Proposal for a single EU professional secrecy standard for the supervision of the financial sector

This policy contribution extracts parts of the article "Towards a single standard of professional secrecy for supervisory authorities - A reform proposal" written with Prof. Dr. René Smits and published in 44(3) *European Law Review* (2019) 295-318, namely 299-303 and 314-318.

In this article, we analysed the professional secrecy standards and accountability of EU financial supervisory authorities according to CRD IV, MiFD II and Solvency II by taking into account the latest ECJ judgments in this regard (*Altmann*, *Baumeister*, *Buccioni* and *UBS Europe*) and found that the standards differ slightly between the sectors - which also the ECJ seems to criticise. In order to enhance legal certainty, create a level playing field for market participants and to foster transparency, we propose the adoption of a single professional secrecy standard across the three financial sectors which would also apply to the ECB.

Status quo: lack of cohesion in EU regulation of three financial sectors

(44(3) *European Law Review* (2019) 295, 299-303)

A comparison of the currently applicable professional secrecy provisions in the three EU supervisory silos shows that they are all similarly worded, but differ in substance. The material frameworks currently in force regarding the supervision of investment services (MiFID II)[1], banking (CRD IV)[2] and insurance and reinsurance (Solvency II)[3] all contain an obligation of professional secrecy for the respective supervisory authorities.[4]

Article 76(1),(2) MiFID II	1. Member States shall ensure that competent authorities, all persons who work or who have worked for the competent authorities or entities to whom tasks are delegated pursuant to Article 67(2), as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. They shall not divulge any confidential information which they may receive in the course of their duties, save in summary or aggregate form such that individual investment firms, market operators, regulated markets or any other person cannot be identified, without prejudice to requirements of national criminal or taxation law or the other provisions of this Directive or of Regulation (EU) No 600/2014 [MiFiR]. 2. Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding.
Article 53 (1) CRD IV	1. Member States shall provide that all persons working for or who have worked for the competent authorities and auditors or experts acting on behalf of the competent authorities shall be bound by the obligation of professional secrecy.

[1] 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 [2014] OJ L173/349.
[2] 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 [2013] OJ L176/338.
[3] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance [2009] OJ L335/1.
[4] Art.76(1) MiFID II, art.53(1) CRD IV, art.64(1) Solvency II.

	Confidential information which such persons, auditors or experts receive in the course of their duties may be disclosed only in summary or aggregate form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law. Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings.
Article 64 Solvency II	Member States shall provide that all persons who are working or who have worked for the supervisory authorities, as well as auditors and experts acting on behalf of those authorities, are bound by the obligation of professional secrecy. Without prejudice to cases covered by criminal law, any confidential information received by such persons whilst performing their duties shall not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual insurance and reinsurance undertakings cannot be identified. However, where an insurance or reinsurance undertaking has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that undertaking may be divulged in civil or commercial proceedings.

Comparative analysis of the sectoral professional secrecy provisions

Professional secrecy requires that confidential information received in the course of the supervisory duties may not be divulged, except in summary or aggregate form so that individual market participants cannot be identified. As regards the personal scope of application, the obligation binds "all persons working for or who have worked for the competent authorities".[5] Furthermore it obliges auditors or experts "acting on behalf of"[6] (CRD IV and Solvency II) or "instructed by"[7] (MiFID II) the competent authorities. The provisions regarding auditors and experts seem similar but could differ e.g. if "acting on behalf of" simply meant when acting for the authorities and "instructed by" more restrictedly signified in the remit of the authority's mandate. In terms of material standards for professional secrecy, the obligation entails that confidential information may not be divulged in principle. As to the degree of the prohibition, the wording in Solvency II seems slightly stronger than the simple statements of prohibition in MiFID II or CRD IV as Solvency II forbids the divulgation "to any person or authority whatsoever". Art.54(1) MiFID I had the very same wording which was deleted by MiFID II.

All three laws, i.e. MiFID II, CRD IV and Solvency II, contain exceptions to the obligation of non-disclosure. There are numerous exceptions for exchange of information with other authorities, either mandated or permitted, in each legal act[8]. Beyond these exceptions, the first exception is that confidential information may be divulged "in summary or aggregate form"[9] such that "individual credit institutions"[10] (CRD IV), "individual insurance and reinsurance undertakings"[11] (Solvency II)

[5] Art.53(1) first subparagraph CRD IV; the wording of art.76(1) first sentence MiFID II and art.64(1) Solvency II is in substance identical despite slightly different wording.

[6] Art.53(1) first subparagraph CRD IV, art.64(1) Solvency II.

[7] Art.76(1) MiFID II.

[8] By way of example: under CRD IV, circumscribed exchange of information with other authorities, bodies and persons in the area of supervision is permitted by art.56; with oversight bodies by art.57; with central banks, deposit protection schemes, the European Systemic Risk Board and the ESAs by art.58; with other entities in the context of national supervision, or the auditing and control of this supervision, by art.59; with a clearing house or other similar body recognised under national law for the provision of clearing or settlement services under art.60; and with third-country supervisory authorities subject to equivalent professional secrecy requirements by art.55. These exceptions have not been further researched for this contribution.

[9] Art.53(1) second subparagraph CRD IV, art.64(2) Solvency II, art.76(1) second sentence MiFID II.

[10] Art.53(1) second subparagraph CRD IV.

[11] Art.64(2) Solvency II.

or "individual investment firms, market operators, regulated markets or any other person"[12] (MiFID II) cannot be identified. In this regard, MiFID II grants stronger confidentiality than CRD IV and Solvency II as it protects "any other person".
The second exception regards "cases covered by criminal law" (CRD IV and Solvency II).[13] By contrast, MiFID II even goes further and extends the exception to "requirements of national criminal or taxation law" or other conflicting MiFID or MiFIR[14] provisions.[15] This is the second important modification introduced by MiFID II compared to MiFID I. In comparison to CRD IV and Solvency II, it is striking that only MiFID II grants access to confidential information for tax law reasons. According to us, there is no reason why confidential information in banking and insurance business should be treated differently. With regard to the exception of "cases covered by criminal law", the ECJ recently decided in the case *UBS Europe* that this exception is not applicable to cases in which the supervisory authority rejects a person holding a post as director and orders his or her resignation.[16] Furthermore, the MiFID II restriction to national criminal law oddly forecloses any possible present or future EU criminal law provision overriding supervisory secrecy concerns.
A third exception to the obligation of professional secrecy regards the possibility to disclose confidential information "in civil or commercial proceedings" in case of declaration of bankruptcy or compulsory winding up of the supervised entity which is inherent to all three frameworks.[17] CRD IV and Solvency II grant this possibility to disclose confidential information only if it "does not concern third parties involved in attempts to rescue" the credit institution/(re)insurance undertaking.[18] MiFID II is stricter in two aspects. It grants the protection of non-disclosure to any "third person" without requiring this third person to be involved in attempts to rescue the concerned entity, but further specifies that the disclosure needs to be "necessary for carrying out the proceeding".[19] As to be further discussed below, this stricter approach already existing in MiFID I led Advocate General (AG) Bobek in his Opinion in *Buccioni* to distinguish the professional secrecy provision of CRD IV from MiFID I.[20]

Findings: Absence of legislative coordination and questionable drafting require remedy

The comparative analysis of the respective provisions[21] on professional secrecy in MiFID II, CRD IV and Solvency II shows that CRD IV and Solvency II are rather similar, whilst MiFID differs in many ways. It is not clear why the supervision of investment services should be treated differently than the supervision of banking and insurance services with regard to professional secrecy, as it is currently the case. As AG Bobek stated in *Buccioni*, the coexistence of differently worded provisions on professional secrecy within the different branches of EU financial services legislation shows that arguments for a sector-specific restrictive interpretation are not per se convincing.[22]
Two institutional points argue in the same direction. The first one regards the professional secrecy standards for the European Supervisory Authorities (ESAs) EBA, ESMA and EIOPA set out in the

[12] Art.76(1) second sentence MiFID II.
[13] Art.53(1) second subparagraph CRD IV, Article 64(2) Solvency II.
[14] 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 [2014] OJ L173/84.
[15] Art.76(1) second sentence MiFID II.
[16] *UBS Europe* (C-358/16), paras 46-47.
[17] Art.53(1) third subparagraph CRD IV, art.76(2) MiFID II, art.64(3) Solvency II.
[18] Art.53(1) third subparagraph CRD IV, art.64(3) Solvency II.
[19] Art.76(2) MiFID II.
[20] AG Bobek's Opinion in *Enzo Buccioni v Banca d'Italia* (C-594/16) ECLI:EU:C:2018:425, paras 57, 58.
[21] Such analysis should include the (mandatory or permissible) exchange of information among supervisory authorities, an element that would remain to be undertaken in further research. See, also, footnote 38.
[22] AG Bobek's Opinion in *Buccioni* (C-594/16), para 44: "In sum, in view of such historical and contextual diversity, not only in exact wording but also in approaches, I would suggest that a healthy dose of scepticism is called for in relation to arguments that insist on suggesting that if the third subparagraph of Article 53(1) of Directive 2013/36, as it happens to be worded today, were not to be interpreted as restrictively as possible, the effective supervision of credit institutions and investment firms would be fatally compromised. It would appear that both in the past as well as in parallel regimes (which are certainly not less sensitive) the rules were or are worded differently, sometimes less restrictively, apparently without the entire edifice immediately crumbling and falling apart".

ESA Regulations[23] and the second one concerns the ECB's professional secrecy standards[24] when exercising its supervision in the context of the Single Supervisory Mechanism (SSM)[25].

Article 70(1), (2) ESA Regulations[26]	1. Members of the Board of Supervisors and the Management Board, the Executive Director, and members of the staff of the Authority including officials seconded by Member States on a temporary basis and all other persons carrying out tasks for the Authority on a contractual basis shall be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased.(...) 2. Without prejudice to cases covered by criminal law, any confidential information received by persons referred to in paragraph 1 whilst performing their duties may not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial institutions cannot be identified. Moreover, the obligation under paragraph 1 and the first subparagraph of this paragraph shall not prevent the Authority and the national supervisory authorities from using the information for the enforcement of the acts referred to in Article 1(2), and in particular for legal procedures for the adoption of decisions.
Article 37 ESCB Statute	37.1. Members of the governing bodies and the staff of the ECB and the national central banks shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy. 37.2. Persons having access to data covered by Union legislation imposing an obligation of secrecy shall be subject to such legislation.
Article 27(1) SSM Regulation	1. Members of the Supervisory Board, staff of the ECB and staff seconded by participating Member States carrying out supervisory duties, even after their duties are ceased, shall be subject to the professional secrecy

[23] The European Banking Authority (EBA), established by Regulation (EU) No 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 [2010] OJ L331/12, as amended; consolidated version at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02010R1093-20160112&from=EN; the European Securities and Markets Authority (ESMA), established by Regulation (EU) No 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 [2010] OJ L331/84, as amended; consolidated version at https://www.esma.europa.eu/sites/default/files/library/2015/11/1095-2010_esma_regulation_amended.pdf; and the European Insurance and Occupational Pensions Authority (EIOPA), established by Regulation (EU) No 1094/2010 of the European Parliament and of the 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 [2010] OJ L331/48.

[24] Professional secrecy is further underpinned by standards adopted by the ECB itself, such as *The Ethics Framework of the ECB*, [2015] OJ C204/3, and the *Single Code of conduct for high-level ECB officials*, December 2018, notably art. 4 thereof, at: https://www.ecb.europa.eu/ecb/legal/pdf/en_single_code_conduct_for_high_level_ecb_officials_f_sign.pdf.

[25] Note that the ECB's Rules of Procedure, in art.23a (*Confidentiality and professional secrecy regarding the supervisory tasks*), also prescribe secrecy but with a reference to Article 37 ESCB Statute which, itself, refers to the "obligation of professional secrecy" without specifying the meaning of the term. See: Decision of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2004/2) (2004/257/EC) ([2004] OJ L 80/33), as lastly amended by Decision ECB/2016/27 of the European Central Bank of 21 September 2016, [2016] OJ L 258/17; consolidated version at:
https://www.ecb.europa.eu/ecb/legal/pdf/celex_02004d0002-20160924_en_txt.pdf.

[26] Article 339 TFEU reads as follows: "The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components."

	requirements set out in Article 37 of the Statute of the ESCB and of the ECB and in the relevant acts of Union law. The ECB shall ensure that individuals who provide any service, directly or indirectly, permanently or occasionally, related to the discharge of supervisory duties are subject to equivalent professional secrecy requirements.

First, the three ESA Regulations each contain the obligation of professional secrecy in a similar wording, but differ from CRD IV, Solvency II and MiFID II substantially in so far as they do not contain a provision allowing for disclosure of confidential information in bankruptcy and winding-up proceedings.[27] This could be explained by the absence of any direct supervisory tasks of the ESAs, as they originally only had exceptional 'overriding' and emergency powers[28], while ESMA now has direct enforcement powers under the Regulation on short selling[29] and the Regulation on credit rating agencies[30]. However, when exercising these powers, the ESAs could well be bound by the same obligation to disclose confidential information as the national competent authorities.
Second, the SSM Regulation[31] plainly refers to art.37 Statute of the ESCB and of the ECB (ESCB Statute)[32] which simply states the obligation of professional secrecy without any nuancing provisions comparable to those set out in CRD IV.[33] However, when exercising its supervisory functions within the SSM, the ECB is also bound by the professional secrecy standards set in CRD IV as a "relevant act of Union law" in the form of its transposition into national law.[34] In light of the ECB's singular position as a central supervisory authority in the SSM[35], the SSM Regulation should contain the same wording as CRD IV and render it immediately binding without subjecting it to diverging transpositions in the Member States. The status quo means that the ECB's professional secrecy standards are not identical for all directly supervised banks subject to diverse CRD IV transpositions by different Member States. This constitutes an unlevel playing field which we suggest should be remedied.

Need for reform?

(44(3) *European Law Review* (2019) 295, 314-316)

In a broader context, two questions arise: Is the current approach appropriate and in line with the need for transparency of public action and accountability of prudential supervisors? And is there scope for encompassing legislation across the entire financial sector to align the confidentiality regimes for the supervisory files in the securities, insurance and banking sectors?

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[27] Art.70(1) first subparagraph, 70(2) first subparagraph ESA Regulations.
[28] Arts 17 and 18 ESA Regulations.
[29] Arts 28, 29, 31 Regulation (EU) No 236/2012, [2012] OJ L86/1.
[30] Art.1(9) Regulation (EU) No 513/2011, [2011] OJ L145/30 amending arts 15 to 21 Regulation (EC) No 1060/2009, [2009] OJ L302/1; the latest Regulation (EU) No 462/2013, [2013] OJ L146/1, contains only minor changes to ESMA's supervisory powers.
[31] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.
[32] Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank [2016] OJ C202/230.
[33] Art.27(1) first subparagraph SSM Regulation.
[34] Art.27(1) first subparagraph, art.4(3) first subparagraph SSM Regulation.
[35] As emphasised by the General Court in *Landeskreditbank Baden-Württemberg – Förderbank v ECB* (T-122/15) EU:T:2017:337, para 63 when it held that "the Council has delegated to the ECB exclusive competence in respect of the tasks laid down in Article 4(1) of the [SSM] Regulation and that the sole purpose of Article 6 of that same regulation is to enable decentralised implementation under the SSM of that competence by the national authorities, under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the [SSM] Regulation"; under appeal: Case C-450/17 P. For an on-going overview of court cases concerning banking union, see: *The Banking Union and Union Courts: overview of cases*, at: https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/.

First, answering our question whether the current set of rules is in line with the requirements of transparency of public action and accountability of prudential supervisors comes back to the starting point of this paper – the regulatory background between the conflicting interests of transparency vs. professional secrecy.[36] Against the backdrop of the ECJ's case law described above,[37] we conclude that the judiciary's remedying the absence of legislative coordination is not sufficient given the interests at stake and the need for legal certainty. Therefore, the question of transparency of public action and accountability of prudential supervisors would have to be answered in adopting the legislative approach. While we strongly endorse confidentiality of supervisory files, a sincere acknowledgment of the need for openness and responsiveness should likewise govern the lawmakers when adopting the new standards. This may mean embracing the paradigm shift for which AG Bobek argued in 'historic' cases (after bankruptcy or resolution of a financial firm) and recognising the information asymmetry between supervisor and affected parties. Balanced provisions should provide adequate mechanisms to judge whether disclosure is appropriate in the case at hand.

Second, the existence of a panoply of confidentiality provisions with small but significant differences resulted from the distinct EU legislative processes for standard setting in the subsectors of the finance industry. That a phenomenon can be explained historically does not imply that its survival is warranted. Actually, a new look at the variety of legal texts may give the legislator a chance to tidy up inconsistencies and introduce a financial sector-wide approach which must facilitate cross-subsector exchanges and which may deepen cooperation among supervisors, notably with different mandates, such as conduct of business, micro-prudential and macro-prudential, AML/CTF[38]. This latter area has come to the fore as an element of supervision where current competences are clearly insufficient to ensure proper 'policing' and new competences at EU level are required[39]. Without too wide opening of confidentiality and whilst maintaining the purpose-driven character of the use of confidential data[40], an encompassing legislative approach may improve currently dispersed and uncoordinated provisions. New provisos would naturally not provide that information obtained for prudential concerns would automatically be usable for other supervisory concerns: what can be shared by which kind of supervisors would be clearly circumscribed, with collecting authorities remaining competent to limit the use to be made of the information they voluntarily impart on colleagues. But there would be *one industry-wide set of standards*, encompassing the ECB, the national competent and designated authorities and the ESAs. This approach would do away with what AG Bobek called the three-layered approach to confidentiality: national rules on access to documents, the professional secrecy provisions of EU law underlying these, and the exceptions to these rules.[41]

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[36] See above section "Regulatory background: accountability through transparency vs. professional secrecy".
[37] See above section "Case law shaping professional secrecy standards".
[38] AML/CTF stands for Anti-Money Laundering and Counter-Terrorist Financing. See Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/73 (AMLD4), as amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43 (AMLD5).
[39] On the basis of its Communication of 12 September 2018 *Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions* (COM(2018) 645 final), at: https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-anti-money-laundering-communication-645_en.pdf, the Commission has proposed amendments to the Regulations governing the ESAs; see: COM(2018) 646 final, at https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-supervisory-authorities-regulation-646_en.pdf. The ECB has established an "AML office" for coordinating issues in the SSM. See: Second ordinary hearing in 2018 at the European Parliament's Economic and Monetary Affairs Committee, Introductory statement by Danièle Nouy, Chair of the Supervisory Board of the ECB, Brussels, 20 November 2018, at: https://www.bankingsupervision.europa.eu/press/speeches/date/2018/html/ssm.sp181120.en.html.
[40] The second of the two locks described at the outset: professional secrecy implies that disaggregate information is confidential and may be used only for specific purposes set out in the law.
[41] AG Bobek's Opinion in *Buccioni* (C-594/16), para 32.

Policy proposal: introduction of a single professional secrecy standard
(44(3) *European Law Review* (2019) 295, 316-318)

For the reasons set out in the previous paragraph, we propose the adoption of a new legal act in the form of a regulation. Thus, the discussion about minimum and maximum harmonisation would be a thing of the past and a clear standard of professional secrecy[42] would apply across the EU. The *Regulation on professional secrecy for supervisory authorities in the financial sector* would replace the existing provisions in the relevant directives. An inventory of provisions in need of amendment and replacement could be made and a public consultation held on the new standard-setting regulation.

Legal basis

We propose the regulation be based on art.114 TFEU as the scope of the regulation is limited to the professional secrecy of authorities whose task it is to supervise financial services within the EU. The legal basis[43] is an essential element of EU legislative reform proposals.[44] In principle, the ECJ requires legislative acts to be based on a single legal basis which covers the main regulatory objective of the legislative act.[45] However, if it aims at several goals which are inseparably linked to each other, the act can exceptionally be based on several legal bases.[46] Such a combination of legal bases is prohibited if the respective procedures are incompatible.[47] Then, the legal basis with stricter conditions trumps the one with less strict conditions. A comparison of the different legal acts containing professional secrecy provisions in the financial sector shows that the EU legislators based them all on different but single legal bases. CRD IV and MiFID II are based on art.53(1) TFEU and Solvency II on its predecessor art.47(2) TEC, showing the backdrop of mutual recognition behind harmonised financial regulation. CRR, MiFIR and the ESA Regulations are based on art.114 TFEU as the general legal basis for harmonisation within the single market. The SSM Regulation is based on art.127(6) TFEU as special legal basis for the conferral of specific tasks relating to the prudential supervision upon the ECB. The three legal bases differ as to their procedure. While art.127(6) TFEU requires Council unanimity[48], arts 53(1) and 114 TFEU prescribe the ordinary legislative procedure where, by default[49], a qualified Council majority is sufficient. Art.127(6) TFEU is not applicable because the regulation would not confer new powers upon the ECB but merely modify the modalities of the ECB executing its supervisory tasks conferred by the SSM Regulation. Art.53(1) TFEU is not well-suited as the proposal only incidentally concerns the facilitation of establishment or service provision for self-employed persons by mutual recognition. The main aim of the proposed regulation is to harmonise the professional secrecy standards of supervisors within the EU's single market both horizontally between the different financial sectors and vertically at EU level (ESAs, ECB) and national level (NCAs). Hence, art.114 TFEU is the right legal basis.

Content of regulation proposal

When such a harmonisation effort is undertaken, this should, as we stated, lead to enhanced transparency of supervisory files. While protecting the confidence between supervisors and

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[42] AG Bobek's Opinion in *Enzo Buccioni* (C-594/16), para 70 indentified remedying "the questionable drafting of Article 53(1) of [CRD IV]".
[43] Required by the principle of conferral under art.5 TEU.
[44] See for example R. Repasi, "Legal Options and Limits for the Establishment of a European Unemployment Benefit Scheme" (2017), pp. 7-8, 41, https://ec.europa.eu/social/BlobServlet?docId=16886&langId=en.
[45] *Parliament v Council* (C-155/07) EU:C:2008:605, para 35.
[46] *Commission v Council* (C-211/01) EU:C:2003:452, para 40; *Parliament v Council* (C-155/07) EU:C:2008:605, para 36; e.g. the 'Omnibus' Directive 2010/78/EU, [2010] OJ L331/120, was based on arts 50, 53(1), 62 and 114 TFEU.
[47] *Commission v Council* (C-300/89) EU:C:1991:244, paras 17-21; *Parliament v Council* (C-155/07) EU:C:2008:605, para 37.
[48] The Lisbon Reform Treaty unfortunately amended the provision for activating the ECB's role in prudential supervision by deleting the requirement of consent of the European Parliament that art.105(6) TEC contained.
[49] Art.16(3),(4) TEU.

supervised, shielding the authorities from having to disclose their considerations in weighing alternatives, and allowing authorities to continue to make use of the surprise effect of supervisory actions, the new standard should include exceptions for cases covered by criminal *and tax* law and for proceedings that relate to (but do not necessarily constitute) bankruptcy or resolution proceedings. The standard should continue to protect business secrets and allow the supervisory authorities time to do their work. Thus, following the ECJ in *Baumeister*, a general presumption that information loses its confidential nature after a lapse of five years should be adopted[50], and a reversal of the burden of proof introduced: only if the party affected by disclosure proves the need for continued secrecy after five years would confidentiality of information be upheld. The alignment would also address the exchange of confidential information not only between different *national* competent and designated authorities, but also between competent authorities of *different subsectors of the financial sector*, especially for entities combining banking, investment services and/or insurance business. The standard would encompass EU authorities, including the ESAs and the ECB. The standard would introduce a single set of rules for sharing information with, inter alia, auditors and accountants, with clearing houses, with authorities in the area of AML/CTF and with bodies responsible for deposit insurance and payment services oversight. An inventory of all mandatory and permissible exchanges of information among authorities, which exceeds the limits of our present contribution, should precede the adoption of the regulation, and a public consultation on the proposed single standard be held.

A single standard would not only help reduce the conflicting standards between the different regulatory silos, but simultaneously introduce a common professional secrecy standard encompassing the national competent authorities and the ECB in its supervisory functions in the SSM. The current striking lack of a single professional secrecy standard applying to the ECB when exercising its supervisory functions within the SSM should, in our view, be remedied[51]: a Single Supervisory Mechanism operating for prudential supervision in the single currency area should not go without a single professional secrecy standard. Furthermore, the outreach to the European Banking Union would help pave the way for regulatory convergence and legal certainty for professional secrecy standards before the envisaged EU Capital Markets Union[52] comes into force. From the industry's point of view, a single standard would also make sense because integrated financial services providers would benefit from higher predictability of the confidentiality of information transmitted to the supervisor. Their different supervisors would likewise benefit from the fact that they could communicate with each other unhindered by petty differences in the law applying to them. A single standard in a directly applicable legal instrument would enhance legal certainty, with interpretation directly provided by the ECJ. We argue that agreement might be within reach as all sides seem to benefit from cross-sector regulatory alignment of professional secrecy standards. A single professional secrecy standard across the EU would contribute to the Single Rulebook and be in line with the level of financial integration achieved, and mandated to be achieved,[53] in Europe.

[50] In line with what Hüpkes, Quintyn and Taylor (footnote 11) rightly submit, namely that supervisory decisions and their reasoning should, after an appropriately long period of time, no longer enjoy confidential treatment.
[51] The ECB is subject to the national variations on art.53 CRD IV.
[52] Originally set out by European Commission, "Action Plan on Building a Capital Markets Union" COM(2015) 468 final; updated and complemented by European Commission, "Communication on the Mid-Term Review of the Capital Markets Union Action Plan" COM(2017) 292 final. An overview of the implementation process which is due to finish in 2019 can be found at https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-action-plan_en.
[53] Art.3(2) TEU, and art.26(2) TFEU: "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".