Liability of Financial Supervisors and Resolution Authorities: Perspectives from Comparative and European Union Law

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Abstract

This article offers a thorough comparative law overview, analysis and discussion of the liability regimes which apply to financial supervisors and resolution authorities at the level of selected individual EU Member States and in major jurisdictions worldwide. There is a growing tendency to limit their liability in one way or another. The extent to which they are protected against liability claims, and the exact shape that this takes, is, however, not uniform across the jurisdictions studied. At the same time, a counter-movement is emerging, as limitations of liability are by no means undisputed and are under attack on various grounds.

The large variety of approaches to liability of financial supervisors and resolution authorities is especially a concern within the European Banking Union (EBU). The European Central Bank (ECB) and the Single Resolution Board (SRB) collaborate closely with the National Competent Authorities (NCAs) and the National Resolution Authorities (NRAs) within the framework of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), respectively, so liability questions will often be intertwined. Yet, the applicable liability standards often differ, and different courts will have jurisdiction. In the view of the authors it would be

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preferable to adopt a uniform liability standard for the ECB/SRB and the NCAs/NRAs. In line with this, the authors would be in favour of including a provision in the SSM Regulation/SRM Regulation to the effect that the Court of Justice of the European Union (CJEU) has exclusive jurisdiction in relation to the liability of both the ECB/SRB and the NCAs/NRAs.

Keywords

Comparative law, tort law, liability law, EU law, financial supervisors, resolution authorities, European Banking Union (EBU), Single Supervisory Mechanism (SSM), Single Resolution Mechanism (SRM), European Central Bank (ECB), Single Resolution Board (SRB)

I. Introduction

In recent times, an increasing number of clients, shareholders, depositors and bondholders of financial firms have filed claims against financial supervisors and resolution authorities for inadequate supervision or inadequate resolution, especially since the Global Financial Crisis.

This article offers a thorough comparative law overview, analysis and discussion of the liability regimes which apply at the level of selected individual EU Member States1 and in major jurisdictions worldwide.2

The global reach of this article was important to us because we wanted to ensure that not only the most important financial centres across the world are covered, but also a fair representation of legal systems worldwide is offered. This is not only intellectually interesting; it is also important from a practitioner’s point of view. Large financial firms or a conglomerate of financial firms often operate in multiple jurisdictions in both Europe and beyond (e.g., in Frankfurt, London, New York, Singapore and Hong Kong). If there is a case of inadequate financial supervision or resolution, this may very well trigger litigation in multiple jurisdictions worldwide.

A key conclusion deriving from this article is that the approach taken towards liability of financial supervisors and resolution authorities is not straightforward. There is constant tension between those in favour and those against granting financial supervisors and resolution authorities some form of protection against liability claims. At first sight, those advocating a limitation of the liability of financial supervisors and resolution authorities seem to be gaining the upper hand, since there is a growing tendency to limit this liability in one way or another. The extent to which such authorities are protected against liability claims, and the exact shape that this protection takes, is however not uniform across the jurisdictions studied. At the same time, a

1 Germany, Austria, France, The Netherlands, Italy, Spain, Portugal, and Greece.
2 The United Kingdom, Ireland, Hong Kong, Singapore, the United States of America, and Australia.
countermovement is emerging, as limitations of liability are by no means undisputed and are under attack on various grounds.

The large variety of approaches to liability of financial supervisors and resolution authorities is especially problematic within the European Banking Union (EBU). The European Central Bank (ECB) and the Single Resolution Board (SRB) collaborate closely with the national competent supervisors (NCAs) and the national resolution authorities (NRAs) within the framework of the Single Supervisor Mechanism (SSM) and the Single Resolution Mechanism (SRM), respectively, so liability questions are very often intertwined. Yet, the applicable liability standards often differ, and different courts will have jurisdiction. In our view, it would be preferable to adopt a uniform liability standard for the ECB/NCAs and the SRB/NRAs. In line with this, we would be in favour of including a provision in the SSM Regulation/SRM Regulation to the effect that the Court of Justice of the European Union (CJEU) has exclusive jurisdiction in relation to the liability of both the ECB/NCAs and the SRB/NRAs.

The growing tendency to limit the liability of financial supervisors and resolution authorities in one way or another is discussed in section II. At the same time, as mentioned previously, a counter-movement is emerging, as limitations of liability are

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3 The first pillar of the EBU, the SSM, has been operational since 4 November 2014. The SSM provides for the direct prudential supervision of the so-called ‘significant’ banks in the participating Member States by the ECB, which is located in Frankfurt. Participating Member States include those whose currency is the euro and those with a derogation, which have established a ‘close cooperation’ in accordance with Article 7 SSM Regulation, such as, since October 2020, Bulgaria and Croatia (Art. 2, point (1) SSM Regulation). It seems merely a matter of time before the ECB will be confronted with further liability claims for inadequate supervision. The SSM was established by the SSM Regulation, i.e., by Council Regulation (EU) No 1024/2013 of 15 October 2013 “confering specific tasks on the [ECB] concerning policies relating to the prudential supervision of credit institutions” (SSM Regulation, adopted by virtue of Article 127(6) TFEU, OJ L 287, 29.10.2013, 63-89. Regulation (EU) No 468/2014 of the ECB of 16 April 2014 (ECB/2014/17, SSM Framework Regulation), OJ L 141, 14.5.2014, 1-50, further specifies certain provisions of the SSM Regulation. On the SSM, see various chapters in Parts I and II of D. Busch and G. Ferrarini (eds), European Banking Union (2nd Ed., OUP 2020); Ch. V. Gortsos, European Central Banking Law – The Role of the European Central Bank and National Central Banks under European Law (2020); and in more detail the individual contributions in J.H. Binder, Ch. V. Gortsos, K. Lackhoff, and Ch. Ohler (eds): Brussels Commentary on the Banking Union (München; C.H. Beck, Oxford; Hart Publishing, Nomos; Baden-Baden, 2021).

4 The SRM constitutes the second pillar of the EBU. Since 1 January 2016, significant banks in the participating Member States are, in principle, resolved at European level, within the SRM, by the Single Resolution Board (SRB) which is located in Brussels. The SRB has legal personality and became fully operational on 1 January 2015. Unlike the ECB, the SRB is an EU agency. It belongs to the decentralised agencies set up to perform technical, scientific, or managerial tasks that support the EU institutions in policy making and implementation. The SRM (including the SRB) was established by Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 (SRM Regulation), OJ L 225, 30.7.2014, 1-90. For a detailed analysis of this legislative act, see Ch. V. Gortsos, The Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF): Legal Aspects of the Second Main Pillar of the European Banking Union, 210-211, 105-133 (e-book, 5th edition, 2019); and the individual contributions in J.H. Binder et al (2021). On EU agencies, see by means of mere indication E. Chiti, Decentralised Implementation: European Agencies in R Schütze and T. Tridimas (eds): Oxford Principles European Union Law – Volume I: The European Union Legal Order, Part IV: Legislative and Executive Governance, Chapter 23, 748-776 (Oxford; University Press 2018).
by no means undisputed and are under attack on various grounds. This counter-
movement is discussed in section III. In section IV we discuss the question of whether
the conditions for liability of financial supervisors and resolution authorities should
be harmonised in the European Banking Union. In section V we end with some con-
cluding remarks.

II. The Growing Tendency to Limit the Liability of Financial Supervisors
and Resolution Authorities

1. General

As mentioned above, there is a growing tendency to limit the liability of financial
supervisors and resolution authorities. In any event, in all the legal systems included
in this study, the liability of financial supervisors and resolution authorities is limited
in one way or another, either expressly or implicitly. The extent to which financial
supervisors and resolution authorities are protected against liability claims, and the
exact shape that this takes, is however not uniform across the legal systems studied.

The following approaches tending to limit or restrict financial supervisors’ and
resolution authorities’ liability can be distinguished: (1) a requirement of fault that
goes beyond negligence; (2) the financial supervisor’s or resolution authority’s
margin of discretion as a means of protection against liability claims; (3) a protection
against liability claims via the causation requirement; (4) a protection against liability
claims by restricting the protective purpose of the norm infringed; (5) a protection
against liability claims via a restriction of the recoverable damages; (6) a protection
against liability claims via a combination of the unlawfulness and the causation
requirement; and (7) a proportionate liability of the financial supervisor or resolution
authority.

2. A Fault That Goes beyond Negligence

2.1. General

The most straightforward way of offering financial supervisors and resolution author-
ities protection against liability claims is by requiring a fault that goes beyond the
negligence standard. Unsurprisingly, most of the jurisdictions studied in this article
have adopted this approach, but not in a uniform way. Having said that, three out of
the eight civil law jurisdictions covered by this study have a preference for a limitation
of liability to gross negligence / gross fault, and intent. The vast majority of the
common law jurisdictions discussed in this article (five out of six) restrict liability of
financial supervisors and resolution authorities to cases of bad faith, which appears

5 Similarly: R. Dijkstra, Essays on Financial Supervisory Liability, 13-34 (Tilburg: Tilburg Uni-
to constitute a higher bar than gross negligence / gross fault. South Africa, the only mixed legal system included in this study, follows the lead of the common law jurisdictions covered in this article, at least in most cases.

2.2. France: Gross Fault

Only the French State can be held liable for the conduct of the Autorité des Marchés Financiers (AMF) and the Autorité de Contrôle Prudentiel et de Résolution (ACPR). This is the case even though the AMF (unlike the ACPR) possesses separate legal personality. The liability of the French State is governed by public law, not by private law. According to long-standing case law from the highest administrative court in France, the Conseil d’Etat, the French State can in principle only be held liable if it commits a gross fault (faute lourde). This line of case law was confirmed by the Conseil d’Etat in 2001 with regard to the liability of the French State for acts committed by a predecessor of the ACPR, the Commission Bancaire.

In France, the notion of gross fault is limited to manifest negligence, i.e., to negligence that is so clear that an ordinary, non-professional person would not have committed it. It seems fair to assume that acting with intent also amounts to gross fault.

2.3. Italy: Intent or Gross Negligence

The Italian approach to liability of financial supervisors changed several times over the past decades. For decades, case law declined jurisdiction in civil liability cases against public authorities, and this was no different for claims against financial supervisors. Since the mid-1990s, things began to change. In 1994, an appeal court decision

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6 Although there may well be exceptions to the gross fault requirement, as in some cases simple negligence might perhaps be sufficient.


8 Eckert, La responsabilité administrative des autorités de régulation, Rev. droit bancaire et financier (mars-avril 2009), Etudes 13, notably n° 19: « une faute qui saute aux yeux ». Adde, A. Seban, concl. sous CE, 30 novembre 2001, Ketchichian, RFDA (2002), p 742, notably p 785: « si la faute doit s’apprécier en concret, on peut dire, pour fixer les idées, que, dans une conception fondée sur la faute simple, le juge doit rapprocher le comportement du service de ce qu’idéalement il aurait dû être si le service avait correctement fait son travail, c’est-à-dire rechercher ce qu’il aurait fait, dans les mêmes circonstances, un bon professionnel. En revanche, dans une conception fondée sur la faute lourde, il convient de se demander si le service a commis une erreur tellement flagrante qu’un non professionnel ne l’aurait vraisemblablement pas commise ; elle suppose un fonctionnement gravement déficient du service ; même lorsque l’action de celui-ci est marquée par une grande technicité, c’est une faute qui saute aux yeux »

awarded damages to investors for losses caused by negligent supervision. In 1999, a landmark decision of the highest Italian civil law court, the Corte di Cassazione, upheld in general terms civil liability cases against public authorities. In 2001, the Corte di Cassazione held the capital markets supervisor liable for reckless approval of a prospectus. After the corporate scandals of the early 2000s, however, the pendulum swung back. In 2006, a statutory restriction made the liability of financial supervisors conditional upon intent or gross negligence, and new cases withered. This statutory restriction of liability is available to (i) the central bank (Banca d’Italia), (ii) the securities commission (Commissione Nazionale per le Società e la Borsa or Consob), (iii) the insurance supervisor (Istituto per la Vigilanza sulle Assicurazioni or Ivass), and (iv) the pension funds supervisor (Commissione di Vigilanza sui Fondi Pensione, or Covip). The national act implementing the Bank Recovery and Resolution Directive (BRRD) extended the same restriction to Banca d’Italia in its capacity as a resolution authority. Following the crisis of a few local banks, however, in most recent times a few cases, in part still pending, were brought against financial supervisors and the resolution authority.

In Italy, the meaning of ‘gross negligence’ is far from clear. Under the definition provided by statutory law to restrict the liability established by the Corte di Cassazione, ‘gross negligence’ requires ‘patent violation of the law’ and severe ‘facts misrepresentation.’ For this reason, no gross negligence exists when: (1) ‘the regulatory framework is evolving and therefore is not unambiguous’; (2) a regulatory provision has been applied by the financial supervisor according to an interpretation later modified by a court or (3) facts are particularly complex and difficult to assess.

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13 Article 24(6-bis), Act 28 December 2005, n. 262 as amended by article 4(3)(d), Legislative Decree 29 December 2006, n. 303. The general provision of Article 24(6-bis), Act 28 December 2005, n. 262 is expressly referred to by art. 4(bis), the Act 1 September 1993, n. 385 – Consolidated Law on Banking (‘CLB’).
14 Article 3(10), Legislative Decree, 16 November 2015, n. 180: ‘In the course of discharging the control function provided by this decree, Article 24(6-bis), Act 28 December 2005, n. 262 applies to the Bank of Italy and its staff’.
15 Court of Cassation en banc, 16 November 2020, n. 25953; Court of Cassation en banc, 6 March 2020, n. 6454; Court of Cassation en banc, 5 March 2020, n. 6324; Trib. Ancona, 20 February 2019, n. 331, both available at https://dejure.it.
16 Article 2(3) Act 13 April 1988, n. 117, as amended by Article 2(1)(c) Act 27 February 2015, n. 18; Court of Cassation en banc, 3 May 2019, n. 11747; Court of Cassation, 7 April 2016, n. 6791, both available at https://dejure.it. For an example of severe facts misinterpretation, Council of State, 14 October 2016, n. 4266, available at https://dejure.it.
18 Council of State, 8 September 2020, n. 5409.
In a case regarding Consob, however, the Corte di Cassazione has explicitly stated that limiting liability to gross negligence ‘does not mean that the law tolerates lax behaviour’ and ‘provides liability towards third parties only when a patent violation of duties or function abuses occur.’ On the contrary, ‘gross negligence occurs’ also in cases of ‘lack of professional diligence, expertise, and prudence’ as required ‘for the public service provided.’ Legal scholarship has underlined the risk related to uncertainty on the meaning of gross negligence: an excessive judicial discretion in reviewing the supervisory activity, which eventually might constrain the discretionary powers of financial supervisors and therefore hinder their independence.

2.4. The Netherlands: Intent or Gross Fault
In 2012, The Netherlands introduced a statutory limitation of liability. The introduction of this statutory limitation of liability was triggered by the publication of an independent report on the bankruptcy of a Dutch bank (DSB Bank) in June 2010. One of the conclusions of this independent investigation committee appointed by the Ministry of Finance was that the Stichting Autoriteit Financiële Markten (AFM) and De Nederlandsche Bank N.V. (DNB) should have bared their teeth more and acted more decisively in their supervision of DSB Bank. According to the report, the reason that they refrained from doing so was at least partially due to fear of liability claims. The statutory limitation of liability provides that DNB and the AFM must have had the intention (opzet) of improperly performing their duties or improperly exercising their powers; alternatively, the improper performance of their statutory duties or the improper exercise of their statutory powers must be accompanied by gross fault (grove schuld). The limitation of liability is also available to DNB if it does not act as a supervisor, but in its capacity as the national resolution authority within the framework of the European Banking Union’s Single Resolution Mechanism.

In The Netherlands, the concept of intent (opzet) requires that the AFM or DNB must either have wilfully and knowingly neglected its duties or otherwise has been aware that its acts or omissions would entail – or probably entail – improper performance of its duties. The Dutch concept of gross fault (grove schuld) involves

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22 Commissie Scheltema, Rapport van de commissie van onderzoek DSB Bank, 241-244, 254-256 (2010).

23 The limitations of liability for the AFM and DNB are laid down in section 1:25d (2) and Art. 1:25d (1) Wft, respectively. Please note that section 1:25d Wft also sets a causation requirement that is stricter than the general causation requirement under Dutch law. This heavier causation criterion thus comes on top of the liability condition of intent and gross fault. See II.5, below.

24 Parliamentary Papers II 2011/12, 33058, No. 3, 5.
conduct on the part of the financial supervisor that is so reprehensible and indifferent that improper performance of its duties is a real possibility.\textsuperscript{25} For a further interpretation, the legislature refers to a judgment of the Dutch Supreme Court (\textit{Hoge Raad}) from the 1950s (which did not concern the liability of financial supervisors), where it is made clear that gross fault means that the fault must be so reprehensible as to be bordering on intent.\textsuperscript{26} There is some discussion in the legal literature about whether the concept of gross fault should be interpreted subjectively or objectively. In the case of a subjective interpretation, the criterion of gross fault is met only if it can be shown that the financial supervisor \textit{was aware} that its conduct was wrong. In the case of an objective interpretation, the criterion of gross fault is already met if it can be shown that the financial supervisor \textit{should reasonably have been aware} that its conduct was wrong.\textsuperscript{27} It remains to be seen how the \textit{Hoge Raad} will eventually interpret the gross fault requirement.

\subsection*{2.5. Greece: Manifest and Serious Error / Gross Negligence or Bad Faith}

In Greece, the statutory liability of the state organs (including financial supervisors) is a no-fault liability (objective liability standard). No-fault liability entails, in principle, that, in order to hold a state organ liable, the existence of negligence or intention (\textit{dolus}) is not required; rather it is sufficient to prove only the existence of an illegal act or omission which takes place during the performance of its duties as a public authority and is causally linked to the damage caused. Illegality exists when a state organ breached a legislative provision intended to protect individual rights or when it acted in breach of its duty of care.

However, in a 2014 landmark decision, the Greek Supreme Administrative Court held that in view of the complex nature of the supervisory duties the statutory no-fault liability provisions for the state organs cannot be applied \textit{per se} to the liability of financial supervisors. Hence, the Court set limits to the no-fault liability of financial supervisors by introducing the condition of ‘manifest and serious error’, in the sense that they can be held liable not for \textit{any} illegal act or omission in supervisory actions, but only from a \textit{manifest and serious error} on behalf of the competent Greek financial supervisor, i.e., the Bank of Greece (prudential supervisor of credit institutions and insurance undertakings) or the Hellenic Capital Market Commission (supervisor of

\begin{itemize}
  \item \textsuperscript{25} Parliamentary Papers II 2011/12, 33058, No. 3, 5.
  \item \textsuperscript{26} HR 12 March 1954, NJ 1955/386 (Codam/Merwede).
  \item \textsuperscript{27} See on the one hand, V. de Serière, \textit{Mr. C. Asser’s handleiding tot de beoefening van het Nederlands burgerlijk recht, Effectenrecht, Deel 2-IV}, 1196 (Deventer: Wolters Kluwer 2018); S. Sahtie, \textit{Wettelijke aansprakelijkheidsbeperking voor DNB en AFM} 10 Maandblad voor Vermogensrecht 275 (Den Haag: Boom Juridische uitgevers, 2012) (who are both in favour of a ‘subjective’ interpretation of the gross fault criterion).
  \item See on the other hand, E. van Praag, \textit{Toezichthoudersaansprakelijkheid voor onvoldoende toezicht en onrechtmatige besluiten in Aansprakelijkheid in de financiële sector} (Serie en Recht vol. 78), 900 (Deventer: Kluwer, 2013); V. Affourtit and R. Lubach, \textit{Toezichthoudersaansprakelijkheid onder de Wet aansprakelijkheidsbeperking DNB en AFM} 4 Overheid & Aansprakelijkheid, 178 (2012) (who are both in favour of an ‘objective’ interpretation of the gross fault criterion).
\end{itemize}
investment firms). In the same 2014 judgment, the Supreme Administrative Court also ruled that a claimant is not entitled to full compensation, but to *reasonable* compensation only for damages arising from defective supervision. Yet, the Court further introduced an exception to the reasonable compensation rule and granted compensatory immunity to the financial supervisors in the cases in which the claimants are already protected by compensation schemes for insurance policy holders, deposit holders and investors).

However, if the Bank of Greece does not act as a financial supervisor, but in its capacity as a resolution authority, the liability condition is not a manifest and serious error, but gross negligence or bad faith. This condition was introduced by Article 72(4) of Law 4335/2015 transposing the BRRD into Greek law. A ‘manifest and serious error’ is to be interpreted as a ‘grave illegality’.

2.6. United Kingdom: Bad Faith
In the United Kingdom, it was decided at common law in the late 1980s that financial supervisors, because of the nature of their role, owed no duty of care to depositors or investors, and so could not be liable in the tort of negligence. Only a separate tort based on bad faith, that is the tort of misfeasance in public office, is in principle available against the Prudential Regulation Authority (PRA), the Financial Conduct Authority (FCA), and the Bank of England (in its capacity as a monetary authority and as the UK resolution authority). This follows not only from the common law, but also from statute law. The statutory limitation of liability is currently contained in the Financial Services and Markets Act 2000 (FSMA), but a similar clause was already included in the now repealed Financial Services Act 1986.

The tort of misfeasance in public office is commonly said to date back to a judgment of Chief Justice Holt of the King’s Bench in *Ashby v White* in 1703. Subsequently little was heard of the tort until the late twentieth century. In early 2001, the House of Lords decided that an allegation that the Bank of England was guilty of misfeasance in a public office, that is bad faith, in its discharge of its functions as banking supervisor in respect of the collapse of the Bank of Credit and Commerce International (BCCI), should proceed to a full trial: *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* (‘Three Rivers’).

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28 GSAC 3783/2014 (*Aspis Pronoia* case). See also further II.6.2, below.
29 *Yuen Kun Yeu v Attorney General for Hong Kong* [1986] AC 175, PC, and *Davis v Radcliffe* [1990] 1 WLR 821, PC.
30 In respect of the FCA, including its function as regulator of payment systems, the limitation of liability is stated in FSMA, Schedule 1ZA, para 25. In respect of the PRA, including its functions under Pt 5 of the Financial Services (Banking Reform) Act 2013, it is provided for in FSMA, Schedule 1ZB, para 33. The Bank of England also has immunity in its capacity as a monetary authority and as a resolution authority: Banking Act 2009, s 244(2)(c). See the now repealed Financial Services Act 1986, s 187(1) to (5), and for recognised professional bodies see s 187(6) and (7).
31 (1703) Ld Raym 938, 92 ER 126. It is said to be best reported in *Smith’s Leading Cases*, vol 1, 253 (13th edn, 1929).
was that the Bank of England (the competent financial supervisor at the time) ought never to have licensed BCCI. Ultimately the case was abandoned in November 2005 by the claimants after 256 days of trial.

Recently, the English Law Commission has consulted on reforms to criminal liability for misconduct in public office at common law. The Law Commission made reference to the parallel tort of misfeasance in public office which similarly dates back at least to the eighteenth century, but saw it as only receiving “clear judicial acknowledgement” in the late twentieth century. The Law Commission acknowledged that the leading case on the tort was *Three Rivers*. It concluded, from a survey it had conducted:

“Misfeasance in public office has limited application given its restriction solely to public office holders, and high threshold requirement of bad faith. As such, the number of successful claims is low, and the exact boundaries of the tort are not fully developed in the case law.”

Having said that, misfeasance in public office is an intentional tort, as opposed to one that can be committed by negligence (even gross negligence) or for which a defendant is strictly liable (as potentially in cases of breach of statutory duty). *Three Rivers* conclusively established that there are two different ways of establishing the qualifying mental state. According to Lord Steyn:

“The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, i.e., conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts, knowing that he has no power to do the act complained of and that the act will probably injure the...
plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.\(^{40}\)

The phrase “targeted malice” appears to have been coined in the Bourgoin case.\(^ {41}\) Lord Steyn held that the claim could only proceed on the second basis. It was ultimately accepted that the criterion of subjective recklessness or reckless indifference in a subjective sense would be sufficient to satisfy the second ground. That is the person must appreciate the risk, and not simply be indifferent to the risk and the consequences thereof.\(^ {42}\) An objective test equates to negligence, and bad faith in the exercise of public powers was the “raison d’être of the tort”.\(^ {43}\)

It seems likely that for the purposes of this tort it will not be possible to amalgamate various good faith errors of several individual officials to arrive at a composite corporate state of bad faith.\(^ {44}\)

As set out above, bad faith is a condition for liability of financial supervisors, but this is otherwise if a breach of one or more of the articles of the European Convention on Human Rights (ECHR) as incorporated into UK domestic law by means of the Human Rights Act 1998 (HRA 1998) can be shown that could give rise to a claim against a financial supervisor as a public authority which has acted unlawfully by breaching Convention rights, and damages may be available in accordance with the bespoke remedial provisions of sections 6 to 8 of the HRA 1998. To date there has been no such reported claim.

2.7. **Ireland: Bad Faith**

The position in Ireland is similar to that in the United Kingdom. The majority of regulatory legislation in Ireland in recent times has provided for either absolute immunity or a limitation of liability to cases of bad faith for the regulatory agency and its members.\(^ {45}\) The Central Bank and Financial Services Authority of Ireland Act 2003 inserted a new section 33AJ(2) into the 1942 Act limiting the liability of the then Central Bank and Financial Services Authority (CBFSAI) to bad faith.\(^ {46}\) Subsequent amendments were made in the Investment Funds, Companies and Miscellaneous Provisions Act 2005, and the Central Bank Reform Act 2010, the latter reflecting the establishment of the Central Bank of Ireland (CBI).\(^ {47}\)


\(^{41}\) Bourgoin SA v Minister of Agriculture, Fisheries and Food [1986] 1 QB 716, CA (Oliver LJ).

\(^{42}\) [2001] UKHL 16, [2003] 2 AC 1, at 231 (Lord Hobhouse).


\(^{46}\) S.26.

The BRRD was transposed into Irish law by means of the European Union (Bank Recovery and Resolution) Regulations, 2015. The CBI has been designated as the national resolution authority making it responsible for the orderly resolution of failing banks and certain investment firms. Its functions in this regard are structurally separated from its supervisory and other functional areas in order to ensure operational independence and avoid conflicts of interest. The limitation of liability to cases of bad faith also applies if the CBI acts in its capacity as a resolution authority.

The exemption in section 33AJ(2) of the 1942 Act is extensive and excludes liability “for damages for anything done or omitted in the performance or purported performance or exercise of any of its functions or powers, unless it is proved that the act or omission was in bad faith”.

This provision provides the CBI with immunity from liability to depositors and other creditors of a failed bank or regulated entity where the CBI is negligent in the way it supervises or resolves that entity.

A question arises as to whether section 33AJ(2) excludes liability for misfeasance in public office. In this respect, reference should be made to the case of Three Rivers, in which the House of Lords did not sanction the strike out of a misfeasance claim. Breslin and Corcoran have suggested that the plaintiffs based their action on misfeasance in order to avoid the difficulties associated with bringing an action in tort for negligent supervision and the then equivalent statutory bar in the UK to proceedings in negligence for regulatory oversight. It is generally agreed that it would be difficult in practice to establish the motives necessary to ground an action for misfeasance in public office. However, if this was done, given that the Supreme Court in Beatty v Rent Tribunal emphasised that “bad faith in the exercise of public powers … is the essence of the tort”, section 33AJ(2) is unlikely to protect the CBI against liability in cases of intentional wrongdoing by its employees.

The seminal Irish case of misfeasance in public office is Kennedy v. The Law Society (No. 4), a decision of the Supreme Court of Ireland. Although subjective mala fides was held to be an essential feature of such a tort, the Court accepted that in exceptional circumstances, it might be possible without undermining the tort of misfeasance in public office for a private duty of care to be owed “in respect of some particular aspect of the carrying out of the duty” but that the negligence would have to be precisely pleaded in such a case. The Court followed the approach of Lord Steyn

48 SI 289/2015.
51 G. Hogan, D. Morgan and P. Daly, Administrative Law in Ireland, para. 20.41 (5th edn, Dublin: Round Hall, 2019).
in *Three Rivers*.\(^{54}\) As noted previously, with regard to the state of mind of the defendant, two different forms of liability in misfeasance of public office were identified by Lord Steyn: (1) “targeted malice” by a public officer which is conduct intended to injure and which necessarily involves bad faith in the exercise of the public power for an improper or ulterior motive or (2) where a public officer acts knowing that he or she has no power to do the act complained of and that the act will probably injure the plaintiff. The Court accepted as correct Lord Steyn’s statement that “It can therefore now be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second form.” Geoghegan J. explained that a subjective test would apply because if an objective ‘reasonable foreseeability’ test were permitted it would “effectively remove the requirement of bad faith.” In the case before it though, the Court determined that the tort had not been made out on the facts.

In *Beatty v. The Rent Tribunal*,\(^{55}\) the Supreme Court noted that Lord Steyn in *Three Rivers* had recognised the possibility that recklessness in the exercise of public-law power might suffice to establish the tort, but that he had described “bad faith in the exercise of public powers … [as] the essence of the tort.” Fennelly J. opined that the necessary standard of recklessness “is something much more than gross carelessness” and requires “clear advertence to the risk (for example, that there is no power to do the act) and not caring about the consequences.” This demonstrates just how difficult it is to establish the level of bad faith required to prove the tort.

### 2.8. **Hong Kong & Singapore: Bad Faith**

The position in Hong Kong and Singapore is likewise similar to the position in the United Kingdom.

In Hong Kong, the various Ordinances give immunity from civil liability for authorised or mandated good faith conduct pursuant to the Ordinances to: (i) the Hong Kong Monetary Authority (HKMA), (ii) the Securities and Futures Commission (SFC), (iii) the Insurance Authority, and (iv) the Mandatory Provident Fund Authority (this authority oversees Hong Kong’s compulsory savings and pension schemes). These authorities are also the resolution authority for the institutions falling within their purview. The immunity from civil liability for authorised or mandated good faith conduct extends to these authorities if they act in their capacity as the competent resolution authority.

The various Ordinances giving immunity from civil liability for authorised or mandated good faith conduct were introduced at different times, but all after *Yuen Kun Yeu v The Attorney General for and on behalf of the Commissioner of Deposit-taking Companies (Hong Kong)* (*Yuen Kun Yeu*) (1987).\(^{56}\) *Yuen Kun Yeu* is one of the leading cases in the common law on the civil liability of financial supervisors for their conduct. Here, the collapse of a deposit-taking company in Hong Kong prompted an

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\(^{54}\) [2000] 2 W.L.R. 1220.


\(^{56}\) [1987] UKPC 16.
action by four depositors against the now defunct Commissioner of Deposit-taking Companies for breach of a duty of care. The depositors argued that the Commissioner was negligent in registering or failing to deregister the company under the then applicable ordinance. The case was ultimately decided by the Privy Council which advised that the Commissioner did not owe a duty of care to the public in fulfilling his supervisory function pursuant to the Ordinance. The Privy Council considered that while the Commissioner had a duty to act in the public interest, he did not owe a particular duty to individual depositors when deciding to register or deregister a company. In short, the claim failed, but apparently Yuen Kun Yeu provided the legislature with sufficient reasons to limit the liability of the Hong Kong financial supervisors to authorised or mandated good faith conduct, which bars any claims based on the tort of negligence.

The Monetary Authority of Singapore (MAS) is Singapore’s central bank, financial supervisor and resolution authority. The MAS Act gives the MAS a broad immunity from legal action in respect of good faith conduct taken pursuant to the MAS Act or any other written law, i.e., the various statutes covering the different financial intermediaries in Singapore. This immunity covers conduct of a supervisory as well as a resolution nature. The current immunity provision has been in effect since 2004. At one time, immunities were conferred by the various statutes that governed the entities regulated by the MAS. For example, the Banking Act gave immunity to persons exercising powers or performing functions pursuant to the Banking Act. These dispersed provisions were repealed by the legislation that introduced the current immunity provision.

The immunity provisions in Hong Kong and Singapore are all subject to the proviso that the authorities have conducted themselves in good faith. In one instance, i.e., Hong Kong’s Banking Ordinance, the Latin equivalent is used (bona fide). Good faith is not defined in the statutes concerned. Nor has the immunity provisions been analysed in detail by the courts. There are other statutes that use the concept of good faith, for example the Bills of Exchange legislation in both jurisdictions provides that

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57 Deposit-taking Companies are now regulated under the Banking Ordinance (Cap 155, HK), and hence fall under the Hong Kong Monetary Authority.
58 Deposit-taking Companies Ordinance (Cap 328, HK), repealed.
60 Monetary Authority of Singapore Act (Cap 186, 1999 Revised Edition, Sing), s 22.
63 Banking Ordinance (Cap 155, HK), s 127(1).
64 Nor do the general interpretation statutes, see Hong Kong: Interpretation and General Clauses Ordinance (Cap 1, HK); Singapore: Interpretation Act (Cap 1, 2002 Revised Edition, Sing).
65 See however, Wallbanck Brothers Securities (Hong Kong) Ltd v Emily Tse [2015] HKDC 306 at [29]-[31], affirmed on appeal, [2015] HKCA 488.
good faith means honestly, notwithstanding negligence. If one considers court pronouncements on good faith in other contexts, it is apparent that good faith at a minimum requires honesty, but depending on the circumstances it may require more. As discussed, in *Three Rivers* Lord Steyn discussed the meaning of bad faith in the context of the tort of misfeasance in public office, and considered that honesty was core to good faith. If the authorities act or decline to act with the predominate intention of harming certain persons, it is likely to constitute bad faith in which case the immunities will not avail. In such cases the tort of misfeasance in public office, which is directed at bad faith exercises of official functions, will be available.

2.9. *Australia: Bad Faith*

There is no general immunity from suit conferred under Australian law on (i) the Australian Prudential Regulation Authority (APRA, the prudential supervisor and the authority responsible for determining whether and how to resolve a bank or insurer), (ii) the Reserve Bank of Australia (RBA, responsible for monetary policy, overseeing financial system stability and the payments system), or (iii) the Australian Securities and Investments Commission (ASIC, the corporate, markets and financial services regulator, responsible for market conduct and investor protection), as Commonwealth authorities. The right to sue the Commonwealth in private proceedings is established by either section 75(iii) of the Australian Constitution or through section 56 of the Judiciary Act. The right can extend to claims against a Commonwealth authority such as APRA and RBA.

However, Parliament may pass laws limiting the liability of the Commonwealth and its authorities to certain causes of action. It has done so, *inter alia*, in the case of APRA and ASIC, but not in the case of the RBA.

It would appear that s 58 of the APRA Act and s 14C of the Banking Act preserve causes of action based on lack of honest belief that they are within power and for the purpose of giving effect to the law. A comprehensive definition of what amounts to

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67 The issue has arisen in the contractual context, see for example, *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd’s Rep 526 at [141].
69 *Commonwealth v Mewett* (1997) 191 CLR 471, 533 (Gummow and Kirby JJ) (Brennan CJ agreeing at 491) (Gaudron J agreeing at 531).
71 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 355–68 (Dixon J). It may be noted that that case concerned a challenge to a scheme for the acquisition of banks by the Commonwealth Bank and it was held that in those circumstances the Commonwealth Bank was a person sued on behalf of the Commonwealth. The RBA is established as a continuation of the Commonwealth Bank as then constituted (s 7), although its functions are now more confined and in its monetary policy is independent.
bad faith may not be possible.\footnote{Lock v Australian Securities and Investments Commission (2016) 248 FCR 547, [127].} Claims in deceit or fraud, or another intentional tort are preserved. This should include, in an appropriate case, the tort of misfeasance in public office, founded as it is on malice or bad faith.\footnote{Perrett v Williams [2003] NSWSC 381, [525] states that a protective provision for acts ‘in good faith’ cannot operate where the elements of misfeasance in public office are made out. See also Three Rivers No 3 [2003] 2 AC 1, 249 (Lord Hope); M. Aronson, M. Groves and G. Weeks, Judicial Review of Administrative Action and Government Liability, para 19.620 (6th edn. Sydney: Thomson Reuters, 2017). On the other hand, in Morris v St Vincents [2020] VSC 690 the court left open whether a provision exempting a person from liability for anything done or omitted to be done in good faith allowed a claim for the tort of misfeasance in public office.} Other intentional torts, such as intimidation, are likely to be preserved. Mere negligence is excluded.\footnote{On this point, the contrast between s 58 of the APRA Act and s 14C of the Banking Act on the one hand and s 70A of the Banking Act is instructive. See further, in Lock v ASIC (2016) 248 FCR 547. On the other hand, it is said that a clause protecting an act done ‘in good faith’ requires more than ‘honest ineptitude’, so that where there was no real attempt to discharge a duty without resort to available resources this left open a claim for negligence: Mid Density Developments v Rockdale Municipal Council (1993) 44 FCR 290.}

There is no similar provision conferring immunity from proceedings against the RBA. In theory therefore, the RBA may have a potential liability in common law negligence, where the elements of that tort are made out. If the RBA were to make negligent misstatements that an entity was sound in a way that were to give rise to a duty of care, that might give rise to liability on ordinary principles of negligent mis-statement.\footnote{For these, in Australia, see R. Balkin and J. Davis, Law of Torts, para 13.19ff (5th edn, London: LexisNexis Butterworths, 2013) (hereafter: Balkin and Davis, Law of Torts).}

Furthermore, a claim against RBA for breach of statutory duty would seem most unlikely. Conceivably, claimants might allege that the RBA could be liable under statute for misleading and deceptive conduct if it were to give misleading assurances as to the soundness of an institution.\footnote{Section 18 of the Australian Consumer Law and s 12DA of the ASIC Act each prohibit a person in trade or commerce from engaging in misleading and deceptive conduct or conduct that is likely to mislead or deceive. The latter provision applies to the exclusion of the former where the conduct is ‘in relation to financial services’, which is more likely where the conduct relates to the affairs of a financial institution (see s 131A of the Competition and Consumer Act 2010 (Cth) (hereafter CCA)).} Yet the prospects of such a claim succeeding would appear remote. The statutory provisions bind the RBA only so far as it is carrying on a business.\footnote{CCA s 2A; ASIC Act s 12AD. See also Reserve Bank Act s 26.} To attract liability there would need to be some statement, made by RBA in the course of the business of acting as a central bank, relied on by a claimant and causing it loss.

2.10. \textit{South Africa: Bad Faith}

South Africa, the only mixed legal system included in this study, follows the lead of the vast majority of the common law jurisdictions discussed in this article (five out of six).
The liability of the South African Financial Conduct Authority and the Prudential Authority for all decisions and actions done in good faith is excluded in section 285 of the Financial Sector Regulation Act.\textsuperscript{79} Thus, any actions or omissions committed or performed not in good faith, but \textit{mala fide} (i.e., in bad faith), may cause the supervisor to be held liable.

\textit{Mala fides} does not necessarily mean intentional, especially in cases of omissions, but here \textit{dolus eventualis} could play an important role. In \textit{Minister of Finance v Gore NO} the court was of the view that deliberately dishonest conduct “as opposed to \textit{bona fide} negligent conduct” strongly suggests that the conduct would be wrongful and thus lead to liability.\textsuperscript{80}

However, the Prudential Authority’s limitation of liability to actions or omissions committed or performed in bad faith, does not apply in relation to its supervision of co-operative banks or co-operative financial institutions.\textsuperscript{81} In such cases the Prudential Authority’s liability is not limited to bad faith, but to gross negligence (see in particular section 85 the Co-operatives Bank Act 40 of 2007). This is due to the nature of a co-operative bank and its management, which is quite different from that of a typical commercial bank, linked to the purpose of co-operative banks which is meant “to promote and advance the social and economic welfare of all South Africans by enhancing access to banking services under sustainable conditions”.\textsuperscript{82}

\textsuperscript{79} With the promulgation of the Financial Sector Laws Amendment Bill (B15-2020) which will introduce a deposit insurance scheme (a new chapter 12A is to be inserted in the Financial Sector Regulation Act) and a framework for the resolution of banks, systemically important non-bank financial institutions and the holding companies of these institutions, section 285 of the Financial Sector Regulation Act will be amended to also include immunity from liability for loss or damage “the Corporation [the Corporation for Deposit Insurance to be created]; a Board member; a staff member of the Corporation; a resolution practitioner appointed for a designated institution in resolution; and a person appointed or delegated by a financial sector regulator, the Reserve Bank or the Corporation … or in respect of, any loss or damage suffered or incurred by any person arising from a decision taken or action performed in good faith in the exercise of a function, power or duty in terms of a financial sector law.”

\textsuperscript{80} 2007 1 SA 111 (SCA) 140; see also Chuks Okpaluba who states in this context: “It is important to note that South African law does not have a separate delict of misfeasance in public office but it recognises that deliberate, dishonest, malicious or fraudulent conduct where shown to have influenced performance of public duty must be considered serious as to constitute wrongfulness for the purposes of delictual liability” (\textit{The Right to the Residual Liberty of a Person in Incarceration: Constitutional and Common Law Perspectives}, South African Journal on Human Rights 458, 480 (2012).

\textsuperscript{81} “‘Co-operative bank’ means a cooperative or a co-operative financial institution registered as a co-operative bank in terms of this Act whose members:

(a) are employed by a common employer or who are employed within the same business district; or

(b) have common membership in an association or organisation, including a religious, social, cooperative, labour or educational group;

(c) reside within the same defined community or geographical area.

‘Co-operative financial institution’ means a co-operative that takes deposits and chooses to identify itself by use of the name Financial Co-operative, Financial Services Co-operative, Credit Union or Savings and Credit Co-operative” (s 1 of the Co-operative Banks Act 40 of 2007).

\textsuperscript{82} See the long title to the Act.
2.11. United States of America: Immunity in the Case of Discretionary Conduct

The United States of America take a different approach than the other common law jurisdictions covered in this article. Federal government and its instrumentalities, including federal financial supervisors and resolution authorities, enjoy immunity from private lawsuits under the doctrine of ‘sovereign immunity’, unless the government has specifically consented to be sued. Government actions are carried out by individuals and, absent sovereign immunity, the government would be responsible for torts committed by its employees acting in the course of their employment under the common law doctrine of *respondeat superior*. Until 1946, the only relief for such a tort claim was to request legislation from Congress that granted relief through a “private bill.” The Federal Tort Claims Act (FTCA), enacted in 1946, provides a limited waiver of the federal government’s sovereign immunity from common law tort claims and allows citizens to bring

“civil actions on claims against the United States, for money damages … for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

On the basis of this phrasing it can be concluded that an individual employee is not subject to tort liability for torts committed within the scope of employment. The immunity from liability for the employee remains even if there is a provision of the FTCA that prohibits the plaintiff from recovering from the government agency. An

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84 The employee and the employer may both be sued, but as a practical matter often only the government employer is sued given the certainty of collecting on a judgment against the government and the uncertainty of collecting on a judgment against an individual.
87 28 U.S.C. § 1346(b)(1); 28 U.S.C. § 2574 (the U.S. “shall be liable, respecting the provision of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances”). The claimant must exhaust any administrative remedies against the agency first, following the claim procedures outlined by statute.28 U.S.C. § 2675 (“An action shall not be instituted upon a claim against the United States … caused by the negligent or wrongful act or omission of any employee of the Government unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing.”).
individual government employee could be sued in tort under applicable state law if
the employee was not acting within the scope of his or her employment, but this course
is “typically an unattractive option for litigants,” as individual government employ-
ees often do not have sufficient financial resources to satisfy a judgment. In addition,
in the U.S. legal system, unless a statute provides otherwise, each party bears their
own legal costs.

There are, however, numerous statutory exceptions to the FTCA’s waiver of sov-
ereign immunity, the most important of which is the discretionary function excep-
tion. That exception provides that the FTCA’s waiver of sovereign immunity shall
not apply to “a claim”:

“based upon the exercise or performance or the failure to exercise or perform a
discretionary function or duty on the part of a federal agency or an employee
of the Government, whether or not the discretion involved be abused.”

The federal financial supervisors thus benefit from the discretionary function excep-
tion to the FTCA and are protected from tort liability.

In the United States there exist a great many of financial supervisors at the federal
level: (i) the Federal Reserve Board of Governors (FRB), which monitors systemic
risks across the broader financial system and in addition acts as the federal supervisor
of so-called ‘state member banks’, (ii) the Financial Stability Oversight Council
(FSOC), which likewise monitors systemic risks across the broader financial system,
(iii) the Securities and Exchange Commission (SEC), the supervisor of securities and
capital markets activities, (iv) the Office of the Comptroller of the Currency (OCC),
the financial supervisor of so-called ‘national banks’, (v) the Federal Deposit Insurance
Corporation (FDIC), which acts as the federal supervisor of so-called ‘state nonmem-
ber banks’, and (vi) the Consumer Financial Protection Bureau (CFPB).

from suit even when the plaintiff is precluded by an FTCA exception from recovering against
the government).

(2019).
91 28 U.S.C. § 2680(a)-(f), (h)-(n)
92 G. Sisk, Official Wrongdoing and the Civil Liability of the Federal Government and Officers 8
U. St. Thomas L.J. 295 (2011) (stating that the discretionary function exception is the most important
exception to the government’s waiver of sovereign immunity in terms of successful assertion by
the government); Congressional Research Service, The Federal Torts Claims Act (FTCA): A Legal
Overview, 18 (2019). (the discretionary function exception is one of the broadest, most significant, and
most frequently litigated exceptions to the FTCA).
93 28 U.S.C. § 2680(a) (emphasis added). Many states have similar statutory provisions relating to
state actions, including the actions of state regulators. See, e.g., O.C.G.A. § 50-21-24(11) (a Georgia
statute providing an exclusion from the state’s tort claims act for “regulatory activities, including, but
not limited to, examinations, inspections, audits, or other financial oversight activities”).
However, it should be noted that sovereign immunity is also waived for breach of contract claims under the Tucker Act. Numerous claimants have been successful in recovering damages against the government for breach of contract regarding promised regulatory accounting practices for entities that purchased failed savings and loan associations (so-called ‘thrift institutions’), following the 1989 Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) prohibition of these same regulatory accounting practices.

Finally, it should be noted that the FDIC, in addition to acting as the federal supervisor of state non-member banks, is also appointed as the receiver for all insolvent banks and thrift institutions. As the receiver of a failed bank, the FDIC may bring suit against the bank’s former officers and directors based on FIRREA, which specifically permits suits for gross negligence and which has been interpreted by the United States Supreme Court in *O’Melveny & Myers v. FDIC* (*O’Melveny*) in 1994 to permit other claims that may be applicable under the relevant state law, such as negligence and breach of fiduciary duty. The Supreme Court clarified in *Atherton v. FDIC* in 1997 that state law standards for a director’s conduct, such as simple negligence, may be used by the FDIC in these suits, with FIRREA providing the “gross negligence” standard as a floor, which would substitute for any state standards for conduct that may be more relaxed.

In suits by the FDIC against officers and directors of the failed bank, the defendants often respond with affirmative defences. Prior to the *O’Melveny* decision, these defences largely failed based on numerous theories. After *O’Melveny*, the results have been more mixed and depend upon the applicable state law and, in some cases, on whether the court has properly considered the continuing viability of any pre- *O’Melveny* rules that were based on federal common law and thus does not survive following *O’Melveny*. In any event, affirmative defences, even if successful against the FDIC, would only reduce the FDIC’s recovery against the directors and officers and are not a claim against the FDIC to recover for any alleged wrongdoing by the FDIC.

3. *The Margin of Discretion: The Portuguese Case*

In Portugal, simple negligence is in principle sufficient for a successful liability claim against (i) the Bank of Portugal (*Banco de Portugal*, BdP), which is simultaneously the central bank of the Portuguese Republic, the national macroprudential authority, the financial supervisor for the banking sector, and the national resolution authority for the purposes of the BRRD, (ii) the Portuguese Insurance and Pension Funds

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96 *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (claims shall be worked out under state laws unless some provision of FIRREA provides otherwise).
Authority (Autoridade de Seguros e Fundos de Pensões, ASF), and (iii) the Portuguese Securities Market Commission (Comissão de Mercado de Valores Mobiliários, CMVM). This is apparent from article 7, section 1 of Law No. 67/2007, which stipulates that the State and other public entities (such as the Portuguese financial supervisors and resolution authorities) are solely liable for damages resulting from unlawful actions or omissions committed with light (ligeira) negligence by its officeholders, civil servants and agents, provided that such actions or omissions occurred in the exercise of the administrative function and because of such exercise.

The notion of unlawful action does not seem particularly challenging per se, whereas that of unlawful omissions would require from the plaintiff to justify its claim on the basis of a legal obligation of the State and public entities to act. The latter are notoriously scarce in such a complex and sensitive area as that of financial supervision as even those provisions that seemingly impose a certain course of action allow nonetheless some necessary margin of discretion to financial supervisors regarding the timing and the contents of their intervention. The BdP, for example, although bound by general principles of law, not only enjoys a considerable discretion as regards the choice between (i) corrective measures, (ii) interim administration and/or (iii) resolution actions, but also in the assessment of the relevant circumstances. For example, where a bank breaches or is likely to breach the legal or regulatory rules governing its activity, the BdP is not ipso facto under the duty to adopt corrective measures; and the appraisal whether a bank is failing or likely to fail is in itself a necessary but insufficient condition for the application of resolution actions. Similarly, both the ASF and CMVM enjoy a considerable leeway in the discharge of their own supervisory responsibilities.

In practice, the margin of discretion apparently serves as an effective protection against liability claims. The current Portuguese position resembles the situation in the Netherlands before the enactment of section 1:25d Wft (which since 1 July 2012 limits the liability of the Dutch financial supervisors AFM and DNB to intent and gross fault). In the landmark case Vie d’Or, the Dutch Supreme Court (Hoge Raad) clarified the legal position before 1 July 2012 as follows. It held that the Dutch financial supervisors were subject to an unwritten standard of care, namely that their conduct ‘must meet the requirements necessary for proper and careful supervision’. Whether or not a financial supervisor had observed the required level of care depended

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98 On this point see the commentary to article 7, section 1 by Raquel Carvalho, Comentário ao Regime..., op. cit., 171; and, commenting on the same provision, F. Cadilha in Regime da Responsabilidade Civil Extracontratual do Estado e demais Entidades Públicas – anotado, 146-148 (2011).
99 Under article 140 (‘Application of measures’) of Regime Geral das Instituições de Crédito e das Sociedades Financeiras (RGICSF): “When adopting the measures laid down in this Title [corrective measures, interim administration and resolution actions], Banco de Portugal is not obliged to observe any particular order, being authorised, according to the specific circumstances of each situation and the principles set out in the foregoing Article, to combine different kinds of measures, without prejudice to the conditions established for the application of each measure taken”.
100 See article 141 of the RGICSF.
101 See article 145-E of the RGICSF.
on all the circumstances of the case, one of which was whether it was exercising a
discretionary power or not. If this was the case (and it usually was and still is), the
courts had to respect that power and could only apply a marginal standard of review. \(^{102}\)
Apparently, this standard of care did not pose a real threat to the AFM and DNB as
no successful liability claim was ever brought against either of them. \(^{103}\)

For the sake of completeness, the following should be added on the Portuguese
position. In addition to those cases where unlawful omissions correspond to a breach
of a duty to act, article 7, sections 3 and 4 of Law No. 67/2007 refer to the abnormal
functioning of a (public) service as a potential source of tortious liability. The
 provision defines the abnormal functioning of a service as comprising those cases
where it would be reasonably expectable that, in accordance with the circumstances
and the average outcome standards, the service in question would have acted to avoid
the damages that came about. Tortious liability for the abnormal functioning of a
service has no correspondence in the general rules on tort law found in the Portuguese
Civil Code as it serves a specific purpose: that of using a comprehensive notion of
unlawfulness and accountability (abnormal functioning of a service) so as to afford
compensation to damages caused by an undetermined or unidentified number of
agents, namely when the latter were under the legal obligation to act but failed to do
so. \(^{104}\)

Although article 7, sections 3 and 4 of Law No. 67/2007 could be taken as a more
plausible cause of action against financial supervisors for unlawful omissions, the
difficulties of applying the latter are, in fact, compounded since it not only requires
the identification of a legal obligation to act, but also the determination of what could
be an abnormal functioning of a service in the context of financial supervision (or
resolution). Whereas in many instances of the public intervention involving the
exercise of the administrative function, the surrounding circumstances and the
expected outcomes are reasonably set – or at least can be reasonably anticipated –
from the outset \(^{105}\), practice has shown that this is far less the case when financial
supervision (or resolution) is involved.

Dam; JOR 2006/295, with annotation by D. Busch (DNB/Stichting Vie d’Or), consideration 4.3.3.

\(^{103}\) See D. Busch, Naar een beperkte aansprakelijkheid van financiële toezichthouders? (inaugural
lecture Radboud University Nijmegen) 61 Serie Onderneming & Recht 5-7, 38-42 (Deventer: Kluwer,
2011).

\(^{104}\) This brings the notion of abnormal functioning of a service close to the concept of faute under
French law. For additional considerations on the nature and scope of article 7, sections 3 and 4 of Law
No. 67/2007, see the commentary by M. Aroso de Almeida, Comentário ao Regime da Responsabilidade
Civil Extraccontratual do Estado e demais Entidades Públicas – anotado, 217-224 (Lisbon: Universidade

\(^{105}\) Even here there is a growing area of public intervention involving a considerable degree of risk
and uncertainty which requires public intervention, but may also be further aggravated by it; on this
point see Carla Amado Gomes (coord.), Direitos dos Riscos Tecnológicos (AAFDL, 2014).
4. The Protective Purpose of the Norm Infringed: The German Case

Like in Portugal, negligence is in principle sufficient in Germany. However, the German financial supervisor, the Bundesanstalt für Finanzdienstleistung (BaFin), is protected against liability claims by a restriction of the protective purpose of the norm infringed.

Pursuant to section 4(4) of the Finanzdienstleistungsaufsichtsgesetz (Law on the Federal Financial Services Supervisory Authority, FinDAG), BaFin (and its institutional predecessor, the former Bundesanstalt für das Kreditwesen\(^{106}\)) discharge their duties ‘in the public interest’ only. While not expressly stated in the wording, the very objective of that provision has always been to exclude state liability for wrongful supervisory decisions and (in)actions. By defining the objective of all aspects of supervisory functions as being exclusively in the public interest, the provision seeks to prevent individuals from establishing that one of the conditions for state liability, i.e., the requirement that the relevant duty exists at least also in their own interest, has been met.\(^{107}\) Following the introduction of what is now Section 4(4) FinDAG, there have been no successful liability cases to date.

According to the explanatory notes on the introduction of what was then Section 6(3) of the Banking Act,\(^{108}\) the principle that the supervisory authority exercised its duties exclusively ‘in the public interest’ was meant to provide a mere statement of an established rule. Further, as a matter of fact, both post-war case law\(^{109}\) and legal doctrine\(^{110}\) had almost unanimously denied third-party liability towards the

\(^{106}\) Note that, under the law as currently in force, the principles analysed in the present article apply to all areas of financial supervision. Originally, however, the restriction on the liability for supervisory failure was developed only in the field of banking supervision.


\(^{108}\) See again, supra, n. 102.

\(^{109}\) E.g., Bundesgerichtshof, 28 April 1960, Case III ZR 176/59, reported in VersR Versicherungsrecht (1960), 979, at 980; Oberlandesgericht (Regional Court of Appeals) Bremen, 13 November 1952, Case 1 W 244/52, reported in Neue Juristische Wochenschrift (1953), 585-6; see, for an account of early case law, Armin Brendle, Amtshaftung für fehlerhafte Bankenaufsicht, 154-61 (Darmstadt: Toeche Mittler, 1987). And see, for contemporary analyses in the academic literature, e.g., Matthias Gratias, Staatshaftung für fehlerhafte Banken- und Versicherungsaufsicht im Europäischen Binnenmarkt (Baden-Baden: Nomos, 1999); Edgar Habscheid, Staatshaftung für fehlsame Bankenaufsicht (Bielefeld: Gieseking, 1998).

\(^{110}\) E.g., J. Flume, Case Note 585-6 Neue Juristische Wochenschrift (1953); E. Körner, Schutz des Publikums bei Verstößen gegen die Verbots- und Genehmigungsvorschriften des Kreditwesengesetzes und des Versicherungsaufsichtsgesetzes 131 ZHR Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 127, at 143-8 (1968); see also J-H. Binder, Bankeninsolvenzen im Spannungsfeld zwischen Bankenaufsichts- und Insolvenzrecht, 625-52 (Berlin: Duncker & Humblot, 2005).
stakeholders of supervised institutions, other than in extreme (and hardly realistic) scenarios of outright abuse of power\footnote{Under general principles of private law, an abuse of power, for the purposes of liability under Section 839 BGB, would require that the relevant official had acted out of improper, personal motives, unrelated to the cause in question; see, e.g., Hans-Jürgen Papier and Foroud Shirvani, \S 839 BGB in \textit{Säcker et al (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch}, para. 272. (8th edn, Munich: CH Beck, 2020).} and evidently illegal behaviour.\footnote{See discussing such exceptions as a hypothetical, e.g., Bundesgerichtshof, 15 February 1979, Case III ZR 108/76, \textit{Wetterstein}, reported in \textit{BGHZ} 74, 144, at 156.}

Responding to increasing criticism of this position in contemporary legal doctrine, the Federal Supreme Court, in the \textit{Wetterstein} and \textit{Herstatt} judgments of 1979, broke with the established principles and held that the supervisory powers of BaFin’s predecessor, the Federal Banking Supervisory Authority (\textit{Bundesaufsichtsamt für das Kreditwesen}), in particular in relation to the management of insolvencies in the banking sector, had to be interpreted as serving not just the protection of systemic stability in the public interest, but also the protection of individual savers of the relevant bank.\footnote{Bundesgerichtshof, 15 February 1979, Case III ZR 108/76, \textit{Wetterstein}, reported in \textit{BGHZ} 74, 144, at 146-53; Bundesgerichtshof, 12 July 1979, Case III ZR 154/77, \textit{Herstatt}, reported in \textit{BGHZ} 75, 120, at 128-33.} The plaintiffs’ claims in either case were ultimately denied on the facts. In the first, the \textit{Wetterstein}, case, the authority was ultimately held not to have breached its duties under the applicable banking law,\footnote{See, applying the Bundesgerichtshof’s judgment on the facts, Oberlandesgericht Munich, 14 July 1980, Case 1 U 226/79, reported in \textit{ZIP Zeitschrift für Wirtschaftsrecht} (1980), 648, at 649-52; further revision denied by Bundesgerichtshof, 17 December 1981, Case III ZR 146/80, reported in \textit{ZIP Zeitschrift für Wirtschaftsrecht} (1982), 151.} whereas in the \textit{Herstatt} case, the courts ultimately decided that the authority had not exceeded their margin of discretion \textit{vis-à-vis} the delinquent bank.\footnote{See Oberlandesgericht Köln, 17 February 1981, Case 7 U 167/79 (unreported); further revision denied by Bundesgerichtshof, 21 October 1982, Case III ZR 20/82, reported in \textit{NJW Neue Juristische Wochenschrift} (1983), 563.} While both cases were sufficient to induce the legislator to adopt the restatement of the nature of supervisory powers in what is now Section 4(4) FinDAG, they thus can be taken not just as a response to (to some extent, still on-going) doctrinal controversies, but also as reflecting the factual difficulties of establishing that the conditions for liability have been met in individual cases.

While not expressly stated in the wording of what is now Section 4(4) FinDAG, it is widely accepted that the restriction does not preclude claims by the addressees of wrongful supervisory actions or decisions, \textit{i.e.}, by regulated institutions themselves or individuals against whom supervisory measures or sanctions have been imposed,\footnote{Cf., e.g., Bundesgerichtshof, 28 April 1960, Case III ZR 176/59, reported in \textit{Versicherungsrecht} (1960), 979.} subject to the general conditions for state liability. The \textit{de facto} scope of such liability is rather narrow, as relevant cases are conceivable only in relation to specific acts or decisions (as opposed to mere inaction), and as it will be difficult to
establish the causation of loss by such measures. To date, there appears no relevant case law whatsoever.

In The Netherlands, it is similarly required to establish the protective purpose of the norm infringed (relativiteitsvereiste or relativity requirement, see article 6:163 Burgerlijk Wetboek (BW). However, unlike in Germany this does not normally pose a major hurdle to successful liability claims against the Dutch financial supervisors. After all, the Explanatory Memorandum to the Dutch Financial Supervision Act (Wet op het financieel toezicht or Wft) explicitly states that DNB’s prudential supervision is not only exercised in the public interest but also serves to protect the ‘customers of the services offered or performed by the financial institutions concerned’, such as deposit holders, clients and policyholders. By the same token, the AFM’s conduct-of-business supervision is exercised not only in the public interest but also to protect the patrimonial interests of ‘clients’.  

The position in Italy is similar. The existence of an ‘unlawful harm’ vis-à-vis a third party depends on the balance between the claimant’s interest and the interest pursued by the harmful conduct of the financial supervisor, as struck by the adjudicator considering the relevant provisions of the law. Furthermore, in case law preceding the 1999 landmark decision of the Corte di Cassazione, an ‘unlawful harm’ typically exists when the wrongdoing of financial supervisors features the omission or poor performance of supervisory duties. In this case, nothing justifies the sacrifice of the claimant’s interest, which, in turn, is protected both at a constitutional level by Article 47(1) of the Constitution and under the law providing investor and customer protection as a purpose of financial supervision.

It should of course be born in mind here that in Italy and the Netherlands (unlike in Germany) the liability is already restricted by means of the requirement of intent or gross fault / gross negligence on the part of the financial supervisors.

In the United Kingdom, the tort of misfeasance in public office does not appear to require a duty owed to claimants as a particular class either. In Three Rivers Lord Steyn rejected suggestions in the Court of Appeal that some antecedent duty to the claimants or notion of proximity might be required. He suggested a very weak requirement of sufficient interest to have standing to bring the claim. Again, it should

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118 Court of Cassation en banc, 22 July 1999, n. 500, at par. 8.

119 See II.2.3 (Italy) and 2.4 (The Netherlands), above.

120 Compare Three Rivers [2001] UKHL 16, [2003] 2 AC 1, at 229 (Lord Hobhouse).
be borne in mind that the liability of the financial supervisors in the UK is already severely restricted by means of the requirement of bad faith.\textsuperscript{121}

5. The Causation Requirement

In the Netherlands, it follows from the text of section 1:25d Wft that the AFM and DNB can be held liable only if the loss is to a \textit{significant extent} due to a failure involving (1) intent or (2) gross fault (a) to perform their statutory duties properly or (b) to exercise their statutory powers properly. According to the legislative history of this provision, the conduct of the AFM and DNB must have been a \textit{major} rather than a \textit{minor} factor in causing the loss.\textsuperscript{122} In view of this, section 1:25d Wft sets a causation requirement that is stricter than the general causation requirement under Dutch tort law.\textsuperscript{123} Similarly, in France, the \textit{main} cause of the damage suffered should be the fault of the supervisor. In view of the foregoing, in the Netherlands and France, a heavier causation requirement comes on top of the liability condition of intent and gross negligence / gross fault. In the United Kingdom the requirement that a breach of duty by a financial supervisor should be an effective cause of the claimant’s losses is seen as a very difficult hurdle to overcome, where the immediate or proximate cause of institution’s failure is usually the mismanagement of that organisation.

6. The Loss Requirement

6.1. Austria

In Austria, the Financial Market Authority, the Financial Reporting Enforcement Panel and the Austrian Auditor Supervisory Authority are protected against liability claims by means of a restriction of the recoverable damages. Pursuant to § 1 State Liability Act and § 1293 Austrian Civil Code, any financial loss without adequate compensation is generally considered as damage. Such damage may be compensated in cash only (§ 1 State Liability Act). However, § 3 subs. 1 sent 2 of the \textit{Finanzmarktaufsichtsbehörndengesetz} (FMABG) provides a specific definition limiting the liability of the Austrian Financial Market Authority to damages that have been directly caused to the legal entity subject to supervision (or resolution). A provision with the same wording can be found in § 10 subs. 4 sent. 2 Financial Reporting Control Act for acts of the Austrian Financial Reporting Enforcement Panel and in § 16 subsection 1 sentence 1 Austrian Auditor Supervision Act for the Austrian Auditor Supervisory Authority.

\textsuperscript{121} See II.2.6, above.
\textsuperscript{122} \textit{Parliamentary Papers II} 2011/12, 33058, 9, 3.
The actual meaning of § 3 subs. 1 sent 2 FMABG remains rather unclear and is subject to a fundamental dispute in Austrian literature. Almost all authors claim that § 3 subs. 1 sent 2 FMABG only addresses damages caused by the Austrian Financial Market Authority to the legal entity subject to supervision itself and therefore excludes damages to third parties like investors.\textsuperscript{124} Especially a liability for an insufficient supervision of the financial markets is considered as being excluded by § 3 subs. 1 sent 2 FMABG.\textsuperscript{125} However, some authors claim that § 3 subs. 1 sent 2 FMABG does not generally exclude all claims by investors, creditors or other market participants but only those damaged by the insolvency of the legal entities subject to supervision.\textsuperscript{126} This idea of limiting the scope of § 3 subs. 1 sent 2 FMABG is nevertheless hardly accepted by other authors.\textsuperscript{127}

6.2. Greece

In its 2014 landmark decision mentioned previously, the Greek Supreme Administrative Court not only introduced the criterion of a manifest and serious error on the part of the financial supervisors, but in addition ruled that the claimant is not entitled to full compensation, but to reasonable compensation only. However, the Court introduced a further exception to the reasonable compensation rule and granted compensatory immunity to financial supervisors in the cases in which the claimants are already protected by compensation schemes for insurance policy holders, deposit holders and investors.\textsuperscript{128} It is understood that the compensatory immunity does not cover situations where the supervised undertakings themselves sue the financial authorities since such institutions do not have recourse to guarantee schemes, or where aggrieved third parties (e.g., investors) do not have access to guarantee schemes at all.

7. Unlawfulness Combined with the Causation Requirement: The Spanish Case

The liability of (i) the Banco de España (BdE, the banking supervisor), (ii) the Comisión Nacional del Mercado de Valores (CNMV, the securities supervisor), (iii) the Dirección General de Seguros y Fondos de Pensiones (DGSFP, the supervisor for insurance and re-insurance), and (iv) the Fondo de Reestructuración Ordenada Bancaria (FROB, the resolution authority) is based on the Spanish Constitution and the general rules in administrative laws for public authorities. These rules contemplate the possibility of damages claims against public administration arising out of an abnormal functioning of the public services. Yet, the specific liability regime is based

\textsuperscript{124} Mader in Gruber/Raschauer, \textit{Online Commentary} version 1.01, § 3 FMABG note 14; dissenting Schöller, 3.3.4.2.4.
\textsuperscript{125} Mader in Gruber/Raschauer, \textit{Online Commentary} version 1.01, § 3 FMABG note 14.
\textsuperscript{127} Especially dissenting M. Oppitz, \textit{Kapitalmarktaufsicht}, 192 (1\textsuperscript{st} edn, Vienna: Linde Verlag, 2017); Schöller, 3.3.4.2.4.
\textsuperscript{128} GSAC 3783/2014 (Aspis Pronoia case).
on an objective liability standard; accordingly, it is not necessary for the claimant to prove either that financial supervisors acted negligently or that the public service developed abnormally.

However, financial supervisors must compensate only the *unlawful* damages *caused* by the financial supervisor’s or resolution authority’s acts or omissions, and these criteria, as interpreted by the Spanish courts, seem to suffice to avoid successful liability claims. So far, the Spanish courts have never ruled in claimants’ favour.

8. Proportionate Liability

8.1. The Netherlands: Joint and Several Liability

Financial supervisors (and resolution authorities) are often not the primary offenders, but merely peripheral tortfeasors. In many cases, there are also one or more primary offenders, such as a financial institution that breaches the regulatory rules and subsequently becomes insolvent. In such cases, from a causal point of view, both the acts or omissions of the primary offender (the financial institution) and the acts or omissions of the financial supervisor (or resolution authority) are a necessary condition to cause the entire damage suffered by the claimant. In other words, but for the acts or omissions of the primary offender or the acts or omissions of the financial supervisor or resolution authority, the claimant would have suffered no damage at all. In the Netherlands, the financial supervisor (or resolution authority) and the financial institution are liable for the ‘same damage’ within the meaning of article 6:102, paragraph 1, first sentence, BW, in such cases. Under Dutch private law this implies that the financial supervisor (or resolution authority) and the financial institution are jointly and severally liable. The claimant can thus sue them both for the full amount (although he will of course never receive more than the full amount). The claimants will often choose to sue the competent financial supervisor (or resolution authority) for damages in view of its deep pockets, particularly where the primary offender has become insolvent.129

8.2. France and Greece: Proportionate Liability

However, a different approach than joint and several liability is certainly possible, which significantly limits the liability of the financial supervisor or resolution authority, namely a proportionate (or partial) liability. This is the approach already adopted in France: the judge must examine whether a division of liability between the finan-

129 D. Busch, *Aansprakelijkheid van financiële toezichthouders*, 57-58 (Nijmegen: Ars Aequi Libri, 2010). In the past I have argued that the civil courts should have the option of deviating from joint and several liability and adopt a partial liability instead, i.e., a liability of the peripheral tortfeasor (here: the financial supervisor) for e.g., 1/3 of the loss and a liability of the primary offender (here: the financial institution) for e.g., 2/3 of the loss. See: D. Busch, *Naar een beperkte aansprakelijkheid van financiële toezichthouders?* (inaugural lecture Radboud University Nijmegen) 61 Serie Onderneming & Recht 60-81 (Deventer: Kluwer, 2011). In a similar vain: K. Maes, *Secundaire aansprakelijkheid*, 517-536 (Den Haag: Boom Juridische uitgevers, 2020).
cial supervisor and the supervised entity is justified in view of the circumstances of each case. An example of such division is a decision of 30 November 2001\textsuperscript{130} regarding the bankruptcy of the bank UBC, where the portion of liability attributed to the French State, due to the gross negligence committed by the then Commission bancaire, was fixed at 10% of the damage suffered by the depositors of the bank.\textsuperscript{131}

A proportionate approach seems conceivable in Greece as well, at least in theory. The judicial review should examine whether external events disrupt the causal link between the supervisor’s actions and the damage suffered or lead to the supervisor and financial institution being jointly responsible for the damage occurred. In the latter case, the court may find that the supervisor is liable only to a certain extent (e.g., 60%, thus the ensuing compensation will be reduced to 60% of the total amount of the damage).

III. Limitations of Liability under Attack

1. General

Section II above suggests that there is a growing tendency to limit the liability of financial supervisors and resolution authorities in one way or another.\textsuperscript{132} At the same time, a counter-movement is emerging, as limitations of liability are by no means undisputed and are under attack on various grounds. This counter-movement is discussed in the present section III.

2. Arguments Based on Constitutional Law

2.1. General

One recurring argument against newly established limitations of liability for the benefit of a financial supervisor or resolution authority is that it should be considered unconstitutional.\textsuperscript{133}

2.2. Austria

In Austria, as mentioned previously, the Financial Market Authority, the Financial Reporting Enforcement Panel and the Auditor Supervisory Authority are protected

\textsuperscript{130} CE, 30 novembre 2001, Kechichian, Banque et droit no 82, mars-avril 2002, 56.
\textsuperscript{131} See G. Eckert, \textit{La responsabilité administrative des autorités de régulation} in \textit{Rev. droit bancaire et financier} (mars-avril 2009), Etudes 13, notably no 15.
\textsuperscript{133} The compatibility of § 4(4) FinDAG with German constitutional law is also doubted by many voices in the German literature. The Federal Constitutional Court has not yet ruled on this question, cf. with further references: Matthias Lehmann and Jonas Schürger, \textit{Staatshaftung für Versäumnisse der BaFin im Fall Wirecard (Part II)} 19 Wertpapier-Mitteilungen 905-912, at 907 et seq. (2021).
against liability claims by means of a restriction of the recoverable damages. Pursuant to § 1 State Liability Act and § 1293 Austrian Civil Code, any financial loss without adequate compensation is generally considered as damage. Such a damage may be compensated in cash only (§ 1 State Liability Act). However, § 3 subs. 1 sent 2 of the Finanzmarktaufsichtsbehördenegesetz (FMABG) provides a specific definition limiting the liability of the Austrian Financial Market Authority to damages that have been directly caused to the legal entity subject to supervision. A provision with the same wording can be found in § 10 subs. 4 sent. 2 Financial Reporting Control Act for acts of the Austrian Financial Reporting Enforcement Panel and in § 16 subsection 1 sentence 1 Austrian Auditor Supervision Act for the Austrian Auditor Supervisory Authority.

Nevertheless, ever since the enactment of § 3 subs. 1 sent 2 FMABG numerous Austrian authors have claimed that the statutory limitation of liability should be considered unconstitutional.134 The major argument in this context is that Art. 23 subs. 1 Federal Constitutional Law explicitly states that the federal government shall be liable for the injury that persons acting on their behalf in execution of the laws have by illegal behaviour culpably inflicted on whomsoever. By limiting or basically excluding the liability of the Austrian Financial Market Authority these constitutional requirements might be violated.

However, other authors claim that Art. 23 subs. 1 Federal Constitutional Law does not necessarily cover a liability of the Austrian Financial Market Authority towards investors and creditors of legal entities subject to supervision.135 In this context some authors also claim that the existence of a civil liability of the legal entities subject to supervision and their representatives should probably be considered as excluding a violation of Art. 23 subs. 1 Federal Constitutional Law.136

In 2009, one investor actually filed a petition at the Austrian Constitutional Court claiming that § 3 subs. 1 sent 2 FMABG is unconstitutional. However, the Austrian Constitutional Court dismissed the complaint without addressing this issue since the investor had no right to file this petition.137 In December 2021 the Austrian Constitutional Court held in a number of cases initiated by investors in the case of

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136 See especially Oppitz, supra note 121, 192.

the Commerzbank Mattersburg im Burgenland AG (the so-called Austrian Wirecard) that the limitations of § 3, subsection 1, sentence 2 FMABG and § 16, subsection 1, sentence 2 APAG are not unconstitutional.\(^\text{138}\) It especially held that the generally unlimited liability of the Austrian Financial Market Authority towards the legal entities subject to supervision and the exclusion of the liability towards investors does not constitute an unequal treatment. In fact, the limitation of the liability towards investors constitutes an explicit decision of the legislator rendered in the aftermath of the financial crises in 2008 that taxpayers shall not bear the costs of an insolvency of a bank. The purpose of the supervision of the Austrian Financial Market Authority is solely the protection of creditors in general (“kollektiver Gläubigerschutz”) and the functioning of the capital markets.

2.3. Greece

As mentioned previously, in its 2014 landmark decision, the Greek Supreme Administrative Court qualified the statutory no-fault (objective) liability of the Bank of Greece and the Hellenic Capital Market Commission set under Article 105 of Law 2783/1941 by ruling that the Greek financial supervisors cannot be held liable for any illegality in their actions but only for cases of grave illegality (condition of serious and manifest error).\(^\text{139}\) In its decision, the Court did not only introduce the ‘serious and manifest error’ condition, but in addition ruled that in cases of damages caused by supervisory failures the claimant is only entitled to reasonable and not full compensation. However, it went one step further and held that the claimants are not even entitled to reasonable compensation in the cases in which they are already protected by compensation/guarantee schemes for insurance policy holders, deposit holders and investors, thus leading to compensatory immunity of financial supervisors in such cases.\(^\text{140}\) Finally, the Court stressed that the compensation mechanism established to compensate the aggrieved third parties in the case brought before it is compliant with the Constitution.\(^\text{141}\)

It is understood that the compensatory immunity does not cover situations where the supervised undertakings themselves sue the financial authorities since such institutions do not have recourse to guarantee schemes, or where aggrieved third parties (e.g., investors) do not have access to guarantee schemes at all. However, the decision attracted criticism by the legal literature on a constitutional law basis. It triggered the concern that the limitation of compensation to reasonable instead of full compensation might not comply with the Greek Constitution. The Constitution requires that that
any damage caused by the State must be restored, but it does not explicitly establish a full-compensation rule. Rather, it was the case-law that had interpreted Article 105 of Law 2783/1941 as demanding complete compensation for damages caused by the state organs. It could be argued that a derogation from the full-compensation interpretation in certain instances and the recognition of reasonable compensation only appear to be tolerable under the Constitution, as long as such restriction to the compensation amount respects the principle of proportionality. However, the above-mentioned Greek Supreme Administrative Court’s decision to grant compensatory immunity if a compensation/guarantee scheme is in place is subject to objections mainly on the basis of the arguments that pre-determined compensation amounts by the guarantee schemes violate the principle of proportionality142 and that, in general, the purpose of guarantee schemes is not to protect supervisory authorities from potential liability claims. Equally, it is argued that such schemes are financed through the mandatory contributions of supervised entities and not from the State budget; accordingly, they cannot be diverted into compensating third-party claims against supervisors.143

2.4. Italy

In Italy, as mentioned previously, in 2006, a statutory restriction made the liability of financial supervisors conditional upon intent or gross negligence.144 While some authors have held the provision consistent with the previous case-law,145 the limitation of financial supervisors’ liability to intent or gross negligence has received criticism from a constitutional perspective. Legal scholarship has pointed out that the statutory restriction to intent or gross negligence: (i) has been introduced through an act of the Cabinet lacking a specific basis in the enabling statute enacted by the Parliament in contrast with Article 76 of the Constitution146 and (ii) determines an unequal treatment between financial supervisors and other public bodies contrary to Article 3(1) of the Constitution.147

142 N. Floros, Civil Liability of the Supervisor to Compensation due to Improper Supervision, 293-297 (Athens; Nomiki Bibliothiki, 2012) (in Greek).
144 Article 24(6-bis), Act 28 December 2005, n. 262 as amended by article 4(3)(d), Legislative Decree 29 December 2006, n. 303. The general provision of Article 24(6-bis), Act 28 December 2005, n. 262 is expressly referred to by art. 4(4-bis), the Act 1 September 1993, n. 385 – Consolidated Law on Banking (‘CLB’).
147 M. Atelli, Prime note sulla nuova responsabilità civile delle «authorities» dopo il d. leg. 303/06 191 Responsabilità civile e previdenza (2007).
2.5.  **Ireland**

As mentioned previously, the liability of the Central Bank of Ireland (CBI) is limited to acts and omissions committed in bad faith (section 33AJ(2) of the 1942 Act).

In *Byrne v Ireland*, the Supreme Court of Ireland determined that the common law rule that the State was deemed to be immune from suit had not survived the enactment of the Irish Constitution. It was held to be inconsistent with an individual’s constitutional rights not to have access to the courts and not being able to recover damages in respect of a legal wrong. However, the Irish Courts have not yet determined whether the legislature can introduce special rules of immunity, such as section 33AJ(2) of the 1942 Act for the benefit of the CBI.

Hogan, Morgan and Daly, the authors of *Administrative Law in Ireland*, the seminal text in this field, have suggested that statutory immunities might survive constitutional challenge. In *Pine Valley Developments Ltd v Minister for the Environment*, the Supreme Court determined that the personal rights’ guarantees contained in Article 40.3 of the Constitution are not absolute and must be balanced against the common good. This means that in some cases no action will lie for negligence or breach of duty. Hogan, Morgan and Daly suggest that:

> “an immunity might, therefore, be justified on the basis of public policy grounds either in order to protect persons performing an essential social service (such as firemen) or some implied constitutional value (such as the independence of persons performing judicial or quasi-judicial functions)”.

It is arguable that either justification could apply in the case of the CBI which is charged with ensuring financial stability and also endowed with significant enforcement powers. Hogan, Morgan and Daly also make the interesting point that pure economic loss unlike most Tort Law, does not “slot neatly” into either the vindication of personal rights to property or to bodily integrity and that statutory immunity might thus be possible. Finally, they state that it could be argued that “interpreting statutory provisions that purport to eliminate causes of action in tort so as only to eliminate claims for pure economic loss would give some effect to the intention of [Parliament] whilst also preserving the personal rights guarantees of the Constitution”.

Two recent decisions have considered the validity of section 33AJ though neither has led to a definitive decision. *Irish Bank Resolution Corporation Limited & Irish Nationwide Building Society v Purcell & Others*, concerned an action taken by the plaintiffs against the former directors of Irish Nationwide Building Society (INBS) alleging that they had unlawfully and improperly delegated their powers to the Chief

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152 [2014] IEHC 525.
Executive Officer (CEO) of INBS. The first defendant, Mr. Purcell, one of the former INBS directors, joined the CBI to the proceedings on the basis that the delegation was carried out with the CBI’s full knowledge and approval and, furthermore, that the defendants had relied on the CBI’s guidance and approval. It is worth emphasising at the outset that this case involved an application by the CBI (as a third party) to have Mr. Purcell’s claim against it struck out and so all Mr. Purcell had to establish was that there was a stateable case\textsuperscript{153} and that it was not bound to fail. The burden of proof was thus lower. One of the arguments made by the CBI was that Mr. Purcell’s claim was either unstateable or was bound to fail because of section 33AJ. In response, counsel for Mr. Purcell argued that:

\begin{itemize}
  \item the CBI has no immunity from suit and that if it has any immunity, it is only in damages;
  \item statutory immunity is for damages only and would not constitute an immunity for a third-party claim for indemnity and/or contribution;
  \item under the Civil Liability Act 1961, the definition of “liable” refers to “legal liability whether or not enforceable by action” and thus the CBI could be joined as a third party because of its legal liability (such liability could result in a declaration that it was a concurrent wrongdoer and/or a declaration it was liable for an indemnity and/or contribution);
  \item the issue of bad faith could remain a live issue in the proceedings;
  \item reliance by the CBI on section 33AJ would give rise to a constitutional challenge.
\end{itemize}

The Court accepted that statutory immunity would not prevent the CBI being joined as a concurrent wrongdoer referring to the above-mentioned definition of ‘liable’ and that the CBI could be correctly joined as a third party even though at a later stage in the proceedings it may wish to rely on a statutory immunity in damages. As the Court did not resolve the damages issue in this case, there was no further determination on this point.

The matter was before the courts again in 2020 in the case of \textit{Lawrence Shields v The Central Bank of Ireland.}\textsuperscript{154} This was an unusual case which arose as a result of a judicial review action of the CBI’s initial refusal to exchange damaged bank notes belonging to the applicant. The CBI on the basis of a forensic test believed that the notes had been intentionally damaged and/or chemically altered and it refused to return them until further testing had been carried out. It also refused to provide the original forensic report, to identify the laboratory conducting the second test or to provide the applicant with a sample of the notes to allow him to conduct his own testing. The second test proved inconclusive as to the cause of the damage and the CBI agreed to exchange the notes and it transferred the funds to the applicant. The

\textsuperscript{153} Indeed J. Cregan went further and opined that it was not only a stateable cause of action but also a prima facie case.

\textsuperscript{154} [2020] IEHC 518.
CBI subsequently sought to have the proceedings against it struck out on the grounds that they were now moot. The applicant resisted that application claiming, *inter alia*, that the CBI had also breached his constitutional rights and that he was entitled to damages.

The High Court accepted that if the CBI sought to rely on section 33A, it would be open to the applicant to make an argument, either that the section should not apply or that it would be invalid as being unconstitutional. However, the Court found that as the CBI had exchanged the notes for value, the primary issue was moot. It agreed to strike out the applicant’s proceedings and so the case did not progress.

2.6. **Australia**

Under the Constitution, the Commonwealth has, among other powers, a number of powers relevant to the supervision and resolution of financial institutions, including the powers to make laws with respect to the acquisition of property on just terms from any person for any purpose in respect of which the Commonwealth may make laws. Since the last power is read to some extent as a guarantee that the Commonwealth will not acquire property of a citizen except on just terms, it may have particular relevance to regulatory action to resolve a failing institution.

Section 69E of the Banking Act provides as follows:

‘(1) If: (a) apart from this section, the operation of this Act would result in the acquisition of property from a person otherwise than on just terms; and (b) the acquisition would be invalid because of paragraph 51(xxxi) of the Constitution; the Commonwealth is liable to pay to the person compensation of a reasonable amount s agreed on between the Commonwealth and the person. If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court of Australia for the recovery from the Commonwealth of such reasonable amount of compensation as the Court determines.

(2) Any damages or compensation recovered, or other remedy given in a proceeding that is commenced otherwise than under this section is to be taken into account in assessing compensation payable in a proceeding that is commenced under this section and that arises out of the same event or transaction.

(3) In this section: *acquisition of property and just terms* have the same respective meanings as in paragraph 51(xxxi) of the Constitution.’

Section 44 of the Financial Sector (Transfer and Restructure) Act 1999 (FSTR Act) is in substantially similar terms. Similar provisions apply to actions of Australian Securities and Investments Commission (ASIC). There is no equivalent provision in the Reserve Bank of Australia Act (RBA Act).

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155 Corporations Act, s 1350, ASIC Act, s 250.
These provisions should not be mistaken for a general commitment by the Commonwealth to compensate persons adversely affected by actions of the Australian Prudential Regulation Authority (APRA). The section has no operation unless the following criteria are satisfied: (a) the operation of the statute would involve an acquisition other than on just terms; and (b) the acquisition would be invalid under s 51(xxxi) of the Constitution.

In including these sections, the Parliament has not conceded that there is any acquisition of property, or that it would be unjust. It is only if a court would otherwise find the legislation invalid under the Constitution that these sections would come into play. Their purpose is to save the action from invalidity, by providing for Commonwealth compensation to the affected person if the Court were to find that there was otherwise an unjust acquisition. Provisions of this kind are likely to be considered effective, at least in answer to the proposition that where the Commonwealth pays no compensation for acquired property it does not acquire on just terms.156 The effect therefore is to give greater certainty that the action taken by the regulators under these Acts should not be rendered invalid. Instead, to the extent that there is an unjust acquisition, the financial risk of that determination is placed on the Commonwealth through the requirement to pay reasonable compensation.

The scope of the provision is therefore dependent on understanding how s 51(xxxi) of the Constitution may affect regulator’s actions. This is a complex and unsettled area. Section 51(xxxi) Section 51(xxxi) provides that the Commonwealth Parliament may make laws with respect to:

“the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.”

The case law on s 51(xxxi) is lengthy, complex, and highly specific to the legislation and action that is being challenged. Its application to action by a prudential regulator is untested. The following general remarks can be made. There is authority that where a law of the Commonwealth effects an acquisition of property within the meaning of s 51(xxxi), it can only do subject to the terms of the acquisition being just.157 The fact that the law pursuant to which the acquisition is made may also relate to some other head of Commonwealth power does not allow the requirement of just terms for the acquisition to be ignored. So, for instance, a law to nationalise a bank may be a law with respect to banking, but aspects of that law that involve the acquisition of property must still be on just terms.158

156 See Minister for Primary Industry and Energy v Davey (1993) 47 FCR 151.
158 See, e.g., Bank of New South Wales v Commonwealth (1948) 76 CLR 1.
Some prudential regulatory actions are highly likely to involve an ‘acquisition of property’. Examples of likely acquisitions of property would be:

(i) a compulsory transfer of the business of an authorised deposit-taking institution (ADI) ordered by the APRA under the FSTR Act to the Commonwealth or another ADI: the property of the bank has been acquired;

(ii) a compulsory transfer of the shares in the ADI under the FSTR Act to the Commonwealth or to another ADI: the property of the shareholders has been acquired.159

A more difficult question would arise, if part of the ADI’s business were acquired under the FSTR Act as part of a plan to reconstruct the ADI under which sound business and depositors’ claims are transferred to a new entity and bad business is left in the transferor entity, along with creditors who may be expected to suffer losses from the deficiency of those assets. Could that be considered an acquisition of the creditors’ claims? In one case it has been held that an acquisition of property was not on just terms where the Commonwealth imposed a limitation period on a tort claim against an entity.160 If so, it could be argued that it is an acquisition of a contract claim to remove the assets from the obligor so as to impair the creditor’s enjoyment of its claim or to cause the obligor to be liquidated or dissolved.161 Yet there is a contrary argument that there is no acquisition of the creditors’ claims at all. They remain entitled to their claims, although the claims may be worth less.

Further, even if there is an obvious, or in substance, acquisition, this does not necessarily mean that s 51(3xxi) would apply to invalidate the acquisition. The section impinges only if the terms of the acquisition are unjust. If the ADI is insolvent or near insolvent, the value of its equity may be nothing, or very little. If it is insolvent in a balance sheet sense the claims of its creditors may be less than their face value, in particular for creditors who do not enjoy the statutory priority attaching to the claims of depositors.162

In the alternative, it might be possible to argue that the exercise of these transfers is in substance a law for the adjustment of competing claims, rather than a law for the acquisition of property.163 The argument would be that the financial condition of the bank requires adjustment of the claims of shareholders and creditors in the interests

159 Bank of New South Wales v Commonwealth (1948) 76 CLR 1, 215 (Starke J). Latham CJ, Rich J and Williams J held that the provisions for transfer of business that involved a novation of banker-customer contracts did not involve an acquisition. Even if this view is correct the FSTR Act does not operate by novation, but by constituting the acquirer as the successor to the affected institution (see s 35). It was not doubted in that case that the provisions in the legislation for the acquisition of shares were an acquisition of property.


161 Where the creditor has expressly agreed in the terms of its instrument to be converted to equity or written off in circumstances of resolution, as in the regulatory capital securities typically issued by Australian ADIs, such an argument would seem untenable.

162 See, e.g., Johnston Fear & Kingham & Offset Printing Co Pty Ltd v Commonwealth (1943) 67 CLR 314; Minister of State for the Navy v Rae (1945) 70 CLR 339, 344–7; Minister for the Army v Parbury Henty and Co Ltd (1945) 70 CLR 459; Nelungaloo Pty Ltd v Commonwealth (1948) 75 CLR 495; Poulton v Commonwealth (1953) 89 CLR 540.

of depositors and the continuity of banking services, and that the transfers are means reasonably adapted to effect that end.164

3. Arguments Based on European Union Law

3.1. General
An argument that appears to be gaining momentum is that national limitations of liability are contrary to European Union law. The relevance of this argument is obviously confined to the European Union.

3.2. No Liability Criterion That Goes beyond a Sufficiently Serious Breach under EU law

(i) Intent: Bulgaria, France, The Netherlands & Italy
In the case of Nikolay Kantarev v Balgarska Narodna Banka, the Court of Justice of the European Union (CJEU) confirmed that a national law stipulating that (in this case) the Bulgarian banking supervisor (Balgarska Narodna Banka) can be held liable only if it has acted intentionally, goes beyond the criterion of a sufficiently serious breach of EU law (see further on this case under point (v) below).165

In view of this, it seems that the limitations of liability in France, the Netherlands and Italy are contrary to EU law, in any event to the extent that they offer protection against intentional breaches of EU law committed by national financial supervisors (but see further under point (iii) below regarding limitations to ‘gross fault’ or ‘gross negligence’).

(ii) Bad Faith: Ireland
As mentioned previously, the liability of the Central Bank of Ireland (CBI) is limited to acts and omissions committed in bad faith (section 33AJ(2) of the 1942 Act). The exemption in section 33AJ(2) is extensive and excludes liability “for damages for anything done or omitted in the performance or purported performance or exercise of any of its functions or powers, unless it is proved that the act or omission was in bad faith”. These detailed provisions provide the CBI with immunity from liability to depositors and other creditors of a failed bank or regulated entity where the CBI is negligent in the way it supervises that entity. This exemption would appear to go beyond that considered acceptable by the CJEU in Nikolay Kantarev v Balgarska Narodna Banka166 as acts or omissions committed other than in bad faith may still result from a ‘sufficiently serious breach’ of EU law.

166 See previous footnote.
A further question is whether the requirement of ‘gross fault’ (France, the Netherlands) or ‘gross negligence’ (Italy) is also stricter than the criterion of a sufficiently serious breach of EU law. The CJEU says the following about this:

‘As regards the condition in respect of there being a sufficiently serious breach of EU law, it should be noted that, according to the Court’s case-law, such a breach implies a manifest and grave disregard by the Member State for the limits set on its discretion. The factors which may be taken into consideration in that regard include, inter alia, the clarity and precision of the rule breached, the measure of discretion left by that rule to the national authorities, whether any error of law was excusable or inexcusable, whether the infringement and the damage caused was intentional or involuntary, or the fact that the position taken by an EU institution may have contributed towards the omission, adoption or retention of national measures or practices contrary to EU law (see, to that effect, judgment of 5 March 1996, Brasserie du pêcheur and Factortame, joined cases C-46/93 and C-48/93, EU:C:1996:79, paragraph 56).’

In addition:

‘(…) the Court has already held that, while certain objective and subjective factors connected with the concept of ‘fault’ under a national legal system may be relevant (…) for the purpose of determining whether or not a given breach of EU law is sufficiently serious, the obligation to make reparation for loss or damage caused to individuals cannot depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of EU law.’

In other words, the Member States are free to use a concept of fault in their national liability conditions but must ensure that it does not go beyond the concept of a sufficiently serious breach of EU law.

The previous case law of the CJEU on the liability of other national government bodies for breaches of EU law suggests that a condition of ‘gross fault’ or ‘gross negligence’ will also go beyond the requirement of a sufficiently serious breach.
For example, the CJEU has held that national legislation limiting the liability of the Italian *Corte di Cassazione* to cases where there has been intent or gross negligence (‘*dolo o colpa grave*’) is contrary to the conditions for liability resulting from the principle of Member State liability under EU law. As it makes no difference for the purposes of this principle what government body is responsible for the breach, it seems likely that the CJEU will extend this reasoning to other government bodies such as financial supervisors.

If this were to happen, it would mean that the liability of the financial supervisors in France, the Netherlands and Italy, *to the extent that it is based on a breach of EU law*, could not be assessed by reference to the requirement of gross fault or gross negligence (nor by reference to intent, see under (i) above).

(iv) Manifest and Serious Error: Greece

As mentioned previously, in its 2014 landmark decision, the Greek Supreme Administrative Court introduced – in the context of the statutory no-fault (objective) liability standard – the condition of a manifest and serious error on the part of the competent Greek financial supervisor, i.e., the Bank of Greece or the Hellenic Capital Market Commission. This should be deemed to be in line with the requirement of a sufficiently serious breach of EU law.

(v) Example of a Sufficiently Serious Breach of EU Law Committed by a National Financial Supervisor

Why did the conduct of the Bulgarian bank supervisor Balgarska Narodna Banka (BNB) amount to a sufficiently serious breach of EU law in *Nikolay Kantarev v Balgarska Narodna Banka*?

The facts of the case were as follows. Private investor Nikolay Kantarev brought an action against the Bulgarian bank supervisor BNB before the *Administrativen sad Varna* (Varna Administrative Court, the Bulgarian administrative court of first
instance) for a breach of EU law. More specifically, he claimed that the BNB had applied Article 1(3)(i) of the version of the Deposit Guarantee Schemes Directive that applied at the time, incorrectly, as a result of which he had received the money he was due much later than the period stipulated in the provision. Kantarev had claimed under the deposit guarantee scheme because the bank where he had a deposit account (Korporativa Targovska Banka, KTB Bank) had got into difficulties as a result of the financial crisis. This prompted the BNB on 20 June 2014 to place the bank under special supervision and direct that its assets and liabilities be audited by external auditors. This audit showed that KTB Bank’s financial results were in deficit and that the bank no longer met the requirements for equity capital under EU law. BNB then withdrew KTB Bank’s banking licence by decision of 6 November 2014. On the same day Kantarev’s account was closed by the BNB. This meant that under the Bulgarian law implementing the Deposit Guarantee Schemes Directive the money in Kantarev’s account had to be reimbursed under the deposit guarantee scheme. This eventually happened on 4 December 2014.

Kantarev contended that the Deposit Guarantee Schemes Directive had been incorrectly transposed and applied in Bulgaria. Determination of the unavailability of a deposit, which is a condition for application of the deposit guarantee scheme, is dependent, under the relevant Bulgarian Law, on withdrawal of the banking licence, whereas the Directive prescribes a fixed period for this purpose. The Varna Administrative Court stayed the proceedings following a decision of the Varhoven administrativen sad (Supreme Administrative Court of Bulgaria) and referred eight questions to the CJEU for a preliminary ruling. These questions relate on the one hand to whether and, if so, how the BNB should have applied Article 1(3)(i) of the Deposit Guarantee Schemes Directive and, on the other, to what is required to establish the liability of the BNB for a breach of EU law, in particular the requirement of a ‘sufficiently serious breach’.

As the conditions for determining whether a deposit is ‘unavailable’ and the period within which this must be done are precise and sufficiently clear, Article 1(3)(i) has direct effect. The CJEU indicates that the BNB should therefore have applied the provision of the Directive and not the incorrect Bulgarian transposition of that provision. So, in brief, Kantarev was entitled to invoke the provision of the Directive directly before the Bulgarian national courts.

What the CJEU considers to be of decisive importance in this case is that Article 1(3)(i) of the Deposit Guarantee Schemes Directive circumscribes the latitude of the BNB by clearly setting out the conditions to which the determination that deposits are unavailable is subject and the time limit within which such a determination must be made. The BNB was therefore obliged to determine the unavailability of the deposits within the mandatory time limit of five working days after it first determined that the KTB Bank had failed to repay a deposit that was due and payable. Accord-

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173 Para. 117.
175 Paras 106-108.
ing to the CJEU, this determination took place on 20 June 2014 when the BNB decided to place the KTB Bank under special supervision and suspend its payments and transactions.\textsuperscript{176} The CJEU states that the fact that the BNB did not determine the unavailability of the deposits until much later, despite the fact that the conditions clearly set out in that provision had long been satisfied, was capable of constituting a sufficiently serious breach within the meaning of EU law.\textsuperscript{177}

Finally, quite apart from the Nikolay Kantarev v Balgarska Narodna Banka case and for the avoidance of doubt, we note that the mere fact that a financial firm under supervision does not comply with one or more rules of the EU financial supervision law that applies to it, does not necessarily trigger a sufficiently serious breach of EU law on the part of the competent national financial supervisor. After all, what must be shown is that the financial supervisor itself somehow committed a sufficiently serious breach of EU law in its supervision of the financial firm concerned.

3.3. Exceptions

However, there are at least two exceptions to what has been said at 3.2 above. The first exception concerns the liability of financial supervisors for wrongfully approving or rejecting a prospectus. Article 20(9) of the Prospectus Regulation provides in this connection as follows:

‘This Regulation shall not affect the competent authority’s liability, which shall continue to be governed solely by national law [the competent authority is the financial supervisor, the authors]. (…)’\textsuperscript{178}

The second exception concerns the liability of (i) national financial supervisors in their capacity as national resolution authorities (NRAs), or (ii) separately established NRAs. Article 3(12) of the Bank Recovery and Resolution Directive (BRRD)\textsuperscript{179} provides as follows:

‘(…) Member States may limit the liability of the resolution authority, the competent authority and their respective staff in accordance with national law for acts and omissions in the course of discharging their functions under this Directive.’

\textsuperscript{176} Para 109.
\textsuperscript{177} Para 115.
\textsuperscript{178} Article 13(6), first paragraph of the Prospectus Directive (the predecessor of the Prospectus Regulation) contained the same provision.
These provisions leave little room for misunderstanding. In so far as it concerns (i) liability for wrongfully approving or rejecting a prospectus, or (ii) liability of national financial supervisors in their capacity as NRAs / separately established NRAs, national limitations of liability are exceptionally permitted to go beyond the ‘sufficiently serious breach’ criterion of EU law.

We recall that if the Bank of Greece does not act in its capacity as a financial supervisor but in its capacity as an NRA, the liability condition is not a ‘manifest and serious error’, but ‘gross negligence or bad faith’. This condition was introduced by Article 72(4) of Law 4335/2015 transposing the BRRD into Greek law. This liability goes beyond a ‘sufficiently serious breach of EU law’ but seems, nevertheless, permissible by virtue of Article 3(12) BRRD.

3.4. Peter Paul Revisited?

(i) General
The well-known Peter Paul judgment of 2004 merits special attention in this context. In this judgment the CJEU (in response to a request for a preliminary ruling by the German Bundesgerichtshof or BGH) held that various financial supervision directives, including the version of the Deposit Guarantee Schemes Directive that applied at the time, were not intended to grant a right to compensation to individuals for inadequate and/or defective supervision by the competent national supervisory authority, save for the right to pay-out under the deposit guarantee scheme.

At the time, this judgment seemed to confirm the section 4(4) FinDAG, which precludes reliance of third-party stakeholders on regulatory requirements as a basis for claims against the German financial supervisor, was in line with EU law. However, this picture is currently shifting.

(ii) Nikolay Kantarev v. Balgarska Narodna Banka
The Bulgarian banking supervisor Balgarska Narodna Banka (BNB) had invoked the Peter Paul judgment in Nikolay Kantarev v. Balgarska Narodna Banka, but the CJEU indicated that this was a different situation:

‘It is clear from the judgment of 12 October 2004 (Peter Paul) that, where national law has established a deposit guarantee scheme, Directive 94/19 does not preclude national legislation which limits individuals from claiming damages for harm sustained by insufficient or deficient supervision on the part of the national authority supervising credit institutions or from pursuing State liability

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181 As the CJEU had previously assumed quite readily that the protective norm criterion (schutznorm) under Community law had been fulfilled, this finding attracted considerable criticism in the literature, See, in particular, M. Tison, Do Not Attack the Watchdog! Banking Supervisor’s Liability after Peter Paul 42 Working Paper in Financial Law Series 26-29 (Ghent: University of Ghent, 2005).
under EU law on the ground that those responsibilities of supervision are fulfilled in the general interest.

In the present case [however], the referring court wishes to know whether a Member State may be held liable for an incorrect transposition of Directive 94/19 and for an incorrect implementation of the deposit guarantee mechanism set out in that directive.\textsuperscript{182}

In the Peter Paul case, the account holders had already received in full the guaranteed amount to which they were entitled under the Deposit Guarantee Schemes Directive, which had not been transposed into German law in time. However, that amount did not cover all the loss they had suffered. The residual loss too was claimed on the basis of Member State liability, but the CJEU held that this was not recoverable. In Nikolay Kantarev v. Balgarska Narodna Banka, by contrast, the account holder did not receive the full guaranteed amount to which he was entitled under the Deposit Guarantee Schemes Directive as this had not been correctly transposed into Bulgarian law. As a result, he received the guaranteed amount much later than would have been the case under the directive and suffered late payment damage. In brief, the issue in the Peter Paul case was whether the account holders were entitled to compensation in excess of the guaranteed amount, whereas the Kantarev case was about compensation for late payment of the guaranteed amount. Strictly speaking, therefore, the judgments are not mutually contradictory.

(iii) The Sustainability of the Peter Paul Approach
Nonetheless, the question arises whether the approach adopted by the CJEU in the Peter Paul judgment is still sustainable in today’s context.\textsuperscript{183} On the basis of the Peter Paul judgment, it could be argued that EU law on financial supervision is not much inclined to award rights of compensation to private individuals, except in clear-cut circumstances of the kind that occurred in the Kantarev case. It can perhaps be argued that the primary aim of the EU financial supervision law that was central to the Peter Paul judgment was still to achieve a common market rather than provide investor protection, whereas investor protection is a key objective of the present (post-crisis)

\textsuperscript{182} CJEU 4 October 2018, ECLI:EU:2018:807, paras. 89-91. In this connection, see also the opinion of Advocate General Kokott of 7 June 2018, ECLI:EU:C:2018:412, paras. 77-84.

supervision legislation. This is fairly obvious in the case of the EU conduct-of-business rules and disclosure rules, such as those included in the Markets in Financial Instruments Directive (MiFID II), the Insurance Distribution Directive (IDD), the Undertakings for Collective Investments in Transferable Securities (UCITS) directives, the Alternative Investment Fund Managers Directive (AIFMD), the Prospectus Regulation, the Sustainable Finance Disclosure Regulation, the Crowdfunding Regulation and the forthcoming Markets in Crypto-Assets Regulation (MiCAR). There might perhaps be more hesitation in respect of the EU prudential rules, but these rules too are increasingly intended to provide explicit protection for the interests of individuals. We would refer in this connection to the Capital Requirements Directive (CRD IV), the prudential banking directive, recital 47 of which states that:

“[s]upervision of institutions on a consolidated basis aims to protect the interests of depositors and investors of institutions (..).”

In view of this, it is almost inevitable that the CJEU will have to conclude in future cases that EU law on financial supervision does indeed grant rights to individuals, with all the attendant consequences.

(iv) Austria, Greece & Germany

As mentioned previously, § 1 State Liability Act and § 1293 Austrian Civil Code, any financial loss without adequate compensation is generally considered as damage. Such a damage may be compensated in cash only (§ 1 State Liability Act). However, § 3 subs. 1 sent 2 of the Finanzmarktaufsichtsbehörden-Gesetz (FMABG) provides a specific definition limiting the liability of the Austrian Financial Market Authority to damages that have been directly caused to the legal entity subject to supervision. A provision with the same wording can be found in § 10 subs. 4 sent. 2 Financial Reporting Control Act for acts of the Austrian Financial Reporting Enforcement Panel and in § 16 subsection 1 sentence 1 Austrian Auditor Supervision Act for the Austrian Auditor Supervisory Authority.

In December 2021 the Austrian Constitutional Court actually dismissed several complaints claiming a violation of European law by § 3 subsection 1 sentence 2 FMABG and § 16 subsection 1, sentence 2 Austrian Auditor Supervision Act in a number of cases initiated by investors in the case of the Commerzialbank Mattersburg im Burgenland AG by stating that the European banking directives and

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the corresponding case law of the ECJ\textsuperscript{186} and the EFTA-Court\textsuperscript{187} do not impose the obligation of the Member States to establish a liability of supervisory authorities towards investors.\textsuperscript{188}

In Greece, in the 2014 landmark decision mentioned previously, the Greek Supreme Administrative Court introduced the criterion of a manifest and serious error on the part of the financial supervisors and ruled that the claimant is entitled only to \textit{reasonable} and not to full compensation. However, in the same decision and following the \textit{Peter Paul} example, the Court introduced an exception to the reasonable compensation and granted compensatory immunity to the financial supervisors in the cases in which the claimants are already protected by compensation/guarantee schemes for insurance policy holders, deposit holders and investors.\textsuperscript{189} It is understood that the compensatory immunity does not cover situations where the supervised undertakings themselves sue the financial authorities since such institutions do not have recourse to guarantee schemes, or where aggrieved third parties (e.g., investors) do not have access to guarantee schemes at all.

In Austria and Greece, the above-mentioned limitations of liability are framed as a limitation of the loss that is eligible for compensation, but in substance they largely follow the German approach in section 4(4) FinDAG, which precludes reliance of third-party stakeholders on regulatory requirements as a basis for claims against the German financial supervisor.

If the CJEU will conclude in future cases that EU law on financial supervision does indeed grant rights to individuals, the abovementioned limitations of liability in Austria, Greece and Germany may well be contrary to EU law.\textsuperscript{190}

(v) The ECB, the ESAs, the ESRB and the SRB
Even though both \textit{Peter Paul} and \textit{Kantarev} concerned national supervisory authorities, there seems to be no reason in principle why the analysis would be any different if the supervision is not in the hands of national supervisors, but instead in the hands of the ECB, an ESA or the ESRB.


\textsuperscript{187} EFTA-Court, 25 February 2021, E-5/20 (\textit{SMA SA and Société Mutuelle d’Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstein}).


\textsuperscript{189} GSAC 3783/2014 (\textit{Aspis Pronoia} case).

\textsuperscript{190} Same conclusion regarding § 4(4) FinDAG in Germany, Jonas Schürger, \textit{Unionsrechtskonformität nationaler Beschränkungen der Staatshaftung im Bank- und Kapitalmarktrecht} 10 Zeitschrift für Bank- und Kapitalmarktrecht 601-609, at 604-606 (2021). Cf. also Art. 13(3) no. 2 of the Latvian State Liability Law and the recent corresponding judgment of the ECJ (ECJ, Case C-735/19 – \textit{Euromin Holdings}). Latvian law in principle allowed national courts to reduce the amount of state liability by 50 % if it exceeds a certain amount. The ECJ ruled that such a rule is not compatible with EU law. The case concerned takeover law. See extensively, Jonas Schürger, \textit{Unionsrechtskonformität nationaler Beschränkungen der Staatshaftung im Bank- und Kapitalmarktrecht} 10 Zeitschrift für Bank- und Kapitalmarktrecht 601-609, at 607-608 (2021).
It is submitted that this analysis should also be extended to the resolution activities of the SRB. The CJEU has not yet ruled whether the rules guiding the SRB’s activities with regard to the resolvability of a bank and eventually its resolution confer rights on individuals.\(^{191}\) Having said that, the resolution framework clearly also intends to protect individuals’ interests. According to Article 18(5) SRM Regulation, which sets out the prerequisites for the fulfilment of the ‘public interest’ (resolution) criterion (and which makes reference to Article 14 SRM Regulation), when acting under the resolution procedure the SRB must, apart from ensuring the continuity of critical functions, avoiding significant adverse effects on financial stability and protecting public funds by minimising reliance on extraordinary public financial support, also protect depositors, investors, as well as client funds and assets.\(^{192}\) Even though the provisions stipulating the objectives of and the conditions for resolution (under Articles 14 and 18 SRM Regulation) are primarily designed to protect the public interest, they also confer rights on individuals, namely depositors, investors and clients of the institution under resolution.\(^{193}\)

### 3.5. No Causation Criterion That Goes beyond the Requirement under EU Law of a Direct Causal Link

As explained previously, it follows from the text of the Dutch limitation of liability in section 1:25d of the Wft that the AFM and DNB can be held liable only if the loss or damage is *due to a significant extent* to their intent or gross fault. By acknowledging in this way that fault can have various causes, the legislature has clarified that the actions of the AFM and DNB which constitute intent or gross fault have been responsible to *a major rather than a minor extent* for causing the loss or damage.\(^{194}\) Similarly, in France, the *main* cause of the damage suffered should be the negligence of the supervisors.

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\(^{191}\) See also A.-K. Kaufhold, *Section D in Brussels Commentary on the Banking Union*, II 1 (a) (München: C.H. Beck, Londen: Hart Publishing, Oxford: Oxford University Press, Baden-Baden: Nomos 2021), with reference to the decision in *Case Paul and Others v BRD*, ECR I-9460 (para. 40), where the CJEU has merely stated, that “it does not necessarily follow either from the existence of such [supervisory] obligations or from the fact that the objectives pursued by those directives [i.e., Council Directive 77/780/EEC, Council Directive 89/299/EEC and Council Directive 89/646/EEC] also include the protection of depositors that those directives seek to confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities.”

\(^{192}\) SRMR, Article 14(2), first sub-paragraph and recital (58), third sentence. The same objectives are laid down in Article 31 BRRD.


\(^{194}\) *Parliamentary Papers II* 2011/12, 33058, 4, 4. See also in this connection, S. Sahtie, *Wettelijke aansprakelijkheidsbepering voor DNB en AFM* 10 Maandblad voor Vermogensrecht 271-278, at. 276 (2012).
These criteria appear at first sight to be more restrictive than the requirement under EU law of a direct causal link. If this is correct, it would mean that the liability of the Dutch and the French financial supervisors for a breach of EU law could not be assessed by reference to the causation requirement under section 1:25d Wft and French case law.\textsuperscript{195}

IV. Towards Harmonisation of Liability within the European Banking Union

1. General

The final aspect of this article is whether the conditions concerning the liability of financial supervisors and resolution authorities should be harmonised within the framework of the European Banking Union (EBU). The ECB and the SRB collaborate closely with the national competent supervisors (NCAs) and the national resolution authorities (NRAs) within the framework of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), respectively, so liability questions will often be intertwined. Yet, as has been shown in section II above, the applicable liability standards often differ, and different courts will have jurisdiction. Before we move on to the question of harmonisation of liability within the SSM and the SRM first a few words on the liability standard that applies to the ECB and the SRB.

2. Liability Standard Applying to the ECB and the SRB

2.1. The ECB

The standard for the non-contractual liability of the ECB is the same as for the liability of the EU and its Member States in general. This is set out in Art. 340 TFEU.\textsuperscript{196} The EU courts have jurisdiction in liability claims against the ECB (Art. 268 TFEU). The General Court is competent for such claims in first instance (Art. 256 TFEU), whereas the European Court of Justice (ECJ) is competent for appeals against the rulings of the General Court.\textsuperscript{197} Proceedings in matters arising from non-contractual liability are barred after a period of five years from the occurrence of the event giving rise thereto (Art. 46 of the Statute of the Court of Justice).\textsuperscript{198}

The provision essentially states that the ECB is liable to make good any damage caused by them or by their servants in the performance of their duties, ‘in accordance

\textsuperscript{195} In D. Busch and S. Keunen, \textit{Wettelijke aansprakelijkheidsbeperking AFM en DNB strijdig met Unierecht?}, Ars Aequi, 59-64 (2019), at 63 I was still of the opinion that the qualified causation criterion set out in Art. 1:25d Wft is more lenient than the requirement under EU Member State liability law of a ‘direct causal link’. I now retract this.

\textsuperscript{196} See also recital (61) SSM Regulation.


\textsuperscript{198} See also Almhofer (2021), \textit{op. cit.}, 221-234, para. 14.08.
with the general principles common to the laws of the Member States’. According to long standing case-law, this standard means that the ECB can be successfully held liable for damages if the following cumulative conditions are met: (i) a sufficiently serious breach of EU law (i.e., qualified unlawfulness); (ii) the rule of EU law infringed must be intended to confer rights on individuals; (iii) the existence of a direct causal link between the breach of the obligation and the damage sustained by the claimant; and finally, (iv) the existence of actual and certain damage. 199

An action for damages can in principle be brought before the CJEU independently from an action for annulment (Article 263 TFEU) or an action for failure to act (Article 265 TFEU). 200

2.2. The SRB
Like in the case of claims against the ECB, the EU courts have jurisdiction in liability claims against the SRB. Proceedings in matters arising from non-contractual liability are similarly barred after a period of five years from the occurrence of the event giving rise thereto (Art. 87(5) SRM Regulation). 201

The standard for the non-contractual liability of the SRM is set out in Art. 87(3) and (4) SRM Regulation. It is similar to the standard that applies to the ECB and the ESAs, but there are some differences as well.

First, the phrasing is more elaborate in that it highlights that the SRB is liable to make good any damage caused by it or by its servants in the performance of their duties, ‘in particular their resolution functions, including acts and omissions in support of foreign resolution proceedings’.

Second, the standard of liability appears to be different at first sight in that the SRB must in accordance with the ‘general principles common to the laws concerning the liability of public authorities of the Member States’, instead of in accordance with the ‘general principles common to the laws of the Member States’. In the Member States there is a growing tendency of granting financial supervisors some form of limitation of liability. 202 Whether this implies that the liability standard for the SRB is stricter than the standard that applies to the ECB, remains to be seen. Strictly speaking, ‘the laws concerning the liability of public authorities’ is a broader category than the laws concerning the liability of national financial supervisors. All in all, it cannot be excluded that the CJEU will rule that the liability standard for the SRB is, all in all, identical to the liability standard that applies to the ECB. It is submitted that that would in any event be the preferable approach. We see no reason in principle why the liability standard applying to the SRB should be any different from the liability

201 See also Almhofer (2021), op. cit., 221-234, para. 14.06 and 14.08.
standard that applies to the ECB. In the remainder of this article, we will assume that
the liability standard that applies to the SRB is the same as that applying to the ECB.

Art. 87(4) SRM Regulation features an in our view rather puzzling, provision on
the liability of the SRB towards the NRAs. Based on this provision, it seems as if the
SRB should always compensate an NRA that is ordered to pay damages as long as
the NRA concerned has not acted intentionally or with manifest and serious error of
judgement. Whether the SRB itself somehow committed a sufficiently serious breach
of EU law is apparently immaterial. This will be discussed further in IV 4.3, below.

3. **SSM**

3.1. **Kantarev and L-Bank**

As discussed, according to the *Kantarev* judgment, Member States are free to use a
concept of fault in their national conditions for the liability of national financial super-
visors, but they must ensure that it does not go beyond the concept of a sufficiently
serious breach of EU law. As discussed, previous case law of the CJEU on the
liability of other national government bodies than financial supervisors for breaches
of EU law suggests that not only a limitation of liability to intent (as was the case in
*Kantarev*) or bad faith, but also limitations of liability to concepts such as gross fault
or gross negligence will go beyond the requirement of a sufficiently serious breach.

However, the *Kantarev* case also makes it clear that EU law does permit a situation
in which a financial supervisor (or other government body), on the basis of the
applicable national rules on liability, is liable for a breach of EU law under less
restrictive conditions than apply under the Community rules.

If the above reading of the *Kantarev* case is correct, it will have a harmonising
effect on the liability standard that applies to national financial supervisors that act
in breach of EU law (including inaction), at least up to a certain extent. In the context
of the SSM this would be particularly welcome, as this would level the playing field
a little further (i) between banks supervised at ECB level and banks supervised at
national level, and (ii) between banks supervised at national level depending on their
home Member State.

At the same time, as set out above, the *Kantarev* judgment explicitly leaves room
for liability standards that are more lenient than the EU standard of a sufficiently
serious breach. This implies that there can still be an unlevel playing field (i) between
banks directly supervised at ECB level and banks supervised at national level (because
national liability standards are permitted to be more lenient than the EU standard),
and (ii) between banks supervised at national level depending on their home Member

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para. 127.

204 See section III 3.2, above.

para. 121. See also in this connection: CJEU, 25 November 2010, ECLI:EU:C:2010:717 (*Fuß*), para. 66
and the case law cited there.
State (as the liability standard in some jurisdictions may well be more lenient than the EU standard).

Finally, and although this is far from clear, it could be argued that the emphasis in the *L-Bank* judgment on the singleness of the SSM also implies a single liability standard. This could be taken to mean that NCAs should be held liable according to the same liability standard as the ECB itself.

3.2. Towards a Uniform Liability Standard for the ECB and the NCAs

In any event, in the context of the SSM it would in our view be preferable to adopt a uniform liability standard for the ECB and the NCAs. It is submitted that there are roughly two options. The first is to adopt the standard of a sufficiently serious breach for the NCAs as well. The second option would be to adopt a limitation of liability that goes beyond a sufficiently serious breach, e.g., intent / bad faith and gross fault / gross negligence for both the ECB and the NCAs, in view of the growing tendency in the Member States (and also in jurisdictions outside of the EU) to limit the liability of financial supervisors in one way or another. The adoption of the second option would in any event correspond to the position of the ECB, which, in its opinion of 27 November 2012 on the draft SSM Regulation, pleaded for the limitation of its liability to wilful intent and gross negligence.

For the sake of legal certainty, it would in our view be preferable to include the uniform liability standard in the SSM Regulation. This would eventually not be possible if one would opt for the second option, as the adoption of this option may well be viewed as a departure from the liability standard of Art. 340 TFEU as further specified by the CJEU.

It is conceivable that one or more NCAs and the ECB are somehow liable for the ‘same damage’. In our view it would be preferable to adopt either of the following approaches.

The first is to adopt the approach that if one or more NCAs and the ECB are somehow liable for the same damage, the NCAs and the ECB are jointly and severally liable. In this option, the claimant may thus recover the full amount from the ECB and each of the NCAs involved. Of course, there should be apportionment between the ECB and the NCAs in this approach, but this should be a purely internal matter, i.e., a matter between the ECB and the NCAs concerned. As a general rule, a joint and several debtor who has performed more than that debtor’s share may claim the excess from the other solidary debtor(s). These internal matters should in our view preferably be made explicit in an amended version of the SSM Regulation.

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208 Compare section II 8.1 of this article.
The second option is to adopt the approach that if one or more NCAs and the ECB are somehow liable for the same damage, the court will at least have the option to adopt a proportionate approach, i.e., that the ECB should pay, e.g., 1/3 of the damage, and the NRAS involved 2/3 of the damage.  

For the avoidance of doubt, it is recalled that a liability of the ECB and the NCAs for the same damage (which we assumed in both above options) should in our view not necessarily be the general rule.

First, if the ECB subjects an NCA to binding instructions with no (or hardly any) discretion on the part of the NCA, and the NCA complies with these instructions, which causes damage to third parties, the ECB rather than the NCA should be liable.

Second, if the ECB subjects an NCA to binding instructions with a certain (or even broad) discretion on the part of the NCA, and the NCA causes damage to third parties by using this discretion in a wrongful way, the NCA rather than the ECB should be liable.

Third, if the ECB subjects an NCA to binding instructions with no (or hardly any) discretion on the part of the NCA, and the NCA does not comply with these instructions, which causes damage to third parties, the NCA rather than the ECB should be liable.

In line with all of the above, we would be in favour of including a provision in the SSM Regulation to the effect that the CJEU has exclusive jurisdiction in relation to the liability of both the ECB and the NCAs. The reason for this is that the ECB and the NCAs must collaborate closely within the framework of the SSM; hence, liability questions will often be intertwined. It therefore makes sense that the same European court should decide on both matters. The alternative is for the CJEU to assess the liability of the ECB, and a multitude of national courts that of the NCAs. The result would be a true litigation nightmare that in the worst case could lead to national courts exonerating their NCAs and in fact finding the ECB as guilty, while the CJEU passes the blame on to the NCAs.

4. SRM

4.1. Kantarev and Art. 3(12) BRRD

The situation within the SRM appears to be different. The Kantarev judgment does not seem to apply in so far as it states that national concepts of fault may not go beyond the ‘sufficiently serious breach’ criterion of EU law. After all, according to Art. 3(12) BRRD, the liability standard which applies to NRAs a purely a national matter:

\[^{209}\] Compare section II 8.2 of this article.

\[^{210}\] Cf. Case C-175/84, Krohn & Co Import Export (Gmbh & Co KG) v Commission, 1986, confirmed in subsequent decisions.

‘(…) Member States may limit the liability of the resolution authority, the competent authority and their respective staff in accordance with national law for acts and omissions in the course of discharging their functions under this Directive.’

This leaves little room for misunderstanding. In so far as it concerns the liability of NRAs, limitations of liability may go beyond the ‘sufficiently serious breach’ criterion of EU law. Obviously, the Kantarev judgment still applies in that it explicitly leaves room for liability standards that are more lenient than the EU standard of a sufficiently serious breach.

The above implies that there can (and often will) be an unlevel playing field (i) between banks resolved at SRB level and those resolved at national level (as national liability law may be more or less lenient than a sufficiently serious breach required for SRB liability), and (ii) between banks resolved at national level depending on their home Member State (as some national liability laws may be more or less generous than a sufficiently serious breach).

4.2. Towards a Uniform Liability Standard for the SRB and the NRAs

In any event, in the context of the SRM, it would in our view be better to adopt a uniform liability standard for the SRB and the NRAs. It is submitted that there are roughly two options. The first is to adopt the standard of a sufficiently serious breach for the NRAs as well. The second option would be to adopt a limitation of liability that goes beyond a sufficiently serious breach, e.g., intent / bad faith and gross fault / gross negligence for both the SRB and the NRAs, in view of the growing tendency in the Member States (and also in jurisdictions outside of the EU) to limit the liability of resolution authorities in one way or another.\(^{212}\)

Whichever of the two options set out above would be chosen, it would in any event make sense to adopt the same liability standard in the context of both the SSM and the SRM. In line with this, we would be in favour of including a provision in the SRM Regulation (as well) to the effect that the CJEU has exclusive jurisdiction in relation to the liability of both the SRB and the NRAs (see above).

4.3. Liability of the SRB towards the NRAs

As mentioned above, Art. 87(4) SRM Regulation features the following, in our view rather puzzling, provision on the liability of the SRB towards the NRAs:

‘The Board shall compensate a national resolution authority for the damages which it has been ordered to pay by a national court, or which it has, in agreement with the Board, undertaken to pay pursuant to an amicable settlement,'
which are the consequences of an act or omission committed by that national resolution authority in the course of any resolution under this Regulation of entities and groups referred to in Article 7(2), and of entities and groups referred to in Article 7(4)(b) and (5) where the conditions for the application of those paragraphs are met or pursuant to the second subparagraph of Article 7(3). That obligation shall not apply where that act or omission constituted an infringement of this Regulation, of another provision of Union law, of a decision of the Board, of the Council, or of the Commission, committed intentionally or with manifest and serious error of judgement.’

It seems as if the SRB should always compensate an NRA that is ordered to pay damages as long as the NRA concerned has not acted intentionally or with manifest and serious error of judgement. Whether the SRB itself somehow committed a sufficiently serious breach of EU law is apparently immaterial. We doubt whether this is indeed the intended result.

In any event (and in line with our proposals with regard to the ECB and the NCAs), in our view it would be preferable to adopt either of the following approaches. The first is to adopt the approach that if one or more NRAs and the SRB are somehow liable for the same damage, the NRAs and the SRB are jointly and severally liable. In this option, the claimant may thus recover the full amount from the SRB and each of the NRAs involved. Of course, there should be apportionment between the SRB and the NRAs in this approach, but this should be a purely internal matter, i.e., a matter between the SRB and the NRAs concerned. As a general rule, a joint and several debtor who has performed more than that debtor’s share may claim the excess from the other solidary debtor(s). These internal matters should in our view preferably be made explicit in an amended version of Art. 87(4) of the SRM Regulation.

The second option is to adopt the approach that if one or more NRAs and the SRB are somehow liable for the same damage, the court will at least have the option to adopt a proportionate approach, i.e., that the SRB should pay, e.g., 1/3 of the damage, and the NRAs involved 2/3 thereof.

For the avoidance of doubt, it is recalled that a liability of the SRB and the NRAs for the same damage (which we assumed in both above options) should in our view not necessarily be the general rule.

First, if the SRB subjects an NRA to binding instructions with no (or hardly any) discretion on the part of the NRA, and the NRA complies with these instructions, which causes damage to third parties, the SRB rather than the NRA should be liable.

Second, if the SRB subjects an NRA to binding instructions with a certain (or even broad) discretion on the part of the NRA, and the NRA causes damage to third parties

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213 Compare section III 8.1, above.
214 Compare section III 8.2, above.
by using this discretion in a wrongful way, the NRA rather than the SRB should be liable.

Third, if the SRB subjects an NRA to binding instructions with no (or hardly any) discretion on the part of the NRA, and the NRA does not comply with these instructions, which causes damage to third parties, the NRA rather than the SRB should be liable.

V. Concluding Remarks

It follows from the above that the approach taken towards liability of financial supervisors and resolution authorities is not straightforward. There is constant tension between those in favour and those against granting financial supervisors and resolution authorities some form of protection against liability claims. At first sight, those advocating a limitation of liability seem to be gaining the upper hand, since there is a growing tendency to limit the liability of financial supervisors and resolution authorities in one way or another. The extent to which financial supervisors and resolution authorities are protected against liability claims, and the exact shape that this takes, is, however, not uniform across the jurisdictions studied. Concurrently, a counter-movement is emerging, as limitations of liability are by no means undisputed and are under attack on various grounds.

The large variety of approaches to liability of financial supervisors and resolution authorities is especially a concern within the European Banking Union. The ECB and the SRB collaborate closely with the NCAs and the NRAs within the framework of the SSM and the SRM, respectively, so liability questions will often be intertwined. Yet, the applicable liability standards often differ, and different courts will have jurisdiction. In our view it would be preferable to adopt a uniform liability standard for the ECB/SRB and the NCAs/NRAs. In line with this, we would be in favour of including a provision in the SSM Regulation/SRM Regulation to the effect that the CJEU has exclusive jurisdiction in relation to the liability of both the ECB/SRB and the NCAs/NRAs.