The supervisory assessment of bank managers’ suitability: Towards ‘executive harmonisation’ in the Banking Union?

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Abstract

This paper argues that the lack of harmonisation in the field of suitability or ‘fitness and propriety’ requirements impedes supervisory efficiency within the Single Supervisory Mechanism, and hampers the achievement of a level playing field as the foundation of an integrated Banking Union. After identifying the source of this lack of harmonisation, it analyses the capacity of different forms of harmonisation to serve as a remedy. This paper thereupon explores the idea of ‘executive harmonisation’ as a next step in the construction of a level playing field for banks. Lastly, the capacity of the Single Supervisory Mechanism to achieve executive harmonisation is evaluated.

I. Introduction

In the aftermath of the collapse of the banking system in 2008, the European Commission elaborated a ‘Roadmap towards a Banking Union’1, aiming to achieve an integrated banking sector based on a ‘level playing field’. To accomplish that goal, the Banking Union is based on a ‘Single Rulebook’, i.e. a harmonised set of rules that govern the EU banking sector. In order to ensure the equal and effective application of those rules, integrated banking supervision was considered an essential element of a Banking Union.2 Therefore, the ‘Single Supervisory Mechanism’ (SSM) was created to supervise euro-area banks. Instead of establishing a single supervisor, the SSM Regulation3 introduces a mechanism where the European Central Bank (ECB) cooperates closely with the national banking supervisors in order to achieve single

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2 European Council, Towards a Genuine Economic and Monetary Union, Report by President of the European Council Herman Van Rompuy, Brussels, 26 June 2012 (EUCO 120/12).

supervision of the euro area. The ECB is entrusted with specific supervisory tasks,\(^4\) such as ensuring compliance with two major components of the Single Rulebook, namely the Capital Requirements Regulation\(^5\), and the national law implementing the Capital Requirements Directive IV (hereinafter ‘CRD IV’).\(^6\)

The achievement of a level playing field through centralised rule-making and supervision is hindered by the fact that the Single Rulebook is composed not only of Regulations, but also of Directives. One may consider the existence of Directives within a Single Rulebook as problematic, as EU Member States can transpose the rules of Directives differently into their national legal orders.\(^7\) Indeed, the possible existence of different national rules seems to be incompatible with the idea of a Single Rulebook. For instance, when zooming in on the national implementation of the CRD IV, national legislation “varies from strict word-for-word transpositions of European legislation to national gold-plating.”\(^8\)

The problem of national differences within the Single Rulebook has become particularly relevant in the field of suitability requirements. Under the CRD IV, members of a bank’s management body\(^9\) must be ‘suitable’ or ‘fit and proper’, meaning that they need to be of sufficiently good repute, to possess sufficient

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\(^4\) The Banking Union is further completed by a Single Resolution Mechanism (‘SRM’) to manage bank resolutions orderly, and a European Deposit Insurance Scheme (‘EDIS’) to protect depositors more effectively.


\(^6\) 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, JO L 176 of 27 June 2013, 338.

\(^7\) Under Article 288 of the TFEU, the EU Member States are only under an obligation to achieve the results of the Directive, while they remain free to choose the form and methods.

\(^8\) European Central Bank, ECB Annual Report on supervisory activities 2015 (March 2016) 5.

\(^9\) Under the CRD IV, ‘management body’ means “an institution’s body or bodies, which are appointed in accordance with national law, which are empowered to set the institution’s strategy, objectives and overall direction, and which oversee and monitor management decision-making, and include the persons who effectively direct the business of the institution”. Recital 56 of the CRD IV explains that “a management body should be understood to have executive and supervisory functions. The competence and structure of management bodies differ across Member States. In Member States where management bodies have a one-tier structure, a single board usually performs management and supervisory tasks. In Member States with a two-tier system, the supervisory function is performed by a separate supervisory board which has no executive functions and the executive function is performed by a separate management board which is responsible and accountable for the day-to-day management of the undertaking. Accordingly, separate tasks are assigned to the different entities within the management body.”
knowledge, skills and experience, and to act with honesty, integrity and independence of mind.\textsuperscript{10} Despite the harmonisation effort of these requirements by the CRD IV, the ECB has observed a lack of harmonisation at national level in the area of suitability requirements,\textsuperscript{11} going as far as speaking about “very diverse rules across Europe”.\textsuperscript{12}

The persisting national diversity within the Single Rulebook constitutes a considerable obstacle to the efficiency of banking supervision under the SSM. This is particularly the case when it comes to suitability requirements. In 2015, the ECB had to deal with 2730 fit and proper assessments triggered by management and supervisory board appointments.\textsuperscript{13} Moreover, 24\% of all alleged breaches reported to the ECB in 2015 concerned the fit and proper requirements.\textsuperscript{14} Due to the diversity of the applicable legal regimes, suitability assessments were particularly difficult to manage for the ECB, even resulting in a backlog in its supervisory work.\textsuperscript{15} This lack of supervisory efficiency confirms that national differences within the Single Rulebook hamper the effectiveness of the Banking Union. The fact that the ECB is faced with 19 different legislations, which potentially require it to judge similar situations in different ways,\textsuperscript{16} is at odds with the idea of an integrated Banking Union built on a level playing field.

The following chapter of this paper will take the suitability requirements of the CRD IV as a starting point to develop why judicial and legislative forms of harmonisation have been – and probably will be – insufficient to achieve a true level playing field for banks (Chapter II). It will introduce the idea of executive harmonisation as a possible solution, and discuss the SSM’s potential to achieve this form of harmonisation (Chapter III). The last chapter will briefly conclude.

\textsuperscript{10} CRD IV (n 6), Article 91.  
\textsuperscript{11} 2015 Annual Report (n 8) 15.  
\textsuperscript{12} Single Supervisory Mechanism – Single Supervisory Law? (Keynote speech by Sabine Lautenschläger, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, at the Workshop of the European Banking Institute (EBI) hosted by the ECB, Frankfurt, 27 January 2016).  
\textsuperscript{13} 2015 Annual Report (n 8) 49.  
\textsuperscript{14} 2015 Annual report (n 8) 53.  
\textsuperscript{15} 2015 Annual report (n 8) 51.  
II. The insufficiency of judicial and legislative harmonisation to level the playing field

Suitability requirements are set out under Article 91 of the CRD IV. When reading this Article, it is striking how broad and abstract its terms are. Article 91 requires members of the management body to be “of sufficiently good repute” and to “possess sufficient knowledge, skills and experience to perform their duties.” The overall composition of the management body also needs to “reflect an adequately broad range of experiences,” and possess “adequate collective knowledge, skills and experience.”Moreover, members of the management body must “act with honesty, integrity and independence of mind”, and they have to “commit sufficient time to perform their functions in the institution”. In addition, Article 91(3) imposes a limit on the number of executive and non-executive directorships that a member of the management body may hold, depending on the “individual circumstances and the nature, scale and complexity of the institution’s activities”. Article 91(5) specifies that “directorships in organisations which do not pursue predominantly commercial objectives shall not be taken into account”.

The aforementioned suitability criteria are interpreted differently across the euro area, as banking supervisors enjoy a broad margin of appreciation when they judge upon their satisfaction. This seems to be the result of two elements. On the one hand, the high degree of abstraction of suitability requirements creates leeway for different interpretations. Rather subjective notions such as “non-financial criteria”, “good repute”, “adequate collective experience”, “honesty, integrity and independence of mind” and “committing sufficient time” may be subject to different understandings in function of the Member State where they are interpreted, as they depend on socio-cultural conceptions and values. On the other hand, the application of suitability criteria necessarily relies on a complex factual assessment, as it requires the evaluation of human capacities. The combination of these two elements gives rise to a broad margin of appreciation, which should be guided by the policy interest of maintaining a safe and sound EU banking system. National banking supervisors may

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17 CRD IV (n 6), Article 91(7).
However be tempted to use this margin of appreciation to pursue interests that are purely national, such as the desire to maintain a more lenient and flexible jurisdiction for banking.

Differences in legal regimes arising from appreciation prerogatives of administrators are difficult to harmonise. Scholars have observed two forms of harmonisation supporting the realisation of the Single Market: judicial and legislative harmonisation.\textsuperscript{19} For each of these, the following two paragraphs will develop their insufficiency to achieve a true level playing field as the basis of an integrated banking system.

Judicial harmonisation consists of the CJUE’s interpretation of the Four Freedoms, pushing Member States to abolish national obstacles to free trade.\textsuperscript{20} It is also referred to as “negative harmonisation” or “negative integration”, in the sense that the Four Freedoms, as interpreted by the CJEU, induce the EU Member States to eliminate national barriers to market integration.\textsuperscript{21} While judicial harmonisation works well for the abolishment of national technical barriers, such as technical criteria for the sale of goods, it is not effective to fight non-technical barriers arising from the difference in legal regimes.\textsuperscript{22} In the case of suitability requirements, the difficulty of harmonisation stems from differences in the interpretation of abstract criteria and complex facts, giving rise to a margin of appreciation that is very difficult to review judicially.\textsuperscript{23} As such, negative harmonisation is unable to bring an efficient solution.

Legislative harmonisation, also known as “positive harmonisation” or “positive integration”, takes place when an EU institution introduces a European standard by means of secondary legislation.\textsuperscript{24} In order to avoid the risk of different national

\begin{thebibliography}{9}
\bibitem{20} Ibid.
\bibitem{22} E J Lohse (n 19).
\bibitem{24} R Schütze (n 21) 193-194.
\end{thebibliography}
implementations of a Directive, an obvious solution would be to adopt a Regulation, which automatically becomes integral part of the legal orders of the Member States without the need of national measures of implementation. Unfortunately, in the field of banking, it is not legally possible to achieve a full transition towards a body of material law solely composed by Regulations. The rules relating to the taking-up and pursuit of activities as self employed persons are subject to a specific legal basis, namely Article 53(1) TFEU, which only allows for the use of Directives. Hence, a core of rules, limited but irreducible, will always need to be incorporated in Directives. In addition, more substantive EU legislation, be it under the form of Directives or Regulations, will not necessarily prevent national banking supervisors from pursuing different interpretations of harmonised rules, and from exercising their margin of appreciation in very different ways. It thus remains an overly ambitious goal to ‘level the playing field’ through legislation. If one has the ambition to harmonise the law to the extent of achieving a true level playing field, it is not sufficient to harmonise the rules without harmonising their application. It is exactly to that end that the European Banking Authority (EBA) was charged with the task to develop common supervisory practices. The EBA gathers the heads of the EU Member States’ banking supervisors, to decide on guidelines on the application of specific rules, such as the EBA guidelines on the assessment of the suitability of members of the management body. In spite of these guidelines on suitability assessments, “significant differences” in actual supervisory practices survive. A possible reason for this is that the EBA’s guidelines are not binding due to EU constitutional constraints. As such, the successful outcome of the EBA’s work depends on the willingness of the EBA’s members, whose policies are in reality only under peer pressure to converge.

What seems to be a necessary precondition to achieve harmonisation not only of legislation, but also of its application, is a European executive authority that absorbs the margin of appreciation enjoyed by national authorities when they apply

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25 Council of the European Union (Opinion of the Legal Service), Interinstitutional Files 2012/0242 (CNS) and 2012/0244 (COD), ST14752/12 (Brussels, 9 October 2012), para 19.
26 EBA is one of the three ‘European Supervisory Authorities’ together with ESMA (European Securities and Markets Authority) and EIOPA (European Insurance and Occupational Pensions Authority).
28 For an in-depth discussion on the constitutional boundaries of European Supervisory Authorities, see P Van Cleynenbreugel, ‘Meroni circumvented? Article 114 TFEU and EU Regulatory Agencies’ (2014) 21 MJ 64.
the law, instead of guiding it gently. Such an authority would need to have the power to impose and enforce its own interpretation of national rules on the basis of its own appreciation of the facts, without the need to have recourse to national authorities. This would require a concentration of investigative and decision making powers in the hands of that authority. As a consequence thereof, this authority would have the power to harmonise the executive application of national rules, giving rise to a phenomenon of ‘executive harmonisation’.

The notion of executive harmonisation is unknown in the landscape of European law, because there has never been an EU authority with the power to apply national rules. At least not until the fourth of November 2014, which is the day the SSM entered into force. The SSM is indeed an interesting test case for executive harmonisation, as the ECB has the power to apply “national law implementing Union law”, i.e. the CRD IV. In particular, the ECB is the competent authority to ensure compliance with national fit and proper requirements. The question that the next chapter will try to answer is whether the scope, structure and functioning of the SSM will allow the ECB to adopt its own interpretation of national law and to apply and enforce this interpretation effectively.

III. The SSM as a model for executive harmonisation?

A first observation that should be made is that the SSM is not a true single supervisor. Instead, it is a mechanism that relies on the cooperation, assistance and expertise of multiple supervisory authorities, in order to achieve single supervision of the euro-area banking system. In other words, single supervision is not the method but the outcome. The supervisory authorities involved are the ECB and the national authorities that are competent for banking supervision in the euro-area Member States (commonly referred to as ‘national competent authorities’, hereinafter ‘NCAs’).

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29 SSM Regulation [n 3], Articles 4(1)(e) and 4(3).
30 EU Member States that do not (yet) have the euro as their currency can choose to join the SSM. To that end, their NCAs need to enter into ‘close cooperation’ with the ECB, under the conditions foreseen in Article 7 of the SSM Regulation, and following the procedure established in ECB Decision ECB/2014/5 of 31 January 2014 on the close cooperation with the NCAs of participating Member States whose currency is not the euro. No formal requests for close cooperation were received in 2014 and 2015.
The allocation of supervisory powers between the ECB and the NCAs is first and foremost based on a distinction between ‘significant’ and ‘less significant’ credit institutions. Only the significant institutions are under direct supervision by the ECB. For each significant institution, a ‘Joint Supervisory Team’ (hereinafter ‘JST’) has been established, composed of staff of the ECB and of the NCAs. The allocation of certain powers – such as the power to impose pecuniary sanctions – also depends on the legal nature of the norm to be applied. The question that is particularly relevant here relates to the reach of the ECB’s supervisory powers when it comes to the application of national rules. Can the ECB impose its own interpretation of those rules? Can it impose its own appreciation of the fulfilment of national suitability criteria? The following paragraphs will zoom in on the powers of the ECB to assess the suitability of the members of a banks’ management body.

To start with, suitability assessments are carried out upon authorisation of any credit institution. Within the SSM, it is the ECB who formally adopts decisions on authorisations and withdrawals of authorisations of significant as well as less significant credit institutions. Before the ECB grants an authorisation to take up the business of a credit institution, the relevant NCA will firstly verify whether an application for authorisation is complete, and will thereupon conduct a complementary assessment to verify whether the application complies with the criteria set out in the relevant national and EU laws. This complementary assessment is carried out together with the ECB and any other NCAs concerned. If the NCA is satisfied that the application is in conformity with the national conditions for authorisations, it will prepare a draft decision containing its assessment and recommendations, proposing that the ECB grants the authorisation. The final

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31 On 4 November 2014 the ECB began to directly supervise 120 entities, identified as significant institutions under the criteria listed in Article 6(4) of the SSM Regulation (i.e. institutions that reach certain thresholds in terms of size, importance for the economy and significance of cross-border activities; that have requested or are receiving public financial assistance; or are among the three most significant institutions in each participating Member State). All other institutions are defined as less significant. The annual assessment of significance conducted in 2015 brought the number of banks and banking groups directly supervised by the ECB to 129. See 2015 Annual Report (n 8) 47.

32 SSM Regulation, Articles 6(4), 4(1)(a) and 14(3).

33 i.e. the NCA that is competent in the Member State where the institution intends to establish itself.


35 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central
decision on the approval or rejection of the authorisation rests with the ECB. Prior to giving its authorisation, the ECB assesses the application on the basis of the conditions for authorisation laid down in the relevant Union law. The Union law that the ECB is sought to apply here, arguably also covers the national suitability criteria transposing the CRD IV, since for the exercise of its supervisory functions, the ECB is mandated to apply “all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives”.

Suitability assessments are also conducted upon any change to the composition of management bodies, such as the appointment of new members, as well as “any new facts that may affect an initial assessment of suitability or any other issue which could impact on the suitability of a manager”. In these cases, the distinction between significant and less significant entities comes back into play. In the case of a significant supervised entity, the JSTs and the ECB’s Authorisation Division jointly carry out the assessment, with the assistance of the NCAs. In fine, the ECB decides on appropriate action in accordance with the relevant Union and national law. Such appropriate action may include a decision requiring the removal of a member (or different members) from the management board. The ECB can impose such a decision directly on significant banks under its supervision, without the need to have recourse to the relevant NCAs.

Suitability assessments can also be triggered by investigations. It is important to highlight that the ECB has autonomous investigatory powers, which it can exercise over significant as well as less significant institutions. For instance, the ECB’s staff can autonomously – i.e. without the need to have recourse to the NCAs – require the submission of documents, examine books and records, conduct interviews, and carry out on-site inspections. If the results of an investigation reveal that a member of the management body of a significant credit institution cannot be considered as fit and

Bank and national competent authorities and with national designated authorities (SSM Framework Regulation), JO L 141 of 14 May 2014, Article 76(1).
36 SSM Regulation (n 3), Article 14(3); SSM Framework Regulation (n 34), Article 77(1).
37 SSM Regulation (n 3), Article 4(3).
38 SSM Framework Regulation (n 34), Article 94(1).
39 SSM Regulation (n 3), Articles 6(4) and 4(1)(e).
40 ECB Guide to Banking Supervision (November 2014) para 68.
41 SSM Regulation (n 3), Article 16(2)(m).
42 SSM Regulation (n 3), Articles 10 to 12.
proper, the ECB has the power to remove at any time that member from the management body.\footnote{SSM Regulation (n 3), Article 16(2)(m).}

The fact that the ECB has far-reaching powers in situations where the assessment of suitability criteria is concerned – such as autonomous investigative powers to verify their compliance, the power to refuse authorisations, to refuse the appointment of managers, or even to remove members from the management body – is in favour of the idea that it will apply and enforce its own interpretation of those criteria. However, the fact that the ECB can directly impose its decisions on supervised entities does not necessarily mean that it can also effectively enforce those decisions if an entity refuses to comply with them. What happens if an entity refuses to remove a member from the management body, or appoints a member in spite of a refusal by the ECB? If the ECB is without powers in such situations, its own interpretation of the law is not very effective. Executive harmonisation therefore requires powers that can force an entity to comply with executive decisions. The following paragraph will therefore verify if the ECB has sanctioning powers to make sure that its interpretation of national rules is effectively respected.

If the ECB wants to impose pecuniary sanctions for breaches of national rules, it can only request the NCAs “to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed”.\footnote{SSM Regulation (n 3), Article 18(5).} Contrary to administrative decisions, for which the ECB can “require” the NCAs to make use of their powers through binding instructions,\footnote{SSM Regulation (n 3), Articles 9(1) and 6(3).} the ECB can only “request” NCAs to “open proceedings”. This supports the view that the ECB cannot determine the outcome of those proceedings, meaning that it cannot oblige the NCAs to impose a sanction. The NCAs might thus regain a certain margin of appreciation to assess the compliance with suitability criteria. There might however be a way for the ECB to circumvent this. When the ECB finds that a member of the management body of a significant bank is not ‘fit and proper’, it can take a decision requiring the supervised entity to remove the member of the management body (cf. supra). If the addressee of such a decision fails to comply, the ECB may arguably assert direct sanctioning powers.

\footnote{SSM Regulation (n 3), Article 16(2)(m).}
Indeed, in case of a breach of ECB decisions, the ECB may impose sanctions in accordance with Regulation (EC) No 2532/98 concerning the powers of the ECB to impose sanctions.\textsuperscript{46} This regulation provides the ECB with the power to impose fines and periodic penalty payments. In particular, periodic penalty payments can be a very efficient tool to convince an institution to comply with an ECB decision. The ECB can arguably use this power to compel an entity to comply with individual decisions, even if the decision itself seeks compliance with a national rule. It is not clear yet to what extent the ECB will follow this point of view.\textsuperscript{47}

Next to the aforementioned power to impose pecuniary sanctions, the ECB disposes of another power that may be effective to compel an institution to comply with its appreciation of suitability criteria. Under Article 14(5) of the SSM Regulation, the ECB may withdraw the authorisation in the cases set out in relevant Union law on its own initiative.\textsuperscript{48} Such cases include the failure to fulfil the conditions under which authorisation was granted,\textsuperscript{49} including the suitability requirements referred to in Article 91(1) of the CRD IV.\textsuperscript{50}

The ECB’s far-reaching powers to ensure compliance with national suitability criteria support the idea that the ECB has the power to harmonise the executive application of national rules, at least when this application targets credit institutions classified as significant. The ECB’s early supervisory practice also suggests that the ECB is well on its way to become the pioneer of executive harmonisation in the euro area. In its 2015 Annual Report on supervisory activities, the ECB states that “euro area policy standards and supervisory practices” have been defined in order to ensure “harmonisation in the application” of national requirements stemming from the CRD IV.\textsuperscript{51} In the area of suitability assessments, the ECB has developed “uniform

\textsuperscript{46} SSM Regulation (n 3), Article 18(7).
\textsuperscript{47} According to the ECB’s 2015 Annual Report on supervisory activities (n 8), the ECB addressed two requests to NCAs to open sanctioning proceedings within the remit of their national competences, and initiated one enforcement proceeding regarding a suspected breach of an ECB supervisory decision by a significant supervised entity. The ECB has however not specified the breaches that underly these proceedings. See 2015 Annual Report (n 8) 54.
\textsuperscript{48} The withdrawal of an authorisation is however subject to consultations with the NCA of the Member State where the credit institution is established, in order to ensure that the ECB allows sufficient time for the NCAs to decide on the necessary remedial actions, including possible resolution measures, and takes these into account. See SSM Regulation (n 3), Articles 14(5) and 14(6).
\textsuperscript{49} CRD IV (n 6), Article 1B(c).
\textsuperscript{50} CRD IV (n 6), Article 13(1).
\textsuperscript{51} 2015 Annual Report (n 8) 51.
supervisory practices,” which it will logically seek to apply. In particular, common SSM policy stances have been developed regarding the requirement of sufficient time commitment to perform a management function, the way of counting directorships that may be held by a member of the management body, the assessment of a management body’s collective suitability, and the evaluation of relevant experience. Nevertheless, the achievement of a level playing field through executive harmonisation by the ECB should not be taken for granted. The following three paragraphs will identify three major obstacles.

First, when it comes to fit and proper assessments of the management bodies of less significant institutions, the ECB has no direct enforcement powers to make sure that its own interpretation of suitability criteria is effectively applied. It can only issue “regulations, guidelines or general instructions” to the NCAs to guide their margin of appreciation. Even though one may argue that the NCAs are technically required to follow such instructions, it seems to be difficult to enforce such a duty in practice.

Second, if the difference in legal regimes does not stem from different applications in supervisory practice, but from different legislative transpositions of the rules foreseen by the CRD IV, the ECB has to apply these transpositions as they stand in national law. As stated by the ECB, “the regulatory framework is still being fragmented even further, as some countries are converting non-binding supervisory practices into binding legal acts.” Such binding legal acts can be acts of legislative nature or regulatory acts adopted by NCAs. It is however not clear to what extent this statement of the ECB is also applicable in the area of suitability requirements. In any case, the trend that the ECB describes will not foster supervisory efficiency, as it will confront the ECB with an even higher diversity of national rules in the exercise of its supervisory tasks.

Third, if national rules go beyond the requirements of the CRD IV, one may even argue that the ECB is left with no power at all – or, at best, only with the power

32 Single Supervisory Mechanism. Achievements after one year (n 12).
33 2015 Annual Report (n 8) 51.
34 SSM Regulation (n 3), Article 6(5)(a).
35 SSM Regulation (n 3), Article 6(3).
36 Ibid.
to give instructions to NCAs – as it can only apply national law that implements Union law. Consequently, what goes beyond the CRD IV might be considered as purely national and out of the scope of Union law. National gold-plating thus seems to be a persisting obstacle to the achievement of a level playing field.

V. Conclusion

This paper started from the premise that the lack of harmonisation of suitability requirements represents a burden on the efficiency of the SSM and on the effectiveness of the Banking Union. The margin of appreciation enjoyed by national banking supervisors to assess these requirements was identified as a major cause of national diversity within the Single Rulebook. This paper thereupon argued that judicial and legislative forms of harmonisation are insufficient to achieve a level playing field for banks, as they cannot determine how national authorities exercise their margin of discretion. To find a solution, the idea of an EU executive authority with the power to interpret and apply national rules was introduced, in order to give rise to ‘executive harmonisation’. The SSM’s capacity to achieve executive harmonisation was evaluated, concluding that the ECB might be successful in harmonising the application of national rules because it disposes of executive powers that allow it to assess facts, to apply national rules directly on banks and to enforce that application effectively through direct sanctioning powers. It is however unlikely that the SSM will be able to complete the level playing field in the Banking Union, as the capacity of executive harmonisation is not without boundaries. While executive harmonisation can harmonise the application of national rules, it cannot harmonise divergent legislation. As a consequence, the legislative or regulatory endorsement of national supervisory practices, as well as national gold-plating, manifest themselves as potential obstacles to the assertion of EU executive power at the stage of application of national rules.
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