

FACULTY OF LAW  
Stockholm University

---

**Rules and Discretion in CRD IV,  
BRRD and MiFID 2  
- a Challenge to Competent Authorities?**

*Klaus Aarnio*

---

Thesis in *Financial Markets Law*, 30 HE credits

Examiner:

Stockholm, *Autumn* term 2015



Stockholm  
University

**Abstract**

This thesis studies the different types of rules in the Capital Requirements Directive (CRD IV), the Bank Recovery and Resolution Directive (BRRD) and the Markets in Financial Instruments Directive 2 2014/65/EU (MiFID 2) and how they affect competent authorities' possibilities to fulfil their duties. The three directives have a common regulatory structure consisting of a combination of minimum requirements, discretionary assessment and explicit rules. Discretion and explicitness are the two themes present throughout the regulatory framework.

The rules adopted have an impact on to what extent objectives such as financial stability and harmonisation on the Union level can be met. There is a conflict between what the framework tries to achieve and the fact that financial markets in the Union still remain largely separate. It is of great importance for competent authorities to be able to react to the conditions they actually face, but the complexity of the regulatory framework may affect their ability to do so. Problems arising in the implementation of explicit rules into national law may in turn compromise the Union dimension.

Continuous review of the regimes adopted ought to be emphasised, since the full consequences of complex regulatory schemes are impossible to predict beforehand. Furthermore, markets are constantly evolving and this development should be closely followed during the review process.

## Contents

1. Introduction	4
1.1 On the method used	5
2. The Directives	8
2.1 CRD IV	8
2.2. BRRD	9
2.3 MiFID 2	9
3. The Rules	11
3.1. Results to be achieved	11
3.1.1 The Union Dimension	11
3.1.2 Specific Results within Entities and the Financial System	13
3.2 Basic Requirements and Discretionary Assessment	15
3.3 Explicit Rules	20
4. Rules and Discretion	26
4.1 Rules and Discretion in CRD IV	26
4.2 Rules and Discretion in BRRD	29
4.3 Rules and Discretion in MiFID 2	30
5. Problems in Implementation	32
5.1 Problems in Implementation - CRD IV	32
5.2 Problems in Implementation – BRRD	34
5.3 Problems in Implementation - MiFID 2	36
6. Technical Standards	38
6.1 Technical Standards to CRD IV	38
6.2 Technical Standards to BRRD	40
6.3 Technical Standards to MiFID 2	40
7. Guidelines	42
6.1 Guidelines to CRD IV	42
6.2 Guidelines to BRRD	43
6.3 Guidelines to MiFID 2	44
8. Conclusions on Regulatory Structure	45
8.1 The Regulatory Structure of CRD IV	45
8.2 The Regulatory Structure of BRRD	46
8.3 The Regulatory Structure of MiFID 2	47
9. Final Conclusions	49
10. Bibliography	51

## 1. Introduction

Article 288 of the Treaty on the Functioning of the European Union defines a directive as "binding as to the result to be achieved", but leaves it to the national authorities to decide how the result required by the directive shall be achieved. In areas such as financial services law, however, directives tend to include explicit rules, minimum requirements and establishment of a mandate for the Commission or ESMA to create thresholds or technical standards, thus limiting the room for manoeuvre that national authorities have. This may further complicate the task for the authorities to take implementing measures, forcing them to adhere to specific requirements while also taking into account the objectives of the directive in question.

The purpose of this thesis is to identify and analyse the different types of rules in the Capital Requirements Directive IV 2013/36/EU (CRDIV), the Bank Recovery and Resolution Directive 2014/59/EU (BRRD) and the Markets in Financial Instruments Directive 2 2014/65/EU (MiFID 2) and to assess their impact on the implementation process from the perspective of the competent authority.

Although the CRD IV, BRRD and MiFID II are all part of the same regulatory package introduced by the EU after the 2008 financial crisis, they concern different areas and are therefore not directly comparable with each other. All three do, however, share a common regulatory structure which can be considered to consist of three elements: general result-oriented objectives, basic requirements combined with discretionary assessment, and explicit rules. Furthermore, there are two recurring themes that can be identified in this structure: discretion and explicitness. Discretionary rules may be seen as being more in the nature of a directive, since they do not – at least not without the addition of limitations which may have an effectively narrowing effect as regards national flexibility – force Member States to introduce any specific solution. Explicit rules, on the other hand, bind Member States to specific means. Such rules dictate, albeit only after being implemented into national law, how competent authorities shall act.

CRD IV, BRRD and MiFID 2 provide for general objectives and requirements, minimum requirements and detailed rules intended to form new harmonised regimes for the whole Union. Financial markets in the Member States still remain largely separate, and so the conditions faced by the competent authorities in different Member States also differ from each other. <sup>1</sup> Also, these markets and their conditions are of course continuously evolving. For this reason, discretion is a crucial tool in assessing and resolving challenges in the Member States as well as in the Union as a whole, as well as in achieving objectives such as financial stability. Whether competent authorities can achieve these things depends on the extent to which they are able to act freely in cases that require measures other than the ones applied universally in the whole Union. Against this background, any combination of discretionary and explicit rules has to be seen as a balancing exercise in which explicit rules should not overrun the competent authority's chances of reacting to market conditions.

### 1.1. On the method used

The focus in this thesis lies upon the competent authorities chances of fulfilling their duties in the implementation of CRDIV, BRRD and MiFID 2. Consequently, aspects related to implementation through national rules in Member States are not - at least not as such - subject to any further study here. Rather, such issues are to be discussed only in cases where they are directly relevant from the competent authority's perspective as regards the fulfilment of their tasks related to the three directives. The subject of discussion is the regulatory nature and technique of the directives and what they as such mean for competent authorities. From this perspective, the national legislative process is relevant for the study here regarding provisions in the directives as opposed to additional ones introduced by Member States.

The analysis in this thesis is based on the regulatory framework and on the question of how much room for manoeuvre these grant competent authorities. This thesis does not

---

<sup>1</sup> European Union *One market without borders*, "[http://europa.eu/pol/singl/index\\_en.htm](http://europa.eu/pol/singl/index_en.htm)", read 2015-10-25.

aim at analysing or evaluating the practical consequences of the framework, but rather discusses the functioning of the framework in regulatory terms from the perspective of the competent authorities with regard to the objectives and division of responsibility that the directives provide for.

The first step in assessing the impact the rules may have on the implementation process is to identify the different types of rules. CRD IV, BRRD and MiFID 2 all being directives, the basic assumption here is discretion - that is, that the rules are "binding as to the results but not to the means", Art. 288 of the Treaty. Other rules differ from this in one way or another, either through simply posing more unspecific general result-oriented requirements, such as a requirement for competent authorities to take into account the union dimension, or through providing for explicit requirements instead.

The different types of rules are to be analysed with the help of requirements related to central issues in the directives. Here, the basic themes of the CRDIV, BRRD and MiFID 2 are the decisive factor - the analysis in this thesis is to be based on rules that represent these themes. The analysis focuses on the levels of explicitness and discretion found in the directives as well as on possible challenges these rules pose to competent authorities.

Apart from identifying and analysing the different types of rules and examples of these, this thesis also aims to study the balance between discretionary and explicit requirements. The purpose is to answer the question whether these - again from the perspective of the competent authority - may work in harmony or whether they may cause problems in the implementation process. This question is to be approached with the help of comparative assessment between explicit and discretionary rules found in the directives and through discussing the balance between them. Furthermore, the implementation process as regards explicit rules and the challenges in it shall also be discussed in order to avoid a simplistic analysis based purely on what the wording in the directive provides for - or appears to provide for. In this, comments from Swedish authorities are used as a tool to highlight cases of unclarity regarding the wording and content of the directives and the problems these may cause.

Technical standards being comprehensive by themselves, they are discussed separately as a special case of explicit rulemaking. Apart from the standards themselves, reports from ESMA are also used in this analysis.

As mentioned above, the directives deal with issues related to different areas of financial services regulation. This also has an impact on the task at hand, since it renders a thorough all-in-one analysis a somewhat lost cause - both impractical and most likely a compromise in substance. The question here is not one of actual content, in which the directives are, for the most part, not directly comparable, but a question of regulatory technique. For this reason, all three directives are to be assessed with the help of the aforementioned method and only later, after being detached from their substantial context, discussed together under the common theme of regulatory technique in the area of Union financial services regulation. Finally, the aim is to, on a general note, point out what challenges the kind of balancing apparent in the directives poses to competent authorities in the Member States.

## 2. The Directives

### 2.1 CRD IV

CRD IV mainly deals with capital requirements, largely following the rules and standards included in the global Basel II and Basel III frameworks.<sup>2</sup> The directive lays down rules concerning four aspects: access to the activity of credit institutions and investment firms, supervisory powers and tools, the prudential supervision process and publication requirements, Art. 1 CRDIV.

The background to the CRD IV is in the previous heavily amended provisions in the Directives 2006/48/EC and 2006/49/EC, many of which were applicable to both credit institutions and investment firms, rec. 1 CRD IV. The CRD IV combines these two elements while also complementing them with new requirements. Prudential requirements of the type found in the earlier directives are now provided for in the CRR, which together with the CRD IV forms a package, the core objective of which is the coordination of provisions, governance and the supervisory framework, rec. 2. Other requirements based on supervisory assessment and discretion are also a basic element in the directive, rec. 3.

CRD IV provides for amounts of initial capital for investment firms as well as a common framework for the monitoring of risks carried by such institutions, rec. 4 and Art. 12. This is an addition to what was included in the original MiFID, which only provided for coordination of rules. MiFID established a common market for financial instruments, but CRD IV is supposed to go further, to finally achieve such a market, rec.5. In order to achieve this, the directive stands on two legs: one in the field of regulatory and supervisory cooperation and convergence and the other on rules regarding the operation of the institutions, rec. 6. This includes a higher degree of transparency and information sharing, rec. 13. The principle of mutual recognition is to be safeguarded through assuring that it really is applied, that there are no obstacles for carrying out activities in several Member States, rec. 23.

---

<sup>2</sup> European Commission *MEMO: Capital Requirements - CRD IV/CRR – Frequently Asked Questions* "http://europa.eu/rapid/press-release\_MEMO-13-690\_en.htm", read 2015-10-25.

## 2.2 BRRD

BRRD deals with the recovery and resolution of financial institutions and financial holding companies as well as their branches, Art. 1 BRRD.

The BRRD attempts to solve issues regarding unsound or failing credit institutions and investment firms. The ultimate objective is to avoid insolvency and, in case of insolvency, to minimise negative systemic effects, rec. 1. This involves securing access to funding "under equivalent conditions for all credit institutions that are otherwise solvent", rec. 2.

Authorities should have tools to intervene early on, thus minimising the negative impact on the financial system and the economy, rec 5. The tools are to be applied in case the institution is either "failing or likely to fail", rec. 6. The question whether a failure affects the financial system as a whole is of importance in the assessment regarding actions to be taken - this is where discretionary assessment becomes relevant: there is naturally no need to act against contagion effects in other Member States if there are none, rec. 7.

Resolution action is to be taken only when it is necessitated by public interest, rec. 13. A core principle in the directive is that shareholders bear losses first and creditors thereafter, rec. 5.

## 2.3 MiFID 2

MiFID 2, which is a recast of the earlier Markets in Financial Instruments Directive 2004/39/EC partly replaced by the Markets in Financial Instruments Regulation 600/2014 (MiFIR), regulates the authorisation and operating conditions for investment firms, the provision of investment services or activities through branches, the authorisation and operation of regulated markets and of data reporting services providers and the supervision, cooperation and enforcement by competent authorities, Art. 2 MiFID 2.

The MiFID 2 aims to cover the full range of investor-oriented activities and to offer investors a high level of protection through harmonisation, rec. 3. Moreover, the directive is also supposed to "increase transparency, protect investors better, reinforce confidence, address unregulated areas, and ensure that supervisors are granted adequate powers to fulfil their tasks", rec. 4. Weaknesses in corporate governance arrangements are addressed through more detailed principles and minimum standards than those in the original MiFID, rec. 5. The form of directive has been chosen specifically to make it possible to "adjust the rules to any existing specificities of the particular market and legal system in each Member State", rec. 7.

The directive is intended to provide for a regime which includes all financial instruments irrespective of trading methods, the objective being to ensure high quality execution and to "uphold the integrity and overall efficiency of the financial system", also taking into account the emergence of new trading systems and thus avoiding regulatory loopholes that can be exploited by such systems, rec. 13. Commodity derivatives and other instruments that "are constituted and traded in such a manner as to give rise to regulatory issues comparable to traditional financial instruments", rec. 8, are also included in the directive. In order to avoid loopholes relating to commodity derivatives traded on an OTF and physically settled, a delegated act regarding the expression "must be physically settled" is to be provided for, rec. 10.

### 3. The Rules

#### 3.1 Results to be achieved

##### 3.1.1 The union dimension

A core objective and factor to relate to in the CRD IV, BRRD as well as in MiFID 2 is financial stability at the Union level.

The general requirement in Article 7 of the CRD IV for competent authorities to take into account the financial stability of the whole Union when exercising their duties is to its nature a standard component in union legislation, intended to ensure that measures do not interfere with the functioning of or with competition on the common market. This is a key factor to be taken into account, since a decision made by a competent authority in one Member State may promote financial stability in that Member State, but do so at the expense of other Member States and the whole of the Union.

Although financial stability may be seen as an end result, it is nevertheless unspecified, as is underlined in recital 50. There is no explicit requirement to achieve any specific result, but any decision a competent authority takes or any measure it takes may of course be questioned on the basis of its effects on the particular aspect of financial stability in the whole union. Although the requirement, typical of a directive, gives the competent authority room for discretion and the freedom to assess the potential effects based on its own judgement and the information available, in practice, this binds the authority to the objective to the extent that it has to show that the union dimension has been duly taken into account.

The union dimension is present throughout the directive. The union aspect is included on a general level in Article 155, which states that competent authorities should consider the potential impact of their decisions on the stability of the financial system in all other Member States. According to Article 156 on liquidity supervision, measures resulting from the implementation of host Member States' monetary policies should not be discriminatory or restrictive as regards credit institutions authorised in other

Member States. Also in a more unspecific fashion, Article 157 requires that competent authorities in different Member States collaborate closely and supply each other with relevant information. Article 158(2) lays down that the authorities shall do "everything within their power to reach a joint decision on the designation of a branch as being significant". While this is based on assessment, the process itself is regulated in further detail in the following paragraphs as well as in Article 159 on on-the-spot checks.

In more specific terms, the union dimension also comes through in Art. 153, which lays down rules for the cooperation between home and host Member States as regards measures to be taken in relation to activities carried out in the host Member State. Firstly, a requirement for host Member States to require credit institutions to remedy their non-compliance is laid down in paragraph 1 and secondly, a requirement to inform the home Member State in case of the credit institutions failure to take necessary steps is laid down in paragraph 2. The measures taken should then be "appropriate", paragraph 3, but are not specified any further. The same also applies for paragraph 4, which requires the competent authorities of the home Member State to take measures to prevent or to punish further breaches.

Article 75(2) requires Member States to ensure that bodies implementing complaint and redress procedures actively cooperate with their counterparts in other Member States.

In the BRRD, the union dimension has a slightly different, more concrete function as group resolution plans are to be drawn up in cooperation with the resolution authorities concerned, rec. 18 and 34, Art. 12 and 17(7). Consequently, the requirement is not applied within one competent authority but - in cases where this is relevant because of cross-border activities that the group is involved in - by several authorities. As the core objective here is to make the resolution of the entities concerned possible, the Union dimension is bound to be present in the decision making instead of just being an aspect to be taken into account - regarding resolution plans, there is no real option to the Union perspective in such a process.

### 3.1.2 Specific results within entities and the financial system

Some rules in the CRD IV, BRRD and MiFID 2 refer to specific results within the financial system or its entities. One objective in CRD IV is to ensure effective oversight by the management body of the institution, promoting a sound risk culture and enabling competent authorities to monitor the adequacy of internal governance arrangements, rec. 54. This is to be achieved through introducing principles and standards which are to be applied taking into account the nature, scale and complexity of the institution's activities, see same recital.

The management of the credit institution is one of the main themes in CRDIV. Rules regarding management arrangements and the functioning thereof are laid down in Articles 16, 23, 26, 63, 76, 86, 88, 91, 92, 93, 95, 121. These rules concern the management body and members thereof, the assessment of proposed acquisitions and acquirers, qualifying holdings possessed by members or shareholders, treatment of risks, governance arrangements as well as remuneration policies.

Article 91 lays out basic requirements for management bodies and members thereof. These requirements are in no way specific but are instead based on the competent authority's assessment of whether the management body reflects "an adequately broad range of experiences and whether its members possess "sufficiently" good repute and "sufficient" knowledge, skills and experience, para 1, see also para 10 for the same diversity requirement. Similarly, paragraph 7 calls for "adequate" collective knowledge, skills and experience. Paragraph 8 further requires members of the management body to act with honesty, integrity and independence. The assessment to be done is based on what is required by the activities that the institution is involved in.

CRD IV lays out that "stable, smooth and progressive" transition to new liquidity and stable funding requirements should be ensured through actions taken by the competent authority when needed. Once again, there is no explicit requirement to take any specific measures, but recital 102 nevertheless provides for a list of measures that the competent authority should consider, namely: administrative penalties, administrative measures, including prudential charges, the levels of which should relate to the disparity

between the actual liquidity position of an institution and the liquidity and stable funding requirements. All this is to be decided upon on a case-by-case basis and in relation to market conditions.

The types of possible measures are defined further in Articles 151-159, which also lay out in which circumstances these should be taken. According to 153(3), the competent authorities of the home Member States are required to take appropriate measures in case of an institution's non-compliance with the rules. This again only lays out a requirement to act as well as the goal (compliance), but not the means of achieving it. The only way in which the measures to be taken are described is through the words "appropriate" (Art. 153(4), "precautionary" (Art. 154). The measures are only limited to the extent that they shall not provide for discriminatory or restrictive treatment based on the fact that a credit institution is authorised in another Member State", Art. 156(3).

In the BRRD, there is an objective to balance for the regulatory regime itself, that is minimising the administrative burden relating to the recovery and resolution plan preparation obligations through "appropriate" and "proportionate" application, rec. 14.

A somewhat more specific, yet still purely result-focused objective can be found in MiFID 2: Member States should ensure (Art. 24(1) lays down that it is the responsibility of the Member States to require investment firms act in accordance with the principles laid down in Articles 24 and 25) investment firms act in accordance with the best interests of their clients and that financial instruments manufactured by these firms "meet the need of an identified target market of end clients within the relevant category of clients" and ensure that the instruments are distributed to that market, rec. 71, Art. 16(3), Art. 24(2). Member States should also ensure that appropriate information about the risks associated with the instruments is provided for by the investment firms, Art. 24(4).

In relation to consumers' best interest, remuneration policies are according to MiFID 2 supposed to be formed in such a way that that they do not conflict with this interest and that they do not through creating certain incentives compromise the best interest of the client, rec. 77 and Art. 24(10) and 27(2). This is essentially a matter of assessment, as no

specific criteria are provided for - unsuitable remuneration policies should simply be identified on the basis of their true or potential effects on the activities of an institution.

Member States are required to make sure that competent authorities in the Member State in question are given all necessary investigatory powers and also to ensure that the authorities establish mechanisms that encourage reporting of potential or actual infringements, rec. 147 and Art. 73.

Ensuring that competent authorities take into account all relevant circumstances is a requirement related to the actual assessment process, rec. 145 and Art. 72. The article provides for a list of possibly relevant circumstances to be taken into account where appropriate, para 2. There is no requirement to do so in case this cannot be considered appropriate by the competent authority. Competent authorities may also take into account additional factors, see last sentence. To their nature, these rules are simple guidance, as they do not provide for how the assessment should be done in any greater detail.

Settling disputes out-of court is to be made possible through the setting-up of complaints and redress procedures, which is to be ensured by the Member States, rec. 151 and Art. 75. This may be done in whatever way is considered appropriate, even using existing bodies, but Member States shall ensure that all investment firms adhere to one or more such bodies that implement such procedures, para 1.

### 3.2 Basic requirements and discretionary assessment

Certain rules in the three directives are, consistent with the nature of a directive, though specific as to the means of achieving the results, focused on setting up basic objectives, yet leaving it up to the Member States or to the competitive authority to establish the specific measures.

Article 65(1) of the CRD IV lays down that Member States shall provide for administrative penalties and measures which are "effective, proportionate and

dissuasive". This specifies what should be provided for and imposed, but does not bind the Member States to any particular model for such penalties and measures; in this sense, it is purely the expected result of these measures that is decisive for a Member State's compliance with this rule. However, a number of basic requirements are laid down in Article 66. Paragraph 1 requires the Member States to provide for penalties and measures at least in the cases listed. Similarly, in paragraph 2, there is also a basic requirement to ensure that certain penalties and measures can be applied in these cases. Furthermore, Art. 67(1) lists out the circumstances in which penalties and measures listed in paragraph 2, same Article, should be able to be applied. Both articles bind the Member States to make it possible for the competent authorities to act in certain cases and also lay down some basic requirements as to what measures should be included in their arsenal. Article 70 furthermore lists some circumstances that the competent authorities should take into account when assessing which measures and which level of penalties to apply. Member States also need to ensure that the penalties and measures can be imposed on certain types of institutions and their managers, Article 126. Article 74(4) also makes it possible to, after consultations with the consulting macroprudential authority and the resolution authority, reduce requirements on recovery plans and resolution plans.

Recital 43 requires Member States to ensure that credit institutions and investment firms have strategies and processes in place for assessing and maintaining the adequacy (in "quantity, quality and distribution") of their internal capital, Art. 73.

A typical case of practical assessment by the competent authority is the process of determining the level of liquidity requirements, Article 105 CRDIV. The purpose of the assessment, which is based on the review and evaluation regulated in Section III, is to assess whether specific liquidity requirements are necessary in order to capture liquidity risks. The Article lays down a list of factors that the competent authority should take into account in this assessment.

The rules on global systemically important institutions (G-SIIs) and other systemically important institutions (O-SIIs) and G-SII and O-SII buffers are a combination of clear

rules as to the methodology to be used on one hand, and discretion in the practical assessment on the other. The identification methodology for both G-SIIs and O-SIIs is to be based on the categories listed in Art. 131(2). The systemic importance of an institution identified as O-SIIs is then assessed "on the basis of at least any of" the criteria listed in paragraph 3 of the Article, thus leaving it up to the competent authorities to apply additional criteria if required.

Article 131(9) of the CRDIV defines how the subcategories of G-SIIs, the number of which should be at least five, should be set, laying down how the lowest and the boundaries between each subcategory should be determined. An exception is however presented in paragraph 10: under the principle of sound supervisor judgment, the competent authority is allowed to re-allocate G-SIIs from a lower sub-category to a higher one, subpara a, or, if the overall score of an entity is lower than the cut-off score of the lowest subcategory, to either a lower or a higher sub-category, subpara b.

In order to prevent and mitigate long-term non-cyclical systemic or macroprudential risks not covered by the Capital Requirements Regulation (CRR), Article 133 of the CRDIV gives Member States the possibility to introduce a systemic risk buffer of Common Equity Tier 1 capital - in general, they "may" introduce such a buffer, but are not required to. However, if such buffer is to be introduced, it shall according to paragraph 3 be set at a minimum of 1 %. Paragraph 4 further clarifies that Common Equity Tier 1 capital maintained in order to fulfil the systemic risk buffer requirement shall not be used to meet any other requirements in CRR or the CRDIV. The paragraph also lays down that in cases where a group identified as a systemically important institution is subject to either a G-SII buffer or an O-SII buffer on a consolidated basis and is also subject to a systemic risk buffer on a consolidated basis, the higher of the buffers shall apply. Also, where an institution, on either individual or sub-consolidated basis is subject to an O-SII buffer as well as a systemic risk buffer, the higher shall apply in that case as well. The setting buffer is regulated further in the following paragraphs, but the buffer itself is presented as one possible tool that Member States can introduce for competent authorities to address risks, thus leaving it to the Member States to introduce it in case it is found necessary and setting rules for the practical application of

such a buffer. In fact, this binds the competent authority extensively once the systemic buffer is in fact introduced.

The setting of countercyclical buffer rates is made compulsory through Article 136 of the CRDIV, but the setting itself is based by the assessment made by the competent authority, although this is limited by two factors: by the buffer guide, which according to paragraph 2 is to be based on the deviation of the ratio of credit-to-GDP from its long-term trend, on one hand, and by ESRB guidance, which is also to be taken into account in the calculation of the buffer guide, para 2b, on the other. The rates are also limited, paragraph 4, thus leaving the competent authority little room for manoeuvre.

The requirements relating to the preparation of the recovery and resolution plans are carefully specified in the BRRD, but the directive nevertheless allows for waiving of requirements on a case-by-case basis in limited cases, Art. 75(11) and (12).

Article 27 lays down basic requirements for early intervention measures - a requirement for the Member States to ensure that competent authorities have at their disposal at least the measures listed in the subparagraphs a-h.

The intention with MiFID 2 is to create detailed principles and minimum standards, which are to be applied "taking into account the nature, scale and complexity of investment firms, rec. 5. In order to guarantee supervisory effectiveness, a common minimum set of powers it introduced, leaving the exercise of these powers to the competent authorities, rec. 137. This is applied in Art. 57 (14) regarding powers to impose sanctions for infringements of position limits. Article 69 lays down that competent authorities shall be given "all supervisory powers, including investigatory powers and powers to impose remedies necessary to fulfil their duties under the Directive". Once again, there are minimum requirements: paragraph 2 lists the powers that should be included in the powers given to the competent authorities.

Since the exercise of powers may cause serious interferences to private and family life, home and communications, Member States are required to have in place effective

safeguards against any abuse related to the powers of the competent authorities, rec. 138. This includes ensuring that delegated tasks are executed only in a defined and documented framework: the tasks to be undertaken must be stated and the conditions under which they are to be carried out must be included, Art. 67(2) subpara 2.

Member States may impose additional requirements on top of the ones laid down in MiFID, but these are subject to conditions and procedures provided for in the directive, rec. 76 and Art. 24(12). Additional requirements must be "objectively justified and proportionate so as to address specific risks to investor protection or to market integrity which are of particular importance in the circumstances of the market structure of that Member State", subpara 1. The rights of investment firms under Articles 34 and 35 of the directive shall not be restricted or otherwise affected, subpara 2.<sup>3</sup> Furthermore, Member States may not impose any additional requirements on investment firms or credit institutions authorised and supervised by the competent authorities of another Member State, Art. 34(1).

Competent authorities shall according to Article 67 be public authorities. Member States, may however delegate tasks to other entities where this is provided for in Art. 29(4). An e contrario interpretation of the second paragraph supports the idea of discretionary powers of judgment as a core element in the decision making process; the right to these powers as well as the exercise of public authority is limited to the public authority.

Administrative sanctions and measure are to be subject to certain essential requirements in Art. 70(6) that are listed in points a-h. These are minimum requirements and it is possible for Member States to empower competent authorities with additional sanctions and measures, see para 7, where imposing additional sanctions or fines exceeding the amounts referred to in point 6 is also permitted. For administrative fines, a maximum level of "at least twice the amount of the benefit

---

<sup>3</sup> Investment firms authorised and supervised by the competent authorities of another Member State in accordance with MiFID 2 and CRDIV (credit institutions) should be able to freely provide services and perform activities within other Member States' territory, Art. 34 MiFID 2. The freedom to establish branches in other Member States is protected in Art. 35. An authorisation in one Member State is valid for the entire Union, Art. 6(3).

derived from the infringement where that benefit can be determined”, corresponding to the principle laid down in recital 142 stating that competent authorities should be empowered to impose fines “sufficiently high to offset the benefits that can be expected”. No action by the competent authority should discriminate against other Member States, rec. 139. Nor should the maintenance of criminal sanctions instead of administrative sanctions for infringement “reduce or otherwise affect the ability of competent authorities to cooperate, access and exchange information in a timely way with competent authorities in other Member States”, rec. 150, cooperation being an obligation under Article 79(1).

Cooperation arrangements between home and host Member States should be “appropriate” to their form, and “proportionate” to the needs for cross-border supervisory cooperation, rec. 154 and Art. 79-81. Despite rules laying down rules for the formal cooperation between authorities in cross-border cases, the practical aspect of cooperation depends on what is decided upon between the competent authorities and on the nature and scale of the impact that the operations have for the securities market in the host Member States.

### 3.3 Explicit rules

Member states shall according to the CRD IV require institutions to maintain a capital conservation buffer and an institution-specific countercyclical capital buffer, both of which are clearly defined, though named exemptions are possible, Art. 129-130.

The capital conservation buffer is to consist of Common Equity Tier 1 capital equal to 2,5 % of the institution’s total risk exposure amount calculated in accordance with Article 92(3) of the CRR on an individual and consolidated basis, Art. 129(1) CRD IV, leaving the competent authority no other discretion than to potentially exempt small and medium-sized investment firms from the requirement granted that such an exemption does not threaten the stability of the financial system of that Member State, para 2. The exemption is required to be fully reasoned and it should be explained why the

exemption does not pose a threat and the investment firms to be exempted shall be clearly defined, subpara 2.

Article 130 clearly defines how the institution-specific countercyclical capital buffer should be calculated. The buffer should be equivalent to the institution's total risk exposure amount calculated in accordance with Article 92(3) CRR multiplied by the weighted average of the countercyclical buffer rates calculated in accordance with Article 140 CRD IV on an individual and consolidated basis. As is the case with capital conservation buffers, an exemption for small and medium-sized investment firms is possible as regards the countercyclical capital buffer as well, Art. 120(2). Even here, the exemption is to be fully reasoned, with an explanation included, subpara 2.

As mentioned above, as regards O-SII and systemic risk buffers, there is no explicit obligation for Member States to introduce such buffers, but should this be done, the setting of them is nevertheless subject to several limitations regarding the size of the buffer, Art. 131 para 5 and Art. 133 para 3, and which of the many different buffers is to be applied in the case of the institution being subject to several buffers, Art. 133 para 4.

If a systemic risk buffer is introduced, the buffer is to be set at 1%, should consist of Common Equity Tier 1 capital, Art. 133(3) and should be based on the exposures to which the buffer is to be applied, see paragraph 8. The capital maintained for the buffer shall not be used to meet any other requirement in either CRDIV or CRR, para 4. In cases where a group identified as a systemically important institution subject to either a G-SII or an O-SII buffer on a consolidated basis while also being subject to a systematic risk buffer, the higher of the buffers shall apply, same paragraph.

A public authority or body designated by the Member State shall set the countercyclical buffer rate for that Member State, Article 136. Paragraph 4 limits the buffer, as percentage of the total risk exposure amount, to between 0% and 2,5 %, setting it in excess of 2,5% being possible where this is justified.

Article 140 lays down the rules for the calculation of institution-specific countercyclical capital buffer rates in detail. The buffer “shall consist of the weighted average of the countercyclical buffer rates that apply in the jurisdictions where the relevant credit exposure of the institution are located or are applied for the purposes of this Article by virtue of Article 139(2) or (3)” (third country countercyclical capital buffers). In case the designated authority sets a countercyclical buffer rate in excess of 2,5%, see above on Art. 136 (4), Member States shall ensure that the buffers specified in point a-c shall apply to relevant credit exposures in the Member State of the designated authority, Art. 140(2). Similarly, if a third-country authority has set a rate exceeding 2,5 % of the total risk exposure amount, buffer rates specified in Art. 140(3)a and b shall apply to the exposure in the third country concerned.

Article 74 requires institutions to have robust governance arrangements. The focus here is on the lines of responsibility, identification, management, monitoring and reporting of risks as well as on internal control mechanisms regarding administration, accounting and remuneration policies, para 1, with the core objective being a sound and effective risk management. The processes shall be “comprehensive and proportionate to the nature, scale and complexity of the risks inherent in the business model and the institution’s activities”, para 2, and they are subject to technical criteria laid down in Articles 75 to 95. The processes are also going to be influenced by EBA guidelines, para 3.

Remuneration trends and practices are to be benchmarked by the competent authority on the basis of disclosed information, Art. 75(1).<sup>4</sup> For each institution, competent authorities should also collect information on the number of natural persons that are remunerated more than one million euros per financial year, para 3. EBA shall issue guidelines to facilitate the implementation of the paragraph. It shall also issue guidelines on sound remuneration policies, para 2.

In the BRRD, there is a clear principle that it is the competent authority that, as explained above, should assess which recovery and resolution tools are to be applied.

---

<sup>4</sup> Criteria for disclose, points (g),(h) and (i), Article 450(1) CRR.

Consequently, it is, for the most part, left to the competent authority to decide which measures should be used and how these should be applied. Rather than providing for explicit rules, the directive opens up for different measures to be taken while still posing some limits and providing guidelines for them. The limits posed are discussed above. Overall, although the provisions are discretionary, the discretion available must be seen as being considerably limited. This serves the aim of harmonising the application of the rules, but interferes with the competent authority's freedom to choose the measures it finds appropriate.

One objective in MiFID 2 is to provide detailed principles and minimum standards, rec. 5. This opens up for rules more explicit than the principles to be used as a basis for assessment by the supervisor. In fact, the directive attempts to minimise discretion in order to establish a single rulebook for Union financial markets, rec. 58. The organisational requirements in Article 16, which the home Member State shall require investment firms to comply with, is an example of this. The possibility for competent authorities to delegate supervisory tasks is reduced; as already mentioned above, Art. 67(2) lays down that when delegating tasks to other entities than other competent authorities this may not involve exercise of public authority or the use of discretionary powers of judgement. The competent authorities shall ensure that the entity to which tasks are to be delegated shall be required to have the capacity and resources needed to effectively execute all tasks, and a "clearly defined and documented framework" shall be established, stating conditions with requirements aiming at avoiding conflict of interest and unfair use of information, subpara 2.

Discretion is also minimised in requirements applicable to tied agents, see Art. 29 and 34. The same also applies to branches, Art. 35.

A common regime for the recording of telephone conversations or electronic communications involving client orders is introduced in Article 16(7), requiring investment firms to record telephone conversations or electronic communications at least when these relate to transactions concluded when dealing on own account or to the provision of client services that relate to the reception, transmission and execution

of client orders, subpara 1. These shall also be recorded if they intend to result in such transactions or in the provision of such client order services, subpara 2. Clients are to be notified according to subparas 4 and 5, and unless this is done, investment firms may not provide such investment services or activities to their clients by telephone, subpara 6.

Investment firms are required to notify and provide information on orders generated by algorithmic trading, and to keep records on such trading, Art. 17(2). If the investment firm's engagement in algorithmic trading is linked to a market making strategy, it shall carry this activity in accordance with paragraph 3, which requires that market making be carried out continuously during part of trading hours, that a written agreement is signed with the trading venue and that the institution has in place effective systems and controls.

Investment firms are required to provide their clients or potential clients with the information listed in Art. 24(4) points a-c.

The possibility for firms providing the service of investment advice on an independent basis and the service of portfolio management to accept and retain fees, commissions or any monetary and non-monetary benefits from third parties is restricted, Art. 24(7). Only minor non-monetary benefits "that are capable of enhancing the quality of service provided to a client are of a scale and nature such that they could not be judged to impair compliance with the investment firm's duty to act in the best interest of the client" are allowed. However, these need to be disclosed. Identical requirements apply for firms providing portfolio management, Art. 24(8).

Authorisation does not cover other ancillary services than those set out in Section B of Annex I, Art. 6(1). Therefore, provision of investment services "in conjunction with the ancillary service consisting of granting loans to investors to allow them to carry out a transaction in which the investment firms is involved" is excluded, rec. 80, see also Art. 25(4), where this exclusion is referred to.

Besides the rules mentioned above, another means of explicit rule making is the introduction of technical standards, since these are binding. They will be discussed further below.

## 4. Rules and Discretion

### 4.1 Rules and Discretion in CRD IV

As mentioned above, the CRD IV aims to provide for a framework of rules regarding the operation of credit institutions. These are supposed to be complemented by individual arrangements, based on supervisory assessment, rec. 3. Therefore, for the competent authority, both in the directive as well as in practice, there is a constant process of finding a balance between these two aspects. A common market in the area of financial services can be seen as the end result that this process should aim at.

The principles and standards introduced in the CRD IV are discretionary in nature; they are, as pointed out in recital 5, supposed to be applied taking into account all the relevant circumstances such as "the nature, scale and complexity of the institution's activities".

Requirements regarding management arrangements, as discussed above, are of common character and not much specified other than to their objectives, which can be summoned up by describing them as a structure that can contribute to a stability within the institution and the financial system. Assessing the "suitability" of shareholders and the "reputation and experience" of members of the management body, Art. 16(3), is part of the process through which this structure shall be built. This task lies once again on the competent authorities and is also of cross-border importance. Obviously, this is largely about exchanging information which the relevant competent authority can then take into account in its overall assessment of the institution. The assessment in question is the one regulated in Article 91. This Article is very strongly in line with the idea of independent supervisory assessment and judgement. The question does arise, however, whether this regime can fully ensure a more or less uniform application that can then result in the stability pursued considering the fact that the assessment on the suitability of members is based on rather loose guidelines. This could have an impact on the common market, creating different standards and customs in different Member States. At the end, all this is likely to depend on other factors such as how other rules are to be applied and how the competent authorities' actions in other areas have an impact on

their assessment in this matter. Other issues are likely to make an authority act differently than it otherwise would. A "playing it safe"-pattern can sometimes be a possible option, meaning that the competent authority, while not necessarily feeling inclined to take certain measures or any measures at all, may feel that it is best to take a measure in order to at least deal with a core problem even if that measure at the same time would go somewhat further than what would actually be needed.

Measures listed in Articles 151-159 are presented as options for the competent authorities in cases where the competent authority decides to take measures in order to ensure that a credit institution complies with the new requirements in time. Since the requirements themselves are clearly defined, this assessment is based on the practical circumstances and the facts regarding the institutions' process in complying with the rules. Time being the decisive factor here, it is safe to say that, given that the competent authority succeeds in accomplishing the result in time, there should be no risk for lack of uniformity with regard to the final results in cases where these are more or less explicitly defined. One factor, though, may have a different impact: the measures taken shall in any case not be discriminatory or restrictive against institutions registered in other Member States, Art. 156(3). This could, lead to some caution. On the other hand, this works both ways - the authority may find it hard to, or cannot at all, apply stricter measures under the same conditions that others who perhaps are treated softer in other Member States are facing.

The CRD IV rules on administrative penalties and measures are based on the idea of discretionary assessment - it is the end result that is of importance. It is, however, as pointed out above, up to each Member State to provide for the toolbox the competent authority should have at hand, Art. 66(1). From a competent authority's perspective, the rules themselves nevertheless give an idea of how and in what types of cases the rules should be applied in practice. In fact, the requirements for the Member States mainly concern two factors: first, the competent authority should be able to act in certain circumstances, Art. 70 and 66(2), and secondly, penalties and measures should be able to be imposed on certain types of institutions as well as on their managers, Art. 126. The relevant circumstances listed in Art. 70 are, regardless of how Member States choose to

apply the Article in other respects, circumstances that the competent authority will have to take into account anyway. While the competent authority's room for manoeuvre may be somewhat diminished by requirements posed by the Member State, the process is supposed to be based on the authority's assessment. In this regard, inflexible requirements would be contradictory to the nature of the Directive and it is thus unlikely that the legislator would pose any obvious challenge to the competent authority's freedom of assessment.

Discretion also runs parallel with rules of varying combinations of explicitness and discretion. Such is the case regarding liquidity requirements, the level of which is to be determined by the competent authority, Art. 105. This is done after the review and evaluation regulated in Section III of the directive, which cannot fully be described as discretionary. Thus, as regards Art. 105, is the end assessment, the measures to be drawn based on the conclusions, that the competent authority may decide upon more freely.

There is a clear balance between clear rules and independent assessment in the rules regarding G-GIIs and O-SIIs in Article 131; as explained above, the basic criteria are set in the Article, but it is possible for the competent authority to apply additional criteria if it finds this necessary. This alone is unlikely to pose any great challenge to the competent authority apart from the assessment itself. There is, however, the possibility that it normally, for reasons of financial stability on Member State level, would not be in the competent authority's interest to classify an institution as a G-GII or O-SII, not to mention taking the measures such a classification leads to. This would then further be complicated by the question of subcategories where Article 131(9) only allows re-allocation to a higher subcategory, but not the other way around.

Where competent authorities perhaps have the most freedom is in the setting of systematic buffers, Art. 133, as the buffer is in fact not explicitly required. Instead, the Article defines what the buffer is actually for rather than requiring its adoption. It also answers the question of which of the buffers to apply - this can likewise be seen as something of a necessary clarification. If the competent authority does decide to set such

a buffer, however, it is indeed subject to several rules regarding its use, mainly related to the effects of the buffer in relation to other Member States and the justification for the buffer, see points 11, 12 and 16. This must be seen as being necessitated by the Union perspective - the setting of whatever buffer under unspecified conditions would be bound to create large differences throughout the Union and thus affect the common market as well as the result-oriented uniformity pursued in the Directive.

The rules regarding the compulsory countercyclical buffer rates in Article 136 leave the competent authority little room for assessment. Not only is the buffer explicitly required, but the setting of it - which is to be based on the assessment of the competent authority - is in fact defined in great detail.

Other required buffers are defined in explicit terms. As regards the capital conservation buffer and the institution-specific countercyclical capital buffer, Art. 129 and 130, discretion is in fact limited to one exemption: the exemption for small and medium-sized investment firms as described above.

In other areas, EBA guidelines have a great impact on the process - this is the case with governance arrangements requirements, Art. 74, as well as with the benchmarking of remuneration trends and practices (which are also subject to technical criteria in Art. 75 and 95), Art. 75. As regards these rules, the uniform approach is almost total, leaving little room for discretionary assessment.

#### 4.2 Rules and Discretion in BRRD

The basis for the BRRD lies in the assessments that are to be made by the competent authorities. These are related to the practical conditions: is the credit institution solvent, is it failing or likely to fail, would its failure affect the financial system of the Union, is resolution action necessary?

Discretion is present in the directive for practical reasons: as the priority is the proper adoption and functioning of resolution plans, preparation obligations should for obvious

reasons not be burdened by excessive administration, see rec. 14 BRRD. Making case-by-case waiving of certain requirements possible serves a similar purpose, see Art. 4(8)-(10). On the other hand, in requiring competent authorities to act, some requirements are much more explicit and leave much less room for discretionary judgement other than in small details. This is the case regarding the rules related to early intervention measures, Article 27, where discretion is limited to the possibility to - depending on the circumstances - choose the other alternative instead of the other.

Although the predominant element in the BRRD is the idea of supervisory assessment, much of the competent authorities' actions are nevertheless going to be influenced by the guidelines that the directive empowers EBA to adopt.

#### 4.3 Rules and Discretion in MiFID 2

MiFID 2 aims to cover all financial instruments, including ones previously unregulated, while also taking into account the impact of the emergence of new trading systems, rec. 4 and 7. The directive's main objectives are investor protection and transparency. Fulfilling all this also requires supervisory action, which is why, as explained above, the directive also calls for new supervisory powers. The legislator has seen discretion as being of great importance in order to make it possible to adjust the regime to the market and legal conditions in each Member State, rec. 7. Adaptability is thus an issue that the directive has to deal with in all areas.

As described above, aspects as the best interest of the client, the needs of the target market and of clients and providing information about risks are all required to be taken into account in the directive, Article 24 and 25. However, as it is the Member States that according to will have to ensure the institutions' compliance in this regard, competent authorities in Member States may face varying degrees of discretion in national rules regarding this assessment. The directive's rules concern the end result, but this can obviously be achieved in different ways, including through extremely limiting rules based on the national legislator's view on the conditions of the market in its home Member State. This could also lead to differences related to the conditions for the operation of financial institutions in different Member States. The same applies for the

assessment of remuneration policies, Art. 24(10). However, this is only relevant for the assessment – it should be noted that when it comes to actual requirements for the institutions, Member States can impose additional requirements only in exceptional cases, Art. 24(12). What actually constitutes unsuitable remuneration policy is at the end a matter of assessment: the question to be answered is whether the policy actually conflicts with the aforementioned principles.

The rules in MiFID 2 are mostly of minimum character - it is possible for the competent authorities to go further (though a maximum level applies for administrative fines, Art. 70(6)(h)). Member states may also choose to take sanctions measures beyond the ones required, Art. 70(6); the application of these measures then depends on what the competent authority is actually able to do under the national rules.

In many ways, MiFID 2 aims to minimise discretion, rec. 58. For competent authorities the organisational requirements in Article 16 are, when introduced by Member States, straightforward - the measures and solutions are dictated to them and the investment firms to comply with. This is not to say such explicit rules could not pose a challenge to implementation; problems could be caused by the conditions of the market in question, existing national rules or by a combination of both. These potential challenges will be studied further in the next chapter.

## 5. Problems in Implementation

### 5.1 Problems in Implementation - CRD IV

Implementation issues in CRD IV mainly concern wordings and their interpretation in national law as well as questions on how the content of the directive should be applied in practice and defined in national law.

In the Swedish implementation process, the supervisor and the Ministry of Finance had differing views on how some of the articles in the directive were supposed to be interpreted. One such issue was the question whether the introduction of automatic restrictions and powers for intervention could coincide with the introduction of capital buffers in Swedish law, see Articles 160(5) and (6) CRDIV.<sup>5</sup>

At some points, the Report of the Swedish Government was unclear. Regarding decisions concerning the recognition of other Member States' shorter transitional periods, Art. 160(6), the proposal did not mention the question of who shall make such decisions.<sup>6</sup> This is crucial, since the directive only refers to Member States but does not specify how and by which authority such a decision should be made.<sup>7</sup> Nor did the proposal touch upon how the geographical location of an exposure should be identified.<sup>8</sup>

Regarding systemic risk buffers, unclear points included how the rules on setting the buffer should be applied - what the size of it should be and when it should be applied. These issues concerned a wording (the word "sufficient" in relation to how risks are handled) in the directive and the relation between different buffers.<sup>9</sup>

There were some harmonisation issues in relation to Articles 91(1) and (2) on the requirements imposed on members of the management body, since the proposal did not

---

<sup>5</sup> Finansinspektionen *Remissvar: Förstärkta kapitäläckningsregler (SOU 2013:65), Fi2013/3294*", [http://fi.se/upload/43\\_Utredningar/30\\_Remissvar/2013/remissvar-kapitalackning-13-10311.pdf](http://fi.se/upload/43_Utredningar/30_Remissvar/2013/remissvar-kapitalackning-13-10311.pdf)", p.3, read 2015-10-25.

<sup>6</sup> SOU 2013:65 Förstärkta kapitäläckningsregler.

<sup>7</sup> Finansinspektionen, p. 5.

<sup>8</sup> Op.cit., p. 6.

<sup>9</sup> Op.cit., p. 6-7.

entirely follow the wording of the directive - this was also the case regarding management bodies of financial holding companies.<sup>10</sup> The supervisor wanted to see the criteria clearly laid down in law and also wanted the legislator to clarify how and to whom the rules were supposed to be applied.<sup>11</sup> A similar problem related to criteria was the question what it actually means to fulfil the criteria in Art. 109(2) related to management arrangements- the supervisor's concern was that certain institutions which the parent does not control could be seen as being covered by the terms "consolidated" and "sub-consolidated", the problem being that the parent cannot alter the management arrangements of companies that it does not control.<sup>12</sup>

What the terms "an institution that is significant in terms of its size, internal organisation and the nature, the scope and the complexity of its activities", Art. 91(3), and "organisations which do not pursue predominantly commercial objectives", Art. 91(5), actually mean was something that the supervisor wanted defined in national law.<sup>13</sup>

The Swedish Government's Report did not clarify how the supervisor should relate to EBA guidelines while waiting for these to be published.<sup>14</sup>

Inconsistent use of language was also present in the proposal. There were several synonyms - or at least they appeared to be at first sight - used for the word "kapitalbas" ('capital base').<sup>15</sup> Another are were consistency is of importance are cases where the same term is used in the CRR and consequent national law - this also applies to definitions. The CRR and CRD IV are consistent in this regard. The Swedish supervisor pointed out one word that was in fact not used in the CRR.<sup>16</sup>

---

<sup>10</sup> Op.cit., p. 8-9.

<sup>11</sup> Op.cit., p. 10-11.

<sup>12</sup> Op.cit., p. 17.

<sup>13</sup> Op.cit., p. 10.

<sup>14</sup> Op.cit.,p. 12.

<sup>15</sup> Op.cit., p. 26.

<sup>16</sup> Op.cit., p. 27.

## 5.2 Problems in Implementation - BRRD

The Riksgälden (Swedish National Debt Office) has pointed out that the model for crisis management provided for by the BRRD is strict and does not leave the authorities much room to adapt their measures to the situation, mentioning the chances of differing from the BRRD model in a systemic crisis as one example of this.<sup>17</sup> In fact, correspondingly, the Riksgälden's comments mainly concerned the national Finanskriskommittén's ('Financial Crisis Committee') proposal and its solutions within the limits posed by the directive.

The proposed decision included a resolution decision-making procedure different from what is provided for in the directive as regards alternative measures to resolution: in the directive, the responsibility for this assessment fell upon the resolution authority (the Riksgälden in the Swedish case), but the proposal had put this in the hands of the supervisor.<sup>18</sup>

A compatibility issue related to the adjustment of contributions was discovered regarding Article 103(7) and the Swedish proposal. The directive created a mandate for the Commission to develop a delegated act regarding risk adjustment of the contributions, but this was not taken into account in the proposal. Additional adjustment would thus in any case be possible in the marginal.<sup>19</sup>

The definitions of covered deposits ("garanterade insättningar") and eligible deposits ("kvalificerade insättningar") proposed by the committee could be misinterpreted and

---

<sup>17</sup> Riksgälden *Resolution – en ny metod för att hantera banker i kris (SOU 2014:52) (Fi2014/2275)*, "<https://www.riksgalden.se/PageFiles/21377/resolution-en-ny-metod-f%C3%B6r-att-hantera-banker-i-kris-sou-2014-52-remissvar.pdf>", p. 3, read 2015-10-25; SOU 2014:52 - Resolution, En ny metod för att hantera banker i kris.

<sup>18</sup> Op.cit., p. 7-8.

<sup>19</sup> Op.cit., p. 14.

they also differed from the wording in Article 2(1) of the Deposit Guarantee Schemes Directive (2014/49/EU), points 4 and 5.<sup>20</sup>

The Riksgälden held that it was unclear both in the Commissions and the Committee's proposals what the decision-making process is supposed to look like and what role a valuation should play in it, see Article 27(1) p. (h) and Article 36. The question was whether the supervisor had to await the resolution authority's decision on valuation before making its assessment.<sup>21</sup>

The Riksgälden raised a question regarding the interpretation of Articles 34(1) and 101(2), asking for a clarification on whether the intention was to ensure compensation from the resolution reserve to creditors that otherwise would find themselves in a worse position in case of resolution than in bankruptcy and liquidation.<sup>22</sup>

The committee's proposal did not include all requirements in Article 6(4) of the directive - the proposal lacked the requirement for the supervisor to submit the recovery plan to the resolution authority and the requirement for that authority to assess it.<sup>23</sup>

At some points, the proposal used wording that differed from the Swedish language version of the directive. One such case was concerned Article 71(2), where the words "in relation to" ("i förhållande till" in the Swedish version, although the Riksgälden used the synonym "hänförliga till") had been substituted with "omfattas", which does not have exactly the same meaning since it rather translates to "to be covered by". Another such example was the use of the word "aktieinnehav", 'holding of shares', instead of the word "innehav", 'holding', which is used throughout the directive. Obviously, contrary to what was intended in the directive, all holdings would not be covered by the former.<sup>24</sup>

---

<sup>20</sup> Op.cit., p. 17.

<sup>21</sup> Op.cit., p. 27-28.

<sup>22</sup> Op.cit., p. 30-31.

<sup>23</sup> Op.cit., p. 35.

<sup>24</sup> Op.cit., p. 45.

In one case, missing words turned the meaning to the contrary, as the words missing were "med avdrag för", 'with deduction of', which lead to covered deposits being included instead of excluded, Art. 103(2).<sup>25</sup>

Riksgälden also wanted the committee to make the wording in paragraph 20, Chapter 28 of the proposal, clearer in order to make sure that the meaning of Art. 50(3) would be included in full; conversion rates for senior liabilities are supposed to be better than for subordinated liabilities.<sup>26</sup>

### 5.3 Problems in Implementation - MiFID 2

Minimum requirements and other explicit rules may in certain cases pose challenges to the implementation process on national level. Since the rules need to be implemented by the Member States, they may in their implemented national form differ from the original requirements of the directive, either in wording or in substance. Obviously, this is also linked to existing national rules.

The Swedish Financial Supervisory Authority pointed out the problems with one particular Swedish piece of legislation, the Lagen (2007:528) om värdepappersmarknaden (LVM): in Sweden, investment advice related to insurance intermediation had been seen as a part of insurance intermediation, 2 kap. 5 § 15 LVM , the intention being to make the provision of fund units possible. Apart from fund units, which were seen as less risky than other financial instruments, this has later come to apply to all financial instruments. The Swedish supervisor has held that many of these do not fill the conditions in Art. 25(4) a (i) MiFID 2 for investment services that can be

---

<sup>25</sup> Op.cit., p. 46.

<sup>26</sup> Ibid.

exempted from the requirements in paragraph 3. It has also underlined that a change to this policy would facilitate its supervision.<sup>27</sup>

Wording in national legislation that differs from the directive's wording may complicate the competent authority's task. Possible problems may include the leaving out of specifying words or simple mistakes whereby some aspects are let out altogether. In the Swedish Government's Report regarding MiFID 2, some wording was in fact not in line with that of the directive, which the supervisor had to point out. These concerned the requirements in Art. 24(4) as well as a wording in Art. 24. Article 24(4) requires that the investment firm informs the client whether the advice is based on a broad or on a more restricted analysis, but the latter had fallen out in the VPL:s Chapter 9 para 13. Also, the requirement in 24(7) that the range of financial instruments that the investment firm assess must be "sufficiently diverse with regard to their type and issuers or product providers" was incompletely implemented in Chapter 9 para 14 of the VPL, solely referring to the type of product. The wording in Article 24(7)b was also misinterpreted: "scale and nature" had been translated to "storlek och karaktär", 'size and character' instead of "omfattning och art", "scale and nature" in the English version of the directive.<sup>28</sup> In general, mistakes like these are likely to be corrected and taken out during the implementation process, but due to the complexity of the directive, some may very well persist. Of course, some mistakes are less dangerous than others, but they may nevertheless cause some confusion when the rules are applied by the competent authority.

---

<sup>27</sup> Finansinspektionen *SOU 2015:2 "Värdepappersmarknaden MiFID II och MiFIR"*, "[http://www.fi.se/upload/43\\_Utredningar/30\\_Remissvar/2015/remissvar-mifid2-mifir-150511.pdf](http://www.fi.se/upload/43_Utredningar/30_Remissvar/2015/remissvar-mifid2-mifir-150511.pdf)", p. 7-8, read 2015-10-25. The Swedish view upon investment advice related to insurance intermation was originally included in the Lagen (1991:981) om värdepappersrörelse, which was replaced by LVM.

<sup>28</sup> Op.cit., p. 14.

## 6. Technical Standards

### 6.1 Technical Standards to CRD IV

There are ten sets of technical standards supplementing CRD IV to be submitted by the EBA. Currently, nine of these have been adopted.<sup>29</sup>

Commission Delegated Regulation (EU) No 1151/2014 on technical standards regarding the information to be notified when exercising the right of establishment and the freedom to provide services specifies what a branch passport notification and the programme of operations in it, a change in branch particulars notification, a notification of termination of operation of a branch and a services passport notification shall include, Articles 1-5.

Commission Delegated Regulation (EU) No 1152/2014 on technical standards regarding the identification of the geographical location of the relevant credit exposures for calculating institution-specific countercyclical capital buffer rates specifies to which location, the institution's home or host Member State, different exposures shall be allocated. This concerns general credit exposures, Art. 2, trading book exposures, Art. 3, as well as securitisation exposures, Art. 4.

Commission Delegated Regulation (EU) No 1222/2014 on technical standards specifies the methodology for the identification of G-SIIs and defines the subcategories for these. This includes common parameters for the methodology, Art. 3, the identification procedure, Art. 4, determination of scores and allocation to subcategories, Art. 5, and indicators, Art. 6.

Commission Delegated Regulation No 525/2014 on the definition of market. This is for the purpose of calculating the overall net position in equity instruments, Art. 1.

---

<sup>29</sup> See overview by the European Commission *Regulatory Technical Standards supplementing Regulation (EU) 575/2013 (CRR) and Directive 2013/36/EU (CRD)*, "[http://ec.europa.eu/finance/bank/docs/regcapital/acts/overview-crr-crdiv-rts\\_en.pdf](http://ec.europa.eu/finance/bank/docs/regcapital/acts/overview-crr-crdiv-rts_en.pdf)", read 2015-10-25.

Commission Delegated Regulation (EU) No 524/2014 specifies the information that home and host Member States supply to each other. Its second chapter concerns institutions operating through a branch and comprises the information on concerning management and ownership, Art. 3, liquidity and supervisory findings, Art. 4, solvency, Art. 5, deposit-guarantee schemes, Art. 6, limitation of large exposures, Art. 7, systemic risk posed by an institution, Art. 8, administrative and accounting procedures, Art. 9, internal control mechanisms, Art. 10, leverage, Art. 11, general non-compliance, Art. 12, supervisory measures and sanctions, Art. 13, preparation for emergency situations, Art. 14, and information authorities of a host Member State. The third chapter concerns cross-border service providers, while the fourth chapter lays down rules for situations related to liquidity stress that affects either the institution or the branch itself.

Commission Delegated Regulation (EU) No 604/2014 concerns "the qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have an impact on an institution's risk profile", Art. 3 and 4. This also includes rules on the calculation of remuneration awarded but not yet paid, Art. 5.

Commission Delegated Regulation No 530/2014 provides for two definitions that further clarify, in numeric terms, what is meant by "exposures to specific risk which are material in absolute terms" in Article 77(4) and "large number of material positions in debt instruments of different issuers" in the Directive, Art. 1 and 2 in the delegated act.

Commission Delegated Regulation No 527/2014 specifies "the classes the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration". There are separate classes for Additional Tier 1 instruments, Tier 2 instruments and other instruments, and the conditions for these are laid down in Articles 2,3 and 4. Write down, write up and conversion procedures are also regulated in detail.

## 6.2 Technical Standards to BRRD

The EBA Final Draft Regulatory Technical Standards (EBA/RTS/2015/05) developed by EBA specify the minimum requirement for own funds and eligible liabilities (MREL), Art. 45 (2) BRRD. The articles in the technical standards concern the amount necessary to ensure loss absorption, Article 2, "exclusions from bail-in or partial transfer which are an impediment to resolvability", Art. 3, the business model, funding model and risk profile, Art. 4, size and systemic risk, Art. 5, contributions by the deposit guarantee scheme, Art. 6, combined assessment of MREL, Art. 7 and transitional and post-resolution arrangements, Art. 8.<sup>30</sup>

The Draft Regulatory Technical Standards (EBA/RTS/2015/06) on the contractual recognition of write-down and conversion powers under Article 33 of Directive 2014/59/EU (BRRD) provides for a list of liabilities that do not fall under the requirement to include the contractual term, Article 2 of the Technical Standards. They also introduce a list of mandatory components in the contractual term required, Art. 3.<sup>31</sup>

## 6.3 Technical Standards to MiFID II

Article 7(4) of MiFID 2 on authorisation gives ESMA a mandate and an obligation to develop regulatory technical standards concerning three requirements:

*"(a) the information to be provided to the competent authorities under paragraph 2 of this Article including the programme of operations;*

*(b) the requirements applicable to the management of investment firms under Article 9(6) and the information for the notifications under Article 9(5);*

---

<sup>30</sup> European Banking Authority (EBA) *EBA Final Regulatory Technical Standards on criteria for determining the minimum requirement for own funds and eligible liabilities under Directive 2014/59/EU*, "<https://www.eba.europa.eu/documents/10180/1132900/EBA-RTS-2015-05+RTS+on+MREL+Criteria.pdf>", p. 19-26, read 2015-10-25.

<sup>31</sup> *EBA Final Report – Draft Regulatory Technical Standards on the contractual recognition of write-down and conversion powers under Article 55(3) of Directive 2014/59/EU*, "<https://www.eba.europa.eu/documents/10180/1132911/EBA-RTS-2015-06+RTS+on+Contractual+Recognition+of+Bail-in.pdf>", p. 4, read 2015-10-25

*(c) the requirements applicable to shareholders and members with qualifying holdings, as well as obstacles which may prevent effective exercise of the supervisory functions of the competent authority, under Article 10(1) and (2)."*

The purpose of providing such standards is to ensure a harmonised authorisation process and, consequently, legal certainty, clarity and predictability.<sup>32</sup> The setting of a list of information to be required for authorisation was according to the original MiFID a task for the competent authority, but this is now changed with the MiFID II, which instead requires ESMA to develop such a list.<sup>33</sup> The list developed by ESMA includes the following information:

"

- i. General information;*
- ii. Information on the capital, including, when available, evidence on the source of capital;*
- iii. Information on the shareholders, including documentation relating to their suitability;*
- iv. Information on the management body and persons directing the business, with indication of the position for which they are appointed, their detailed curricula vitae and evidence of their suitability;*
- v. Financial information;*
- vi. Information on the organisation. "*<sup>34</sup>

Apart from the harmonisation argument, ESMA claims that the list will facilitate guidance in the authorisation processes reduce inquiries by applicants and simplify internal processes. ESMA also claims that the list reduces "the potential for an uneven playing field" because it ensures "a lower level of subjectivity".<sup>35</sup>

---

<sup>32</sup> European Securities and Markets Authority (ESMA) *Final Report on MiFID II-MiFIR draft technical standards on authorisation, passporting, registration of third country firms and cooperation between competent authorities*, [https://www.esma.europa.eu/system/files/2015-esma-1006\\_-\\_mifid\\_ii\\_final\\_report\\_on\\_mifid\\_ip\\_technical\\_standards.pdf](https://www.esma.europa.eu/system/files/2015-esma-1006_-_mifid_ii_final_report_on_mifid_ip_technical_standards.pdf), p. 110, read 2015-10-25.

<sup>33</sup> *Op.cit.*, p. 110-111.

<sup>34</sup> *Op.cit.*, p. 112.

<sup>35</sup> *Op.cit.*, p.113.

## 7. Guidelines

The Guidelines are a non-binding means of providing for regulatory guidance. Despite this, they are nevertheless more often than not detailed and may, in part because of the very fact that they are elaborate, and in part because of the authority that the EBA has, influence the actions of competent authorities. Consequently, guidelines are, in practice, more or less binding.

### 7.1 Guidelines to CRD IV

Regarding CRD IV, the EBA has developed three sets of guidelines, of which two are finalised.<sup>36</sup>

The Guidelines on sound remuneration policies are currently under development. They will specify the criteria for "mapping remuneration components to either fixed or variable pay" and provide guidance "on the application of deferral arrangements and the pay-out instruments ensuring that variable remuneration is aligned with an institution's long-term risks and that any ex-post risk adjustments can be applied as appropriate".<sup>37</sup>

The Guidelines on remuneration benchmarking exercise specify the following:

- (a) the information to be submitted to the EBA regarding the benchmarking of remuneration trends and practices by competent authorities under Article 75(1) of Directive 2013/36/EU1;*
- (b) the benchmarking of remuneration trends and practices at EEA level, the measures to be taken to ensure the consistency of the data collected for this purpose and the procedural involvement of competent authorities in the EBA's remuneration benchmarking exercise*

---

<sup>36</sup> EBA Remuneration - Technical Standards, Guidelines and Recommendations, "<https://www.eba.europa.eu/regulation-and-policy/remuneration>", read 2015-10-25.

<sup>37</sup> EBA Guidelines on sound remuneration policies, "<https://www.eba.europa.eu/regulation-and-policy/remuneration/guidelines-on-sound-remuneration-policies>", read 2015-10-25.

*(‘the exercise’) under Article 75(2) of Directive 2013/36/EU* <sup>38</sup>

The Guidelines on the data collection exercise regarding high earners are intended to facilitate the collection of information "information regarding the natural persons per institution remunerated EUR 1 million or more per financial year" and ensure the consistency of this information. <sup>39</sup>

## 7.2 Guidelines to BRRD

To the BRRD, two guidelines have been finalised and one is currently under development. <sup>40</sup>

The Guidelines on early intervention triggers are supposed to promote convergence of supervisory practices as well as to establish a link between the provisions in BRRD and those of CRD IV regarding the on-going supervision process. <sup>41</sup>

The Guidelines on cooperation agreements between deposit guarantee schemes are still under development. They will specify the objectives and minimum content of cooperation agreements between Deposit Guarantee Schemes (DGS). <sup>42</sup>

---

<sup>38</sup> EBA *Guidelines on the remuneration benchmarking exercise (EBA/GL/2015/03)*, "<https://www.eba.europa.eu/documents/10180/757286/EBA-GL-2014-08+%28GLs+on+remuneration+benchmarking+%29.pdf/9d87c18b-ed79-4ceb-a3f6-64928cc26065>", p. 3, read 2015-10-25.

<sup>39</sup> EBA *Guidelines on the data collection exercise regarding high earners (EBA/GL/2014/07)*, "<https://www.eba.europa.eu/documents/10180/757283/EBA-GL-2014-07+%28GLs+on+high+earners+data+collection%29.pdf/da42488f-09c1-4558-ae4e-6258e11b8345>", p. 7, read 2015-10-25.

<sup>38</sup> EBA *Recovery, resolution and DGS*, "<https://www.eba.europa.eu/regulation-and-policy/recovery-and-resolution>", read 2015-10-25.

<sup>41</sup> EBA *Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU*, "[https://www.eba.europa.eu/documents/10180/1151520/EBA-GL-2015-03\\_EN+Guidelines+on+early+intervention+measures.pdf/9d796302-bbea-4869-bd2c-642d3d817966](https://www.eba.europa.eu/documents/10180/1151520/EBA-GL-2015-03_EN+Guidelines+on+early+intervention+measures.pdf/9d796302-bbea-4869-bd2c-642d3d817966)", p. 4, read 2015-10-25.

<sup>42</sup> EBA *Guidelines on cooperation agreements between deposit guarantee schemes*, "<https://www.eba.europa.eu/regulation-and-policy/recovery-and-resolution/guidelines-on-cooperation-agreements-between-deposit-guarantee-schemes>", read 2015-10-25.

The Guidelines on recovery plan indicators specify the minimum list of quantitative and qualitative recovery plan indicators.<sup>43</sup>

### 7.3 Guidelines to MiFID 2

The guidelines to MiFID 2 are developed by the European Securities and Markets Authority (ESMA).

The purpose of the guidelines on complex debt instruments and structured deposits is to provide for criteria for the classification of complex and non-complex securities.<sup>44</sup> Both are instruments that carry risks and costs that the client may not be aware of.<sup>45</sup>

The guidelines for the assessment of knowledge and competence will specify the criteria for "the assessment of knowledge and competence of the investment firm's personnel giving investment advice or information about financial instruments, investment services or ancillary services to clients on behalf of the investment firm to fulfil their obligations under Article 24 and Article 25".<sup>46</sup>

---

<sup>43</sup> EBA *Guidelines on the minimum list of qualitative and quantitative recovery plan indicators* (EBA-GL-2015-02), p. 4, read 2015-10-25.

<sup>44</sup> ESMA *Consultation Paper - Draft guidelines on complex debt instruments and structured deposits*, "[http://www.esma.europa.eu/system/files/2015-610\\_cp\\_mifid\\_guidelines\\_complex\\_products.pdf](http://www.esma.europa.eu/system/files/2015-610_cp_mifid_guidelines_complex_products.pdf)", p. 7, read 2015-10-25.

<sup>45</sup> *Op.cit.*, p. 4.

<sup>46</sup> ESMA *Consultation Paper - Draft guidelines for the assessment of knowledge and competence*, "[http://www.esma.europa.eu/system/files/2015-753\\_cp\\_mifid\\_guidelines\\_on\\_knowledge\\_and\\_competence.pdf](http://www.esma.europa.eu/system/files/2015-753_cp_mifid_guidelines_on_knowledge_and_competence.pdf)", p. 4, read 2015-10-25.

## 8. Conclusions on Regulatory Structure

### 8.1 The regulatory structure of CRD IV

The union dimension, at least in terms of trying to create a harmonious regime for all Member States, may in some cases conflict with the fact that financial markets in the Union are still very much separate national markets. This reality cannot be ignored, and any action taken under the assumption that the opposite is true may of course affect how objectives such as sound risk taking and financial stability are successfully dealt with.

In the CRD IV, the criteria for assessment, such as in the case of liquidity requirements, is often found in the directive itself, but then complemented by additional ones in technical standards. The assessment itself is a free exercise for the competent authority.

The categories for the identification of G-SIIs and O-SIIs are listed in the directive, Art. 131(2), but the classification is regulated through technical standards. The systemic importance of an O-SII, however, is assessed on the basis of criteria listed in the directive, para 3.

The setting of systemic risk buffers is not made compulsory, but is however regulated through the setting of a lower limit in the CRD IV, Art. 133(3). The case with countercyclical buffers is somewhat similar, although there is little flexibility in the range of 0-2,5 % despite some room for adjustment, Art. 136(4). Countercyclical buffers, on the other hand, are indeed made compulsory and then influenced by a buffer guide as well as guidance. Overall, the assessment process here may be seen as a combination of varying degrees of discretion and explicit rules. The case with capital conservation buffers and institution-specific countercyclical capital buffers is different, since the rules for them lean more towards explicitness: the former is almost completely regulated through explicit rules while the calculation of the latter is strictly defined, see Art. 129(1) and Art. 130.

The assessment of governance arrangements is subject to technical criteria. This is bound to make for a strongly harmonised procedure despite the fact that it is the competent authority that has to come up with a view of whether the governance arrangements of an institution are proper; the criteria are detailed to such an extent that they will have specific practical consequences. Another consequence of the technical criteria is that the competent authority may be considered or considers itself bound to act in a certain way in cases where the technical criteria even proposes that measures shall be taken in such scenarios. This is similar to the effect guidelines may have on what is expected or appears to be expected from the competent authority. Authorities have an obligation to act according to the mandate given to them and the objectives they have to guard in their role, regardless of whether this is a result of a directive or national provisions.

Most technical standards to the CRD IV may be looked upon as helpful resources and formalisations of procedures rather than strong limitations to the competent authority's freedom of assessment.

## 8.2. The regulatory structure of BRRD

Of the three directives discussed, the BRRD is perhaps the one most obviously based on discretion. The directive emphasises appropriate and proportionate application. It does, however pose requirements regarding recovery and resolution plans. There is some flexibility: as mentioned earlier, waiving of requirements is possible on a case-by-case basis.

In the provisions concerning early intervention measures, discretion is limited, Art. 27. On the other hand, the requirements on the measures do not prevent the competent authority from deciding what measures to apply. Rather, the directive poses some limits and gives some guidance as to their application.

The technical standards to the directive feature minimum requirements and lists, which both contribute to a harmonised regime that defines on what the directive should be applied.

### 8.3 The Regulatory Structure of MiFID 2

MiFID 2 requires Member States to ensure that investment firms adhere to the principles laid down in Article 24 and 25 regarding the best interest of clients (to which the question of remuneration policies is related), matching an identified target market and the provision of appropriate information. Member States may to some extent decide to depart from the discretionary approach presented in the directive, but considering the wording this is unlikely to lead to strictly defined requirement aimed at influencing the behaviour of investment firms. Besides, assessing whether an identified target market does exist and its needs is a task best left to the competent authority in any case. Explicit requirements could in that case concern what that target market may be, but this could then turn out to be problematic from a union perspective, since this contradicts with the objective of a common market for financial services.

The competent authority's assessment is guided by the principle in Art. 72 stating that the authority should take into account all relevant circumstances. What these circumstances are is not defined other than through a list of possible circumstances, para 2.

Discretionary assessment is to lean on principles and minimum standards, designed to be applied "taking into account the nature, scale and complexity of investment firms", rec. 5. Additional requirements are also possible, and these are in turn subject to conditions and procedures specified in the directive, rec. 76 and Art. 24(12). Granting discretionary powers is a key issue and a core element in the decision-making process, see above on page 15.

Administrative sanctions and measures are subject to minimum requirements, Art. 70(6). At the end, these are decided upon by the Member States and may be stricter than the minimum level prescribed by the directive. The guiding principle here is the principle that the fines should be "sufficiently high to offset the benefits that can be expected", rec. 139.

In certain areas, MiFID 2 aims to minimise discretion. Consequently, the directive includes a wide range of explicit rules, the purpose of which is to form common regimes for information sharing as well what and how information is recorded (the recording of telephone conversations, Art. 16(7), see page 19, is one example of this).

The technical standards to MiFID 2 are aligned with the cause of minimising discretion. The main goal is to create a level playing field through harmonisation, which is seen as promoting legal certainty, clarity and predictability. According to EBA, this would minimise subjectivity, see page 37.

## 9. Final Conclusions

In this thesis, an attempt has been made to identify the different types of rules in the CRD IV, BRRD and MiFID 2 as well as to analyse what impact the two main common elements, discretion and explicitness, may have on the competent authorities ability to fulfil their duties.

As mentioned above, financial markets in the Union remain largely separate. In order to deal with factors that affect or may affect financial stability - in the Member State in question or in the Union, authorities need to be able to react accordingly. However, there is an obvious risk for conflict between the aim of creating a common regime within the Union through harmonisation, and the actual conditions faced by the competent authorities. Even without analysing the methodology (which is a much more complex subject than what can satisfyingly be discussed here) used in creating provisions for the whole of the Union, it is safe to say that a common regime cannot within one uniform system reflect the situation in all Member States, although the leeway available in the setting of rates may be seen as doing this to some extent.

The type of rules adopted - that is, how the regulatory framework is actually built, have an impact on whether the aim of the objectives can be fulfilled, both in regard to promoting financial stability and to creating a harmonised regime.

The question is how much room for discretion the directives really provide for. Explicit rules seldom offer much flexibility, and indeed, in many scenarios they specifically require the competent authority to act. Adjustments are of course possible, but if they can only be made upwards, it is impossible to say for sure whether such flexibility is enough to ensure that the competent authority can act in the most appropriate way in any given situation. Even rules that are not entirely explicit may in practice considerably limit the competent authority's room for manoeuvre, since minimum requirements are detailed to a varying extent. Standardised procedures also add to this, although they cannot be seen as particularly problematic as such.

The technical standards to the directives are because of their binding nature instrumental in making the provisions detailed and far-reaching. It is also important to note that many provisions are further strengthened by the fact that competent authorities actions are also increasingly influenced by guidelines, which in turn are non-binding to their nature, but nevertheless effectively guide competent authorities to act in a uniform way, thus supporting the objective of harmonisation. The resulting regulatory structure is a compromise between the discretion needed and explicitness to guarantee harmonisation and objectivity, which indeed is an important element especially in a common regime.

Implementing a common regime is, however, not necessarily a smooth process. Even explicit rules need to be interpreted and - the CRD IV, BRRD and MiFID 2 being directives - implemented into national law. The implementation process may be complicated by general interpretation issues regarding the actual content of a provision, by problems related to the choice of wording or inconsistent wording either in national proposals or existing national legislation. Mistakes and misunderstandings may complicate the harmonisation process and risk creating differing regimes across the Union.

Overall, it can be said that the complexity in the regulatory framework is at times such that there is in fact no guarantee that there can in practice be a functioning balance between discretion and explicitness in any given case.

Since the actual effects and consequences of a regulatory scheme like the one discussed here may not be fully predicted beforehand, it is of great importance that the regimes adopted be continuously reviewed and the development of financial markets in the Union closely followed. What one believes is right today may not necessarily work tomorrow.

## **10. Bibliography**

### **Union legislation**

#### Treaties

Treaty on the Functioning of the European Union.

#### Regulations

Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR).

Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (CRR).

#### Directives

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID 2).

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (BRRD).

Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

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

Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions.

Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.

#### Technical Standards and Related

European Banking Authority (EBA) *EBA Final Regulatory Technical Standards on criteria for determining the minimum requirement for own funds and eligible liabilities under Directive 2014/59/EU*,

"<https://www.eba.europa.eu/documents/10180/1132900/EBA-RTS-2015-05+RTS+on+MREL+Criteria.pdf>", read 2015-10-25.

EBA *Final Report – Draft Regulatory Technical Standards on the contractual recognition of write-down and conversion powers under Article 55(3) of Directive 2014/59/EU*,

"<https://www.eba.europa.eu/documents/10180/1132911/EBA-RTS-2015-06+RTS+on+Contractual+Recognition+of+Bail-in.pdf>", read 2015-10-25

European Commission *Regulatory Technical Standards supplementing Regulation (EU) 575/2013 (CRR) and Directive 2013/36/EU (CRD)*,

"[http://ec.europa.eu/finance/bank/docs/regcapital/acts/overview-crr-crdiv-rtts\\_en.pdf](http://ec.europa.eu/finance/bank/docs/regcapital/acts/overview-crr-crdiv-rtts_en.pdf)", read 2015-10-25.

European Securities and Markets Authority (ESMA) *Final Report on MiFID II-MiFIR draft technical standards on authorisation, passporting, registration of third country firms and cooperation between competent authorities*,

"[https://www.esma.europa.eu/system/files/2015-esma-1006\\_-\\_mifid\\_ii\\_final\\_report\\_on\\_mifid\\_ip\\_technical\\_standards.pdf](https://www.esma.europa.eu/system/files/2015-esma-1006_-_mifid_ii_final_report_on_mifid_ip_technical_standards.pdf)", read 2015-10-25.

Guidelines and Related

EBA *Guidelines on the data collection exercise regarding high earners (EBA/GL/2014/07)*,

"<https://www.eba.europa.eu/documents/10180/757283/EBA-GL-2014-07+%28GLs+on+high+earners+data+collection%29.pdf/da42488f-09c1-4558-ae4e-6258e11b8345>", read 2015-10-25.

EBA *Guidelines on sound remuneration policies*, "<https://www.eba.europa.eu/regulation-and-policy/remuneration/guidelines-on-sound-remuneration-policies>", read 2015-10-25.

EBA *Guidelines on the remuneration benchmarking exercise (EBA/GL/2015/03)*,

"<https://www.eba.europa.eu/documents/10180/757286/EBA-GL-2014-08+%28GLs+on+remuneration+benchmarking+%29.pdf/9d87c18b-ed79-4ceb-a3f6-64928cc26065>", read 2015-10-25.

EBA *Recovery, resolution and DGS*,

"<https://www.eba.europa.eu/regulation-and-policy/recovery-and-resolution>", read 2015-10-25.

EBA *Remuneration - Technical Standards, Guidelines and Recommendations*,

"<https://www.eba.europa.eu/regulation-and-policy/remuneration>", read 2015-10-25.

## **National legislation**

Lagen (2007:528) om värdepappersmarknaden

Lagen (1991:981) om värdepappersrörelse

## Official Reports

SOU 2013:65 Förstärkta kapitaltäckningsregler.

*SOU 2014:52 Resolution - en ny metod för att hantera banker i kris*

## Official Documents

Finansinspektionen *Remissvar: Förstärkta kapitaltäckningsregler (SOU 2013:65), Fi2013/3294*",

[http://fi.se/upload/43\\_Utredningar/30\\_Remissvar/2013/remissvar-kapitaltackning-13-10311.pdf](http://fi.se/upload/43_Utredningar/30_Remissvar/2013/remissvar-kapitaltackning-13-10311.pdf)", read 2015-10-25.

Riksgälden *Resolution – en ny metod för att hantera banker i kris (SOU 2014:52) (Fi2014/2275)*,

["https://www.riksdagen.se/PageFiles/21377/resolution-en-ny-metod-f%C3%B6r-att-hantera-banker-i-kris-sou-2014-52-remissvar.pdf"](https://www.riksdagen.se/PageFiles/21377/resolution-en-ny-metod-f%C3%B6r-att-hantera-banker-i-kris-sou-2014-52-remissvar.pdf), read 2015-10-25.

Finansinspektionen *SOU 2015:2 "Värdepappersmarknaden MiFID II och MiFIR"*,

["http://www.fi.se/upload/43\\_Utredningar/30\\_Remissvar/2015/remissvar-mifid2-mifir-150511.pdf"](http://www.fi.se/upload/43_Utredningar/30_Remissvar/2015/remissvar-mifid2-mifir-150511.pdf), p. 7-8, read 2015-10-25.

## Other Sources

European Union *One market without borders*,

["http://europa.eu/pol/singl/index\\_en.htm"](http://europa.eu/pol/singl/index_en.htm), read 2015-10-25.