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Abstract

This comment seeks to provide a conceptual framework for analysing the Banking Union's implications for private law. After discussing how and in what form the Banking Union can engender potentially relevant regulatory norms, it identifies the general ways whereby these can be recognised in private law and translated into private rights and/or duties. It then responds to a common argument against translation, namely, that the public nature of the regulatory regime's goals and concerns hinders its normative expansion in the realm of private law. On a more practical level, it provides a tentative catalogue of private legal relations likely to be affected by the Banking Union.

Keywords

Banking Union, SSM, SRM, EBA, Banking regulation, Single rulebook, Private remedies, Regulatory duties, Civil liability.

1. Introduction*

The debate on the interaction between governmental and business actors, and between norms of public and private law, in the field of financial regulation may not be exhaustive, but it is not new either.[1] Many of the existing contributions focus on the role of collective private organisations or lobbies in the development of public or publicly enforced standards of financial behaviour[2] or, more generally, on the ways in which such private organisations participate in regulatory regimes.[3] In a thoughtful and topical essay,[4] Stefan Grundmann moves in another direction. He contemplates the likely impact of the euro area's nascent Banking Union – that is, of a regulatory regime of supranational and public character – on private law and private relationships. Thus, following a concise discussion of the Banking Union's institutional construction, Grundmann asks whether, in view of their goals and method of enforcement, its regulatory norms can and should be translated into norms of private law, shaping private rights and duties. He then identifies specific areas of private law where such translation might be expected to take place.

This comment seeks to provide a conceptual framework for analysing the Banking Union's implications for private law. After discussing how and in what form the Banking Union can engender potentially relevant regulatory norms (Section 2), it identifies the general ways whereby these can be recognised in private law and translated into private rights and/or duties (Section 3). It then responds to a common argument against translation, namely, that the public nature of the regulatory regime's goals and concerns hinders its normative expansion in the realm of private law (Section 4). On a more practical level, it provides a tentative catalogue of private legal relations likely to be affected by the Banking Union (Section 5).

2. Regulatory Law of the Banking Union

In a nutshell, the Banking Union is a streamlined and highly centralised regime for the supervision and resolution of banks in the euro area (and potentially beyond it, since non-euro area Member States can join in on a voluntary basis), based on a novel, complex and tiered institutional set-up.[5] Although it reserves specific operational roles for national supervisors and resolution officials, for the truly critical decisions it relies on supranational decision-making, especially with regard to the largest and most systemically important credit institutions. Its two-pronged institutional construction comprises a Single Supervisory Mechanism (SSM) and a separate Single Resolution Mechanism (SRM).

The SSM is an integrated organisational framework for banks' prudential supervision (but not for conduct-of-business and/or consumer-related regulation).[6] It is founded on two legal instruments: a Regulation on the organisation and procedures of the SSM itself (SSM Regulation),[7] establishing the ECB's role as the Banking Union's ultimate supervisory authority; and an accompanying instrument, which amended the legal framework of the European Banking Authority (EBA) for the purpose of ensuring a balance between the countries of the Banking Union and the non-participating Member

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* The author thanks Jens-Hinrich Binder, Jenny Giotaki and Vassilios Tountopoulos for valuable observations.

1 E.g., Norton (2003); Gorton (2003).

2 E.g., Faerman et al. (2001).

3 E.g., Mosley (2009); Cafaggi (2011); Backer (2011); Pagliari (2012).

4 Grundmann (2015).

5 For an initial overall assessment, see Moloney (2014a).

6 See Gortsos (2015).

7 Regulation (EU) No 1024/2013, OJ 2013 L 287/63.

States in the EBA's decision-making procedures.[8] Within the SSM, the ECB is entrusted with direct supervisory responsibility for large, systemically important credit institutions. With regard to 'less significant' credit institutions, the ECB is responsible for their authorisation as well as for the vetting of major changes in the shareholder structure; the ongoing supervision is normally left to the national supervisory authorities on a home-country basis,[9] although there are reserve powers whereby the ECB can take over the relevant tasks as well. The ECB is also responsible for the overall coordination, by means of regulations, guidelines or general instructions, of the national supervisory policies.

The ECB's competence extends to the adoption of appropriate corrective measures when a bank under its direct supervisory responsibility has crossed the threshold for early intervention.[10] If, however, a bank is found to be not merely weak, but non-viable, its resolution will be carried out by the Banking Union's second mechanism, the SRM.[11] The SRM includes centralised decision-making procedures for the resolution of ECB-supervised banks, supported by common financial arrangements in the form of a Single Resolution Fund (SRF) (but not by common deposit guarantee arrangements, since the system of separate national DGSs has been retained). The operation of the SRM is based on a Regulation establishing a Single Resolution Board (SRB) as the central resolution authority and setting out the decision-making procedures for resolution (SRM Regulation).[12]

Significantly, both mechanisms will apply, in their respective fields, the relevant norms of the pan-European 'single rulebook'. The single rulebook was not designed with specific reference to the euro area or the Banking Union. In fact, both the concept and the expression clearly predate the Banking Union project: the European Council called for the establishment of a 'European single rule book applicable to all financial institutions in the Single Market' as early as June 2009;[13] and much of the legislative work on the rulebook's key components had already been done before the summer of 2012, when the Spanish crisis triggered the move to a Banking Union. Moreover, the single rulebook applies uniformly in all EU Member States (and in the three other countries of the EEA, once the EEA Joint Committee amends the EEA Agreement for the purpose of extending the applicability of the relevant instruments to them), even though specific differentiations are possible on matters relating primarily to the operation of the monetary union and its economy, rather than the single market. Nonetheless, the single rulebook was retrospectively identified as one of the foundational elements of the Banking Union, alongside the SSM and the SRM.

The single rulebook includes a fully harmonised prudential framework for credit institutions which are still going concerns, as well as norms establishing a structured approach for the recovery of problem banks and the resolution of non-viable or failed ones. The prudential framework takes the form of two basic instruments, the Capital Requirements Directive (CRD IV)[14] and the Capital Requirements Regulation (CRR),[15] both of which were adopted according to the ordinary legislative procedure, and a very large number of accompanying delegated and implementing acts, whose preparation is entrusted to the EBA and their final adoption to the Commission. Issues relating to supervisory interventions in weak banks and, particularly, to the resolution of failed ones are governed by another basic instrument, the Bank Recovery and Resolution Directive (BRRD),[16] which is also supported by numerous secondary measures.

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[8] Regulation (EU) No 1022/2013, OJ 2013 L 287/5.

[9] SSM Regulation, Art. 6.

[10] Directive 2014/59/EU, OJ 2014 L 173/190 (BRRD), Arts. 27-30; and SRM Regulation, Art. 13.

[11] For a concise description, see European Commission (2014).

[12] Regulation (EU) No 806/2014, OJ 2014 L 225/1.

[13] European Council Conclusions, 19 June 2009. See also European Council Conclusions, 18 October 2012.

[14] Directive 2013/36/EU, OJ 2013 L 176/338.

[15] Regulation (EU) No 575/2013, OJ 2013 L 176/1.

[16] Directive 2014/59/EU, OJ 2014 L 173/190.

Given that 'single rulebook' is a moniker, rather than a term of art,[17] one could use it to describe solely the European regulatory norms of an essentially prudential nature, that is, those aiming at risk avoidance or risk containment at the level of the individual bank, as well as at systemic stability at the macro level.[18] In this central sense, the rulebook would include the aforementioned and certain closely related instruments, such as the Deposit Guarantee Schemes Directive,[19] the Financial Conglomerates Directive[20] and the Electronic Money **Directive**.[21] However, one could also use the expression to describe the entire corpus of harmonised rules of European banking law.[22] The latter sense is more consistent with the EBA's mandate, which encompasses regulatory functions both in the prudential field and in the field of transactional and conduct-of-business regulation.[23] This would bring into the picture those instruments of European law which are directly and primarily concerned with banking transactions, such as the Payment Services Directive,[24] the Consumer Credit Directive,[25] the Mortgage Credit Directive,[26] the Distance Marketing of Consumer Financial Services Directive,[27] the Third Money Laundering Directive,[28] or the provisions in MiFID II[29] setting out conduct-of-business obligations for financial intermediaries, including credit institutions, offering investment services to their clients.

We can thus distinguish between three aspects of the emerging legal and regulatory regime: (a) the norms setting up the institutional framework of the SSM and the SRM and governing their operation; (b) the core of the single rulebook, which encompasses norms of essentially prudential intent; and (c) the penumbra of the single rulebook, covering norms primarily directed at banking transactions and market activities and the quality of banks' relationships with their clients and counterparties. The norms in the first category are constitutive of the Banking Union and applicable only within its geographic limits. Their content is primarily organisational and procedural, rather than substantive. As such, they can have only limited, if any, resonance in private law. In contrast, the single rulebook (whose legal effect goes beyond the Banking Union, as already explained) contains substantive norms, which can potentially be of considerable significance for private law. From this perspective, however, there is an evident difference between the prudential core and the transactional penumbra. Despite their extensive reliance on administrative tools, the non-prudential instruments are specifically designed to shape the contractual behaviour of credit institutions and their individual relationships with clients; they are thus indelibly linked to matters of private law. A similar linkage to private-law matters can only occasionally be observed in the prudential instruments.

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17 The term 'single rulebook' is used twenty times in the preambles to the various instruments setting up the Banking Union or establishing the Union's basic prudential framework for credit institutions, but not once in their operative provisions; SSM Regulation, Rec. (7), (11)-(12), (30)-(32), (87); Regulation 1022/2013, Rec. (2), (4), (7), (11); SRM Regulation, Rec. (5), (7), (11), (35); CRD IV, Rec. (9)-(10); and CRR, Rec. 14. In most cases, the reference is simply to the 'single rulebook for financial services in the Union', without further explanation.

18 Thus SRM Regulation, Rec. (11).

19 Directive 2014/49/EU, OJ 2014 L 173/149.

20 Directive 2002/87/EC, OJ 2003 L 35/1.

21 Directive 2009/110/EC, OJ 2009 L 267/7.

22 This is the meaning implied in the references to a single rulebook in SSM Regulation, Rec. (31), SRM Regulation, Rec. (35), CRD IV, Rec. (10) and CRR, Rec. (14). Similar references can be found in the earlier instrument setting up the EBA, Regulation (EU) No 1093/2010, OJ 2010 L 331/12 (Regulation establishing the EBA), Rec. (5), (22).

23 Regulation establishing the EBA, Art. 1(2)-(3) and (5), as amended.

24 Directive 2007/64/EC, OJ 2007 L 319/1.

25 Directive 2008/48/EC, OJ 2008 L 133/66.

26 Directive 2014/17/EU, OJ 2014 L 60/34.

27 Directive 2002/65/EC, OJ 2002 L 271/16.

28 Directive 2005/60/EC, OJ 2005 L 309/15.

29 Directive 2014/65/EU, OJ 2014 L 173/349.

Since the precise effect of regulatory rules on market practice frequently depends on the approach and interpretations of their administrative enforcers, it may be expected that the intensity and uniformity of the single rulebook's impact on private behaviour will increase as the banking supervisory methodologies and practices converge at the European level. In this context, the establishment by the EBA of common regulatory and supervisory standards and practices[30] and the development of a supervisory handbook, aimed at ensuring cross-national consistency of the supervisory work by standardising methodologies and processes,[31] may also contribute to imprinting the European regulatory choices on banks' commercial behaviour and business organisation in a more stable and visible way, thus further shaping standard private practice. In particular, the supervisory handbook, despite its non-binding and confidential character, can exercise a strong influence in the direction of a unified supervisory approach, both in the prudential area and in connection to consumer protection.[32] Nonetheless, it remains to be seen how this facet of the EBA's work, which is supposed to be of pan-European relevance, will be coordinated with the ECB's own power to adopt regulations, guidelines and recommendations for the purpose of organising the SSM's supervisory work within the narrower, but more coherent regulatory space of the Banking Union.[33]

3. Regulatory Norms As Private Obligations

It is evident that the financial sector's need to comply with its regulatory obligations exercises a strong influence on the development of private practice. Depending on the case, both prudential and transactions-orientated provisions are bound to influence the behaviour of the private parties at which they are directed and to shape the banks' internal organisation, common market arrangements and contractual relations with individual clients. This structuring influence of compliance does not require that the relevant regulatory duties be translated into private rights or duties and enforced in private law. The direct reflection of the regulatory duties in private law, however, is also possible. This can be highly significant for the overall dynamics of enforcement of the rules as well as for the situation of particular parties in case of breach.

One should distinguish clearly between the two levels at which particular regulatory norms may be converted into private obligations and private rights of action: the norms' private enforceability may be required by European law; alternatively, the private effects of the norms may be recognised merely at the national level, that is, in the domestic legislation or in the jurisprudence of individual Member States.

For historical, political and practical reasons, in most cases the instruments of European law regulating economic activities are perceived as falling within the field of public economic law, not private law; they often include requirements regarding their implementation through national administrative measures, but remain silent about their private-law implications.[34] In an increasing number of cases, however, the legislative texts include provisions on private rights of action. This applies, for instance, to violations of provisions protecting consumers of goods and services.[35] Another conspicuous example is competition law, where, after decades of exclusive insistence on public enforcement, European law currently not only mandates that private actions for damages for breaches

30 Regulation establishing the EBA, as amended, Art. 8(1)(a).

31 Ibid, Art. 8(1)(aa) and 29(2).

32 Regulation 1022/2013, Rec. (7).

33 SSM Regulation, Art. 4(3), second sub-para.; cf. CRD IV, Rec. (9), (10).

34 See, e.g., Cafaggi and Muir Watt (2009); Reich (2010).

35 See, e.g., Directive 85/374/EEC, OJ 1985 L 210/29, on liability for defective products; Directive 2009/22/EC, OJ 2009 L 110/30, on injunctions for the protection of consumers' interests; Directive 2011/83/EU, OJ 2011 L 304/64, on consumer rights; and (in untypical legal form) Regulation (EC) No 261/2004, OJ 2004 L 46/1, on compensation and assistance to airline passengers.

of the relevant rules be available under national law, but goes on to harmonise most aspects of the applicable civil liability regime.[36] Private rights and remedies may also be recognised in secondary instruments of European law (directives and regulations) in less developed form, through provisions framed in general terms, asserting the principle of private actionability without going into details,[37] and perhaps even implicitly, through mere references to the resolution of private disputes. Finally, the availability of private remedies for breaches of European law may be recognised judicially by the Court of Justice of the European Union (CJEU) when interpreting the relevant instruments.[38]

In national law, the private enforcement of a European regulatory norm may be established by legislative fiat, as an express complement to the administrative or criminal system of enforcement. Alternatively, the courts may recognise the breach of the norm as a self-standing cause of action (such as civil liability for breach of statutory duty or a mandatory rule of law) or, where this is not possible, reinterpret the general standards of civil liability in line with the substantive duty established in regulatory law.[39] In all cases, parallel public and private proceedings for one and the same case of misconduct, as defined in public law, will be possible.

The cognisance of a regulatory duty in private law will generally serve to extend the liability of the duty holder; but in certain cases it may operate to restrict it, or to give it a concrete content, by confining the applicable general behavioural standards (whose precise content would otherwise be ascertainable only *ex post* and on the basis of the facts of the case) to the more specific, and possibly more formal and procedural, requirement of public law.[40] In this manner, compliance with the regulatory norm may provide an effective safe harbour against more demanding interpretations of the same standards. This indirect restrictive result will be more likely to affect national litigation when the cause of action is recognised in uniform terms in European law. In rare cases, European law may even exclude liability altogether in circumstances where a remedy would otherwise be available in national contract or tort law.[41]

This does not mean that private remedies for breaches of norms in the single rulebook are, or are likely to become, ubiquitous. As already mentioned, a growing body of rules in secondary European legislation provide explicitly for private actions (including class actions). The trend, however, is less pronounced in relation to financial services, and particularly weak in the field of banking. Even in the area of securities regulation, where the link between regulatory intervention and protection of individual rights is much closer than in prudential regulation, European legislation only rarely makes explicit provision for private remedies.[42] At the national level too, the matter remains controversial,

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36 Directive 2014/104/EU, OJ 2014 L 349/1. See Hüschelrath and Schweitzer (2014).

37 As in the case of intellectual property law, Directive 2004/48/EC, OJ 2004 L 195/16.

38 Prior to the enactment of Directive 2014/104/EU, the availability of damages for violations of EU antitrust rules had been recognised judicially, Case C-453/99 *Courage Ltd* v *Crehan* [2001] ECR I-6297, paras. 24, 26, 36.

39 As in the case law discussed in Della Negra (2014). Cf. Cherednychenko (2014b); Cherednychenko (2015).

40 The regulatory rules may thus turn into 'maximum standards of protection' in private law; Cherednychenko (2014b), at pp 671–674.

41 E.g., Directive 2009/65/EC, OJ 2009 L 302/32 (UCITSs IV Directive), Art. 79(2) (even though it is rather unlikely that national laws might recognise liability in the excluded circumstances).

42 Moloney (2014b), at pp 414-415, 950-951, 968-70. For exceptions, see Directive 2003/71/EC, OJ 2003 L 345/64 (Prospectus Directive), Art. 6(2); Directive 2004/109/EC, OJ 2004 L 390/38 (Transparency Directive), Art. 7; Regulation (EC) No 1060/2009, OJ 2009 L 302/1 (Credit Rating Agencies Regulation), as amended, Art. 35a. A harmonised liability regime in favour of retail clients for breaches by investment service providers (including banks) of conduct-of-business rules was proposed at one point, but eventually failed to find its way into MiFID II. Nonetheless, MiFID II, Art. 69(2), third sub-para., provides that 'Member States shall ensure that mechanisms are in place to ensure that compensation may be paid or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of [the investment services regime]'.

with the liability regime varying widely across countries.[43] A similar situation pertains in relation to classic retail banking activities, such as consumer and mortgage credit, where the applicable directives fail to specify the private-law consequences of infringements of their norms.[44] The provision of payment services stands apart, since the relevant Directive includes numerous liability rules.[45] On the other hand, the creation of effective mechanisms of alternative dispute resolution for retail users of financial services is a recurring theme of directives in both the securities[46] and the banking field.[47] This reflects the European legislators' concern for the development of practical and cost-efficient remedies in areas where recourse to the courts is an inconvenient solution for most aggrieved persons. However, the insistence on dispute resolution mechanisms presupposes that retail clients can actually have valid private claims; it should thus be seen as an implicit expression of a legislative intention to create rights of action for breach of the directives' protective norms.

In these transactional areas, where protecting clients is a central concern, the dearth of European provisions on private remedies is probably due less to a lack of appreciation of the benefits of civil liability for the quality of the intended protection than to the grave difficulties inherent in the attempt to harmonise the national liability regimes. The complexities and potential unintended consequences of the harmonisation exercise are reinforced by a reluctance to inflict local and piecemeal changes on the supposedly coherent structures of national private laws. On the other hand, the possibility of alignment of the public with the private duties and remedies at the national level is left intact. Thus, rather than suggesting a radical divergence of the two branches of law, the absence of European norms on civil liability may point to the need for decentralised translation of the substantive regulatory requirements into the local idiom of private law.

The matter **takes** on **a different complexion** when we turn to prudential regulation – the core subject of the single rulebook and the primary concern of the Banking Union. Here, there is a complete absence of European provisions on civil liability for regulatory infractions.[48] The situation is not much different at the national level. This lack of private remedies almost certainly reflects the belief that the objectives of the prudential regime are of a purely public character as well as that private litigation is inherently unsuitable as an enforcement tool in this area (a topic to which we will return in Section 5).

4. Public Goals and Private Obligations

The goals of the Banking Union are examined carefully in Grundmann's essay. It is asked, in particular, whether these diverge fundamentally from the goals of private law, so as to preclude the conversion of the Banking Union's norms into obligations of private law. Although Grundmann sees areas of convergence, it is interesting that he poses the question at all. Are goals truly critical to the issue in hand?

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43 See Veil (2010), at pp 417-421.

44 The Consumer Credit Directive, Art. 23, provides for 'penalties', thus envisaging an administrative system of enforcement, possibly supported by criminal penalties, but the term cannot include civil actions. More recently, the Mortgage Credit Directive, Art. 38, requires the establishment of 'sanctions', but is silent about the form that these should take.

45 Payment Services Directive.

46 MiFID II, Art. 75(1).

47 Payment Services Directive, Art. 83(1); Consumer Credit Directive, Art. 24(1); Mortgage Credit Directive, Art. 39(1).

48 Unusually, however, the Credit Rating Agencies Regulation – an instrument which, though not concerning credit institutions, was undoubtedly adopted for reasons of a prudential-systemic nature – includes a special civil liability regime in favour of investors and issuers who have suffered damage as a result of a credit rating agency's infringement of particular regulatory requirements, Credit Rating Agencies Regulation, as amended, Art. 35a.

The description of the goals of legal provisions as private or public is not uncommon, but it should be doubted whether it can be determinative of the relationship between public and private obligations. The public-private distinction itself is highly problematic:[49] its nature and criteria,[50] its historically contingent character,[51] and its malleability and possible collapse[52] are topics of perennial debate. In European law, especially, the boundaries between the public and the private sphere vary, depending on the issue;[53] and no attempt is made to classify measures in two separate branches. At the national level too, where the general distinction is upheld at both the procedural and the substantive level, it would be hardly plausible to maintain that the private law's distinctiveness is linked to the supposedly fundamental and inalterable nature of its goals. The province of private law was once identified with principles of formal equality, private autonomy and individual responsibility, as reflected in property rights, the free negotiation and strict enforcement of contracts and a generally free market; but today a large part of the scholarship emphasises notions of social responsibility, the law's role in balancing and regulating competing private interests and the need to protect the weaker parties in transactions. The preponderance of standard contracts and multilateral, network contractual relationships in modern practice, as well as the increasing awareness of the external effects of *inter partes* transacting, have also helped to introduce regulatory elements and public concerns into the very fabric of private law.

Occasionally, the continuing autonomy of national private law in relation to regulatory norms of European provenance is defended on the theory that a purely regulatory approach with public objectives may only provide an unvarying minimum level of individual protection, while the general standards of private laws can always be individuated and recalibrated *ex post*, in an attempt to achieve corrective justice and equity.[54] The argument assumes that, compared to regulatory law, traditional private law will tend to confer more complete protection on individual parties. However, it is by no means clear that all national systems of private law actually operate (nor that they should operate) in this manner to serve the interests of apparently weak parties. If anything, private law is internally conflicted. There are strong tensions between competing values of individualism and solidarity, legal certainty and *ex post* equity, formalism and open-ended standards,[55] which are resolved differently from country to country and time to time. Moreover, it is not self-evident that the separate evaluation of the same factual situation would result in a higher level of protection in private than in regulatory law. In fact, the opposite is highly likely, if, for instance, new types of protection introduced by European legislation are not given cognisance in national private law, because they cannot be brought under accepted headings of civil liability. The example of competition law may again serve as an example; but the same may apply to regulatory duties relating to banking transactions (for instance, consumer credit or mortgage contracts) or to certain conduct-of-business rules in securities regulation, whose breach is now subject to administrative sanctions, but may not necessarily provide a good basis for contractual or delictual professional liability. If so, bringing national private law in line with the new regulatory norms will actually increase the level of protection afforded to the users of financial services.

One should also consider an additional scenario, entailing the deliberate creation on the part of the legislator of novel civil rights of action for breach of regulatory duties, in a purely instrumental attempt to enlist private law in the service of regulatory objectives. One could object that this is an adulteration of private law and a violation of its integrity, but the possibility certainly exists. A well-

[49] E.g., Freedland and Auby (2006).

[50] E.g., Barnett (1986).

[51] E.g., Merryman (1968); Horwitz (1982).

[52] E.g., Kennedy (1982).

[53] See Sauter and Schepel (2009).

[54] See, e.g., Cherednychenko (2014a), at pp 490-491; and, in more nuanced terms, Marjosola (2014), at pp 566-570.

[55] Cf. Kennedy (1976).

established line of analysis addresses enforcement precisely in this manner, turning the remedies of administrative, private and criminal law into substitutable means for pursuing the legal system's various objectives (all of which are deemed to be, in one or another sense, 'public', just as the legal system itself is public).[56] On this view, enforcement tools should be chosen depending on their relative effectiveness and efficiency in bringing about the desired goal. Thus, the availability of civil liability and private rights of action may be accepted, either as a substitute for administrative or criminal enforcement or in parallel with them, purely on grounds of optimal enforcement. Clearly, there are inherent limits, since the various elements of a private action (theories of liability, norms of actionability or standing, *intra partes* procedure, evidential norms and standards of proof, principles of causation, forms and limits of the remedies) cannot be modified without affecting the quality and integrity of the adjudicative process[57] and its private and social costs. These practical limits, however, have little to do with the public nature of the regulatory goals, since the latter could easily dovetail with, and utilise, the narrow private interests that the availability of a civil right of action would incentivise to come forward.

In any event, the nature of the goals cannot erect a barrier to the private enforcement of regulatory norms if this is required by European legislation or by a national legislative instrument. In contrast, the question of goals becomes highly important in relation to the judicial recognition of private effect. It is well known that a putative legislative intention to protect private interests or to confer rights on individuals is a critical parameter in deciding whether the breach of a European norm (or, in the case of a directive, its non- or incorrect implementation) is actionable or not. This consideration is applied by the CJEU when deciding on a norm's pan-European effect,[58] as well as by the national courts, when considering liabilities from the residual prism of domestic private law.

In this context, the protective aim of each regulatory norm must be examined separately. However, Grundmann rightly points out that the goals animating the Banking Union project (including the reintegration of the euro area's banking markets, an exit from the vicious circle between financially weak banks and fiscally weak sovereigns, and the severance of links between regulators, politicians and banking interests at the national level[59]) cannot easily justify a reading of the relevant instruments as aiming at the protection of particular private interests. In his reading, the only goal which converges with those of private law is that of improving the supervision of cross-border banking groups by decisively applying a one-entity approach. Even the latter, however, cannot easily be converted into specific private obligations.

For Grundmann, the Banking Union's emphasis on public goals is one more example of the fundamentally instrumental character of European law, whose overriding objective is integration, and accordingly, of its limited ability to take into account individual private parties, pay due respect to their autonomy and their rights and properly balance their interests. It must be wondered whether integration is indeed a goal of 'public law' or a constitutive aspiration of the European project, which transcends the public law-private law divide. Paradoxically (if one subscribes to the view that integration is a goal of public law), according to the jurisprudence of the CJEU,[60] private rights of action must be recognised in relation to the breach of certain European norms, because this ensures their effectiveness (a concept serving precisely the purpose of integration). The principle of effectiveness can thus provide an independent basis for actionability.

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[56] See, e.g., Becker and Stigler (1974); Landes and Posner (1974); Shavell (1993); and, specifically in relation to the enforcement of financial (securities) regulation, Jackson and Roe (2009).

[57] Cf. Fuller 1978.

[58] Joined Cases C-6/90 and C-9/90 *Francovich et al.* [1991] ECR 1-5357, para. 39; Case C-91/92 *Faccini Dori* v *Recreb Srl* [1994] ECR I-3325, para. 27.

[59] SSM Regulation, Rec. 2-6.

[60] See Case C-453/99 *Courage*, para. 20.

In the past, effectiveness had only marginal practical implications in this direction; but this may be due to the legal form of the applicable European instruments, which were preponderantly directives. Directives cannot have full horizontal direct effect,[61] while the obligation of the Member States to transpose their norms with full effect tends to be limited to the establishment at the national level of the prescribed mechanisms of enforcement. Accordingly, where a directive does not require that civil remedies be available, the private-law consequences of an infraction are determined primarily by the internal legal order of each Member State.[62] As recently suggested by Tountopoulos,[63] however, the situation may be different if the measures are in the form of regulations – an increasingly common occurrence in European financial law: in the eyes of the CJEU, the uniform and effective enforcement of such fully unified norms may justify a more interventionist approach, including the recognition of private enforcement rights in appropriate cases.[64] Still, one should probably not expect dramatic developments in this direction. The components of the single rulebook whose subject matter makes them particularly suitable for private enforcement (that is, those containing harmonised transactional or conduct-of-business rules) are precisely those which retain the form of directives and whose enforcement is still left to a variety of national authorities, operating outside the SSM framework. Their lack of direct effect could thus combine with the principle of procedural autonomy of the Member States to impede a pan-European recognition of private rights of action by the CJEU.

5. Areas of Interaction

In his paper, Grundman identifies three areas of private law which can be strongly affected by the Banking Union: banks' corporate governance, resolution, and client relationships. It is worth examining briefly in what ways the regulatory norms may affect private law in each of these areas and elsewhere.

There can be no doubt that the business organisation and internal relations of banks are affected directly and profoundly by the post-crisis regulatory framework in a way unknown in the past. Then, prudential regulation was almost exclusively focused on the observance of a single capital adequacy ratio. Undoubtedly, the measurement methodology affected the relative cost faced by the banks when undertaking different types of transactions, and thus incentivised particular financial behaviours. But the banks' internal organisation and decision-making used to be largely unaffected by the regulatory system.[65] This 'black-box' approach has now been abandoned, and the prudential regime is increasingly concerned with internal governance. Alongside a much more complex and intrusive system of financial controls, the new regulatory arrangements cover a host of corporate matters, including banks' corporate governance, directors' and managers' duties, directors' remuneration, business plans and strategies, internal risk management practices, or even the structure of cross-border banking groups.[66] The introduction of structural controls, involving the separation of certain potentially risky trading activities from banks' deposit-taking business, is also under consideration. In all these respects, regulatory law is superimposed on the private law of business organisation and limits the freedom of choice of banks and their stakeholders. Talking here of a 'translation' would be

61 Case C-91/92 *Faccini Dori*, para. 20.

62 Case C-604/11 *Genil 48 SL, Comercial Hostelera de Grandes Vinos SL* v *Bankinter SA, Banco Bilbao Vizca Argentaria SA*, judgment of 30 May 2013, para. 57; Case C-174/12 *Hirmann* v *Immofinanz AG*, judgment of 19 December 2013, para. 40; cf. Grundmann (2013).

63 Tountopoulos (2014).

64 But not the establishment of remedies unknown in national law, since this would violate the principle of procedural autonomy of the Member States; Case C-432/05 *Unibet v Iustitiekanslern* [2007] ECR I-2271, paras. 40-42.

65 See, e.g., Tomasic (2011).

66 See Binder (2015).

deceptive: rather than being translated into private law, regulatory law simply takes over from it. Nor is the role of private enforcement likely to be significant in ensuring compliance with the new norms.

The regulatory regime's invasion of the field formerly occupied by private law is even more pronounced in relation to bank insolvency, where the BRRD's new resolution regime replaces altogether the procedures and criteria of general insolvency law, transfers the decision-making responsibility fully to the hands of administrative bodies and away from the courts, and gives primacy to the preservation of financial stability and the continuity of the banking intermediation function over the traditional evaluations and practices of insolvency law. In this area, the substantive claims and procedural rights of individual stakeholders must be reconceptualised within the parameters of the new regime in which they are absorbed.

Of course, one can still envisage specific factual situations where the breach of the regulatory norms would open the road to new forms of purely private claims. For instance, if a manager's contract of employment provides for remuneration in excess of what would be permissible under the CRD IV and its implementing legislation, the relevant clause may be invalid as contrary to a mandatory rule of law. Again, the regulatory environment may determine the standard of performance expected of a bank's staff in the private setting; thus, the failure of an officer to ensure compliance with the bank's regulatory obligations within his personal field of responsibility may justify his dismissal for cause or even, depending on the circumstances, give rise to a compensation claim.

More interesting than such incidental private effects is the question of direct civil liability of the bank and/or its directors and officers for breaches of prudential requirements *per se*. Traditionally, private litigation has been scarcely in evidence in the field of prudential regulation, and for good reason: over and above the aforementioned objection of principle relating to the system's exclusively public character, an attempt to apply normal principles of civil liability to a breach of the regulatory requirements would stumble on almost insurmountable practical problems. Most prudential norms are inherently unsuitable for compensatory claims, because in a pre-insolvency context their violation does not lead to direct and quantifiable harm, much less to damage to specific parties, but merely to a general weakening of the relevant institution's overall resilience.[67] Moreover, potential infringements are not easily observable. In combination, the lack of suitable plaintiffs, the evidential problems, the near impossibility of causally linking the infringements to specific and quantifiable losses (at least when the threshold of insolvency has not yet been crossed), all these and other technical factors suggest that, in general, damages are not an effective or appropriate means for the enforcement of prudential regulations. It is highly improbable that this will somehow change as a result of the Banking Union or of the new prudential norms in the CRD IV/CRR package.

However, it is not totally inconceivable that a special regime of civil liability might be introduced legislatively, for reasons of public policy. In order to be effective, such a system would need to substantially modify the traditional concepts and principles of civil liability. Europe might thus follow the US, with its long history of private enforcement of public regulatory statutes, based on modified liability rules and enhanced damages.[68] Indeed, American law already includes special provisions on the personal professional liability of directors who caused their bank's failure. It should be noted, however, that this is not a case of truly private enforcement: the civil claim can only be brought in the form of a derivative action by the Federal Deposit Insurance Corporation as receiver of the failed bank.[69] Remarkably, similar types of insolvency-linked professional liability may soon gain currency

[67] Theoretically, however, a bank in breach of prudential requirements could be pursued by competitors, or by stakeholders such as depositors, seeking injunctive or declaratory relief or specific performance; cf. Case C-253/00, *Muñoz and Superior Fruiticola* v *Frumar and Redbridge* [2002] ECR I-7289. This type of action would avoid some of the problems in relation to actions for damages, but would not provide meaningful incentives for potential plaintiffs and would in all likelihood be totally insignificant in terms of improving compliance with the rules.

[68] See Farhang (2010); Glover (2012).

[69] Federal Deposit Insurance Corporation (2015); May (2015).

in Europe, since one of the general principles governing the recently introduced resolution regime is the imposition in national law of civil or criminal liability on the natural and legal persons responsible for the failure of a credit institution.[70] This development would not represent a dramatic innovation, however, because it bears similarities with existing rules of the general insolvency law of certain European countries, such as the wrongful trading provision of UK law.[71]

Some authors propose going further than that, by creating special duties, standards of care and attendant liability regimes for key decision-makers (depending on the proposal, directors, senior managers and/or controlling shareholders) of all banks, or of systemically important ones, including when these are still going concerns.[72] For present purposes, it is sufficient to note that, whatever one's view on the merits of such proposals, the relevant theories of liability diverge extensively from the general law in terms of the identity of affected persons, their duties, the standards of proof and causation and/or the feasible remedies. They are thus unsuitable for judicial endorsement through the reinterpretation and individuation of the usual standards of civil liability; their adoption would almost certainly require explicit legislative intervention.

One area where the Banking Union is bound to lead to the development of the principles of private law at European level is that of state liability for faulty regulatory decisions. The fact that supranational institutions such as the ECB and the SRB (and, to a lesser extent, the EBA) are now directly responsible for front-line supervisory decision-making means that the resolution of grievances and the fate of civil claims can no longer be seen as a matter of national law. In this context, one must distinguish between, on the one hand, actions by third parties, such as depositors, who have suffered loss as a result of the failure of a credit institution and seek to recover their loss by turning against the regulatory and supervisory authorities on the theory that, if the latter had properly performed their responsibilities, the loss would have been avoided, and, on the other hand, actions by regulated institutions and/or their individual controllers, directors or staff, who may be directly harmed by a negative supervisory decision or action.

Significantly, as a result of the Europeanisation of the prudential regulatory regime, claims of the first category are less likely to succeed in the future. Indeed, the test of the regulatory norm's protective intent is likely to constitute a strong barrier to their claims. The test has already been applied by the ECJ to the supervision of credit institutions in the *Paul* case.[73] Decided in the context of the pre-SSM system, whereby supervisory responsibilities were allocated to the national competent authorities on a home-country basis, the case is authority for the principle that the European norms relating to prudential regulation are not intended to protect depositors or creditors individually, but the banking system at large. The protection that individual depositors must enjoy as a matter of European law is limited to the establishment of deposit guarantee schemes covering deposits at least up to the prescribed level; if a Member State has provided for the mandatory participation of credit institutions in a national scheme meeting the pan-European requirements, it will then be free to decide that the ongoing supervision of credit institutions is carried on only in the public interest and to deny individual claims for compensation for damage resulting from any supervisory failures.[74] At its time, the decision left open the possibility of a more 'generous' treatment of complainants in national law. However, the centralisation of prudential supervision in the Banking Union precludes divergent national interpretations regarding the nature of the supervisory responsibility of the competent authorities and, in particular, of the ECB. In this sense, irrespectively of any statutory immunity in

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70 BRRD, Art. 34(1)(3); and SRM Regulation, Art. 15(1)(e).

71 Insolvency Act 1986, s 214.

72 E.g., Schooner (2010); Bruner (2013), at pp 529, 560-561; Hill and McDonnell (2013); Armour and Gordon (2014). Existing reform proposals typically concern American law, but could be adapted to a European legal setting.

73 C-222/02 *Paul et al. v Bundesrepublik Deutschland* [2004] ECR I-9425.

74 Ibid, para. 47. See Binder (2005); and Tison (2005).

their favour, the new supranational supervisors may find protection in the *Paul* ruling against actions in damages based simply on the substandard performance of their duties, even where this is due to gross negligence or *faute lourde*.[75]

In contrast, the second category of potential claims cannot be foreclosed on grounds of principle. The civil liability of European institutions and bodies for illegal and harmful actions is well founded in the Treaties; [76] and the expansion of their jurisdiction in areas that are intrinsically linked to the personal interests of regulated persons will unavoidably generate factual situations where individual harm will be claimed and the conditions of liability will need to be defined.

One should, finally, consider the implications of the Banking Union for wholesale banking markets and practices. Much has already been said about the norms in the single rulebook concerning banking transactions and relations with (retail) clients and the ways in which such norms can be recognised in private law too. But wholesale transactions may be affected in a different manner by the Banking Union. The EBA's elaboration of the prudential rules and the ECB's supervisory interventions may be more important in this context than the various directives' consumerist norms. The multilateral character of inter-professional market-based transacting reduces the significance of decentralised contracting and litigation for the development of commercial practice, while increasing that of market-wide standardisation. The latter, however, is critically influenced by the financial institutions' collective interaction with the public authorities, their cooperation and mutual adaptation. Moreover, the shifting regulatory environment constitutes part of the financial and risk parameters within which market practice develops. Accordingly, as critically but less directly than in relation to banks' corporate governance, the official stance on prudential questions can exercise a very powerful shaping influence on the development of the standard market practice (including in relation to collateralisation), the standard documentation used by transacting parties and, potentially, the network contracts which underpin certain infrastructures.

[75] On the criteria of regulatory liability under various national laws, see Tison (2005), at pp 643-655.

[76] TFEU, Arts. 268, 340; Statute of the ECB and the ESCB, Art. 35.3.

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