credit industry—those 123 institutions in the eurozone that are 'systemically relevant'—thus giving the ECB direct supervisory power over them only, and only general responsibility of last resort (for the proper functioning of the supervisory system at large) with respect to the rest; and secondly, the legal measure is grounded on other measures. It is embedded in a regulatory compendium which had already been fundamentally reformed due to the crisis. In fact, the SSM Regulation, while establishing a complete system of competences and administrative powers for the ECB, is based on the reformed

[10] In this sense, the President of the *Bundesbank* Jens Weidmann in the Frankfurter Allgemeine Zeitung (FAZ) of 19.3.2013; that it was meant as a first step only and that the others had to follow soon was, however, explicitly mentioned already in the 12th Recital of the SSM Regulation as well as outlined in the June 2012 Report of the President of the European Council 'Towards a Genuine Economic Union' (Brussels, 26 June 2012, EUCO 120/12, PRESSE 296, PR PCE 102).

substantive law on banking supervision contained already in the Capital Requirements Directive IV (CRD IV) and the Capital Requirements Regulation (CRR)[11] which apply to the whole of the EU. The CRD IV package had already fundamentally reformed the requirements for own funds, liquidity and risk diversification with respect to each and every engagement taken by credit institutions, but also introduced important standards on the internal governance of banks, i.e., on their organisation (namely regarding remuneration and risk management). In particular, the directly applicable Regulation covers prudential and disclosure requirements, whereas the Directive concerns also prudential supervision, corporate governance and market access. The SSM Regulation is further supplemented by the internal regulations for the ECB as supervisory authority[12] and by the (re-)formulation of the procedural rules on collaboration with the European Banking Authority, i.e., with the non-eurozone Member States.[13] Conversely, within the SSM, the interplay of supervisory powers and competences in the current supervision exercised by the ECB on the one hand and by the national supervisory authorities of the eurozone Member States on the other is set out in the SSM Regulation itself, and outlined in detail in the SSM Framework Regulation (for more detail, see below Sect. 2.2).

Still more problematic (than the transfer of powers to the ECB for the current supervision), also from the point of view of ensuring Treaty compatibility, was supranationalisation for the second 'pillar', the creation of a Single Resolution Mechanism for credit institutions. The SRM Regulation (*supra* n. 8) again does not stand alone: this measure, though containing much more substantive law (on recovery and resolution) than the SSM Regulation (on current supervision), is based on extensive harmonisation as well, namely on the Banking Resolution and Recovery Directive (BRRD) adopted the same day, and harmonises, and has indeed mostly created from scratch, a recovery and resolution regime for credit institutions.[14] Thus, of all harmonisation measures (for the whole of the EU), the BRRD is the only one adopted only in the second wave of legal measures on the

[11] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (CRD IV), OJ 2013 L 176/338, and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (CRR), OJ 2013 L 176/1—both implementing Basel III.

[12] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation), OJ 2014 L 141/1.

[13] Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013, OJ 2013 L 287/5.

[14] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ 2014 L 173/190.

Banking Union, because, before, there was no EU regulatory regime on banks' recovery and resolution. In this area, for the purpose of supranationalisation of the administration, a 'specific' EU agency was set up in Brussels, the Single Resolution Board (SRB), owner of the Single Resolution Fund [Art. 67(3) SRM Regulation]; the Fund is important for financing recovery and resolution procedures and is funded by bank contributions up to the amount of €55 billion (see Arts. 67–79 SRM Regulation and Intergovernmental Agreement).

The third institutional 'pillar' of the European Banking Union, a European Deposit Guarantee Scheme, failed in its core idea, however: contrary to the initial plans and due to particularly strong political opposition and disagreement, no European administrative and joint fund scheme was set up, but reform was limited to (already existing) harmonisation of national deposit guarantee schemes (no 'communitisation').[15] The core of the (harmonised) regime is a safeguarding of certain creditors via (national) deposit guarantee schemes (within some Member States, such as Germany, split up in groups of credit institutions). In case of insolvencies of credit institutions, these schemes have to guarantee deposits of consumers and SMEs of up to €100,000 (supplemented by a prioritisation of these groups of creditors also in the insolvency distribution proceedings as set out under pillar II, the SRM Regulation).

2.2 The Institutional Setting—System of Supervisory Authorities and the European Central Bank

In the following, only the first and second pillars of the supranationalisation of banking supervision are considered. Only these, which present the full picture of 'Europeanisation' both of the regulatory and of the administrative scheme, raise fundamentally new questions. Then, also the Rulebook as the fourth element comes into play.

Three points are of more general importance and need to be stressed from the outset: they concern the reach of the regime ('small-scale solution'), the interplay with other European regulatory agencies ('too complex'), and the 'independence' of the ECB (potentially problematic with respect to democratic accountability, a concern strongly voiced in Germany in particular).

The concern that the regime is 'small-scale' may first have been motivated by the fact that at the time, in 2013, only the SSM had been adopted and was seen as being 'not enough' (*supra* n. 10). This changed after the adoption, within a year, of the SRM Regulation and also, albeit to a lesser degree, because of the reform of the deposit guarantee schemes (still national). Another aspect of the concern still continues to exist, namely that the SSM and SRM Regulations introduce supervision and administrative implementation at EU level only for a limited number of

[15] On the dispute on whether for a European deposit guarantee scheme a common guarantee fund was needed, see Arnaboldi (2014); Schneider (2013b), at pp. 456; and regarding the concern that a European (!) recovery and resolution scheme would not be operational without a deposit guarantee, which therefore, to align well, needed to be European as well (just as, in the US, with the Federal Deposit Insurance Company, FDIC), see Aizenman (2009); Gros and Schoenmaker (2014); Weder di Mauro (2013), at pp. 19.

'systemically relevant' credit institutions and even this only for eurozone Member States.[16] The latter may change due to the fact that non-eurozone Member States can opt to enter into 'close cooperation' with the SSM (i.e., access this scheme) (which only the UK has so far (politically) ruled out). With respect to safeguarding euro stability, there is, however, a significant reason for distinguishing between the two kinds of Member States indeed: the eurozone Member States no longer possess monetary instruments such as depreciation of their own currency or steering of the money supply in order to react to budgetary problems, which indeed makes the isolation of risks stemming from insolvencies of credit institutions an even more urgent concern; conversely, budgetary problems of these Member States also influence the stability of the euro as a currency more directly, and thereby also the budgets and economies of other eurozone Member States. The concern about the number of institutions supervised is even less 'alarming': while it is true that only 123 credit institutions are under direct supervision of the ECB, they are nevertheless engaged in the bulk of the banking business in the eurozone.[17] And while the ECB is directly responsible for those 123 credit institutions, with respect to the other 3000 credit institutions of the eurozone it is only responsible for macro-prudential risk supervision (under Art. 5 SSM Regulation) and not for the classical, micro-prudential banking supervision (with powers conferred upon it by Art. 4 SSM Regulation) [see Art. 6(6) SSM Regulation], this does not change the situation that the ECB is ultimately responsible for the supervisory system and is its ultimate 'master' in the eurozone (Banking Union).[18] This has three reasons: the ECB is exclusively competent for issuing licences to credit institutions and withdrawing them (also with respect to large block holdings), but, moreover, it can also subject every single case and issue to its own supervision if necessary [Art. 6(5) SSM Regulation]; therefore, according to Art. 6(1) second phrase of the SSM Regulation, the ECB has responsibility of last resort for banking supervision in the eurozone; finally, and more as a matter of factual importance, the practice which the ECB will exercise and which, additionally, will have a large impact on the Single Rulebook is likely to shape also the national practices regarding less significant institutions in a

[16] Prominent is the criticism voiced by, for instance, Legrain (2014); Goyal (2013), at pp. 12; U Schneider and P Mülbert, 'Europäische Bankenunion ohne effektiven Rechtsschutz?', Börsen-Zeitung, 5.1.2013. It is true, however, that the restriction of the ECB's direct supervision to those 123 credit institutions constitutes the most incisive modification of what had been the EU Commission's proposal (and Barroso's political announcement of it in September 2012 in his 'State of the Union' speech). Today, this restriction is justified by subsidiarity concerns (see Recitals 28 and 87 SSM Regulation). Under Art. 6(4) SSM Regulation, the following credit institutions are 'systemically relevant': (1) any credit institution whose total value of assets on the balance sheet exceeds €30 billion or (2) any credit institution whose total value of assets on the balance sheet exceeds only €5 billion, but also exceeds 20 % of the GDP of that eurozone Member State; (3) any credit institution that is among the three biggest in that eurozone Member State; (4) any credit institution that has requested or received financial assistance directly from the EFSF or the ESM; (5) *any other credit institution which the ECB considers* to be 'systemically relevant' and therefore subjects to its own supervision. On the list of 123 credit institutions (21 in Germany), see European Central Bank, List of Significant Supervised Entities, 16 March 2015, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/list_sse_lsi.en.pdf?7cfe8aed9fcde86121744f574159bd25.

[17] For figures on this, see Lannoo (2014a), at pp. 27.

[18] Going even further (the 'most powerful EU Institution' altogether): Schneider (2013a), at pp. 4–5.

similar way as the European Commission's antitrust 'case law' has done with national antitrust practice. The intimate link between the ECB's and the national authorities' supervision, namely via exhaustive information exchange, is in fact a core characteristic of the (new) concept of integration underlying the SSM Regulation. Finally, however, for the question raised here—namely that of the impact the European Banking Union may have on private law duties—it is not even so important to know whether the national supervisory practices will really considerably align: if at all, it is certainly only the ECB's practice which can considerably influence private law on banking (which itself has mostly been harmonised at EU level already).

A second institutional interplay will be important in this respect, now completely at EU level: indeed, there are other institutions at EU level to be considered, the most important ones for private law on banking being the European Banking Authority, which coordinates banking supervision for all EU Member States and is also responsible for drafting the Single Rulebook(s) in this area, and the European Securities Markets Authority (ESMA). Both were created during the first phase of the building of the new financial architecture, after the financial crisis of 2007–09 and the euro crisis of 2010–15, within the so-called European System of Financial Supervision, ESFS (2010/11), which was set up on the basis of the de Larosière report. Within the ESFS, supervisory agencies were created for the three core areas of financial services, and this was still done for *all EU Member States*, i.e., for banking supervision (EBA), for securities markets supervision (ESMA) and for insurance supervision (EIOPA, not relevant in the present context).[19] However, the agencies were given only coordination functions and a core role in setting the implementing rules for EU legislation, setting out the details through guidelines and Level II regulatory and implementing regulatory standards (approved by the European Commission). The administrative competence as such still remains with the national agencies. Today, while a representative of the ECB's Supervisory Board is a non-voting member of EBA's Board of Supervisors [Article 40(1)(d) EBA Regulation, as amended in 2013], it can be assumed that the ECB will play a significant coordinating role with regard to the representatives of the national competent authorities in the EBA (holding voting rights). In any case, the role of the ECB as an independent institution established by the EU Treaties required re-adjustment of the interinstitutional equilibrium, namely it should not be subordinated to the said agencies (the EBA and, in other contexts, also ESMA) which were created only by EU secondary law, i.e., it should not come *under* their coordination powers [on this, see Regulation (EU) No 1022/2013, *supra* n. 13]. What tipped the balance towards the voices asking for more than coordination was

[19] The three authorities of the ESFS are listed in Art. 2(2) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ 2010 L 331/84: ESMA (created by Regulation (EU) No 1095/2010 itself, replacing the formerly existing authority for this area, CESR); the EBA (created by Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ 2010 L 331/12); and EIOPA, the supervisory authority on insurance undertakings.

the crisis in Cyprus and in the Spanish banking sector, which came to a head in the period between 2012 and early 2013. The European Banking Union, also involving centralisation of administrative implementation, indeed constitutes the answer to the concerns formulated. However, this second phase of the new financial architecture, developed in response to the financial and euro crises, encompasses only eurozone Member States (and those that 'enter into close cooperation').

2.3 Reaching Beyond the SSM, SRM and Even ESFS: The Role of the Rulebook

The fourth pillar is different, not referring to a certain area of the law or problem, but rather to the pursuit of uniformity as such: the Single Rulebook. It contains the guidelines for the uniform practical application of the CRD IV package (*supra* n. 11) and the BRRD (*supra* n. 15). Seen from this perspective, it would seem logical for the European Banking Authority to be responsible for drafting it.[20] On the other hand, the need for a Single Rulebook has been seen in the context that one single institution—which would be the ECB—cannot act on the basis of diverging practices [see, however, Art. 4(3) SSM Regulation]. This divergence of institutional responsibility and of main thrust may also be the main problem for drafting a Single Rulebook in the area of prudential supervision and regulation and of recovery and resolution. Given the weight of its future practice, its outstanding prestige and high expertise (and its manpower which is many times bigger), a strong influence of the ECB on the shaping of the Single Rulebook can be expected and even already sensed. On the other hand, it is the idea of a Single Rulebook formulated by the EBA which in fact transposes the very idea of the European Banking Union—full uniformity also in the administrative application—to the whole of the Union! This is because the Rulebook is meant to be so detailed that leeway in interpretation and discretion is covered and thus taken away from national authorities by the guidelines it contains. As 'banking supervision practice crystallising into guidelines', the Rulebook in fact extends the idea of administrative uniformity to the whole of Europe. Thus, the real difference between banking supervision inside and outside the eurozone may not so much be the uniform application of the technical standards contained in a detailed Single Rulebook, but the supervisor itself: in the one case, a supranational supervisor, in the other (still) a national one. As, moreover, the influence on private law described below may be exercised not only by the relevant directives, regulations and practice of the ECB, but also by the more detailed guidelines on practice contained in the Rulebook, this instrument potentially affects not only the European Banking Union and the ESFS, but also private law on banking more generally.

[20] On the Rulebook on banking supervision and on EBA's competence to draft it, see Moloney (2013); Schneider (2013b).

3 Translation into Duties—A Feasible Goal?

3.1 Starting Point: Regulation and Individual (Private Law) Duties

A comprehensive link between protection of the overall system (the system's function or functioning) and protection of the individual client/investor has been proposed and argued most vigorously for in capital market law: the argument that sound protection of individual investors' interests serves market functioning as well is accepted more in this area of law than in other areas of regulation.[21]

However, capital market law evolution formed not the first, but only the second large wave of market regulation through harmonisation (not 'full' integration)—under the paradigm of disclosure. The first large such wave concerned, of course, antitrust law, and this also explains its paradigmatic importance for EU law and the internal market (*supra* n. 5). On the other hand, in antitrust law, the link between individual relationships (and protection of individual clients) and market regulation (protection of the functioning of markets) was formulated and then conceptualised only in a rather abstract way: while the protection of consumers and clients is regarded as a core aim also of antitrust law [see Art. 101(3) TFEU], the protection of individual clients is not considered an important means, and certainly not the most important one, to warrant undistorted market structures. The fact that the link is only considered in such an abstract way may also explain why private law (remedies) developed so late in this area of regulation: only after almost five decades of development was a regime installed at EU level in which violation of antitrust provisions should trigger not only fines and administrative measures (all mostly aimed at market functioning) but also individual claims for damages.[22] On the other hand, this recent development towards accepting such damage claims in antitrust law should also be meaningful for the Banking Union: it makes it particularly plausible that also the latter's regulatory regime should have an impact on private law rights and duties.

However, in banking supervision—also the European Banking Union—the link between regulatory market-related functions and individual protection seems, again (as in antitrust law), much less close than in capital market law. And indeed, when considering the main goals pursued by the creation of a Banking Union, these do not seem particularly meaningful for private law (see *infra* Sect. 3.2). Similarly, the structure of decision-taking also raises concerns regarding the interplay between market regulation and private law (see *infra* Sect. 3.3). Indeed, also in the individual areas, for instance, in company law, some authors have already found strong clashes

[21] For protection of functioning markets and of individual investors (as mutually reinforcing each other), ground-breaking (not only in German literature): Hopt (1975), at pp. 51 et seq. and 334-337; today, for instance, Grundmann (2012), § 19 para. 16-18; see also Moloney (2014), at pp. 564–571; apparently, however, individual investors' litigation is of little importance in UK practice, see: Alcock (2000), at pp. 178-180 ('In the UK, such private resort to the courts has been much rarer.').

[22] See for tort claims in antitrust law (and legislative action in this respect in Europe), the White Paper of the European Commission 'Damages actions for breaches of the EC antitrust rules', COM(2008) 165 final, now enacted as Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1; on this Directive, see Wisking and Dientzel (2014) and Haus and Serafimova (2014).

with the regulatory regime of the European Banking Union (see *infra* Sect. 4). All this raises the question of whether indeed the regulatory framework of the European Banking Union *can* and *should* be translated into individual private law rights and duties and whether this can be done in a meaningful way.

3.2 Divergence and Convergence of Regulatory and Private Law Goals

The SSM Regulation can be regarded as the basic act of the European Banking Union, already designing the overall picture and system, including the second and third pillars (see 12th Recital). Therefore, the list of goals contained in Recitals 2–6 can be taken as being representative for the European Banking Union as a whole. These goals can be subdivided into three major ones:[23] the 2nd Recital considers fragmentation of the European credit industry as a core reason for its vulnerability. The subsequent Recitals make clear that this does not refer to general private law on banking but means mainly two things: on the one hand, it is feared that national supervisory agencies can be influenced too much by politics and perhaps also by the banking industry in that country (so-called 'regulatory' or 'legislative capture');[24] in this respect, more efficiency is called (and hoped) for (4th Recital, goal 1). On the other hand, it is pointed out that groups of banks—the typical form of 'banks' that are 'systemically relevant'—can be supervised only in a suboptimal way if the economic entity is split up with respect to supervision (goal 2). A coordinated vision and treatment of 'one business' is inhibited. A third reason is considered to be that the mutual dependence between state funds which had to be used for the bail-out of banks and, conversely, of bank funds often invested in state bonds had disastrous effects during the crisis—often mutually speeding up budgetary problems—and that therefore this link had to be broken (6th Recital, goal 3). For all three reasons (and goals), supervision at EU level is considered to offer better chances of cure and success—and, as will be further explained below, this seems rather convincing in principle.

For the question of whether the European Banking Union's regulatory regime *should* influence private law questions, these three goals and their compatibility with private law objectives must be the point of departure. Some authors see European private law legislation as being too 'instrumental' anyhow, i.e., too much oriented towards the creation of a single market (as required by the core legal basis, Art. 114 TFEU) and not primarily towards balancing the interests of the private law subjects affected.[25] The goals enumerated for the European Banking Union seem even less compatible with those of private law, namely goals number 1 and 3

[23] Similar ones can be found in the SRM Regulation: breaking links between bank funds and state funds and treating groups in a uniform way, see Recitals 6, 10 and 19; and, more abstract: combatting 'fragmentation' of the system (Recitals 1 and 9), and fostering 'stability of credit institutions' (Recital 12), 'financial stability' (Recital 19) and 'market integrity' [Art. 6(2)]. A key difference in terms of objectives defined is clearly due to the legal basis of the SRM, i.e., Art. 114 TFEU. Consequently, the relevance of a limited SRM for the completion of the internal market in financial services as a whole is extensively referred to in, e.g., Recital 12.

[24] On this concept and on typical mechanisms used, see Stigler (1971); further developed by Laffont and Tirole (1991) and Levine and Forrence (1990).

[25] Namely Joerges (1980); to some extent also Reich et al. (2013), at pp. 70-86, esp. at pp. 78 et seq.; Howells and Weatherill (2005), esp. at pp. 89.

mentioned above, i.e., that 'capture' resulting from pressure from national politics and the banking industry should be avoided and that the mutual budgetary link between states and banks, with its adverse effects, should be broken. Conversely, the second goal—to judge/supervise groups of companies (banks) on a unitary basis—qualifies as important also in private law, see in this respect Art. 3(2) of the European Insolvency Regulation, where a major plea for law reform, perhaps the most important one, is made for subjecting the economic unity (group) to *one* law only.[26] And even if goals number 1 and 3 do not strongly converge with private law goals, there is still the consideration that combatting legislative or administrative capture may also reduce the risk that in certain countries private law on banking will be too favourable to the credit industry—if the Banking Union's regulatory regime influences private law at all. Moreover, unification of supervisory practice should be seen as being useful also for private law, if it really influences it *and* harmonised private law is seen as being preferable to fragmented private law in this area.[27]

There are more goals besides these three, but they seem integrated into the distribution of competences between the ECB and national supervisory agencies. The ECB's competence is more extensive—as will be shown below—if the practice or funding of a credit institution more strongly affects the stability of this institute as such, the stability of the credit industry more generally or the market integrity of the EU as a whole.

3.3 Actors and Decision-Taking in Supervision and in Private Law Adjudication

For the question of whether the European Banking Union's regulatory regime *should* influence private law questions, actors are important besides goals. In this respect, the picture seems even more problematic, mainly for three reasons: firstly, while it may be of lesser importance here whether action takes place at EU or national level, it does seem important that decision-takers are supervisors and not judges, that they typically have high(er) economic expertise and that they also adopt a primarily economist's perspective. Economic considerations of efficiency—i.e., of market efficiency in the form of financial overall stability—may diverge considerably from a balancing of party interests: in cases of multiple fraudulent practices, it may be fair in the interest of clients to annul bank transactions or to award major damages, but this may be highly problematic for the stability of the financial system. Secondly, as supervisory decisions are often taken in a process of discussion and mutual understanding between supervisory authority and credit institution, the client—despite his interest, albeit an indirect one—is typically not heard. Finally, supervisory practice is not 'public' in the same way as is adjudication, with rather systematic publication of court decisions down to the lower courts, thus fostering private law development and reform.[28]

[26] In the very recent literature, see Renner (2014).

[27] On this question, the advantages and disadvantages of centralised and decentralised rule-setting, and the different kinds of regulatory competition, see (with many more references) Grundmann (2013a).

[28] Kegel (1964), at pp. 262, stated quite poignantly: 'The law is public, if it is anything'.

4 The Individual Areas of Translation into Duties

4.1 Translation into Duties in Which Areas?

While the considerations on goals and actors do not seem to strongly suggest that solutions or value judgments of the regulatory framework *should* impact on private law, it cannot be neglected that considerable overlaps *are* unavoidable. They make such translation into duties likely to happen and raise the question of how best to shape it, thus channelling the discussion which has only just begun. The overlaps are very concrete in mainly two areas: in company law and organisation, because the CRD IV and the SSM Regulation (*supra* nn. 11 and 7) stipulate requirements, either already in substance (for remuneration of managers) or conferring executive powers on the ECB to formulate requirements (as to the organisation of credit institutions; see *infra* Sect. 4.2); and in insolvency law (including the law relating to upcoming crises), because the BRRD and the SRM Regulation (*supra* nn. 14 and 8) formulate a regime of recovery and resolution for banks (see *infra* Sect. 4.3). The former area is about the duties to act and organise within the credit institution as a going concern (i.e., defining goals which managers have to pursue and setting limits to remuneration). The latter area is about the particularly incisive, but also exceptional case of recovery and restructuring, again with organisational duties, but also with rules on the client or shareholder relationship (insolvency proceedings, carving out systemically relevant parts, and reshaping and ranking proprietary rights of shareholders and creditors). These two areas have already been discussed more thoroughly and shall therefore serve as the starting point for our further discussion. However, just as interesting, or perhaps even more so, is the third mode of influence on private law, because it has scarcely been discussed so far. At the same time, it constitutes the core of classical private law (see *infra* Sect. 4.4) inasmuch as the gap between the two above-mentioned more concrete areas is filled by a far more diffuse (and potentially also larger) area: that of the normal client relationship between credit institutions as going concerns and their clients. The question is again how the Banking Union's regulatory regime may impact on this area. All the considerations are based on the more general ones as discussed in regard to the relationship between regulatory order and classical private law (see *supra* Sect. 3.1).

4.2 Governance of Credit Institutions (Organisations)

For credit institutions in particular, regulatory regimes had, already in the past, departed from just stating the duties of how to behave in the external relationship, e.g., duties were formulated concerning the internal organisation and acting ex ante—designed to render it more likely that the institution indeed complies with its duties to the outside world. If, for instance, the fiduciary duty banned any acts pursuing own interests or interests of third parties contrary to the interest of the principal (investor), compliance with this duty was fostered by an organisational separation of those units responsible for pursuing own interests (for instance, proprietary trading) from those charged with client and fiduciary relationships (i.e.,

investment advice). Much to the point was the Investment Services Directive, followed by MIFID and MIFID II:[29] conflicts of interests were taken care of in these Directives, perhaps most clearly first in MIFID, with *organisational* requirements (Art. 13 et seqq. MIFID) *and* with a code of *conduct* (Art. 18 et seqq. MIFID). The organisational requirements formulated by the Banking Union's regulatory regime (in the CRD IV) are, however, different from the earlier ones: the requirements regarding the internal organisation are no longer primarily aimed at supporting compliance with duties stemming from the rules on conduct (as in MIFID), for instance, in individual investor relationships. Rather, the aim pursued in the external relationship is already one of prevention and is related to systemic (and no longer individual) concerns, such as 'financial stability' and 'stability of credit institutions', not consumer or investor protection (see Recitals 5, 6 and 28 SSM Regulation). Moreover, the requirements are no longer aimed only at the organisation as such, but directly at the behaviour of managers themselves (i.e., in their function of steering the company), and they relate to an area which, before, had always been seen as a classical area of decisions on strategy, as the core of autonomous choice by the company, albeit with shareholder voting (e.g., remuneration of the board). Therefore, some authors speak of a change of paradigm in 'banking company law', i.e., the specific company law for banks, because the prime aim to be pursued is no longer (primarily or exclusively) maximisation of gains and the value of the company, i.e., for shareholders (shareholder value), but safeguarding the 'stability of credit institutions' (a goal prevailing in case of conflict).[30]

There are, however, two alternatives to this explanation which so dramatically overthrows the classical image of the goal(s) to be pursued by directors. The first one would shape the supervisory requirements differently and then reshape private law less dramatically. It has been vigorously supported mainly by economists: a dramatic increase in own funds requirements.[31] On the one hand, this would even further extend requirements imposed 'from outside' (after the reform already carried out with the CRD IV package), further reducing probabilities of bank failure. If indeed (as is mostly assumed) the leverage effect (higher, with lower own funds) is the prime cause of bank insolvencies (and led to the problems encountered in the sovereign debt crisis, causing enormous negative externalities), there is a good case for thinking about 'more regulation' (higher regulatory requirements). Conversely, in such a changed framework (then potentially without disproportionate returns owing to leverage), it would also be easier to keep up maximisation of gains, i.e., 'shareholder value', as the prime goal of directors' actions. Indeed, some traces of this approach can also be found in the regulatory scheme that was eventually adopted insofar as duties under the regime of prudential supervision (also capital requirements) can be made dependent on the kind and amount of risk present in relations with

[29] Directives 93/22/EEC (of the Council) and 2004/39/EC and 2014/65/EU respectively (of the European Parliament and of the Council), OJ 1993 L 141/27, OJ 2004 L 145/1 and OJ 2014 L 173/349; on the overall subject matter, see Kumpan (2014), Enriques (2006) and Kumpan and Leyens (2008).

[30] Binder (2013b); see also Langenbucher (2014).

[31] Namely Admati and Hellwig (2013).

clients.[32] The 'high capital requirements' approach as such, however, has not been adopted, for one main reason: though, formally, maintaining a higher degree of autonomous decision-taking in matters of corporate goals, in substance, the approach would have been considerably more intrusive. Thus, in the adopted scheme, the greater intrusion into private law autonomy (with respect to goal-setting) is due to the extension of supervisors' regulatory powers and discretion in individual cases which, in turn, is needed because risks are still not 'abundantly' covered by capital requirements in the first place.

A second alternative conceptualisation of the development seems possible. Here, the re-adjustment of goals of directors' actions is seen as a more general one and not only in a sector-specific way: 'private' company law is then seen—quite generally—as an area with particular rules (on legitimate goals) for situations of risk reaching beyond 'the normal'. Party autonomy is then seen as dramatically limited (also) in company law if the danger of negative externalities becomes too high—well beyond the standard creditor protection via capital maintenance as well as preventing capital outflow (in decline anyhow). Thus, negative externalities become one of the criteria in the interpretation of general clauses on directors' conduct of business and the legally accepted goals of such conduct. The re-adjustment of goals via banking supervision law can then be regarded as just one example of a more general rule according to which directors, in situations of crisis and abnormal risk (i.e., insolvency), will have to take the potential negative externalities as the prevalent guideline for action. For such a concept, one could point to a development broadly found in comparative company law: in leading jurisdictions, for all branches and forms of companies limited by shares, i.e., as a general concept, directors are subjected to special duties in times of crisis, mostly termed as general clauses with, however, some specifications.[33] Conduct of business by directors of banks is then qualified as always carrying a risk of crisis and insolvency, because of the much higher volume of potential negative externalities created by each credit institution alone (given the leverage effects) and because of the equally much higher risk of contagion of the whole economy. It can therefore be regarded as permanent trading in a situation of crisis, although, of course, the response does not exactly coincide with that in cases of wrongful trading or similar concepts used in the law governing limited companies 'in crisis'. Banking supervision law will then, however, act as a tool to spell out the criteria in more detail and thus add—indirectly—to a more general company law governing special risk and crisis (with reduced party autonomy ensuing from such risk).

[32] Regarding the different buffers and their goals (esp. incentives for risk reduction and compensation for higher systemic risk because of size), see Avgouleas and Cullen (2014), Goodhart and Dimitrios (2012) and Theissen (2013). For a US perspective: Whitehead (2011/12).

[33] For a comparative law survey (and further references) on such instruments as the ban on so-called wrongful trading or the *action en comblement de passif*: (2000) Corporate group law for Europe, at pp. 245–258; Grundmann (2012), § 35 para. 40–42.

4.3 Governance of Markets via the Recovery and Restructuring Regime

The second well-defined area on which the European Banking Union's regulatory regime focuses and where the impact on private law is also highly palpable and indeed frequently discussed is the law on bank recovery and resolution. Moreover, in this area, the second type of impact can be properly felt, i.e., repercussions on markets and market structures more generally. Other such questions—not discussed here—are the introduction of an institutional separation of commercial and investment banking activities (separation system, as in the Glass Steagall Act, with the Commission's proposal to this end currently facing much discussion at EU level)[34] as well as an institutional separation of different tasks or spheres of supervision. This may lead to the situation that for consumer law (remaining within the competence of national authorities) the markets may remain more segregated than with respect to stability issues.

Recovery and resolution of banks, the example chosen here, is indeed more intensely discussed, also for its private law implications. Again, many authors take the view (probably even more generally than for 'banking company law', i.e., specific company law for banks) that the BRRD and the SRM Regulation quite decidedly *re*-shape private law in a way which is guided by goals of banking supervision, for instance, through giving privileges to certain creditors with a view to protecting small investors.[35] As the bail-in regime with its nuanced differentiation between different groups of shareholders and creditors quite obviously constitutes a particular regime of insolvency law, the impact on private law, mainly commercial law, is clearly direct. This is because in most Member States, in commercial law, insolvency law is seen as the final phase of (banking) contract law—most prominently in Germany—[36] or of company law—i.e., in Italy,[37] France and England.[38] This part of the law on recovery and resolution is regarded as a separate segment of insolvency law, highly distinct from general insolvency law and largely guided by the specificities of the sector, but still as one kind of insolvency law.

The (other) examples chosen here have been selected in such a way as to show—just as in the case of the general bank-client relationship (*infra* Sect. 4.4)—how the regulatory regime can influence private law both by annulling transactions (banning certain forms) and by *re*-shaping them, i.e., by stating particular duties whose violation may give rise to damages, etc.

[34] On ring-fencing and separation along the lines of banking business areas, see European Commission, Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions, 29 January 2014, and High-Level Expert Group on Reforming the Structure of the EU Banking Sector ('Liikanen Report'), 2 October 2012, available at http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.htm.

[35] This is to avoid bank-runs and protect small investment (often aimed at estate planning for old age). On this area see, for instance, Binder (2013a), Hadjiemmanuil (2014) and Madaus (2014).

[36] In fact, the most famous commentary on banking transactions has gained its reputation also because it arranged the discussion of legal problems along the lines of the 'life' of transactions, i.e., from their 'birth' to their 'death', i.e., insolvency: see Canaris (1981); for commercial banking, also Canaris (1988).

[37] Commercial law also systematically comprises insolvency law, i.e., for companies, in the curricula or textbooks, see, for instance, Cian (2014/15).

[38] For wrongful trading and the *action en comblement de passif* under company law, see *supra* n. 33.

For the first type of examples, the point of departure is already difficult, namely whether the recovery and resolution part of the European Banking Union's regulatory regime can be conceived without state aid law at all. Thus, the question is not only one of impact of the regulatory regime on private law, but of impact of one regulatory regime on the other and of that combination on private law. The answer to the question raised first must probably be negative, already for the simple reason that aid from the Recovery Fund under Arts. 67, 76–79 SRM Regulation is explicitly subject to the state aid regime (Arts. 18–19 SSM Regulation).[39] This part of the regulatory regime then has an obvious influence on private law: just like bans on short-selling constitute a control of products which may or may not be offered to clients (see *infra* Sect. 4.4), certain interpretations of state aid law with respect to banks may or may not render certain mergers legally possible. It is, for instance, an open question whether recoveries including mergers and state aid should be permissible because size is hoped to increase the stability of the credit institution, or whether—quite to the contrary—the risk of creating yet another institution that de facto is too big to fail in the future should be decisive in not allowing state aid for such a recovery.[40] Whatever the answer given to these questions, it has obvious repercussions on the structure of banking markets, e.g., on the degree of concentration.

The prime example which comes to mind when discussing the second kind of impact—no longer imposing a ban on certain kinds of transactions, but rather *re*-shaping the duties and imposing a particular design of duties owed in bank transactions—is, of course, the bail-in regime for resolution itself, including the ranking of shareholders' and creditors' rights (see *supra* n. 36). There are other examples though—perhaps less prominent, but still more illustrative of the link between prudential regulation and private law. Much to the point is the practice already established by the EU Commission when it still had to handle banks' recovery and resolution procedures solely via state aid law—a practice which, however, will probably remain influential also under the new regime.[41] One clear prerequisite with respect to the design to be submitted and then fostered via state aid has always been that the intervention will not create impediments and distortions with respect to the internal market, i.e., the cross-border flow of offers and investments.[42] This design is, of course, one of the reshaped private law arrangements for banks, and at the same time it is clear that it affects market

[39] For this question (also the aspect that the funds are levied on banks and not as general taxes), see Legal Service of the Council of the EU, Opinion on the Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No. 1093/2010 of the European Parliament and of the Council (13 September 2012), para. 45. For reasons to consider the EU recovery and resolution regime as being more broadly linked to state aid law, see Lannoo (2014b).

[40] See Lambert et al. (2014). For arguments in the first sense: Dewatripont (2014) and Avgouleas and Cullen (2014), at pp. 49. Supporting the second view: Davies and Tracey (2014).

[41] See, in principle, Lannoo (2014b).

[42] See in particular Drijber and Burmester (2009), D'Sa (2009), Gilliams (2011) and Murphy (2013).

structure very directly—in any case, the level playing field of the internal market has to be kept undistorted.

4.4 Governance of Individual Client Relationships

The third area can be seen as the 'remainder' of what has been discussed so far, i.e., the bank-client relationship in an ongoing-concern situation. From the perspective of private law, however, this is the core area of private law on banking: the relationship with the client in the whole phase of actively doing business. From this perspective, the other two areas rather constitute well-defined 'special' cases.

4.4.1 Modes of Impact

Again the question is whether the Banking Union's regulatory scheme *does* and/or *should* impact on private law. A good starting point may well be the most important decision taken so far by the European Court of Justice (ECJ) on what, from a substantive law perspective, could be termed as a *law avoiding bank transaction(s)*: in January 2014, the ECJ had to decide on a ban on short-selling transactions, albeit in a case where this ban was not laid down by an administrative act but by an implementing rule (issued by ESMA).[43] The ECJ confirmed that such a ban can be based on Art. 114 TFEU even if the agency pronouncing the ban is not provided for in the TEU/TFEU and first has to be set up on the basis of this competence, if its powers are sufficiently well defined. This decision can be generalised. In substance, it upholds the prohibition of a particular (investment) banking product, even though it has not been justified mainly in terms of investor protection and transparency (protection of clients), but has been based on concerns about market risks which can be triggered by short-selling (protection of markets). In line with the ECJ's reasoning, such power should, in my view, be available *a maiore*, also to the ECB (as it has been created as an institution by the EU Treaty itself), and also via individual decisions on banking supervision [see Art. 127(6) TFEU]. These decisions could be 'individualised', also in the sense that they may differentiate between credit institutions or Member States' legal orders (see Recital 17 SSM Regulation). This is important also for the impact on private law and can be explained as follows: prohibitions by the ECB may not be justified primarily by motives of consumer protection (protection of clients) (Recital 28 SSM Regulation). This, in fact, makes it unlikely in the relationship with systemically relevant banks that there are prohibitions motivated solely by concerns of consumer protection at all, because national authorities will typically be hesitant to step in against these banks (also because of the ECB's power of coordination). Prohibitions will need to be justified by risks regarding 'financial stability' or 'stability of the credit institution' (Recitals 5 and 6 and Art. 1, first phrase, SSM Regulation) or the 'integrity of the internal market' (Recitals 10 and 30 and Art. 1, first phrase, SSM Regulation). The latter will, however, encompass those cases where products are marketed which can be misleading to a large number of investors and which

[43] See *supra* n. 8.

therefore arouse suspicion with the general public or which lead to large numbers of claims, for instance, for voidance or for damages. These two reactions can question the integrity of the internal market as well as the stability of credit institutions. Thus, the exception of consumer protection has to be seen as being functionally limited, i.e., to cases where consumer protection concerns do not also affect the prime goal of the ECB's supervision, which is stability and overall market integrity. At the same time, this goal—much more than that of consumer protection—can differ from country to country and, above all, from credit institution to credit institution. If prohibitions are imposed, the banking products affected can no longer be marketed—unless the prohibition is challenged by the credit institution in the courts. Therefore, the decision taken by the ECB reshapes private law directly, without direct recourse being possible on the clients' part.

The latter point is different in a second line of cases which should be discussed here: in these cases the question is asked whether the exact shape of the duties owed to the supervisory agency, for instance, to the ECB, also influences the shape of duties owed in the client relationship (typically contractual). Again, the ECB may not base its instructions exclusively or even mainly on concerns of consumer protection. It is, however, not even obvious whether this also includes concerns of investor protection.[44] The ECB could step in in any case when it responds to a widespread practice among credit institutions or a practice that is capable of undermining confidence or might give rise to large numbers of claims. It still remains to be seen what kinds of prohibitions or instructions the ECB will issue. Two examples that have been discussed already regarding the interplay between regulatory regime and private law can nevertheless illustrate potential developments. Because there now is an EU competence (i.e., the ECB) and a Single Rulebook, it is likely, however, that the visibility and uniformity of banking supervision in the EU legal regime will increase considerably due to much more visible guidelines and much denser case law. Both examples deal with core questions of investment banking and of the loan business.

With respect to the requirements specified in MIFID regarding investment services, namely investment advice given in the client relationship, but also portfolio administration or questions of best execution or of bank fees, it has so far already been disputed whether the highly concrete specifications, for instance, in Art. 18 et seqq. MIFID (now Art. 24 et seqq. MIFID 2), also shape the duties in the (contractual) client relationship. Some Supreme Courts, such as the German Court, answer this question in the negative, others such as the Spanish and probably also the English Courts, in the positive (full binding force also in private law).[45] If, for instance, duties of documentation are enforced more consistently Europe-wide, this question will gain even more relevance, and certainly if the ECJ responds to it more concisely than in the *Bankinter* decision.[46] The mass character of the investment

[44] On the relationship between consumer and investor protection—some authors also see investor protection mainly as consumer protection—see, for instance, Buck-Heeb (2012) and Moloney (2012).

[45] For the most recent developments in the case law of different national courts, see Grundmann (2015a).

[46] ECJ, 30.5. 2013, Case C-604/11 *Bankinter* [2013] *ECR* N.N., also published in OJ 2013 C 225/16 (key statements in the ruling); on my interpretation of the decision, see Grundmann (2013b).

services business will often speak in favour of systemic relevance in the light of the canon of goals discussed above (not just consumer law).

The second example to be discussed is similar in this respect: the standard of responsible lending may also have implications not only for consumer protection, but also for stability concerns, if the awarding of subprime loans is made a business model. The subprime-loan crisis of 2008 has shown that systematic neglect of such a standard and, if it exists, its violation can have dramatic systemic effects.[47] While the (amended) EC Consumer Credit Directive of 2008 did not (clearly) introduce such a standard, some authors interpreted parallel standards contained in banking supervision law as establishing such a standard (with duties and sanctions ensuing from it) also in the private law loan relationship.[48] Again, a more uniform and more visible practice is to be expected in banking supervision law. And if the ECJ gives private law effect to banking supervision law, for instance, with respect to MIFID and MIFID 2, this will impact also on other areas, such as loans.[49]

The Single Rulebook may also potentially play a core role. The relevance of Rulebooks for private law has already been discussed in other areas, e.g., the Single Rulebook in the Single European Payments Area (SEPA). This Rulebook regulates (among others) restitution between banks in case of unsuccessful or revoked direct debits.[50] This matter was formerly regulated in interbank agreements, which national Supreme Courts considered (in part) as also favouring the clients.[51] Therefore, similar considerations may be possible with respect to any Rulebook.

Therefore, it can be asked, more generally, what role the Single Rulebook will play when implementing and specifying in more detail rules that potentially also protect private parties. Traditionally, courts are not bound by interpretations made by administrative agencies. However, whether this is true also if the administrative body is created under supranational law and has the task of refining and applying supranational law can be questioned. Could national courts, for instance, without preliminary reference to the ECJ, deviate from a decision rendered by the ECB or EBA (for instance, by drafting the Rulebook)? If the answer to this question had to be negative, the impact on private law would be omnipresent. In case of the Rulebook, this would affect all banks (irrespective of systemic relevance and their seat). Conversely, in case of decisions taken by the ECB, a spill-over to banks which it does not supervise (directly) would need to be discussed.

Yet another private law set of disputes could arise with respect to ‘state liability’, because liability of the ECB for supervisory failure is explicitly maintained (Recital

[47] Mian and Sufi (2014).

[48] In this sense, for instance (invoking the Banking Supervision Act which contains a duty of responsible lending), Hofmann (2010), at pp. 1785 et seq.; for a comprehensive discussion, see Atamer (2011).

[49] For the loan business, of course, the Mortgage Credit Directive 2014 has introduced a duty of responsible lending for mortgage loans, which is by far the most important segment, anyhow: see Art. 19(5) n. 5 of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ 2014 L 60/34; see also its Art. 7.

[50] See, for instance, Grundmann (2015b), Third Part, paras. 481–485.

[51] For clauses favouring third parties and contained in interbank agreements in the area of direct debit, see Grundmann (2015b), Third Part, para. 348.

61). As, however, the ECB's decisions have to be aimed at 'financial stability' and 'stability of credit institutions', it will be difficult to prove a causal link between a violation of the bank's duties and individual damages, in particular because credit institutions—which are typically more likely to suffer direct damages than clients—will usually not sue (outside situations of recovery and resolution).

4.4.2 Divergence or Convergence of Goals?

When assessing the desirability of these potential modes of influence, the question again has to be asked whether the goals of the European Banking Union's supervisory regime do not deviate too much from those of private law: can the potential influence shown be welcome and is it likely to emerge at all if the goals strongly diverge? The answer is, in part, that divergence as such is highly questioned: like in the area of organisational duties, potentially even more prominently than there, private law governing client relationships can also be thought to encompass an important element of public good orientation. This can be illustrated with the examples already mentioned.

The duty of responsible lending can be understood as one protecting less experienced and informed ('weaker') borrowers—a duty (of some kind) to assess the feasibility of redemption of a particular loan. Violation can lead to damages. However, this duty can also be understood as favouring third parties as well, i.e., individual creditors of subprime lenders—and not only in the sense of banking supervision which is aimed at protecting financial stability at large or the stability of credit institutions (with a view to avoiding their insolvency and harm to their creditors). Protecting creditors of subprime lenders gives this duty some 'bite' at a much earlier stage. If a lender, given his actual and expected income and personal wealth, is most probably incapable of paying back the loan or even the interests owed, there will typically be just as high a probability that creditors of this lender will be harmed. When it is more likely than not that third parties will be harmed, some laws (such as German law) hold that securing such debt or securing debts in such a way violates bona mores and that therefore the transaction is void.[52] In other words: private law seems to also have a public good orientation of some kind more generally.

With respect to investment services, namely duties to give proper advice and safeguard the fiduciary interests of the client, a similar step may be more difficult to make: different from subprime lending, a violation of these duties may typically not also harm third parties 'directly'. Poor investment decisions may, in virtually all cases, harm the client, but do not lead to his insolvency—and therefore the harm really will remain limited (only) to him. In most cases, only frequent violation of the duties will be capable of arousing general mistrust and may also affect market integrity. Also in this area, however, already in the traditional 'private law' discussion, some 'hints' can be found for an understanding according to which banking supervision goals and private law goals are seen as being more closely aligned: it may be recalled that this is mainly the area where protection of market

[52] See the three decisions of the German Private Law Supreme Court (*Bundesgerichtshof*), reported in: BGHZ (official reports) 133, 25; Neue Juristische Wochenschrift (NJW) 1998, 671; and NJW 1998, 2047.

functioning and of individual investors is seen as mutually reinforcing, the latter serving as a tool for fostering the former (see *supra* n. 24).

When thus reconsidering the protective goals of private law rules, one is inclined to also interpret them such as to preventively protect third parties and to put more emphasis on the mutually re-enforcing power of regulation and of private law: such an approach no longer emphasises only the enabling function which regulation also has within the contractual exchange relationship (as Böhm and Mestmäcker have done, *supra* n. 1), but also more systematically studies the instruments in classical private law that exercise a protective function regarding third parties' rights.[53] It must, however, be admitted that not all goals envisaged with the creation of the European Banking Union exercise their influence in this way also in classical private law. The aim, for instance, of severing the (toxic) bond between bank funds and state funds (see 6th Recital SSM regulation) will probably not have much effect in private law. However, already a better understanding of the core aims of both areas of the law—regulation and private law—will bring the Banking Union's regulatory compendium closer to private law and enhance translation into individual rights and duties.

5 Conclusions

The European Banking Union constitutes, besides antitrust law, a second mega-area of business law and regulation where—mainly for mandatory reasons of public good—an integrated system has been introduced, not only at regulatory level (with harmonisation and unification), but also in administrative implementation. In my view, it is beyond doubt that this will again trigger a considerable push in integration, like antitrust law did in the 1960s and 1970s. Whether this push will encompass only macro-prudential and market risks remains to be seen. Conversely, it may also well be that this push reaches individual rights and duties within credit institutions (as organisations) and individual rights and duties in situations of recovery and/or resolution of banks. It may even extend further, i.e., to the individual client relationships in the market. If this happens, the question raised here will keep European private law scholarship busy for a while. Finally, if indeed a European Capital Market Union were established, with far-reaching reforms, the relationship between regulation (supervision or market regulation) and private law could even become one of the core themes of discussion in the next decade.

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[53] More generally for contract law and for its protective function also regarding third parties' rights and for the public good, see Grundmann and Renner (2013).

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