The future of EU financial law

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Key points

- The imprint of the major themes of our time is as apparent in the field of financial law as in any other. Obvious examples are the coronavirus crisis, sustainability, the onward march of technology, the unceasing struggle between integration and federalism on the one hand and protectionism and nationalism on the other and, last but not least, the pressure brought to bear by leading geopolitical powers such as China, the United States and Russia. These forces have largely shaped financial law in Europe, especially in the recent past, and will continue to do so in the future.
- Where these forces are actually leading us, however, is less easy to predict. It remains to be seen whether all the new European rules and legislative proposals will produce a fully integrated, sustainable and digital European Capital Markets Union and a complete and smoothly functioning European Banking Union. And it is still much too early to gauge whether Brexit will work out well for the EU27.
- But one thing is certain: Europe's tentacles reach deep into financial law. No matter what finance-related topic one studies, whether it be combating money laundering and terrorist financing or issues such as deposit insurance schemes, non-performing loans, the coronavirus crisis or local products such as investment-linked policies and share leasing, one is bound sooner or later to have to deal with EU law. In other words, for practitioners of financial law, the need to deal with EU law is simply a fact of life. As long as the European Union continues to exist, of course.

1. Introduction

We live in times of great uncertainty and change. Naturally, this is true worldwide and not just of our old, trusted Europe. The major themes of our time are playing a defining role in financial law as well: the coronavirus crisis, sustainability, the onward march of technology, the unceasing struggle between integration and federalism on the one hand and protectionism and nationalism on the other (think, for example, of Brexit and nationalist tendencies in countries such as Poland and Hungary) and, last but not least, the pressure exerted by major geopolitical powers such as China, the USA and Russia. These themes have largely shaped financial law in Europe in the recent past and look set to do so in the future as well. So, let's get started as we have a lot to discuss.

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2. Capital markets union action plan

General

Although we may live in uncertain times, this has by no means dampened the European Commission's regulatory zeal, at least not in relation to the financial sector. Take the Capital Markets Union (CMU) Action Plan which the Commission launched in September 2015. The idea of the plan is simple, namely to ensure that those needing and providing capital can find each other more easily within Europe, especially across borders. This could occur through the intermediary of a bank, the capital markets or alternative channels such as crowdfunding. In addition, it is thought that more non-bank funding will reduce dependence on the traditional banking sector and make for better absorption of economic shocks.[1]

The European Commission plans to achieve the CMU mainly by removing barriers and introducing rules to facilitate investment, and perhaps also by means of a European grant here and there. This was so when the CMU Action Plan was launched in 2015, and it was still the case shortly after the Brexit referendum on 23 June 2016.[2] The CMU Action Plan 2020, which the Commission launched in September 2020 in the midst of the coronavirus chaos, is based on the same thinking.[3] Assuming that we believe that the CMU can be brought about through EU legislation, this must of course be the right approach. But this is no easy task for the financial sector in particular, partly because the financial markets are so dynamic and therefore in a state of constant flux.

Moreover, as Europe is not a federation but, for the most part, a motley collection of sovereign states, all kinds of national and hence potentially obstructive rules continue to exist. Obvious examples are in the fields of tax law, contract law, property law, insolvency law and company law—all of which are still essentially national in nature. To tackle these problems, the Commission's CMU Action Plan 2020 makes bold proposals in two of these fields.

Standardized EU-wide system for withholding tax relief procedures

First, in the field of taxation. Taxes can be a barrier to cross-border investment. According to the Commission, alleviating the tax-associated burden in cross-border investment does not necessarily require harmonization of tax codes or rates. A significant burden ascribed to taxation is caused by divergent, burdensome, lengthy and fraud-prone refund procedures for tax withheld in cases of cross-border investment. These procedures cause

1 COM(2016) 601 final, p 2. For the initial action plan, see: COM(2015) 468 final. See extensively on CMU, amongst others, D Busch, E Avgouleas and G Ferrarini (eds), *Capital Markets Union in Europe*, OUP 2018.

2 COM(2015) 468 final; COM(2016) 601 final. Since the Brexit referendum, however, the CMU agenda has been slightly modified, with more emphasis on supervisory convergence (no integrated financial markets without supervisory convergence or even a central supervisor) and a genuine new addition to the CMU family: the Sustainable Finance Action Plan. For more information on these aspects, see the subsection 'Centralization of supervision of the European financial markets' and Section 3 below.

3 COM(2020) 590 final. As regards the Final Report of the High-Level Forum on the EU Capital Market Union, which preceded the Commission's most recent CMU proposals, see, eg K Langenbucher, 'Building a Capital Market—the Final Report of the High Level Forum on the EU Capital Market Union' (2020) 6 ECFR 601–18.

considerable costs that dissuade cross-border investment where taxes on the return on investment need to be paid in both the member state of the investment and that of the investor and can be reimbursed only after a lengthy and costly process. These considerations result in Action 10 of the CMU Action Plan 2020: in order to lower costs for cross-border investors and prevent tax fraud, the Commission promises to propose a common, standardized, EU-wide system for withholding tax relief at source.[4]

Harmonization—or in any event increased convergence—of non-bank insolvency law

Second, the Commission makes a proposal in its CMU Action Plan 2020 concerning non-bank insolvency law. The Commission notes that the stark divergence between national insolvency regimes is a long-standing structural barrier to cross-border investment. Divergent and sometimes inefficient national regimes make it difficult for cross-border investors to anticipate the length and outcome of value recovery proceedings in cases of bankruptcy, rendering it difficult to adequately price the risks, in particular for debt instruments. Harmonization of certain targeted areas of national insolvency rules or their convergence could enhance legal certainty. Furthermore, regular monitoring of the efficiency of national insolvency regimes would allow Member States to benchmark their insolvency regimes against those in other Member States. This might encourage those Member States with underperforming regimes to reform them. The results of the monitoring could also feed into the European Semester process. These considerations result in Action 11 of the CMU Action Plan 2020: to make the outcomes of insolvency proceedings more predictable, the Commission will take a legislative or non-legislative initiative for minimum harmonization or increased convergence in targeted areas of non-bank insolvency law. In addition, together with the European Banking Authority (EBA), the Commission will explore possibilities to enhance data reporting in order to allow for a regular assessment of the effectiveness of national loan enforcement regimes.[5]

Actions 10 and 11 are certainly initiatives worth considering. But whether these plans will reach the finish line and, if so, in what form remains to be seen. EU intervention in national tax law and private law is and will remain a sensitive subject.

Simplification of public listings for SMEs

Aside from the fact that Europe is not a federation but basically a jumble of sovereign states, which is only too conducive to the continued existence of all kinds of national and

4 COM(2020) 590 final, p 12. See also: <https://ec.europa.eu/jrc/en/page/eu-wide-system-withholding-tax-relief-174656> accessed 18 October 2021.

5 COM(2020) 590 final, pp 12–13. See also EBA, 'Report on the benchmarking of national loan enforcement frameworks—response to the European Commission's call for advice on benchmarking of national loan enforcement frameworks (including insolvency frameworks) from a bank creditor perspective' (18 November 2020) (EBA/Rep/2020/29). See also the European Commission's public consultation 'Insolvency laws: increasing convergence of national laws to encourage cross-border investment' (consultation period from 18 December 2020 to 26 March 2021) (<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment_en> accessed 18 October 2021).

thus potentially obstructive rules (see the sections 'General', 'Standardized EU-wide system for withholding tax relief procedures' and 'Harmonization—or in any event increased convergence—of non-bank insolvency law' above), the CMU project is largely a bottom-up project. In other words, the creation of an integrated European capital market is mainly up to those who provide and seek capital themselves.

An important secondary objective of the CMU project is to improve the access of SMEs to funding. At present, SMEs in Europe are still mainly reliant on bank loans. If the banking sector is doing badly, this immediately affects SMEs. We were able to see this during the previous financial crisis. At the time, banks were extremely reluctant to provide credit to SMEs, with all the consequences that entailed.[6] In the current coronavirus crisis, we are again seeing that banks are increasingly restricting the flow of funding for SMEs.

So, from this point of view, it is a good idea for SMEs to be given better access to other sources of funding, making them less reliant on bank loans. Easier access for SMEs to the capital markets would therefore be a good thing. They can then attract financing by issuing marketable bonds and shares. Under MiFID II and the Prospectus Regulation, it is now possible to obtain a listing in the EU on a so-called 'SME growth market'.[7] This is less complicated and less expensive than a real stock exchange listing. But the SME growth market does not yet qualify as a resounding success. Given the complexity of the process it involves, resorting to the capital markets is evidently still an unattractive and unnatural route for SMEs. What is also questionable is whether there are capital providers who see a profit in such an investment.[8]

In view of Action 2 of the CMU Action Plan 2020, the Commission too realizes that more must be done to entice SMEs to the capital market. In order to promote and diversify small and innovative companies' access to funding, the Commission wishes to assess whether the listing rules for public markets can be further simplified.[9] The Commission has also announced that it will continue its work on creating an SME IPO fund. The aim of the fund is to make it easier for SMEs, in particular in sectors of strategic importance to the EU, to raise capital and finance their growth. As the coronavirus crisis has radically changed the economic landscape in the EU, it will be necessary to reaffirm the ambition to support the financing of smaller companies and innovative scale-ups. In the Commission's opinion, this makes the case for the urgent creation of an ambitious SME IPO fund even more compelling. It will also continue its work on supporting the development of local public

6 See, eg G Wehinger, 'SMEs and the Credit Crunch: Current Financing Difficulties, Policy Measures and a Review of Literature' OECD Journal: Financial Market Trends Volume 2013/2 (<https://www.oecd.org/finance/SMEs-Credit-Crunch-Financing-Difficulties.pdf> accessed 18 October 2021).

7 Art 15 of Regulation (EU) 2017/1129 (the Prospectus Regulation) and art 33 of Directive 2014/65/EU (MiFID II/the Markets in Financial Instruments Directive II).

8 But see F Annunziata, 'The Best of all Possible Worlds? The Access of SMEs to Trading Venues: Freedom, Conditioning and Gold-plating' (EBI WPS No 96) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3865182), who paints a more positive picture> accessed 18 October 2021.

9 See for some concrete proposals in this regard the Final report of the Technical Expert Stakeholder Group (TESG) on SMEs: 'Empowering EU capital markets for SMEs—Making listing cool again' (May 2021) (<https://ec.europa.eu/info/sites/default/files/business_economy_euro/growth_and_investment/documents/210525-report-tesg-cmu-smes_en.pdf> accessed 18 October 2021).

markets, notably by looking into how stock market indices can support liquidity in SME equity.[10] But luring SMEs to the stock exchange will not be easy. And even if it does succeed, it remains to be seen whether investors will be willing to invest in SMEs of this kind. And that brings us to the next point.

European single access point for financial and sustainability-related company information

Reliable, standard information about SMEs and start-ups is essential not only for the purposes of a public listing but also to get investors to invest in such companies. But at present reliable, standard information is in very short supply, certainly about companies in other countries. It is against this background that Action 1 of the CMU Action Plan 2020 should be seen: the Commission undertakes to propose the setting-up of an EU-wide platform (European single access point/ESAP) to provide investors with seamless access to financial and sustainability-related information on companies.[11] This is an excellent idea, but not so easy to achieve in the case of information about SMEs and start-ups. There is currently no EU-wide standard for information on companies of this kind. It must therefore first be developed, either by means of EU legislation or by means of soft law, for example drawn up by the SME and start-up community itself, or by a combination of the two.

Centralization of supervision of the European financial markets

The CMU project may be largely a bottom-up project, but there are certainly also aspects that require a top-down approach. Harmonized rules are essential for a level playing field in Europe and will have to be set by the European legislator (top-down). Some progress has been made on this point in recent years, especially since many European rules have now been enacted as EU regulations. Previously, the EU rules for the financial markets were mainly found in directives. These in turn had to be transposed into national legislation, which led to differences in implementation that tended to adversely affect the degree of harmonization and thus undermine the notion of a level playing field in Europe. For example, the market abuse and prospectus rules are now found in regulations rather than directives, and the new rules for crowdfunding can also be found in a regulation.[12] Regulations do not need to be transposed into national legislation, which is beneficial for the degree of harmonization.[13]

But that's not all that needs to be done. The supervision of compliance with these European rules is still largely in the hands of national financial supervisors. And a supervisor in one Member State may be more flexible than a supervisor in another. Despite

10 COM(2020) 590 final, pp 7–8.

11 COM(2020) 590 final, p 7. For the ESAP consultation document, see: <https://ec.europa.eu/info/consultations/finance-2021-european-single-access-point_en> accessed 18 October 2021 (consultation period from 20 January to 12 March 2021).

12 Regulation (EU) 596/2014 (Market Abuse Regulation/MAR); Regulation (EU) 2017/1129 (Prospectus Regulation); Regulation (EU) 2020/1503 (Crowdfunding Regulation).

13 This may be different if a provision in a regulation allows a Member State an option or discretion.

uniform European rules, Europe still has no level playing field and no truly integrated financial markets, but this is and remains the aim of the CMU project. Hence, convergence or even centralization of supervision is fairly high on the CMU agenda of the European Commission. Unfortunately, progress on this subject is slow. As long ago as 2017 and 2018, the Commission made an attempt to designate ESMA (the European Securities and Markets Authority) as the direct supervisor of certain types of investment institution and crowdfunding service providers, and wanted to give it the power to approve certain categories of prospectuses.[14] The Commission also wanted to place providers of so-called Pan-European Personal Pension Products (PEPPs) under the direct supervision of the European Insurance and Occupational Pensions Authority (EIOPA).[15]

None of these plans has come to fruition. Why not? More supervisory powers for ESMA (or EIOPA) would be at the expense of the influence of national supervisors and hence of the Member States. France and the Netherlands were in favour of a more centralized form of supervision, but at the time in question Germany was not. If the supervision of financial markets is to be more centralized, Germany will have to give up its opposition. After all, we all know how things work in Europe: if the Franco-German axis agrees on a course of action, there is a real chance it will happen, especially now that the United Kingdom has left the EU. The recent Wirecard scandal is likely to put further pressure on Germany to modify its position on the centralization of supervision. After all, in future discussions on this subject Germany will find it harder to claim that its national supervision is always beyond reproach, as the German Federal Financial Supervisory Authority (BaFin) and also the German Financial Reporting Enforcement Panel (FREP) were recently confronted with a highly critical report from ESMA about their defective supervision of Wirecard AG.[16] According to Action 16 of the CMU Action Plan 2020, the European Commission will consider proposing measures for stronger supervisory coordination or direct supervision by the European supervisory authorities. The Commission will also carefully assess the implications of the Wirecard case for the regulation and supervision of EU capital markets and act to address any shortcomings that are identified in the EU legal framework. On 12 March 2021, the Committee immediately published a consultation document on this subject.[17] To make matters worse, on 15 March 2021, BaFin was obliged to open proceedings for the insolvency of Greensill Bank in Bremen (the Australian-British parent company had previously been granted a moratorium on the payment of its

14 COM(2017) 536 final (20 September 2017) (certain investment institutions and prospectuses); COM(2018) 113 final (8 March 2018) (crowdfunding service providers).

15 COM(2017) 343 final (29 June 2017). It is noted in this connection that, under the forthcoming Markets in Crypto-Assets Regulation (MiCAR) (COM(2020) 593 final), if an asset-referenced token has been classified as significant in accordance with arts 39 or 40, its issuer shall carry out its activities under the supervision of the European Banking Authority (EBA), which shall exercise the powers of competent authorities conferred by arts 21 and 37–38 as regards issuers of such tokens (art 98(1)). Furthermore, if an e-money token has been classified as significant pursuant to arts 50 or 51, the EBA shall be responsible of their issuers' compliance with the requirements laid down in art 52 (art 98(4)). Of course, we will need to wait and see whether this proposal will reach the finish line.

16 ESMA, *Fast track peer review report on the application of the guidelines on the enforcement of financial information (ESMA/2014/1293) by BaFin and FREP in the context of Wirecard* (3 November 2020) (ESMA42-111-5349).

17 See <https://ec.europa.eu/info/consultations/finance-2021-esas-review_en> accessed 18 October 2021.

debts). This means that, after Wirecard, Germany now has a second billion-euro scandal, which critics say unfolded right in front of BaFin's very eyes.[18] This has put mounting pressure on Germany.[19]

So, does this mean that nothing at all has been achieved in terms of centralizing supervision of the European financial markets? No, some progress has been made. ESMA already directly supervises credit rating agencies (CRAs) and trade repositories (TRs).[20] A CRA publishes assessments of the creditworthiness of a company or government.[21] A TR is an entity that centrally collects and maintains the records of derivatives in a trade repository. TRs provide regulators and supervisors with more information about the derivatives market. From 1 January 2022, ESMA also directly supervises data reporting service providers and administrators of key benchmarks.[22] Data reporting service providers provide information about transactions in financial instruments such as listed shares and bonds. Benchmarks are used to determine the value of a financial instrument or contract, or to determine how much should be paid out to the investor under such an instrument or contract. Benchmarks are also used to measure the performance of an investment institution.[23]

While all of these may be encouraging steps forward, they are of course still rather meagre in their totality. At its core, the supervision of the European financial markets is still conducted at national level. This is in stark contrast to the lightning-fast establishment of the European Banking Union (EBU), which provides that the 'significant' banks within the participating Member States[24] are placed under the direct prudential supervision of the European Central Bank (ECB) in Frankfurt (first pillar) and that, if these banks fail, they are, in principle, also resolved in an orderly manner at European level by the Single Resolution Board (SRB) in Brussels (second pillar). By the way, this certainly does not mean that everything is running smoothly within the EBU. In this area too, we come up

18 See Gerben van der Marel, *Financiële ravage in Duitsland door omgevallen Greensill* (Greensill's collapse wreaks financial havoc in Germany), *FD* 16 March 2021.

19 See on the Wirecard scandal, eg: S Mock, 'Wirecard and European Company and Financial Law' (2021) 4 ECFR 519–54. On the potential liability of BaFin in connection with the Wirecard scandal see, eg M Lehmann and J Schürger, 'Staatshaftung für Versäumnisse der BaFin im Fall Wirecard' (2021) 18–19 Wertpapier-Mitteilungen 857–64 (Part I), 905–12 (Part II).

20 It has these powers under Regulation (EU) No 1060/2009 (CRA Regulation) (as subsequently amended); Regulation (EU) No 648/2012 (European Market Infrastructure Regulation or EMIR) (as subsequently amended); and Regulation 2015/2365 (Securities Financing Transactions Regulation or SFTR).

21 For a recent discussion of the liability of CRAs, see D Verheij, 'Credit Rating Agency Liability in Europe' (PhD thesis at the University of Leiden), Eleven Publishers 2021.

22 See arts 4 and 5 Regulation (EU) No 2175/2019 (which amend provisions of the Benchmark Regulation and the MiFIR).

23 It should be noted in passing that a switch is currently being made from 'traditional' benchmarks such as LIBOR (London Interbank Offered Rate), which have turned out to be somewhat sensitive to manipulation, to a neutral and reliable replacement. This is an extremely complex exercise that has occupied financial regulators and the financial sector for many years. And the end is not yet in sight. As regards the underlying European legislation, see <https://www.esma.europa.eu/policy-rules/benchmarks> accessed 18 October 2021. See extensively on the European Benchmark Regulation: I Khort, 'The Proportionality of the European Benchmark Regulation' (PhD thesis at the University of Zürich), Dike 2021.

24 Participating Member States include those whose currency is the euro and those with a derogation, which have established a 'close cooperation' in accordance with art 7 SSM Regulation, such as, since October 2020, Bulgaria and Croatia (art 2, point (1) SSM Regulation).

against the problem that insolvency law can still differ from one member state to another—and that is just one of many problems.[25]

Consolidated tape

Since the entry into force of the MiFID I regime on 1 November 2007, there has been free competition in the EU/EEA between the established stock exchanges (known as 'regulated markets') and alternative trading platforms (known as 'multilateral trading facilities' and 'organised trading facilities'). All these 'markets' fulfil the same economic function, namely matching supply and demand for securities and other financial instruments on a multilateral basis. Free competition between all these trading platforms has proved successful in Europe. So, if I ask my financial intermediary ('investment firm') to buy 10 Shell shares for me, he can choose from a wide range of platforms on which to execute my order. In making that choice, he is bound by the so-called 'best execution' obligation, because he must, of course, execute the order on terms that are most favourable to me.[26] The idea is that competition between trading platforms is good, as it reduces the costs of executing client orders and thus benefits investors.[27]

But it also has disadvantages. Owing to the sheer number of platforms that are active, the markets are to a greater or lesser extent fragmented. As a result, there may be insufficient liquidity per platform, resulting in sub-optimal pricing and price differences (albeit often minimal) between the platforms. How can we ensure that the prices on all these platforms continue to converge and that the various platforms together form a fully integrated market in economic terms? Many feel that the answer lies in greater transparency. The various platforms are already required to publish the volumes and prices of concluded

25 See: S Buckingham and others, 'Study on the differences between bank insolvency laws and on their potential harmonization—Final report' (November 2019) (<https://www.bruegel.org/2020/06/study-on-the-differences-between-bank-insolvency-laws-and-on-their-potential-harmonisation/> accessed 18 October 2021). For more information about these and other aspects of the EBU, see eg J-H Binder, 'Towards Harmonised Frameworks for the Liquidation of Non-Systemically Relevant Credit Institutions in the EU? A Discussion of Policy Choices and Potential Impediments' (2021) 4 ECFR 555–87; C Zilioli and K Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar 2021); M Louisse-Read, 'Public Funding of Failing Banks in the European Union' (PhD thesis, Radboud University, Nijmegen) (Law of Business and Finance vol. 19), (Kluwer 2020); A Musso Piantelli, 'Managing Banking Crises in Europe After the Great Crisis' (Law of Business and Finance Vol 20) (PhD thesis, Radboud University, Nijmegen), (Wolters Kluwer 2021); L Wissink, 'Effective Legal Protection in Banking Supervision' (PhD thesis, Utrecht University) (Europa Law Publishers 2021); MBJ van Rijn, 'Judicial Protection for Banks under the Single Rulebook and the Single Supervisory Mechanism' (PhD thesis, Radboud University, Nijmegen) (WoltersKluwer 2022); D Busch and G Ferrarini (eds), *European Banking Union* (2nd edn, OUP 2020).

26 See for the best execution rules: art 27 of Directive 2014/65/EU (MiFID II). See for further details Commission Delegated Regulation (EU) 2017/575 and 576.

27 The MiFID I regime consisted of the following instruments: Directive 2004/39/EC (MiFID); Directive 2006/73/EC (MiFID Implementing Directive); Regulation (EC) No 1287/2006 (MiFID Implementing Regulation). The MiFID II regime consists of the following instruments: Directive 2014/65/EU (MiFID II); Regulation (EU) No 600/2014 (the Markets in Financial Instruments Regulation/MiFIR); some 40 implementing and delegated acts (for a list, see <https://ec.europa.eu/info/law/markets-financial-instruments-mifid-ii-directive-2014-65-eu/amending-and-supplementary-acts/implementing-and-delegated-acts_en> accessed 18 October 2021 (under the heading: 'implementing and delegated acts: full list')). As regards regulated markets, multilateral trading facilities and organized trading facilities, see eg: D Busch and JEC Gulyás, 'Chapter 8—Alternative Trading Platforms in the EU: Multilateral Trading Facilities, Organised Trading Facilities and Systemic Internalizers' in J-H Binder and P Saguato (eds), *Financial Market Infrastructures—Law and Regulation* (OUP 2021).

transactions and that helps of course.[28] But there is not yet a provider that offers all these data to the market in consolidated form. Unlike in the United States, we in Europe do not yet have what is known as a consolidated tape provider.

Nonetheless, the position of consolidated tape provider has been explicitly regulated since the entry into force of MiFID II on 3 November 2018. Such a provider must have an authorization and is subject to continuous supervision. Under MiFID II, the local supervisor is responsible for granting the authorization and supervising the provision of the service, but, as noted earlier, these powers have been transferred to ESMA since 1 January 2022 (the consolidated tape provider is a species of the data reporting service provider genus, about which more has been said above in the section 'Centralization of supervision of the European financial markets'). However, a consolidated tape provider is not guaranteed a monopoly and is also not completely free to determine the price it charges for the trade data. The next step could be to make it possible for the provider to have a monopoly, subject to certain conditions, by amending MiFID II. The most far-reaching solution would be for the EU itself to set up a consolidated tape provider, for example by entrusting ESMA with this responsibility.

Which of these routes the Commission intends to take is not really clear from the CMU Action Plan 2020. In Action 14, the Commission promises in any event to propose 'the creation of an effective and comprehensive post-trade consolidated tape', but only for 'equity and equity-like financial instruments' (ie not for marketable bonds and derivative products). The Commission considers that this, together with the European single access point (Action 1 is discussed in the section 'European single access point for financial and sustainability-related company information' above), would give investors access to much-improved information at a pan-European level.

On the subject of competition, Euronext and other established stock exchanges are not keen on the advent of a consolidated tape provider. After all, their business model is based to a large extent on the sale of data of this kind. Indeed, such sales reportedly account for no less than 20 per cent of Euronext's turnover.[29]

Other action points

I would certainly not wish to suggest that the above provides a comprehensive overview of all the action points contained in the CMU Action Plan 2020. A few of those not yet covered are: (i) revision of the rules for European long-term investment funds with a view to realizing more long-term financing for companies and infrastructure projects, in particular those contributing to the objective of smart, sustainable and inclusive growth (Action 3); (ii) removal of regulatory obstacles for insurance companies to invest long term and provision for an appropriate prudential treatment of long-term SME equity investment by

28 For more about this, see eg: JEC Gulyás, 'EU Equity Pre- and Post-Trade Transparency Regulation: from ISD to MiFID II' (PhD thesis, Radboud University, Nijmegen), WoltersKluwer 2021.

29 Lennart Zandbergen, *Beursuitbaters fel gekant tegen central systeem voor transactiedata* (Stock exchange operators fiercely opposed to central system for trade data), *FD* 7 December 2020, p 27.

banks (Action 4); (iii) assessment of the feasibility of introducing a requirement for banks to direct SMEs, whose credit application they have turned down, to providers of alternative funding (Action 5); (iv) review of the regulatory framework for securitization to enhance banks' credit provision to EU companies, in particular SMEs (Action 6) (securitization is a tool that enables banks to consolidate loans and convert them into securities for sale on the capital markets); (v) conduct a feasibility assessment for the development of a European financial competence framework and the possibility of introducing a requirement for Member States to promote learning measures supporting financial education, in particular in relation to responsible, long-term investing (Action 7); (vi) various measures to provide further protection for retail investors, as well as action to reduce the information overload for experienced retail investors, albeit subject to certain safeguards (Actions 8 and 15); (vii) pension-related initiatives (Action 9).[30]

EU recovery prospectus

The prospectus (an information document for investors) is an essential part of the CMU. It offers companies access to the European capital markets. As part of the initial CMU plans from 2015, the Commission proposed to modernize the Prospectus Directive and replace it with a Prospectus Regulation that is directly applicable in the Member States. And with success, because the Prospectus Regulation has been in force since 21 July 2019. As a result, the rules for issuers seeking a stock exchange listing and/or wishing to offer securities to the investing public can be found in directly applicable legislation.[31]

In response to the coronavirus crisis, the Commission published the so-called Capital Markets Recovery Package (CMRP) on 24 July 2020 (ie before the publication of the CMU Action Plan 2020 discussed above). One of the CMRP proposals (which has since been adopted) concerned the introduction of an EU recovery prospectus.[32] The severe economic consequences of the pandemic call for a swift introduction of measures to facilitate investment in the real economy, allow a rapid recapitalization of European companies, and enable issuers to access the capital markets at an early stage of the recovery. That is the *raison d'être* of the EU recovery prospectus. The idea is that this short-form prospectus is (i) easier to produce for issuers, (ii) easy to read for investors, and (iii) easy to scrutinize for national financial regulators (approval within 7 instead of 10 business days). The EU recovery prospectus consists of a single document of no more than 30 pages, which focuses on the essential information that investors need in order to make an informed

30 COM (2020) 590 final.

31 Regulation (EU) 2017/1129. For more information about the Prospectus Regulation, see eg: S Alvaro, R Lener and P Lucantoni (eds), *The Prospectus Regulation—The Long and Winding Road* (Quaderni giuridici 22, ottobre 2020) (<https://www.consob.it/web/consob/novita/-/asset_publisher/xMXdfdeSuZFj/content/quaderno-giuridico-consob-n-22/11973> accessed 18 October 2021); D Busch, G Ferrarini and JP Franx (eds), *Prospectus Regulation and Prospectus Liability* (OUP 2020).

32 Regulation (EU) 2021/337. Other proposals that are part of the Capital Markets Recovery Package concern amendments to MiFID II and to the securitization rules as contained in the Securitization Regulation and the Capital Requirements Regulation (CRR). See: <https://ec.europa.eu/info/publications/200722-proposal-capital-markets-recovery_en> accessed 18 October 2021. As regards the proposed adjustments to the securitization rules, see the subsection 'Further develop secondary markets for distressed assets' below. The MiFID II adjustments have already been adopted: Directive (EU) 2021/338.

decision. It is available only to issuers who wish to issue shares (ie not bonds) and have been listed on a regulated market (stock exchange) or an SME growth market for at least 18 months. As with 'regular' prospectuses, the EU recovery prospectus uses the 'EU passport mechanism', which means that all EU investors can finance these companies if they wish. Thirty-first December 2022 is the last date on which it will be possible to produce an EU recovery prospectus. While this is an excellent initiative in itself, it is relatively insignificant in the greater scheme of things. On the other hand, every little bit helps.

The Union and the Members States as providers and users of capital

Investors and especially the business community have been hit hard by the coronavirus crisis.[33] If investors already have capital available, they are likely to prefer investing in their own country rather than in another European country, whereas the very aim of the CMU is to encourage investors to invest more across borders. In times of uncertainty, people still choose the familiar, although this is probably less true of institutional investors such as large pension funds (eg the ABP Pension Fund).

But the Member States themselves can, of course, also act as providers and users of capital and thus provide a boost for the establishment of the CMU in these difficult times. As interest is at an historical low, they can borrow cheaply on the capital markets (in which capacity they therefore act as users of capital) and channel the money on to the business community in the form of loans, share capital or even gifts (in which capacity they are therefore providers of capital). Although the member states are bound by the EU rules on state aid, the European Commission is applying them relatively flexibly during the coronavirus crisis.[34] Moreover, the ECB and the euro area central banks are continuing for the time being to buy up government bonds on a massive scale via the secondary markets and have even upped the tempo somewhat recently.[35] Despite this huge buying programme, interest rates in the euro area are now rising somewhat, but that will not be allowed to spoil the fun for the time being.[36] Naturally, the situation in which national governments act as providers and users of capital has long been a reality, given the massive support they are providing to trade and industry in their countries. After all, this support is being financed by the issue of government bonds, which are then bought by the commercial

33 Paradoxically, the Amsterdam AEX Index reached its highest point ever during trading on 31 March (704.25 points) and the highest ever closing price on 1 April (708.43 points). Nowadays, this index is dominated by tech companies such as ASML and Adyen, which are precisely the businesses doing well during the coronavirus crisis. Naturally, the ultra-low interest rates are also playing a role. cf Marianne Slegers, *AEX-index tikt hoogste punt ooit aan, middenin de coronacrisis* (AEX Index hits highest point ever, in the middle of the coronavirus crisis), *FD* 1 April 2021, pp 1 and 3; *Record slotstand van AEX sneuvelt na turbulent beursjaar* (Record closing position of AEX broken after turbulent stock market year), *FD* 2 April 2021, p 5.

34 See arts 107–109 TFEU. For more information about state aid during the coronavirus crisis, see <https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html> accessed 18 October 2021.

35 The CJEU confirmed in its judgments of 16 June 2015, case C-62/14 (*Gauweiler*), and 11 December 2018, case C-493/17 (*Weiss*) that the ECB's programmes for the purchase of government bonds are permitted in principle. However, the German Constitutional Court (*Bundesverfassungsgericht*) recently took a very different view, resulting in a European row: BVerfG, Urteil des Zweiten Senats vom 05. Mai BVG2020 BV. For more about this, see: D Busch, 'Is the European Union Going to Help us Overcome the COVID-19 Crisis?' (2020) 15(3) *CMLJ* 347–66, at 349–51 and 358–60 (with further references).

36 *Rentes stijgen door, ondanks opkopen in het ECB-programma* (Interest rates continue rising despite buy-ups in the ECB programme) *FD* 13 March 2021, p 47.

banks and resold to the ECB and the national central banks. The EU itself can also act as a provider and user of capital. Indeed, this is already happening (see section 3, subsection 'Sustainable finance and the coronavirus crisis, below).

Naturally, it is good and also necessary in the short term for the EU and the Member States themselves to act as providers of capital to support national and European businesses, but in the medium and long term it will mainly be up to private sector organizations themselves to act as users and providers of capital. The Member States and the EU cannot go on providing capital indefinitely to the corporate sector (since the burden of this lending will fall on future generations), just as the ECB and the national central banks cannot go on buying government bonds indefinitely, especially if inflation continues to rise. The establishment of the CMU is and remains a long-term project that can succeed only through a combination of public and private measures at various levels.

3. Sustainable finance action plan

General

The European Commission has pointed out that we are increasingly confronted by the consequences of climate change and resource depletion. It therefore wants more investment in 'green' companies and products. In its initial Sustainable Finance Action Plan (SFAP) of March 2018, the Commission states that as the financial sector acts as an intermediary between users and providers of capital, it has a key role to play in this green transition.[37] The SFAP is an integral part of the CMU Action Plan and must also be seen in conjunction with the broader European climate plans (the Green Deal and the European Climate Law that forms part of it).[38]

The SFAP has the following aims: (i) reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth; (ii) manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues; and (iii) foster transparency and long-termism in financial and economic activity.[39]

The action plan translates these aims into 10 concrete measures: (1) establish an EU classification system (taxonomy) for sustainable activities; (2) create standards and labels for green financial products; (3) foster investments in sustainable projects; (4) incorporate sustainability when providing financial advice; (5) develop sustainability benchmarks; (6) better integrate sustainability in credit ratings and market research; (7) clarify the duties of institutional investors and asset managers; (8) incorporate sustainability in prudential requirements for financial institutions such as banks and insurers (eg a lower capital adequacy requirement for loans to sustainable companies); (9) strengthen sustainability disclosure, both for investors and for financial supervisors, for example through better integration of sustainability in accounting

37 COM(2018) 97 final, 8 March 2018, p 1.

38 See the Green Deal presented by the Commission on 10 December 2019 (COM(2019) 640 final) and the proposal forming part of it and dated 4 March 2020 for a European Climate Law (COM(2020) 80 final). For an amended and more ambitious proposal for a European Climate Law, see: COM(2020) 563 final (17 September 2020). See also COM(2020) 562 final.

39 COM(2018) 97 final, p 3.

rule-making; (10) foster sustainable corporate governance and attenuate short-termism in capital markets.[40] In this section I will focus on some of the core elements of the SFAP.

Taxonomy Regulation

When is a product or business 'green'? That is something we must agree on first. After all, if we in Europe do not have a shared understanding of what is ecologically sustainable, how can we expect to arrange for the supply and demand of green capital to be better matched in Europe? In such a situation, there is the ever-present danger of confusion about terms and even plain deception because activities are presented as greener than they actually are ('greenwashing'). So, it is a good thing that the Commission has decided to give top priority to establishing an EU classification system—or taxonomy—for sustainable activities (Action 1). Nor has Brussels wasted any time, because the Taxonomy Regulation had already been adopted by 18 June 2020.[41]

The Taxonomy Regulation contains uniform criteria for determining whether an economic activity qualifies as environmentally sustainable. The Regulation identifies six environmental objectives: (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems.[42] An activity qualifies as environmentally sustainable where it contributes substantially to one or more of the environmental objectives and does not significantly harm any of the other environmental objectives.[43]

But that's not sufficient in itself. Based on technical advice from experts, the Commission is currently in the process of drawing up further rules (Level 2 legislation) which identify the actual activities that can be classified as sustainable. This concerns six series of sustainable activities, each series corresponding to one of the six environmental objectives mentioned above. The first two series were submitted to the public for consultation in November 2020 and correspond to the environmental objectives referred to at (a) and (b) above.[44] The Taxonomy Regulation will come into effect in phases: the first two environmental objectives on 1 January 2022 and the other four on 1 January 2023.[45] The further rules are bound to be a source of friction. A while ago it was apparent from a leaked proposal that the European Commission was considering classifying state-of-the-art natural gas power stations as green

40 Ibid pp 4–11. See also, COM(2021) 390 final and COM(2021) 188 final. For more about the SFAP or parts of it, see: D Busch, G Ferrarini and A van den Hurk, 'Chapter 2—The European Commission's Sustainable Finance Action Plan and other International Initiatives' in D Busch, G Ferrarini and S Grünewald (eds), *Sustainable Finance in Europe—Corporate Governance, Financial Stability and Financial Markets* (EBI Studies in Banking and Capital Markets Law Vol 1) (Palgrave Macmillan 2021); F-J Beekhoven van den Boezem, C Jansen and B Schuijling (eds), *Sustainability and Financial Markets* (Law of Business and Finance Vol 17) (Kluwer 2019).

41 Regulation (EU) 2020/852 (hereinafter 'the Taxonomy Regulation').

42 Art 9, Taxonomy Regulation.

43 Art 3, Taxonomy Regulation.

44 The draft regulation and two accompanying draft annexes can be downloaded at: <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en> accessed 18 October 2021.

45 Art 27(2) of the Taxonomy Regulation. See also: CV Gortsos, 'Chapter 11—The Taxonomy Regulation: More Important than Just as an Element of the Capital Markets Union' in Busch, Ferrarini and Grünewald (n 40).

undertakings to make the funding of new power plants more attractive, much to the astonishment of scientists and environmental organizations.[46] And what about nuclear energy? A nuclear power plant may not emit greenhouse gases, but it does produce nuclear waste.[47]

Sustainable Finance Disclosure Regulation

An important step will be determining what activities are environmentally sustainable (see the section 'Taxonomy regulation', above). Once this has been accomplished, the next step will be to arrange for financial intermediaries (such as asset managers and advisers) to integrate sustainability considerations into their investment policy and advice, and to provide transparency to the investing public about the extent to which they do this (Actions 7 and 9). Many financial intermediaries already did this to a greater or lesser extent, because there has been considerable demand for sustainable investments for some time, but until recently they did not do so on the basis of harmonized rules at European level. This was changed by the new Sustainable Finance Disclosure Regulation (SFDR) on 10 March 2021, when most of its rules became applicable.[48] Incidentally, the term sustainability has a broader meaning in the SFDR than in the Taxonomy Regulation. Under the SFDR a sustainable investment covers all three 'ESG' categories (ie environmental, social and good governance objectives), whereas the Taxonomy Regulation relates only to environmental sustainability (ie the 'E' factor).[49]

Whatever the case, the SFDR is an important step forward as harmonized sustainability transparency is a dire necessity, basically because the alternative is not workable. After all, divergent national rules and market practices (i) make it very difficult to compare different financial products, (ii) create an uneven playing field for such products and for distribution channels, and (iii) erect additional barriers within the internal market. This in turn leads to confusion for investors and is, at worst, plain misleading because financial intermediaries promote their investments as sustainable when in reality they are not (or much less so) (greenwashing).[50] The SFDR requires financial intermediaries to provide sustainability transparency on their website, in periodic reports, in promotional material and in pre-contractual information (at both entity level and product level).

Furthermore, one must distinguish between two key concepts: (i) 'sustainability risks', and (ii) 'sustainable investments'. 'Sustainability risk' is defined as an environmental, social or governance event that, if it occurs, could cause an actual or a potential material negative impact on the *value* of the investment.[51] A 'sustainable investment', on the other hand, is an investment in an economic activity that *contributes* to an environmental *or*

46 See <https://nos.nl/artikel/2373904-uitgelekt-plan-brussel-wil-moderne-aardgascentrales-milieuvriendelijk-label-geven.html> accessed 18 October 2021 (24 March 2021).

47 Cf Matthijs Schiffers, *Kernenergie is de hete aardappel die de Commissie liever nog even doorschuift* (Nuclear energy is a hot potato the Commission doesn't wish to burn its fingers on just yet), *FD* 3 April 2021, p 33.

48 Regulation (EU) 2019/2088, as later amended by the Taxonomy Regulation (hereinafter 'SFDR').

49 Art 2(17) SFDR; art 3 Taxonomy Regulation.

50 Cf recital (9) SFDR.

51 Art 2(22) SFDR.

social objective, always provided (a) that the investments do not significantly harm any of the other environmental and social objectives, and (b) that the investee companies follow good governance practices.[52]

Further key concepts are 'dark green' and 'light green' products, and even 'grey' products. Green products either have sustainable investment as their objective (dark green) or they merely aim to promote sustainable investment (light green).[53] A distinction that is in my opinion bound to cause confusion in the market. Grey products neither promote sustainable investment nor have it as their objective, but they are nevertheless caught by the SFDR in the sense that grey products—just like green products—involve reporting on sustainability risks.[54]

But once again, this is not sufficient in itself. Most of the SFDR rules still have to be implemented at a practical level (Level 2 rules). The three European Supervisory Authorities (ESAs) take the lead in drafting these rules, but it is the Commission that adopts them and thus has the final say.[55] Although the drafting work at the ESAs was delayed by the coronavirus crisis, this was remarkably not seen by the European Commission as a reason for recommending that the SFDR itself become applicable at a later date. It was not until 4 February 2021 that the ESAs published their final drafts for the Level 2 rules.[56] The Commission was no longer able to adopt these rules before the SFDR became applicable on 10 March 2021. As an emergency measure, the joint ESAs therefore suggested to the national supervisors on 25 February 2021 that they encourage financial intermediaries to comply with the Level 2 rules anyway.[57] To add to the confusion, the three ESAs published a consultation document on 15 March 2021 which again provided for a change to what were termed the 'final' drafts of the Level 2 rules published on 4 February 2021.[58] This procedure certainly did not win any prizes for planning, because financial intermediaries hardly had any time to prepare.[59]

Reliable sustainability-related company information

And, on reflection, how do financial intermediaries actually get reliable sustainability-related information about the companies in which they invest? The companies themselves will often not have that information available at this early stage. I would like to remind the

52 Art 2(17) SFDR.

53 See art 9 (dark green products) and 8 (light green products) SFDR, respectively.

54 See art 6 SFDR.

55 The three ESAs are: ESMA, EBA and EIOPA.

56 JC 2021 03.

57 See the Joint ESA Supervisory Statement dated 25 February 2021 (JC 2021 06), which can be downloaded at https://www.esma.europa.eu/sites/default/files/library/jc_2021_06_joint_esas_supervisory_statement_-_sfdr.pdf, accessed 18 October 2021.

58 JC 2021 22. See p 57 ff for a consolidated version of the Level 2 rules.

59 It is evident from a letter dated 7 January 2021 from the ESAs to the European Commission (JC 2021 02) that financial intermediaries have a host of questions about the meaning of all kinds of terms used in the SFDR. For more about the SFDR, see, eg D Busch, 'Chapter 12—Sustainability Disclosure in the EU Financial Sector' in Busch, Ferrarini and Grünewald (n 40). See also the 'sustainability letters' from the Dutch conduct-of-business supervisor AFM to the sector of 6 July and 16 December 2020: <https://www.afm.nl/nl-nl/nieuws/2020/juli/duurzaamheidsbrief-aan-sector; https://www.afm.nl/nl-nl/nieuws/2020/december/pensienuitvoerders-voorbereiden-sfdr-verordening> accessed 18 October 2021.

reader here of Action 1 of the CMU Action Plan 2020: the Commission undertakes to propose the setting-up of an EU-wide platform (European single access point/ESAP) to provide investors with seamless access to financial and sustainability-related information on companies (see section 2, subsection 'European single access point for financial and sustainability-related company information' above).

Whatever the case, financial intermediaries are dependent for the time being on third parties who claim to have access to this sustainability-related information. But that immediately raises a further question: how can financial intermediaries be sure that these data are reliable? According to the Dutch Authority for the Financial Markets (AFM), its French counterpart *Autorité des Marchés Financiers (AMF)* and more recently, ESMA as well, providers of sustainability-related information must be regulated under an EU regulation and be subject to direct supervision by ESMA, just as is already the case with credit rating agencies (CRAs) under the CRA Regulation.[60]

Finally, the proposed Corporate Sustainability Reporting Directive (CSRD) will provide for a mandatory disclosure regime for both non-financial and financial companies (listed or non-listed). The idea is that this will provide financial intermediaries with the sustainability information they need to make informed sustainable investment decisions. It covers both the sustainability impact of a company's activities as well as the business and financial risks faced by a company due to its sustainability exposures (known as the 'double materiality' concept).[61] However, according to the proposal only large undertakings are covered by the disclosure regime, and, as of 1 January 2026 most SMEs. So micro undertakings are completely out of scope.[62] In terms of proportionality this may seem logical, but it may well have a detrimental effect on the market for micro-financing.

Sustainable finance and the coronavirus crisis

As already noted, investors and especially the business community have been hit hard by the coronavirus crisis.[63] As less capital is available due to the current crisis (see section 2, subsection 'The Union and the Members States as providers and users of capital' above), it follows that less capital is also available for making the transition to a greener society. Implementation of the climate plans is likely to be delayed by the crisis. This is particularly tragic since there may be a link between climate change and the outbreak of pandemics.[64] So a delay in the realization of the climate plans is actually not acceptable.

60 See 'AFM/AMF Position Paper: Call for a European Regulation for the provision of ESG data, ratings, and related services' (<https://www.afm.nl/en/nieuws/2020/december/reguleer-aanbieders-duurzaamheidsdata> accessed 18 October 2021). On this subject, see: Daniel Cash, 'Calls for ESG Rating Agency Regulation Grows Louder in Europe, But Could It Actually Save the Industry?' (<https://financialregulationmatters.blogspot.com/2020/12/calls-for-esg-rating-agency-regulation.html> accessed 18 October 2021); ESMA's letter to DG FISMA dated 28 January 2021 (ESMA30-379-423).

61 See COM(2021) 390 final, at p 3. See for the proposal for the CSRD itelf: COM(2021) 189 final.

62 See COM(2021) 189 final, art 19a and 29a CSRD, as well as recitals (15) ff.

63 But see n 33.

64 That link was identified, eg by the European Commission in the *Consultation on the renewed sustainable finance strategy* dated 8 April 2020 (p 3) (<https://ec.europa.eu/info/consultations/finance-2020-sustainable-finance-strategy_and> accessed 18 October 2021).

However, three more positive notes may perhaps be struck. First, the coronavirus crisis may help us to realize that a video link, despite all its limitations, works quite well, and that it is not always necessary to fly around the world for face-to-face meetings. And, second, the massive state aid provided by governments to their corporate sector gives them the opportunity to impose stringent green conditions, at least in theory. And, last but not least, the EU and its Member States can themselves act as providers and users of green or social financing.[65]

Consider, for example, the funding of the EU programme for short-time working and part-time unemployment benefits (Support to mitigate Unemployment Risks in an Emergency, or SURE). SURE is being funded by raising a total of EUR 100 billion from the investing public through social bonds issued by the EU itself, which is an absolute first. By 18 May 2021, the European Commission had already raised nearly EUR 90 billion through the issuance of social bonds in six rounds under the EU SURE instrument. The issues consisted of 5, 10 and 15-year bonds. The great interest showed by investors translated into favourable bond price conditions for the EU. The funds raised were then funnelled to the Member States in the form of loans to help them directly cover the costs associated with financing national short-time working schemes and similar measures in response to the pandemic. On 27 October 2020, the EU SURE social bond was listed on the Luxembourg Green Exchange, a leading platform exclusively dedicated to sustainable securities.[66]

But there's more. During the Special European Council of 17–21 July 2020, the European heads of government managed with great difficulty to reach an agreement on the European multiannual budget (2021–2027) and the Corona Recovery Fund.

The European budget for 2021–2027 amounts to a total of EUR 1,074 billion. More money has been earmarked for innovation, sustainability and climate action. About 30 per cent of all budget expenditure must contribute to the European climate target.

In essence, the agreements about the Corona Recovery Fund (the so-called Next Generation EU plan) are as follows. There will be a fund of EUR 750 billion, which will be fully financed by the issuance of bonds by the EU itself. Of the amount thus raised, a sum of EUR 390 billion is for grants, and the other EUR 360 billion for loans. Around 30 per cent of all expenditure of the Recovery Fund must contribute to achieving the European climate target.[67]

65 It is also worth noting in this connection that the Bank of England has recently indicated that it is going to ensure that its own financing programmes are based on green principles. See Camilla Hodgson, Valentina Romei and Nathalie Thomas, 'Bank of England given New Mandate to Buy 'green' Bonds,' *Financial Times* (3 March 2021). The UK therefore seems to be well ahead of the European central banks.

66 See: COM(2021) 148 final, pp 9–11; <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/sure_en> accessed 18 October 2021.

67 See <https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/eu-budget-2021-2027_en> accessed 18 October 2021. The Corona Recovery Fund (the European Union Recovery Instrument) was established by regulation (see Regulation (EU) 2020/2094 and Regulation (EU) 2021/241). The amount of EUR 750 billion is in 2018 prices. In current prices this amounts to EUR 806.9 billion. See: <https://ec.europa.eu/info/strategy/recovery-plan-europe_en> accessed 18 October 2021.

Countries that receive money through the multiannual budget or from the Corona Recovery Fund (whether in the form of loans or grants) are required to apply the European values of freedom and democracy in practice. They must have independent judges. The European Parliament had tightened up the requirement that the recipients must respect the rule of law. It is common knowledge that in Poland and Hungary the independence of the judiciary is under threat, freedom of the press is at risk and the rights of LGBTI people are being curtailed. These two countries have long threatened to exercise their right of veto to block the multiannual budget and the Corona Recovery Fund, because under the new agreements they could be punished in the future if they fail to adhere to the rule of law. On 10 December 2020, they dropped their opposition after everyone had agreed to a compromise proposal put forward by Germany.[68]

This means that the EU itself will place a sum of at least EUR 225 billion in green bonds to finance the Corona Recovery Fund/Next Generation EU plan, and will funnel the money raised in this way to green investments in the form of a grant or loan. Moreover, under the multiannual budget an amount of at least EUR 322.2 billion will go to green projects over the next seven years. It is hoped that this will provide a boost for the green capital market. On 12 October 2021, the European Commission issued the first NextGenerationEU green bond, thus raising EUR 12 billion to be used exclusively for green and sustainable investments across the EU.[69]

But once again, the green transition will never be able to do without capital from the private sector. Businesses are currently fighting with all their might to keep their heads above water. Although the number of insolvencies is presently at an historical low,[70] at least in the Netherlands, this is inevitably due to the fact that a large part of the business community is being artificially kept alive by the various rounds of state aid (zombie companies). Many people expect a wave of insolvencies, and not only in the Netherlands.[71] However, Klaas Knot, president of the Dutch central bank, recently intimated that he was not all that gloomy about the prospects for the Dutch economy.[72] Whatever the case, it is very much to be hoped that in the coming period the struggling business community will recognize just how essential the green transition is and make their contribution.

68 <https://nos.nl/artikel/2360118-akkoord-over-begroting-op-top-europese-unie.html> accessed 18 October 2021.

69 See <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5207> accessed 18 October 2021.

70 See <https://www.cbs.nl/nl-nl/faq/corona/regionaal/faillissementen> accessed 18 October 2021.

71 See <https://www.pwc.nl/nl/actueel-publicaties/assets/pdfs/pwc-bijzonder-beheer-barometer-nov-2020.pdf> accessed 18 October 2021 (Netherlands); Ryan Banerjee and others, *Liquidity to Solvency: Transition Cancelled or Postponed?* BIS Bulletin no 40 (25 March 2021) <https://www.bis.org/publ/bisbull40.htm> (international overview); Federico J Diez and others, 'Insolvency Prospects Among Small-and-Medium-Sized Enterprises in Advanced Economies: Assessment and Policy Options', IMF (2 April 2021) (<https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2021/03/25/Insolvency-Prospects-Among-Small-and-Medium-Sized-Enterprises-in-Advanced-Economies-50138> accessed 18 October 2021) (international overview) .

72 See: Marcel de Boer and Joost van Kuppeveld, 'Klaas Knot: *Ik ga niet mee in het idee van een tsunami van faillissementen* (I don't buy into the idea of a tsunami of insolvencies), FD 23 March 2021, p 13.

Towards a more sustainable world?

As is apparent from the Green Deal and the SFAP, the European Union sets the bar high when it comes to sustainability. Indeed, the Commission even considers that progress is not fast enough. On 21 April 2021, the European Commission published a follow-up of the SFAP.[73] But the EU is not an island. Broadly speaking, two contrasting scenarios are conceivable. In a pessimistic scenario, the more flexible or even non-existent sustainability agendas of other geopolitical powers gives them a competitive advantage that is detrimental to the EU. In an optimistic scenario, the EU will set the sustainability standard worldwide.[74] Major institutional investors such as Blackrock and State Street in any event say they are strong supporters of the sustainability agenda.[75] And some hope is also provided by the fact that the United States rejoined the Paris climate agreement on 20 January 2021 following a decision by its 46th president Joe Biden, although at the time of writing he is having a hard time in getting his ambitious climate plans adopted.[76]

4. Digital finance package

General

On 24 September 2020, the Commission published its digital finance package.[77] This package of measures once again comes under the CMU umbrella and builds on the FinTech Action plan of March 2018.[78] The current plans (digital finance strategy) are also ambitious and set out four main priorities: (i) remove fragmentation in the Digital Single Market; (ii) adapt the EU regulatory framework to facilitate digital innovation; (iii) promote a data-driven finance; and (iv) address the challenges and risks with digital transformation, including enhancing the digital operational resilience of the financial system.[79]

According to the Commission, the digital finance strategy will benefit not only new market participants but also consumers and SMEs. Embracing digital finance can only help to promote innovation in Europe, thereby creating opportunities to develop better financial products for consumers, including those who currently lack access to financial services (financial inclusion). The plans will also lead to new ways of financing European business, especially SMEs. More generally, the digital finance strategy will be able to ensure that supply and

73 COM(2021) 390 final.

74 Cf Anu Bradford, *The Brussels Effect—How the European Union Rules the World* (OUP 2020).

75 See <https://www.blackrock.com/corporate/literature/publication/blk-sustainability-mission-statement-web.pdf> and <https://www.statestreet.com/values.html> accessed 18 October 2021.

76 See <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/>. See also the public statement of John Coates (Acting Director, Division of Corporation Finance, US Securities and Exchange Commission, SEC) dated 11 March 2021 'ESG Disclosure—Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets' (<https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121> accessed 18 October 2021). See Richard Kessler, 'COP26—Joe Biden's climate credibility hangs by a thread as the clock ticks to Glasgow' (12 October 2021) (https://www.rechargenews.com/energy-transition/cop26-joe-bidens-climate-credibility-hangs-by-a-thread-as-the-clock-ticks-to-glasgow/2-1-1079730, accessed 18 October 2021).

77 COM(2020) 591 final; <https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en> accessed 18 October 2021.

78 COM(2018) 109 final.

79 COM(2020) 591 final; <https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en> accessed 18 October 2021; <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1684> accessed 18 October 2021.

demand for capital can be matched more quickly in Europe, for example when it comes to funding green plans. Geopolitical considerations also play a crucial role in the Commission's strategy. As Europe's hopes of maintaining its autonomy or even leading the way in setting global standards depend on its ability to counterbalance digital superpowers such as China, a competitive, innovative, digital, single market for financial services is vital. So Europe's naivety is finally a thing of the past. The strategy also aims to guarantee a level playing field for providers of financial services, whether they be traditional banks or tech companies, under the motto 'same activity, same risks, same rules' (but see the subsection 'Regulation on Markets in Crypto-assets', last words, below).[80] Amidst all this digital innovation, it is, of course, also important to strike the right balance between market access for new market participants and innovation through the use of artificial intelligence and blockchain on the one hand, and investor protection, financial stability and action to combat money laundering and cybercrime on the other.[81] But this is certainly no easy matter.

Before discussing the concrete legislative plans behind the digital finance package, I would first like to consider the recently adopted Crowdfunding Regulation.[82] This regulation is the product of the 2018 FinTech Action Plan to which I have already referred.[83]

Crowdfunding Regulation

Crowdfunding platforms act as intermediaries between investors and businesses, making it easier for investors to identify projects they want to invest in. In the Crowdfunding Regulation, crowdfunding platforms are referred to as 'crowdfunding service providers'.[84] Generally speaking, investing through crowdfunding can be done in two ways: by granting loans (loan-based crowdfunding) or by participating in the capital of a business (equity-based crowdfunding).[85] Crowdfunding seems to be an interesting additional or even alternative source of financing for SMEs, especially start-ups. As already mentioned, European SMEs are still far too dependent on bank loans, and it would therefore be a good thing if they could gain easier access to the capital markets. But whether that is feasible remains to be seen, as indicated earlier (see section 2, subsection 'Simplification of public listings for SMEs', above). Crowdfunding will sometimes provide easier access and thus perhaps be a more realistic option than recourse to the traditional capital markets. In any event, it is becoming an increasingly important source of funding for start-ups. The Crowdfunding Regulation is intended to make it easier for crowdfunding platforms to operate throughout the EU and applies from 10 November 2021.[86]

80 See ibid.

81 See ibid.

82 Regulation (EU) 2020/1503 (hereinafter 'the Crowdfunding Regulation'). It should be noted that implementing rules (Level 2 rules) are currently being prepared. See ESMA/35-36-2201 (26 February 2021). A Q&A document has also been published: ESMA35-42-1088 (25 February 2021).

83 COM(2018) 109 final.

84 Art 2(1)(e) Crowdfunding Regulation.

85 Art 2(1)(a) Crowdfunding Regulation.

86 Art 51 Crowdfunding Regulation.

The Crowdfunding Regulation does not apply to all possible forms of crowdfunding. For the sake of convenience, I have so far assumed that crowdfunding always relates to businesses in need of capital to finance their plans. In practice, however, private individuals also raise money through crowdfunding, for example for a good cause. In such cases, the money raised is usually a gift (and not the provision of a loan or participation in the capital of a company). These situations fall outside the scope of the Crowdfunding Regulation. Under the Regulation, the person seeking funding (the project owner) must always be a company and may not be a consumer, and the capital must always be raised through loans or by (or in combination with) the issue of securities.[87] However, it should be noted that the provider of the loan or the purchaser of the securities may be either a consumer or a business.[88] Individual crowdfunding offers with a consideration of over EUR 5,000,000 (calculated over a 12-month period) do not fall under the Crowdfunding Regulation.[89] If the offer is of securities to the public, the Prospectus Regulation will usually apply in such cases.

As already noted, it was originally intended that ESMA should become the authorizing authority and should also directly supervise the crowdfunding service provider (see section 2, subsection 'Centralization of supervision of the European financial markets' above).[90] Moreover, the initial Commission proposal provided for the crowdfunding service provider to have the choice between applying the national crowdfunding rules (if any) and the application of the European regime. In the former case, the crowdfunding service provider had nothing to do with European rules and the authorization and supervision was at most the responsibility of a local supervisor, in any event not of ESMA. The disadvantage of this option was that the service provider was then only allowed to operate within its own national borders. If the service provider opted for the European regime, the authorization granted by ESMA would enable it to operate throughout the EU/EEA.[91]

The final version reads differently. Once a party comes within the scope of the Crowdfunding Regulation, that regime applies. The scope for a provider to operate within its own country's borders on the basis of local rules (if any) has therefore been dropped. Moreover, responsibility for authorization and supervision was given not to ESMA but simply to the competent national supervisors (in the Netherlands the AFM). Once a party has been granted authorization, it can operate throughout the EU/EEA. The local authorization therefore functions as a European passport. Crowdfunding services should be provided only by legal persons established in the Union.[92]

87 Art 1, para 2(a), and art 2, para 1(a), Crowdfunding Regulation.

88 Art 2, para 1(i), Crowdfunding Regulation.

89 Art 1, para 2(a), Crowdfunding Regulation.

90 Arts 10–13 COM(2018) 113 final.

91 Art 2, para 1, and art 10, para 8 COM(2018) 113 final.

92 Arts 1(1), 3(1), 12(1), 15(1) and 18 Crowdfunding Regulation. The question of whether it would be desirable to allow entities established in third countries to obtain authorization as a crowdfunding service provider under the Crowdfunding Regulation will be taken into account in a future evaluation report (see art 45, para 2(q), Crowdfunding Regulation.

The competent supervisor will be able to grant the authorization only if various requirements are met. A crowdfunding service provider must meet certain prudential requirements, its management must be assessed for suitability and reputation and it must have established, for example, a procedure for handling customer complaints.[93] Naturally, these requirements also apply on a continuous basis. What also apply on a continuous basis are conduct-of-business rules, ie rules that prescribe how the service provider must treat its customers. First, the service provider must always act honestly, fairly and professionally in the best interests of the client. This general obligation of loyalty is partly defined in more detail in specific conduct-of-business rules. These include rules about the provision of information so that clients and prospects can make an informed and balanced decision on the basis of the information provided about granting a loan or investing in securities through the crowdfunding service provider. The service provider must also comply with know-your-client (KYC) rules in relation to non-experienced investors. It must therefore not only *provide* information but also *gather* it.[94]

These authorization requirements and conduct-of-business rules thus resemble but are certainly not identical to the rules that providers of investment services (such as portfolio management, advice and execution-only services) must comply with under the MiFID II rules. Quite apart from all kinds of other differences, there is a periodic obligation under the Crowdfunding Regulation in relation to inexperienced investors to simulate the potential losses in order to give them a better understanding of the investment risks they run, and there is a statutory reflection period of four days.[95] Due to the differences, there is no level playing field between the traditional investment service providers (which are subject to MiFID II) and crowdfunding service providers (which are covered by the Crowdfunding Regulation). The question is whether that is justified. From an economic point of view, both cases involve the purchase and sale of investments, albeit through different channels (investment services or crowdfunding).[96]

EU regulatory framework for crypto-assets

General

I have just mentioned the traditional investment service providers that are subject to the MiFID II rules. Parties that provide investment services and/or perform investment activities are known as investment firms. Both the services and the activities always relate to 'financial instruments'. It is apparent from the definition of 'financial instrument' that this is a fairly broad concept. It covers not only securities (in brief, negotiable shares and

93 Art 12, para 2, of the Crowdfunding Regulation.

94 Art 3, para 2, and art 19 ff. Crowdfunding Regulation.

95 Art 21, paras 5–6, and art 22 Crowdfunding Regulation.

96 For a discussion of the concerns about the absence of a level playing field, see the contributions to Part III (Consumer Protection) of V Colaert, D Busch and T Incalza (eds), *European Financial Regulation—Levelling the Cross-Sectoral Playing Field* (Hart/Bloomsbury 2019). As regards the Crowdfunding Regulation, see eg: P Ortelani and M Louisse-Read, *The EU Crowdfunding Regulation—Law and Practice* (OUP 2021); K Serdaris, 'Behavioural Economic Influences on Primary Market Disclosure—The Case of the EU Regulation on European Crowdfunding Services Providers' (2021) 3 ECFR 428–63.

bonds) but also, for example, all kinds of derivative products such as interest and currency swaps and even greenhouse emission rights.[97]

Although the definition of the term 'financial instrument' is broad, it does not cover all conceivable financial products. Crypto-assets (eg bitcoins) can often not be regarded as a 'financial instrument'. An entity that only provides services or performs activities with regard to crypto-assets will therefore often not be treated as an investment firm and will therefore not be subject to the MiFID II regime. Nor will the offering of crypto-assets to the public by means of a so-called initial coin offering (ICO) usually fall under the Prospectus Regulation, because that relates only to the offering of securities to the public. As already noted, crypto-assets can often not be regarded as a financial instrument, and therefore not as a security (which is, after all, a 'species' of the financial instrument 'genus').[98]

However, this does not mean that market participants of this kind are not subject to any supervision whatever. Since 21 May 2020, providers of certain crypto-services (namely, custodial wallet providers and providers engaged in exchange services between virtual currencies and fiat currencies, that is to say coins and banknotes that are designated as legal tender and electronic money of a country and accepted as a medium of exchange in the issuing country) are in the Netherlands subject to the Money Laundering and Terrorist Financing (Prevention) Act (Wwft), thereby implementing the Fifth Anti-Money Laundering Directive.[99] Moreover, these providers of crypto-services fall under the Sanctions Act 1977 (Sw). As such, they must register with the Dutch central bank (DNB), which supervises compliance with both sets of rules.[100] According to some crypto-entrepreneurs, the registration requirement is more like an authorization requirement, resulting in high costs and strict conditions. Against this backdrop, crypto-company Bitonic had filed a law suit against DNB for its crypto policy at the District Court of Rotterdam.[101] The court ruled in favour of Bitonic and shortly thereafter DNB softened its crypto policy.[102]

Regulation on markets in crypto-assets

Moreover, if it is up to the European Commission, the issuance of crypto-assets and trading and services in relation to such assets will soon be regulated by the Regulation on

97 See the list of 'financial instruments' in Annex I, s C of MiFID II.

98 For a recent article on the related issue of prospectus liability in the case of ICOs, see: S Mock, <https://www.law.ox.ac.uk/business-law-blog/blog/2021/03/prospectus-liability-and-initial-coin-offerings-back-roots> accessed 18 October 2021. Arts 14, 22 and 47 of COM(2020) 593 final (MiCA) provide for European civil liability rules which are without prejudice to civil liability claims in accordance with national law. It remains to be seen whether these European liability rules make it to the finish line.

99 Directive (EU) 2018/843.

100 See <https://www.toezicht.dnb.nl/2/50-237963.jsp> accessed 18 October 2021 ('Money Laundering and Terrorist Financing (Prevention) Act and crypto'); <https://www.toezicht.dnb.nl/2/50-237925.jsp> accessed 18 October 2021 ('Sanctions Act and crypto'). See also: <https://www.dnb.nl/voor-de-sector/open-boek-toezicht-sectoren/aanbieders-cryptodiensten/> accessed 18 October 2021; AMF Hakvoort, *FRP* 2021/2.

101 See Rutger Betlem, *Bitcoinhandelaar naar rechter om 'te strenge regels' van toezichthouder* (Bitcoin trader brings legal proceedings to challenge supervisor's 'unduly strict rules') *FD* (23 March 2021), p 27; ibid, *Cryptobedrijf Bitonic: we gaan niet willens en wetens in tegen DNB* (Crypto company Bitonic: we're not deliberately picking an argument with DNB), *FD* 24 March, p 21.

102 Rotterdam District Court 7 April 2021, ECLI : NL : RBROT : 2021:2968; Rutger Betlem, DNB zwakt regels cryptobedrijven af ('DNB softens its crypto policy'), FD 20 May 2021.

Markets in Crypto-assets (MiCA).[103] This brings us to one of the initiatives behind the Digital Finance Package. The Commission makes a distinction between crypto-assets that are already covered by EU law (MiFID II, Prospectus Regulation and Market Abuse Regulation) and other crypto-assets. In the Commission's view, previously unregulated crypto-assets should come under the MiCA Regulation.[104] However, the MiCA Regulation also contains specific rules for 'stablecoins' (asset-referenced tokens), even if they must be classified as electronic money within the meaning of the Electronic Money Directive (Directive 2009/110/EC).[105]

Under the proposed Regulation, (i) crypto-asset issuers and (ii) crypto-asset service providers are subject to an authorization requirement and continuous supervision. Under the new rules, these market participants with an authorization in one Member State can operate throughout the EU/EEA (European passport). The rules proposed by the Commission are partly reminiscent of the rules from the Prospectus Regulation (for providers of crypto-assets), and partly of the MiFID II rules for investment services (for providers of crypto-asset services).[106] There are also market abuse rules for the trade in crypto-assets that resemble the rules from the Market Abuse Regulation.[107] But, here too, the rules are certainly not identical. Naturally, the fact that market participants of this kind will now be subject to European regulation and supervision is welcome, but if the MiCA Regulation enters into force in the proposed form there will still be no level playing field and the question is whether this is justified.[108] It should be noted, by the way, that implementation rules (Level 2 rules) are being drawn up.[109]

A pilot regime for market infrastructures based on Distributed Ledger Technology

As I have already mentioned, the Commission considers that crypto-assets already covered by EU law (MiFID II, Prospectus Regulation and Market Abuse Regulation) should remain subject to the existing legislation, but it has proposed a pilot regime for Distributed Ledger Technology (DLT) market infrastructures that wish to try to trade and settle transactions in financial instruments in crypto-asset forms. The pilot

103 COM(2020) 593 final (MiCA).

104 Art 2, paras 1 and 2, MiCA.

105 Art 2, para 2, and art 43 ff MiCA.

106 Arts 15 ff and 53 ff respectively of the MiCA Regulation.

107 Art 76 ff MiCA Regulation.

108 For an initial analysis of MiCA see eg: P Giudici and G Ferrarini, 'Digital Offerings and Mandatory Disclosure: a Market-Based Critique of MiCA' *European Corporate Governance Institute—Law Working Paper No. 605/2021* (<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3914768> accessed 18 October 2021); DA Zetsche and others, 'The Markets in Crypto-Assets regulation (MiCA) and the EU digital finance strategy' (2021) 16(2) *CMLJ* 203–25; <https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2020/november/13/background-briefing-meet-mica> accessed 18 October 2021. See also the critical opinion of the ECB dated 19 February 2021 in which it proposed all kinds of changes to the MiCA Regulation (CON/2021/4) (see, eg the ominous opening words on p 1. '*... there are some aspects of the proposed regulation relating to the responsibilities of the ECB, the Eurosystem and the European System of Central Banks (ESCB) concerning the conduct of monetary policy, the smooth operation of payment systems, the prudential supervision of credit institutions and financial stability where further adjustments are warranted*'). The ECB's opinion is discussed at: <https://www.dentons.com/en/insights/articles/2021/march/16/ecb-issues-opinion-on-markets-in-crypto-assets-regulation-eu-parliament-rapporteur-tables-changes> accessed 18 October 2021.

109 Art 121 MiCA Regulation.

regime represents a so-called 'sandbox' approach—or controlled environment—which allows temporary derogations from existing rules. This will allow regulators to gain experience of the use of distributed ledger technology in market infrastructures, while ensuring that they can deal with risks to investor protection, market integrity and financial stability. The intention is to allow companies to test and learn more about how existing rules fare in practice.[110]

Digital Operational Resilience Act

Tech companies are playing an ever greater role in the financial sector, not only because they provide ICT for financial institutions (such as banks, stock exchanges and fintechs) but also because they themselves are now providing financial services. The EU's Digital Operational Resilience Act (DORA) is intended to provide all participants in the financial system with the necessary guarantees to limit cyber-attacks and other risks. Under the proposed legislation, all businesses must ensure that they can withstand all kinds of ICT disruptions and threats. The proposal also introduces a supervisory framework for ICT providers, such as providers of cloud computing services.[111]

A retail payments strategy: modern and cost effective payments

The fourth and final element of the Digital Finance Package is a renewed retail payments strategy. The aim of the strategy is to bring safe, fast and reliable payment services to European citizens and businesses. It will make it easier for consumers to pay in shops and make e-commerce transactions safely and conveniently. It seeks to achieve a fully integrated retail payments system in the EU, including instant cross-border payment solutions. This will facilitate payments in euros between the EU and other jurisdictions. According to the Commission, it will promote the emergence of home-grown and pan-European payment solutions and reduce Europe's dependence on global players in this field. Naturally, an important legislative step has already been taken in the form of the new Payment Services Directive (PSD2). However, PSD2 will be re-evaluated in the fourth quarter of 2021 and, if necessary, adjusted to support the implementation of the policies set out in the retail payments strategy.[112] All this will undoubtedly mean greater competition for traditional payment service providers such as banks.

5. Brexit

General

In its Brexit referendum on 23 June 2016, the United Kingdom announced its intention to leave the European Union. However, the road to the exit proved truly excruciating. Brexit

110 COM(2020) 594 final; <https://ec.europa.eu/commission/presscorner/detail/nl/IP_20_1684> accessed 18 October 2021.

111 COM(2020) 595 final; <https://ec.europa.eu/commission/presscorner/detail/nl/IP_20_1684> accessed 18 October 2021.

112 COM(2020) 592 final; <https://ec.europa.eu/commission/presscorner/detail/nl/IP_20_1684> accessed 18 October 2021; <https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en> accessed 18 October 2021.

did not become a reality until 1 January 2021. The UK had formally left the Union 11 months earlier (on 1 February 2020) on the basis of the Withdrawal Agreement, at which point it became a 'third country'.[113] But this withdrawal was immediately followed (under the terms of the Withdrawal Agreement) by a transition period during which everything was to remain the same or almost the same (from the perspective of EU law) until 31 December 2020 *unless* the parties decided before 1 July 2020 to extend the transition period for a maximum of 1 or 2 years, but that did not happen. Until the end of the transition period, the UK had access to the EU's financial markets in the same way as before 1 February 2020. That is, English financial institutions could offer their services in other member states without requiring a local authorization, provided that they possessed an authorization issued by the competent British regulator. In brief, the British authorization therefore functioned as a 'European passport'. On 24 December 2020, a last-minute deal was concluded on the future trade relationship between the EU27 and the UK, thereby managing to avoid a so-called 'hard' Brexit (ie no trade deal at all) at the eleventh hour. However, the deal contained no agreements about British access to the EU's financial markets (and vice versa). Despite the trade deal, the UK's departure from the EU qualifies as a hard Brexit for the financial sector because authorizations issued by the competent UK regulator have no longer functioned as a European passport since 1 January 2021.[114]

British financial institutions had, of course, seen the storm coming for quite some time. For years, they did not know whether they would retain their access to the EU. In recent years, many of these institutions therefore transferred assets and activities to authorized group companies in the EU27. And the end of this migration wave does not yet seem in sight. For those institutions that judged a move to mainland Europe would prove unprofitable, there was sometimes no other option than to cut ties with their European clients. This was why many British banks closed the bank accounts held with them by clients in mainland Europe.[115] How Brexit will work out in the long term for the City of London and for the financial sector in the EU27 remains to be seen, but the first shifts are already visible. Amsterdam has overtaken London as the centre for European equity trading. Figures published by EY also show that banks, insurers and other financial institutions have to date moved assets totalling EUR 1,500 billion to the EU27. A quarter of the large companies in the City of London have been adversely affected by Brexit. According to British merchant bankers, companies wanting a stock exchange listing are now more inclined to come to Amsterdam because the rules on Euronext are more flexible.[116]

113 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ C 384 I, 12 November 2019, p 1).

114 For the Trade Agreement, see *OJ EU* 2020, L 444. See also: <https://www.rijksoverheid.nl/onderwerpen/brexit/brexit-stand-van-zaken> accessed 18 October 2021.

115 See <https://nos.nl/artikel/2349658-brexit-nadert-britse-banken-heffen-plotseling-rekening-van-nederlandse-klanten-op.html> accessed 18 October 2021.

116 Joost Dobber, *De City wil niet nog meer handelsterrein verliezen* ('City of London Averse to Losing even more Ground to Trading Rivals') *FD* (3 March 2021) pp 2–3.

The EU and the UK can declare each other's legislation and supervision in a number of sub-areas to be equivalent, thereby making market access comparable to that available with the European passport possible in a limited number of areas. However, these so-called equivalence decisions are unilateral and were therefore not part of the negotiations on the future partnership.[117]

An equivalence decision for British central clearing counterparties

It should be noted, however, that due to the risks to financial stability, the European Commission adopted a time-limited (18-month) equivalence decision on behalf of central clearing counterparties (CCPs) established in the UK.[118] CCPs play a central role in the clearing of standardized OTC derivatives transactions. By way of follow-up, ESMA recognized the three UK CCPs (ICE Clear Europe Limited, LCH Limited and LME Clear Limited) as third-country CCPs on 28 September 2020, namely until 30 June 2022.[119] This means that the British CCPs may, at least provisionally, continue to provide clearing services to their clients in the EU27. And that is a good thing, as a very sizeable volume of euro-denominated OTC derivatives transactions are cleared by CCPs in the UK. The estimated daily values of repos and interest rate swaps denominated in euros are EUR 101 billion and EUR 33 trillion respectively (approximately 99 per cent of the Union market).[120] If the Commission had not taken an equivalence decision, this would have meant that a staggering volume of transactions would suddenly have had to be cleared all at once through CCPs within the EU27. This would have been a very costly and complex operation, which could also have threatened financial stability if it had been done precipitately. Moreover, it is highly questionable whether sufficient capacity currently exists within the EU27.

Be that as it may, British CCPs do not have to move to the European mainland for the time being in order to continue to service clients in the EU27. But whether that will remain the case is the question. The position is as follows. The EMIR was amended on 10 October 2019 in such a way that third-country CCPs established in countries for which the Commission has adopted an equivalence decision (such as the UK) should be divided into two groups: systemically relevant (Tier-2 CCPs) and non-systemically relevant (Tier-1 CCPs). If a third-country CCP is not systemically relevant, there are no additional requirements for recognition by ESMA of a CCP in that third country. The CCP can then operate within the

117 See <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/kamerstukken/2020/12/27/kamerbrief-beoordeling-handels–en-samenwerkingsovereenkomst-eu-vk> accessed 18 October 2021.

118 See Implementing Decision (EU) 2020/1308. OTC stands for 'over the counter'.

119 *ESMA to recognise three UK CCPS from 1 January 2021* (28 September 2020) (ESMA77-99-1403). On 25 November 2020, pursuant to the Central Securities Depositories Regulation (Regulation (EU) No 909/2014), the Commission also adopted a time-limited equivalence decision for the regulation and supervision of central securities depositories (CSDs) established in the UK. On this basis, ESMA recognized Euroclear UK and Ireland Limited (EUI) as third-country CSDs (until 30 June 2021). See *ESMA to recognise Euroclear UK and Ireland Limited (EUI) after Brexit transition period* (11 December 2020) (ESMA71-99-1483): 'This time period should give concerned EU issuers sufficient time to transfer their securities to EU CSDs.' So an extension of the equivalence decision for British CSDs does not seem to be on the cards. A CSD or central securities depository is an institution that specializes in holding securities for the purpose of allowing clearing and settlement to be performed electronically. As regards the activities of EUI, see <https://www.euroclear.com/services/en/provider-homepage/euroclear-uk-ireland.html> accessed 18 October 2021.

120 At any rate in 2017. See COM(2017) 292 final, 8 June 2017, p 6.

Union on the basis of compliance with the rules of its home country and need not additionally comply with the European rules under EMIR. This is different once ESMA considers that a third-country CCP is or will become systemically relevant. In that case, the CCP must fulfil additional requirements in order to be allowed to start or continue operating in the Union, including compliance with the strict prudential EMIR requirements that also apply to CCPs established in the EU. As soon as a third-country CCP becomes so systemically relevant in ESMA's opinion that even compliance with the prudential EMIR provisions is insufficient, ESMA (in consultation with the relevant central banks) can advise the Commission to take a decision that the third-country CCP may no longer operate in the Union unless it establishes itself in the EU27.[121] It will be clear that this change is a direct response to Brexit. The key question is, of course, whether the main British CCPs fall into this strictest category.

The exact standard to be applied by ESMA in assessing whether a third-country CCP is or will become systemically relevant is specified in implementing legislation (Level 2 rules) published on 21 September 2020.[122] When ESMA recognized the three British CCPs as third-country CCPs on 28 September 2020 (see above), the exact standard was thus already known. ESMA's recognition decision therefore states how these CCPs are classified. LME Clear Limited is classified as a Tier 1 CCP and is therefore not systemically relevant, but ICE Clear Limited and LCH Limited are both classified as Tier 2 CCPs and are therefore systemically relevant. But how systemically relevant are they exactly? ESMA will investigate this in the near future. If the outcome of that investigation is that ICE Clear Limited and LCH Limited are or will become of such systemic importance that even compliance with the prudential EMIR provisions is insufficient, ESMA (in consultation with the relevant central banks) may advise the Commission to decide that these two British CCPs should no longer be allowed to operate in the Union. The only way for these CCPs to continue operating in the EU27 will then be to move to a city within the EU27 (eg Paris or Milan), apply for an EMIR authorization there and then fully submit to the EMIR regime. This would then herald a dramatic shift in the UK's clearing sector to the EU27 (and to the USA as CCPs there have equivalence with both the EU and the UK).[123] Similarly, if the Commission does not extend the current equivalence decision (valid until 30 June 2022), relocation will be the only option.[124] LCH Limited has already set up a subsidiary in Paris to be able to clear transactions in mainland Europe (LCH SA).[125]

121 Regulation (EU) 2019/2099.

122 Delegated Regulation (EU) 2020/1303.

123 See also: Matthijs Rotteveel, *Europese Unie speelt hoog spel in strijd met VK om rentederivaten* ('EU Playing High Stakes Game in Battle with UK Over Interest Rate Derivatives'), *FD* (29 March 2021) p 27. For the record, I would note that a regulation has now also been adopted concerning the recovery and orderly resolution of CCPs: Regulation (EU) 2021/23. For more about this, see eg: J-H Binder, 'Chapter 12—Central Counterparties Insolvency and Resolution in the EU' in Binder and Saguato (n 27).

124 According to the ECB, the market should not expect the Commission to extend the equivalence decision for British CCPs; see: <https://www.risk.net/derivatives/7814796/ecb-dont-expect-equivalence-extension-for-uk-ccps> accessed 18 October 2021.

125 <https://www.lch.com/about-us/our-clearing-houses>. See on Brexit and CCP supervision recently eg: M Lehmann, 'Brexit and CCP Supervision: From Extraterritoriality to a Model of Shared Control' (EBI WPS No 101) (<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3904130> accessed 18 October 2021). See also, amongst others, D Busch, 'Chapter 3—A Stronger Role of the ESAs in the EU27' in Busch, Avgouleas and Ferrarini (n 1), p. 28–54, at pp 35–54; G Ferrarini and D Trasciatti, 'Chapter 7—OTC Derivatives Clearing, Brexit, and the CMU' in Busch, Avgouleas and Ferrarini (n 1), pp 140–67.

Additional equivalence decisions?

Under the European rules, the Commission could also adopt equivalence decisions in relation to the rules and supervision in the UK for other types of financial institution.[126] In making its equivalence assessment, the Commission takes into account the implications for financial stability, market transparency and integrity, investor protection and a level playing field, while maintaining a forward-looking approach.[127] The latter addition is crucial. As the rules applicable to the British financial sector do not yet differ fundamentally from those in force before Brexit, equivalence often exists at present. But it seems likely that this will not continue. The City of London does not want to lose its leading position, and is now critically scrutinizing the rules for the British financial sector. For example, it wishes to offer founders of fast-growing FinTechs more opportunities to retain control over their company even after an IPO and to make it easy to bring 'spacs' (special purpose acquisition companies) to the British stock exchange. Spacs are also known as 'blank check companies'. These are shell companies listed on a stock exchange with the aim of acquiring and then incorporating a privately owned business, thereby avoiding the traditional process of an IPO. The rules for listing a spac on Euronext Amsterdam are currently more flexible than in London. The UK is also currently considering adjusting the rules for insurers. It therefore seems that the European and UK rules for the financial sector will diverge still further in the near future. Additional equivalence decisions of the Commission are therefore not expected for the time being. As agreed in the trade deal, the parties have now concluded a memorandum of understanding laying the foundation for further cooperation in this area. It is doubtful whether this provides a basis for additional equivalence decisions. At present, the Union appears to have little to gain from adopting a conciliatory approach towards the UK.[128]

6. Action plan for a comprehensive Union policy on preventing money laundering and terrorist financing

On 7 May 2020, the Commission published its Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing.[129] Although the framework for combating money laundering and terrorist financing has long been regulated at EU level, the level of harmonization is still fairly minimal since the chosen form of

126 On this point, see eg E Wymeersch, 'Third-Country Equivalence and Access to the EU Financial Markets Including in Case of Brexit' (2018) 4 JFR, 209–75; E Howell, 'Post-Brexit UK Fund Regulation: Equivalence, Divergence or Convergence?' (2020) 3 EBOR 611–39; F Pennesi, 'Equivalence in the Area of Financial Services: An Effective Instrument to Protect EU Financial Stability in Global Capital Markets?' (2021) 1 CMLR 39–70.

127 See <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/kamerstukken/2020/12/27/kamerbrief-beoordeling-handels–en-samenwerkingsovereenkomst-eu-vk> accessed 18 October 2021.

128 Dobber (n 116) 2–3; Philip Stafford, 'UK and EU begin Diverging on Financial Regulation after Brexit' *Financial Times* (26 March 2021); Jim Brundsen and Peter Foster, 'UK and EU Reach Financial Regulation Deal in Break-through on Co-operation' *Financial Times* (26 March 2021).

129 See <https://ec.europa.eu/commission/presscorner/detail/nl/ip_20_800> accessed 18 October 2021.

legislation is through directives (the First to the Fifth Anti-Money Laundering Directives) and, most importantly, supervision is still conducted at national level.

Although the scope of the rules extends beyond the financial sector, we have recently seen that compliance with the rules to combat money laundering and terrorist financing is a major headache for large banks operating throughout Europe such as ING and ABN AMRO. Banks of this kind are confronted by different rules and policies in each member state, which makes compliance complex and pushes up costs. The Dutch Public Prosecution Service has imposed a fine of EUR 775 million on ING for serious failures in preventing money laundering.[130] For similar reasons it imposed a fine of EUR 480 million on ABN AMRO.[131] Moreover, the Dutch Public Prosecution Service, acting in accordance with the directions of The Hague Court of Appeal, has instituted criminal proceedings against ING's former CEO.[132] This was therefore sufficient reason to discuss the main points of the Commission's action plan.

The Action Plan aims to strengthen the EU's efforts to combat money laundering and terrorist financing, as well as its global role in this field. It aims to introduce further harmonization of EU rules and thus make them more effective. Since regulatory oversight and coordination between Member States' authorities should also be improved, the Commission also proposes to establish an EU-level supervisor in this field.

On 20 July 2021, following up on the Action Plan, the European Commission presented an ambitious package to strengthen the EU's anti-money laundering and countering terrorism financing (AML/CFT) rules, consisting of four legislative proposals: (1) a Regulation establishing a new EU AML/CFT Authority (AMLA Regulation); (2) a Regulation on AML/CFT, containing directly applicable rules, including in the areas of Customer Due Diligence and Beneficial Ownership; (3) a sixth Anti-Money Laundering Directive, containing provisions that will be transposed into national law, such as rules on national supervisors and Financial Intelligence Units (FIUs) in Member States; and (4) a revision of the 2015 Regulation on Transfers of Funds to trace transfers of crypto-assets (Regulation 2015/847/EU).[133]

According to the proposals of the European Commission, AMLA should become the central authority coordinating national authorities to ensure the private sector correctly and consistently applies EU rules. AMLA should also support FIUs to improve their analytical capacity around illicit flows and make financial intelligence a key source for law enforcement agencies. In particular, it should: (a) establish a single integrated system of AML/CFT supervision across the EU, based on common supervisory methods and

130 <https://www.fiod.nl/ing-betaalt-775-miljoen-vanwege-ernstige-nalatigheden-bij-voorkomen-witwassen/> accessed 18 October 2021.

131 Marcel de Boer and others, *Witwasboete ABN AMRO; nader onderzoek OM naar Zalm* ('ABN AMRO Money Laundering Fine; further Investigation by the Public Prosecution Service into Zalm'), *FD* (19 April 2021).

132 The Hague Court of Appeal, 9 December 2020, ECLI : NL : GHDHA : 2020:2347; <https://nos.nl/artikel/2359956-waarom-oud-ing-bestuurder-hamers-alsnog-voor-de-rechter-moet-komen.html> accessed 18 October 2021.

133 See European Commission, 'Press Release 20 July 2021, Beating Financial Crime: Commission Overhauls Anti-money Laundering and Countering the Financing of Terrorism Rules' (<https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3690> accessed 18 October 2021).

convergence of high supervisory standards; (b) directly supervise some of the riskiest financial institutions that operate in several Member States or require immediate action to address imminent risks; (c) monitor and coordinate national supervisors responsible for other financial entities, as well as coordinate supervisors of non-financial entities; and (d) support cooperation among national Financial Intelligence Units (FIUs) and facilitate coordination and joint analyses between them, to better detect illicit financial flows of a cross-border nature.[134]

As the legislation is a headache not only for financial and other institutions themselves but certainly also for the competent national regulators, none of them is likely to object if a European supervisor is made responsible for carrying out at least part of the supervision in a uniform manner. And the German and French finance ministers, among others, have already announced that they would welcome European supervision in this area. So it might actually happen.[135]

7. A European deposit insurance scheme, bad loans and the coronavirus crisis

Towards a European deposit insurance scheme?

The coronavirus crisis has been bad news for the EBU. EBU has not yet been completed as the third pillar—a European deposit insurance scheme (EDIS)—is still not in place. Under the existing EU Directive on deposit insurance schemes, it is already the case that if a bank in the EU is unable to meet its payment commitments, an aggrieved depositor (saver) can recover up to a maximum of EUR 100,000 from the deposit insurance fund. Each Member State has (or should have) set up such a fund, which is jointly financed by the banks in that Member State. The idea now is that the financing of the deposit insurance scheme within the euro area should be elevated to the European level.[136] But the Netherlands and Germany, in particular, are unenthusiastic. If an Italian, Spanish, Portuguese or Greek bank goes bankrupt, the Dutch and German banks would have to contribute. The Netherlands and Germany have always made clear that they would agree to an EU-funded deposit insurance scheme only if the non-performing loans (NPLs[137]) on bank balance sheets, particularly those of the south European banks, are reduced to acceptable proportions. Spain, Italy and Portugal were well on the way to reducing the proportion of NPLs on their banks' balance sheets, which had in any event improved the

134 COM(2021) 421 final. See on the Commission's proposal for a Regulation establishing a new EU AML/CFT Authority a nutshell: European Commission, ibid.

135 See the letter dated 8 November 2019, *Paper Europees AML/CFT toezicht* (reference : 2019-0000188315) and, above all, the accompanying position paper drawn up by the finance ministers of the Netherlands, France, Germany, Spain, Italy and Latvia: <https://www.rijksoverheid.nl/documenten/kamerstukken/2019/11/08/position-paper> accessed 18 October 2021.

136 For the Commission's initial proposal, see COM(2015) 586 final. For more about this, see V Colaert, 'Chapter 14—European Deposit Insurance System (EDIS): third pillar of the Banking Union or dead end?' in Busch and Ferrarini (n 25).

137 NPLs (non-performing loans) are bank loans that are subject to late repayment (90 days past due) or unlikely to be repaid by the borrower, if, eg the borrower faces financial difficulties. See <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2376> accessed 18 October 2021.

prospect of the EBU's third pillar being introduced. However, the coronavirus crisis has caused the share of NPLs on bank balance sheets across Europe to rise sharply again.[138] After all, many European businesses and households that have borrowed money from banks have encountered payment problems due to the pandemic. In Greece, insufficient progress has been made in recent years in consolidating bank balance sheets, and the current crisis is only adding to the problems.[139] José Manuel Campa, the chair of the EBA, has recently voiced concerns about this, calling it 'utterly paradoxical' that the share of NPLs in the euro area fell to the exceptionally low level of 2.6 per cent at the end of 2020. He has called on European banks to look more critically at their loan portfolios and, where necessary, take their losses immediately.[140] Whatever the case, if the share of NPLs on European bank balance sheets increases again, a European-funded deposit insurance scheme will also be further away than ever, although the Commission has put the subject back on the agenda in a recent consultation document. As an intermediate step, thoughts are currently turning to a 'hybrid' model, in which EU liquidity support is provided to national deposit insurance funds that need it.[141]

A European bad bank?

Naturally, a crisis can also lead to greater centralization. Indeed, there are once again calls for a so-called European bad bank (European Asset Management Company or AMC) to be set up as a receptacle for all non-performing loans.[142] The idea is that the pain will then be shared across Europe. Whether this form of solidarity is feasible remains to be seen. But one thing is certain: the problem that the share of non-performing loans on European bank balance sheets is likely to rise again due to the coronavirus crisis will not disappear by doing nothing. The publication by the European Commission of an NPL action plan

138 See COM(2020) 822 final, pp 5–6.

139 See COM(2020) 822 final, table 1 on p 6.

140 See Marcel de Boer, *Toezichthouder: zombiebedrijven kunnen ook de banken aantasten* ('Supervisor: Zombie Companies can also Harm the Banks'), *FD* 23 March 2021, p 27; <https://www.bloomberg.com/news/articles/2021-03-22/european-banks-urged-to-recognize-loan-losses-following-covid> accessed 18 October 2021. Similarly, see Andrea Enria (chair of the Supervisory Board of the ECB): <https://www.bankingsupervision.europa.eu/press/speeches/date/2021/html/ssm.sp210316~55c3332593.en.html> accessed 18 October 2021; DNB: <https://www.dnb.nl/media/faxpn0vj/ofs_najaar_2020.pdf> accessed 18 October 2021 (p 20); Marcel de Boer, *EBA ziet voorbode van meer afboekingen bij banken* ('EBA sees Portent of more Bank Write-downs') *FD* 31 March 2021.

141 See <https://ec.europa.eu/info/consultations/finance-2021-crisis-management-deposit-insurance-review-targeted_en> (26 January 2021), 32 ff. The ECB is already in favour of a hybrid model as an intermediate step; see the lecture by Luis de Guindos (Vice-President of the ECB): *Banking Union: Achievements and Challenges* (18 March 2021) (<https://www.ecb.europa.eu/press/key/date/2021/html/ecb.sp210318_1~e2126b2dec.en.html> accessed 18 October 2021).

142 See *FD*, 19 April 2020, *Greek central bank president advocates a European bad bank*; *FD* 22 April 2020, *Moet politiek ingrijpen om banken van giftige leningen af te helpen*? ('Should Politicians Intervene to Help Banks Jettison Toxic Debts?'). The establishment of a European bad bank has also been advocated by Andrea Enria (chair of the ECB'a Supervisory Board). 'ECB: the EU needs a Regional Bad Bank' *Financial Times* (26 October 2020) (<https://www.ft.com/content/cc3a9a51- 4d9a-4c73-9ff0-9f623ecf4065> accessed 18 October 2021). Antonio Carrascosa (former member of the Single Resolution Board, SRB) is more sceptical; see: *A European Bad Bank—a necessary tool for financial stability?* (28 December 2020) (<https://srb.europa.eu/en/node/1109> accessed 18 October 2021). The same goes for Elke König (chair of the SRB); see speech by Elke König at the EBI Policy Conference: *Europe and the Covid-19 crisis* (5 November 2020) (<https://srb.europa.eu/en/node/1080> accessed 18 October 2021). As regards NPLs, see: E Avgouleas, 'Chapter 8—The EU framework dealing with non-performing exposures', in Busch and Ferrarini (n 25).

on 16 December 2020 to address this problem is therefore to be welcomed.[143] The action plan builds on the 2017 European Council NPL strategy.[144]

How do we keep bank lending up to standard?

Before considering this, we need to take a few steps back. As already noted, many European businesses and households have come under great financial pressure as a result of the pandemic. It is therefore necessary to ensure that they have access to the funding they need during the crisis. Besides all kinds of state aid (facilitated by a more flexible application of European rules) and payment deferrals (moratoriums), maintaining the volume of bank lending is essential. In Europe, efforts are being made to achieve this by relaxing the EU banking rules and/or their application, for example by providing favourable prudential treatment for non-performing loans if they are covered by government guarantees, and by flexible application of international accounting standards (IFRS9).[145] On the other hand, the standards should not be applied too flexibly, because banks must naturally continue to look realistically at their loan portfolios and, where necessary, immediately take their losses (see section 'Towards a European deposit insurance scheme?', above).

The NPL action plan

However, more is needed to maintain the volume of bank lending. This is why the Commission published its NPL action plan on 16 December 2020. The plan has four main goals.

Further develop secondary markets for distressed assets

First, the NPL action plan envisages further developing the secondary markets for distressed assets. A deeper and more liquid secondary market for distressed assets would provide banks with the possibility to reduce their NPLs by selling them to third-party investors. This would create room on the bank balance sheets for new lending, enabling them to fund the economic recovery.[146]

Reaching agreement quickly on the Commission's proposal for a Directive on credit servicers, credit purchasers and the recovery of collateral, which was adopted in March 2018,[147] will be a vital step. This proposal ensures that, if a loan is sold, debtor protection across the single market is not weaker than the protection offered by the initial lending bank. It would ensure that consumer protection obligations are upheld irrespective of

143 COM(2020) 822 final.

144 ECOFIN Council: *Action Plan to Tackle Non-Performing Loans in Europe*, July 2017.

145 See COM(2020) 822 final, p 1 (with further references). As regards the European coronavirus measures, see: CV Gortsos and W-G Ringe (eds), *Pandemic Crisis and Financial Stability* (<https://ebi-europa.eu/ebi-e-book-series/> accessed 18 October 2021); CV Gortsos and W-G Ringe (eds), *Financial Stability amidst the Pandemic Crisis—On Top of the Wave* (https://ebi-europa.eu/ebi-e-book-series/> accessed 18 October 2021); the EBI COVID regulatory tracker (<https://ebi-europa.eu/covid-regulatory-tracker/> accessed 18 October 2021) (updated regularly).

146 See COM(2020) 822 final, p 7.

147 COM(2018) 0135 final.

how NPLs are resolved.[148] As regards this proposal, see also the subsection 'Reform the EU's corporate insolvency and debt recovery legislation' and the section 'Dutch Supreme Court ruling on the transfer of NPLs from a bank to a non-bank' below.

As part of the Capital Markets Recovery Package of 24 July 2020 (see section 2, subsection 'EU recovery prospectus' above), the Commission also proposed targeted improvements to the securitization framework for banks' non-performing exposures.[149] Securitization is a technique that enables banks to consolidate loans, convert them into securities and sell them on the capital markets, thus removing them from their balance sheets. NPLs are part of a wider set of non-performing exposures (NPEs). Such exposures could include, for example, not only loans but also other debt instruments such as a debt security, an advance and a demand deposit. An agreement was reached on this in December 2020, the idea being that these adjustments should make it easier for banks to remove NPLs from their balance sheets.[150]

The Commission considers that there would be merit in establishing a central electronic data hub at EU level to increase transparency in the NPL market. Such a hub would act as a data repository underpinning the NPL market and allowing a better exchange of information between all market participants involved (credit sellers, credit purchasers, credit servicers, national asset management companies (AMCs) and private NPL platforms), thereby ensuring that NPLs can be disposed of effectively. On the basis of a public consultation, the Commission will explore several alternatives for establishing a data hub at European level in order to determine the best way forward.[151]

Reform the EU's corporate insolvency and debt recovery legislation

Second, the NPL action plan proposes to reform the EU's corporate insolvency and debt recovery legislation so that the various insolvency frameworks across the EU converge, while maintaining high standards of consumer protection. More convergent insolvency procedures would increase legal certainty and speed up the recovery of value for the benefit of both creditor and the debtor. The Commission urges the Parliament and the Council to reach an agreement swiftly on the legislative proposal for minimum harmonization rules on accelerated extrajudicial collateral enforcement, which the Commission proposed as long ago as 2018. It should be noted, by the way, that consumers are completely excluded from this accelerated enforcement procedure.[152]

148 See COM(2020) 822 final, p 7.

149 COM(2020) 282 final and COM(2020) 283 final. See also Action 6 of the CMU Action Plan, discussed in section 2, subsection 'Other action points' above.

150 See COM(2020) 822 final, p 7.

151 See COM(2020) 822 final, pp 7–12; <https://ec.europa.eu/info/publications/201216-non-performing-loans-action-plan_nl> accessed 18 October 2021.

152 See COM(2020) 822 final, pp 15–17; <https://ec.europa.eu/info/publications/201216-non-performing-loans-action-plan_nl> accessed 18 October 2021. For the 2018 proposal, see: COM(2018) 0135 final. For more about this, see: Ben Schuijling, Vincent van Hoof and Tom Hutten, 'Non-performing Loans and the Harmonisation of Extrajudicial Collateral Enforcement Across Europe' (2019) International Insolvency Review 341 ff. cf also section 2, subsection 'Harmonization—or in any event increased convergence—of non-bank insolvency law' above.

Support the establishment and cooperation of national asset management companies

Third, the NPL action plan proposes support for the establishment and cooperation of national AMCs at EU level. Asset management companies are vehicles that provide relief to distressed banks by enabling them to remove NPLs from their balance sheets. This helps them to re-focus on lending to viable firms and households instead of managing NPLs. The Commission is prepared to support member states in setting up national AMCs, if they wish to do so, and would explore how cooperation could be fostered by establishing an EU network of national AMCs. While national AMCs are valuable because they benefit from domestic expertise, an EU network of national AMCs could enable national entities to exchange best practices, enforce data and transparency standards and better coordinate actions. A network of AMCs could also use the data hub to coordinate and cooperate their activities with each other in order to share information on investors, debtors and servicers. Accessing information on NPL markets will require that all relevant data protection rules regarding debtors are respected.[153]

Implement precautionary public support measures

Finally, the NPL action plan proposes to facilitate the provision of state aid to banks. Given the exceptional nature of the pandemic, authorities must have the possibility to implement precautionary public support measures, where needed, to ensure the continued funding of the real economy. This support can naturally be granted only if it is permitted under the Bank Recovery and Resolution Directive (BRRD) and the European rules on state aid.[154] In the Commission's view, both sets of rules allow scope for the provision of state aid, given the special circumstances. The Commission indicates how the rules should be interpreted in the light of the coronavirus crisis and basically calls on the member states in its NPL Action Plan to make use of this scope when necessary.[155]

Dutch Supreme Court ruling on the transfer of NPLs from a bank to a non-bank

It would seem from the European initiatives described above that banks should be able to sell their NPLs (claims/receivables) to non-banks in order to free up space on their balance sheets for new lending to viable companies. But what about the interests of the debtors of such claims, since they are then confronted with a new creditor? The question as to

153 See COM(2020) 822 final, pp 12–15; <https://ec.europa.eu/info/publications/201216-non-performing-loans-action-plan_nl> accessed 18 October 2021. For more about national AMCs, see, eg: E Avgouleas and others, *Non-performing loans: new risks and policies? What factors drive the performance of national asset management companies?*, Economic Governance Support Unit (EGOV) Directorate-General for Internal Policies PE 651.386—March 2021; Avgouleas and others, ibid PE 659.647—March 2021.

154 For a recent discussion of this subject, see Louisse-Read (n 25).

155 See COM(2020) 822 final, pp 17–20; <https://ec.europa.eu/info/publications/201216-non-performing-loans-action-plan_nl> accessed 18 October 2021. It is also interesting in this context that the CJEU recently shied away from intervening in an Italian support scheme established for Italian banks under private law in 2014. Although, according to a Commission decision dating from 2015, this arrangement did amount to the provision of prohibited state aid by the Italian authorities, both the court of first instance and the CJEU ruled that this was not the case because the scheme was not imputable to the Italian state, and there had also been no circumvention of the BRRD. See CJEU 2 March 2021, C-425/19 P, ECLI : EU : C : 2021:154 (*Tercas*).

whether banks may transfer claims of this kind to a non-bank under applicable national private law and, if so, what safeguards are available to the debtor was recently submitted for a preliminary ruling by Amsterdam District Court to the Dutch Supreme Court in two cases.[156]

In two identical judgments, the Dutch Supreme Court held that the nature of a bank's claim against a client under a loan agreement is *not* such as to preclude the transfer of the claim to a non-bank. The possibility that the non-bank will, *in practice*, exercise its rights and powers derived from the right of action differently than the bank does not in itself justify making an exception to the basic principle of Article 3:83, paragraph 1, of the Dutch Civil Code (DCC) that claims and rights of action are transferable.[157]

A non-bank does not become liable to the bank's duties of care to its client as a result of the transfer.[158] But where a duty of care (or special duty of care) owed by a bank to a client limits the nature of its claim (including any associated (ancillary) rights and obligations), that claim can be assigned to the non-bank only subject to this limitation. Moreover, the borrower may invoke against the non-bank the defences he would have had against the bank (Article 6:145 DCC).[159]

After assignment of the claim, the legal relationship thereby created between the non-bank and the borrower is governed by the criteria of reasonableness and fairness (Article 6:2 DCC). What these criteria require of the non-bank in any given situation depends on the particular circumstances. It is also important to note here that the assigned claim originates from a bank that has duties of care (or special duties of care) by virtue of that capacity. The non-bank can be expected to ensure that its conduct is determined in part by the justified interests of the borrower. In so far as the non-bank has its own duty of care, it *may* therefore be required in certain circumstances to behave towards the borrower in the same way as may be required of a bank acting reasonably.[160]

The following is also important in the context of the non-bank's own duty of care. When, after an assignment, a non-bank manages a credit that has been granted to a consumer, this constitutes 'offering' within the meaning of section 1:1 of the Dutch Financial Supervision Act (Wft). In that case, the non-bank, as a financial service provider, is subject to an obligation to obtain an authorization pursuant to section 2:60 (1) of the Dutch Financial Supervision Act and, like a bank, to the rules of conduct and standards laid down in Part 4 of the Financial Supervision Act. If the non-bank has outsourced the

156 Supreme Court, 10 July 2020, ECLI : 2020:1274 and 1276. See also the detailed advisory opinion of Advocate General Hartlief: ECLI : NL : PHR : 2020:358 and 359; see extensively on these preliminary rulings, amongst others, D Busch and L Buitelaar, 'Overdracht van oninbare bankleningen na Promontoria', *Weekblad voor Privaatrecht, Notariaat en Registratie* (*WPNR*) 2021/7340, pp 695703.

157 See paras 2.6.3 and 2.7 of the judgment.

158 A lot more can be said about the civil duty of care of banks (and other financial institutions). For a recent discussion of the duty of care (also in relation to the doctrine of mistake, financial supervision law and Directive 93/13/EEC): D Busch, 'The Future of the Special Duty of Care in the Financial Sector—Perspectives from The Netherlands' (2021) 3 *European Business Law Review* 473–500 (including many references to the case law and literature).

159 See paras 2.10 and 2.15.1, first paragraph, of the judgment.

160 See para 2.15.1, second paragraph, of the judgment.

management or execution of the credit to a credit manager within the meaning of Article 3 of the Wft Exemption Scheme, only the latter is subject to an authorization requirement and to the conduct-of-business rules and standards laid down in Part 4 of the Financial Supervision Act.[161]

What all this means in concrete terms for the borrower's legal position is explained by the Dutch Supreme Court by reference to an example in which a non-bank increases the rate of interest rate payable on the transferred claim (the loan) after the assignment. The borrower cannot invoke the bank's duty of care against the non-bank since that duty of care did not pass to the non-bank as a result of the assignment.[162] However, the borrower can invoke the content of the assigned claim against the non-bank and hence also the limitations that form part of that claim. If, for example, the bank and its client had agreed on a maximum permitted interest rate increase (subject, by virtue of Article 6: 248 DCC, to the requirements of reasonableness and fairness in so far as they supplement or derogate from what has been agreed), that agreement limits the content of the claim that the bank assigns to the non-bank, and it is this limited claim which thus passes to the non-bank. As this limitation of the possibility to raise the interest rate is part of the claim, it therefore applies to the non-bank. If the bank has a special duty of care which means or entails that the interest rate can be increased only to a certain maximum, this duty limits the content of the claim which the bank assigns to the non-bank and it is this limited claim that thus passes to the non-bank. Here too, the limitation of the possibility to raise the interest rate is part of the claim and therefore applies to the non-bank.[163]

In the cases discussed above, the limitation of the possibility to increase the interest rate after assignment therefore applies to the non-bank because the limitation forms part of the transferred claim, and Article 6:145 DCC cannot be invoked in this connection. Nonetheless, if the non-bank requests payment of the increased interest rate, the borrower may, pursuant to Article 6:145 DCC, invoke the right of suspension which it could have invoked against the bank.[164]

I would make the following observation in passing. Title VII of the aforementioned Commission proposal for a directive on credit servicers, credit purchasers and the recovery of collateral contains an amendment to the Mortgage Credit Directive in Article 38.[165] The draft article provides not only (i) that, in the event of an assignment to a third party of the creditor's rights under a credit agreement or of the agreement itself, the consumer is entitled to plead against the assignee any defence which was available to him as against the original creditor (including set-off where the latter is permitted in the Member State concerned), but also (ii) that the consumer must be

161 See para 2.12 of the judgment. For the most recent version of Article of the Wft Exemption Scheme (as of 1 October 2020), see: *Government Gazette* 30 September 2020, no 501–57, pp 1–5 (including Explanatory Memorandum).

162 See para 2.16 of the judgment.

163 See para 2.16 of the judgment.

164 See para 2.16 of the judgment.

165 Directive 2014/17/EU.

informed of the assignment.[166] If the proposed provision reaches the finish line unchanged, the requirement described at (ii) will necessitate a change in Dutch securitization practice, because at present the debtors of assigned claims are not, in principle, notified of the assignment (undisclosed assignment).[167] Undoubtedly, some intense lobbying is already going on to get this requirement dropped. By way of comparison, in the case of consumer credit (other than mortgage credit and some other forms of credit), the same requirement applies under the Consumer Credit Directive[168] as referred to at (i) above, and although the main rule is that the debtor must be informed of the transfer, this rule is subject to an exception if the original lender continues to manage the credit in consultation with the assignee (as is customary in the case of securitizations).[169]

I will now return to the subject of the Supreme Court's preliminary ruling and pick up the thread again. After the assignment, the non-bank and the borrower have a legal relationship with each other which is governed by the requirements of reasonableness and fairness pursuant to Article 6:2 DCC. Even if the assigned claim were to *not* involve a limitation of the possibility to increase the interest rate, the requirements of reasonableness and fairness might still mean that the non-bank has a duty to limit an interest rate increase. A relevant factor may be the extent to which the interest rate hike is in keeping with market rates.[170] Moreover, a raising of the interest rate by the non-bank may be unacceptable according to the requirements of reasonableness and fairness. This means that if the bank was authorized to raise the interest rate but did not do so as a goodwill gesture and the non-bank proceeds after the assignment to raise the interest rate in circumstances where this is not limited by a special duty of care and is not unacceptable according to standards of reasonableness and fairness, the borrower has *no* protection against it.[171]

In short, the Dutch Supreme Court too has held that a transfer of NPLs from a bank to a non-bank must be possible, albeit subject to the necessary safeguards for the debtor of the assigned claim, especially if he or she is a consumer.

166 COM(2018) 0135 final.

167 For a recent discussion of the practice of securitization, see, eg M Kuilman, 'Securitisatieverordening van kracht!', *Maandblad voor Vermogensrecht* (*MvV*) (2019),pp 354–63, at pp 354–7.

168 Directive 2008/48/EC.

169 See art 17 of the Consumer Credit Directive, which has been transposed into Dutch law in art 7:69, paras 1–2, DCC. N.B. This provision does *not* apply to mortgage loans (see art 7:58 (2)(a) DCC).

170 As regards the importance of interest rate increases being in keeping with market rates on the basis of unilateral interest rate change clauses in relation to continuous consumer credit (which is, in fact, completely separate from the problem of transfers of claims), the Appeals Committee of the Financial Services Complaints Tribunal (KiFiD (the Dutch institute for alternative dispute resolution in the financial sector) recently ruled that the average consumer can justifiably expect the interest rate on his or her loan to rise and fall in keeping with the interest rate on similar loans, unless the lender has provided different information in advance: CvB KiFiD 21 January 2019 (2019-004 and 2019-005), 13 December 2019 (2019-005A), 5 February 2020 (2019-005B) (for the sake of transparency, it should be noted that the author was one of the advisers who gave the above-mentioned KiFiD decisions); 3 March 2021 (2021-0015); 6 April 2021 (2021-20); 6 April (2021-21) (<https://www.kifid.nl/uitspraken/> accessed 18 October 2021).

171 See para 2.16 of the judgment.

8. European influence on national private law in the financial sector

General

The preliminary ruling of the Dutch Supreme Court on the transfer of NPLs from a bank to a non-bank brings us fairly logically to the subject of national private law. This section too is about private law, more specifically about the influence of EU law on our national private law. This influence, which is now being felt in various ways in the financial sector, is occurring as a result not only of (i) the effect on private law of EU regulations (such as the Market Abuse Regulation and the Prospectus Regulation) and directives (such as MiFID II and previously MiFID I) that have been transposed into national financial supervisory law in most (if not all) Member States, but also of (ii) European directives that are 'simply' implemented in national private law codifications (for example: the Directive on unfair terms in consumer contracts (Directive 93/13) and the Unfair Commercial Practices Directive, as well as parts of the Consumer Credit Directive, the Mortgage Credit Directive and the Payment Services Directive 2).[172]

Investment-linked policies

Although the days when investment-linked life insurance policies (ILPs) were popular financial products in the Netherlands are long gone, there is still no sign that the steady stream of Dutch case law on this subject will be coming to an end any time soon. The widespread mis-selling of these policies, with their high hidden costs, meant that they came to be known in popular parlance as 'woekerpolissen' (extortionate policies). In one of the many ongoing legal actions, The Hague Court of Appeal recently submitted a number of questions for preliminary ruling to the Dutch Supreme Court concerning the effect of the Third Life Directive (now repealed) and Directive 93/13/EEC on national private law.[173]

For a better understanding of the questions submitted by The Hague Court of Appeal for a preliminary ruling, we must know the background. In its judgment of 22 November 2019 on unilateral interest rate alteration clauses in Euribor mortgages, the Dutch Supreme Court clarified the following points. Although at the time in question the conduct-of-business rules applicable to banks and other lenders did not generally oblige

172 See recently eg: D Busch, 'The Private Law Effect of MiFID: Genil and Beyond' (2017) 1 European Review of Contract Law 70–93; D Busch, 'The Private Law Effect of the Market Abuse Regulation' (2019) 3 *CMLJ* 296–319; D Busch, 'The Influence of the EU Prospectus Rules on Private Law' (2021) 1 *CMLJ* 3–30; OO Cherednychenko, 'Two Sides of the Same Coin: EU Financial Regulation and Private Law' (2021) 1 EBOR 147–72; Seb Malik, 'MiFID II: The Quest for Ever-elusive Effectiveness' (2021) JIBLR 121–30 (private law effect of MiFID I and II in English law); OO Cherednychenko and M Andenas (eds), *Financial Regulation and Civil Liability in European Law* (Edward Elgar 2021); R d'Ambrosio and S Montemaggi (eds), *Quaderni di Ricerca Giuridica, Private and public enforcement of EU investor protection regulation, Conference papers Banca d'Italia, Rome, 4 October 2019* (<https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2020-0090/qrg-90.pdf> accessed 18 October 2021); London Circuit Commercial Court (QBD) 22 June 2020 (*Target Rich International Ltd v Forex Capital Markets Ltd*) (Swiss Flash Crash; private law effect MiFID; *effet utile*) [2020] EWHC 1544 (Comm) (<https://www.bailii.org/ew/cases/EWHC/Comm/2020/1544.html> accessed 18 October 2021). See for recent cases on the influence of Directive 93/13 on financial contracts in the Netherlands for example: CvB KiFiD 3 March 2021 (2021-0015); 6 April 2021 (2021-20); 6 April (2021-21) (<https://www.kifid.nl/uitspraken/> accessed 18 October 2021).

173 The Hague Court of Appeal, 23 February 2021, ECLI : NL : GHDHA : 2021:302.

them to provide information about the structure of the interest rate, this did not mean that they did not have such an obligation if it was necessary to supply the borrower with adequate information when entering into the agreement, owing to the transparency requirement under Article 5 of Directive 93/13/EEC.[174]

Nowadays, conduct-of-business rules of the type to which the Dutch Supreme Court was referring are for the most part included in financial regulation (mostly of EU manufacture) and sometimes in the DCC. In this way, banks and other financial institutions are subject to detailed obligations to provide information (and numerous other conduct-of-business rules). The Dutch Supreme Court judgment shows that the civil courts may sometimes grant retroactive effect to these detailed information obligations by resorting to the backdoor method of the transparency requirement. For this reason, banks and other financial institutions would do well not to blindly focus on compliance with financial regulation. The question they must always ask themselves is whether a standard clause in a financial contract with a consumer can withstand the test of the transparency requirement. Merely complying with the information obligations that applied under the conduct-of-business rules in force at the time does not necessarily guarantee this. Whatever the case, if the transparency requirement is found to have been breached, this could mean that the clause is unfair and therefore voidable. Nonetheless, even if a clause is not transparent, it does not necessarily follow that a court would hold it to be unfair and therefore voidable. To decide whether a clause is unfair, it is necessary to consider all the relevant circumstances at the time of the contract's conclusion as well as the cumulative effect of all the terms of the contract in question.[175]

Now that the context is clear, we can move on to consider the questions recently submitted by The Hague Court of Appeal to the Dutch Supreme Court for a preliminary ruling. To start with, The Hague Court of Appeal has asked whether compliance by an insurer with the statutory information obligations laid down in the Third Life Directive and in the implementing provisions of national law (RIAV 1994 and 1998[176]) means that the insurer can also generally[177] be deemed to have also fulfilled its private law obligations, for example those arising from European private law open standards such as Directive 93/13/EEC and its transparency requirement and national private law open standards, such as consensus *ad idem*, unreasonably onerous clauses within the meaning of Article 6:233 et seq. DCC, the implemented transparency requirement in Article 6:238, paragraph 1, DCC, the supplementary and limiting effect of the requirements of reasonableness and fairness (Article 6:248 DCC) and the (contractual or extra-contractual) duty of care of the insurer towards the policyholder.[178]

174 Dutch Supreme Court 22 November 2019, ECLI : NL : HR : 2019:1830, para 4.2.3, second paragraph, second sentence of the judgment.

175 HR 22 November 2019, ECLI : NL : HR : 2019:1830, paras 4.1.1, 4.1.2 and 3.2.1 of the judgment.

176 'RIAV' is the Dutch abbreviation for 'scheme governing the provision of information to policyholders'.

177 Apart from specific details relating to a particular person, which are irrelevant in the context of the art 3:305a DCC procedure in which these questions are asked.

178 The Hague Court of Appeal, 23 February 2021, ECLI : NL : GHDHA : 2021:302, no. 14.3.1.

If the answer to the first question is in the negative, then the supplementary information obligations that exist under the European and/or Dutch open standards must then meet the criteria formulated by the CJEU in *Axa Royale Belge* and *Nationale-Nederlanden v Van Leeuwen* judgments,[179] namely that the information required (i) is clear, accurate and necessary for the policyholder to understand the essential characteristics of the commitment, and (ii) ensures a sufficient level of legal certainty, for example by enabling the insurer to identify with sufficient foreseeability what additional information it must provide and the policyholder is entitled to expect.[180]

These questions are about the influence of EU law on our national private law. Perhaps the most appropriate course of action would be for the Dutch Supreme Court in turn to refer these issues to the CJEU for a preliminary ruling, because the answers are by no means obvious. I am curious as to what the Dutch Supreme Court will do.

Share leasing

Another ghost from the past also continues to haunt us. I am referring to the scheme that was once so popular among private investors in the Netherlands, namely investing with borrowed money through so-called share leasing products—an arrangement which also benefited initially from tax concessions. Investing with borrowed money tends to go well as long as stock market prices rise. But when stock market prices started to fall, as they always do at a given moment, many buyers of share leasing products found themselves in financial difficulties. Quite apart from falling stock market prices, it turned out that many share leasing products had been sold to private individuals for whom the resulting monthly payment obligations were too high. As a result, many of them were soon unable to pay their monthly instalments to the bank, after which the bank invariably terminated the leasing agreement. The securities portfolio was then liquidated by the bank, but due to the fall in stock market prices the proceeds were often insufficient to repay in full the borrowed money and the interest owed on it. Many consumers were therefore left with a residual debt. In two of the many ongoing legal actions concerning share leasing, both the Amsterdam and The Hague Courts of Appeal have submitted questions about the application of Directive 93/13/EEC for a preliminary ruling. This they have done not to the Supreme Court, but directly to the CJEU. As, in my opinion, the questions submitted for preliminary ruling by The Hague Court of Appeal are the most interesting, I will confine myself to discussing those questions.

For a better understanding of the questions submitted by The Hague Court of Appeal for a preliminary ruling, we must first take a few steps back. In separate proceedings, Amsterdam Court of Appeal submitted questions to the Dutch Supreme Court for a

179 CJEU 5 March 2002, ECLI : EU : C : 2002:136 (*Axa Royale Belge*); CJEU 29 April 2015, ECLI : EU : C : 2015:286 (*Nationale-Nederlanden v Van Leeuwen*).

180 The Hague Court of Appeal, 23 February 2021, ECLI : NL : GHDHA : 2021:302, no 14.3.2. On 13 October 2021 Attorney-General Ton Hartlief submitted his (non-binding) legal advice ('conclusie') of 127 pages to the Dutch Supreme Court on this matter. He answers the first question with 'no' and the second question with 'yes'. See ECLI : NL : PHR : 2021:973, at No 16.

preliminary ruling on the application of Directive 93/13/EEC in relation to share leasing. This concerned a so-called residual debt product: as only interest was payable during the term of the share leasing agreement, the principal borrowed therefore remained fully intact. When the consumer defaulted on the interest payments, the bank exercised its right to terminate the agreement. Article 6 of the bank's special terms and conditions contained a liquidated damages clause, stipulating that the consumer had to pay damages amounting to the cash value of the interest payments over the remainder of the term. The Dutch Supreme Court held that this constituted an unreasonably onerous clause in general terms and conditions because it failed to take into account that the termination meant the bank would get back the principal earlier and could lend this amount out again at the then prevailing interest rate. This meant that the Dutch Supreme Court was bound, under Article 6:233 DCCC, to set aside the clause contained in Article 6 of the special terms and conditions in so far as it related to the interest instalments that were still in the future at the time of the termination on the basis of that provision. There was therefore no entitlement to those interest instalments under Article 6 of the special terms and conditions.[181]

In the Supreme Court's opinion, this does not alter the fact that if the buyer defaults, the bank retains the option of terminating the agreement, whether or not on the basis of Article 6 of the special terms and conditions, and claiming damages in accordance with Article 6: 277 DCC. Due to the termination, the bank will receive the repayment of the loan amount earlier than agreed. In the case of a share leasing agreement, it must be assumed that earlier repayment will enable the financial institution concerned to re-lend the amount involved. Hence, the advantage to the institution of early repayment is that once this amount is re-lent, it will immediately bear interest again at whatever rate the institution can negotiate at that time.

The Dutch Supreme Court therefore held that, in accordance with the above considerations, this advantage must be taken into account when the damage as referred to in Article 6: 277 BW is determined.[182]

Now that the context is clear, we can move on to consider the question recently submitted by The Hague Court of Appeal to the CJEU for a preliminary ruling, which is basically as follows: once a liquidated damages clause (penalty clause), as included in Article 6 of the seller's special terms and conditions, has been set aside at the consumer's request, can the seller of the share leasing product claim the statutory compensation provided for by a supplementary provision of national law which would have been applicable in the absence of that term, namely pursuant to Article 6:277 DCC? Unlike the Dutch Supreme Court's previous ruling (see above), the CJEU has answered this question with a resolute 'no'.[183] How did the CJEU come to this conclusion? Where a national court finds that an unfair term in a contract concluded between a seller and a consumer is void, that court cannot modify that contract by revising the content of that term, even by applying a

181 HR 21 April 2017, ECLI : NL : HR : 2017:773, para 3.9.1 of the judgment.

182 Dutch Supreme Court 21 April 2017, ECLI : NL : HR : 2017:773, para 3.10.1 of the judgment.

183 See CJEU 27 January 2021, 8ECLI : EU : C : 2021:6 para 67 of the judgment.

supplementary provision of national law (in this case Article 6: 277 DCC) in place of the unfair term. That power would contribute to eliminating the dissuasive effect on sellers of the straightforward non-application with regard to the consumer of those terms, in so far as those sellers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers.[184]

9. Conclusion

At the start of this article, I noted that the main themes of our time are playing a defining role in financial law as well: the coronavirus crisis, sustainability, the onward march of technology, the unceasing struggle between integration and federalism on the one hand and protectionism and nationalism on the other and, last but not least, the pressure exerted by major geopolitical powers such as China, the United States and Russia. As I pointed out, these forces have largely shaped financial law in Europe in the recent past and will continue to do so in the future. Where these forces are actually leading is, however, less easy to predict. It remains to be seen whether all the new European rules and legislative proposals will produce a fully integrated, sustainable and digital European Capital Markets Union and a complete and smoothly functioning European Banking Union. And it is still much too early to gauge whether Brexit will work out well for the EU27. But one thing is certain: Europe's tentacles reach deep into financial law. No matter what finance-related topic one studies, whether it be preventing money laundering and terrorist financing or issues such as deposit insurance schemes, non-performing loans, the coronavirus crisis or local products such as investment-linked policies and share leasing, one is bound sooner or later to have to deal with EU law. And I have not even got around to mentioning the new European prudential rules for investment firms that become applicable as of 26 June 2021 (IFR/IFD) or the MiFID II, MAR, AIFMD, Solvency II and BRRD/SRMR review.[185] In other words, for practitioners of financial law, the need to deal with EU law is simply a fact of life. As long as the European Union continues to exist, of course.

184 CJEU 27 January 2021, ECLI : EU : C : 2021:68, paras 62–67 of the judgment.

185 See Regulation (EU) 2019/2033 (Investment Firm Regulation, IFR); Directive (EU) 2019/2034 (Investment Firm Directive, IFD). For the reviews of MiFID II, MAR (Market Abuse Regulation), AIFMD (Alternative Investment Fund Managers Directive), Solvency II (EU rules for insurers and re-insurers) and BRRD/SRMR (Bank Recovery and Resolution Directive/Single Resolution Mechanism Regulation), see: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12167-Review-of-the-regulatory-framework-for-investment-firms-and-market-operators-MiFID-2-1-/public-consultation> accessed 18 October 2021; <https://www.esma.europa.eu/press-news/consultations/consultation-mar-review> accessed 18 October 2021; <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12648-Alternative-Investment-Fund-Managers-review-of-EU-rules/public-consultation> accessed 18 October 2021; <https://www.eiopa.europa.eu/browse/solvency-ii/2020-review-of-solvency-ii_en> accessed 18 October 2021; <https://ec.europa.eu/info/consultations/finance-2021-crisis-management-deposit-insurance-review-targeted_en> accessed 18 October 2021. The last of these reviews also deals with a deposit insurance scheme, possibly funded by the EU. This topic has been briefly discussed in section 7, subsection 'Towards a European deposit insurance scheme?' above.