Part I General, 1 Governing Financial Institutions: Law and Regulation, Conduct and Culture

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I. Introduction

1.01 Compared with governance in general, the scholarly literature has paid relatively little attention to the governance of financial institutions,¹ which is however not only important, but also unique.² This volume intends to fill this gap through original contributions offered by scholars and practitioners focussing on the law and regulation of the governance of financial institutions (Parts I–III) and on the role played by conduct and culture in the same area (Part IV).

1.02 After the 2008 financial crisis, a substantial part of the blame for the numerous bank failures that occurred as a result of the crisis has been put on corporate governance. Consequently, regulation and supervision have been enhanced both as a complement to the governance of financial institutions and as a substitute for the same in areas where governance failures appear more evident. Against this backdrop, important questions arise. Has the swinging of the pendulum between (p. 4) corporate governance and financial regulation gone too far, as a result of the ‘nirvana fallacy’³ that often affects reformers? Should corporate governance recover some of the lost ground, possibly through spontaneous enhancement of the role of boards by financial institutions and cautious deregulation of the governance mechanisms by supervisory authorities? Is corporate law for financial institutions in need of reform, for instance by restricting the scope of the business judgement rule, or should this suggestion be rejected, as this would affect entrepreneurship and stifle innovation in the financial sector? Must this reform, if any, come from national legislation or from a European source or both? These and other important questions regarding the relationship between governance of financial institutions on the one hand, and rules and regulation on the other, will be analysed and discussed in Part I of this volume.⁴

II. Basic Concepts

1.03 Financial institutions are enterprises that provide financial services. They perform three main functions: transformation of financial assets; broker–dealer services; asset management. Three types of financial institutions are consequently identified: financial intermediaries; investment firms; asset managers.⁵ Financial market infrastructures are added as a special type of financial institution, whose relevance is on the rise in today’s financial markets.⁶
1.04 Financial intermediaries transform financial assets acquired through the market and constitute them into a different type of asset, more widely preferable, which becomes their liability. Financial intermediaries include banks of all types and credit unions, insurance companies, pension funds, investment funds, and finance companies. Their transformation function involves at least one of the following: (i) maturity intermediation; (ii) risk reduction via diversification; (iii) transaction costs reduction; and (iv) payment services. Banks often provide all of these functions. Insurers offer the first three, while pension funds and investment funds provide (p. 5) risk diversification and transaction costs reduction. Specialized institutions offer payment services in addition to banks.

1.05 Investment firms provide broker–dealer functions, such as exchanging financial assets on behalf of customers and/or for their own account, and/or underwriting functions (i.e. they assist their clients in the creation of financial assets, which they then offer to market participants). Asset managers provide investment advice to other market participants (including financial intermediaries) and/or manage their assets.

1.06 Financial market infrastructures are established as multilateral systems among participating institutions, including the operator of the system, for the purposes of clearing, settling, or recording payments, securities, derivatives, or other financial transactions. They foresee a set of common rules and procedures for all participants, a technical infrastructure, and a specialized risk-management framework. Through the centralization of specific activities, they allow participants to manage their risks more efficiently and, in some instances, eliminate certain risks. 8

1.07 Financial institutions are in the business of taking risks and managing them. In so doing, they face ‘idiosyncratic’ risks, such as credit risk, settlement risk, counterparty risk, liquidity risk, market risk, and operational risk. 9 Moreover, the great financial crisis has restored the importance of systemic risk in the financial sector, as distinguished from idiosyncratic risk. A common factor in the various definitions of systemic risk is that a trigger event, such as an economic shock or institutional failure, causes a chain of bad economic consequences, which could include a chain of financial institution and/or market failures. 10 While an idiosyncratic shock will affect only a single institution or asset, systemic risk focuses on the danger of the entire financial system collapsing, causing a major downturn in the real economy. Indeed, the consequences of a systemic financial crisis are more devastating than those of other economic crises because of the role that finance plays in the economy. 11

1.08 Connected with the concept of systemic risk, is that of systemically important financial institutions (SIFIs). SIFIs are firms whose disorderly failure, because of their size, complexity, and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity. 12 The Financial (p. 6) Stability Board (FSB) recommends that financial institutions that are clearly systemic in a global context (G-SIFIs) should have higher loss-absorbency capacity than the minimum levels agreed in Basel III. These institutions must also be subject to more intensive coordinated supervision and resolution planning to reduce the probability and impact of their failure.

1.09 Financial intermediaries in general are different from non-financial firms for several reasons that matter from a corporate governance perspective. Firstly, they are more leveraged, with the consequence that the conflict between shareholders and fixed claimants, present in all corporations, is more acute for them. 13 Secondly, banks' liabilities are largely issued as demand deposits, while their assets (e.g. loans) often have longer maturities. The mismatch between liquid liabilities and illiquid assets may become a problem in a crisis situation, as was vividly seen in the recent financial turmoil, when bank runs took place at large institutions, threatening the stability of the whole financial system. Thirdly, despite contributing to the prevention of bank runs, deposit insurance generates moral hazard by incentivizing shareholders and managers of insured institutions to engage
in excessive risk-taking. Similarly, the expectation that governments will bailout large financial institutions without letting them fail enhances moral hazard of the managers, while reducing monitoring by creditors. Fourthly, asset substitution is relatively easier in financial firms than in non-financial ones. This allows for more flexible and rapid risk shifting, which further increases agency costs between shareholders and stakeholders (bondholders and depositors) and moral hazard of managers. In addition, banks are more opaque, that is, it is difficult to assess their risk profile and stability. Information asymmetries, in particular for depositors, hamper market discipline and, in turn, increase moral hazard of managers.

1.10 Insurers are different from non-financial firms for reasons that are not entirely similar to those applicable to banks. Insurance covers risk for financial and corporate undertakings, and households. Unlike most financial products, it is characterised by the reversal of the production cycle insofar as premiums are collected when the contract is entered into and claims arise only if a specified event occurs. Insurers intermediate risks directly. They manage these risks through diversification and risk pooling enhanced by a range of other techniques. In addition to business risks, insurers bear technical risks, which concern the liability side of their balance sheet and relate to the actuarial and/or statistical calculations used in estimating liabilities. They also incur risks from their investments and financial operations, including those arising from asset-liability mismatching.

These preliminary comments show, on one side, the importance of corporate governance for financial institutions; and, on the other, the uniqueness of banks and insurers’ governance as a reflection of their specialness. Banks, in particular, are inherently fragile given the liquid nature of deposits and the illiquid nature of their assets, which makes them especially prone to crisis. Other institutions, like asset managers, are less fragile, to the extent that they undertake risks on behalf of investors, while their activities are more similar to other professional activities, including those of lawyers and accountants. The corporate governance of asset managers, albeit important, is less special than in the case of banks and is mainly focused on the quality of services offered to clients and on the prevention of conflicts of interest.

III. Lessons from the Financial Crisis

1.12 Official policy documents issued after the 2008 crisis argued that the malfunctioning of corporate governance at banks and other financial institutions contributed to their collapse in the financial turmoil. The de Larosière Report stated that corporate governance was one of the most important failures in the crisis. An Organisation for Economic Co-operation and Development (OECD) paper and a Commission Green Paper similarly argued that boards of directors rarely comprehended either the nature or scale of the risks they were facing. The same documents argued that the recourse to flawed remuneration structures, including the excessive use of short-term incentives for managers and other risk-taking employees, contributed to the failure of many banks and other financial institutions.

1.13 Similar arguments have been criticized by empirical studies showing that good governance is not enough for bank soundness. A notable example is a paper by Andrea Beltratti and René Stulz, who investigate possible determinants of bank performance measured by stock returns, for a sample of ninety-eight large banks across the world, during the crisis. The authors find no evidence that failures and weaknesses in corporate governance arrangements were a primary cause of the financial crisis. In particular, they find no evidence that banks with better governance performed better during the crisis. On the contrary, banks with more pro-shareholder boards performed worse. Another paper by Rüdiger Fahlenbrach and René Stulz on bank CEO incentives analyses a sample of ninety-eight large banks across the world and finds ‘no evidence that banks with a better
alignment of CEOs’ interests with those of their shareholders had higher returns during the crisis’.\textsuperscript{23} The authors rather identify ‘some evidence that banks led by CEOs whose interests were better aligned with those of their shareholders had worse stock returns and a worse return on equity’.

1.14 Almost paradoxically, therefore, ‘good’ corporate governance (i.e. aligning the interests of managers and shareholders) simply led bank managers to engage in more risky activities. However, this is explained by the fact that in financial intermediaries a major part of the losses are externalized to stakeholders, while gains are fully internalized by shareholders and managers (if properly aligned by the right incentives). It is therefore the task of prudential regulation and supervision to reduce the excessive risk propensity of shareholders and managers in order to guarantee the ‘safety and soundness’ of financial institutions.\textsuperscript{24} Capital requirements, in particular, should reduce the incentives of shareholders to undertake excessive risks, while providing a cushion for the protection of depositors and other stakeholders, including the taxpayers to the extent that the chances of a bailout are diminished.\textsuperscript{25} Another way to mitigate these problems would be to keep large financial institutions in public ownership so as to align the interests of shareholders with those of the financial system. However, this has clear downsides in terms of political interference with the management of financial institutions, as shown by those countries where public ownership of banks and other financial institutions is widespread.\textsuperscript{26}

1.15 Nonetheless, there is a role for corporate governance in constraining excessive risk-taking by financial institutions beside prudential supervision. A study by Ellul and (p. 9) Yerramilli shows that the organization of risk management at banks, including the role of boards overseeing the same, is important in predicting risk-taking by the institutions concerned and their performance over time.\textsuperscript{27} The authors examined the organizational structure of risk management at Bank Holding Companies (BCH) in the United States by constructing an index (Risk Management Index = RMI) that measures the importance attached to the risk management function within each BCH and the quality of risk oversight provided by the BHC’s board of directors. Their main hypothesis is that BCHs with strong and independent risk-management functions should have lower tail risk, all else being equal. In fact, a strong risk-management function correctly identifies risks and prevents excessive risk-taking, which cannot be controlled entirely by regulatory supervision or external market discipline. They find that BCHs with higher pre-crisis RMI had lower tail risk, a smaller fraction of nonperforming loans, and better operating performance and stock return performance during the crisis years. They also examine the association between RMI and tail risk-taking over the 1995–2010 period and find that BCHs with higher RMI (strong organizational risk controls) in the previous year have lower risk in the following one. On the whole, Ellul and Yerramilli highlight that weak risk management at financial institutions may have contributed to the excessive risk-taking that brought about the financial crisis. Indeed, they show that banks with internal risk controls in place before the onset of the financial crisis were more judicious in the tail risk exposures and fared better, in terms of both operating performance and stock market performance, during the crisis years. To conclude, aligning the interests of boards, managers, and shareholders is not enough for limiting risk-taking by financial institutions to an optimal level from a societal perspective. Indeed, the quality of risk-management systems and effective board monitoring over these systems definitely contribute to the safety and soundness of financial institutions.\textsuperscript{28}

IV. Global Principles

1.16 The financial crisis has led to a restatement of the global principles concerning the corporate governance of financial institutions in the belief that governance failures contributed to these institutions’ failures in the crisis. However, the work of (p. 10) international organizations in this area started just before the end of the last century.\textsuperscript{29} In 1999, the OECD published the ‘Principles of Corporate Governance’, which focus on
publicly traded companies, both financial and non-financial. The Principles were subsequently updated and are now available in their 2015 edition, which has been issued under the auspices of G20/OECD.\textsuperscript{30} The Basel Committee on Banking Supervision (BCBS) took the first edition of the Principles as a basis for drafting its Guidelines on corporate governance principles for banks in 1999.

1.17 Originally the BCBS Guidelines were directed to assist supervisors in the promotion of sound corporate governance practices, with the belief that ‘through sound corporate governance, bank supervisors can have a collaborative working relationship with bank management, rather than an adversarial one’. In their 2015 edition, however, the Guidelines underline that ‘effective implementation of sound corporate governance requires relevant legal, regulatory and institutional foundations’ and encourage supervisors ‘to be aware of legal and institutional impediments to sound corporate governance, and to take steps to foster effective foundations for corporate governance where it is within their legal authority to do so’. No doubt, this exhortation reflects and/or explains the post-crisis shift of many legal systems from a supervisory to a regulatory approach to bank governance.

1.18 One of the main goals of the 2015 BCBS Guidelines is to emphasize the role of risk governance in banks. Indeed, their main purposes are ‘to explicitly reinforce the collective oversight and risk governance responsibilities of the board’ and ‘to emphasize key components of risk governance such as risk culture, risk appetite and their relationship to a bank’s risk capacity’. Moreover, the Guidelines identify ‘the specific roles of the board, board risk committees, senior management and the control functions, including the CRO and internal audit’.

1.19 The OECD Guidelines on Insurer Governance follow a path similar to that of the BCBS Guidelines and were ‘designed in light of the overriding objective of an insurance undertaking, which is to provide benefits to the insured in accordance with the contracts concluded with them, and satisfy its shareholders (member-policy holders in the case of mutual insurers)’.\textsuperscript{31} Their rationale is explained accordingly: ‘( … ) insurers are expected to have sound governance practices and effective risk management so that they will be in a position to provide promised benefits to (p. 11) policy holders (and any relevant beneficiaries) and thus fulfil their insurance function in the economy’.\textsuperscript{32}

1.20 The topic of financiers’ compensation is more politically charged than that of corporate governance as it involves issues that are especially salient from the voters’ perspective particularly in times of crisis. However, no domestic regulatory solution can be effective without agreement at international level, which explains why international principles for sound compensation practices were adopted after the crisis at the initiative of G20 and the FSB.\textsuperscript{33} In a similar vein, the FSB adopted ‘Principles for an Effective Risk Appetite Framework’, which aim to enhance the supervision of SIFIs, but are also relevant for the supervision of financial institutions and groups more generally, including insurers, securities firms, and other non-bank financial institutions.\textsuperscript{34} The FSB Principles set out key elements for an effective risk appetite framework, an effective risk appetite statement, risk limits, and defining the roles and responsibilities of the board of directors and senior management. For non-SIFIs, supervisors and financial institutions may apply the Principles proportionately so that the Risk Appetite Framework is appropriate to the nature, scope, and complexity of the activities of the financial institution.

1.21 The Basel Committee’s ‘Corporate Governance Principles for Banks’ clearly enounce the overarching principle of proportionality by specifying that their implementation should be commensurate with the size, complexity, structure, economic significance, risk profile and business model of the bank and the group (if any) to which it belongs. This means making reasonable adjustments where appropriate for
banks with lower risk profiles, and being alert to the higher risks that may accompany more complex and publicly listed institutions.

Proportionality, therefore, works in two directions, either weakening or reinforcing the governance requirements of the institutions concerned on the basis of their risk profile and business model. Other circumstances are also relevant, such as size and complexity, so that smaller institutions and/or less complex ones can be treated differently in the implementation of the individual standards, which could be either displaced or applied in a different way.

Moreover, firms that qualify as systemically important financial institutions (SIFIs) are ‘expected to have in place the corporate governance structure and practices commensurate with their role in and potential impact on national and global financial stability’. Indeed, SIFIs’ distress or disorderly failure can cause significant disruption to the wider financial system and economic activity, because of their size, complexity, and systemic interconnectedness. This is why the FSB framework for reducing the moral hazard of SIFIs has been adopted. The objective of this framework is to address the systemic risks and the associated moral hazard problem for institutions that are seen by markets as too big to fail. Amongst the various measures foreseen, intensive and effective supervision of all SIFIs is required, including through stronger supervisory mandates, resources, and powers, and higher supervisory expectations for risk management functions, data aggregation capabilities, risk governance, and internal controls.

As a result, the international principles touching upon corporate governance and related issues establish a hierarchy of firms, depending on their systemic relevance (G-SIFIs, SIFIs) or on their significance, complexity, and size. However, the implementation of the principles and the choice of how to model them with respect to such hierarchy are left to individual jurisdictions. It is known that the European Union has neglected proportionality to a large extent, particularly in the CRD IV provisions concerning the corporate governance of banks and compensation practices, which tend to follow a one-size-fits-all approach that is creating problems for smaller and/or less complex institutions.

The international principles and the EU provisions are not uniform across financial sectors, which is often justified by the functional differences between types of firms highlighted in section II above. Nevertheless, some of the differences in regulation across sectors are less clearly grounded, as will be shown with regard to fit and proper requirements which are heavier under CRD IV and MiFID II than in other sectors.

Moreover, divergences emerge between the regulation of financial intermediaries and capital markets regulation, as will be shown with reference to the Market Abuse Regulation and its potential clashes with the prudential regulation of intermediaries.

(V. Corporate Governance and Prudential Regulation: Complements or Substitutes?)

Governments and regulators rely on corporate governance as a complement to financial supervision, which explains why regulation is on the rise in this area to the point that some argue that a new type of European company law statute is arising for financial institutions. In brief, regulation requires boards of directors and their risk committees to oversee the undertaking and management of risks by financial institutions. Board members of financial institutions are subject to regulatory duties, which specify their monitoring tasks and the ways in which they should perform the same in the interest of financial stability. In the absence of regulation, financial institutions would undertake more risks
than is socially optimal, for they would act exclusively in the interest of shareholders who do not internalize the social costs, but only the private costs of their firm’s failure.

1.26 Corporate governance therefore serves the purposes of supervisors, to the extent that it should prevent the undertaking of excessive risk by financial institutions. No doubt, also the interests of shareholders are protected. However, wealth maximization by financial institutions is constrained whenever regulation or supervision foreclose the assumption of risk which would be in the interest of shareholders to assume, but could endanger creditors or even threaten systemic stability. A difficult trade-off is therefore struck between the maximization of the value of financial firms and the social interest to systemic stability.\(^42\)

The case is not different for financial institutions which are constituted as cooperatives, except that they may need special tailoring of the prudential requirements. The case of Rabobank shows that even a long story of success as a banking group made of cooperatives may not prevent the involvement in financial scandals, such as those concerning LIBOR, which has determined the need for a deep governance overhaul.\(^43\) Even worse, the case of Venetian banks shows how the cooperative form may contribute to generate serious governance problems, which have led—in the presence of fraudulent behaviour and supervisory failures—to the crisis and resolution of these banks.\(^44\)

1.27 Regulators, for their part, complement the monitoring by boards and risk committees through public supervision on governance mechanisms and risk management by financial institutions. The EBA Guidelines on common procedures and (p. 14) methodologies for the supervisory review and evaluation process (SREP), drawn up pursuant to Article 107(3) of CRD IV, offer a good example. They are addressed to competent authorities and are intended to promote common procedures and methodologies for the SREP referred to in Article 97 et seq of CRD IV and for assessing the organization and treatment of risks referred to in Articles 76 to 87 of that Directive. The common SREP framework introduced in these guidelines is built around business model analysis; assessment of internal governance and institution-wide control arrangements; assessment of risks to capital and adequacy of capital to cover these risks; and assessment of risks to liquidity and adequacy of liquidity resources to cover these risks. The specific elements of the SREP framework are assessed and scored on a scale of 1 to 4. The outcome of the assessments, both individually and considered as a whole, forms the basis for the overall SREP assessment, which represents the up-to-date supervisory view of the institution’s risks and viability.

1.28 The monitoring of corporate governance by bank supervisors can be usefully explained from the perspective of the ‘representation hypothesis’ developed by Dewatripont and Tirole.\(^45\) In their opinion, prudential regulation is primarily motivated by the need to ‘represent’ small depositors (and small customers of non-bank financial institutions) and to bring about appropriate corporate governance. The two authors see the import of corporate governance ideas as a way to enrich the financial regulation debate. In brief, they argue that financial institutions tend to be regulated under the following circumstances:

- First, the claimholders are somewhat unsophisticated or free-riding (small depositors, insurance policyholders, pensioners) and/or cannot conceivably thoroughly monitor their counterparts due to the number of such parties and to the time scale involved (interbank depositors, traders on securities markets). Second, no mechanism of private representation is (or can be?) set up that would dispense the claimholders from having to monitor, write covenants, and interfere.\(^46\)

Dewatripont and Tirole argue however that ‘despite some differences, the philosophy of prudential regulation strongly resembles that of loan agreement covenants’.\(^47\) Standard loan agreements demand capital adequacy, include liquidity and early warning systems, and provide for the handling of failures. In the case of covenant violation, the creditor may face roughly the same choices as a banking regulator: ‘forbearance, liquidation, or renegotiation’. The latter results in debt forgiveness, which is the analogue of government
financial assistance, or in a debt-equity swap, which is the analogue of government ownership.

(p. 15) 1.29 However, post-crisis reforms have extended prudential regulation to areas, which are not easily reduced to the covenants analogy and reinforce the idea of financial regulation as a substitute for corporate governance. One of these areas is incentive compensation. The FSB principles and standards interfere with the structure of compensation in ways that restrict the autonomy of boards. 48 Other areas are risk management and internal controls, which are intrinsic components of the design of the firm governance, but in the case of financial institutions are also subject to regulation and supervision. 49

1.30 Given that corporate governance is a complement to regulation in assuring the stability of financial institutions, an important question for policy research is to what extent and under what conditions regulation should work either as a complement or a substitute for corporate governance. Another important question is whether and to what extent bank resolution and the relevant regimes influence the corporate governance of banks by adding gone-concern considerations to the traditional going concern-perspective. 50 Moreover, the role of institutional investors as shareholders of (listed) financial institutions needs to be considered, to the extent that their engagement puts pressure on the governance structures of the relevant institutions and may contribute to better risk management by the same, given that diversified shareholders are in any case exposed to systemic risk. 51

VI. The Role of Conduct and Culture

1.31 Corporate governance effectiveness depends not only on rules and their enforcement, but also on conduct and culture within the firm. As argued by Douglass North from a general perspective:

... formal rules, in even the most developed economy, make up a small (although very important) part of the sum of constraints that shape choices; a moment’s reflection should suggest to us the pervasiveness of informal constraints. In our daily interaction with others, whether within the family, in external social relations, or in business activities, the governing structure is overwhelmingly defined by codes of conduct, norms of behaviour, and conventions. 52

In a similar setting, culture plays a fundamental role for it ‘defines the way individuals process and utilize information and hence may affect the way informal constraints are specified. Conventions are culture specific, as indeed are norms’. 53

(p. 16) 1.32 This explains the emphasis put on culture in post-crisis corporate governance discussion, which underlines the roles that conduct and the relevant monitoring play in the financial services sector: ‘With over $100 billion in fines imposed on the largest financial institutions since the financial crisis, there is now a growing suspicion that ethical lapses in banking are not just the outcome of a few bad apples—deviant rogue traders—but rather a reflection of systematic weaknesses in governance’. 54 There is no doubt, therefore, that research on the governance of financial institutions should not be restrained to legal and economic analysis, but extend to the role and impact of culture and conduct in financial firms from a broad social sciences perspective. 55 In this way, sociology, psychology, and anthropology will help understanding the ‘informal constraints’ which determine financial institutions’ behaviour and complement their regulation and supervision. 56

1.33 Important questions regarding the relationship between governance of financial institutions on the one hand, and conduct and culture on the other, are analysed and discussed in the chapters included in Part IV of this volume. Indeed, ineffective rules and inadequate governance structures are not enough to explain the 2008 financial crisis, nor to justify the reiteration of misbehaviour and fraud episodes carried out during the subsequent
years by banks and other financial institutions. In order to get to the roots of these problems and to build a sustainable financial system, a new approach should be followed and similar phenomena should be analysed through the lenses of other social sciences too.\textsuperscript{57}

\textbf{1.34} Moreover, financial supervision needs to combine ‘structural’ perspectives with insights into the behavioural and cultural drivers of firm performance, in order to become more effective in fostering firm and financial stability. Two chapters in this volume specifically examine the case of the supervision of conduct and culture by the Dutch National Bank (DNB)\textsuperscript{58} and that of the Dutch banker’s oath and the Dutch Banking Disciplinary Committee.\textsuperscript{59} Other chapters consider the relatively new topic of conduct risk and its treatment from the perspectives of regulation, governance, and culture,\textsuperscript{60} and the traditional issue of conflicts of interest which is (p. 17) however examined from a comparative perspective with a new emphasis on the role of culture in compliance.\textsuperscript{61}

\textbf{1.35} Part IV is completed by an analysis of the recent banking crises in some European countries, such as Italy, Portugal, Spain, and the Netherlands. The relevant case studies show how weaknesses in corporate governance and culture, together with political interference and supervisory failures, contributed to the failure of either public or private institutions in the aftermath of the great financial crisis.

\textbf{Footnotes:}


3 See Harold Demsetz, ‘Information and Efficiency: Another Viewpoint’, Journal of Law and Economics (1969), 12, 1, stating: ‘The view that now pervades much public policy economics implicitly presents the relevant choice as between an ideal norm and an existing “imperfect” institutional arrangement. This nirvana approach differs considerably from a comparative institution approach in which the relevant choice is between alternative real institutional arrangements’.

4 See, in various directions, Jens-Hinrich Binder, Chapter 2; Kitty Lieverse and Claartje Bulten, Chapter 5; Paul Davies and Klaus Hopt, Chapter 6; Steven Schwarcz, Aleaha Jones, and Jiazhen Yan, Chapter 7; Iris Palm-Steyerberg and Danny Busch, Chapter 8; Guido Ferrarini, Chapter 11, all this volume.


7 Fabozzi, Modigliani, and Jones, n 5, 24.


9 Fabozzi, Modigliani, and Jones, n 5, 30.

11 See the definition offered by the Systemic Risk Centre, London School of Economics, at www.systemicrisk.ac.uk/systemic-risk, accessed 1 July 2018.


14 See International Association of Insurance Supervisors (IAIS), Insurance core principles, updated November 2015.

15 ibid.

16 For a critical view, see Cristoph van der Elst, ‘Corporate Governance and Banks: How Justified is the Match’, Law Working Paper No 284/2015, who hardly finds convincing arguments for bank governance specificities.


18 See Jens-Hinrich Binder, ‘Governance of Investment Firms under MiFID II’, in Danny Busch and Guido Ferrarini (eds), Regulation of the EU Financial Markets: MiFID II & MiFIR, Oxford University Press, 2017, 49.


24 Lawrence White, ‘Corporate Governance and Prudential Regulation of Banks: Is There Any Connection?’, in Barth, Lin, and Wihlborg (eds), n 2, 344.

25 Anat Admati and Martin Hellwig, The Bankers’ New Clothes, Princeton University Press, 2013. Other important remedies are analysed by Paul Davies and Klaus Hopt, Chapter 6, this volume.

26 See Johannes Adloff, Katja Langenbucher, and Christina Parajon Skinner, Chapter 14, this volume, with special reference to Germany and the United States; Maribel Sáez-Lacave and María Gutiérrez-Urtiaga, Chapter 22, this volume, concerning the Spanish crisis of public banks.


conclusions, in line with the official reports cited earlier, at least for what concerns risk management failures before and throughout the financial crisis.

29 See Jens-Hinrich Binder, Chapter 2, and Arthur van den Hurk and Michele Siri, Chapter 3, both this volume.


32 ibid, 43, arguing that insurers ‘as financial institutions accepting funds in return for promised future payments ( … ) may have an incentive to engage in risky behaviour or practices that have short-term benefits but do not properly consider policyholder interests or, more broadly, the reputation of the industry’.


37 See n 33.


39 See Iris Palm-Steyerberg and Danny Busch, Chapter 8, this volume.

40 See Carmine di Noia and Matteo Gargantini, Chapter 12, this volume.

41 See Kitty Lieverse and Claartje Bulten, Chapter 5, this volume.

42 A similar trade-off exists between the interest to keep the confidentiality of inside information (MAR) and the need to allow the circulation of information within financial institutions and their groups for prudential reasons: Carmine di Noia and Matteo Gargantini, Chapter 12, this volume.

43 See Martin van Olffen and Gerard van Solinge, Chapter 15, this volume.

44 See Paolo Giudici, Chapter 21, this volume.


46 ibid, 44.

47 ibid, 88.

48 See Guido Ferrarini, Chapter 11, this volume.

49 See Lodewijk van Setten, Chapter 9, this volume, with special reference to CRD IV, MiFID II, the UCITS Directive, and the AIFMD.

50 See Bart Bierens, Chapter 4, this volume.

51 See Maria Cristina Ungureanu, Chapter 13, this volume.

53 ibid, 42.


57 See Guido Ferrarini and Shahshan Zhu, Chapter 16, this volume.

58 See Wijnand Nuijts, Chapter 17, this volume.

59 See Peter Laaper and Danny Busch, Chapter 18, this volume.

60 See Antonella Sciarrone Alibrandi and Claudio Fregeni, Chapter 19, this volume.

61 See Geneviève Helleringer and Christina Skinner, Chapter 20, this volume.