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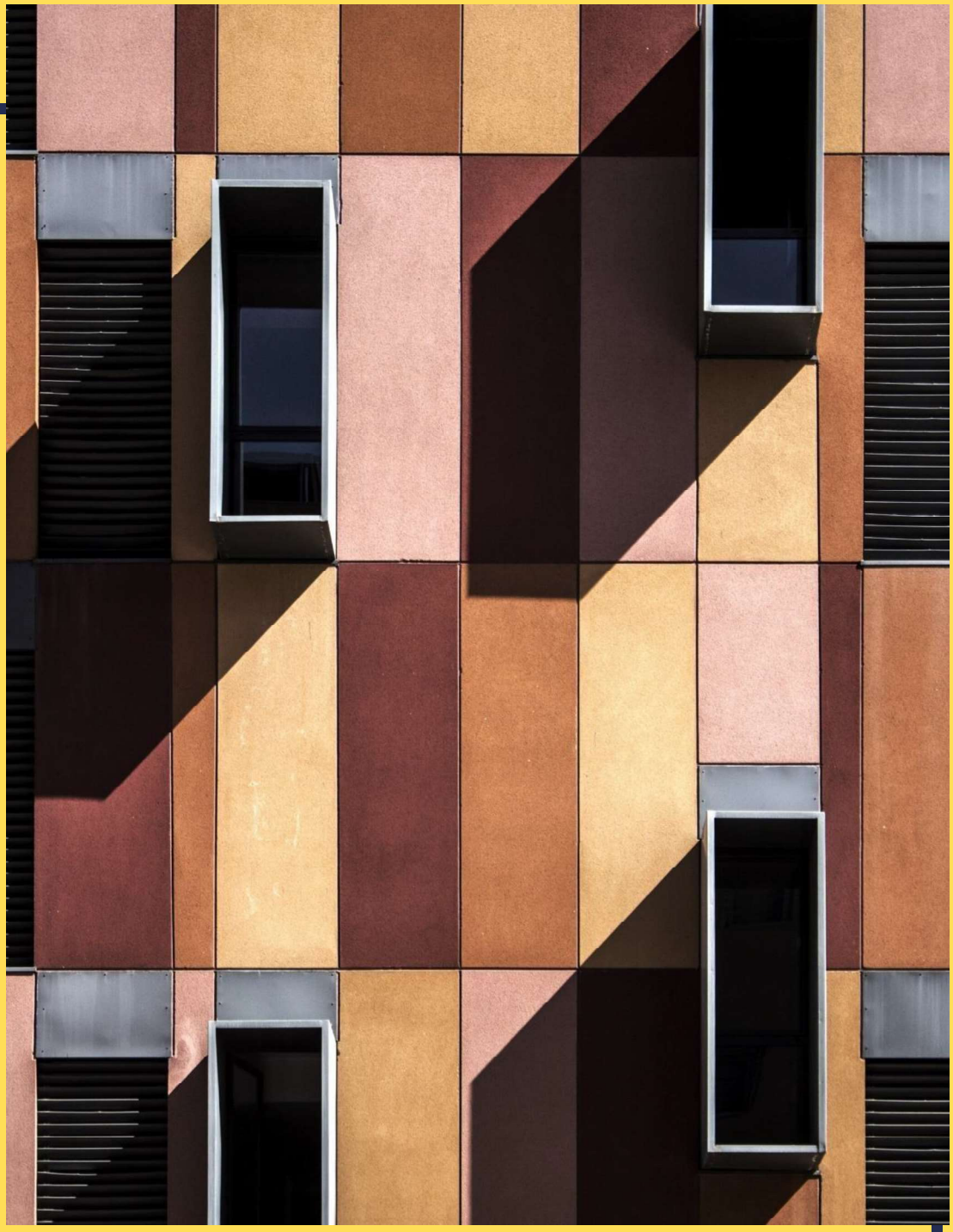

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SUMÁRIO – *SUMMARY*

DIREITO DAS POLÍTICAS PÚBLICAS
REVISTA DO PROGRAMA DE PÓS-GRADUAÇÃO EM DIREITO DA UNIRIO

Submetido em 11/08/2020
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THE FINANCIAL SUPERVISORY AUTHORITY IN GERMANY

A AUTORIDADE DE SUPERVISÃO FINANCEIRA NA ALEMANHA

Margherita Paola Poto [I]

ABSTRACT

The present contribution aims to illustrate the German regulatory system in financial supervision, its structure and its flexibility to hold out against the storms of the perduring critical situation in the financial system. The bird's eye view depicts a consolidated system, where a single regulator supervises the three segments of the financial market (securities *stricto sensu*, banks and insurance), and where the independence from the executive rather than being flaunted as the winning choice, has been set aside in favour of a "delegation of powers", since the authority is a federal institution that belongs to the portfolio of the Federal Ministry of Finance. In addition to the relevant role of the German Financial Supervisory Authority (*Bundesanstalt für Finanzdientleistungsaufsicht*, hereinafter the Bafin) played at national level, it is noteworthy its relevant stature at international level, given the explicit mandate of the Bafin to engage in international administrative cooperation. The Bafin plays a key role in implementing the global financial standards set out in the Basel Accords. In the first part of the contribution, I will analyse the authority and its characteristics, particularly focusing on

RESUMO

A presente contribuição visa ilustrar o sistema regulatório alemão em supervisão financeira, sua estrutura e flexibilidade para resistir às tempestades da persistente situação crítica do sistema financeiro. Em uma visão panorâmica, representa um sistema consolidado, onde um único regulador supervisiona os três segmentos do mercado financeiro (títulos stricto sensu, bancos e seguros), e onde a independência do executivo, em vez de ser alardeada como a escolha vencedora, foi definida aparte a favor de uma "delegação de poderes", visto que a autoridade é uma instituição federal que pertence à pasta do Ministério da Fazenda Federal. Além do papel relevante da Autoridade de Supervisão Financeira Alemã – Bafin (Bundesanstalt für Finanzdientleistungsaufsicht) desempenhado a nível nacional é digno de nota a sua importância relevante a nível internacional, dado o mandato explícito do Bafin para se envolver na cooperação administrativa internacional. O Bafin desempenha um papel fundamental na implementação dos padrões financeiros globais estabelecidos nos Acordo da Basiléia. Na primeira parte da contribuição, irei analisar a autoridade e suas características, focalizando

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the element of the independence in legislation, on its interpretation in jurisprudence, and on its specifity in the national system. The second part of the contribution will tackle the other delicate aspect related to the regulatory authorities in Germany, the public administration liability in case of damages to third people, its constitutional grounds and the extensive interpretation of its mechanisms to the authority supervising financial markets. Some concluding remarks will lead this contribution to an end.

KEYWORDS

German Financial Supervisory Authority. Economic and Financial Policy. German Regulatory System. Public Policy. Financial Market and Financial Law.

particularmente o elemento da independência na legislação, sua interpretação na jurisprudência e sua especificidade no sistema nacional. A segunda parte da contribuição abordará o outro aspecto delicado relacionado com as autoridades reguladoras na Alemanha, a responsabilidade da administração pública em caso de danos a terceiros, seus fundamentos constitucionais e a ampla interpretação de seus mecanismos para a autoridade de supervisão dos mercados financeiros. Algumas observações finais encerrarão esta contribuição.

PALAVRAS-CHAVE

Autoridade de Supervisão Financeira Alemã. Política Econômica e Financeira. Sistema Regulatório Alemão. Mercado Financeiro e Direito Financeiro.

DIREITO DAS POLÍTICAS PÚBLICAS
REVISTA DO PROGRAMA DE PÓS-GRADUAÇÃO EM DIREITO DA UNIRIO

PART I

1 THE ELEMENT OF INDEPENDENCE IN THE EUROPEAN LEGISLATIVE FRAMEWORK

In order to propose a solution to the financial crisis of the past five years, at European level a new system of Financial Supervision has been established, comprising an European Systemic Risk Board, three European Supervisory Authorities (ESAs) for each sector of supervision (bank, pension, market), a Joint Committee of the European Supervisory Authorities in charge of their coordination with financial conglomerates and competent or supervisory authorities for each Member State.

The system has been created under the aegis of the De Larosière Report[1], where a great emphasis has been given not only to the independence of the European actors, but also to the national supervisors. In three points, the Report highlights the importance of independence for the national authorities.

Paragraph 187) expressly mentions independence as a key element of the supervisory authorities:

> "The ESFS (European System of Financial Supervision, editor's note) must be independent from possible political and industry influences, at both EU and national level. This means that supervisors shall have clear mandates and tasks as well as sufficient resources and powers […]."[2]

Paragraph 196) assigns to the European Commission the specific task to carry-out an examination of the degree of independence of all national supervisors. As a logical conclusion, Recommendation 19 in paragraph 197) includes this provision within the to-do list of the European Commission's tasks in the first stage of implementation of the Report (dating 2009-2010)[3].

Paragraph 208), iv) assigns to the European Supervisory Authorities the task to evaluate the independence of the national supervisory authorities through peer reviews. As a counterbalance to independence, accountability to the political authorities is to be

[1] The High-Level Group on Financial Supervision in the EU chaired by J. de Larosière, Report,Brussels, 25February, 2009: http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf, last visited in May 2013.

[2] The High-Level Group on Financial Supervision in the EU chaired by J. de Larosière, cit., p. 47.

[3] Idem, p. 49.

granted, both at European and national levels, so that supervisory work is independent from the political authorities, but accountable to them[4].

In addition to the above mentioned tasks related to the element of independence, the Report provides a definition of supervisory independence, "as a situation in which the supervisor is able to exercise its judgment and powers independently with respect to the enforcement of prudential and/or conduct of business rules, i.e. without being improperly influenced or overruled by the parties under supervision, the government, the Parliament, or any other interested third party."[5]

As such, the supervisory authority shall be empowered and able to make its own independent judgments (e.g. with respect to licensing, on-site inspections, off-site monitoring, sanctioning, and enforcement of the sanctions), without other authorities or the industry having the right or possibility to intervene. Moreover, the supervisor itself shall base its decisions on purely objective and non-discriminatory grounds. However, supervisory independence differs from central bank independence (i.e. in relation to monetary policy), in the sense that the government (usually the Finance minister) remains politically responsible for maintaining the stability of the financial system, and the failure of one or more financial institutions, markets or infrastructures can have serious implications for the economy and tax payer's money. Consequently, the supervisory authority should operate within a certain scope of responsibilities and under an explicit delegation of powers in the form of legislation passed by. Parliament and the government should not exercise immediate powers on the supervisory authority and interfere directly in its day-to-day activities.

The Report adds that:

> Independence should be balanced and strengthened by proper accountability arrangements and transparency of the regulatory and supervisory process, consistent with confidentiality requirements. National authorities should however relinquish control mechanisms such as having government representatives, chairing or actively participating in the management board of the supervisory authority, or giving the government the right to intervene in the day-to-day operations of the supervisory authority. Their influence should be limited to the possibility of amending the legal framework, imposing

[4] Idem, p. 53.

[5] Idem, note 10, p. 47.

> long-run strategic goals, and monitoring performance, on the condition that this is done in an open and transparent manner[6].

Based on various internationally recognised standards and codes (such as the above mentioned G10 Basel Core Principles for Effective Banking Supervision, the IAIS Insurance Core Principles and the IOSCO Objectives and Principles of Securities Regulation) the articulated definition underpins the elements of the authorities' independence, implying a certain autonomy of the decision making process; an organisational separation from the ministries; a certain degree of freedom from ministerial control; the guarantee of the rule of law in the modalities of election of their members; financial autonomy.

It is equally clear that the independence shall be granted from both market parties and the political arena and this aspect will be extremely relevant when I will analyse the German elasticity in interpreting the element of "political independence" (in case C-518/07[7]). Germany did not consider a core element the political independence, rather focusing on the importance to avoid any conflicts of interest between the independent authority and the market parties. Though the point has been explicitly stressed only in the case of the Authority of Data Protection, nevertheless the situation is similar in the case of the financial supervisory authority.

In line with the recommendations of the De Larosière Report, the provisions on the independence of the regulatory authorities have been set up specifically for the three authorities (the above mentioned European Supervisory Authorities, ESAs) established within the European System of Financial Supervision, and namely: Art. 1 (2) Regulation 1093/2010 for the European Banking Authority (EBA);[8] Art. 1 (2) Regulation 1094/2010 for the European Insurance and Oc. Pensions Authority (EIOPA);[9] Art. 1 (2) Regulation

[6] Ibidem.

[7] See paragraph 3 of the present contribution.

[8] Regulation (EU) n. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, in *OJ* 15/12/2010, L 331/12.

[9] Regulation (EU) n. 1094/2010 of the European Parliament and Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, in *OJ* 15/10/2010, L 331/48.

1095/2010 for the European Securities and Markets Authority (ESMA).[10] The letter of the law refers to the same provisions in the three European Supervisory Authorities and recites as follows: "When carrying out its tasks, the Authority shall act *independently* and objectively and in the interest of the Union alone." Further footprints of the independence of the authorities and their members are retraceable in the recitals ("*whereas*") of the above mentioned establishing Regulations, and respectively for the EBA, EIOPA and ESMA in *whereas* 45), 44), 45), where the role of the authorities is to "serve as *independent* advisory body to the European Parliament, Council, Commission."

Additionally, Regulation n. 1092/2010 establishing the European Systemic Board, in charge with overseeing risk in financial system as a whole (whereas n. 4), stresses the aspect of the independence of the European Systemic Risk Board (ESRB).

> "Whereas" 15 recites: "The Union needs a specific body responsible for macro prudential oversight across its financial system, which would identify risks to financial stability […]. Consequently, the ESRB should be established as a new *independent* body, covering all financial sectors […]."[11]

The independence of the administrative authorities plays a pivotal role in the European legislative framework, as well as in the interpretation of the courts, as I will illustrate in the following paragraph.

One might expect a compliant and similar situation at national scale. But here comes the surprising divergence. As anticipated above, the Federal Republic of Germany, the largest economy in Europe,[12] opted for a system where the political independence is not considered the centerpiece of the whole financial supervisory structure. Though the European Court of Justice stigmatised this choice in the specific case of the Data Protection Authority, the judicial darts have not reached the Financial Supervisory

[10] Regulation (EU) n. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, in OJ 15/10/2010, L 331/84.

[11] Regulation (EU) n. 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, in OJ 15/10/2010, L 331/1.

[12] Furthermore, Germany was the fifth largest economy in the world for 2010, according to GDP (PPP) and fourth in the world according to GDP (Current Prices, US Dollars). Germany's GDP (PPP) was US$2.94 trillion and its GDP (Current Prices, US Dollars) was US$3.31 trillion. http://www.economywatch.com/world_economy/germany/, last visited in May 2013.

Authority, which remains, up to this moment, solidly connected to the Ministry of Finance.

Before analysing the Bafin's constitutional grounds, its structure and its powers, I will describe the actual position of the European judiciary *vis-à-vis* the element of independence of regulatory authorities.

2 THE EUROPEAN COURT OF JUSTICE CHAMPIONIZES THE INDEPENDENCE CAUSE

Case C-518/07 addresses the fundamental topic of the supervisory bodies' independence, offering the interpretation of the Court of Justice on the legislative provisions regarding the Data Protection Authority. I will focus on two main aspects shining through the case: on one hand, the position of the Federal Republic of Germany *vis-à-vis* the requirement of the independence; on the other hand, the interpretation offered by the European judiciary[13]. The judgment does not give space to ample generalisation and extensions to other domains, being confined within the borders of the Data Protection Authority; nevertheless, it offers hints for a parallel analysis between models of authorities (data protection and financial regulatory authorities).

The dispute concerned two different interpretations given by the European Commission and the Federal Republic of Germany about the expression "with complete independence" in the Directive 95/46 (Data Protection Authority) and about the exercise

[13] Case C-518/07, European Commission v. Federal Republic of Germany, Judgment of the Court of Justice (Grand Chamber) of 9 March 2010 [2010] ECR1-1885; in *Common Market Law Review*, 2012, p. 1755-1768, commented by J. Zemanek; in *Diritto Pubblico comparato ed europeo*, 2010, 944-947, commented by L. Fabiano, *Chi controlla il controllore? Sulla (illegittimità, secondo la Corte di Giustizia, della) vigilanza (statale) delle autorità di controllo*. On the case see also A. Roßnagel, *Verurteilung Deutschlands zur Neuorganisation seiner Datenschützer*, *Europäische Zeitschrift für Wirtschaftsrecht,* 2010 p.299-301; A. Epiney, *Zu den Anforderungen an die Unabhängigkeit der Kontrollstellen im Bereich des Datenschutzes*, *Aktuelle juristische Praxis - AJP* 2010 p.659-663; T. Petri, M. Tinnefeld, *EuGH: Unabhängigkeit der Datenschutz-Kontrollstellen*, *Multimedia und Recht,* 2010 p.355-356; M. Aubert, E. Broussy, F. Donnat, *Chronique de jurisprudence communautaire. Autorités administratives indépendantes et principes démocratiques*, *L'actualité juridique; droit administratif* 2010, p. 938-939; F. Kauff-Gazin, *Vers une conception européenne de l'indépendance des autorités de régulation?, Europe 2010 Juillet Etudes nº 9 p.12-16; H. P. Bull, Die "völlig unabhängige" Aufsichtsbehörde, Europäische Zeitschrift für Wirtschaftsrecht 2010, p.488-494; I. Spiecker, Juristenzeitung 2010 p.787-791; M. Cortés, M. José, Jurisprudencia del Tribunal de Justicia de la Unión Europea, Enero - Abril 2010, Revista de Derecho Comunitario Europeo 2010 nº 34 p.1-61; F. Fabbrini, Il diritto dell'Ue e l'indipendenza delle autorità nazionali garanti della protezione dei dati, Giornale di diritto amministrativo 2010 p.1028-1033; E. M. Frenzel, "Völlige Unabhängigkeit" im demokratischen Rechtsstaat - Der EuGH und die mitgliedstaatliche Verwaltungsorganisation, Die öffentliche Verwaltung 2010 nº 22 p.925-931.*

of the supervisory authorities functions (concerning protection of individuals with regard to the processing of personal data).

On one hand, the Federal Republic of Germany supported a narrow interpretation of the "complete independence" required to the supervisory authorities in exercising their functions, as the Directive of Data Protection requires "the supervisory authorities to have functional independence in the sense that those authorities must be independent of bodies outside the public sector which are under their supervision and they must not be exposed to external influences."[14] Consequently,

> "the State scrutiny exercised in the German Länder does not constitute such an external influence, but rather the administration's internal monitoring mechanism, implemented by the authorities attached to the same internal monitoring machinery as the supervisory authorities […]."[15]

On the other hand, the European Commission's interpretation of "complete independence" has been rooted on the idea that "the supervisory authority must be free from any influence, whether that influence is exercised by other authorities or outside the administration."[16]

The ruling of the Court of Justice starts from these two meanings of independence (functional and complete) to expose its own overview, where the definition develops from three main questions: 1) What does the law say about independence? 2) Does the State scrutiny allow it? 3) Is independence against the democratic principle?

As a premise to these questions, the Court clarifies that contrarily to the position taken by the Federal Republic of Germany "the concept of "independence" is complemented by the adjective "complete", which implies a decision-making power independent from any direct or indirect external influence on the supervisory authority."[17]

The answer to the first question (Why does the law say about independence?) is to be found in the letter of the law, and in particular in the purposes of the legal provision.

[14] C-518/07 cit., paragraph 16, p. I-1907.

[15] Ibidem.

[16] C-518/07 cit., paragraph 15, p. I-1907.

[17] C-518/07, cit., paragraph 19, p. I-1908.

In the case of the Data Protection Authority, Directive 95/46[18] assigns the protection of the fundamental rights and to personal data to national supervisory authorities. Their independence is the guarantee intended "to ensure the effectiveness and reliability of compliance with the provisions on protection of indifiduals with regard to the processing of personal data and must be interpreted in the light of that aim". As a squire to his knight, independence sustains the authority "to strengthen the protection of individuals and bodies affected by their decisions". Consequently, when carrying out their duties, the authorities shall act objectively and impartially, remaining free from any external influence, such as the influence of the State or the *Land*, and not from the influence only of the supervised bodies.[19]

The answer to the second question ("Does State scrutiny allow independence?") is scorporated into two points: a State interference over the decisions of the supervisory authorities may hinder the economical independence on one side, and the political independence on the other side. In this regard, the Court observes that concerning the economical influence, the government may be an interested party in the decision-making process if it actually or potentially participates therein. Regarding the political independence, the risk is two-fold: firstly, the scrutinising authorities could exercise a political influence over the scrutinised authorities, in terms of prior compliance on the part of the scrutinised in the light of the scrutinising's authority decision making practice. Secondly, for the purpose of the role adopted by those authorities, it is necessary, according to the Court, that their decisions remain above any suspicion of partiality.[20]

Answering the third question (Is independence against the democratic principle?), the Court reminds that democracy is a pillar of European Community law and was expressely enshrined in Article 6(1) EU as one of the foundations of the European Union. For this reason, it has to be taken into consideration when interpreting acts of secondary law, such as directives.

In hermeneutic perspective, the Court concludes that the principle

[18] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ* 23/11/1995, L 281/ 31.

[19] C-518/07, cit., paragraph 24 and 25, p. I-1910.

[20] C-518/07, cit., paragraphs 35-36, pp. I-1912-1913.

> "does not preclude the existence of public authorities outside the classical hierarchical administration and more or less independent of the government. The existence and conditions of operation of such authorities are, in the Member States, regulated by the law or even, in certain States, by the Constitution and those authorities are required to comply with the law subject to the review of the competent courts. Such independent administrative authorities, as exist moreover in the German judicial system, often have regulatory functions or carry out tasks which must be free from political influence, whilst still being required to comply with the law subject to the review of the competent courts."[21]

In other words, the *status* independent of the general administration on the supervisory authorities (in the specific case, responsible for the protection of individuals with regard to the processing of personal data outside the public sector) does not deprive those authorities of their democratic legitimacy.

The Court comes to these conclusions for the Data Protection authority. One may wonder whether the formulated argumentations might be extended to the financial supervisory authorities. What does the law say about independence? Does independence jeopardise economical and political decisions? Is independence contrary to the democratic principle?

As above illustrated, several provisions at European level give emphasis on independence as a key element in financial supervisory bodies. It is equally true that there is not a specific provision requiring that independence shall be a characteristic of the national supervisory bodies, as in the case of the Data Protection Authorities. Nevertheless, the European legislative ruling contains a clear indicator for the national legislator, as well.

In the following paragraph, I will analyse the German position on financial supervisory bodies' independence. It seems that, though the legislator opted for a *pro*-independence solution, its interpretation recalls the "functional independence" provided in Case C-518/07, with a specific focus on the economical independence, rather than on the political.

Resuming the three questions, Germany opted for independence at legislative level (What does the law say about independence?), but it provided a narrow interpretation, where the economical independence prevails over the political, since, as I

[21] C-518/07, cit., paragraph 42, p. I-1914.

will say, the Bafin is under the Ministry of Finance (Does independence jeopardise economical and political decisions?), without compromising democracy (Is independence contrary to the democratic principle?). And as far as the ado around Bafin is confined to the political arena,[22] very little is left to say to the courts. [23]

3 THE ELEMENT OF INDEPENDENCE IN THE NATIONAL LEGISLATIVE FRAMEWORK.

In the Federal Republic of Germany, the origin of a structural model of authorities acting in sensitive sectors of the public administration, with elements of independence from the executive may be traced back to the Conference held at the Berlin Chamber of Commerce by Carl Schmitt in 1930, at which it was declared that the German central bank, as well as other bodies such as the Railways, were "neutral" organs of administration of the economy with regards to government policy[24].

The problem of the constitutional basis of neutral organisations in Germany lies mainly in identifying a regulation that combines the democratic principle and devolution of powers to external and independent organs. In other words, the main issue regards establishing the way in which the constitutionally required principle of democracy may be reconciled with the need for delegation of powers to expert bodies which are independent from day-to-day politics. Pursuant to Art. 20 GG all State authority has to emanate from the people. Therefore, a continuous chain of legitimacy between the sovereign people and the state power must be shown generally for all powers.

This means that delegation of powers must receive constitutional coverage and is therefore only legitimate within the bounds of the constitution. In the tension between democratic principle and authorities' independence from political power, the democratic

[22] The debate around Bafin seems to have had broader implications rather than the mere dispute over its independence: see K. Engelen, *Germany's Fighting over BaFin*, in *The International Economy,* Winter 2010, p. 54 and ff.. According to Engelen, Bafin is falling victim to those conservative and liberal politicians who from the beginning almost a decade ago had been rejecting a German version of the FSA [*the British Financial Supervisory Authority*], opting instead to put banking supervision under the umbrella of the Bundesbank.

[23] P. Dann, M. v. Engelhardt, The Global Administrative Order through a German Lens: Perception and Influence of Legal Structures of Global Governance in Germany, in German Law Journal, 1 July 2011, p. 1383.

[24] C. Schmitt, *Das Problem der innerpolitischen Neutralitaet*, now in *Verfassungsgericht Aufsätze aus den Jahren* 1924-1925, Berlin, 1958, 41.

principle still prevails, so that generally «a legal form which states dependency on government is chosen even if in practice the principle of non intervention prevails»[25].

In the delicate balance between the requirements of independence and the requirements of conformity to the constitution, there is a tendency towards the creation of a system in which the authorities regulating the system's sensitive sectors, are bound to comply with the rule of law. Thus, upon closer examination, these regulatory authorities like the traditional administrative authorities of the German system, are obliged to observe the rule of law, as they are bound «to the statutes and the law» («*an Gesetz und Recht gebunden*»)[26]. The democratic legitimation is the foundational concept of the regulatory authorities in Germany, far more important than their political independence from the executive.

4 ESTABLISHMENT AND AIMS OF THE BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGSAUFSICHT (BAFIN)

Ever since it was founded, in May 2002, the Federal Financial Supervisory Authority (*BaFin*) has exercised the integrated functions of supervising banking and finance, insurance, and securities trading. It was established as an independent public law body, that however maintains ties with the Ministry of Finance, whose legal and functional supervision it is subject to.[27]

BaFin is thus a federal authority, that operates under the Federal Ministry of Finance. This means that it is subordinate only to the highest federal body, that is the Federal Ministry of Finance, whose authority it comes under, and which has jurisdiction over all federal territory.

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[25] A. Van Aaken, *Independent Administrative Agencies in Germany*, in www.dirittoamministrativo.jus.unitn.it, last visited in April 2013.

[26] B. Rudolf, *The enforcement of Judgements against Public Authorities in the Federal Republic of Germany*, *European Public Law*, 2001, who affirms that «*the importance of the executive's being bound to the statutes and the law cannot be underestimated* […]. *Given the historic experience of the national-socialist rule with its blatant disregard of the rule of law, this principle has assumed a central position in the self image of the Federal republic of Germany. An administrative authority that intentionally disregards the law leaves the common ground of societal consensus*». For a general framework on administrative law in Germany see O. Mayer, *Theorie des französischen Verwaltungsrechts*, 1886, 2; see also C.F. Gerber, *Über öffentliche Recht*, 1852; G. Jellinek, *Gesetz und Verordnung, Staatsrechtliche Untersuchungen auf Rechtgeschischtlicher und Rechtvergleichender Grundlage*, Tübingen, 1919; V. E. Orlando, *Giorgio Jellinek e la storia del diritto pubblico generale*, 1949, Milano; Id., *Diritto pubblico generale. Scritti varii (1881-1940) coordinati in sistema*, Milano, 1940.

[27] M. Schüler, *Integrated financial supervision in Germany*, 2004, ZEW Discussion Papers 04-35.

Independence from the federal government means essentially independence from the Ministry of Finance in terms of funding, because it is financed by the businesses and institutions that are subject to its supervision.[28]

Even the location of the supervisory authority, inside the Ministry of Finance building in the centre of Bonn, reveals the nature of a body which, although independent of the federal budget, still remains within the Ministry structure.

BaFin was established following approval of the FinDAG,[29] on 22 April 2002, with the specific purpose of unifying the three market supervisory functions (banking, insurance, and securities) under a single federal body. It thus merged the federal supervisory offices for the credit system (*Bundesauftsichtamt für das Kreditwesen - BAKred*), for the insurance system (*Bundesaufsichtamt für das Versicherungswesen - BAV*) and for the financial products trade (*Bundesaufsichtamt für Wertpapierhandel*).[30]

Regarding this last point, the BaFin has three main supervisory objectives: its paramount aim is to ensure the functioning of the entire financial industry in Germany. From this objective, two others can be inferred: to safeguard the solvency of banks, financial services institutions and insurance undertakings – which in the past was mainly a function of the BAKred and the BAV – and to protect clients and investors.[31]

Fundamentally, the main objectives that BaFin pursues, in a perspective of general supervision and in defence of the public interest, relate to supervision of the stock market as a whole, both in terms of the transparency and solvency of banks, and of the protection of investors.

BaFin operates in the public interest. Its main objective is to guarantee the correct working, stability and integrity of the German financial system, so as to allow clients, as well as insurance companies and investors, to have complete trust in the system. In addition to the general function of ensuring supervision over the solvency of institutions

[28] C. Di Capua, *Il sistema bancario tedesco*, in *Quaderni di Ricerche realizzati nell'ambito della ricerca* «*Verso un sistema bancario e finanziario europeo*», a cura dell'Ente per gli Studi Monetari, Bancari e Finanziari Luigi Einaudi, n. 56, 2003.

[29] *Gesetz über die integrierte Finanzdienstungfsicht 22 April* 2002, *BGBI*, I, 1310.

[30] K.D. Dehlinger, *Vertragliche Marktsegmentregulierung an Wertpapierbörsen*, Baden Baden, 2003.

[31] K.K. Mwenda, *Legal aspects of Unified Financial Services Supervision in Germany*, in *German Law Journal*, 2003, 4, 10.

subject to its controls, BaFin is also responsible for ensuring that banks, financial institutions and insurance companies fulfil their duties appropriately.

Through its activity of market supervision, BaFin also encourages the adoption of standards of practice and behaviour, with the aim of maintaining the confidence of investors in the financial market.[32]

5 BAFIN'S STRUCTURE

BaFin comprises three distinct organisational units, known as Directorates: the unit assigned to banking supervision (*Bankenaufsicht*), one assigned to insurance system supervision (*Versicherungsaufsicht*) and lastly one charged with supervision of the financial system in a strict sense and asset management (*Wertpapieraufsicht/Asset Management).*[33]

The first unit is divided into four departments, each respectively responsible for oversight of large banks and certain credit institutions (*Aufsicht über Großbanken und ausgewählte Kreditbanken*), of Länder banks, savings banks and rural banks (*Aufsicht über Landesbanken, Sparkassen und Bauskassen*), with supervision of banks granting credit, of special and of regional banks (*Aufsicht über Kreditbanken, Regionalbanken und Spezialbanken*) and, lastly, with supervision over credit institutions and the lawfulness of cooperative shareholding models (*Aufsicht über Kreditinstitute in der Rechtsform der eigetragenen Genossenschaft*).

The second unit is composed of five department structures. The first is charged with carrying out general functions in the insurance system, such as establishing insurance conditions, as well as management of the health insurance system (*Grundsatzfragen der Versicherungsaufsicht; aufsicht über Krankenversicherungsunternehmen*). The second oversees the life insurance system (*Aufsicht über Lebensversicherungsunternehmen und Sterbenkassen*). The third oversees damage insurance and national insurance groups (*Aufsicht über Schaden und Unfall V-U, Nationale Versicherungsgruppe*); the fourth, international insurance groups and financial

[32] See pag. 9 *Annual Report*, 2006,Bafin, on *http://www.bafin.de/jahresbericht/2006/kapitel_VIII_en.pdf*.

[33] C. Schiedermair, «*3L3*» - *European financial supervisors cooperate across sector boundaries*, pubblicato in *Q3/07, Bafin Quarterly*, *3rd Quarter Edition* 2007, *Issued by the Federal Financial Supervisory*, p. 4; see also *BaFin, 2005, Jahresbericht der Bundesanstalt für Finanzdienstleistungsaufsicht, DruckVerlag Kettler GmbH, Bönen*, Bonn und Frankfurt am Main, 2006.

conglomerates (*Internationale Versicherungsgruppen und Finanzkonglomerate)*. The last department oversees pension insurance systems (*Bertriebliche Altersorgung; aufsicht über Pensionkassen und Pensionfonds*).

The third directorate consists of four departments. The first has similar functions to those of the first insurance department, in other words with responsibilities for identifying general principles and conditions of the financial supervision system (*Grundsatzfragen der Wertpapieraufsicht*). The second has oversight of insider trading and forms of publicity for investments, as well as stock exchange competencies (*Insideruberwachung, Ad-Hoc-Publizität; Director's dealing; Borsen kompetenz-zentrum*). The third is charged with supervision over the correct application of laws concerning credit (*Aufsicht über FDI nach KWG und WpHG*). The last department is responsible for supervision over investment funds (*Investmentfonds*)[34].

6 FUNCTIONS

6.1 Bafin's Powers Under the Financial Instruments Law (Wertpapierhandelgesetz - Wphg).

One of the main laws governing BaFin's functions is the law on financial instruments (*Wertpapierhandelgesetz – WpHG*)[35], enacted in 1998 but subsequently amended in the sections regarding supervision[36]. I will look at part II, especially sections 3-10 of this law, regulating BaFin's powers and functions. Section 3 states that the authority has general responsibility for supervision under the law, and assigns to BaFin a general power to act in order to prevent or eliminate any risks which may arise in the financial system.[37]

The Authority oversees and monitors compliance with laws safeguarding the proper functioning of the market, and may provide any instructions required to ensure their implementation. It also holds the power of prohibiting or suspending the circulation

[34] http://www.bafin.de/bafin/organigramm.*en.pdf.*

[35] Wertpapierhandelgesetz - WpHG, in der Fassung der Bekanntmachung vom 9. September 1998, in *BGBl.*, I, 2708.

[36] *Handelsgesetzbuch, Wertpapierhandelgesetz*, 44. Auflage, 2006, Becktexte in Dtv, München.

[37] § 3 (1) Wertpapierhandelgesetz - WpHG cit..

of financial products on the market.[38] In order to fulfil its supervisory functions over the financial sector, BaFin also exercises powers of so-called inspectional supervision: it can gather information, and request documentation, to the extent that it deems necessary for effective monitoring of possible breaches of the law. In coordination with this inspectional activity, BaFin must immediately inform the public prosecutor[39] in the event that there is evidence that an offence has been committed under section 38 of the same law.[40]

If the Authority believes that the investigation is not being carried out according to legal requirements, it may request the publication of a report or a statement providing an account of the main phases of the preliminary enquiry.[41]

This law specifies, in addition, that any kind of objection or protest against the above-mentioned measures can have no delaying effect.[42]

The last of the authority's sanctionative powers is found in the provision that refers to the principle of international cooperation, and permits disclosure of information regarding persons under investigation only for the purpose of guaranteeing *International Zusammenarbeit* (international cooperation): «(10) *Die Bundesanstalt darf ihr mitgeteilte personenbezogene Daten nur zur Erfllung ihrer aufsichtlichen Aufgaben und für Zwecke der Internationalen Zusammenarbeit nach Maßgabe des § 7 speichern, verändern und nutzen*».[43]

6.2 The Advisory Committee

Other regulations, aside from those concerning the powers which BaFin is invested with, relate to the establishment within the Authority of an advisory committee consisting of representatives from each *Land*, who are assisted, if necessary, also by representatives from the Ministry of Finance, of Justice, of Economy and Labour, as well

[38] §3 (2) Wertpapierhandelgesetz - WpHG cit..

[39] §3 (5) Wertpapierhandelgesetz - WpHG cit..

[40] §3 (3) Wertpapierhandelgesetz - WpHG cit..

[41] § 3 (5) Wertpapierhandelgesetz - WpHG cit..

[42] § 3 (7) Wertpapierhandelgesetz - WpHG cit..

[43] § 3 (10) Wertpapierhandelgesetz - WpHG cit..

as representatives from the German Federal Bank. The committee may also consult with experts on securities, on the stock exchange and on economics.[44]

The committee carries out supervision and provides the supervisory authority with opinions in the following ways: 1. through issuing opinions and guidelines concerning BaFin's supervisory activity; 2. through consultancy in the area of supervision of stock market institutions and institutions that trade in financial instruments; 3. through supervisory activity on the correct division of competencies between BaFin and the authorities charged with supervision of the markets as well as cooperation between them.[45]

The advisory committee may also make recommendations regarding general progress on supervisory operations by BaFin which, in turn, compiles an annual report on its supervisory activity, on progress made in this activity and also on international security and cooperation.[46] The committee is convened at least once a year by BaFin's President and, in the event that one third of its members request it, each member has the right to contribute to the committee's advisory activity.[47]

6.3 The Cooperation Between Supervisory Authorities

The WpHG provisions include a standard clause on the duties of cooperation between authorities charged with oversight of the securities market, cooperation which must be in place both on a national and international level. Section 7 of the law specifies a list of duties of cooperation with authorities that operate abroad: as regards supervision of financial instruments and markets, subsection 1 of section 7 states that BaFin must cooperate with the supervisory authorities of other Member States of the European Community and of the states which are parties to the Agreement on the European Economic Area.[48]

[44] § 5 (1) Wertpapierhandelgesetz - WpHG cit..

[45] § 5 (2) Wertpapierhandelgesetz - WpHG cit..

[46] § 5 (3) Wertpapierhandelgesetz – WpHG cit..

[47] § 5 (3) Wertpapierhandelgesetz - WpHG cit..

[48] § 7 (1) Wertpapierhandelgesetz - WpHG cit..

6.3.1. The German System and the International Cooperation

In the area of the international cooperation, reference should be made to the recent reform of the financial system under the system of the Basel Accords[49], that seek to extend the process of harmonisation and integration of supervisory principles, in particular the principle of cooperation between the bodies charged with supervision.[50] BaFin, which also participated in the drafting of the Basel principles, agreed to implement the accords.

Germany implemented the principles through enactment of primary and secondary legislation. Particularly worthy of mention is the *Kreditwesengesetz-KWG* amendment made by the legislative provision of 17 November 2006. It provides for a series of modifications relating to the requisites for appraising capital adequacy, the solidity of groups of institutions and of parent companies, to the specification of the matters subject to audit, and to the inspectional powers of BaFin.[51]

6.3.2 Cooperation at National Level

The forms of cooperation between national authorities include the agreements between BaFin, the German Federal Bank and the Federal Cartel Authority (Federal Competition Authority), as well as the need for exchange of information, including personal data, required in order to correctly fulfil supervisory duties.[52]

Furthermore, still within the scope of national cooperation duties, there are historical ties between BaFin and the *Bundesbank*, whose involvement in the banking supervisory system is not only due to its development over time, but also to the nature of its duties. Although its objectives and tasks as Central Bank are not exactly the same as

[49] The Basel Accords (Basel I, Basel II, Basel III) are International agreements approved by the Basel committee, a ramification of the Bank for International Settlements (BIS), which also includes, in addition to the Basel Committee for Banking Supervision, the Committee on Global Financial Systems (CGFS) and the Committee on Payment and Settlement Systems (CPSS). The provisions laid down at EU level regarding the need for integration in the field of supervision must necessarily be coherent with what has been decided, on an international level, by the Basel Committee. The Basel Committee constitutes an example, possibly the most important, of a regulatory network which cuts across national powers. For updates see http://www.bis.org, last visited in May 2013.

[50] M. Poto, *The System of Financial Supervision in Europe - Origin, Developments and Risk of Overruling*, in *EJRR*, *Symposium on the Financial Crisis in the Europe* (Part 2), n. 4/2011, p. 491 and ff..

[51] Q3/2007, *3rd Quarter Edition* 2007, http://www.bafin.de/bafinjournal/bq0703_en.pdf, last visited in May 2013.

[52] § 6 (2) Wertpapierhandelgesetz - WpHG cit.

those of banking supervisors generally, the objectives and activities of monetary policy and prudential supervision often overlap or complement each other in the financial sector.

This feature causes a particular kind of similarity - and sometimes an overlapping - of functions as regards the powers that should have been transferred to the central European system from 1 January 1999[53]. The Banking Act of 1961 assigned to the Federal Banking Supervisory Office responsibility for supervision of credit institutions and - with the coming into force of the Sixth Amendment of the Banking Act – also of financial institutions.

The Federal Banking Supervisory Office took on the role of independent federal authority on 1 January 1962, charged with reporting to the Federal Ministry of Economy (and until the end of 1972, to the Federal Ministry of Finance). With the entry into force of the law on integrated supervision of financial services of 1 May 2002, the three different Federal Supervisory Offices responsible for oversight of banking, of insurance, and of securities trading were unified within a single authority assigned to supervision of the financial sector.

Because of its relations with credit institutions, its local presence and in general its proximity to market operations, the *Bundesbank* has always exercised considerable influence on the finance sector. It is no coincidence, in fact, that Section VII of the Banking Act provides for the involvement of the *Bundesbank* in banking supervision operations. *Deutsche Bundesbank* and BaFin still operate in concert today, according to their respective duties and functions, as specified by parliamentary act of agreement[54].

According to this agreement, most of the functions concerned with banking supervision are assigned to the *Bundesbank* because of its decades-long experience of supervisory activity in the financial market and payment operations sectors. In its activity of monitoring financial operations, it performs the functions of assessing the documentation and reports prepared annually by credit institutions.

BaFin, on the other hand, as successor to the Federal Banking Supervisory Office carries out a more secondary role in the banking sector: it is responsible for supervision

[53] *See the opinion of the European Central Bank in* http://www.ecb.int/ecb/legal/pdf/en_con_2007_32_f_sign.pdf, last visited in May 2013.

[54] *http://www.bancaditalia.it/pubblicazioni/relann/rel05/rel05it/rel05_indice.pdf*, last visited in May 2013.

of all measures of a financial nature (sovereign measures). Only in exceptional cases does it review audits of banking operations, on its own or together with the *Bundesbank*. Aside from the above mentioned supervision of credit institutions, the *Bundesbank* exercises a linking role because of its functions as Central Bank, in this way contributing to the stability of the financial system, in line with the provisions of the European System of Central Banks (ESCB). It performs important functions in: determination of general rules; supervision of banking operations, except for sovereign operations which, as previously explained, are the responsibility of BaFin; in prudential oversight of audits; and in the operations of cooperation and coordination in the sector of prudential supervision.

However BaFin's duties are not limited to performing sovereign functions, that is to say those operations authorising, monitoring and, if necessary, terminating the activity of credit institutions. They also extend to laying down guidelines of a general nature, which may consist of codes of conduct that the banks are obliged to follow, and rules about new financial services or services that hold risks. In addition its functions may also involve resolving problems related to banking and financial services, when they endanger the stability of institutional structures or when in some way they may jeopardise the economic system as a whole.

Also in the area of authority powers, there exists a duty of mutual cooperation between BaFin and the *Bundesbank*. This cooperation takes the form of the *Bundesbank*'s participation in enactment of secondary legislation, in bank inspections, in international cooperation and coordination, and in the management of any crises in the sector.

With specific regard to cooperation in ongoing supervision of credit institutions, the law reforming supervisory authorities provides that BaFin is responsible for adopting administrative measures on the basis of the results of controls and of further monitoring carried out by the *Bundesbank*, which in turn acts in compliance with the guidelines issued by BaFin.

In extremely simplified terms, it may be said that ongoing supervision, generally carried by peripheral units of the *Bundesbank*, consists in: analysis of reports provided by credit institutions, of audit reports, and of documents related to annual accounts; carrying out and analysing the results of technical bank monitoring with the objective of judging the adequacy of capital reserves and of risk management procedures; and assessing the results of investigations.

In the area of inspectional supervision, the auditing companies play an important role: they draft detailed annual reports on the overall situation of intermediaries, and are also obliged to immediately inform BaFin if they discover evident irregularities in the financial system.

Moreover, BaFin may carry out extraordinary sector inspections; these are generally delegated to auditing companies or to the *Bundesbank*[55].

7 REGULATORY SUPERVISION AND INTERNAL AUDITS

The KWG regulates in detail the activities of credit institutions, in the area of regulatory supervision, causing significant reduction in the margins of discretionary power that the supervisory authority had in performing its activity.

The main competencies of BaFin as regards secondary legislation are clarification of prudential rules concerning capital adequacy and liquidity, as well as defining best practice in the internal organisation of the institutions which it oversees. As regards adequate capital resources of intermediaries, this is defined by the KWG. Further regulation is referred to BaFin, whose autonomy is limited on one hand by the provisions contained in the European directives, and on the other by the binding opinions of the *Bundesbank.*

Regulations on specific organisational duties for credit institutions were introduced by the sixth amendment to the KWG, in order to extend the possibilities of intervention on the part of authorities overseeing bank organisation. Article 25a, subsection 1, confirms the obligation of credit institutions to provide themselves with an adequate risk management system, with a well-organised structure, with an adequate control system, and with good information systems security.[56]

Risk management has also been recently regulated through development of best practices that provide minimum standards for administration of the credit area and the credit process (*Mindestanforderungen an das Kreditgeschäft*- MAK).[57] BaFin's purpose,

[55] Gesetz über den Wertpapierhandel, WpHG cit., Part. II, Sect. IV, § 3.

[56] BaKred, *Jahresbericht 2000*, 2001, 12 and ff..

[57] BaFin, 2002d, in www.bafin.de, last visited in May 2013.

in defining these practices, is to reinforce awareness of risks adopted by banks and to improve transparency.[58]

The MAKs made definition of a credit risk strategy compulsory, as well as separation of operating functions from control functions, definition of the entire credit process, and monitoring of possible related risks.

8.CONCLUDING COMMENT

In the Federal Republic of Germany, traditionally characterised by a large number of banks, a low degree of concentration, and a strong public sector presence, regulatory policies have never aimed to have much effect on the structure of the banking system.

Therefore, among all the German supervisory authorities, there is no body that carries out a real function as leader in the banking system.

On this point, it has been stated that "BaFin's lack of independence from political power, counterbalanced by the *Bundesbank*'s involvement in supervision, and consequent incomplete autonomy in carrying out supervision, seem to constitute important limitations to the institution's capacity to act as the primary external interlocutor and central reference point of the whole banking system."[59]

The absence of new ambitions in terms of legislation, aimed at promoting increasing regulation of the market, shifts attention towards the external pressure of Community sources, currently viewed as one of the most effective factors stimulating modernisation of the entire system: "Since the 1990's, European harmonisation has increasingly driven changes in banking regulation. The adoption of EU regulation required extensive amendments to the banking act. One important example is the adoption of the own funds directive and the capital adequacy directive […], which led to a substantial increase in capital requirements for banks. Notwithstanding such adjustments, the amendments left the supervisory concept embedded in the banking act - imposing exposure limits relative to banks capital – intact".[60]

[58] Paragraph 7, Sect. 37 b WpGH 9 September 1998 cit..

[59] C. Di Capua, *Il sistema bancario tedesco* cit., 118.

[60] D. Domanski, *The impact of financial regulation on financial structures in post-war Germany*, in *Quaderni di Ricerche realizzati nell'ambito della ricerca «Verso un sistema bancario e finanziario europeo», a cura dell'Ente per gli Studi Monetari, Bancari e Finanziari Luigi Einaudi*, n. 45, 2003, 10.

PART II

1 ON STATE LIABILITY

The second part of the present contribution deals with the delicate aspect around the liability of the supervisory bodies, through the lens of the national legislator and the Court of Justice of the European Union.

In Germany, the system of State liability (*Staatshaftungsrecht*) is not grounded on a single regulatory structure; public administration liability is regulated through case law, which has built up through the application of positive law and which has relatively few regulations, fundamentally the provisions in § 839 of *Bürgerliches Gesetzbuch* (Civil Code, hereinafter BGB) and article 34 of the Grundgesetz (Constitution, hereinafter GG).[61]

In particular, § 839 BGB provides for the situation in which an official violates an official duty towards a third party wilfully or with gross negligence. In this case, s/he is obliged to provide compensation for any damage caused only if the injured party is not able to obtain compensation in any other way.[62] The second subsection of the above section also extends the application of these rules to officials responsible for issuing decisions on a legal dispute. The third subsection specifies that this provision does not apply in cases in which the injured party negligently or wilfully failed to prevent the damage, not performing any specific remedy otherwise provided for by the law. Art. 34 GG provides that when a public official breaches an official duty that he holds towards a third party, the State or the public body for which he works is liable. Any action of recourse for offences committed wilfully or with gross negligence can be made in a civil court, as can damages claims.

In identifying possible situations of public administration liability in the German system, it is first necessary to take account of all cases of occurrence of liability for breaching norms which regulate the activity of those in authority. In this respect, distinction is made between:

[61] F. Ossenbuel, *Staatshaftunggsrecht*, München, V ed., 1998; K. Windhorst - H.D. Sproll- S. Detterback, *Staatshaftungsrecht*, München, 2000.

[62] S. Detterbeck, *Allgemeines Verwaltungsrecht*, München, 2002, 309; H. Maurer, *Allgemeinesvewaltungsrecht*, München, 2004, §§ 25 and ff.; F. Schoch, *Amtshaftung*, in *Jura*, 1988, 585.

> *a*) *Amtshaftung* claims, based on the combined provisions of § 839 BGB and Art. 34 GG. As already mentioned, in order to combine these, there must be no grounds excluding and/or limiting liability (§ 839, I, 2 BGB cit., the so-called *Mitverschulden*, or presumption of *Versäumung der Rechtsmittel*, provided for by § 839 cit.). Such cases, to which the general time limits for damages claims apply (three years), must be heard by a civil judge, against the public administration, which may also bring a separate claim against the public official.[63]
>
> *b*) *Aufopferung* (literally "sacrifice") claims; this type of claim is made in the event of alleged breach of any fundamental right, under Art. 2 II GG. Such claims may be brought in any cases in which there has been unlawful intrusion by state authorities in the legal sphere of a private individual, causing damage to him or her.[64]
>
> *c*) Claims for protection in cases of damage to property suffered as a result of unlawful removal on the part of the public administration, similar to expropriation.[65]
>
> *d*) Claims for termination of execution and performance and for elimination of consequences arising from unlawful action of the public administration, upon annulment or withdrawal of the order.

Naturally, more than one of these cases listed may occur together. Generally, nearly all of them may be brought alongside an *Amtshaftung* claim. For example, regarding the relationship between this type of claim and the action taken in the case of expropriation for public use, the law has established that it does not conform either with the specialty principle or with the subsidiarity principle, since the rulings they relate to have different characteristics.

The situation is different when it is possible to resort to restitutive remedies under *d*), where the general preclusive principle of the so-called "priority of the primary norm" (*Vorrang des primarrechtsschutzes*) finds application; it operates when determining relationships between the application of constitutive remedies (aimed at removing public

[63] H. Stoll, *Il risarcimento del danno nel diritto tedesco*, in S. Patti (cur. by), *Annuario di diritto tedesco*, 2001, Milano, 169.

[64] O. Mayer, *Die Haftung des Staates für rechtswidrige Amtshandlungen*, in *Sächsisches Archiv fürr Rechtspflege*, 1913, 11, and amplius in the three editions of the II volume of *Deutsches Verwaltungsrecht*, 1896 (p. 345 and ff.), 1917 (p. 516 and ff.) and 1924 (p. 295 and ff.); see also W. Schmidt, *Die Aufopferung vermögenswerter Rechte*, *NJW*, 1999, 2847.

[65] H. Maurer, *Allgemeines Verwaltungsrecht* cit., 709 and ff..

administration invalidity) and the actuation of compensatory remedies in the broad sense.[66]

This approach does not seem to be unanimously shared by judiciary, in the sense that failure to resort to jurisdictional protection is often interpreted in terms of contributory negligence, so that the civil judge has to deal with the question of the legitimacy of the act. The most obvious case is that of liability for breach of official duties. The third subsection of § 839 of the BGB, as seen above, specifically stipulates that no compensatory obligation exists if the injured party negligently or wilfully has failed to perform a specific remedy.

2 ON SUPERVISORY BODIES LIABILITY

Liability of supervisory bodies for non-fulfilment of the duties assigned to them is very frequently based on provisions relating to unlawful conduct of public employees and officials, particularly for those bodies charged with oversight of the so-called sensitive areas.

As previously stated, according to Art. 34 GG, the administration is liable in all those cases in which a breach has occurred of official duties towards a third party.

As experts have pointed out, the notion of *Drittbezogenheit*, or breach of official duty, is central to issues regarding public administration liability.[67]

[66] BVerfGE, 15 July 1981, in *BVerfGE* 58, 300. See W. Ruefner, *Basic Elements of German Law on State Liability*, in J. Bell and A.W. Bradley, *Governmental Liability: a Comparative Study*, UKNNCL, 1991, 248, 260: «*the consequences of this decision are as yet unclear. Initially some writers maintained that the entire concept developed under the notion of «quasi-espropriatory enchroachment» should be abandoned. Later the view prevailed that the further development of the law on state liability could not simply be discontinued. In particular, the failure of the State Liability Act, which put off a possible reform to a remote future, made it impossible to imagine that one could go solely on the restricted basis of a fault related claim in tortious governmental liability*».

[67] M. Clarich, *La responsabilità della Consob nell'esercizio della funzione di vigilanza: due passi oltre la sentenza della Corte di cassazione n. 500/99*, in *Danno e resp*., 2002, 346.

In this regard, there is justification for coordination of provisions contained in Art. 34 GG with those in § 839 BGB, confirming the liability of public employees who, during the performance of the duties assigned to them, cause damage to a third party.[68]

Once a "reflected" liability of the State for an action carried out by an employee in performing official duties has been established that the crucial issue is the need to identify those who are able to initiate legal proceedings in order to obtain remedy for harm suffered as a consequence of the public administration's unlawful conduct.

It has been pointed out that, in the case of action taken by the body regulating the stock market, essentially aimed at safeguarding the public interest, a single individual was not granted the right to take legal action in order to protect his or her personal legal situation because the regulatory body's action was not directed at him or her.[69]

In the same way, in the area of finance, and especially in the credit and insurance sectors, German law long remained anchored to the idea that powers conferred by sector regulations on the supervisory authorities were aimed at the protection of the public interest, thus excluding the possibility that the authorities could be held liable towards a third party.

A complete change of judicial attitude occurred in 1979, when the Federal Administrative Tribunal, in two bank failure cases (*Wetterstein* and *Herstatt*[70]), ordered that investors in a banking institution, who had suffered damage as a consequence of lack of supervision on the part of the Federal Office for Banking Supervision (*Bundessaufsuchstamt für das Kreditwesen,* hereinafter BKW), were entitled to take legal

[68] J. Hecker, *sub § 839 BGB*, in *Erman BGB 11. Auflage. Band II*, herausgegeben von

H. P. Westermann, Köln, 2004, 3132. See also Mahendra P. Singh, *German Administrative Law in Common Law Perspective*, Heidelberg, 2001.

[69] B.S. Markesinis, *The German Law of Obligations*, vol. II, *The Law of Torts: A Comparative Introduction*, Oxford, 1997, 904. "[T]*he State's activity cannot be engaged if the requirements of § 839 BGB are not satisfied. Looking at them, however, one sees clear signs of a protective philosophy which may have made sense at the turn of the century but which nowadays appears less convincing*".

[70] See BGH, 15 febbraio 1979, in *NJW*, 1979, 1354 e BGH, 12 luglio 1979, *ibidem*, 1879. M. Tison, *Challenging the Prudential Supervisor: Liability* versus *Regulatory Immunity, Paper prepared for the SUERF Conference* «*stability and efficiency of financial market in Central and Eastern Europe*», Tallinn, 12-14 june 2003, 9.

action in order to obtain compensation for the losses arising from breach of the Office's duty to protect.[71]

Pronouncement of the liability of the credit supervisory authority was based on a strict interpretation of the 1961 Banking Law (*Kreditwesengesetz*), that enabled direct protection of investors considered as single users to be identified as one of the various aims of the law, and established the same law as a default rule for all cases not already provided for in a different manner under specific sector regulations.

The sudden increase in supervisory authority liability had such a disruptive effect within the German credit system that, in order to avoid the possibility of an overload in legal disputes which would have been difficult to manage, § 6 of the KWG was amended in 1984. This restored the original concept according to which all duties performed by supervisory authorities were exclusively aimed at protecting the public interest.[72]

With this surprising backlash, the ability of investors to take legal action for liability against supervisory authorities was definitively repressed. Still today, only banks can start proceedings for liability under§ 839 BGB and 34 GG, in cases in which they are the direct addressees of activity carried out by the supervisory body, and not in all cases where this activity is generally addressed towards the pursuit of the public interest.[73]

3 SUPERVISOR'S LIABILITY AND EUROPEAN LAW

The ruling of the Court of Justice of the European Union of 12 October 2004, case C- 222/02 has played a key role in addressing the issue of the supervisor's liability.[74] The

[71] A. Seban, *Le juge administratif doit-il retenir une faute lorde ou une faute simple pour engager le responsabilité de l'Etat à raison de la surveillance exercée par la Commission bancaire sur les établissements de crédit*?, in *Conclusions sous Conseild'Etat, Assemblée 30 novembre 2001, n. 219562, Ministre de l'Economie et des finances c/ M. Kenichchian et autres, on line* www.rajf.org*, last consulted in July 2013.*

[72] J. Horn, «*Germany*», in *Banking Supervision in the European Community. Institutional Aspects*, Brussels, *Edition de l'ULB*, 1995, 142. M. Tison, *Challenging the Prudential Supervisor* cit., 11 who states that the main objective of the provision is «*to fend off liability claims in the future, by indicating that prudential supervision did not serve the protection of individual creditors.*

[73] P. Ulmer, *Sub § 839 BGB*, in Münchener Kommentar - Bürgerliches gesetzbuch - Schuldrecht - Besonderer Teil III herausgegeben von K. Rebmann - F.J. Säcker – R. Rixecker, München, 2004.

[74] See comments in *NJW*, 2004, 3479, in *Common Market Law Review*, 2005 f. 3, note by M. Tison, *Do not attack the watchdog! Banking supervisor's liability after Peter Paul*, in *Giur. it*., 2005, 390, note by D. Siclari, Drittbezogenheit *del dovere d'ufficio*, öffentlichen Interesse *ed esclusione della responsabilità dell'autorità di vigilanza bancaria nell'ordinamento tedesco*, in *Foro it*., 2005, IV, 101, in *Riv. it. dir.*

preliminary question, submitted to the Court of Justice in the case under consideration, dealt with the relationship between the German national legal system and directives on prudential supervision. It was raised by the *Bundesgerichtshof* (hereinafter, BGH) in a civil case brought by a private citizen who suffered damage as a result of the failure of a bank in which he had deposited his savings; he decided to sue the Federal Republic of Germany in order to recover compensation for the damage he sustained due to the German State's failure to implement Directive 94/19/CE on the deposit guarantee system.

The claimant argued that if the German State had implemented Directive 94/19/CE within the time limit specified (1 July 1995), the bank holding his savings would have had its authorisation to operate as a credit institution withdrawn well before it failed.

The directive confers on the *Bundesaufsichtsamt für das Kreditwesen* (Federal Office of Credit Institute Supervision) the task of adopting appropriate measures towards the credit institutions which do not comply with the obligation to be part of a deposit guarantee system, thus devolving to the above regulator the authority to adopt the necessary measures.

In this specific case, between 1991 and 1997 the claimant had made considerable deposits with the bank, which then failed, while the above directive, including the powers conferred on the BKW, only became part of the German legal system in August 1998.

The belated implementation of this directive, therefore, appeared to have impeded the introduction, on the part of the regulator responsible, of the necessary deposit protection measures.

During the final appeal, the BGH asked the European Court of Justice to verify compatibility with Directives 77/780, 89/299, 89/646, and 94/19, of Article 839 BGB, which declares that: "the public official who, wilfully or with gross negligence, violates the obligations of his office toward a third party must compensate the third party for the damage arising from his actions"; of Article 34 GG according to which "if a public official, in performing his functions, violates the obligations imposed by his office towards a third party, liability rests primarily with the State or with the institution where

pubbl. com., 2005, f. 3-4, note by M. Poto, *La Corte di Giustizia ed il sistema tedesco di vigilanza prudenziale: la* primauté *si scontra con il vecchio adagio* ubi maior, minor cessat.

the official is employed"; and especially of Article. 6, no. 4, of the *Gesetz über das Kreditwesen* (Law on Credit), which states that "the *Bundesaufsichtsamt* carries out the tasks assigned to it by this law and by other laws exclusively in the public interest".

The court ruled that both Directive 94/19/CE, and the "system" arising from the combined dispositions of the directives mentioned above are not in contrast with the national disposition according to which supervision of credit institutions is carried out only in the public interest. This, therefore, means that national dispositions that exclude individuals from recovering compensation for damage caused by deficient supervision on the part of the relevant sector authority are compatible with Community law.

Two main points emerge thus far which the Court particularly emphasises: on the one hand, the fact that directives on supervision may not be interpreted in such a way as to confer on investors further rights compared to those guaranteed by the national legal system, in the event of unavailability of their deposits, with inadequate supervision on the part of the competent national authority. On the other hand, and as a direct consequence of such a conclusion, it is expressly stated that Directives 77/780, 89/299 and 89/646 are not in contrast with national law according to which the duties of the national supervisory authority as regards credit institutions are exclusively performed in the public interest, thus excluding individuals from the possibility of seeking compensation for damage caused by inadequate supervision on the part of this supervisory authority.

The issues dealt with by the Community judges are, therefore, of indisputable importance in terms of the relationship between national legislation and Community legislation. Although they are formally irreproachable in terms of correct application of Community principles concerning State liability for failure to implement directives, they nevertheless appear to raise some questions regarding correct application of the effective guarantee principle, at least as regards its practical repercussions on and its concrete applicability to legal situations involving addressees of the norms on supervision.

4 THE INFLUENCE OF THE EUROPEAN LAW OVER BGH DECISIONS

The ruling of the Court of Justice of the European Union constitutes one of the centralpoints around which the reasoning of a decision by the BGH was constructed; this related to rejection of a damages claim made by a group of deposit-holders against BaFin for negligent supervision. The investigation into the legitimacy of the compensation claim

by the aggrieved clients carried out by the German Supreme Court focused on analysis of the combined dispositions of § 6, par. IV of the KWG and of § 4, par. IV of the FinDAG and its compatibility with Community law on the one hand, and with national legislation on the other.[75]

The damages claim had been made by a group of clients of the BVH-Bank, who, following a series of heavy losses in their deposits with this bank, initiated legal action against the Federal Republic of Germany; they claimed the direct involvement, and therefore liability for losses, of the credit supervisory Authority for negligent oversight of administration of banking operations[76].

On the other side, the defending *Bundesrepublik* based its defence on the argument that single individuals have no right to sue, since duty of care is to be performed solely for the protection of the public interest.

Furthermore, in the well-constructed presentation of its defence, the Federal Republic asserted the lack of grounds for all damages claims against the State for non-compliance with European duties, or *Staatshaftungsanspruchs* (also referring to the ruling of the Court of Justice of the European Union of 12 October 2004 c-222/02), as well as the groundlessness of the claimant's case based on the alleged breach of official duties on the part of the supervisory Authority (*Amtsshaftungsgrundssätzen*).

In relation to the first point, the German argument makes reference to the decision of the Court of Justice, according to which three requirements must be fulfilled before the State can be held legally responsible for non-compliance with Community directives, and therefore before an individual's damages claim can be considered legitimate: 1)the regulation which is considered to have been breached must specifically recognise the status of individuals; 2) the unlawful conduct must consist in violation of that regulation;

[75] V. BGH, urteil vom 20.1.2005, III ZR 48/01 (OLG Köln), in *NJW*, 2005, 11.

[76] The judgment incipit states: «*Die Kl. Haben ihren Schaden darauf zurückgeführt, dass das Bundesaufsichtsamt* (the Supervisory Authority) *seinen Aufsichtsplichten nicht hinreichend nachgekommen sei* (was negliglent in its supervisory tasks) *und nicht zu einem früheren Zeitpunkt Maßnahmen nach §§ 6 III, 33, 45, 46 KWG ergriffen habe*» (and has not taken decisions according to §§ 6, III, 33, 45, 46 KWG).

3)the existence of a causal relationship between the unlawful conduct and the damage claimed must be proved.[77]

The German reasoning is founded specifically on the basis of the established non-existence of an explicit provision of this kind in the European legislation, confirmed by the Court of Justice's ruling which, as already mentioned, in the ruling of 12 October 2004 rejected the possibility of interpreting directives concerning supervision as directly awarding rights to deposit-holders, in the event of unavailability of their deposits, when claiming negligent supervision on the part of the national supervisory authority.

From this, Germany argued that the supervisory authority acts for a purpose which may only be considered as being aimed at the protection of public interest.

The second point of the German defence scrutinises the difficulties connected with a possible "system fault", an analysis which, in the opinion of the Federal Republic of Germany, can only result in the demonstrated non-existence of any possible liability. For this to exist, the claimant would have to prove the actual existence of a regulation recognising that their legal position was entitled to protection: an *Interesse* that is not, however, *öffentliche*, but rather purpose-oriented (*«nach dem Zweck»*).[78]

Indicating the content of Parliamentary proceedings concerning the approval of the 1984 financial law (KWG of 20.12.1984)[79] and also the interpretation provided by the BGH,[80] the defending public administration referred to their interpretation of § 6, par. III

[77] See § I.1 judgm. cit.. On the relationship between EU Law and German law, see F. Mayer, *The European Constitution and the Courts. Adjudicating European constitutional law in a multilevel system*, Heidelberg, 24-27 febbraio 2003, Jean MonnetWorking paper, n. 9, 2003. More in general on the compliance with the EU law see W. Van Gerven, *The ECJ's recent case-law in the field of Torit Liability, towards a European* Ius Commune and M. Fierstra, *The Significance of the Francovich Jurisprudence for the National Courts*; G. Krohn, *Government Liability in Germany for infringement of Community Law*, published in R.H.M. Jansen, D.A.C. Koster, R.F.B, Van Zutphen, *European Ambitions of National Judiciary*, The Hague, 1998, 91, 111, 119.

[78] O. Mayer, *Deutsches Verwaltungsrecht*, Leipzig, 1895; V.R. Tezner, *Die Deuschen Theorien der Vewaltungsrechtsplege, Separatabdruck aus dem Verwaltungsarchiv*, Berlin, 1901; R. Von Laun, *Das Freie Ermessen und seine Grenzen*, Leipzig und Wien, 1910, in part. p. 61 and ff..; W. Horstmann, *Das öffentliche Interesse und seine Vertretung vor den Verwaltungsgerichten, Inauguraldissertation zur Erlangung der juristichen Doktorwürde der Rechts -und Staatswissenschaftlichen Fakultät der Universität zu Göttingen*, Göttingen, 1938.

[79] V. Gesetzentwurf der Bundesregierung (BT-Dr 10/1441, 20). See also BGH, Urteil vom 2.6.2005 III ZR 365/03, in www.recht-in.de, last consulted in June 2013.

[80] BGH, Urteil vom 15.2.1979, III ZR 108/76 (München), in *NJW*; Heft 27, 1354, BGH, Urteil vom 12.7.1979, III ZR 154/77 (Köln), in *NJW*; Heft 37, 1879.

KWG, according to which the supervisory authority, in fulfilling its official duties that include, along with other activities, supervision over the transparency and correctness of accounts, acts in the public interest (point 2, paragraph I).

The above defence of the public administration was accepted by the BGH, and consequently the damages claim advanced by the deposit-holders was rejected.[81]

5 CONCLUDING COMMENT

To sum up, the law regarding the liability of supervisory authorities in the German system seems to be based on the use of a well-defined criterion that distinguishes between regulations which provide for only *öffentliche Interesse* in the legitimacy of public administration activity, and regulations in which, on the contrary, interest seems to be defined according to the specific purpose that the public administration aims to pursue (*Interesse nach dem Zweck*).[82]

Precisely with reference to the relation between *Interesse nach dem Zweck* and the legal position of individuals upheld by the court, the so-called "personal" public law (*das subjective Offentliche Recht*), it is reasonable to consider the BGH's decision as an element which perfectly fits into the mosaic of the protection of the personal position of individuals in the German system.

In line on this matter with a well-consolidated jurisprudential approach, defining "personal" public law «*die dem einzelnen kraft öffentlichen Rechts verliene Rechtmacht, vom Staat zur Verfolgung eineger Interessen ein bestimmtes Verhalten verlangen zu können*»[83], legal scholars identify a specific connection between the individual's personal position and the need for the public authorities to behave in a certain way ("*bestimmt Verhalten*") in the pursuit of the public interest ("*zur Verfolgung eineger Interessen*").

This leads to the very clear definition of the features of *öffentliche Interesse*:[84] intrinsic to it is a specific objective ("*der Zweck*") which the law identifies, and which at

[81] § 3 urteil BGH, 20.1.2005 cit..

[82] BGH, Urteil vom 18.2.1999, III ZR 272/96 (Koblenz), in *NVwZ* 1999, Heft 6, 689, also in *NJW*, 1999, 2275.

[83] H. Maurer, *Allgemeines Verwaltungsrecht*, München, 2004, in part. p. 163 and ff., See also G. Jellinek, *System der subjectiven öffentlichen Interesse*, Tübingen, 1919; R. Rainer, *Die doppelte Abhangigkeit des subjectiven öffentlichen Rechts*, in *Deutsches Verwaltungsblatt*, 1996, 641.

[84] H. Maurer, *Allgemeines Verwaltungsrecht* cit., in part. p. 166.

the same time constitutes the specific objective in public action and the basis for the individual's claim regarding that action.[85]

As a consequence, is the legitimate expectation of the private citizen to receive protection in the event that a breach of a legal disposition should occur. Hence the statement regarding the practical aspect of "personal" public law, which is based on the possibility of jurisdictional monitoring of the same.[86]

CONCLUSION

The outcome of the research provides the impression that Germany has resisted to the financial crisis in virtue of a consolidated regulatory structure, where the abstract characteristics of independence and liability have been replaced by a collaborative dependence with substantial democratic guarantees and by an accepted immunity in case of damages. This shows how the European rules have been accomodated in the German framework and not always literally translated into legislative and operative choices.

Interestingly enough, the option for an integrated model, with an authority acting as a branch of the Ministry of Finance, but formally independent in determining its policies, and closely cooperating with the *Bundesbank* at national level, seems to have been the winning choice, at least in times where all the financial structures have collapsed elsewhere, like cards castles[87].

It is not a surprise for the legal scholar to assist to scandal-driven attempts to reform. It has been observed that "there has been a substantial activity in reviewing and reforming financial regulation after the global financial crisis. But arguably, much of the

[85] G. Jellinek, *System der subiektiven öffentlichen Rechte* cit., 68.

[86] H. Maurer, *Allgemeines Verwaltungsrecht* cit., 164. See also Mahendra P. Singh, *German Administrative law in Common Law Perspective*, cit., 253.

[87] See K. Davis, *Regulatory Reforms Post the Global Financial Crisis: An Overview. Report prepared for the Melbourne APEC Finance Centre*, Australian APEC Study Centre

at RMIT University, in http://www.apec.org.au/docs/11_CON_GFC/Regulatory%20Reform%20Post%20GFC-%20Overview%20Paper.pdf, last visited in May 2013. On the regulatory attempts after the financial crisis see also E. Engobo, R. Ako, P. Okonmah, L. Ogechukwu, *Corporations, CSR and Self Regulation: What Lessons from the Global Financial Crisis?*, in *German Law Journal*, 1 February 2010, p. 230 and ff..

activity, while in the right direction, lacks a compass provided by rigorous theory of how financial markets operate."[88]

As regards its financial regulatory framework, Germany seems to have found its compass in the strategy to maintain the existing structures (a branch of the Ministry of Finance; the Bundesbank) and rely on their solid accountability and on their role as key negotiators in the respective international bodies.

Though never expressely said, the political independence of the regulatory bodies has been pushed into the background for the sake of the democratic principle.

Likewise, for the liability rules, the choice has been to limit them within the boarders of the general public interest. As a result, in the absence of a specific and targeted duty of care, the supervisory authority is immune from claims by third parties, which is quite a unique feature among the supervisory authorities in the EU. [89]

The study has provided an overview on the German option to trust the national inner wisdom in regulating the financial system, which led the country into a phase of financial predominance in the European arena

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[88] K. Davis, *Regulatory Reforms* cit., p. 39.

[89] R. J. Dijkstra, *Liability of Financial Supervisory Authorities in the European Union*, *Journal of European Tort Law*, 2012, 3, 346, in part. 368: "Only two member states, Germany and Austria, grant immunity to their financial supervisory authorities".

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