Towards a Single Standard of Professional Secrecy for Financial Sector Supervisory Authorities: A Reform Proposal

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Towards a Single Standard of Professional Secrecy for Financial Sector Supervisory Authorities: A Reform Proposal

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Access to information; Banking supervision; Banks; Confidential information; EU law; Financial regulation; Harmonisation; Secrecy; Transparency

Abstract

Recent case law on the scope of professional secrecy for the supervisory authorities of the financial sector and on the measure of openness of their files highlights the lack of co-ordination among the silos of supervision and the absence of clear and uniform professional secrecy rules across the financial sector. The introduction of the Single Supervisory Mechanism (SSM) makes this situation more acute: notwithstanding a centralised system of banking supervision, different approaches may exist in respect of access to files, even when based on EU legislation. This contribution addresses the accountability of supervisory authorities and, notably the European Central Bank (ECB), from the perspective of access to supervisory files, as a prelude to possible follow-up proceedings for failing supervision. Recent judgments in the Altmann*,* Baumeister*,* Buccioni *and* UBS Europe *cases slowly move the case law on supervisory secrecy towards more openness, long after* Hillegom v Hillenius *(1984). The judgments make us wonder whether the absence of legislative co-ordination and questionable drafting is being remedied by the judiciary. The variety of legislative provisions and relevant recent case law form the backdrop of our proposal to adopt a Regulation on professional secrecy for supervisory authorities in the financial sector, which would institute a single standard directly applicable across Member States and supervisory authorities.*

Introduction

Transparency of public action is core in a democracy which affects to uphold the rule of law. Transparency is sometimes trumped by other considerations, giving secrecy precedence. The supervision of financial services is an area where professional secrecy is needed and minutely prescribed. The transparency of financial sector supervision has been a central issue in two cases before the Court of Justice of the European Union (CJEU), the *Baumeister*[1] case regarding the supervision of investment services under the Markets

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[1] *Bundesanstalt für Finanzdienstleistungsaufsicht v Baumeister* (C-15/16) EU:C:2018:464; [2018] Bus. L.R. 1730.

in Financial Instruments Directive I (MiFID I)[2] and the *Buccioni*[3] case regarding the supervision of banking under the Capital Requirements Directive IV (CRD IV).[4] A third case, *UBS Europe*,[5] fits into the picture that the CJEU follows a holistic approach on professional secrecy standards for financial supervision. In this contribution we discuss these cases as the basis of our proposal for a single standard of professional secrecy for financial sector supervisors, placing them in the context of the role of transparency in the accountability of independent central banks and supervisory authorities subject to confidentiality restraints. The cases show the slow (too slow, we argue) movement of the CJEU towards more openness, and highlight the lack of legislative co-ordination between the various sectors, reflecting the three silos of EU supervision: (1) banks and investments firms; (2) securities trading; and (3) insurance and pensions. Professional secrecy standards for the supervisory authorities are worded slightly differently and seem oddly unaligned, which is all the more remarkable since these supervisors are expected and even mandated to co-operate and co-ordinate over national and subsector boundaries. Judicial interpretation can only provide limited relief for the legislative lack of effective standard-setting that we perceive. The cases discussed provide ample reason for a fresh perspective on professional secrecy across the entire financial sector. Against this backdrop, the present contribution takes the bold step of proposing a single standard to be applied to all EU financial supervisors, in the service of remedying absent "legislative co-ordination" and "questionable drafting".[6]

Regulatory background—accountability through transparency v professional secrecy

Transparency is often seen as an element of the accountability of central banks and supervisory authorities. Accountability is core to the embedment of independent agencies in a democracy.[7] It can be variously defined.[8] In the context of central banks and supervisory authorities in the financial sector, we follow Lastra and Amtenbrink's definition of accountability as,

> "an obligation owed by one person (the accountable) to another (the accountee) according to which the former must give account of, explain and justify his actions or decisions against criteria of some kind, and take responsibility for any fault or damage."[9]

[2] Directive 2004/39 on markets in financial instruments amending Council Directives 85/611 and 93/6 and Directive 2000/12 of the European Parliament and of the Council and repealing Council Directive 93/22 [2004] OJ L145/1, subsequently amended; see consolidated text: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004L0039-20060428&from=EN* [Accessed 26 April 2019].

[3] *Buccioni v Banca d'Italia* (C-594/16) EU:C:2018:717; [2018] Bus. L.R. 2336.

[4] Directive 2013/36 of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87 and repealing Directives 2006/48 and 2006/49 [2013] OJ L176/338.

[5] *Proceedings brought by UBS Europe SE* (C-358/16) EU:C:2018:715; [2019] Bus. L.R. 61.

[6] Words used by Advocate General (AG) Bobek in his Opinion in *Buccioni v Banca d'Italia* (C-594/16) EU:C:2018:425 at [60] and [70] when referring to missing alignment between MiFiD I and CRD IV.

[7] We approve of what C. Goodhart and R. Lastra state in "Central Bank Accountability and Judicial Review" SUERF Policy Note Issue No.32 (2018): "Accountability—*ex ante* and *ex post*—is a constitutive part of the design of an independent agency in a democratic system, whose aim is to bring back the central bank to the system of checks and balances (*trias politica*)."

[8] See G. ter Kuile, L. Wissink and W. Bovenschen, "Tailor-made Accountability within the Single Supervisory Mechanism" (2015) 52 C.M.L. Rev. 155.

[9] F. Amtenbrink and R. Lastra, "Securing Democratic Accountability of Financial Regulatory Agencies—A Theoretical Framework" (2008) in R. de Mulder, *Mitigating Risk in the Context of Safety and Security: How Relevant is a Rational Approach?* (Rotterdam: Erasmus School of Law & Research School for Safety and Security (OMV), 2008), pp.115–132.

In a framework of democratic governance, as the EU professes to be,[10] accountability encompasses explanations and responsiveness to the representatives of the electorate[11]—which in the EU context means the European Parliament, and also the Council representing Member State governments—and judicial review.[12] It is the latter form of accountability that we focus on here.[13]

For both political and judicial accountability, the independence of central banks and supervisory authorities[14] is a hurdle to tackle, as is the measure of precision of the description of the public function to be exercised.[15] After all, the standard of review is derived from the statutory task: if this is clear and unequivocal, conduct can be more easily assessed than in case of multiple objectives.[16] This contribution focuses on prudential supervision so that accountability[17] and transparency for the monetary policy task of central banks will be disregarded.[18]

With the ECB[19] and national competent authorities[20] endowed with independence,[21] there are two barriers to tackle when holding them accountable: their intended distance from political decision-making and the potential breadth of their mandate. A third barrier, on which we concentrate in this contribution, is the transparency of the activities of the supervisor: without adequate information about the conduct to be

[10] Articles 2, 9–12 TEU.

[11] A wider scope than the term "parliamentary accountability" used by Lastra and Amtenbrink seems to imply. The distinction between *parliamentary* and *ministerial* accountability is introduced by E. Hüpkes, M. Quintyn and M. Taylor, "The Accountability of Financial Sector Supervisors: Principles and Practice", *IMF Working Paper WP/05/51* (2005), available at *https://www.imf.org/en/Publications/WP/Issues/2016/12/31/The-Accountability-of-Financial-Sector-Supervisors-Principles-and-Practice-18018* [Accessed 1 May 2019].

[12] Administrative review may be considered another element of accountability.

[13] Our attention goes to access to files. Other issues may be relevant for the effectiveness of judicial accountability of central banks and supervisors, such as the expertise of the courts in these specialised matters. A proposal to establish a special chamber at the CJEU was recently presented by Goodhart and Lastra, "Central Bank Accountability and Judicial Review" (2018).

[14] Or of any agency attributed with public functions to be pursued independently, e.g. competition law enforcement or supervising special areas (telecom, energy, and so on). Our attention is on the financial sector.

[15] Powerfully expressed as follows by P. Nicolaides, "Accountability of the ECB's Single Supervisory Mechanism: Evolving and Responsive", *CERiM Online Paper Series Paper* 10/2018 (2018), SSRN, *https://ssrn.com/abstract=3209864* [Accessed 24 April 2019]: "explanation and justification presuppose the existence of an explicit or implicit performance benchmark."

[16] As Amtenbrink and Lastra, "Securing Democratic Accountability of Financial Regulatory Agencies" in *Mitigating Risk in the Context of Safety and Security* (2008) rightly state: "The more specific the goals and standards the more effective accountability can be." Likewise, Hüpkes, Quintyn and Taylor, "The Accountability of Financial Sector Supervisors" (2005): "A well-defined statutory objective against which the agency's performance can be measured is traditionally viewed as a key requirement for holding independent agencies accountable." In the context of macro-prudential supervision (which concerns the stability of the financial system as a whole, to be distinguished from micro-prudential supervision, aiming at sound and safe individual businesses), the same point is made by A. Keller, "Independence, Accountability and Transparency: are the Conventional Accountability Mechanisms Suitable for the European Systemic Risk Board?" (2017) 28 *International Company and Commercial Law Review* 176: "The supervisors' mandate is not specific and is hard to measure, and hence it lacks a benchmark against which their performance can be assessed."

[17] On the intriguing issue of an independent central bank itself setting the inflation target by operationalising the Treaty mandate to "maintain price stability" (art.127(1) TFEU), considered justified by the CJEU: see *Proceedings brought by Weiss* (C-493/17) EU:C:2018:1000 at [54]–[56].

[18] Note that a holistic approach for the pursuit by the ECB of price stability (the objective of monetary policy) *and* financial stability (the goal of prudential supervision) is advocated by M. Goldmann, "United in Diversity: The Relationship between Monetary Policy and Prudential Supervision in the Banking Union" (2014) 14 *European Constitutional Law Review* 283, *https://doi.org/10.1017/S1574019618000184* [Accessed 24 April 2019].

[19] Article 130 TFEU; art.7 Statute of the ESCB and of the ECB.

[20] CRD IV art.4(4).

[21] Similarly, designated authorities under MiFiD II need to be independent: see Recitals 123 and 137 of the Preamble to this Directive.

assessed, whether by the political bodies or the judicial organs, accountability is an empty shell. We concur with Amtenbrink and Markakis, according to whom "transparency forms a crucial precondition for accountability."[22] For many years, transparency has been propagated, also by international bodies, as a key element[23] in the organisational set-up of financial supervision.[24] In the EU context, transparency[25] is codified as a general principle for all activities in art.15 TFEU and in the Access to Documents Regulation.[26] As transparency is specifically regulated in the context of supervision of the financial sector, we will not go into the wider field of (central bank) transparency.[27]

Transparency is counterbalanced by the need for professional secrecy, or law-imposed confidentiality.[28] The professional secrecy of the authorities supervising the financial system within the EU serves a number of interests. These include the effectiveness of supervision, the protection of business secrets of the supervised and their clients, and the smooth functioning of the single market in financial products which relies on joint oversight by dispersed authorities at the level of the Union and the Member States. Central to professional secrecy is the issue of trust, at least at three levels. First, the general public and individual counterparties need to trust the reliability of financial businesses, notably banks.[29] Secondly, the supervised need to trust the supervisor who receives a wealth of business information from the financial industry operators.[30] Thirdly, the financial sector supervisory authorities need to trust each other, as they are jointly

[22] F. Amtenbrink and M. Markakis, "Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism" (2019) 44 E.L. Rev. 3, 8.

[23] See Principle 2: Independence, accountability, resourcing and legal protection for supervisors of the Core Principles for Effective Banking Supervision, adopted by the Basel Committee on Banking Supervision (2012), *https://www.bis.org/publ/bcbs230.pdf* [Accessed 24 April 2019].

[24] International Monetary Fund (IMF), *Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principles* (September 1999), *https://www.imf.org/external/np/mae/mft/code/eng/code2e.pdf* [Accessed 24 April 2019].

[25] F. Coman-Kund, A. Karatzia and F. Amtenbrink, "The Transparency of the European Central Bank in the Single Supervisory Mechanism" (2018) 51 *Credit and Capital Markets—Kredit und Kapital* 55, *https://doi.org/10.3790/ccm.51.1.55* [Accessed 24 April 2019]: "the principle of transparency is undeniably part of the EU acquis."

[26] Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

[27] See D. Curtin, "'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency" (2017) 23 E.L.J. 28–44, *https://onlinelibrary.wiley.com/doi/full/10.1111/eulj.12211*; and P. van Cleynenbreugel, "Confidentiality behind transparent doors: The European Central Bank and the EU law principle of openness" (2018) 25 *Maastricht Journal of European and Comparative Law* 52–76, *https://journals.sagepub.com/doi/pdf/10.1177/1023263X18760546* [Both accessed 24 April 2019].

[28] An issue tangentially relevant to the matters we discuss, namely access by a journalist to documents containing business secrets and relating to commercial contracts of a publicly held bank under EU legislation (Directive 2003/98/ on the re-use of public sector information ([2003] OJ L 345/90) and the disclosure provisions applicable to banks under Regulation 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation 648/2012 [2013] OJ L321/6 (the CRR), was decided in a judgment of 14 November 2018 in *Nova Kreditna Banka Maribor d.d. v Republika Slovenija* (C-215/17) EU:C:2018:901 (at the time of writing not yet available in English).

[29] T. Duijkersloot, A. Karagianni and R. Kraaijeveld, "Political and Judicial Accountability in the EU Shared System of Banking Supervision and Enforcement" in M. Scholten and M. Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Cheltenham: Edward Elgar, 2017), pp.28–52, *https://doi.org/10.4337/9781786434630.00008* [Accessed 24 April 2019]: "The rationale underpinning those secrecy provisions has to do with the very nature of banking: confidence. To put it simply, history shows that if the public loses confidence in a specific bank, this could cause a run on the bank, resulting in the bankruptcy of that bank. It might even result in a loss of confidence in the banking system as a whole. The upshot of this has been the inclusion of secrecy provisions in the ESCB Statute, the SSMR and CRD IV as well as in national law."

[30] As is emphasised with an example from another relationship of trust by G. Zagouras, "On-site Inspections Conducted by the European Central Bank: Legal Considerations" (2018) 33 J.I.B.L.R. 437: "As with the doctor-patient relationship, mutual trust is essential to the relationship between the supervisor and the supervised entity."

responsible for the safety and soundness of banks and for transparent and customer-friendly conduct on the financial markets in Europe.

Confidentiality is considered an inevitable aspect of financial supervision, also in international standards.[31] Hüpkes et.al., while acknowledging that "[s]upervision inevitably deals with matters of acute commercial sensitivity" so that "publication of bank supervisory decisions and required actions need to be treated with circumspection", submit that,

> "the presumption should be that such decisions and the reasoning behind them will be a matter of public record, even if this disclosure occurs well after the event."[32]

They cite proper reasoning and grounding in law and fact, as well as consistency between similar cases as results from transparency. We would like to add the possibility of redress for affected parties as another fruit from transparency. Such redress is one element of accountability for independent central banks and supervisors.

Status quo—lack of cohesion between sectoral professional secrecy standards in financial supervision

A comparison of the currently applicable professional secrecy provisions in the three EU supervisory silos shows that they are all similarly worded, but differ in substance. The material frameworks currently in force regarding the supervision of investment services (MiFID II), banking (CRD IV) and insurance and reinsurance (Solvency II)[33] all contain an obligation of professional secrecy for the respective supervisory authorities.[34]

Article 76(1), (2) MiFID II	1. Member States shall ensure that competent authorities, all persons who work or who have worked for the competent authorities or entities to whom tasks are delegated pursuant to Article 67(2), as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. They shall not divulge any confidential information which they may receive in the course of their duties, save in summary or aggregate form such that individual investment firms, market operators, regulated markets or any other person cannot be identified, without prejudice to requirements of national criminal or taxation law or the other provisions of this Directive or of Regulation (EU) No 600/2014 [MiFiR]. 2. Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding.

[31] Clearly, the IMF in its *Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principles* (September 1999), *https://www.imf.org/external/np/mae/mft/code/eng/code2e.pdf* [Accessed 24 April 2019]: "Moral hazard, market discipline, and financial market stability considerations may justify limiting both the content and timing of the disclosure of some corrective actions and emergency lending decisions, and information pertaining to market and firm-specific conditions. In order to maintain access to sensitive information from market participants, there is also a need to safeguard the confidentiality and privacy of information on individual firms (commonly referred to as 'commercial confidentiality'). Similarly, it may be inappropriate for financial authorities to make public their supervisory deliberations and enforcement actions related to individual financial institutions, markets, and individuals."

[32] Hüpkes, Quintyn and Taylor, "The Accountability of Financial Sector Supervisors" (2005), in a discussion of "Confidentiality and Transparency" at p.15. Note that availability of data from the supervisory file after five years is an issue in the *Baumeister* case.

[33] Directive 2009/138 of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance [2009] OJ L335/1.

[34] MiFID II art.76(1); CRD IV art.53(1); Solvency II art.64(1).

Article 53 (1) CRD IV	1. Member States shall provide that all persons working for or who have worked for the competent authorities and auditors or experts acting on behalf of the competent authorities shall be bound by the obligation of professional secrecy. Confidential information which such persons, auditors or experts receive in the course of their duties may be disclosed only in summary or aggregate form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law. Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings.
Article 64 Solvency II	Member States shall provide that all persons who are working or who have worked for the supervisory authorities, as well as auditors and experts acting on behalf of those authorities, are bound by the obligation of professional secrecy. Without prejudice to cases covered by criminal law, any confidential information received by such persons whilst performing their duties shall not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual insurance and reinsurance undertakings cannot be identified. However, where an insurance or reinsurance undertaking has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that undertaking may be divulged in civil or commercial proceedings.

Comparative analysis of the sectoral professional secrecy provisions

Professional secrecy requires that confidential information received in the course of the supervisory duties may not be divulged, except in summary or aggregate form, so that individual market participants cannot be identified. As regards the personal scope of application, the obligation binds "all persons working for or who have worked for the competent authorities".[35] Furthermore it obliges auditors or experts "acting on behalf of"[36] (CRD IV and Solvency II) or "instructed by"[37] (MiFID II) the competent authorities. The provisions regarding auditors and experts seem similar but could differ, e.g. if "acting on behalf of" simply meant when acting for the authorities and "instructed by" more restrictedly signified in the remit of the authority's mandate. In terms of material standards for professional secrecy, the obligation entails that confidential information may not be divulged in principle. As to the degree of the prohibition, the wording in Solvency II seems slightly stronger than the simple statements of prohibition in MiFID II or CRD IV, as Solvency II forbids the divulgation "to any person or authority whatsoever". Article 54(1) MiFID I had the very same wording that was deleted by MiFID II.

All three laws, i.e. MiFID II, CRD IV and Solvency II, contain exceptions to the obligation of non-disclosure. There are numerous exceptions for exchange of information with other authorities, either mandated or permitted, in each legal act.[38] Beyond these exceptions, the first exception is that confidential information may be divulged "in summary or aggregate form",[39] such that "individual credit institutions"[40]

[35] CRD IV art.53(1) first subparagraph; the wording of art.76(1) first sentence MiFID II and art.64(1) Solvency II is in substance identical despite slightly different wording.

[36] CRD IV art.53(1) first subparagraph; Solvency II art.64(1).

[37] MiFID II art.76(1).

[38] By way of example: under CRD IV, circumscribed exchange of information with other authorities, bodies and persons in the area of supervision is permitted by art.56; with oversight bodies by art.57; with central banks, deposit protection schemes, the European Systemic Risk Board and the ESAs by art.58; with other entities in the context of national supervision, or the auditing and control of this supervision, by art.59; with a clearing house or other similar body recognised under national law for the provision of clearing or settlement services under art.60; and with third-country supervisory authorities subject to equivalent professional secrecy requirements by art.55. These exceptions have not been further researched for this contribution.

[39] CRD IV art.53(1) second subparagraph; Solvency II art.64(2); MiFID II art.76(1) second sentence.

[40] CRD IV art.53(1) second subparagraph.

(CRD IV), "individual insurance and reinsurance undertakings"[41] (Solvency II) or "individual investment firms, market operators, regulated markets or any other person"[42] (MiFID II) cannot be identified. In this regard, MiFID II grants stronger confidentiality than CRD IV and Solvency II as it protects "any other person".

The second exception regards "cases covered by criminal law" (CRD IV and Solvency II).[43] By contrast, MiFID II even goes further and extends the exception to "requirements of national criminal or taxation law" or other conflicting MiFID II or MiFIR[44] provisions.[45] This is the second important modification introduced by MiFID II compared with MiFID I. In comparison with CRD IV and Solvency II, it is striking that only MiFID II grants access to confidential information for tax law reasons. According to us, there is no reason why confidential information in banking and insurance business should be treated differently. With regard to the exception of "cases covered by criminal law", the CJEU recently decided in the case *UBS Europe* that this exception was not applicable to cases in which the supervisory authority rejects a person holding a post as director and orders his or her resignation.[46] Furthermore, the MiFID II restriction to national criminal law oddly forecloses any possible present or future EU criminal law provision overriding supervisory secrecy concerns.

A third exception to the obligation of professional secrecy regards the possibility to disclose confidential information "in civil or commercial proceedings" in the case of a declaration of bankruptcy or compulsory winding up of the supervised entity, which is inherent to all three frameworks.[47] CRD IV and Solvency II grant this possibility to disclose confidential information only if it "does not concern third parties involved in attempts to rescue" the credit institution/(re)insurance undertaking.[48] MiFID II is stricter in two aspects. It grants the protection of non-disclosure to any "third person" without requiring this third person to be involved in attempts to rescue the concerned entity, but further specifies that the disclosure needs to be "necessary for carrying out the proceeding".[49] As will be further discussed below, this stricter approach already existing in MiFID I led Advocate General (AG) Bobek in his Opinion in *Buccioni* to distinguish the professional secrecy provision of CRD IV from MiFID I.[50]

Findings—absence of legislative coordination and questionable drafting require remedy

The comparative analysis of the respective provisions[51] on professional secrecy in MiFID II, CRD IV and Solvency II shows that CRD IV and Solvency II are rather similar, while MiFID differs in many ways. It is not clear why the supervision of investment services should be treated differently from the supervision of banking and insurance services with regard to professional secrecy, as is currently the case. As AG Bobek stated in *Buccioni*, the coexistence of differently worded provisions on professional secrecy within

[41] Solvency II art.64(2).
[42] MiFID II art.76(1) second sentence.
[43] CRD IV art.53(1) second subparagraph; Solvency II art.64(2).
[44] Regulation 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation 648/2012 [2014] OJ L173/84.
[45] MiFID II art.76(1) second sentence.
[46] *UBS Europe* (C-358/16) EU:C:2018:715 at [46]–[47].
[47] CRD IV art.53(1) third subparagraph; MiFID II art.76(2); Solvency II art.64(3).
[48] CRD IV art.53(1) third subparagraph; Solvency II art.64(3).
[49] MiFID II art.76(2).
[50] Opinion of AG Bobek in *Buccioni v Banca d'Italia* (C-594/16) EU:C:2018:425 at [57], [58].
[51] Such an analysis should include the (mandatory or permissible) exchange of information among supervisory authorities, an element that would remain to be undertaken in further research. See also fn.38.

the different branches of EU financial services legislation shows that arguments for a sector-specific restrictive interpretation are not per se convincing.[52]

Two institutional points argue in the same direction. The first one regards the professional secrecy standards for the European Supervisory Authorities (ESAs) EBA, ESMA and EIOPA set out in the ESA Regulations,[53] and the second one concerns the ECB's professional secrecy standards[54] when exercising its supervision in the context of the Single Supervisory Mechanism (SSM).[55]

Article 70(1), (2) ESA Regulations[56]	1. Members of the Board of Supervisors and the Management Board, the Executive Director, and members of the staff of the Authority including officials seconded by Member States on a temporary basis and all other persons carrying out tasks for the Authority on a contractual basis shall be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased. … 2. Without prejudice to cases covered by criminal law, any confidential information received by persons referred to in paragraph 1 whilst performing their duties may not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial institutions cannot be identified. Moreover, the obligation under paragraph 1 and the first subparagraph of this paragraph shall not prevent the Authority and the national supervisory authorities from using the information for the enforcement of the acts referred to in Article 1(2), and in particular for legal procedures for the adoption of decisions.

[52] Opinion of AG Bobek in *Buccioni* (C-594/16) (C-594/16) EU:C:2018:425 at [44]: "In sum, in view of such historical and contextual diversity, not only in exact wording but also in approaches, I would suggest that a healthy dose of scepticism is called for in relation to arguments that insist on suggesting that if the third subparagraph of Article 53(1) of Directive 2013/36, as it happens to be worded today, were not to be interpreted as restrictively as possible, the effective supervision of credit institutions and investment firms would be fatally compromised. It would appear that both in the past as well as in parallel regimes (which are certainly not less sensitive) the rules were or are worded differently, sometimes less restrictively, apparently without the entire edifice immediately crumbling and falling apart."

[53] The European Banking Authority (EBA), established by Regulation 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (ESA), amending Decision 716/2009 and repealing Commission Decision 2009/78 [2010] OJ L331/12, as amended; consolidated version at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02010R1093-20160112&from=EN*; the European Securities and Markets Authority (ESMA), established by Regulation 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77 [2010] OJ L331/84, as amended; consolidated version at *https://www.esma.europa.eu/sites/default/files/library/2015/11/1095-2010_esma_regulation_amended.pdf*; and the European Insurance and Occupational Pensions Authority (EIOPA), established by Regulation 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision 716/2009 and repealing Commission Decision 2009/79 [2010] OJ L331/48 [All accessed 24 April 2019].

[54] Professional secrecy is further underpinned by standards adopted by the ECB itself, such as The Ethics Framework of the ECB [2015] OJ C204/3, and the *Single Code of conduct for high-level ECB officials* (December 2018), notably art.4 thereof, at *https://www.ecb.europa.eu/ecb/legal/pdf/en_single_code_conduct_for_high_level_ecb_officials_f_sign.pdf* [Accessed 24 April 2019].

[55] Note that the ECB's Rules of Procedure, in art.23a (Confidentiality and professional secrecy regarding the supervisory tasks), also prescribe secrecy, but with a reference to art.37 ESCB Statute which, itself, refers to the "obligation of professional secrecy" without specifying the meaning of the term. See: Decision of the European Central Bank adopting the Rules of Procedure of the European Central Bank (ECB/2004/2) (2004/257) [2004] OJ L80/33, as last amended by Decision ECB/2016/27 of the European Central Bank [2016] OJ L258/17; consolidated version at *https://www.ecb.europa.eu/ecb/legal/pdf/celex_02004d0002-20160924_en_txt.pdf* [Accessed 24 April 2019].

[56] Article 339 TFEU reads as follows: "The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components."

Article 37 ESCB Statute	37.1. Members of the governing bodies and the staff of the ECB and the national central banks shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy. 37.2. Persons having access to data covered by Union legislation imposing an obligation of secrecy shall be subject to such legislation.
Article 27(1) SSM Regulation	1. Members of the Supervisory Board, staff of the ECB and staff seconded by participating Member States carrying out supervisory duties, even after their duties are ceased, shall be subject to the professional secrecy requirements set out in Article 37 of the Statute of the ESCB and of the ECB and in the relevant acts of Union law. The ECB shall ensure that individuals who provide any service, directly or indirectly, permanently or occasionally, related to the discharge of supervisory duties are subject to equivalent professional secrecy requirements.

First, the three ESA Regulations each contain the obligation of professional secrecy in a similar wording, but differ from CRD IV, Solvency II and MiFID II substantially insofar as they do not contain a provision allowing for disclosure of confidential information in bankruptcy and winding-up proceedings.[57] This could be explained by the absence of any direct supervisory tasks of the ESAs, as they originally only had exceptional "overriding" and emergency powers,[58] while ESMA now has direct enforcement powers under the Regulation on short selling[59] and the Regulation on credit rating agencies.[60] However, when exercising these powers, the ESAs could well be bound by the same obligation to disclose confidential information as the national competent authorities.

Secondly, the SSM Regulation[61] plainly refers to art.37 Statute of the ESCB and of the ECB (ESCB Statute),[62] which simply states the obligation of professional secrecy without any nuancing provisions comparable to those set out in CRD IV.[63] However, when exercising its supervisory functions within the SSM, the ECB is also bound by the professional secrecy standards set in CRD IV as a "relevant act of Union law" in the form of its transposition into national law.[64] In light of the ECB's singular position as a central supervisory authority in the SSM,[65] the SSM Regulation should contain the same wording as CRD IV and render it immediately binding without subjecting it to diverging transpositions in the Member States. The status quo means that the ECB's professional secrecy standards are not identical for all directly supervised banks subject to diverse CRD IV transpositions by different Member States. This constitutes an unlevel playing-field which we suggest should be remedied.

[57] ESA Regulations art.70(1) first subparagraph; 70(2) first subparagraph.

[58] ESA Regulations arts 17 and 18.

[59] Regulation 236/2012, [2012] OJ L86/1 arts 28, 29, 31.

[60] Regulation 513/2011 [2011] OJ L145/30 art.1(9) amending arts 15 to 21 Regulation 1060/2009, [2009] OJ L302/1; the latest Regulation 462/2013, [2013] OJ L146/1, contains only minor changes to ESMA's supervisory powers.

[61] Council Regulation 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.

[62] Protocol (No.4) on the Statute of the European System of Central Banks and of the European Central Bank [2016] OJ C202/230.

[63] SSM Regulation art.27(1) first subparagraph.

[64] SSM Regulation art.27(1) first subparagraph; SSM Regulation art.4(3) first subparagraph.

[65] As emphasised by the General Court in *Landeskreditbank Baden-Württemberg — Förderbank v ECB* (T-122/15) EU:T:2017:337; [2018] 1 C.M.L.R. 7 at [63], when it held that "the Council has delegated to the ECB exclusive competence in respect of the tasks laid down in Article 4(1) of the [SSM] Regulation and that the sole purpose of Article 6 of that same regulation is to enable decentralised implementation under the SSM of that competence by the national authorities, under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the [SSM] Regulation"; confirmed on appeal: (C-450/17 P) EU:C:2019:372 . For an ongoing overview of court cases concerning the European Banking Union, see: EBI, *The Banking Union and Union Courts: overview of cases*, *https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/* [Accessed 24 April 2019].

Case law shaping professional secrecy standards

The judiciary tried to remedy the unlevel playing-field resulting from the absence of legislative co-ordination and questionable drafting. It did so in part by interpreting the diverging professional secrecy standards similarly. An analysis of both the previous and the recent case law further suggests that the CJEU took an active part in shaping the scope of professional secrecy duties and the exemptions to them.

The Hillegom v Hillenius *case*

The scope of professional secrecy first came before the European Court in the early 1980s in the *Hillegom v Hillenius* case,[66] in which a client of a bankrupt financial services provider sought damages from the supervisory authority. Envisaging a claim against the Dutch Central Bank (De Nederlandsche Bank, or DNB) for alleged failing supervision, the Dutch municipality of Hillegom, which had lost funds with a small bank in the Netherlands with Panamanian owners, started proceedings involving a DNB employee, Mr Hillenius. The local authority had lost NLG 600,000[67] within six months of its depositing funds at the Amsterdam American Bank (AA Bank), and requested a provisional examination of witnesses before the Amsterdam District Court to establish whether there was a case to be made against the Central Bank. Mr Hillenius, the accountant responsible for supervision of the AA Bank at DNB, refused to answer a number of questions, relying on professional secrecy. The District Court (Arrondissementsrechtbank) found against this claim, the Regional Court of Appeal (Gerechtshof) agreed with Mr Hillenius and, ultimately, the Hoge Raad (the Supreme Court of the Netherlands) referred preliminary questions to the European Court. At issue was the relationship between the Dutch implementing provision[68] of art.12 of the First Banking Directive (FBD)[69] on professional secrecy and the general duty to give evidence contained in the Dutch Code of Civil Procedure.[70]

Relying on the need for the proper functioning of the system of supervision and the exchange of information among supervisory authorities in the Community,[71] and referring to the context and aim of the FBD, the Court found that "the ban on disclosure also covers statements which [employees and former employees of a supervisory authority] make as witnesses in civil proceedings".[72] Thus, in principle, professional secrecy extended to the hearing of witnesses in civil proceedings.[73] As art.12 of the FBD allowed exceptions to professional secrecy when enacted by national law, there was scope for the lifting of the secrecy. The Court found that the national court needed to balance between two interests: "the interest in establishing the truth, which is fundamental to the administration of justice, and the interest in maintaining the confidentiality of certain kinds of information", in order to "[decide] whether or not a witness who has received confidential information may rely on his duty of non-disclosure". Courts needed to pay particular attention to the fact that "the information in question was obtained from supervisory authorities in other Member States in accordance with art.12(2) of the Directive".[74] The *Hillegom v Hillenius*

[66] *Municipality of Hillegom v Hillenius* (C-110/84) EU:C:1985:495.
[67] Against the NLG/EUR conversion rate: €272,000 but probably worth double that amount at current prices.
[68] The then Wet toezicht kredietwezen (Act on the Supervision of the Credit System) s.46.
[69] First Council Directive of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (77/780) [1977] OJ L322/30.
[70] Wetboek van Burgerlijke Rechtsvordering s.1946.
[71] *Hillegom v Hillenius* (C-110/84) EU:C:1985:495 at [27].
[72] *Hillegom v Hillenius* (C-110/84) at [28].
[73] Note that, for criminal proceedings, the provision on professional secrecy contained an explicit exception.
[74] *Hillegom v Hillenius* (C-110/84) at [33].

case led to an amendment of the provision on professional secrecy: in the SBD, the legislator included an exemption for disclosure in case a bank had been declared bankrupt.[75]

The Altmann *case*

The second relevant case is the *Altmann* case,[76] in which the scope of the confidentiality requirements of MiFID I was refined. The case against the Bundesanstalt für Finanzdienstleistungsaufsicht, the German Federal Financial Supervisory Authority, referred to as BaFin, concerned Phoenix Kapitaldienst GmbH (Phoenix), the same investment firm as later in *Baumeister*, and was brought by applicants in proceedings against this defaulted firm who had requested to see the supervisory files at BaFin relating to it. Phoenix presented a business model that was primarily aimed at defrauding investors—a Ponzi scheme—and was liquidated in 2005. The proceedings concerned BaFin's refusal to give access to the file, so they were qualified as administrative[77] and not as civil or commercial proceedings, in which case the veil of secrecy might have been lifted: art.54 MiFID I allows that where an investment firm has been declared bankrupt or is being compulsorily wound up, "confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding".[78]

According to AG Jääskinen's Opinion in *Altmann*, "in civil or commercial proceedings" meant that the proceedings must be pending so that the mere intention to conduct such proceedings was not sufficient for the release of confidential information from the bounds of professional secrecy.[79] He also stated that the civil or commercial nature of the proceedings was not to be determined by the nature of the national court, but rather by the nature of the proceedings, giving the example that civil proceedings can also take place before an administrative court.[80]

The CJEU held that the case did not fulfil any of the exceptions to the obligation of non-disclosure of confidential information, that BaFin was allowed to invoke professional secrecy, and that "there are no exceptions to the general prohibition on divulging confidential information other than those specifically provided for in [art.54 MiFID I]".[81] Thus, art.54 is a "closed circuit": only exceptions contained therein may permit access to confidential information held by the supervisory authorities.

The Baumeister *case*

This case also concerns access to BaFin's supervisory files on the investment firm Phoenix.[82] BaFin's refusal to grant access to documents and reports in the supervisory file was the subject of three proceedings under German law. The applicant faced a decade-long meandering through the courts, giving conflicting answers, before he could even begin suing the supervisor: In 2008, the Frankfurt administrative court (Verwaltungsgericht Frankfurt) ordered the release of the documents with the exception of those containing business secrets and documents relating to the UK Financial Services Authority.[83] On appeal, the Higher

[75] By amending art.12 FBD to include the following proviso: "Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be divulged in civil or commercial proceedings."

[76] *Altmann v Bundesanstalt für Finanzdienstleistungsaufsicht* (C-140/13) EU:C:2014:2362; [2015] 1 C.M.L.R. 51.

[77] *Altmann* (C-140/13) at [39].

[78] *Altmann* (C-140/13) at [37].

[79] Opinion of AG Jääskinen in *Altmann* (C-140/13) EU:C:2014:2168 at [52].

[80] Opinion of AG Jääskinen in *Altmann* (C-140/13) at [57].

[81] *Altmann* (C-140/13) at [35].

[82] *Bundesanstalt für Finanzdienstleistungsaufsicht v Baumeister* (C-15/16) EU:C:2018:464; [2018] Bus. L.R. 1730.

[83] Verwaltungsgericht Frankfurt, judgment of 12 March 2008, 7 E 5426/06. Note that the current UK supervisor is no longer the FSA but consists of two authorities: the Prudential Regulation Authority (PRA), an arm of the Bank of England, and the Financial Conduct Authority (FCA).

Administrative Court of Hesse (Hessischer Verwaltungsgerichtshof) held,[84] in 2013, that access was to be granted based on a document-by-document appraisal whether they contained trade or business secrets (in which case they would remain secret).[85] On appeal on a point of law, the Federal Administrative Court of Germany (Bundesverwaltungsgericht) disagreed with the intermediate court, holding that a more restrictive reading of the secrecy provisions was called for (i.e. less disclosure). Yet, unsure whether the EU provisions behind the terms of the relevant German law required a broader construction, this court referred questions to the European Court of Justice.[86]

The Federal Administrative Court of Germany asked three questions regarding the interpretation of art.54(1) MiFID I and the scope of protection it affords. The first question was whether all business information communicated to the supervisory authority was covered by the term "confidential information" without further conditions. Especially, the German court wondered if all statements of the supervisory authority contained in the file, including its correspondence with other bodies, were covered by "prudential secrecy" as part of professional secrecy. The court also asked about the determining factors of confidentiality (nature, interest, circumstances, burden of proof). The second question pointed at the relevant date for determining the confidentiality, and asked whether the date of communication to the supervisory authority was the only relevant factor. In the case of a negative answer to the second question, the third question regarded a possible time-limit for the confidentiality of information, e.g. of five years, after which the supervisory authority would have to prove the ongoing confidentiality of the information item.

Opinion of the Advocate General in *Baumeister*

In his Opinion,[87] AG Bot gave a strong message in support of all-encompassing confidentiality of the entire supervisory file. Not only the information imparted by the supervised entity, or the business secrets of this entity or third persons, but also the statements and policy documents of the supervisor in its file should be safe from disclosure. Foremost in the AG's reasoning is the preservation of trust, both between the supervised entities and the supervisory authority (without which financial firms would not be willing to wholeheartedly share information with their supervisors)[88] and among supervisory authorities (which need to be confident that the information they exchange in the interest of supervision of financial activities in the single market is kept secret).[89] The AG suggests that the Court should ignore its case law on the confidential nature of documents in competition law proceedings[90] or on public access to documents as "the specific nature of the supervision of financial markets"[91] requires this different approach to confidentiality. His reasoning applies beyond the scope of MiFID I and encompasses the confidentiality regimes introduced by other financial sector legislation, a point to which we will return below. AG Bot perceives the risk of "financial catastrophe" if secrecy were not strictly upheld.[92] In his view, the legislator has undertaken a balancing between the various interests and adopted a regime of exhaustively limited exceptions to the ground rule of secrecy, a weighing the courts should not disturb.[93]

[84] After windings in the proceedings, including a 2010 refusal by German Federal Ministry of Finance to obey an order of the Verwaltungsgericht to submit the files for the court to inspect, and the reactions to this from various courts in parallel proceedings, details which the Advocate General provides in [16] and [17] of his Opinion.

[85] Hessischer Verwaltungsgerichtshof, judgment of 29 November 2013, 6 A 1293/1.

[86] Bundesverwaltungsgericht, referral to the CJEU of 4 November 2015, 7 C4/14.

[87] Opinion of AG Bot in *Bundesanstalt für Finanzdienstleistungsaufsicht v Baumeister* (C-15/16) EU:C:2017:958.

[88] Opinion of AG Bot in *Baumeister* (C-15/16) EU:C:2017:958 at [47].

[89] Opinion of AG Bot in *Baumeister* (C-15/16) at [22].

[90] Opinion of AG Bot in *Baumeister* (C-15/16) at [26], [35]–[37].

[91] Opinion of AG Bot in *Baumeister* (C-15/16) at [1], [37].

[92] Opinion of AG Bot in *Baumeister* (C-15/16) at [52].

[93] Opinion of AG Bot in *Baumeister* (C-15/16) at [61], [62].

The CJEU's judgment in *Baumeister*

The Court does not follow the all-inclusive approach to secrecy that the AG proposed. Yet, its interpretation, although allowing some leeway for transparency of documents in a supervisory file, certainly many years after the events recorded therein, seems to meet the quest for openness only partially, and with hesitation.

The Court notes that MiFID I does not define what "confidential information" means. Following its classical approach of interpretation of EU law, the Court looks at the wording, context and objective of the legislation to establish the meaning of the term. As to the wording, the Court notes that MiFID uses the term "confidential information" and does not generically refer to "information", implying a distinction between the two.[94] As for context and objectives, the Court notes that MiFID I seeks to enact harmonised rules "to offer investors a high level of protection and to allow investment firms to provide services throughout the [EU] on the basis of home country supervision".[95] Echoing the AG, the Court notes that the system of supervision of investment firms[96] "requires that both the supervised entities and the competent authorities can have confidence that the confidential information provided will, in principle, remain confidential".[97] As "the absence of such confidence is liable to compromise the smooth transmission of the confidential information that is necessary for monitoring", the Court discerns, in line with *Altmann*, two interests which the obligation of secrecy serves: the specific interests of the firms directly concerned and the public interest in the normal functioning of the markets in financial instruments of the EU.[98] Thus, the obligation of professional secrecy in MiFID I does not mandate all information in a supervisory file to be deemed confidential.[99] This opening towards less secrecy allows the Court later on to allow for the passage of time to be taken into account,[100] and to find that the national legislator can vary the level of secrecy of the entire supervisory file subject to the MiFID minimum,[101] leading to less harmonised practices across the EU under what it seems to qualify as minimum harmonisation.

On the information to which the obligation of secrecy applies, the Court finds that, subject to exceptions, it extends to,

> "information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of investment firms that the EU legislature established in adopting [MiFID I]."[102]

This is without prejudice to other EU law provisions that prescribe "stricter protection of the confidentiality of certain information",[103] such as art.58(1) MiFID I on the exchange of information among supervisory authorities. Like the AG, the Court finds that art.54 MiFID I exhaustively lists the exceptions to "the general rule that disclosure of confidential information held by the competent authorities is prohibited".[104] In a crucial passage, the Court states that art.54 MiFID I does,

[94] *Baumeister* (C-15/16) EU:C:2018:464 at [24].
[95] *Baumeister* (C-15/16) at [26].
[96] *Baumeister* (C-15/16) at [26]–[30].
[97] *Baumeister* (C-15/16) at [31] with a reference to its judgment in *Altmann* (C-140/13).
[98] *Baumeister* (C-15/16) at [32], [33].
[99] *Baumeister* (C-15/16) at [34].
[100] *Baumeister* (C-15/16) at [48]–[51].
[101] *Baumeister* (C-15/16) at [44].
[102] *Baumeister* (C-15/16) at [35].
[103] *Baumeister* (C-15/16) at [36].
[104] *Baumeister* (C-15/16) at [37], [38].

> "not create a right of access that can be exercised by the public to information held by the competent authorities or to regulate in detail how any such right of access that may be recognised in some cases by national law is to be exercised."[105]

The Court distinguishes[106] MiFID I from the rules on public access to documents,[107] and concludes that MiFID I is a *lex specialis* for supervision.[108]

The Court ends with the opening for Member States legislatures to enact a stricter regime of confidentiality: reading art.54's "sole aim" as "to impose on the competent authorities the obligation to refuse, as a general rule, to disclose confidential information", it holds that:

> "Member States remain free to decide to extend the protection against disclosure to the entire contents of the supervision files of the competent authorities or, conversely, to permit access to information that is in the possession of the competent authorities which is not confidential information within the meaning of [art.54]."[109]

Thus, national law which decrees full confidentiality of supervisory files conforms with art.54, while national law which, on the contrary, allows more transparency but upholds the non-disclosure of confidential information as per art.54, is also declared compatible with this provision. It is for the German Court to decide whether the information Baumeister requests BaFin to disclose is covered by professional secrecy binding on it by virtue of art.54.[110]

On the question of a possible time bar on confidentiality, the Court finds that, in principle, the confidentiality regime fully applies for as long as information remains to be classified as confidential according to the two criteria given by the Court[111] but it recognises that,

> "the passage of time is a circumstance that is normally liable to have an influence on the analysis of whether the conditions governing the confidentiality of the information concerned are satisfied at a given point in time."

The prohibition to disclose,

> "applies to information held by the competent authorities that must be classified as 'confidential' at the time of their examination of a request for disclosure, irrespective of how that information was classified at the time when it was communicated to those authorities."[112]

While it seems common sense to require that classification as confidential needs to apply at the moment of a request for access, the judgment is not entirely clear on how the passage of time (13 years since the original request!) works out. Our preferred reading of the judgment is that Baumeister's request for access to the supervisory file is still valid and BaFin needs to examine the confidentiality of the information *ex novo*.[113]

Further on the influence of the lapse of time, the referring court had asked in its third question whether business secrets no longer qualify as such after five years. Declaring the protection of business secrets a

[105] *Baumeister* (C-15/16) at [39].
[106] *Baumeister* (C-15/16) at [40]–[42].
[107] The EU's Access to Documents Regulation; see fn.26.
[108] *Baumeister* (C-15/16) at [43].
[109] *Baumeister* (C-15/16) at [44].
[110] *Baumeister* (C-15/16) at [45].
[111] *Baumeister* (C-15/16) at [48].
[112] *Baumeister* (C-15/16) at [50] and [51].
[113] The latter reading is supported by the CJEU's following answer to the third question.

general principle of EU law,[114] the Court finds that information that is at least five years old "must, as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature", with an exception and an exemption. The exception applies when the party relying on the quality of information as a business secret "shows that, despite its age, that information still constitutes an essential element of its commercial position or that of interested third parties".[115] With the onus of proof shifting to the party invoking confidentiality, information older than five years may still qualify as a business secret. This also applies in the context of MiFID[116] but—and here comes the exemption—the five year-term does not invalidate confidential treatment,

> "which might be justified for reasons other than the importance of that information with respect to the commercial position of the undertakings concerned, such as, in particular, information relating to the supervision methodology and strategy employed by the competent authorities."[117]

The Buccioni *case*

In the *Buccioni* case,[118] similar questions arose on the professional secrecy provisions of credit institution supervision. Mr Buccioni held a deposit account with the Italian bank Banca Network Investimenti SpA (BNI SpA) which went into compulsory winding up in 2012. Since his deposits exceeded the sum of €100,000 protected under the Italian deposit guarantee scheme,[119] Mr Buccioni lost substantial parts of his deposits. Considering a damages claim against the national supervisory authority Banca d'Italia, he requested the latter to grant him access to supervisory information regarding BNI SpA. As Banca d'Italia denied this request, Mr Buccioni brought an administrative action. Being unsuccessful in the first instance, Mr Buccioni continued before Italy's highest administrative court, the Council of State (Consiglio di Stato) which referred three questions to the CJEU. The Council of State asked if a right of access to supervisory information derives from the general principle of transparency under art.15 TFEU, from the SSM Regulation or from art.51 CRD IV. On 12 June 2018, AG Bobek delivered his Opinion on the case.[120] On 13 September 2018, the CJEU gave its judgment.[121]

Opinion of the Advocate General in *Buccioni*

AG Bobek dismissed the first two questions because he deemed neither of the provisions to be applicable as they both oblige only EU Institutions while the case concerns the national competent authority Banca d'Italia.[122] As regards the confidentiality provision in CRD IV, he thoroughly weighed its wording and purpose, carefully distinguished the case from the foregoing CJEU jurisdiction in the *Altmann* case and

[114] *Baumeister* (C-15/16) EU:C:2018:464 at [53]. This is in line with earlier case law: *Varec SA v Belgium* (C-450/06) EU:C:2008:91; [2008] 2 C.M.L.R. 24.

[115] *Baumeister* (C-15/16) at [54].

[116] *Baumeister* (C-15/16) at [55].

[117] *Baumeister* (C-15/16) at [56].

[118] *Buccioni v Banca d'Italia* (C-594/16) EU:C:2018:717.

[119] In line with EC Directive 94/19 of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes [1994] OJ L135/5, as amended by Directive 2009/14 of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19 on deposit-guarantee schemes as regards the coverage level and the payout delay [2009] OJ L68/3. The current EU rules are set out in Directive 2014/49 of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes [2014] OJ L173/149. Core terms of EU deposit insurance have been interpreted in the judgment of 4 October 2018 in *Kantarev v Balgarska Narodna Banka* (C-571/16) EU:C:2018:807.

[120] AG Bobek's Opinion in *Buccioni v Banca d'Italia* (C-594/16) EU:C:2018:425.

[121] *Buccioni* (C-594/16) EU:C:2018:717.

[122] AG Bobek's Opinion in *Buccioni* (C-594/16) at [26]–[29].

interpreted it as granting access to supervisory information in order to pursue a damages claim against the supervisor. According to art.53(1) third subparagraph CRD IV,

> "where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings."

AG Bobek focused on the meaning of "in civil or commercial proceedings". Since this exception to the principle of professional secrecy was introduced only in the SBD after the *Hillegom v Hillenius* case[123] which we discussed above, he proposed "a healthy dose of scepticism" towards arguments for a restrictive interpretation. Then, he distinguished the *Buccioni* case from the *Altmann* case, where the Court seemed to have interpreted the equivalent provision of MiFID I to mean "in the course of civil or commercial proceedings brought by the applicants in the main proceedings"[124] rather than "for the purposes of (potential) proceedings". AG Bobek stressed that the CJEU—as opposed to AG Jääskinen[125]—did not explicitly require the civil proceedings already to be pending.[126]

In his distinction between *Altmann* and *Buccioni*, AG Bobek noted the legal differences between the relevant provisions: art.53(1) CRD IV contains fewer conditions for disclosure than art.54(2) MiFID I ("if necessary for carrying out the proceeding" and "third parties involved in attempts to rescue that credit institution").[127] Therefore he deems the CRD IV to allow "greater leeway for disclosure" than MiFID I or, in other words, to narrow the possibility of non-disclosure.[128] In terms of factual and contextual differences, AG Bobek considered *Buccioni* to be "a pure access to documents scenario, largely detached from the insolvency procedure as such" regarding exclusively information drafted by the Banca d'Italia.[129] In *Altmann*, however, the access request regarded audit reports, internal opinions, reports, correspondence, contracts and other documents regarding the company's internal organisation.[130] From a practical point of view, AG Bobek added that requiring the civil proceedings to be pending would lead to a perversion of judicial protection, since many Member States do not foresee pre-trial disclosure obligations so that the (potential) claimants would have to bring an action in order to receive access to information necessary to weigh the chances of the action.[131] He therefore concluded that the possibility to disclose confidential information "in civil or commercial proceedings" should be understood "as meaning '*for the purpose* of civil or commercial proceedings'".[132] This reading received criticism in the German legal literature.[133]

The CJEU's judgment in *Buccioni*

The CJEU's judgment in *Buccioni*[134] is remarkable in two ways. First, it contains a holistic approach to financial services supervision by establishing a parallel interpretation of both the MiFID I and CRD IV provisions on professional secrecy and by repeatedly referring to its previous case law on investment services (*Altmann* and *Baumeister*). Secondly, the CJEU partially follows AG Bobek in his wide

[123] *Hillegom v Hillenius* (C-110/84) EU:C:1985:495.
[124] *Altmann* (C-140/13) EU:C:2014:2362 at [39].
[125] AG Jääskinen's Opinion in *Altmann* (C-140/13) EU:C:2014:2168 at [52], [56].
[126] AG Bobek's Opinion in *Buccioni* (C-594/16) EU:C:2018:425 at [52], [55].
[127] AG Bobek's Opinion in *Buccioni* (C-594/16) at [57], [58].
[128] AG Bobek's Opinion in *Buccioni* (C-594/16) at [60].
[129] AG Bobek's Opinion in *Buccioni* (C-594/16) at [62], [63].
[130] AG Bobek's Opinion in *Buccioni* (C-594/16) at [64] (Emphasis in the original).
[131] AG Bobek's Opinion in *Buccioni* (C-594/16) at [67]–[71].
[132] AG Bobek's Opinion in *Buccioni* (C-594/16) at [77].
[133] B. Herz, "Neue Rechtsprechung zum Zugang zu Informationen von Finanzaufsichtsbehörden" (2018) 36 N.J.W. 2601, 2602–2603.
[134] *Buccioni* (C-594/16) EU:C:2018:717; [2018] Bus. L.R. 2336.

interpretation of the derogation "in civil and commercial proceedings" by allowing that these proceedings are not yet started but about to be started once the requested information is accessed. However, the CJEU establishes a more prudent approach to professional secrecy as it grants the supervisory authorities and the national courts a wide discretion in weighing the applicant's informational interest against the opposing interests protected by the principle of secrecy.

In the beginning, the CJEU expressly notes that art.15 TFEU and arts 22(2) and 27(1) SSM Regulation do not apply to national supervisory authorities and are "irrelevant in the main proceedings".[135] However, the Court seems to answer the preliminary question by interpreting art.53(1) CRD IV in conjunction with these provisions,[136] and to interpret the directive implicitly acknowledging that the single banking licence is now, in the Euro Area, a European one. Then, the CJEU derives the importance of the principle of supervisory secrecy from various CRD IV Recitals and provisions which stress the goal of achieving a high degree of harmonisation and supervisory co-operation based on information exchange.[137] The supervisory framework created by CRD IV requires that "both the supervised credit institutions and the competent authorities can have confidence that the confidential information provided will, in principle, remain confidential".[138] The CJEU continues by emphasising that confidence in confidentiality is necessary for the smooth functioning of supervision and that professional secrecy protects not only the private interests of the credit institution but also the stability of the EU's financial system as a public interest.[139] Lastly, the CJEU stresses that professional secrecy can only be derogated from in the specific cases set out by CRD IV.[140] In this context, it is interesting that the CJEU repeatedly quotes its *Baumeister* judgment "by analogy".[141]

Against this general framework, the CJEU analyses the derogation of professional secrecy of art.53(1) third subparagraph CRD IV,

> "where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings."

The CJEU follows AG Bobek's interpretation according to which this provision allows for disclosure already before civil or commercial proceedings have been initiated because the provision is restricted to persons directly concerned by the bankruptcy or compulsory liquidation of the credit institution.[142] Therefore and in principle, the CJEU grants to these persons the right to access confidential supervisory information before commencing civil or commercial proceedings, because otherwise "the needs of the proper administration of justice would be undermined".[143] According to the CJEU, this ruling does not contrast with its judgment in *Altmann* because of factual and procedural differences, a reading which again follows AG Bobek's Opinion.[144] The civil and commercial proceedings do not yet have to be pending when the applicant requests access to confidential supervisory information.

Nevertheless, the CJEU follows its general attitude of interpreting derogations strictly,[145] and requires the applicant to bring forward,

[135] *Buccioni* (C-594/16) EU:C:2018:717 at [20].
[136] *Buccioni* (C-594/16) at [19].
[137] *Buccioni* (C-594/16) at [21]–[26].
[138] *Buccioni* (C-594/16) at [27].
[139] *Buccioni* (C-594/16) at [28]–[29].
[140] *Buccioni* (C-594/16) at [30].
[141] *Buccioni* (C-594/16) at [27], [28], [29], [30].
[142] *Buccioni* (C-594/16) at [31]–[33].
[143] *Buccioni* (C-594/16) at [33]–[35].
[144] *Buccioni* (C-594/16) at [36].
[145] *Buccioni* (C-594/16) at [39] and the case law cited.

> "precise and consistent evidence plausibly suggesting that it is relevant for the purposes of civil or commercial proceedings which are under way or to be initiated, the subject matter of which must be specifically identified by the applicant and without which the information in question cannot be used."[146]

Hence, the applicant faces a high burden of proof when requesting access to confidential supervisory information. Furthermore, it remains within the supervisor's discretion whether or not to grant access as long as it weighs correctly the conflicting interests of secrecy and disclosure, which will be subject to the control exercised by the national courts.[147]

From a practical perspective, this judgment renders access to confidential information rather difficult because applicants generally have no insight into the business of their bank which undergoes bankruptcy or liquidation proceedings. It is difficult to imagine many cases in which a person suffering a loss from such a bank will have enough evidence to solidify this evidence for a civil liability claim against the supervisor. This general information asymmetry between supervisor and concerned third party will leave most applicants without the possibility of access to confidential information. Even though the CJEU grants a general access right in *Buccioni*, this right is narrowed by strict conditions of evidence. Given the high burden of proof, the judgment factually rejects AG Bobek's claim[148] for a paradigm shift regarding the confidentiality of supervisory documents once bankruptcy or liquidation proceedings have started. Since the balancing of confidentiality and disclosure interests is difficult and might have a systemic impact even once bankruptcy proceedings are initiated, the judgment could express the CJEU's sensitivity for the peculiarities of financial supervision.

The UBS Europe *case*

On the same day as *Buccioni*, the CJEU decided the case of *UBS Europe*,[149] which concerned MiFID I. In this case from Luxembourg, two persons active in the financial sector had requested copies of correspondence from the national supervisory authority, the Commission de surveillance du secteur financier (CSSF). They wished to use this in their defence in administrative proceedings that had followed their removal from the financial sector as the CSSF considered them untrustworthy.

The questions referred to the CJEU by the Cour administrative (Higher Administrative Court) were,

> "whether Article 54(1) and (3) of [MiFiD I], read in conjunction with Article 41 of the Charter of Fundamental Rights of the EU (Charter), should be interpreted as meaning that the exception to the obligation of professional secrecy laid down in that provision and relating to 'cases covered by criminal law' applies to a situation in which the [competent authority] adopt[s] a measure or a sanction covered by national administrative law. If this should not be the case, it seeks to ascertain to what extent that obligation of professional secrecy is in any event restricted by the right to an effective remedy and a fair trial and by the respect for the rights of the defence enshrined in Articles 47 and 48 of the Charter, read in the light of Articles 6 and 13 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)."[150]

Again, the scope of professional secrecy was at issue, and the question to what extent supervisory files should remain confidential, even for documents needed for the defence of supervised entities or persons.

[146] *Buccioni* (C-594/16) at [38].
[147] *Buccioni* (C-594/16) at [39].
[148] AG Bobek's Opinion in *Buccioni* (C-594/16) EU:C:2018:425 at [84]–[87].
[149] *Proceedings brought by UBS Europe SE* (C-358/16) EU:C:2018:715; [2019] Bus. L.R. 61.
[150] Article 47 of the Charter concerns the right to an effective remedy and a fair trial, and art.48 the presumption of innocence and the right of defence.

The Court found that administrative proceedings leading to "a finding that a person no longer satisfies the requirement of good repute" concern access to the financial market and are not a sanction in application of MiFiD I with a penal character in the sense of the Charter and of the ECHR.[151] Thus, the exception for "cases covered by criminal law" did not apply in the Luxembourg proceedings.[152] In assessing whether the applicants who had been removed from the market had been treated in accordance with the rights to a fair trial and the right of defence under arts 47 and 48 of the Charter,[153] the Court held, first, that the CSSF had acted in implementation of MiFiD I so that the Charter was applicable.[154] It then found that the right to an effective remedy is recognised in EU law[155] and encompasses,

> "protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person constitutes a general principle of EU law."

Furthermore, "[t]he right of access to the file is the necessary corollary of the effective exercise of the rights of the defence".[156] Yet, "the right to disclosure of the documents relevant to the defence is not unlimited and unfettered", and must be balanced with other interests.[157] Should there be documents in a supervisory file that are "objectively connected to the complaints upheld against [a person removed from the market by the supervisory authority]", then it is for the national court "to weigh up the interests … before taking a decision whether to communicate each of the requested pieces of information".[158]

In this judgment, the CJEU similarly gives a long interpretation of art.54(1) and (3) MiFID I read in conjunction with arts 47 and 48 of the Charter,[159] along the lines it had done in *Baumeister*.[160] Given this broad reading, the *UBS Europe* ruling also concerns ESMA when exercising its supervisory functions, as the Charter is applicable to this EU agency.[161] Furthermore, the *UBS Europe* judgment similarly draws upon *Baumeister* on various occasions[162] and, in parallel to the strict interpretation of the derogation for "civil and commercial proceedings" in *Buccioni*,[163] gives a strict interpretation of the derogation for "cases covered by criminal law".[164] Finally, we note that the *UBS Europe* ruling is equally relevant for access to files by persons not, or no longer, considered "fit and proper" (FAP) as directors of a credit institution pursuant to CRD IV by a national competent authority or by the ECB.[165]

[151] *UBS Europe* (C-358/16) EU:C:2018:715 at [46].
[152] *UBS Europe* (C-358/16) at [47].
[153] *UBS Europe* (C-358/16) at [48].
[154] Pursuant to art.51(1) Charter; *UBS Europe* (C-358/16) EU:C:2018:715 at [52].
[155] By the Charter (art.47), as a general principle of EU law and by MiFiD I itself (art.52(1)); *UBS Europe* (C-358/16) EU:C:2018:715 at [54], [56] and [57].
[156] *UBS Europe* (C-358/16) at [61].
[157] *UBS Europe* (C-358/16) at [68].
[158] *UBS Europe* (C-358/16) at [70].
[159] *UBS Europe* (C-358/16) at [48]–[70].
[160] *Baumeister* (C-15/16) EU:C:2018:464 at [26], [27]–[33], [38], cited in *UBS Europe* (C-358/16) EU:C:2018:715 at [31]–[39]. *UBS Europe* (C-358/16) at [28].
[161] Including specifically art.41 (Right to good administration), addressed to "institutions, bodies, offices and agencies of the Union".
[162] *UBS Europe* (C-358/16) at [31]–[39], [65].
[163] *Buccioni* (C-594/16) EU:C:2018:717 at [38]–[39].
[164] *UBS Europe* (C-358/16) at [41]–[47].
[165] CRD IV arts 13(1), 91(1) and 67(2)(d). See the ECB's *Guide to fit and proper assessments* (May 2017), *https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fap_guide_201705.en.pdf*. On its website, the ECB calls for a more harmonised approach to FAP assessments: "ECB Banking Supervision would welcome a more harmonised implementation of CRD IV. The same rules should be implemented in the same way throughout Europe to ensure that management bodies are assessed equally …": see *https://www.bankingsupervision.europa.eu/press/publications/newsletter/2018/html/ssm.nl180214_4.en.html* [Both accessed 24 April 2019].

The CJEU's holistic approach—common applicability of case law beyond sectoral boundaries

From a systematic point of view, the repeated references to *Baumeister* and *Altmann* in the *Buccioni* judgment hint at the CJEU taking a holistic approach which interprets the professional secrecy provisions of MiFID I and CRD IV in a parallel way.[166] This impression is underlined by the CJEU judgment in *UBS Europe*. A common reading of these CJEU judgments reveals that the CJEU does not conceive the EU financial regulation framework as a puzzle of merely sector-specific provisions but rather conceives it as a pointillistic picture where provisions and case law from one sector influence the reading of another sector's regulation, all of them adding up to a united picture. This can be understood as the judiciary trying to remedy the legislative incoherence regarding professional secrecy standards.

In *Baumeister*, the CJEU defined the notion of confidential information as information which is not public and the disclosure of which is likely to negatively impact the interests of the person who provided that information or of third parties. The relevant moment for determining the confidentiality of the information is the moment of examination. Given the importance of the passage of time, the CJEU further stated the principle that confidential information loses its confidential character after five years unless the party relying on the confidential nature exceptionally proves that the information still constitutes an essential element of its commercial position or that of interested third parties. We conclude that these definitions and standards set by the CJEU for MiFID I also apply under the equivalent MiFID II provision.[167] In addition, given the comparability of the relevant provisions in CRD IV and Solvency II, we deduce that the standards can also be applied to the supervision of credit institutions under CRD IV and the supervision of insurance and reinsurance business under Solvency II.

In *Buccioni*, the CJEU shone light on the meaning of the exceptional access to supervisory documents "in civil and commercial proceedings" by generally including the request for access in this exception even before a market participant initiates a damages claim against the supervisory authority. The CJEU thus followed AG Bobek's distinction of the CRD IV provision from the equivalent MiFID I provision and the interpretation of the latter in *Altmann*. However, the CJEU restricted this general access to confidential information by establishing a high burden of proof for persons damaged by a bank's bankruptcy or liquidation. Since governmental liability for supervisory action has always been one of the most disputed fields of financial regulation, the CJEU's judgment in *Buccioni* certainly attracts attention beyond the boundaries of credit institutions' supervision. For example, access to confidential information is also very relevant in the relation to the bank's resolution authority. Recently, the Appeal Panel of the Single Resolution Board held that an SRB decision rejecting access to information regarding the resolution of Banco Popular Español did not fulfil the SRB's obligation to balance confidentiality concerns with overriding public interests.[168]

Need for reform?

In a broader context, two questions arise: Is the current approach appropriate and in line with the need for transparency of public action and accountability of prudential supervisors, and is there scope for encompassing legislation across the entire financial sector to align the confidentiality regimes for the supervisory files in the securities, insurance and banking sectors?

[166] Similarly on *Baumeister*, see E. Gurlit, "Die Reichweite der Verschwiegenheitspflichten der BaFin nach Baumeister: Alles auf Anfang!" [2018] N.Z.G. 1097, 1099.

[167] Similarly, see Gurlit, "Die Reichweite der Verschwiegenheitspflichten der BaFin nach Baumeister" [2018] N.Z.G. 1097, 1099.

[168] SRB Appeal Panel, Final decision from 19 June 2018 on joined cases 44/2017 and 7/2018, *https://srb.europa.eu/sites/srbsite/files/case_44_17_7_18_project_decision_20180618_anonymised.pdf* [Accessed 24 April 2019].

First, answering our question whether the current set of rules is in line with the requirements of transparency of public action and accountability of prudential supervisors comes back to the starting point of this article: the regulatory background between the conflicting interests of transparency vs. professional secrecy.[169] Against the backdrop of the CJEU's case law described above,[170] we conclude that the judiciary's remedying the absence of legislative co-ordination is not sufficient given the interests at stake and the need for legal certainty. Therefore, the question of transparency of public action and accountability of prudential supervisors would have to be answered in adopting the legislative approach. While we strongly endorse confidentiality of supervisory files, a sincere acknowledgment of the need for openness and responsiveness should likewise govern the law-makers when adopting the new standards. This may mean embracing the paradigm shift for which AG Bobek argued in "historic" cases (after bankruptcy or resolution of a financial firm) and recognising the information asymmetry between supervisor and affected parties. Balanced provisions should provide adequate mechanisms to judge whether disclosure is appropriate in the case at hand.

Secondly, the existence of a panoply of confidentiality provisions with small but significant differences resulted from the distinct EU legislative processes for standard-setting in the subsectors of the finance industry. That a phenomenon can be explained historically does not imply that its survival is warranted. Actually, a new look at the variety of legal texts may give the legislator a chance to tidy up inconsistencies and introduce a financial sector-wide approach which must facilitate cross-subsector exchanges and which may deepen co-operation among supervisors, notably with different mandates, such as conduct of business, micro-prudential and macro-prudential, AML/CTF.[171] This latter area has come to the fore as an element of supervision where current competences are clearly insufficient to ensure proper "policing" and new competences at EU level are required.[172] Without too wide an opening of confidentiality, and while maintaining the purpose-driven character of the use of confidential data,[173] an encompassing legislative approach may improve currently dispersed and unco-ordinated provisions. New provisos would naturally not provide that information obtained for prudential concerns would automatically be usable for other supervisory concerns: what can be shared by which kind of supervisors would be clearly circumscribed, with collecting authorities remaining competent to limit the use to be made of the information they voluntarily impart on colleagues—but there would be one industry-wide set of standards, encompassing the ECB, the national competent and designated authorities and the ESAs. This approach would do away

[169] See above, "Regulatory background: accountability through transparency vs. professional secrecy".

[170] See above, "Case law shaping professional secrecy standards".

[171] AML/CTF stands for Anti-Money Laundering and Counter-Terrorist Financing. See Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60 of the European Parliament and of the Council and Commission Directive 2006/70 [2015] OJ L141/73 (AMLD4), as amended by Directive 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138 and 2013/36 [2018] OJ L156/43 (AMLD5).

[172] On the basis of its Communication of 12 September 2018, "Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions" COM(2018) 645 final, *https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-anti-money-laundering-communication-645_en.pdf*, the Commission has proposed amendments to the Regulations governing the ESAs; see COM(2018) 646 final, *https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-supervisory-authorities-regulation-646_en.pdf*. The ECB has established an "AML office" for co-ordinating issues in the SSM. See: Second ordinary hearing in 2018 at the European Parliament's Economic and Monetary Affairs Committee, Introductory statement by Danièle Nouy, Chair of the Supervisory Board of the ECB, Brussels, 20 November 2018, *https://www.bankingsupervision.europa.eu/press/speeches/date/2018/html/ssm.sp181120.en.html* [All accessed 24 April 2019].

[173] The second of the two locks described at the outset: professional secrecy implies that disaggregate information is confidential and may be used only for specific purposes set out in the law.

with what AG Bobek called the three-layered approach to confidentiality: national rules on access to documents, the professional secrecy provisions of EU law underlying these, and the exceptions to these rules.[174]

Proposal for a single EU professional secrecy standard for the supervision of the financial sector

For the reasons set out in the previous sections, we propose the adoption of a new legal act in the form of a regulation. Thus, the discussion about minimum and maximum harmonisation would be a thing of the past, and a clear standard of professional secrecy[175] would apply across the EU. The Regulation on professional secrecy for supervisory authorities in the financial sector would replace the existing provisions in the relevant directives. An inventory of provisions in need of amendment and replacement could be made and a public consultation held on the new standard-setting regulation.

Legal basis

We propose that the regulation should be based on art.114 TFEU as the scope of the regulation is limited to the professional secrecy of authorities whose task it is to supervise financial services within the EU. The legal basis[176] is an essential element of EU legislative reform proposals.[177] In principle, the CJEU requires legislative acts to be based on a single legal basis which covers the main regulatory objective of the legislative act.[178] However, if it aims at several goals which are inseparably linked to each other, the act can exceptionally be based on several legal bases.[179] Such a combination of legal bases is prohibited if the respective procedures are incompatible.[180] Then, the legal basis with stricter conditions trumps the one with less strict conditions. A comparison of the different legal acts containing professional secrecy provisions in the financial sector shows that the EU legislators based them all on different but single legal bases. CRD IV and MiFID II are based on art.53(1) TFEU and Solvency II on its predecessor art.47(2) TEC, showing the backdrop of mutual recognition behind harmonised financial regulation. CRR, MiFIR and the ESA Regulations are based on art.114 TFEU as the general legal basis for harmonisation within the single market. The SSM Regulation is based on art.127(6) TFEU as special legal basis for the conferral of specific tasks relating to the prudential supervision upon the ECB. The three legal bases differ as to their procedure. While art.127(6) TFEU requires Council unanimity,[181] arts 53(1) and 114 TFEU prescribe the ordinary legislative procedure where, by default,[182] a qualified Council majority is sufficient. Article 127(6) TFEU is not applicable because the regulation would not confer new powers upon the ECB but merely modify the modalities of the ECB executing its supervisory tasks conferred by the SSM Regulation.

[174] AG Bobek's Opinion in *Buccioni* (C-594/16) EU:C:2018:425 at [32].

[175] AG Bobek's Opinion in *Buccioni* (C-594/16) at [70] identified remedying "the questionable drafting of Article 53(1) of [CRD IV]".

[176] Required by the principle of conferral under art.5 TEU.

[177] See for example R. Repasi, "Legal Options and Limits for the Establishment of a European Unemployment Benefit Scheme" (2017), pp.7–8, 41, *https://ec.europa.eu/social/BlobServlet?docId=16886&langId=en* [Accessed 24 April 2019].

[178] *Parliament v Council* (C-155/07) EU:C:2008:605; [2009] 1 C.M.L.R. 23 at [35].

[179] *Commission v Council* (C-211/01) EU:C:2003:452 at [40]; *Parliament v Council* (C-155/07) EU:C:2008:605; [2009] 1 C.M.L.R. 23 at [36]; e.g. the "Omnibus" Directive 2010/78 [2010] OJ L331/120, was based on arts 50, 53(1), 62 and 114 TFEU.

[180] *Commission v Council* (C-300/89) EU:C:1991:244; [1993] 3 C.M.L.R. 359 at [17]–[21]; *Parliament v Council* (C-155/07) EU:C:2008:605 at [37].

[181] The Lisbon Reform Treaty unfortunately amended the provision for activating the ECB's role in prudential supervision by deleting the requirement of consent of the European Parliament that art.105(6) TEC contained.

[182] Article 16(3), (4) TEU.

Article 53(1) TFEU is not well suited as the proposal only incidentally concerns the facilitation of establishment or service provision for self-employed persons by mutual recognition. The main aim of the proposed regulation is to harmonise the professional secrecy standards of supervisors within the EU's single market both horizontally between the different financial sectors and vertically at EU level (ESAs, ECB) and national level (NCAs). Hence, art.114 TFEU is the right legal basis.

Content of regulation proposal

When such a harmonisation effort is undertaken, this should, as we stated, lead to enhanced transparency of supervisory files. While protecting the confidence between supervisors and supervised, shielding the authorities from having to disclose their considerations in weighing alternatives, and allowing authorities to continue to make use of the surprise effect of supervisory actions, the new standard should include exceptions for cases covered by criminal and tax law and for proceedings that relate to (but do not necessarily constitute) bankruptcy or resolution proceedings. The standard should continue to protect business secrets and allow the supervisory authorities time to do their work. Thus, following the CJEU in *Baumeister*, a general presumption that information loses its confidential nature after a lapse of five years should be adopted,[183] and a reversal of the burden of proof introduced: only if the party affected by disclosure proves the need for continued secrecy after five years would confidentiality of information be upheld. The alignment would also address the exchange of confidential information not only between different national competent and designated authorities, but also between competent authorities of different subsectors of the financial sector, especially for entities combining banking, investment services and/or insurance business. The standard would encompass EU authorities, including the ESAs and the ECB. The standard would introduce a single set of rules for sharing information with, inter alia, auditors and accountants, with clearing houses, with authorities in the area of AML/CTF and with bodies responsible for deposit insurance and payment services oversight. An inventory of all mandatory and permissible exchanges of information among authorities, which exceeds the limits of our present contribution, should precede the adoption of the regulation, and a public consultation on the proposed single standard should be held.

A single standard would not only help reduce the conflicting standards between the different regulatory silos, but simultaneously introduce a common professional secrecy standard encompassing the national competent authorities and the ECB in its supervisory functions in the SSM. The current striking lack of a single professional secrecy standard applying to the ECB when exercising its supervisory functions within the SSM should, in our view, be remedied[184]: a Single Supervisory Mechanism operating for prudential supervision in the single currency area should not go without a single professional secrecy standard. Furthermore, the outreach to the European Banking Union would help pave the way for regulatory convergence and legal certainty for professional secrecy standards before the envisaged EU Capital Markets Union[185] comes into force. From the industry's point of view, a single standard would also make sense because integrated financial services providers would benefit from higher predictability of the confidentiality of information transmitted to the supervisor. Their different supervisors would likewise benefit from the

[183] In line with what Hüpkes, Quintyn and Taylor, "The Accountability of Financial Sector Supervisors" (2005) rightly submits, namely that supervisory decisions and their reasoning should, after an appropriately long period of time, no longer enjoy confidential treatment.

[184] The ECB is subject to the national variations on art.53 CRD IV.

[185] Originally set out by European Commission, "Action Plan on Building a Capital Markets Union" COM(2015) 468 final; updated and complemented by European Commission, "Communication on the Mid-Term Review of the Capital Markets Union Action Plan" COM(2017) 292 final. An overview of the implementation process which is due to finish in 2019 can be found at *https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-action-plan_en* [Accessed 24 April 2019].

fact that they could communicate with each other unhindered by petty differences in the law applying to them. A single standard in a directly applicable legal instrument would enhance legal certainty, with interpretation directly provided by the CJEU. We argue that agreement might be within reach as all sides seem to benefit from cross-sector regulatory alignment of professional secrecy standards. A single professional secrecy standard across the EU[186] would contribute to the Single Rulebook and be in line with the level of financial integration achieved, and mandated to be achieved,[187] in Europe.

[186] As to the future framework regulating financial services between the EU and the UK post-Brexit, see more generally H. Berger and N. Badenhoop, "Financial Services and Brexit—Navigating Towards Future Market Access" [2018] 19 E.B.O.R. 679–714.

[187] Article 3(2) TEU and art.26(2) TFEU: "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."