Regulating Bank Governance and the EU Capital Requirements Directive

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Abstract

This article pays tribute to Professor Mads Andenas's scholarly contribution to European banking law and regulation. The article addresses how EU banking law under the Capital Requirements Directive IV regulates private shareholder rights regarding their governance or control rights over banking corporations and the extent to which public law regulatory powers are constrained by EU constitutional law regarding the application of administrative sanctions on EU banks or bank shareholders who violate CRD IV governance principles and rules. The analysis will focus on the CRD IV's sound and prudent governance principle and related regulatory technical standards adopted by the European Banking Authority. It will also analyse the extent to which EU administrative or regulatory sanctions can be applied to banks for violating the sound and prudent governance principle and related regulatory standards and how the principle of proportionality could apply to the exercise of such regulatory powers. The article builds on the fascinating body of work of Professor Andenas in analysing EU banking law and the extent to which EU member state supervisory authorities are constrained by fundamental EU legal principles in imposing sanctions on banks for violating applicable law and regulatory rules.

Introduction

Professor Mads Andenas has distinguished himself as a European company and financial law and international economic law scholar who has trenchantly analysed the tensions between private law rights and public law duties and obligations. This has resulted in a number of outstanding articles, books and edited studies that have influenced both academic and policy-making debates especially as they relate to fundamental principles of EU Treaty and constitutional law and administrative regulation. His work is recognized internationally and has led to appointments and visiting professorships at many of the world's leading universities, including Oxford, Cambridge and Harvard Universities. Prior to his appointment as Chair in Private Law at the University of Oslo, he was Director of the British Institute of International and Comparative Law as well as Director of the Centre of European Law at King's College London, and a Senior Teaching Fellow of the Institute of European and Comparative Law, Oxford and formerly a Fellow in Law at Harris Manchester College, Oxford and Professor at the University of Leicester. Recently, he was a visiting fellow at All Souls College, Oxford.

His research and teaching interests have covered Norwegian law,[1] EU law,[2] international, and comparative law.[3] Furthermore, human rights law has played an important role in his research in which he has addressed fundamental legal principles such as proportionality, legality and due process of law.[4] Moreover, he has analysed these fundamental EU treaty principles, such as free movement, as they relate to company,[5] banking and financial market law.[6] Most notably, he has made important contributions in the analysis of the proportionality principle in the context of WTO law and classical EU law.[7] As an avid practitioner of the art of comparative law, he does not shy away from the detailed analysis of fundamental legal concepts as they are interpreted and applied in diverse legal systems.[8]

Over the years, an important theme in his analysis of the tension between private law rights and public law duties and responsibilities has been that the insistence on private law rights during times of market or social distress is likely to be more disruptive to society and to the rule of law than to be a public good.[9] The European Court

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[1] Mads Andenæs & Eirik Bjørge, *The Norwegian Court Applies the ECHR by Building upon Its Underlying Principles* 19 European Public Law 214-246 (2013).

[2] See e.g. Mads Andenæs, *Civil Liability of Credit Rating Agencies in the European Union in Special Issue: Civil Liability of Credit Rating Agencies in the European Union* 11 International and Comparative Corporate Law Journal 1 (2015).

[3] See e.g. Mads Andenæs & Duncan Fairgrieve, *Intent on Making Mischief : Seven Ways of Using Comparative Law* in Pier Giuseppe Monateri (ed.), *Methods of Comparative Law*, Chapter 2 s 17-79 (Edward Elgar Publishing, 2012).

[4] See e.g. Mads Andenæs & Eirik Bjørge, *National Implementation of ECHR Rights* in Andreas Føllesdal; Birgit Peters & Geir Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2014) ; See also Mads Andenæs & Andreas Motzfeldt Kravik, *Menneskerettene i væpnet konflikt* 52 Lov og rett: Norsk juridisk tidsskrift 214-231 (2013).

[5] See e.g. Mads Andenæs, *EU Company Law and the Company Laws of Europe* 6 International and Comparative Corporate Law Journal 7-41 (2008) ; See also Mads Andenæs & Gudula Deipenbrock, *Directors' Dutites to Promote the Success of the Company and 'Enlightened Shareholder Value* 7 International and Comparative Corporate Law Journal 1-70 (2010).

[6] See e.g. Mads Andenæs, *Harmonising and Regulating Financial Markets* in Mads Andenæs (ed.), *Theory and Practice of Harmonisation* (Edward Elgar Publishing, 2012). Kapittel, *Harmonising and Regulating Financial Markets*, s 1 – 29 See also Mads Andenæs and Iris H-Y Chiu, *Regulatory Governance of Alternative Investment Fund Managers* 3 Law and Economics Yearly Review 208-272 (2014).

[7] See Mads Andenæs & Stefan Zleptnig, *Proportionality and Balancing in WTO Law: A Comparative Perspective i*n Mads Andenæs & Kern Alexander (ed.), *The World Trade Organization and Trade in Services* (Brill Nijhoff, 2008). See also Mads Andenæs & Stefan Zleptnig, *Proportionality and Balancing in the WTO: A Comparative Perspective*, Cambridge Review of International Affairs 20 (2007). See also Mads Andenæs, *Proportionality: WTO Law: In Comparative Perspective* in Texas Journal of International Law (2007).

[8] See e.g. Mads Andenæs and Teorier om tyske, *Grundrechte" og kontrakt. Lesesirkel i kontraktsrett* (2011). See also Eirik Bjørge & Mads Andenæs, *Giudice nazionale e interpretazione evolutiva della convenzione europea dei diritti dell'uomo* LXIV(4) Rivista trimestrale di diritto e procedura civile 1267-1280 (2010).

[9] See Bank of America's shareholders' suit for having taken over Merrill Lynch at the height of the crisis, see <http://dealbook.nytimes.com/2012/09/28/bank-of-america-to-pay-2-43-billion-to-settle-class-action-over-merrill-deal/?_r=0>.

of Human Rights dealt with this tension firmly in *Grainger v. the UK*[10] and this case has important implications for how EU company, banking and financial law address the relationship between with public law rights, such as the principle of proportionality, legality and equal protection under law, and the assertion of private law rights. It would therefore seem fitting in this Festshrift to add certain thoughts and ideas to those of Professor Andenas's regarding how EU banking law under the Capital Requirements Directive IV regulates private shareholder rights regarding their governance or control rights over banking corporations and the extent to which public law powers are constrained by general principles of EU constitutional law in the imposition of administrative sanctions on EU banks or bank shareholders who violate EU governance principles and rules. This contribution will attempt to build on the fascinating body of work of Professor Andenas by examining recent developments in EU banking law concerning the regulation of bank corporate governance and the extent to which member state supervisory authorities are constrained by fundamental EU legal principles, such as the proportionality principle, in imposing sanctions on banks or bank shareholders for violating applicable law and regulatory rules.

Reforming European Bank Governance under CRD IV – the General Framework

Following the financial crisis of 2007-08, the European Union drastically restructured its public regulatory law by adopting a massive legislative programme of banking and financial law reform governing all areas of the financial services sector. The major objective of the legislative programme was to ensure that there would be no repeat of the banking collapses and public bail-outs of privately-owned banks that occurred across many EU member states in 2007 and 2008 and which caused Europe to enter into its longest and most severe economic recession since the 1930s. As part of the financial market legislative reforms, the EU Council and Parliament adopted the Capital Requirements Directive IV that was a substantial reform that built on previously EU banking reform legislation in 2006 (CRD I), 2008 (CRD II) and 2010 (CRD III). The CRD IV substantially adds to the substantive requirements regarding the regulation of bank corporate governance and enhances the powers of supervisory authorities to enforce governance principles (ie., the principle of sound and prudent management) based on more detailed criteria for determining when and what type of administrative sanctions banks and bank shareholders should be subject to for violations of the principle of sound and prudent management.

The Capital Requirements Directive IV (CRD IV) consists of the Capital Requirements Regulation (CRR) and the Capital Requirements Directive (CRD).[11] Most

[10] *Grainger v. the UK* <http://hudoc.echr.coe.int/eng?i=001-112312? and <http://www.ejiltalk.org/echr-leaves-northern-rock-shareholders-out-in-the-cold/>.

[11] See Regulation (EU) No 575/2013 and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision

provisions of the CRD IV took effect in Europe in January 2013 and apply to a wide range of banking activities, including bank capital and liquidity management, corporate governance and risk management. For most Member States, the CRR of the CRD IV containing the capital and liquidity rules and provisions became applicable in 2013. Regarding the regulation of bank governance, Art. 162 of the CRD requires the transposition into domestic law of the CRD's provisions dealing with 'sound and prudent management' of credit institutions and certain investment firms and administrative sanctions by 31 December 2013.[12] Consequently, as a matter of EU law, the relevant provisions of the CRD IV applying to the 'sound and prudent management' of credit institutions and administrative sanctions should have been implemented by member states by 31 December 2013 and should have been applicable to all regulatory enforcement actions related to bank governance beginning in 2014.

The CRD IV requirements that relate to bank corporate governance standards and risk management practices are found in the CRD. This affords much more discretion to Member States to devise rules governing bank corporate governance and risk management from within their existing domestic legal and regulatory regimes. In that regard, the CRD requirements regarding bank corporate governance and risk management build on and enhance existing requirements that were established under the previous Capital Requirements Directives, I II, and III.

Under the CRD, bank supervisors have wide discretion to address the particular risks that individual banks face and pose to the domestic banking system. As such, bank supervisors are not subject to a prescriptive framework of rules (although rules supplement the exercise of supervisory discretion). Supervisors may adopt stricter requirements with some banks, as opposed to others, where they decide that the institution has not devised a risk management model or implemented suitable corporate governance practices and strategies that address the particular risks that the bank faces and poses to the financial system.[13]

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of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC. The CRR addresses the calculation and estimates of regulatory capital and liquidity requirements for EU-based credit institutions and certain investment firms. As a Regulation, it is directly applicable to EU Member States' regulatory law and administrative rulebooks. In contrast, the CRD, as a Directive, is not directly applicable in Member States and must be implemented through the adoption of domestic legislation. As a Directive, the Member State is able to adapt the provisions of the Directive in a way that respects national legal requirements and practices, whereas the Regulation affords much less flexibility and must supersede through direct application existing provisions of Member State laws.

[12] In contrast, the Capital Requirements Regulation (CRR, CRD IV) requirements concerning capital and liquidity requirements for systemically important financial institutions (Art. 131) and returns on initial capital for credit institutions are not required to be implemented until 1 January 2016. See Parliament Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

[13] K Alexander, *The EU Single Rulebook: Capital Requirements for Banks and the Maximum Harmonisation Principle* in Hinojosa & Beneyto (eds), *European Banking Union: The New Regime*, Chapter 3, p 24 (Wolters Kluwer, 2015).

Under the CRD IV, member state supervisory authorities have the authority to take all necessary measures to ensure the prudent and sound management of banks and certain investment firms, and they may subject these institutions to remedial, business and recovery and resolution plans whose content must be approved by the supervisor. Under CRD IV, the bank supervisor may also regulate and approve the risk management practices and strategies of banks under its supervision and may vet and approve the appointment of bank senior managers and board members during normal periods of bank operations as well as when the bank is subject to remedial orders or plans and/or recovery and resolution plans.

The European Banking Authority (EBA) was established in 2010 to promote enhanced harmonisation of supervisory practices across the Member States of the EU. The EBA seeks to ensure that the exercise of supervisory powers, including the exercise of powers that intervene in the governance of banking and investment firms and the application of sanctions under the CRD IV, is not excessively divergent across EU jurisdictions and that the exercise of supervisory powers, including imposing administrative and punitive sanctions, are based on recognised principles of proportionality, legality and due process.

Regulating Appointments to the Management Bodies of the Bank

The CRD establishes that responsibility for appointments to the managing body is within the purview of the credit institution, specifying that such an appointment should be based on knowledge, repute, skill and experience (CRD, Art. 91). The EBA Guidelines on the suitability of members of the management body put the primary onus of this assessment on credit institutions both prior and after appointment (Art. 3.2 (b)), with the requirement to notify the competent authority of appointments. Assessment of suitability by credit institutions is broadly based on reputation and experience.[14] EBA guideline 11 on internal governance also specifies that it is the responsibility of the managing board to appoint its members and sets out indicators to be taken into account to achieve this objective.

The CRD, CRR and EBA Guidelines on the assessment of suitability of members of the managing board suggest that the first stage of appointment and assessment falls on the credit institution's supervisory board with reporting requirements to the competent authority. This first stage of appointment and assessment of suitability by the credit institution is undertaken (a) prior to appointment or as soon as is practicable, not exceeding six weeks from appointment; and (b) on an ongoing basis.[15]

A second stage involves evaluation by the competent authority of the credit institution's appointments. Under the EBA Guidelines on management body suitability, competent authorities are tasked with undertaking an independent assessment of the

[14] Guidelines on the assessment of the suitability of members of the management body and key function holders prepared by the European Bank Authority, 22 November 2012, Art. 5.

[15] EBA Guidelines above, art(s) 6.1, 6.2.

suitability of proposed or appointed members of the management body.[16] However, it should be emphasised that the EBA guidelines are legally non-binding and that the ultimate decision on appointments to the management body lies with the competent authority.[17] If a member of the management body is not considered to be suitable, the competent authority should require the credit institution either not to appoint the member or if the member is already appointed to take appropriate measures to replace her.

EBA Guidelines on the assessment of suitability of members of the managing board, guidelines 13-15, set out criteria to be used by the competent authority in assessing suitability. These are far more prescriptive than the criteria set out for the credit institutions and broadly focus around three factors: reputation; experience and governance (guideline 13). Elements to assess good reputation include personal and business conduct to ensure sound and prudent management of the credit institutions, criminal and administrative records, investigations, compliance with professional codes of conduct,[18] dismissal from employment in a position of trust including minor incidents, especially those relating to crimes in the financial sector, tax offences, corporate law, insolvency (guideline 13). Criteria for assessment of experience include banking and financial sector-related education, training and professional and practical experience gained in previous occupations (guideline 14). Governance criteria include sufficient devotion of time, avoidance of conflict of interests and independence (guideline 15).

The EBA Guidelines on management body suitability specify that if a member of the management body is not suitable, the credit institution, and, if necessary, the competent authority should take appropriate action.[19] The kind of action that can be undertaken varies. For the credit institution, appropriate action following non-suitability of a prospective member of the managing board involves taking necessary steps to improve the suitability of the individual under consideration e.g. training, adjusting responsibilities, etc. (EBA Guideline 8.2 on management body suitability).

For the competent authority, the appropriate action following non-suitability of a prospective member of the managing board is a more prescriptive process. The first stage of this process involves evaluation of information provided by the credit institution.[20] The weight given by the competent authority to elements of the stipulated

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[16] *Ibid.*, art. 3.4 (b).

[17] Guidelines on the assessment of the suitability of members of the management body and key function holders prepared by the European Bank Authority, 22 November 2012, Art. 12.2.

[18] Guidelines on the assessment of the suitability of members of the management body and key function holders prepared by the European Bank Authority, 22 November 2012, Art. 13.5 (c) relevantly provides that "particular account should be taken of the following factors, which may cast doubt on a member's good repute:

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c. relevant current or past investigations and/or enforcement actions by any other regulatory or professional bodies for non-compliance with any relevant provisions."

[19] Executive Summary of the EBA Guidelines on management body suitability, EBA/GL/2012/06 22 November 2012.

[20] Guidelines on the assessment of the suitability of members of the management body and key function holders prepared by the European Bank Authority, 22 November 2012, Art.11.1

assessment criteria may vary based on national law.[21] This in effect means that it would be possible for the member state supervisory authority's assessment of the suitability of a prospective board member to vary substantially from that of the bank's controlling shareholders or bank board members.

The competent authority is required to inform the credit institution of non-compliance with any regulatory measures, giving the credit institution the opportunity to correct any such instances of non-compliance. The competent authority may reassess the suitability of members of the management body including through inspection and/or an interview process.[22] The entire process – both the first stage (assessment by the credit institution) and the second stage (assessment by the competent authority) – is to be completed within six months from the date of receipt of the complete application.[23]

Sound and Prudent Management of the Bank

While the CRD IV (CRD and CRR), as well as supporting Guidelines, does not define the concept of 'sound and prudent management', it repeatedly emphasises the essential role of the management body in ensuring sound and prudent management. This is to be achieved primarily through robust internal governance arrangements. The CRD requires robust governance arrangements including clear organisational structures, defined, transparent and consistent lines of responsibility, effective processes to monitor and report risk, adequate internal control mechanisms including administration and accounting procedures and remuneration policies, consistent with sound and effective risk management.[24]

It is the management body's role to define, oversee and supervise implementation of governance arrangements in a manner that ensures effective and prudent management and includes setting out the credit institution's strategic objectives, risk strategy and internal governance, overseeing the process of disclosure and oversight of senior management.[25] As explained above, the management body of a credit institution comprises its supervisory and managerial function. The term "management body" is used in the EBA Guidelines on internal governance to embrace all possible governance structures, keeping in mind that EU-wide there is the use of both unitary (where one body e.g. the Board of Directors, performs both supervisory and management functions) and dual governance structures (where supervisory and management functions are performed by a supervisory board and a management board, respectively). The Guidelines do not advocate any particular structure.

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[21] Guidelines on the assessment of the suitability of members of the management body and key function holders prepared by the European Bank Authority, 22 November 2012, Art.11.2.

[22] Guidelines on the assessment of the suitability of members of the management body and key function holders prepared by the European Bank Authority, 22 November 2012, Art.11.3.

[23] Guidelines on the assessment of the suitability of members of the management body and key function holders prepared by the European Bank Authority, 22 November 2012, Art.11.4.

[24] CRD (CRD IV), Art. 74 (1).

[25] CRD (CRD IV), Art. 88 (1).

The management body is required to exercise its powers in a manner which is not just sound and prudent, but also proportionate to the nature, scale and complexity of the credit institutions risk structure.[26] The provisions relating to sound and prudent management by the management body are further fleshed out in the EBA Guidelines on internal governance. These identify specific instances of prudential and sound management that are part of the responsibilities of the management body. According to the EBA Guidelines on internal governance (Guideline 8 (2) in particular) special responsibilities of the management body broadly cover:

a. business strategy of the credit institution within the purview of the applicable regulatory framework and the institution's long-term financial interests and solvency;
b. overall risk strategy;
c. amount, types and distribution of internal capital;
d. robust and transparent organisation structure with effective communication channels;
e. policy on appointment of individuals with key functions;
f. remuneration framework;
g. governance principles and corporate values;
h. effective internal control including risk, compliance and internal functions; and
i. financial reporting and accounting framework.

Indicators of whether or not a bank's 'prudent and sound management' is being safeguarded cover a wide area of activity, including bank capital and liquidity management, corporate governance and business strategy, reputation and operational risks, including fraud and money laundering risks. Prudent and sound management also covers non-quantitative governance and legal risks that the bank may be exposed to and the risks arising from its decision-making processes and accountability structures. The bank's overall controls in corporate governance, organisational structure, and risk strategy are important features of prudential regulation.

It is clear from the provisions of the CRD, CRR and supporting Guidelines that the primary responsibility for sound and prudent management is on the management body. The CRD recognises the power that shareholders exercise and therefore their role in ensuring sound and prudent management. Under Art. 14 (2) if a competent authority is not satisfied as to the suitability of shareholders, it may refuse authorisation to commence activity of a credit institution in the interests of preserving sound and prudent management of the credit institution.

Sanctions Available to National Supervisory Authorities

The CRD IV authorises the imposition of an array of sanctions measures against credit institutions and covered investment firms that violate the sound and prudent manage-

[26] CRD, Art. 74 (2).

ment principle of the CRD. Art. 26(2) of the CRD specifies that where the influence exercised by the so-called "proposed acquirer" of a bank or covered investment firm in an acquisition or takeover is likely to operate to the detriment of the prudent and sound management of the institution, the competent authorities shall take appropriate measures to put an end to that situation. The CRD allows supervisors wide discretion in determining what appropriate measures are: Art. 26(2) provides that such measures "may consist in injunctions, penalties, subject to Arts 65 to 72, against members of the management body and managers, or the suspension of the exercise of the voting rights attached to the shares held by the shareholders or members of the credit institution in question." Save in the most egregious of situations, the supervisor should consider applying one or more of the lesser measures listed in Art. 67 (see below) before applying the more severe sanctions listed under Art. 26(2).

Under the CRD, the supervisor is given all supervisory powers to intervene in the activity of institutions, as is necessary for the exercise of their function.[27] However, as mentioned above, those powers are subject to Arts 65 to 72.

The responsible member state supervisor would have at its disposal two kinds of action for the failure of a bank to procure "prudent and sound management". The first is corrective, through procedural actions, and the second is more in the nature of punitive action. Under the CRD IV, administrative sanctions consist of measures that can be classified as 'corrective' and/or 'punitive'.[28] As a matter of EU law, both types of action must be proportionate. Specifically, Art. 65 of the CRD requires Member States to lay down rules on administrative penalties and administrative measures in respect of breaches of national provisions, which "shall be effective, proportionate and dissuasive".[29]

The administrative sanctions provided for in Art. 67 consist of both corrective and punitive measures. Corrective measures are those that provide for redress of a wrong through compensation, damages for loss or an order to stop violating the law or regulation. For example, Art. 67 of the CRD requires Member States to adopt administrative sanctions that are corrective in nature that, among other things, provide 'compensation' or damages for loss, or an order to stop violating the law or regulatory rules.[30] Specifically, Art. 67(a) authorises the bank supervisor to issue a public state-

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[27] CRD (CRD IV) Art. 64 (1).

[28] The terms "corrective" and "punitive" are not used in the CRD IV or European Banking Authority technical implementing standards, regulations and guidelines. See Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC; and Parliament Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

[29] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, Art. 65 (1 and 2)).

[30] Art. 68 sets out the conditions, content and format for the publication of administrative penalties. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the

ment of censure which identifies the natural person, institution, financial holding company or mixed financial holding company responsible and the nature of the breach. Art. 67(b) provides for corrective measures in the form of orders requiring the natural or legal person responsible to cease specified conduct and to desist from a repetition of that conduct.[31]

Art. 67 also sets out an illustrative list of applicable administrative penalties. It identifies the kind of institutions and breaches that would attract the specified penalties, including institutions which fail to have in place governance required by the competent authorities in accordance with the national provisions transposing Art. 74 (internal governance and resolution and recovery plans).[32]

Under Art. 67(c), punitive measures are those which are additional to corrective measures, such as a fine or penalty or loss of license *etc*, and in the case of an institution, withdrawal of the authorisation of the institution in accordance with Art. 18. Art. 67(d) provides that, subject to Art. 65(2), the supervisor can impose a temporary ban against a member of the institution's management body or any other natural person who is held responsible, from exercising functions in institutions. Art. 67(e) provides that, in the case of a legal person, administrative pecuniary penalties of up to 10% of the total annual net turnover including the gross income consisting of interest receivable and similar income, income from shares and other variable or fixed-yield securities, and commissions or fees receivable in accordance with Art. 316 of the CRR of the undertaking in the preceding business year. Art. 67(f) provides that, in the case of a natural person, administrative pecuniary penalties of up to EUR 5 000 000, or in the Member States whose currency is not the euro.

Art. 67 (g) provides for sanctions that are both punitive and corrective in the form of measures that are penalties, fines or orders that are unrelated or partially-related to losses incurred by depositors, investors or the public. In such cases, the penalties or fines can amount to up to twice the amount of the profits gained or losses avoided because of the breach; if profits or losses avoided cannot be determined, the regulator can still assess a fine, penalty or order that serves, in the regulator's view, to deter future misconduct.

It is clear throughout the CRD IV, however, that the application of both punitive and corrective measures by the bank supervisor and any regulatory bodies must meet the proportionality test established in EU law. Art. 70 relates to the effective applica-

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activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

[31] CRD, Art. 69 relates to exchange of information on penalties and maintenance of a central database by the EBA. See Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

[32] Art. 67 (1) provides that "an institution fails to have in place governance arrangements required by the competent authorities in accordance with the national provisions transposing Art. 74". See Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

tion of penalties and exercise of powers to impose penalties by competent authorities. It specifies that when determining the type of administrative penalties to impose, the competent authorities shall take into account all relevant circumstances, including, (a) the gravity and the duration of the breach; (b) the degree of responsibility of the natural or legal person responsible for the breach; (c) the financial strength of the natural or legal person responsible for the breach; (d) the importance of profits gained or losses avoided by the natural or legal person responsible for the breach, insofar as they can be determined; (e) the losses for third parties caused by the breach, insofar as they can be determined; (f) the level of cooperation of the natural or legal person responsible for the breach with the competent authority; (g) previous breaches by the natural or legal person responsible for the breach; and (h) any potential systemic consequences of the breach.

Art. 71 relates to the reporting of breaches. It places the onus of establishing effective and reliable mechanisms to encourage reporting of potential or actual breaches on the competent authority. Art. 72 provides for a right of appeal, requiring Member States to ensure that decisions/measures taken pursuant to laws/regulations in accordance with the Directive/Regulation are subject to a right of appeal.[33]

As mentioned above, Art. 67 provides a ladder of administrative sanctions to be applied depending on the egregiousness and persistence of the violation in question. The facts of each case will determine the type and nature of sanction to be imposed; for example, any relatively minor breach of the sound and prudent management principles or other principle or rule in the CRD or CRR should be addressed in a proportionate way by relatively less stringent administrative sanctions that can serve either dissuade an institution (ie., the bank board or individual) from engaging in the violation or to correct its conduct or as a punitive measure to deter future misconduct. The proportionality principle is crucial for determining whether or not the administrative sanction in question is appropriate given the facts of each violation. For example, a bank's board of directors that does not have a persistent record of violating banking regulation requirements but nevertheless in an isolated incident violates a regulatory rule (ie., failing to consult the supervisor when appointing its chief executive officer) should be subjected to a relatively minor sanction so long as it was willing to address the violation by taking corrective action (ie., consulting with the supervisory authority) within a reasonable period of time if the appointment of the bank executive was found to be in appropriate and in violation of EBA guidelines and generally accepted supervisory practice. Above all else, the supervisor's intervention into the board's

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[33] Art. 72 of the Directive provides that "Member States shall ensure that decisions and measures taken pursuant to laws, regulations and administrative provisions adopted in accordance with this Directive or to Regulation (EU) No 575/2013 are subject to a right of appeal. Member States shall also ensure that failure to take a decision within six months of submission of an application for authorisation which contains all the information required under the national provisions transposing this Directive is subject to a right of appeal." See Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

legal authority to appoint a senior manager of a bank or other regulated institution should proportionate and based on transparent regulatory rules and accepted supervisory practices in effect at the time of the supervisor's decision to intervene into the exercise of control rights of shareholders and the board of directors whom they elect to exercise their control powers. This exercise of authority – that is, control rights over the appointment of senior management – should be guided by the circumstances of each case and whether the supervisor's exercise of power is serving corrective or punitive function *and* whether it complies with EU Treaty and constitutional principles of proportionality, due process, and legality under EU law.

Legal Constraints on the Imposition of Sanctions by National Supervisory Authorities

Art. 65 of the CRD in effect means that penalties and measures can only be imposed if they are provided for in law, conform to the procedural and substantive principles set forth in Arts 66-72, and are proportional and necessary to meet the general interest of the EU. The procedural and substantive principles of Arts 66-72 embed the principles of proportionality, right to appeal, and legality (as discussed below).

In general, while a member state supervisor has a reasonably wide canvas for the exercise of its supervisory powers, these powers are required to be exercised in line with CRD IV and keeping in mind the key EU legal principles – that of proportionality, right to appeal/due process and legality,[34] as recognised by the EU Treaty ('**Treaty of Lisbon**'). Art. 6(3) of the Treaty of Lisbon provides that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'[35] The supervisory powers of competent authorities are therefore tempered by wider EU legislation and Treaty of Lisbon principles.

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[34] Moreover, as discussed below, the CRD IV expressly supports a maximum harmonisation approach to EU-wide banking regulation and supervision that aims to promote a level playing field for all EU-based credit institutions and covered investment firms. See Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC; and Parliament Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

[35] The ECHR was adopted by the Council of Europe and came into force in 1950. The ECHR is adjudicated by the domestic courts of signatory states of the Council of Europe and by the European Court of Human Rights in Strasbourg. See Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950.

The Relationship between EU Law, the Charter and the ECHR and Its Jurisprudence

EU law and the ECHR case law recognise certain principles, such as proportionality, the right to appeal, and legality, as applicable to the exercise of public law powers. Administrative law has incorporated these principles to develop a series of tests for measuring the lawfulness of the exercise of public law powers. Any exercise of public law powers that infringes on ECHR treaty rights, such as the right to property, must be compatible with Convention rights and EU law and must follow a proper reasoning process that comes to a reasonable conclusion. Accordingly, member state bank supervisory authorities exercising powers under the CRD IV are required to be mindful of Treaty of Lisbon principles and legislation and ECHR rights.

All EU Member States are signatories to the ECHR. The Charter of Fundamental Rights of the European Union came into force in 2009 through Art. 6 of the Treaty of Lisbon.[36] The Charter applies to the institutions of the EU and its Member States. Much of the Charter is based on the ECHR, European Social Charter, jurisprudence of the Court of Justice of the European Union (‘**CJEU**’), general principles of law common to EU Member States, and pre-existing provisions of EU law.

Under the Charter, EU Member States must act and legislate consistently with the Charter when implementing EU primary law and legislation.[37] EU and Member State courts can strike down legislation adopted by Member States that implements EU law if that legislation contravenes the Charter. Poland and the United Kingdom, however, secured an opt-out to the Treaty of Lisbon – known as the ‘Polish Protocol’,[38] as follows:

> *“Article 1. (1) The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*
> *(2) In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.*

[36] The Charter was adopted on 7 December 2000, but only became legally binding on EU states in December 2009 by the Treaty of Lisbon, Art. 6. See European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01. Art. 6(1) provides that the Union “recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 which shall have the same legal value as the Treaties”.

[37] Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012, Art. 51 states that the provisions of the Charter are applicable to “Member States only when they are implementing Union law.”

[38] Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom C 306/156.

Article 2. To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom."

Regarding the Polish and UK opt outs, it has been observed that although Poland and the UK had obtained the agreement of EU Member States that the Protocol prevented the 'Charter from being interpreted in a way that creates new rights to those already provided for in British and Polish law,' it however could not prevent the enforcement of rights that 'are already recognised as general principles of EU law under Art. 6(3) of the TEU'.[39] Art. 6(3) provides that:

"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Such fundamental rights would include rights to property and due process. Such views have been supported by recent jurisprudence of CJEU. Importantly, in case C-489/10, Advocate General Kokott stressed that the Protocol No. 30 on the application of the Charter to Poland and the UK does not constitute an 'opt-out' from the Charter for the two countries but works 'as a guide to interpretation'.[40] Similarly, in joined Cases C-411/10 and C-493/10, the CJEU held that the Protocol does not exempt Poland and the UK from the Charter. Both countries must comply with the obligations set out in the Charter and Member States' courts must guarantee compliance with the Charter's provisions.[41]

Proportionality

The principle of proportionality is embedded in EU law (including the CRD) and the ECHR. It requires, *inter alia*, national authorities to give effect to the principle in their implementation of EU legislation. The principle of proportionality requires that there be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective. A decision that is proportionate is also likely to be rational, evidence-based and reasonable.

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[39] Douglas-Scott, *The EU and Human Rights after the Treaty of Lisbon* 11 Human Rights Law Review 645-682, p 654 (2011),

[40] *Criminal proceedings against Łukasz Marcin Bonda*, CJEU Case C-489/10, Opinion of the Advocate General Kokott (15 December 2011), page 23.

[41] *N.S. v. Secretary of State for the Home Department*, CJEU Case C-411/10, and *M.E. & Others v. ORAC*, CJEU Case C-493/10, Judgment of the Grand Chamber (21 December 2011), page 120.

Furthermore, any limitations on rights and freedoms guaranteed by the Charter are required to be proportional and made only if it is necessary and meets the general interest of the EU. (Art. 52 (1) of the Charter).[42] The Charter specifies that any exception to the rights and freedoms of the Charter – including the right to property under Art. 17(1) – must be provided for by law. According to the jurisprudence of the European Court of Human Rights ('**ECtHR**'), proportionality arises in the context of justifying any interference with rights on the basis of such interference being "necessary in a democratic society".[43] The central idea is of striking a fair balance, which finds its expression in sub-principles such as less restrictive alternatives; avoidance of absolute rules, which allow for no exceptions; inappropriate reasons; flawed or inadequate procedural protections and safeguards; or decisions, which undermine the 'essence' of a right.[44]

Under the CRD IV, Member States and their supervisory authorities are explicitly required to ensure that their conduct complies with the proportionality principle. Several provisions of the CRD IV allude to the principle. The CRR sets out an interpretation of the principle of proportionality in the context of the EU's financial sector. Preamble paragraph 46 provides that:

> *"The provisions of this Regulation respect the principle of proportionality, having regard in particular to the diversity in size and scale of operations and to the range of activities of institutions. […] Member States should ensure that the requirements laid down in this Regulation apply in a manner proportionate to the nature, scale and complexity of the risks associated with an institution's business model and activities. The Commission should ensure that delegated and implementing acts, regulatory technical standards and implementing technical standards are consistent with the principle of proportionality, so as to guarantee that this Regulation is applied in a proportionate manner. The EBA should therefore ensure that all regulatory and implementing technical standards are drafted in such a way that they are consistent with and uphold the principle of proportionality."*

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[42] Art. 52 (1) deals with the scope and interpretation of rights and principles. It sets out "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." See Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012.

[43] *Beyeler v. Italy,* ECtHR No. 33202/96, Judgment (5 January 2000), page 27, para. 111 stating '[a]ny interference in with the enjoyment of a right or freedom recognised by the Convention must, … pursue a legitimate aim'. See also *Hasan and Chaush v. Bulgaria,* ECtHR, (Judgment of 26 October 2000), holding that the principle of legality under ECHR prevents prohibits the state from taking arbitrary and capricious action and requires that any action depriving a person or entity of its property be a proportionate measure that achieves the public interest.

[44] *Sovtransavto Holding v. Ukraine*, ECtHR No. 48553/99, Judgment (25 July 2002). *Offerhaus v. the Netherlands,* No. 35730/97 (16 December 2001) (it should be 16 January 2001).

As discussed above, Art. 70 of the CRD makes specific provision about the effective application of penalties and exercise of powers to impose penalties by competent authorities. It sets limits on the imposition of sanctions by national supervisory authorities. In particular, it requires Member States and their supervisory authorities, while deciding administrative penalties/measures, to take account of all relevant circumstances, including, where appropriate:

a. "*the gravity and the duration of the breach;*
b. *the degree of responsibility of the natural or legal person responsible for the breach;*
c. *the financial strength of the natural or legal person responsible for the breach, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person;*
d. *the importance of profits gained or losses avoided by the natural or legal person responsible for the breach, insofar as they can be determined;*
e. *the losses for third parties caused by the breach, insofar as they can be determined;*
f. *the level of cooperation of the natural or legal person responsible for the breach with the competent authority;*
g. *previous breaches by the natural or legal person responsible for the breach;*
h. *any potential systemic consequences of the breach*."

The EBA Guidelines also have an implied element of proportionality by specifying that credit institutions should make suitability assessments of the managing body keeping in mind the nature, scale and complexity of the business of the credit institution.[45] There is therefore a clear and express requirement for national authorities to apply the principle of proportionality in its supervisory conduct as a matter of EU law generally, and under CRD IV specifically.

The Right to Property and Proportionality

An EU bank supervisor's duty to apply the principle of proportionality is reinforced because the exercise of supervisory powers often involves taking measures that limits the rights of property of shareholders and creditors in a banking institution or investment firm. In particular, the property rights of shareholders and creditors (ie., bondholders) is guaranteed as a fundamental right, both under EU law, the Charter and the ECHR. Art. 17 (1) of the Charter protects the right to property. It provides that property may only be deprived in the public interest or as provided for by law, subject to the payment of fair compensation.[46] The Charter is addressed to EU institu-

[45] EBA Guideline 7 on management body suitability.

[46] Art. 17 (1) of the Charter provides that "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions,

tions and bodies as well as national authorities implementing EU law, requiring such bodies to apply the provisions of the Charter in their implementation or direct application of EU directives/regulations into national law.[47]

In the ECHR context, the right to property is recognised in Art. 1 of the First Protocol. It provides that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law." According to the case law of the ECtHR, the term "possessions" in Art. 1 of the First Protocol to the ECHR, includes matters of financial value such as stocks and shares in a company (*Bramelid and Malmström v. Sweden* (1983) 5 EHRR 249). In *Olczak*, the court observed that shares in a public company have economic value and therefore can be regarded as "possessions" within the meaning of Art. 1 of the First Protocol of the ECHR.[48]

A company share is not only an indirect claim on the company's assets, but can include other rights as well, especially voting rights and the right to influence the company'.[49] In the *Marini vs. Albania* case, the ECtHR found that shares held by the applicant had an economic value and constituted "possessions" within the meaning of Art. 1 of Protocol No. 1.[50] It proceeded to observe that a company share is "a complex thing. It certifies that the holder possesses a share in the company together with corresponding rights. That is not only an indirect claim on company assets, but other rights, especially voting rights and the right to influence the company, may stem from the share".[51]

In the *Marini* case, the applicant held a 50% stake in a company. Repeated actions by the State left the applicant with no decision-making power in the company. Consequently, there were changes in the powers the applicant exercised as a shareholder, that is to say in his ability to run the company, control its assets and receive its profits. The ECtHR found that the State measures at issue had rendered the applicants' shareholding "inactive", had "upset the "fair balance" that has to be struck between the demands of the public interest, and the need to protect the applicant's right to the

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except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest." See Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012.

[47] Art. 51 (1) of the Charter, provides that "provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers." See Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012.

[48] *Olczak v. The Republic of Poland*, ECtHR No. 30417/96, Final Decision on Admissibility (7 November 2002), page 60 (citing ECHR [decision] App No 11189/84, *S and T v. Sweden* (11 December 1986), DR 50, 158). For a more detailed discussions see Alexander, T*he EU Single Rulebook: Capital Requirements for Banks and the Maximum Harmonisation Principle* in Hinojosa & Beneyto (eds), *European Banking Union: The New Regime*, Chapter 3 (Wolters Kluwer, 2015).

[49] *Sovtransavto Holding v. Ukraine*, (48553/99) [2002] ECHR 621, (25 July 2002), pp 4-5 (citing S and T v. Sweden).

[50] *Marini v. Albania*, ECtHR No. 3738/02, Judgment (18 December 2007), paras 161 and 164.

[51] *Marini v. Albania*, ECtHR No. 3738/02, Judgment (18 December 2007), para. 165.

peaceful enjoyment of his possessions". Consequently, the State had failed to comply with its obligation to secure the applicant's effective enjoyment of his right of property, as guaranteed by Art. 1 of Protocol No. 1.[52]

Consequently, an investor's shareholding in an EU-based credit institution or investment firm clearly constitutes a "possession" for the purposes of Art. 1 of the First Protocol of the ECHR. Particularly, a shareholder's voting rights in its shares also constitute "possessions" for the purposes of Art. 1 of the First Protocol. That is, the shareholder's right to elect members of the bank board of directors and to exercise other control rights in influencing the sound and prudent management of a bank or covered investment constitutes a fundamental property right.

The Treaty of Lisbon, as it relates to the right to property, would through Art. 6(3) apply the ECtHR jurisprudence to the exercise of supervisory powers by an EU/EEA member state that infringe on the property rights of bank shareholders and creditors, including the shareholders control rights to influence the sound and prudent management of a bank. Decisions which affect or impinge on individual shareholdings in a bank, therefore, must comply with the "proportionality" principle, as it is applied through the Treaty of Lisbon by ECtHR case law.

Principles of Due Process in Appealing the Imposition of Administrative Sanctions

The imposition of administrative sanctions requires that member states establish fair and impartial tribunals to adjudicate regulatory disputes whose conduct and decision-making are governed by Art. 6 of the Convention of Human Rights. A difficult area for some member states has been fulfilling their duty to provide adequate procedural avenues of appeal and judicial oversight for investors and regulated financial institutions subjected to administrative sanctions. Establishing a transparent and fair process that respects the right to appeal and adequate judicial oversight must respect the "doctrines of legality and due process" under EU law.

Supervisory decisions that infringe on property rights must also respect the doctrines of legality and due process. The principle of legality involves public law acts that are within the scope of any powers that are taken for a proper purpose. Procedural fairness requires that individuals or business entities have the right to be heard before a decision is made by a public law authority that impacts their rights. Any decision involving the exercise of public law powers that impacts rights must follow a proper reasoning process leading to a reasonable conclusion.[53]

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[52] *Marini v. Albania*, ECtHR No. 3738/02, Judgment (18 December 2007), para. 174.

[53] *Olczak v. The Republic of Poland*, ECtHR No. 30417/96, Final Decision on Admissibility (7 November 2002). See also *Capital Bank AD v. Bulgaria,* ECtHR No. 49429/99, Judgment (24 November 2005), page 137. The court observed that under emergency circumstances provisional regulatory measures could be taken without due process safeguards but pending a review of the bank's objections at a later hearing before a final regulatory decision is made. 36-37.

Further, the Charter (Art. 47) guarantees the right to an effective remedy for anyone whose rights are guaranteed by EU law. Art. 47 further specifies that such a right to an effective remedy includes the right to a fair trial within a reasonable period of time by an independent tribunal. More specifically, Art. 72 of the CRD provides that Member States shall ensure that decisions and measures taken pursuant to laws, regulations and administrative provisions in accordance with the CRD or the CRR are subject to a right of appeal.[54] Therefore, any decision by a member state supervisory that infringes on fundamental possessions or other property rights (ie., shareholdings or bond holdings of banks) are subject to appeal and should not take effect until such a reasonable time for appeal has lapsed. Given that the right to appeal is guaranteed under EU law (and, specifically, the CRD), then member state supervisory authorities are required to provide credit institutions and institutions covered under the CRD IV to an effective remedy and a fair trial in the form of an appeal process.

In addition, the principles of procedural fairness (due process) and proportionality are also relevant for determining whether any deadline imposed by a supervisor for complying with an administrative order that shareholders sell their interests in a bank or other institution should comply with reasonable time periods given the urgency of the situation (ie., whether the order is made during a financial crisis). Also, any supervisory sanctions should not be imposed until the bank or the bank's shareholders (if shareholders are the subject of the sanction) have had the opportunity to appeal and that any reconsideration by the supervisory authority of the sanction due to an appeal or request for rehearing should lead to a postponement of the imposition of the sanction or penalty. For instance, a supervisor's postponement or delay in reconsidering its decision to impose sanctions based on a request for rehearing or appeal of the original decision until after a time following date of imposition of the sanctions (if the imposition of such sanctions cannot be effectively or practically reversed) would potentially constitute a violation of the doctrines of legality and due process under EU law, together with the specific requirements of Art. 72 of the CRD. As a general matter, the bank board or its shareholders (if shareholders are subjected directly to the sanction) should have the opportunity to exhaust their appeal through all administrative and judicial channels before the supervisor's order to impose sanctions goes into effect.

Conclusion

Mads Andenas has made an outstanding contribution to our understanding of how EU Treaty and constitutional law applies to the company law and property law rights of shareholders of banks and other companies subjected to public law regulatory powers. His commentary and analysis over the years provide an important scholarly dimension for lawyers and policymakers to enhance their understanding of the relevance of EU Treaty principles to the exercise of corporate and commercial law rights.

[54] Art. 55 of the 2006 Capital Requirements Directive I contained an equivalent provision.

This modest contribution to Professor Andenas's festchrift attempted to shed some light on the application of EU Treaty law principles to the exercise of public regulatory powers over the corporate governance of banks and certain investment firms. Indeed, the principle of 'sound and prudent management' in the Capital Requirements Directive IV is an important legislative principle that empowers member state supervisory authorities to regulate the control rights of shareholders in EU credit and investment institutions in order to achieve broader public regulatory objectives. However, the chapter suggests that the exercise of such broad regulatory powers are subject to the EU constitutional principles of proportionality, legality, and due process, which Professor Andenas has elaborated so well in his research and commentary. The broad assertion of public law powers to achieve regulatory objectives is increasingly becoming an important issue for EU member state authorities, as demonstrated by the implementation of the Bank Recovery and Resolution Directive and its impact on bank shareholder and creditor rights. In providing another perspective on this tension as it relates to the sound and prudent management of a bank, this essay attempts in a small way to build on the edifice already established by Professor Andenas's work.