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FINANCIAL STABILITY IN PRIVATE LAW: INTERSECTIONS, CONFLICTS, CHOICES

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Abstract

The article discusses how the emergence of a policy of financial stability in international and European economic law has an impact on private relations, leading private law itself to become an instrument of financial stability. The result is an intersection of financial regulation and private law whereby financial regulation addresses consumer protection top-down and private law addresses financial stability bottom-up. The incorporation of the goal of financial stability nonetheless creates tensions in private law, since the latter aims at further objectives, occasionally leading to conflicts. The article shows how the accommodation of those objectives requires the striking of balances, and discusses instances in which case law of European courts arbitrated between different interests producing dissimilar results in different contexts. This casts further doubts on the consistency of the notion of financial stability as a policy or legal principle; despite its prominence at the international and European level, it unfolds in different forms depending on the interests at stake.

1. Introduction

The pursuit of "financial stability" emerged as a goal of paramount importance in international and European economic law after the 2007–2008 global financial crisis (hereafter: GFC) and the ensuing European debt crisis.[1] In the 2010s, the Union introduced a number of reforms with the aim of achieving sound public finances and stabilizing financial markets[2] through

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1. Lastra, *International Financial and Monetary Law* (OUP, 2015).

2. Hofmann, "Stabilizing the financial sector: EU financial services 2010–2012", 8 E.R.P.L. (2013), 426–455.

improved supervision.[3] As financial stability assumed the position of a new overarching objective of EU law,[4] the EU underwent what resembles a "constitutional mutation".[5] Nonetheless, while the term appears uncontroversial and beneficial in nature, as a necessary antidote to the dangerous instability resulting from a crisis which soon spilled over from the financial to the "real economy", its implementation is far from unambiguous. First, the notion is a multifaceted and evolving one which can be associated with different objectives[6] and which shows a propensity to blur into bordering concepts, possibly leading to legal uncertainties and disputes.[7] Second, and leaving aside the more fundamental observation that financial stability in itself appears to be a self-defeating concept,[8] the objective – depending on the way in which it is defined[9] and pursued – might stand in tension with other goals which have either traditionally or recently dominated the landscape of economic law: liberalization,[10] integration,[11] harmonization,[12]

3. Ferran, "Understanding the new institutional architecture of EU financial market supervision" in Ferrarini, Hopt, and Wymeersch (Eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis* (OUP, 2012), pp. 111–158.

4. Lo Schiavo, *The Role of Financial Stability in EU Law and Policy* (Kluwer, 2017).

5. Tuori and Tuori, *The Eurozone Crisis. A Constitutional Analysis* (Cambridge University Press, 2014), p. 117.

6. The notion of financial stability is now being infused with considerations linked to the idea of sustainability, see Commission Communication, "Action Plan: Financing sustainable growth", COM(2018)97 final.

7. The unclear demarcation line between financial and monetary stability is relevant to the disagreement between the ECJ (Case C-62/14, *Gauweiler*, EU:C:2015:400; Case C-493/17, *Weiss*, EU:C:2018:1000) and the German Constitutional Court (2 BvR 859/15 of 5 May 2020).

8. Minsky, "The financial-instability hypothesis: Capitalist processes and the behavior of the economy" in Kindleberger and Laffargue (Eds.), *Financial Crises: Theory, History, and Policy* (Cambridge University Press, 1982), pp. 13–39. In legal literature, Alexander, *Principles of Banking Regulation* (Cambridge University Press, 2019), p. 47.

9. Traditionally, stability has been given a negative definition, thus "a state of affairs in which episodes of instability are unlikely to occur", Allen and Wood, "Defining and achieving financial stability", 2 *Journal of Financial Stability* (2006), 152–172. It is now predominantly understood as the capability of withstanding shocks: according to the ECB: "Financial stability can be defined as a condition in which the financial system – which comprises financial intermediaries, markets and market infrastructures – is capable of withstanding shocks and the unravelling of financial imbalances", available at <www.ecb.europa.eu/pub/financial-stability/> (all websites last visited 4 Jan. 2021).

10. On the significance of the notion of "general good", which covers financial stability, for trade in financial services, see Dalhuisen, *Dalhuisen on Transnational, Comparative, Commercial, Financial and Trade Law.* Vol. 3 (Bloomsbury/Hart, 2019), p. 806; Casey and Lannoo, *The MiFID Revolution* (Cambridge University Press, 2009), p. 181.

11. Discussing conflicts and trade-offs between "domestic" stability and international financial integration as well as a "global" stability, see Lupo-Pasini, "Financial stability in international law", 18 *Melbourne Journal of International Law* (2017), 48–70.

12. Andenas and Chiu, "Financial stability and legal integration in financial regulation", 38 EL Rev. (2013), 335–359.

innovation,[13] and possibly economic growth,[14] with the latter becoming a burning issue especially in times of economic recession. Equally contentious is its possible conflict with property rights and private autonomy and, therefore, with rights and values which are preponderant in private law. Reflecting on the developments of the last few years, this contribution focuses on the interplay between the internationally promoted goal of financial stability and private law, paying particular attention to consumer protection. At first sight, the two domains are distinct: financial stability appears to be the goal of financial regulation,[15] while private law pursues objectives such as, among others, the protection of the consumer. In other words, financial regulation serves the function of ensuring financial stability, "whereas private law is primarily concerned with the balancing of rights and duties between private parties".[16] That separation allows private law to "go further than the minimum norms necessary for ensuring the stability of the financial system".[17] At the same time, however, the separation has been traditionally invoked in order to shield regulators from direct actions by harmed investors.[18]

The distinction between the two domains – not always crystal clear in the way it is relied on by the courts[19] – is becoming even more blurred. On the one hand, it is long established that financial regulation does not only aim at stability – which is in fact a more recent objective – but also assumes as its role

13. With regard to fintech, Omarova, "Technology v technocracy: Fintech as a regulatory challenge", 6 *Journal of Financial Regulation* (2020), 75–124; Arner, Zetzsche, Buckley and Barberis, "Fintech and regtech: Enabling innovation while preserving financial stability", 18 *Georgetown Journal of International Affairs* (2017), 47–58.

14. For a discussion, finding no evidence for a regulatory capital-induced trade-off, see Stewart, Chowdhury and Arjoon, "Bank stability and economic growth: Trade-offs or opportunities?", (2020) *Empirical Economics*, available at <doi.org/10.1007/s00181-020-01886-4>.

15. "[F]inancial stability has become a key issue and objective in modern financial regulation aiming to do things better in terms of risk management than individual banks can do even when properly managed and not tempted by short term benefits", Dalhuisen, op. cit. *supra* note 10, p. 596.

16. V. Mak, "The 'average consumer' of EU law in domestic and European litigation" in Leczykiewicz and Weatherill (Eds.), *The Involvement of EU Law in Private Law Relationships* (Hart, 2013), pp. 333–356, at p. 342.

17. Ibid.

18. See the UK House of Lords' case *Three Rivers District Council* v. *Governor and Company of The Bank of England*, [2001] UKHL 16; Case C-222/02, *Peter Paul*, EU:C:2004:606, and again, applying those two precedents, in the Court of Appeal's case of *Poole* v. *HM Treasury,* [2007] EWCA Civ 1021.

19. Tison, "Do not attack the watchdog! Banking supervisor's liability after *Peter Paul*", 42 CML Rev. (2005), 639–675.

the protection of investors[20] and consumers.[21] On the other hand – and this is the more specific focus of this contribution – private law, after having undertaken the function of promoting consumer protection, began to perform the function of improving financial stability. This instrumentalization[22] gives rise to tensions: firstly, the emphasis on stability is likely to conflict with other predominant principles and aims in private law. Secondly, as stability needs to be balanced with those other values, it is theoretically possible that the emergence of a new goal might unexpectedly lead to a decrease of consumer protection. As an example of the kind of tensions in private law: would it be possible or desirable to limit the rights of retail investors to avert the possibly destabilizing effects of invalidating a large number of onerous contracts which might subvert the stability of systemically important banks and consequently of the financial system? If the answer to that question is negative, then stability might be in need of being preserved in other ways: by way of simplification, possibly either by bail-outs, which will nonetheless stretch the boundaries of State aid law, or bail-ins[23] which might theoretically produce tensions with depositor protection. Even capital requirements[24] might conflict with shareholders rights. In either case, although the debate around stability has mostly focused on its public international and supranational role, the private law dimension appears to be inextricably linked to stability and in need of specific consideration. This necessitates a more careful examination of the way in which the goal of stability unfolds in private law in its comparative and constitutional dimension. The way in which possible conflicts are solved appears to be ambivalent: it will be shown that financial stability is capable of sacrificing the interests of certain economic players but not necessarily others. The pressure placed by the aim of stability on private law is also being addressed through reforms aimed at a more explicit alignment of consumer

20. Garicano and Lastra, "Towards a new architecture for financial stability: Seven principles", 13 *Journal of International Economic Law* (2010), 597–621, at 599.

21. On investors and consumers, see Cartwright, *Banks, Consumers and Regulation* (Hart, 2004), p. 4.

22. On private law instrumentalization, see Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union. Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung* (Nomos, 2010).

23. Bail-ins, however, do not remove the possibility of a bail-out. See Avgouleas and Goodhart, "Critical reflections on bank bail-ins", 1 *Journal of Financial Regulation* (2015), 3–29.

24. A comprehensive analysis of bank capital requirements is beyond the scope of this article. Generally, capital is considered to contribute to financial stability, though this needs to be seen in light of the regulatory environment: "the impact of capital on systemic risk is less pronounced for banks located in countries with better public and private monitoring of financial institutions and in countries with higher levels of information availability", see Anginer, Demirgüç-Kunt and Mare, "Bank capital, institutional environment and systemic stability", 37 *Journal of Financial Stability* (2018), 97–106, at 104.

protection with financial stability. Against this background, the legal significance of financial stability appears to be less clear than the constant references to it might suggest.

To illustrate these points, the article looks at European private law broadly understood and in its constitutional dimension, focusing on the developments at the international level and more specifically at the law of the European institutions[25] in their interactions with national laws. The article presents the topic as an increasingly convoluted one, as it starts by depicting a coherent and relatively linear evolution of financial stability as an international policy, and then goes on to consider its intersections with private law, problematizing and dissecting the former by highlighting the tensions that it generates in the latter. The article is structured as follows: section two will provide a short but necessary introductory overview of the development of financial stability in its international and EU frameworks, focusing on its links to the objective of investor protection in financial regulation; section three will focus on how those developments have a bearing on private law, discussing how this is instrumentalized in light of financial stability; section four critically considers the question of the tensions between financial stability and other values of private law, looking at the case law of European courts; section five considers the wider implications of a trade-off between different objectives. The conclusion summarizes the main points: since private law cannot aim only at achieving financial stability, as it is also functional to the pursuit of other public policy objectives, it becomes a battlefield for new conflicts and balancing of interests.

2. Consumer protection as an objective of financial regulation

While financial regulators have traditionally envisaged their objective as one of ensuring the integrity of the financial market,[26] the notion of stability has been more often associated to price or exchange stability.[27] The 1966 Segré

25. Although the main focus is on the European Union, this also includes the Council of Europe and the European Free Trade Association.

26. On market integrity, see McVea, "Supporting market integrity" in Moloney, Ferran and Payne (Eds.), *The Oxford Handbook of Financial Regulation* (OUP, 2015), pp. 631–658, at p. 634. Market integrity can be defined as "the extent to which a market operates in a manner that is, and is perceived to be, fair and orderly and where effective rules are in place and enforced by regulators so that confidence and participation in the market is fostered". OICV-IOSCO, Consultation Report "Regulatory issues raised by the impact of technological changes on market integrity and efficiency", July 2011, p. 8.

27. See e.g. the Articles of Agreement of the International Monetary Fund, Art. IV.

Report[28] already referred to stability mainly as stability of exchange rates and prices, and the 1997 Stability and Growth Pact again understood it largely as price stability, regarding sound public finances as a means to that primary end.[29] As the financialized economy became preponderant over the years, the goal of ensuring financial stability also by way of enhanced investor protection started emerging more forcefully,[30] particularly so in the 1990s.[31] A "twofold approach", aimed at ensuring both investor protection and financial stability, developed. The 1993 Investment Services Directive,[32] while maintaining a low regulatory profile, insisted on the need for authorization "in order to protect investors and the stability of the financial system".[33] Those efforts were reinvigorated after the GFC, when the G20 Summit of 2009 took the decision of to institutionalize the Financial Stability Forum, establishing the Financial Stability Board.[34] The 2009 de Larosière report[35] suggested the reorganization of the EU system of financial supervision to improve the stability of both individual firms and of the financial system as a whole.[36] Efforts were directed not only at ensuring the financial stability of countries, but of their financial sectors as well: ensuring the stability of the euro area is declared as the very first commitment of the contracting parties in the 2012 Treaty establishing the European Stability Mechanism, but also inspires the powers of the newly created European Securities and Markets Authority (ESMA),[37] the European Banking

28. Commission, "The development of a European capital market. Report of a Group of Experts appointed by the EEC Commission", Brussels, Nov. 1966.

29. Tuori and Tuori, op. cit. *supra* note 5, p. 132.

30. For an overview of this development, see Lo Schiavo, op. cit. *supra* note 4.

31. See the public lecture given at the London School of Economics on 18 Nov. 1993 by then Governor of the Bank of England, Edward George, "The pursuit of financial stability", available at <www.bankofengland.co.uk/-/media/boe/files/quarterly-bulletin/1994/the-pursuit-of-financial-stability.pdf>.

32. Council Directive 93/22/EEC on investment services in the securities field, O.J. 1993, L 141.

33. Ibid., Recital 2.

34. See Carrasco, "The global financial crisis and the financial stability forum: The awakening and transformation of an international body", 19 *Transnational Law & Contemporary Problems* (2010), 203–220. International monetary and financial law remain characterized by a largely informal institutional structure, see Lastra, "Do we need a world financial organization?", 17 *Journal of International Economic Law* (2014), 787–805.

35. The high-level group on financial supervision in the EU, chaired by Jacques de Larosière, *Report* (Brussels, 25 Feb. 2009).

36. On the evolution of EU law in this area, Marcacci, *Regulating Investor Protection under EU Law. The Unbridgeable Gaps with the U.S. and the Way Forward* (Palgrave, 2015).

37. Regulation (EU) 1095/2010 of the European Parliament and the Council establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, O.J. 2010, L 331/84.

Authority(EBA),[38] and the European Insurance and Occupational Pensions Authority (EIOPA)[39] – all parts of the so-called European System of Financial Supervision.

While the importance of protecting investors in order to avoid destabilizing macroeconomic effects has long been recognized,[40] the linkage between financial stability and consumer protection became more evident, though not necessarily clearer, in post-crisis legislation. ESMA[41] is tasked with both long-term stability of the financial system and enhancing consumer protection.[42] Even in countries which have opted for an institutional design that keeps them separated,[43] consumer protection, integrity, and stability do end up being substantively interlinked. In the UK – a notable example of a country which changed approach after the GFC – the Prudential Regulation Authority (PRA) must promote the soundness of regulated firms, ensuring that their business is carried out "in a way which avoids any adverse effect on the stability of the UK financial system", while the Financial Conduct Authority (FCA) aims at consumer protection, integrity, and competition. The law nonetheless clarifies that "[t]he 'integrity' of the UK financial system includes (a) its soundness, stability and resilience".[44] On the other side of the Atlantic, the US Consumer Financial Protection Bureau (CFPB) was created after the GFC to ensure that consumer debt products are safe and transparent, and was given extensive rule-making and enforcement powers.[45] Even within

38. Regulation (EU) 1093/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, O.J. 2010, L 331/12.

39. Regulation (EU) 1094/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, O.J. 2010, L 331/48.

40. On the US: Skeel, *Icarus in the Boardroom. The Fundamental Flaws in Corporate America and where they came from* (OUP, 2006), p. 7; Poser, "Why the SEC failed: Regulators against regulation", 3 *Brooklyn Journal of Corporate, Financial & Commercial Law* (2009), 289–324, at 290.

41. On the novel consumer protection mandate of the ESMA, see Moloney, *The Age of ESMA. Governing EU Financial Markets* (Bloomsbury/Hart, 2018), p. 232.

42. Regulation 1095/2010, cited *supra* note 37, Art. 1(5).

43. For an overview predating the reform of the supervisory system in the EU and the UK, Keßler, Micklitz and Reich (Eds.), *Institutionelle Finanzmarktaufsicht und Verbraucherschutz, Eine rechtsvergleichende Untersuchung der Regelungssysteme in Deutschland, Italien, Schweden, dem Vereinigten Königreich und der Europäischen Gemeinschaft* (Nomos, 2010).

44. Financial Services and Markets Act, Part 1A, Chapter 1, 1D.

45. Levitin, "The Consumer Financial Protection Bureau: An introduction", 32 *Review of Banking & Financial Law* (2012), 321–369.

complex regulatory infrastructures, forms of cooperation between agencies with different mandates can then be established.[46]

In order to achieve their statutory objectives, all the mentioned authorities are given powers which have an impact on the contracts that private parties conclude. Probably the most spectacular example of this is represented by the FCA's intervention in the area of high-cost short-term credit,[47] while ESMA[48] temporarily restricted the marketing, distribution or sale of the notoriously complex and risky[49] contracts for difference to retail investors.[50] In this sense, financial stability converges with the objective of enhancing financial market integrity.[51] The link is corroborated by the Court of Justice, which couples the power of imposing limits on the freedom to enter into certain transactions with "the pursuit of the objective of financial stability within the Union".[52]

While these authorities offer a recent example of the interrelation of those objectives, it has been accepted for a long time that securities regulation should aim both at investors protection and stability of the financial system.[53] In the literature it can thus be concluded that "[t]he notion of investor protection is now infused with wider financial stability concerns",[54] while in American scholarship some suggest that consumer financial protection itself

46. In the US: 2011 Memorandum of Understanding (Information-Sharing MOU) between the Consumer Financial Protection Bureau (CFPB), the Conference of State Bank Supervisors (CSBS), and various State financial regulatory authorities (State Regulators); and 2013 CFPB-State Supervisory Coordination Framework CFPB and CSBS, on behalf of the State Regulators. With proposals for a further formalization of that system of coordination, see Odinet, *Foreclosed. Mortgage Servicing and the Hidden Architecture of Homeownership in America* (Cambridge University Press, 2019), p. 109. In the UK: Memorandum of Understanding between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority, 2019.

47. FCA, CONC Consumer credit sourcebook, 5A.2.3.

48. On the significance for the centralization of supervisory powers in the EU, see Howell, "The Evolution of ESMA and direct supervision: Are there implications for EU supervisory governance?", 54 CML Rev. (2017), 1027–1058.

49. The issue has been indirectly addressed by A.G. Tanchev in Case C-208/18, *Jana Petruchová*, EU:C:2019:314, concerning the qualification as a "consumer" of a retail investor.

50. ESMA Decision 2018/796, and renewals.

51. Recital 11: "The Authority should protect public values such as the integrity and stability of the financial system, the transparency of markets and financial products and the protection of investors".

52. Case C-270/12, *UK* v. *EU* (*ESMA*), EU:C:2014:18, para 85.

53. Goodhart, Hartmann, Llewellyn, Rojas-Suarez and Weisbrod, *Financial Regulation: Why, How and Where Now?* (Routledge, 1998), p. 2.

54. Andenas and Chiu, *The Foundations and Future of Financial Regulation. Governance for Responsibility* (Routledge, 2014), p. 136.

should "serve a role not only in protecting individuals from excessive risk, but also in protecting markets from systemic risk".[55]

3. Consumer protection as an instrument of financial stability

Despite the distinction between the domains, private law and financial regulation do not exist in isolation from one another,[56] as the former complements the provisions of the latter.[57] This can be seen if we consider how the violation of rules of conduct may trigger civil law remedies: current practices suggest divergent approaches ranging from separation to different degrees of hybridization,[58] whereby courts – and Alternative Dispute Resolution[59] – can look at financial regulation to establish rights and duties which have been infringed and grant remedies to private parties.[60] The ECJ recognized the possibility of reinforcing the system established by MiFID II[61] – which declares in its recitals the twofold objective of protecting both investors and financial stability – with civil remedies, even if such forms of interaction raised concerns about the achieved degree of harmonization.[62] This reflects in a certain complementarity of the activities of regulatory agencies and civil courts: in comparison, it can be noted how after the US Supreme Court controversially held that there is no civil liability under the Securities Exchange Act for aiding and abetting another person's

55. Gerding, "The subprime crisis and the link between consumer financial protection and systemic risk", (2009) *FIU Law Review,* 93–122, at 93.

56. Cherednychenko, "Private law discourse and scholarship in the wake of the Europeanisation of private law" in Devenney and Kenny (Eds.), *The Transformation of European Private Law. Harmonisation, Consolidation, Codification or Chaos?* (Cambridge University Press, 2013), pp. 148–171, at 158.

57. In times of crisis, private law performs the function of managing the fall-outs from crisis, see Bridge and Braithwaite, "Private law and financial crises", 13 *Journal of Corporate Law Studies* (2013)*,* 361–399.

58. See Cherednychenko, "Contract governance in the EU: Conceptualising the relationship between investor protection regulation and private law", 21 ELJ (2015), 500–520.

59. In the UK, see *R (on the application of the British Bankers' Association (BBA))* v. *Financial Services Authority (FSA),* [2011] EWHC 999 (Admin).

60. Busch, "Why MiFID matters to private law: The example of MiFID's impact on asset manager's civil liability", 7 *Capital Markets Law Journal* (2012), 386–413; Della Negra, *MiFID II and Private Law: Enforcing EU Conduct of Business Rules* (Bloomsbury/Hart, 2019).

61. Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments (MiFID II), O.J. 2014, L 173.

62. Case C-604/11, *Genil* v. *Bankinter*, EU:C:2013:344. Tison, "De bescherming van de belegger in het kapitaalmarktrecht: De hobbelige weg naar een Europees ius commune", Working Paper 2008-07, Financial Law Institute, Ghent University.

misrepresentation,[63] the law was reformed to allow the Securities and Exchange Commission, rather than private parties, to bring actions in those situations.[64]

In addition to these well-known complementary functions, contract law can also be framed in a way which is functional to the pursuit of financial stability. This is immediately true for sovereign bond contracts, which can be regulated so as to achieve a "more sustainable sovereign debt financing".[65] The same nonetheless increasingly applies to B2C transactions, where regulation takes into account the goal of promoting stability besides that of consumer protection. In other words, while the objectives attributed to regulatory bodies address consumer protection as an "end", one can point to the emergence in private law of consumer protection as a "means" to financial stability. If financial stability is a broad objective which, inspiring different areas of EU law, can be pursued by different institutions[66] and through various instruments,[67] then EU private law is exposed to its influence too. The two-fold approach now appears in relation to innovations in European contract law, where consumer protection coexists with the protection of the system more broadly.[68] It is possible to speak in this sense of a new instrumentalization of private law in general, and consumer protection in particular. It has been suggested with regard to the reforms promoted at the international level by the IMF, the World Bank and the OECD, and particularly aimed at promoting consumers' financial literacy, that "an adequate and efficient regulatory framework of consumer protection is one of the necessary prerequisites for global financial stability".[69]

More in particular, and on the basis of the consideration that "[c]onsumer confidence and trust in a well-functioning market for financial services promotes financial stability, growth, efficiency and innovation over the long

63. *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver*, N. A., 511 U.S. 164 (1994).

64. Gevurtz, "The protection of minority investors and compensation of their losses", 62 AJCL (2014), 303–331, at 324.

65. Alexander, "Regulating sovereign bond contracts in Europe" in Grundmann, Möslein and Riesenhuber (Eds.), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (OUP, 2015), pp. 451–460.

66. On the ECB's secondary financial stability mandate, see Psaroudakis, "The scope of financial stability considerations in the fulfilment of the mandate of the ECB/Eurosystem", 4 *Journal of Financial Regulation* (2018), 119–156.

67. Lo Schiavo, op. cit. *supra* note 4, p. 43.

68. Pagliantini, "Statuto dell'informazione e prestito responsabile nella direttiva 17/2014/UE" in Sirena (Ed.), *I mutui ipotecari nel diritto comparato ed europeo. Commentario alla direttiva 2014/17/UE* (Gruppo 24 Ore, 2015), pp. 27–38.

69. Durovic and Micklitz, *Internationalization of Consumer Law: A Game Changer* (Springer, 2017), p. 8. See OECD, "Financial literacy and consumer protection: Overlooked aspects of the crisis", June 2009.

term",[70] the G20 High-Level Principles on Financial Consumer Protection encourage fair and equitable treatment, financial education, and responsible business conduct. Financial consumer protection can thus be strengthened "to promote growth, enhance financial stability and increase consumer welfare".[71] This instrumentalization might affect further areas: for instance private international law can become an instrument of stability, since it can help relink the global and the local dimensions allowing for a more effective control of the conduct of businesses.[72]

The increasing relevance of financial stability for European private law is best understood in a historical perspective considering the development of consumer protection in the credit market. The Consumer Credit Directive of 2008 (hereafter: CCD) is a case in point.[73] A clash of views as to the level of protection to be afforded to the consumer led to the adoption of a text which included a compromise as to the pivotal principle of responsible lending, *de facto* turned into a toothless principle of responsible borrowing.[74] That outcome was an illustration of the debate between the possibly opposite poles of "access" and "protection" in the way in which financial inclusion was pursued, with the balance being tipped in favour of the former. The awareness as to the rooting of the GFC in the subprime mortgage market led to a reconsideration of that compromise, as evidenced by the Mortgage Credit Directive of 2014 (hereafter: MCD).[75] The MCD filled a gap intentionally left open by the CCD, whose scope did not extend to credit secured on residential property.[76] Unlike the CCD, the MCD made it clear that credit should not be made available in the case of a negative assessment of the creditworthiness of

70. OECD, "G20 high-level principles on financial consumer protection", Oct. 2011, p. 4.

71. Benöhr, "Financial Consumer Protection in the Banking Sector: A Comparative and Empirical Approach", research supported by the UNCTAD, available at <unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Financial-Consumer-Protection.aspx>.

72. Van der Eem, "Financial stability as a global public good and private international law as an instrument for its transnational governance – some basic thoughts" in Muir Watt and Fernández Arroyo (Eds.), *Private International Law and Global Governance* (OUP, 2014), pp. 293–300.

73. Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers and repealing Council Directive 87/102/EEC, O.J. 2008, L 133/66.

74. See Łobocka-Poguntke, *The Evolution of EC Consumer Protection in the Field of Consumer Credit* (Peter Lang, 2012). On responsible lending, see Ramsay, "From truth in lending to responsible lending" in Howells, Janssen and Schulze (Eds.), *Information Rights and Obligations* (Ashgate, 2004), pp. 47–66.

75. Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) 1093/2010, O.J. 2014, L 60/34.

76. As clarified by the ECJ in Case C-602/10, *Volksbank Romania*, EU:C:2012:443, Member States remained free to extend the scope of application of the directive to mortgage agreements.

the consumer.[77] That difference can be explained on the basis of the need for higher protection due to the possibly more severe consequences of the transaction – including the possible loss of one's home. The recitals explicitly confirm that some of the considerations behind the move are nonetheless linked to the different macroeconomic scenario. The adoption of the MCD was regarded as part of a plan towards a "safe, responsible and growth-enhancing financial sector in Europe", as mentioned in the Commission's European Financial Stability and Integration Report.[78]

More significantly, there is a direct link between the Directive and the above-mentioned new international financial architecture. Recital 58 of the MCD links the need for appropriate credit checks to the "recommendations of the Financial Stability Board". In 2012, the Financial Stability Board in fact issued its "Principles for sound residential mortgage underwriting practices", inspired by the consideration that, because of the interconnectedness of the international financial system and the practice of securitization, weak residential mortgage underwriting practices in one country might lead to global instability; they therefore require better regulation.[79] Complementing the provisions of the new Directive, the EBA issued guidelines on creditworthiness assessment based on the FSB's Principles.[80] More recently, the ECJ had the occasion to consider the differences in the approaches to creditworthiness assessment by the two directives. Confronted with the question whether Member States could go beyond the requirements of the CCD and establish that a credit provider can be prohibited by national law from granting credit in case of a negative assessment, the ECJ answered in the affirmative noting that, in light of the objective "to ensure market transparency and stability", Member States have to ensure appropriate regulation. In support of this interpretation, the Court mentioned the rules of the MCD "which was adopted, as is mentioned in recital 3, with regard to property loans to consumers following the international financial crisis which showed that irresponsible behaviour by market participants can undermine the foundations of the financial system" and "demonstrates the desire of the EU legislature to make creditors accountable" by ensuring that credit is made available only when the creditworthiness assessment was positive.[81] The

77. MCD, Art. 18(5)(a).

78. Commission, "European Financial Stability and Integration Report 2013", SWD(2014)170, p. 83 et seq.

79. FSB, "Principles for sound residential mortgage underwriting practices", April 2012, I.

80. EBA/GL/2015/11,1 June 2015, "Final Report on Guidelines on creditworthiness assessment", p. 5.

81. Case C-58/18, *Schyns*, EU:C:2019:467, para 46.

international emergence of the financial stability objective apparently puts its weight on the side of protection.

While creditworthiness assessment has been the object of much attention, the relevance of financial stability considerations is not limited to it, but extends to the regulation of the contractual relation after a breach has occurred. The MCD makes it clear that the principle that creditors should exercise reasonable forbearance before initiating foreclosure procedures is due to "the significant consequences for creditors, consumers and potentially financial stability of foreclosure".[82] While the implications in terms of consumer protection, as well as for human rights,[83] are self-evident, the importance of limiting foreclosures also reveals a macroeconomic dimension. Excessive levels of household indebtedness have been highlighted by the IMF as a concern for financial stability.[84] Since then, the idea is promoted by international institutions[85] that over-indebtedness should be counteracted not only through a preventive approach but even through appropriate curative procedures. In that vein, the reform of personal insolvency laws[86] has occasionally represented a condition for the assistance of European institutions to countries in financial trouble in the context of the mechanism of conditionality[87] which now – controversially[88] – also underlie the European Stability Mechanism and the amended EU treaties. In the meantime, in the context of the wide-ranging plans to build a Capital Markets Union[89] and as

82. MCD, Recital 27.

83. Case C-34/13, *Kušionová*, EU:C:2014:2189. For a critical discussion of the relevance of fundamental rights in private law, see Collins, "On the (in)compatibility of human rights discourse and private law" in Micklitz (Ed.), *Constitutionalization of European Private Law* (OUP, 2014), pp. 26–60.

84. IMF, "Dealing with Household Debt. World Economic Outlook", April 2012; IMF, "Global Financial Stability Report. Is growth at risk?", Oct. 2017, p. 70.

85. See also, immediately before the outbreak of the global financial crisis, Council of Europe Recommendation CM/Rec(2007)8.

86. More generally, see Ramsay, *Personal Insolvency in the 21st Century. A Comparative Analysis of the US and Europe* (Bloomsbury/Hart, 2019).

87. European Commission Directorate-General for Economic and Financial Affairs, "The Economic Adjustment Programme for Ireland", Occasional Papers 76, at 52; Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece, Aug. 2015, at 18. For a critical analysis of bankruptcy law reform in Ireland under IMF's supervision, Spooner, "The quiet-loud-quiet politics of post-crisis consumer bankruptcy law: The case of Ireland and the Troika", 81 *Modern Law Review* (2018), 790–824.

88. See Salomon, "Of austerity, human rights and international institutions", 21 ELJ (2015), 521–545. Also Schepel, "The bank, the bond, and the bail-out: On the legal construction of market discipline in the Eurozone" 44 *Journal of Law and Society* (2017), 79–98.

89. Commission Communication, "Action plan on building a Capital Markets Union", COM(2015)468 final. More recently, Commission Communication "A Capital Markets Union for people and businesses. New action plan", COM(2020)590 final.

part of a package of initiatives to tackle high non-performing loans ratios, the European Commission also proposed a directive aimed at regulating the market for non-performing loans, a project which is "essential for ensuring competition in the banking sector, preserving financial stability and encouraging lending so as to create jobs and growth within the Union".[90]

4. Tensions between private law and financial stability

Considering the developments sketched out in the previous section, it would appear that the goals of financial stability and consumer protection are intersecting and mutually reinforcing. On the one hand, financial regulations give authorities the power to intervene in the market to ensure protection and stability; on the other hand, private law is taking on the role of ensuring stability as well as protecting the consumer. The result is an intersection of financial regulation and private law, whereby financial regulation addresses consumer protection top-down and private law addresses financial stability bottom-up. Yet this process reveals more contentious aspects, as it is not unlikely that the two objectives, rather than benignly standing in harmony, will end up in conflict.[91] As stability requires a more proactive regulatory framework, consumer protection can be improved but at the same time cannot be pushed to the point of undermining stability itself.

One example of a possible conflict – in that case solved in favour of stability – can be found in the new US financial architecture. As mentioned above, the CFPB has been given considerable powers to pursue consumer protection in the financial sector, but this might give rise to concerns as to whether excessive levels of protection can endanger stability. It is therefore established that the Financial Stability and Oversight Council (FSOC) has the power to set aside a regulation by the CFPB if two-thirds of the Council conclude that such regulation would "put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk".[92]

90. Commission, Proposal for a directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral, COM(2018)135 final 2018/0063 (COD), Recital (2).

91. See Della Negra, op. cit. *supra* note 60, p. 208.

92. Section 1023 of the Dodd-Frank Act. The structure of this authority and its degree of independence gave rise to legal challenges, as most clearly and recently seen in the US Supreme Court case *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U.S. ___ (2020) of 29 June 2020. It was established, by a majority of conservative justices, that its Director can be removed by the President of the United States at will.

While the power has so far never been formally exercised, it has become politically contentious, as its use has been occasionally alluded to.[93]

Of course, considering the existence of the various objectives at a more general level, it could be suggested that, to the extent that it is able to reduce risks in the market, investor protection will in fact contribute to financial stability, so that regarding the two goals in EU law as conflicting might be wrong.[94] Nonetheless, at a more specific level which considers private interactions *in concreto* rather than regulatory objectives *in abstracto*, a conflict might in fact emerge. One can think first of situations in which compensation adjudicated by civil courts endangers the financial viability of a systemically important firm, with possibly negative consequences for the market.[95] Even the possibility of increased opportunistic litigation might represent a risk for the efficiency and stability of markets.[96] A possible conflict between values such as consumer protection and stability – an expression of the more fundamental one between fairness and utility – must therefore be considered. But does this tension reside in a question of economic consequences of the allocation of losses, or is there a more fundamental incompatibility between the principles which inspire legal rules? Additionally, it remains to be seen how the principle of private autonomy has to be construed in light of stability: for instance, should private transactions which are deleterious for stability be invalidated in the same way in which anti-competitive agreements are?

To address these questions, it is necessary to start by clearing the field of the traditional objection based on private autonomy, which is opposed to the very idea of private law instrumentalization, and according to which public policy considerations should not play a role in private law adjudication.[97] While this is not the place to engage in that discussion,[98] it can simply be assumed that private law, either through judicial law-making or regulation, *is* already

93. See Levitin, "CFPB Arbitration rulemaking – and potential FSOC veto", *Credit Slips. A Discussion on Credit, Finance, and Bankruptcy*, 10 July 2017, available at <www.creditslips.org/creditslips/2017/07/cfpb-arbitration-rulemaking.html> and, on the same blog, Levitin, "CFPB politics update", 9 Aug. 2017, available at <www.creditslips.org/creditslips/2017/08/cfpb-politics-update.html>.

94. Lo Schiavo, op. cit. *supra* note 4, p. 63.

95. Della Negra, op. cit. *supra* note 60, p. 208.

96. MacNeil, "Enforcement and sanctioning" in Ferran, Moloney and Payne, op. cit. *supra* note 26, pp. 281–306, at p. 293; on this point see also Della Negra, op. cit. *supra* note 60, p. 16.

97. See Weinrib, *The Idea of Private Law* (Harvard University Press, 1995).

98. For a middle-ground position between autonomists and instrumentalists, see Dagan, "The limited autonomy of private law", 56 AJCL (2008), 809–834. For a discussion with reference to EU private law and regulation, see Dagan, "Between regulatory and autonomy-based private law", 22 ELJ (2016), 644–658, Hesselink, "Private law, regulation, and justice", 22 ELJ (2016), 681–695.

inspired by economic considerations. This is evident as far as regulatory interventions in private law are concerned,[99] but even in general contract law as found in civil codifications or in the common law. In this sense, there would be few theoretical reasons why, having admitted instrumentalization inspired by, for instance, competition, instrumentalization in light of financial stability could not also be pursued. The more substantial question rather emerges as to whether a private law inspired by competition broadly understood is compatible with financial stability, since already at a general level the two policies are likely to interfere with one another, occasionally requiring one to give way to the other. In other words, the question is not whether stability is compatible with an abstract and pure model of private law entirely based on autonomy, but with the current model of constitutionalized private law already inspired by further considerations, including autonomy.

The point related to the compatibility of stability on the one hand, and further objectives such as competition and consumer protection on the other hand, is far from being purely academic and is already known in other areas. Consider, for instance, the State aid law implications of the assistance provided by States to financial institutions. The coexistence of multiple regulatory objectives including competition and stability already led the European Commission to be confronted with a series of difficult trade-offs.[100] During the financial crisis, the Commission accepted that assistance to financial institutions was justified on the basis of Article 107(3)(b) TFEU, pursuant to which aids intended "to remedy a serious disturbance in the economy of a Member State", "may be considered to be compatible" with the internal market, and it adopted about 500 decisions[101] where assistance was justified by the overarching need for stability. The legitimacy of such assistance as intended to counteract the effects of financial crises[102] was confirmed by the ECJ.[103] This allowed the injection of 4.5 trillion euros – an "astonishing" 36.7 per cent of EU GDP compared to the 2 per cent spent in the

99. It is debated whether those interventions pursue one overarching objective or have an "experimentalist" inspiration. See Svetiev, "The EU's private law in the regulated sectors: Competitive market handmaiden or institutional platform?", 22 ELJ (2016), 659–680.

100. Gray and de Cecco, "Competition, stability and moral hazard: The tension between financial regulation and State aid control" in Laprévote, Gray and de Cecco (Eds.), *Research Handbook on State Aid in the Banking Sector* (Elgar, 2017), pp. 20–53.

101. Nicolaides, "Legal standing of investors in failed banks", 27 Nov. 2018, available at <www.lexxion.eu/en/stateaidpost/legal-standing-of-investors-in-failed-banks/>, who notes that in the last few years, the Commission steadily tightened the rules on State aid to banks.

102. Case C-526/14, *Kotnik*, EU:C:2016:570, para 49 et seq.

103. Case C-579/16 P, *Commission* v. *FIH Holding and FIH Erhversbank*, EU:C:2018:159; Case C-544/17 P, *BPC Lux 2 and Others* v. *Commission*, EU:C:2018:880.

1980s[104] – into the banking system: while the tension could be resolved within the existing legal categories, the economic effect does appear to be exceptional. Similarly, in international trade law, liberalization proposals aimed at facilitating global competition can conflict with both stability[105] and consumer protection, as national market regulations oriented towards those latter objectives constitute otherwise undesired non-tariff barriers to trade. In order to resolve that tension and permit deviations from the overall goals of liberalization, while States attempt to export their own regulatory standards to promote stability and simultaneously enjoy a position of advantage in global competition,[106] the Annex on financial services to the GATS – as well as other trade and investment agreements – included a prudential "carve-out". This allows domestic regulation intended "to ensure the integrity and stability of the financial system"[107] and is currently proving to be "a bastion" against litigation on financial regulations.[108] By the same token, EU law already developed a "general good" exception to acknowledge some regulatory powers of the host State on foreign financial services providers. The principle was present also in the Investment Services Directive, which referred to the "stability and sound operation of the financial system and the protection of the investor"[109] as considerations included in the exception. However, the vagueness of the notion posed noticeable problems for harmonization,[110] until MiFID[111] – which was designed to eliminate host Member State control to the

104. Chalmers, Davies and Monti, *European Union Law*, 4th ed. (Cambridge University Press, 2019), p. 1000.

105. Demirgüç-Kunt and Detragiache, "Financial liberalization and financial fragility" in Pleskovic and Stiglitz (Eds.), *Proceedings of the 1998 World Bank Conference on Development Economics* (The International Bank for Reconstruction and Development, 1999), pp. 303–331, suggesting that this can be counteracted through the creation of an appropriate regulatory and supervisory framework; Arner, *Financial Stability, Economic Growth and the Role of Law* (Cambridge University Press, 2007), p. 262.

106. Davies, "Financial stability and the global influence of EU Law" in Cremona and Scott (Eds.), *EU Law Beyond EU Borders. The Extraterritorial Reach of EU Law* (OUP, 2019), pp. 146–173.

107. Annex on financial services, 2(a). On the interpretation of the prudential carve-out, see WTO Appellate Body in *Argentina – Financial Services* (2016).

108. This is not to say that conflicts of that kind are resolved within international economic law. On the contrary, in the last decades there have been numerous disputes on financial services. See Lupo-Pasini, "Financial disputes in international courts", 21 *Journal of International Economic Law* (2018), 1–30.

109. See Tison, "What is 'general good' in EU financial services law?", 24 LIEI (1997), 1–46.

110. Ortino, "The role and functioning of mutual recognition in the European market of financial services", 56 ICLQ (2007), 309–338.

111. Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments, O.J. 2004, L 145, repealed by MiFID II, cited *supra* note 61.

greatest extent possible[112] – established a more comprehensive model of regulation of business conduct, thus heavily reducing Member States' leeway.[113]

Just as those objectives might possibly clash in State aid law or WTO law, their incorporation in private law produces tensions. Is financial stability compatible with the other principles and goals which have been traditionally pursued by private law, such as competition, *pacta sunt servanda,* or consumer protection itself? In the following, it will be shown that the accommodation of those objectives is possible at the price of a continuous balancing either at the judicial or at the regulatory level. With regard to the outcome of that process, a case law analysis shows that the balancing may yield different results depending on the interests at stake.

4.1. *Corporate law and shareholder protection*

The aforementioned tensions are evident in areas which are traditionally more explicitly open to economic considerations, such as corporate law. While firms are not generally under an obligation to act in a way which preserves stability, regulation might impose requirements on them aimed at reducing systemic risk: "corporate governance rules and regulations have become instruments at the service of financial stability".[114] Also here, however, the objective is capable of clashing with other principles underlying corporate law, and with shareholder protection in particular. As important as it is, the principle of protection of minority shareholders cannot be pushed to the point of endangering the proper functioning of the corporation: it has been provokingly noted in the literature that, "given shareholders' inclination to short-term profits, and the economy's need to embed long-term growth and stability, a governance that excluded shareholder views would seem desirable – although radical";[115] and empirical research evidences that banks where executives are more insulated from shareholders are financially stronger.[116]

112. Moloney, *EU Securities and Financial Markets Regulation*, 3rd ed. (OUP, 2014), p. 398.

113. Colaert, "European banking, securities and insurance law: Cutting through sectoral lines?", 52 CML Rev. (2015), 1579–1616, at 1609.

114. Wymeersch, "Corporate governance and financial stability", Working Paper 2008-11, p. 4, Financial Law Institute, Ghent University. See also, Fernandes, Farinha and Martins, "Determinants of European banks' bailout following the 2007–2008 financial crisis", 19 *Journal of International Economic Law* (2016), 707–742, and Kokkinis, *Corporate Law and Financial Instability* (Routledge, 2017).

115. Talbot, *Critical Company Law* (Routledge, 2016), p. 86.

116. Ferreira, Kershaw, Kirchmaier and Schuster, "Measuring management insulation from shareholder pressure", ECGI Finance Working Paper No. 345/2013.

Bank resolution regimes will further need to mediate between shareholder protection and the proper functioning of the economy.[117]

This conflict has become visible in the ECJ's more recent case law, dealing with situations where the pursuit of stability required measures opposed by shareholders. Initially, in a series of cases revolving around the interpretation of the then Second Company Law Directive,[118] the ECJ consistently stated that EU law precludes national laws which, aiming at ensuring the continued operation of indebted undertakings "which are of particular economic and social importance for society as a whole",[119] allow for capital to be raised by means of administrative measures without a resolution by the general meeting.[120] The possibility of derogations from this principle "with the aim of safeguarding certain vital interests of the Member States which are liable to be affected in exceptional situations"[121] was recognized, but only where EU law allows so.[122]

Notably in the 1996 case *Pafitis*[123] (the first on this question where the defendants were private parties instead of State entities, although the relief sought was directed against what could be seen as an administrative measure)[124] the Bank of Greece ordered the recapitalization of a commercial bank and placed it under the temporary supervision of an administrator appointed to ensure recapitalization. Since the decision to increase capital had been taken by the administrator without convening the general meeting of shareholders, a group of shareholders sought the annulment of the decision. When the national court referred the case to Luxembourg, the ECJ suggested in clear terms that while "[i]t is true that considerations concerning the need to protect the interests of savers and, more generally, the equilibrium of the savings system, require strict supervisory rules in order to ensure the

117. Alexander, "Bank resolution regimes: Balancing prudential regulation and shareholder rights", 9 *Journal of Corporate Law Studies* (2009), 61–93.

118. Second Council Directive 77/91/EEC, O.J. 1977, L 26, now Directive (EU) 2017/1132 of the European Parliament and of the Council relating to certain aspects of company law (codification), O.J. 2017, L 169. It is important to note that the new rules explicitly allow for limitations to the prerogatives of the general meeting in the case of use of the resolution tools, powers and mechanisms provided for in Title IV of 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, O.J. 2014, L 173.

119. Joined Cases C-19 & 20/90, *Karella,* EU:C:1991:229, para 36.

120. Joined Cases C-19 & 20/90, *Karella*; Case C-381/89, *Syndesmos Melon*, EU:C:1992:142.

121. Joined Cases C-19 & 20/90, *Karella*, para 27.

122. Ibid., paras. 27 and 28.

123. Case C-441/93, *Pafitis*, EU:C:1996:92.

124. Stuyck, annotation of Case C-192/94, *El Corte Inglés SA* v. *Cristina Blázquez Rivero*, EU:C:1996:88; Case C-129/94, *Rafael Ruiz Bernáldez*, EU:C:1996:143; Case C-441/93, *Panagis Pafitis*, 33 CML Rev. (1996), 1261–1272, at 1268 and 1270.

continuing stability of the banking system",[125] that did not also imply that the organs of public limited liability companies should be deprived of their prerogatives. The balance was tipped in favour of the shareholders.

It is crucial to note that in *Pafitis*, the ECJ did recognize the relevance of both objectives, but suggested that stability could be achieved without limiting shareholders' rights through other mechanisms, such as notably a generalized scheme to guarantee deposits.[126] In fact, Directive 94/19/EC harmonized the laws of the Member States, making mandatory a scheme to protect deposits below a certain threshold, with the declared intent of achieving both stability and investor protection.[127] As stressed by the ECJ on another occasion, the Directive had a "twofold approach" intended "both to protect depositors and to ensure the stability of the banking system".[128] In the literature too it is suggested that, for various reasons, deposit protection does contribute to financial stability.[129] Nevertheless, and leaving aside economic empirical evidence suggesting that in fact depositor protection funds are generally correlated with increased banking instability,[130] later events showed that even that mechanism might not be sufficient to fulfil both objectives at the same time.[131] As mentioned by the EFTA Court interpreting that Directive in the context of the collapse of Landsbanki and answering in the negative the question whether Iceland was liable to harmed international investors not fully covered by the scheme, "the funding obligation imposed on the members of a guarantee scheme is limited under the Directive and must not be too onerous in order not to jeopardize the stability of the banking system".[132] Given these problematic aspects, which also led to the necessity of upgrading

125. Case C-441/93, *Pafitis*, para 49.

126. Ibid., para 51.

127. On compensation and depositor protection schemes, see Cartwright, op. cit. *supra* note 21, p. 189.

128. Case C-571/16, *Kantarev*, EU:C:2018:807, para 56. The ECJ brought those objectives within the realm of the internal market competence, Case C-233/94, *Germany* v. *European Parliament and Council,* EU:C:1997:231, para 15.

129. Kleftouri, "Meeting the rationale of deposit protection system", 22 *Journal of Financial Regulation and Compliance* (2014), 300–417; Kleftouri, *Deposit Protection and Bank Resolution* (OUP, 2015), p. 9.

130. Demirgüç-Kunt and Detragiache, "Does deposit insurance increase banking system stability? An empirical investigation", 49 *Journal of Monetary Economics* (2002), 1373–1406. Nonetheless, the study suggests that this negative effect will not be produced in countries with a "very good" institutional environment.

131. Kleftouri (2015), op. cit. *supra* note 129, p. 24, on the role and limitations of the UK Financial Services Compensation Scheme and suggesting that "the goals of financial stability and depositor protection need to be viewed as highly interconnected".

132. EFTA Court, Case E-16/11, *EFTA Surveillance Authority* v. *Iceland*, para 173.

the Directive,[133] as well as to a proposal for the creation of a European Deposit Insurance Scheme as the third pillar of the Banking Union,[134] there seem to be limits to what protection schemes alone can achieve as a safety net envisaging both stability and investor protection.

In the wake of the financial crisis – which, it is suggested, "immensely"[135] affected the established case law of supranational courts – measures aimed at stabilizing the market led to a surge of cases, forcing the ECJ to re-engage with its jurisprudence. Famously in *Kotnik*[136] – involving burden-sharing and having a plurality of implications both for State aid and private law[137] – the Grand Chamber of the ECJ accepted that "the objective of ensuring the stability of the financial system while avoiding excessive public spending and minimizing distortions of competition constitutes an overriding public interest"[138] which is capable of trumping other considerations. Rejecting the argument that, following the Court's own precedents, the approval of a general meeting of the company was necessary, the Court distinguished its previous case law explaining that those earlier cases concerned "the insolvency of a single bank", while the present situation involved the "prerequisite for the grant, to banks faced with a capital shortfall, of State aid intended, in an exceptional context of a national economy being affected by a serious disturbance, to overcome a systemic financial crisis capable of adversely affecting the national financial system as a whole and the financial stability of the European Union".[139] The Court explicitly acknowledged that the previous cases had been decided in a different era, i.e. before the third stage of the

133. Directive 94/19/EC, amended by Directive 2009/14/EC, was repealed by Directive 2014/49/EU, O.J. 2014, L 173/149. Payne, "The reform of Deposit Guarantee Schemes in Europe" 12 *European Company and Financial Law Review* (2015), 539–562.

134. Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM(2015)586 final – 2015/0270 (COD). See also Carmassi, Dobkowitz, Evrard, Parisi, Silva and Wedow, "Completing the Banking Union with a European Deposit Insurance Scheme: Who is afraid of cross-subsidisation?", European Central Bank, Occasional Paper Series, No 208, April 2018; Arnaboldi, *Risk and Regulation in Euro Area Banks. Completing the Banking Union* (Springer, 2019), pp. 109–122.

135. Gerapetritis, *New Economic Constitutionalism in Europe* (Hart, 2019), p. 189.

136. Case C-526/14, *Kotnik*, EU:C:2016:767.

137. Badenhoop, "Banking communication non-binding and burden-sharing approved: *Kotnik*", 13 *European Review of Contract Law* (2017), 299–309.

138. Case C-526/14, *Kotnik*, para 69.

139. Ibid., para 90. At para 93, the ECJ also clarified that the fact that the new bank recovery and resolution regime introduced, from 1 Jan. 2016, derogations from the principle that any increase in capital must be decided upon by the general meeting "does not permit the conclusion that, before that date, derogations of that kind were prohibited".

implementation of the Economic and Monetary Union. Reforms have now raised stability to a level which allows it to trump shareholder rights. Hence, "although there is a clear public interest in ensuring throughout the European Union a strong and consistent protection of investors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system".[140]

This line of reasoning was confirmed in *Dowling*.[141] The case involved the exceptional general meeting of a bank rejecting the instruction received by the Central Bank of Ireland to recapitalize the company, and the consequent direction order issued by the High Court to increase capital. The ECJ confirmed that it is possible to circumvent the need for a general meeting "where there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union";[142] it insisted that this finding was "in no way irreconcilable"[143] with *Pafitis*, as the facts of that case allegedly did not reveal a systemic risk dimension. A distinction is therefore confirmed between "*ordinary* reorganization measures" and "*extraordinary* reorganization measures, such as a direction order designed to avoid, in a situation where there is a serious disturbance of the national economy and of the financial system of a Member State, the failure of a bank and thereby to maintain the financial stability of the European Union".[144] In both sets of cases, the tension between shareholder protection and stability was acknowledged, but different outcomes were reached, based on the recognition of the existence of a systemic risk.

In the final analysis, the principle of minority shareholders' protection remains a relatively weak one. Addressing the question whether there is such a general principle in EU law, the ECJ had already clarified in *Audiolux* that that objective simply cannot be considered a general principle of EU law.[145] As minority shareholder protection is not the first candidate to become a constitutional principle and can at most be a general principle of corporate law,[146] it is clear that when contrasted to the goal of financial stability rooted in the Treaties and underlying bank insolvency reforms, it is very likely to be a secondary consideration.

140. Ibid., para 91.
141. Case C-41/15, *Dowling*, EU:C:2016:836.
142. Ibid., para 55.
143. Ibid., para 53.
144. Ibid.
145. Case C-101/08, *Audiolux*, EU:C:2009:626, para 63.
146. Hesselink, "The general principles of civil law: Their nature, roles and legitimacy" in Leczykiewicz and Weatherill, op. cit. *supra* note 16, pp. 131–180.

4.2. *Property law and investment protection*

Limitations to shareholders rights might be necessary to ensure stability. And yet, such an approach puts pressure not only on corporate governance, but also on property law. If financial stability considerations can trump the principles governing the ordinary functioning of corporations, including shareholder protection, which does not enjoy a form of recognition as a quasi-constitutional principle, the question emerges as to whether they can also prevail over property rights, which on the contrary do enjoy such a constitutional status. Notably pursuant to the case law of the European Court of Human Rights (ECtHR),[147] corporate shares constitute "possession" in the sense of Article 1 of Protocol No. 1 ECHR.[148] As shareholders' rights amount to rights to property under the Convention,[149] illegal administrative actions causing a loss to shareholders might lead to a violation of the Convention. Article 1(2) and the case law of the ECtHR, nonetheless, famously accept proportionate limitations to that right in light of the general interest. What is more, with regard to the austerity measures[150] implemented in various countries,[151] the ECtHR insisted both on the wide margin of appreciation acknowledged to the States and on the "the existence of an exceptional crisis without precedent"[152] in order to allow States to reduce salaries and retirement pensions of public servants, accepting that proportionate[153] measures adopted in the pursuit of the stability of public finances were legitimately taken in the

147. See Council of Europe/ECtHR, "Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Protection of property", 30 April 2020. For an academic analysis from the UK perspective, see Allen, *Property and the Human Rights Act 1998* (Hart, 2005), p. 83.

148. ECtHR, *Olczak* v. *Poland*, Appl. No. 30417/96, judgment of 7 Nov. 2002; ECtHR, *Sovtransavto Holding* v. *Ukraine*, Appl. No. 48553/99, judgment of 25 July 2002; ECtHR, *Shesti Mai Engineering OOD and Others v. Bulgaria*, Appl. No. 17854/04, judgment of 20 Sept. 2011; ECtHR, *Reisner* v. *Turkey*, Appl. No. 46815/09, judgment of 1 Dec. 2016; ECtHR, *Knick* v. *Turkey*, Appl. No. 53138/09, judgment of 12 June 2018.

149. Alexander, op. cit. *supra* note 8, p. 153.

150. For a critical analysis, see Pervou, "Human rights in times of crisis: The Greek cases before the ECtHR, or the polarisation of a democratic society", 5 *Cambridge International Law Journal* (2016), 113–138.

151. ECtHR, *Valkov and Others* v. *Bulgaria*, Appl. Nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, judgment of 25 Oct. 2011; ECtHR *Panfile* v. *Romania*, Appl. No. 13902/11, judgment of 20 March 2012; ECtHR, *Koufaki and Adedy* v. *Greece*, Appl. Nos. 57665/12 and 57657/12, judgment of 7 May 2013; ECtHR, *Da Conceição Mateus* v. *Portugal and Santos Januário* v. *Portugal*, Appl. Nos. 62235/12 and 57725/12, judgment of 8 Oct. 2013.

152. ECtHR, *Koufaki*, para 37.

153. In ECtHR, *N.K.M.* v. *Hungary*, Appl. No. 66529/11, judgment of 14 May 2013, the ECtHR ruled that a 98% tax on part of the severance pay of a civil servant constituted a violation of the ECHR.

public interest.[154] This is relevant for the banking sector, and the events surrounding the collapse of the British bank Northern Rock are significant: the complaints about the alleged violation of investors' property rights following the nationalization and liquidation of the bank were unsuccessful in the UK. Those measures, it was recognized by the Court of Appeal, were intended to safeguard financial stability.[155] When the dispute reached the ECtHR,[156] the Court dismissed the case, finding the complaint as to a violation of Article 1 of Protocol No. 1 manifestly ill-founded.[157] As summarized in the literature, as long as the measure is taken lawfully and in the public interest, those complaints in the context of a financial crisis "are unlikely to be viewed sympathetically" by the courts.[158]

In the case law of the ECJ, where references to the right of property are read in light of Article 17 of the Charter of Fundamental Rights (CFR), the approach taken in *Kotnik* rejects the argument that burden-sharing measures such as those laid down in the Banking Communication[159] constitute interference in the right to property of shareholders and subordinated creditors[160] even if, as has been highlighted, the Court does so at the price of some circularity in its reasoning[161] and of a strong reliance on the no-creditor-worse-off principle.[162] A more explicit engagement with property law aspects came two months after that decision. In the *Ledra Advertising* case,[163] which concerned the Memorandum of Understanding between Cyprus and the Troika (Commission, ECB, IMF) establishing that depositors would bear part of the burden, the ECJ concluded that while the Commission was bound by the respect of the right to property even when signing the

154. ECtHR, *Koufaki and Adedy v. Greece*, Appl. Nos. 57665/12 and 57657/12, paras. 36–41.

155. *SRM Global Master Fund LP* v. *Treasury Commissioners*, [2009] EWCA Civ 788.

156. For an overview of the different stages of the dispute, see Qureshi and Nicol, "Protection of shareholders under the European Convention of Human Rights and the 'margin of appreciation'", 28 *Butterworths Journal of International Banking and Financial Law* (2013), 135–137.

157. ECtHR, *Grainger* v. *United Kingdom*, Appl. No. 34940/10, judgment of 10 July 2012.

158. Cranston, Avgouleas, Van Zwieten, Hare and Van Sante, *Principles of Banking Law*, 3rd ed. (OUP, 2018), p. 178.

159. Commission Communication on the application, from 1 Aug. 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (Banking Communication), O.J. 2013, C 216/1.

160. Case C-526/14, *Kotnik*, para 79.

161. Gargantini, "Procedure di risoluzione bancarie: tutela della proprietà e dell'equo processo" in Caggia and Resta (Eds.), *I diritti fondamentali in Europa e il diritto privato* (Roma Tre Press, 2019), pp. 213–272, at 246.

162. Fucile, "Resolution framework and the protection of fundamental rights" in Lo Schiavo (Ed.), *The European Banking Union and the Role of Law* (Elgar, 2019), pp. 259–272, at 268.

163. Joined Cases C-8–10/15 P, *Ledra Advertising*, EU:C:2016:701.

Memorandum, that right is not absolute and proportionate limitations to it are justified.

The fact that limitations to the right to property are possible is of course not new, and is found in the civil as well as constitutional traditions of many countries which accept that property should serve a social function. In the European Communities, this was already accepted in the 1970s, when the ECJ recognized that rights of ownership, "far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder", so that "it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched".[164] The approach was followed in several other instances.[165] In *Ledra Advertising*, the Court developed that jurisprudence, now explicitly qualifying the pursuit of financial stability as an objective of the EU. As the ECJ concluded, limitations to that right are justified "[i]n view of the objective of ensuring the stability of the banking system in the euro area, and having regard to the imminent risk of financial losses to which depositors with the two banks concerned would have been exposed if the latter had failed".[166] Following *Ledra Advertising*, the ECJ later dismissed the action for damages against the EU for a possible infringement of the right to property of depositors and shareholders following the restructuring of Cypriot banks.[167]

Similarly, the Italian Constitutional Court[168] in 2018 found no violation of the right to property, as protected both by the Italian Constitution and supranational law, by a reform of Italian banking legislation.[169] In order to increase the stability of the system, the reform required the transformation of larger cooperative banks into companies limited by shares and, in order to avoid their undercapitalization, allowed in that case for limitations to the redemption of shares held by withdrawing shareholders. The question arose whether this amounted in practice to an expropriation rather than merely a

164. Case C-4/73, *Nold*, EU:C:1974:51, para 14.

165. See Comparato and Micklitz, "Regulated autonomy between market freedoms and fundamental rights in the case law of the CJEU" in Bernitz, Groussot and Schulyok (Eds.), *General Principles of EU Law and European Private Law* (Kluwer, 2013), pp. 121–153.

166. Joined Cases C-8–10/15 P, *Ledra Advertising*, para 74.

167. Judgment of the General Court (Fourth Chamber, Extended Composition) in Case T-680/13, *Chrysostomides, K. & Co. and Others* v. *Council and Others*, EU:T:2018:486. On the issue of the alleged violation of the right to property, the judgment of the GC was upheld by the ECJ Grand Chamber in Joined Cases C-597 & 598/18 P, C-603 & 604/18 P, *Council* v. *K. Chrysostomides & Co. and Others*, EU:C:2020:1028, paras. 154–172.

168. Italian Constitutional Court, judgment of 15 May 2018 No. 99/2018.

169. Art. 1(1)(a), D.L. 24 Jan. 2015, No. 3, converted and amended by Statute of 24 March 2015, No. 33, amending Art. 28(2)2-ter of Legislative Decree No. 385/1993.

limitation, but the Constitutional Court answered in the negative, concluding that since limitations are temporary and contingent, the law does not have a definitive expropriating effect. The Constitutional Court reached the conclusion both by stressing the harmony between Italian legislation and the EU legal framework on capital requirements,[170] and by referring to the supranational case law on the subject. Hence, it was established by the Constitutional Court that measures involving sacrifices for shareholders' and creditors' rights do not amount to a disproportionate and intolerable interference in the right to property when they pursue the objective of financial stability.[171]

The ECJ was later faced with the issue.[172] The question was raised whether Italian legislation was precluded not only by EU rules on capital requirements, but also by the freedom to conduct a business and the right to property as protected by the CFR. Relying on its settled case law on the freedom to conduct a business,[173] as well as its later cases from *Kotnik* to *Ledra Advertising*, the ECJ answered the question in the negative, noting that "according to the Court's case law, the objectives of ensuring the stability of the banking and financial system and preventing a systemic risk are objectives of public interest pursued by the European Union".[174]

A further layer to be considered in this context is that of international investment law, since measures such as the ones discussed so far might amount to expropriations prohibited under bilateral investment treaties. There have been instances where international investors have challenged State measures aimed at stabilizing the banking sector. In those cases, nonetheless, arbitral tribunals have generally rejected the claims, either relying on the prudential carve-outs in those agreements or even, when such provisions were lacking, acknowledging the existence of reasonable regulatory powers of the State.[175]

170. Regulation (EU) 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012, O.J. 2013, L 176, and Commission Delegated Regulation (EU) 241/2014 supplementing Regulation (EU) 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions, O.J. 2014, L 74.

171. Italian Constitutional Court, judgment of 15 May 2018, No. 99/2018, para 5.6.

172. Case C-686/18, *Adusbef and Others*, EU:C:2020:567.

173. Case C-283/11, *Sky Österreich*, EU:C:2013:28.

174. Case C-686/18, *Adusbef*, para 92.

175. With references to several cases, see Mitchell, Hawkins and Mishra, "Dear Prudence: Allowances under international trade and investment law for prudential regulation in the financial services sector", 19 *Journal of International Economic Law* (2016), 787–820, at 798. See also Mersch, Achtouk-Spivak, Affaki, Contartese and Vidal Puig, "The new challenges raised by investment arbitration for the EU legal order", European Central Bank, Legal Working Paper Series No. 19, Oct. 2019.

Despite these continuous references to financial stability as a justification for interferences with property rights, it must be noted that courts are not prepared to legitimize each and every measure which purportedly aims at stability. On the contrary, national courts have already declared the illegality of various austerity measures when these curtailed socio-economic rights[176] and when they aimed at reducing public debt through privatization.[177] Judicial reasoning, however, was generally not based on the right to property alone, but involved further considerations such as – notably but not exclusively[178] – the principle of equality and social rights as laid down in constitutions.[179] Paradigmatically, in Portugal[180] – the country which offered the "most serious legal challenge to the austerity measures"[181] – the Constitutional Court in 2012 declared the unconstitutionality of various norms contained in the State Budget Law which reduced public pensions and public sector workers' salaries, on the basis of the argument that by affecting certain categories, the statute disproportionality imposed sacrifices on certain groups of citizens, thus violating the principle of equality.[182] In that instance, the Court underlined that not even a state of economic emergency can authorize the legislature to disrespect basic constitutional principles.[183] The impact of this and following sensitive rulings along the same lines by the Portuguese Constitutional Court[184] was such that one of the Troika's new conditions for

176. See Italian Constitutional Court, judgment of 10 March 2015, No. 70/2015.

177. On privatization of water supply in Greece, see the rulings of the Greek Council of State 1906/2014, 1223/2020 and 1224/2020.

178. Italian Constitutional Court, judgment of 8 Oct. 2012, No. 223/2012, referring to the principle of judicial independence as being jeopardized by pay cuts for judges.

179. Fasone, "Constitutional courts facing the euro crisis. Italy, Portugal and Spain in a comparative perspective", MWP 2014/25, Max Weber Programme, EUI Working Papers. See the contributions in Kilpatrick and de Witte (Eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, EUI Working Papers LAW 2014/05.

180. On the jurisprudence of the Portuguese Constitutional Court on austerity, see Nogueira de Brito, "Putting social rights in brackets? The Portuguese experience with welfare challenges in times of crisis" in Kilpatrick and de Witte, ibid. pp. 67–77; Gomes, "Social rights in crisis in the Eurozone. Work rights in Portugal", in Kilpatrick and de Witte, ibid., pp. 78–84; Cisotta and Gallo, "The Portuguese Constitutional Court case law on austerity measures: A reappraisal", in Kilpatrick and de Witte, ibid., pp. 85–94.

181. Estella, *Legal Foundations of EU Economic Governance* (Cambridge University Press, 2018), p. 224.

182. Portuguese Constitutional Court, ruling No. 353/12 of 5 July 2012.

183. On the necessity of maintaining a core of human rights and the rule of law during economic crises, see Letnar Černič, "The European Court of Human Rights, rule of law and socio-economic rights in times of crises", 8 HJRL (2016), 227–247.

184. In particular, Portuguese Constitutional Court rulings Nos. 187/2013, 474/2013, and 862/2013. See Canotilho, Violante and Lanceiro, "Austerity measures under judicial scrutiny: The Portuguese constitutional case law", 11 EuConst (2015), 155–183. Discussing also the role of the government, see Violante, "The Portuguese Constitutional Court and its austerity case

financial assistance was that Portugal had to "take a number of steps aiming at mitigating the legal risks from future potential Constitutional Court rulings".[185]

While this evolution is instructive to show the interaction between stability and the protection of investors, illustrating how the former has gained more relevance in recent years, it remains to be seen whether the same applies with regards to the protection of the consumer in contract law. Does financial stability play the same role when dealing with consumer debts rather than investments?

4.3. *Contract law and consumer protection*

Exceptional conditions might justify interventions in existing contracts which ultimately deprive parties of some of their rights. When, at the peak of the debt crisis, Greece retroactively imposed Collective Action Clauses (CAC) in the terms and conditions of Greek-law government bonds in order to enable a majority of investors to accept a haircut for all bondholders,[186] courts dealing with the complaints of dissatisfied retail investors constantly found against the claimants. Different national courts[187] reached that conclusion either declaring that by introducing a new term in contracts governed by its domestic law, Greece had acted *iure imperii,*[188] or by accepting the commercial nature of the issue but declining jurisdiction on private international law grounds.[189] The ECJ, in *Kuhn,*[190] came to the conclusion that for the purposes of Brussels I Regulation (recast)[191] the disputes did not pertain to "civil and commercial

law" in Pinto and Pequito Texeira (Eds.), *Political Institutions and Democracy in Portugal. Assessing the Impact of the Eurocrisis* (Springer, 2018), pp. 121–143.

185. European Commission, The Economic Adjustment Programme for Portugal – Seventh Review, Winter 2012/2013, Occasional Papers 153, June 2013, Annex 5, 1.28, p. 72.

186. Zettelmeyer, Trebesch, Gulati, Monacelli and Whelan, "The Greek debt restructuring: An autopsy", 28 *Economic Policy* (2013), 513–563.

187. For a comprehensive analysis of the German cases on Greek bonds, revealing some differences in the approaches of various courts, see Grund, "The legal consequences of sovereign insolvency – A review of creditor litigation in Germany following the Greek debt restructuring", 24 MJ (2017), 399–423.

188. German Federal Supreme Court, No. VI ZR 516/14 of 8 March 2016.

189. Austrian Supreme Court, judgment of 25 Nov. 2015, 8 Ob125/15p. For a comparison between Germany and Austria, see Grund, "Enforcing sovereign debt in court – A comparative analysis of litigation and arbitration following the Greek debt restructuring of 2012", 1 *University of Vienna Law Review* (2017), 34–90.

190. Case C-308/17, *Hellenische Republik* v. *Leo Kuhn*, EU:C:2018:911.

191. Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2012, L 351.

matters".[192] The Court stressed the exceptional nature of the disputed measure and its macroeconomic background:

> "the unprecedented reliance on the retroactive inclusion of a CAC and the resulting amendment to the financial terms took place in an exceptional context, in the circumstances of a serious financial crisis. They were namely dictated by the necessity . . . to restructure the Greek State's public debt and to prevent the risk of failure of the restructuring plan of that debt, to avoid that State failing to pay and to ensure the financial stability of the euro area".[193]

Similarly, the legitimacy of this approach was confirmed by the ECtHR, which rejected the allegation that the haircut amounted to a violation of the right to property: the ECtHR found that the measure served a public interest aim, "à savoir le maintien de la stabilité économique et la restructuration de la dette, dans l'intérêt général de la communauté".[194]

However, this line of cases should not be taken to mean that the existence of exceptional circumstances will always authorize a State to breach its contractual obligations. This had already been seen in the Argentinian bonds saga. Argentina's argument that paying all its creditors would lead to further economic crises was rejected by US courts;[195] most courts in

192. In that case, the Court reached the opposite conclusion from what it had previously reached in Case C-226/13, *Fahnenbrock and Others* v. *Hellenische Republik,* EU:C:2015:383, which revolved around the interpretation of the identical formula "civil and commercial matters", employed however by Regulation (EC) 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, O.J. 2007, L 324/79. The same wording was given independent interpretations: on the difference between the approach in *Kuhn* and *Fahnenbrock*, see Opinion of A.G. Bot, in Case C-308/17, *Kuhn*, EU:C:2018:528.

193. Case C-308/17, *Kuhn*, para 40. Nonetheless, as explained by A.G. Szpunar in Case C-641/18, *Rina*, EU:C:2020:3, the judgment in *Kuhn* "cannot be understood as meaning that the general objective of a measure, such as it may be inferred from the context in which it is adopted, is in itself sufficient support for a finding that it constitutes a manifestation of public authority" (para 74), but "the circumstance that, in the light of their objective, certain acts are performed in the public or general interest is, in my opinion, merely an indication that those acts are performed in the exercise of powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals" (para 78).

194. ECtHR, *Mamatas and Others* v. *Greece*, Appl. Nos. 63066/14, 64297/14 and 66106/14, judgment of 21 July 2016, para 103. On the significance of the decision, see Belle, "*Mamatas and Others* v *Greece*: How the European Court of Human Rights could change sovereign debt restructuration" in Haskell and Rasulov (Eds.), *New Voices and New Perspectives in International Economic Law* (Springer, 2020), pp. 153–171.

195. *NML Capital, Ltd.* v. *Republic of Argentina*, 699 F.3d 246, 250 (2d Cir. 2012) 263.

Europe[196] also decided against the State, which was found to have waived immunity.[197] As explained by the German Federal Court of Justice,[198] in line with a 2007 decision by the Federal Constitutional Court,[199] not even after the GFC has a general international law principle developed which allows a State to simply refuse to pay its creditors because of the existence of a state of economic emergency. It appears that the contract cannot be intentionally breached by the State as a party but, at least in European law, it might exceptionally be re-regulated by the State as a sovereign, to allow a majority of private parties to agree to a haircut. The importance of contract terms[200] and contract law as a relevant instrument against the background of financial stability clearly emerges: contract terms do, in fact, play a role – although it remains debatable how important a role – for sovereign debts.[201] The repercussions of this approach on the sanctity of contract – the doctrine which has often and controversially permeated sovereign debt enforcement litigation since the mid-1980s[202] – are noticeable.[203] Yet, this all relates to the quite atypical area of sovereign bond contracts, which are characterized by a specific yet problematic amalgamation of public and private interests. How does this relate to entirely private transactions? Due consideration needs to be given to EU contract law.

196. As an exception, Italian Court of Cassation, ruling No. 11225/2005 of 21 April 2005.

197. See in particular the UK Supreme Court, *NML Capital Ltd* v. *Argentina*, [2011] UKSC 31, reversing a Court of Appeal ruling that Argentina was protected by immunity.

198. German Federal Court of Justice, No. XI ZR 193/14 of 24 Feb. 2015.

199. German Federal Constitutional Court (BVerfG), 2 BvM 1/03, 2 BvM 2/03, 2 BvM 3/03, 2 BvM 4/03, 2 BvM 5/03, 2 BvM 1/06, 2 BvM 2/06, 8 May 2007.

200. Probably also as a consequence of the lessons learnt from the problems with Argentinian bonds, which did not include such clauses, CACs have become "the tool that has gained the most support over the last decade, and that states and international finance institutions mainly rely on to ease sovereign debt restructurings". Iversen, "The future of involuntary sovereign debt restructurings: *Mamatas and Others v Greece* and the protection of holdings of sovereign debt instruments under the ECHR", 14 *Capital Markets Law Journal* (2019), 34–58, at 49.

201. Mark, Weidemaier and Gulati, "International finance and sovereign debt" in Parisi (Ed.), *The Oxford Handbook of Law and Economics. Volume 3: Public Law and Legal Institutions* (OUP, 2017), pp. 482–500.

202. Gathi, "The sanctity of sovereign loan contracts and its origins in enforcement litigation", 38 *George Washington International Law Review* (2006), 251–326, at 323, suggests that the consequence of the approach as developed in particular by US Courts is "the virtual elimination of balancing considerations – such as comity and the act of state doctrine – in enforcement litigation".

203. See Porzecanski, "Behind the Greek default and restructuring of 2012", MPRA Paper Series, No. 44166, 2012.

EU contract law is not new to forms of instrumentalization. In fact, its history is tightly linked with that of competition,[204] as approximation of laws was part of the project of achieving a level playing field within the Single Market.[205] The creation of a "competitive contract law"[206] was not without controversy: given that goal, deregulation might be needed whenever excessive levels of protection amount to barriers to trade. The possible contrast between protection and competition was smoothed out, and immediate deregulatory consequences were avoided through the use of minimum harmonization, as well as by setting a high standard of consumer protection.[207] Significantly, the possible deregulatory effect was felt more strongly in the case of full harmonization directives.[208]

Nonetheless, as the EU strives to regain stability, the principle of competition has largely been suspended.[209] The incorporation of the goal of financial stability might create tension in a contract law which has been developed mostly to achieve competition. A first level of conflict arises between competitive contract law and financially stable contract law. Competitive contract law aims at harmonizing rules, in order not to place additional burdens on some traders, and at empowering contract parties through information, in order to allow them to fulfil their role of rational and fully informed actors, as required by an ideal competitive market. The attention paid to stability shifts the focus from information to product regulation, which is necessary to restrict services and practices that are deemed to be detrimental to financial stability, and promote so-called "plain vanilla" financial instruments.

The change of paradigm has already led to the suggestion that newer directives are characterized by a somewhat "paternalistic" approach leading to a possible decrease of freedom of contract.[210] Certainly, considering the known and well-founded criticisms that have been canvassed against the information paradigm, the move towards stability might appear to be beneficial to consumer protection, at least if one accepts that protection is better served by a more interventionist approach and assuming that regulation

204. See Grundmann, "The role of competition in the European codification process" in Micklitz and Cafaggi (Eds.), *European Private Law after the Common Frame of Reference* (Elgar, 2010), pp. 36–55.

205. Micklitz, "The transformation of private law through competition", 22 ELJ (2016), 627–643.

206. Ibid.

207. In the interest of consumers, some limitations to competition are allowed. See Joined Cases C-94 & 202/04, *Cipolla*, EU:C:2006:758.

208. See Joined Cases C-261 & 299/07, *VTB-VAB NV* v. *Total*, EU:C:2009:244.

209. Micklitz, op. cit. *supra* note 205.

210. Cherednychenko, "Freedom of contract in the post-crisis era: Quo vadis?", 10 *European Review of Contract Law* (2014), 390–421.

itself does not have a destabilizing effect on the economy. But as we move from competitive contract law to financially stable contract law, is it possible that consumer protection might need to be lowered in order to give way to stability? A second possible level of conflict emerges, this time between consumer protection and financial stability. This is not to say that, otherwise, consumer protection law would be an area free of conflicts,[211] but the inclusion of a further objective, possibly hierarchically superordinate through its recognition in EU economic law, can put further pressure on the other values.

The possibility that excessively protective rules and judgments might be detrimental to the stability of the financial system has already been aired, based on the concern that the costs associated with protection might simply be unbearable for the other, systemically important, party. In anticipation of the famous *Ille Papier* decision by the German Federal Court of Justice on advisory liability for the mis-selling of financial derivatives,[212] representatives of the defendant bank, fearing a decision which would translate into losses of 1 billion euros, lamented that the judgment would have such repercussions overall as to trigger a new financial crisis.[213] This, perhaps exaggerated,[214] macroeconomic concern has rarely translated into a legal argument tested in courts.

The issue has nonetheless been indirectly addressed by the ECJ, in the *Gutiérrez Naranjo* case.[215] The case originated in the context of the Spanish debt and housing crisis, as EU consumer law – and the Unfair Terms Directive more in particular[216] – was invoked to shield consumers against the now socially unsustainable effects of onerous credit agreements. Against that background, the Supreme Court of Spain had concluded that clauses in mortgage loan agreements establishing a minimum rate below which the variable rate of interest could not fall ("floor clauses") were unfair as they were non-transparent, in consequence of the fact that the consumer had not

211. See Adams and Brownsword, "The ideologies of contract", 7 *Legal Studies* (1987), 205–223, at 213.

212. German Federal Court of Justice, No. XI ZR 33/10.

213. Jansen, annotation of Judgment of the Bundesgerichtshof (Federal Court of Justice of Germany) of 22 March 2011 "Passion to inform— BGH expands banks' advisory duties", 12 GLJ (2011), 1492–1509.

214. Dastis, "Change of circumstances (Section 313 BGB) Trigger for the next financial crisis?", 23 E.R.P.L. (2015), 85–99.

215. Joined Cases C-154, 307 & 308/15, *Gutiérrez Naranjo*, EU:C:2016:980.

216. On the relevance of the Directive in the context of post-crisis litigation, see Micklitz and Reich, "The Court and sleeping beauty: The revival of the Unfair Contract Terms Directive (UCTD)", 51 CML Rev. (2014), 771–808.

been sufficiently informed of the legal and financial consequences of those terms. At the same time, the Supreme Court had limited the possible economically perturbing effects of its ruling, excluding its retroactivity affecting existing contracts.[217] The reasoning was rooted in legal certainty rather than financial stability: the clauses themselves were considered to be lawful, as unfairness only stemmed from the fact that consumers had not been sufficiently informed in specific circumstances. Reasons of legal certainty, nonetheless, merged with economic considerations: in justifying the limitation of the temporal effects, the Supreme Court of Spain referred to the case law of the ECJ itself. In the earlier (2013) case *RWE,*[218] concerning the unfairness of terms in contracts for the supply of gas allowing the supplier to unilaterally alter the price of the service, macroeconomic concerns had been raised, as the German Government in its written observations asked the Court to limit the temporal effects of its judgment. This was due to "the serious financial consequences that could be produced with respect to a large number of gas supply contracts in Germany, bringing about a substantial loss for the undertakings concerned".[219] Following its established case law on the issue,[220] the ECJ found in that regard that "only in altogether exceptional cases may the Court, in application of the general principle of legal certainty inherent in the legal order of the European Union, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith", pointing to the necessity of "two essential criteria", i.e. that those concerned have acted in good faith and that "there is a risk of serious difficulties".[221] Since those financial consequences for gas supply undertakings could not be determined on the sole basis of the interpretation of EU law given by the Court in that case, the argument was unsuccessful.[222]

Against that background, the Supreme Court of Spain considered that precisely the possible repercussions on the economic system – due to the sum

217. Spanish Supreme Court, judgments 241/12 of 9 May 2013, No. 139/2015 of 25 March 2015 and No. 222/2015 of 29 April 2015.

218. Case C-92/11, *RWE Vertrieb*, EU:C:2013:180.

219. Ibid., para 57.

220. Case C-57/93, *Vroege*, EU:C:1994:352. In Case 43/75, *Defrenne*, EU:C:1976:56, paras. 70 and 71, the Court noted that: "In view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy", "Although the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision."

221. Case C-92/11, *RWE Vertrieb*, para 59.

222. Ibid., paras. 61 and 62.

of all the awards of damages in possibly many thousands of lawsuits[223] – fulfilled the "serious difficulties" criterion. Incidentally, it may be noted that limiting the temporal effects of judgments is a technique which has already been employed by constitutional courts especially in the wake of the European debt crisis.[224] For instance, in its 2012 decision, already mentioned above, the Portuguese Constitutional Court limited the effects of a declaration of unconstitutionality of certain austerity measures taken against the background of conditionality, conscious that "an unqualified declaration of unconstitutionality could endanger the maintenance of the agreed financing and thus the State's solvency".[225]

In *Gutiérrez Naranjo*, however, when the Spanish lower courts asked whether the approach of the Supreme Court was compatible with the Unfair Terms Directive, the ECJ ultimately answered in the negative. The ECJ found that limiting the temporal effects of the finding of invalidity would undermine its dissuasive effect, rooted in the principle of effectiveness. The Court did not explicitly frame the issue in terms of a contrast between stability and protection, thus adopting a narrower approach to the question. At the same time, the Court notably departed from the Opinion of Advocate General Mengozzi, who instead engaged more openly with the background of the case and clearly referred to a tension between consumer protection and financial stability, striking a balance in favour of stability. The Advocate General recognized, approving of the approach of the Spanish Supreme Court, that "the stability of an economic sector . . . is a concern shared by the EU legal order".[226] There is in fact a range of cases in other domains, particularly in the health sector, which involve delicate conflicts between EU rights and the stability of national social security systems, and in which considerations relating to the latter have been deemed capable of justifying some limitations to the former.[227] With regard to consumer protection, nonetheless, broader considerations relating to the stability of the financial sector were not accepted by the ECJ, as the principle of effectiveness played a more prominent role.

223. Spanish Supreme Court, judgment No. 139/2015, 9(4).

224. See Italian Constitutional Court, judgment No. 10/2015 of 9 Feb. 2015. For a discussion see Faraguna, "The economic crisis as a threat to the stability of the law: Recent developments in the case law of the Italian Constitutional Court", 8 HJRL (2016), 249–270.

225. Portuguese Constitutional Court, No. 353/12. Summary in English available at <www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html>.

226. Opinion of A.G. Mengozzi in Joined Cases C-154, 307 & 308/15, EU:C:2016:552, para 74.

227. Case C-157/99, *Geraets-Smits* v. *Stichting Ziekenfonds*, EU:C:2001:404. Most recently, Case C-243/19, *Veselī bas ministrija*, EU:C:2020:872.

5. Trade-offs and offshoots

Finding univocal trends in the range of disparate cases which have been considered is not straightforward. It appears that while in some instances financial stability is regarded as a goal of paramount importance which justifies compressions of shareholder and investor protection in light of a burden-sharing philosophy, the same has not happened in other circumstances. In consumer contract law in particular, the ECJ avoided accepting arguments based on stability, even though it was explicitly advised to do so. There are in fact good reasons for requiring investors to bear part of the costs of bank failure,[228] and while stability might justify limitations to investor protection when it comes to their property and corporate rights, it does not necessarily do so when it comes to the protection of the consumer in certain contractual relations such as, notably, mortgage agreements: financial stability means different things in the context of investments and consumer debts. In fact, shareholders and investors are the, theoretically well-informed, holders of risky financial instruments while the consumer is understood to be risk-adverse.

At the same time, the category of the small investor remains somehow ambiguous. While a complex system of statutory rights is specifically linked to retail investment services, the distinction between institutional and small investors has not been decisive in cases in which State measures aimed at stability impacted on the rights of both classes. In *Mamatas*, the ECtHR stressed that investing in bonds is not a risk-free activity[229] and rejected the claim based on an alleged discrimination between majority and holdout bondholders – the former being institutional investors and the latter being unsophisticated retail investors – pointing out the difficulty in drawing that distinction,[230] the volatility of the bond market[231] and, tellingly, the negative repercussions on the Greek economy of excluding some investors from the haircut.[232] Courts also found against the investors in the Northern Rock cases which involved complaints from both retail shareholders, who held shares for retirement purposes, and hedge funds. In that regard, it has been speculated that, perhaps, "a group of retail investors who had held the shares for long periods of time might have received a somewhat more sympathetic hearing

228. Chalmers, Davies and Monti, op. cit. *supra* note 104, p. 1004.

229. Appl. Nos. 63066/14, 64297/14 and 66106/14, *Mamatas*, cited *supra* note 194, para 117.

230. Ibid., para 137.

231. Ibid., para 136.

232. Ibid., para 138.

from both courts".[233] Regulatory reforms promoted to increase financial stability as well as judgments favourable to consumers in financial transactions aim at ensuring that unsophisticated investors are not offered risky products.

Importantly, the nature of the subjects involved in the disputes is also particularly relevant. References to financial stability play one role when they are invoked by public entities to justify a compression of private rights – although measures might still be reviewed in light of fundamental rights – and a different, apparently less successful, role in the context of litigations between private parties, where the instability of the system at large is feared as a possible consequential effect of decisions which might immediately impact on the financial stability of a firm. In that latter context, it has been suggested in the literature that, at least at the present stage of the legal evolution, "financial stability concerns invoked by the firms, and not supported by legal provisions, do not justify a reduction of the standard of protection for retail clients".[234]

Does the approach of the ECJ in consumer law possibly mean that consumer protection remains conceptually shielded against broader macroeconomic considerations, to the point that in practice it is likely always to prevail in the case of a conflict? This is not likely to be the case. Private law already strikes balances between opposing interests in light of macroeconomic objectives, pursuing social policy and possibly rejecting solutions which are economically undesirable or inefficient.[235] Predominant interpretations of contract law doctrines already represent the outcome of a balancing of interests where different conceptions of stability can play a role,[236] while the above-mentioned reforms to EU consumer law are in fact an attempt to strike a new balance between opposing private interests.

233. Waibel, "ECHR leaves Northern Rock shareholders out in the cold", *EJIL:Talk!*, 3 Aug. 2012, available at <www.ejiltalk.org/echr-leaves-northern-rock-shareholders-out-in-the-cold/>.

234. Della Negra, op. cit. *supra* note 60, p. 189.

235. As is well known, the idea that in particular the common law, as opposed to legislation, is economically efficient was advocated by early law and economics scholars, see Ehrlich and Posner, "An economic analysis of legal rulemaking", 3 *Journal of Legal Studies* (1974), 257–286.

236. The doctrine of frustration or change of circumstances might offer an illustration. The difficult application of the doctrine as a tool to invalidate excessively onerous financial contracts in the wake of the GFC is rooted in the fact that the law circumscribes the application of the doctrine to exceptional circumstances in order to avoid it being used as an escape route from bad bargains, favouring legal certainty and stability of the contract over possibly opposite considerations. For a comparative overview of the relevance of that doctrine in the GFC, see the contributions in Başoğlu (Ed.), *The Effects of Financial Crises on the Binding Force of Contracts – Renegotiation, Rescission or Revision* (Springer, 2016).

On occasion, and in particular when it is necessary to foster innovative interpretations, judges might explicitly refer to policy considerations to reach their decisions, as for instance – sticking with the area of financial services – in the famous House of Lords decision in *Barclays* v. *O'Brien*[237] on undue influence, based on the necessity to mediate between surety protection and the need to maintain the functioning of the credit market.[238] In other cases, the balancing between stability and protection, even when not explicitly articulated, might be mediated through the application of open-ended doctrines: again in *Gutiérrez Naranjo*, the ECJ's reasoning was rooted in the necessity to ensure the principle of effectiveness. Yet effectiveness is a contested notion which has served the aim of achieving different purposes in the jurisprudence of the ECJ,[239] even within the same area of consumer protection,[240] becoming an instrument through which opposite exigencies have been balanced and some interests have been promoted over others. In this sense, the reluctance of the ECJ to engage in macroeconomic considerations in *Gutiérrez Naranjo* can be understood as an expression of a macroeconomic consideration itself: by refusing to support the concerns related to the economic situation of one party, i.e. the banks, the Court ultimately protected the interests of another, i.e. the consumer debtor. Accepting an argument based on the macroeconomic dimension of the dispute would have been detrimental to the socioeconomic rights of the consumer, in contrast to previous "constitutionalized" consumer law cases exemplified by *Aziz*,[241] where precisely that recognition contributed to consumer and debtor protection.[242]

In sum, contrary to the impression that it is a coherent notion which equally irradiates in the whole legal system, financial stability appears to play different roles when considered in different contexts, where it has to be balanced with the need to protect disparate subjects and values.

In light of the above-mentioned tensions and trade-offs, it is clear why the 2017 Consumer Financial Services Action Plan by the European Commission declared that "EU law aims to strike a balance between the freedom to provide financial services and sufficient safeguards for consumers and market

237. *Barclays Bank plc* v. *O'Brien*, [1993] UKHL 6.

238. See Collins, "Utility and rights in common law reasoning: Rebalancing private law through constitutionalization", 30 *Dalhousie Law Journal* (2007), 1–25.

239. Episcopo, "Judicial law-making and the principle of effectiveness in EU (private) law", Working Papers Jean Monnet Chair European Private Law, Working Paper 1/2019.

240. Della Negra, "The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: *Sanchez Morcillo* and *Kušinová*", 52 CML Rev. (2015), 1009–1032.

241. Case C-415/11, *Mohamed Aziz* v. *Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, EU:C:2013:164.

242. In this sense, see C. Mak, "*Gutiérrez Naranjo*: On limits in law and limits of law", 43 EL Rev. (2018), 447–459.

stability".[243] Depending on the way in which that balance is struck, further collateral effects might also be produced. Indirectly recognizing the tension between conflicting objectives, the MCD hints at the necessity that "adequate alternative arrangements are in place to ensure that policy objectives relating to financial stability and the internal market can be met without impeding financial inclusion and access to credit".[244] The move towards stability has, in fact, a restrictive effect which in turn produces financial exclusion, raising the puzzling question whether financial inclusion is best achieved through increased protection or increased access. Are consumers better off included in a possibly risky financial market or when they are kept out of it for their own good? This question, which has long been discussed in consumer law and economics,[245] cannot in fact ever aspire to a definitive and univocal answer, as the choice between access and protection will depend on a balancing exercise which is, itself, unstable. The level of protection or exclusion which is acceptable depends on decisions which need to take into account a plurality of variables, ranging from the safety-net provisions provided for by the welfare State[246] to the level of competition in the market.

6. Conclusion

Three key elements emerge at the end of these considerations. First, especially in the last decade, an international economic policy of financial stability has arisen which is capable of justifying a new instrumentalization of private law. Second, while financial stability and consumer protection might appear to be mutually reinforcing, that development should be considered with a cautious attitude, as the incorporation of stability considerations within private law produces, of necessity, tensions with other values underlying that field. Third, as emerged by looking at the European multilevel system, the tensions between those values can be solved differently in different contexts, casting further doubts on the consistency of the notion of financial stability, which now appears to play different roles in various areas where it has to be balanced with the need to protect different subjects.

For those who share the widespread criticisms against forms of investor and consumer protection based (solely) on information, the international

243. Commission Communication, "Consumer Financial Services Action Plan: Better Products, More Choice", COM(2017)139 final, 3.1.

244. MCD, Recital 17.

245. Cayne and Trebilcock, "Market considerations in the formulation of consumer protection policy", 23 *University of Toronto Law Journal* (1973), 396–430, at 427.

246. See Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts* (Bloomsbury/Hart, 2017).

emergence of financial stability, chipping away at competition and sowing its seeds in private law, might appear as an improvement in terms of consumer protection, even leaving aside the question of its possible exclusionary side effects and of the systemic repercussions of possibly flawed regulations. Yet, the suggestion that protection might simply follow stability or stability might follow protection is debatable, because the coexistence of the goals will demand trade-offs. Consequently, the interplay between the notions cannot also mean interchangeability, as if consumer protection in private law were an alternative to financial regulation of business conduct and vice versa. The MCD provides yet another example. Both the Directive and its commentators rightly emphasize that its policy considerations find their roots in the under-regulation of the US subprime mortgage market. It is also true, however, that a more crucial role in that crisis was played by the securitization of underperforming loans, so that a regulatory emphasis on the origination of the loan might be only partially successful – or not successful at all – in addressing the key issues of financial stability, if financial regulation does not sufficiently address further aspects of the market. This should not be taken as an argument against instrumentalization of private law per se, which would presuppose an ideological view of private law as apolitical and detached from its macroeconomic context. On the contrary, it calls for a comprehensive approach which considers the necessary and mutual interplay between the regulatory environment and private law in the pursuit of given socio-economic objectives. The concrete meaning of the abstract notion of stability will be determined by that interaction.