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Regulace úvěrových institucí v EU

Diplomová práce

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Katedra evropského práva

Datum vypracování práce (uzavření rukopisu): 31. prosince 2016

CHARLES UNIVERSITY

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Regulation of credit institutions in the EU

Master's thesis

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Date of completion (manuscript closure): 31 December 2016

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Poděkování

Ráda bych na tomto místě poděkovala prof. JUDr. PhDr. Michalovi Tomáškoví, DrSc. za jeho trpělivost a odborné rady při psaní této práce. Dále bych chtěla poděkovat své rodině a za jejich podporu při psaní této práce a během celého studia.

Acknowledgement

I would like to thank prof. JUDr. PhDr. Michal Tomášek, DrSc. for his patience and expert advice during my work on this thesis. Furthermore, I would like to thank my family for their love and support in the course of writing this thesis and during my studies.

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INTRODUCTION

Credit institutions are important market players in the financial world. They are privately owned, profit oriented institutions, but they also serve a public goal of money intermediation. They channel the vast majority of payments. There would be no need for the existence of credit institutions if there were no transaction costs involved in everyday world. If the borrowers and lenders were able to find each other without any associated costs or risks, credit institutions would not exist.

In order to successfully achieve the goal of the enabling function of the regulation, depositors need to trust the credit institution itself as well as the whole financial market. The importance of trust was emphasised even more by recent events. If the trust in a credit institution is lost, depositors may believe that it will fail to repay their deposits. That can lead the depositors to attempt to withdraw their deposits. This may also lead the depositors of other credit institutions to believe that their own, perhaps somewhat similar credit institutions, could also fail, resulting in a distrust towards the whole system. Because of the interconnectedness of the whole system, a failure of one institution may lead to the failure of a whole financial system. As we saw in recent years, the biggest credit institutions, the so-called “too big to fail” credit institutions, were counting on the governments to step in and provide help in case of any disturbances. As a consequence they were more likely to take risks than they would have been, if they were solely responsible for their potential failure.

The regulation of credit institution was and still continues to be a sensitive issue and is accompanied by heated discussions between the Member States. The source of the problems lies mainly in the differences between the opinions of different Member States on how to

regulate credit institutions and especially to what extent.

In this thesis I will consider the regulation of credit institutions, its evolution, and its positive and negative sides. At first I will analyse the historical development of the internal market for financial services, as it formed the subsequent regulation of credit institutions. After the analysis of its development and its consequences I will present the current framework of the regulation of credit institutions. I will consider the development of the regulation over time, starting from the first attempts in the early seventies and ending with the most current regulation.

The objective of this thesis is to answer the question of how the regulation of credit institutions evolved and how the development affected the current regulation. I will also evaluate the potential of the regulation to prevent further financial crisis.

In the first chapter I will present the most important notions. The second chapter will describe the development of the internal market for financial services through primary and secondary law and the case law of the Court of Justice. Third chapter will then analyse the development of the credit institution regulation. The fourth chapter will present and analyse the most important concepts and development of the Basel Accords, a very important soft law instrument. Finally, the fifth chapter will analyse the content and impact of the most current regulation.

Because the topic of this thesis is an area of law that is currently very quickly evolving, there are not that many books that could be used as sources. Therefore, it is also based on the information provided by the EU and other institutions, as well as their own research papers.

1. REGULATORY FRAMEWORK FOR CREDIT INSTITUTIONS

Credit institutions were first defined in Article 1 of the First Banking Directive¹ and continue to be defined as “*undertakings whose business is to receive deposits and other repayable funds from the public and to grant credits for its own account*”.² Apart from these two fundamental functions, which the credit institutions are required to perform, a useful tool to consider while trying to define their business may be found in Annex 1 of the Capital Requirements Directive 2013³. This section contains a list of all activities that can be carried under a single banking licence. I find this definition too broad, as the wording may lead to substantially different national regulations. However I understand the reasoning behind it, i. e. to leave space for accommodating different national particularities⁴.

The regulation of credit institutions may be divided into two areas. First is the regulation in the narrower sense, i. e. the “*set of rules and standards that govern financial institutions; their main objective is to foster financial stability and to protect the customers of financial services*.”⁵ Second part of the regulatory framework is the regulation of the activities of the national and international authorities, i. e. the supervision - “*process designed to oversee financial institutions in order to ensure that rules and standards are properly applied*”.⁶ From

¹ The First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, 1977 OJ L 322/30 (“**First Banking Directive**”)

² Ibid., art. 1

³ 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 L 176/338 (“**Capital Requirements Directive 2013**”),

⁴ DRAGOMIR, Larisa. European prudential banking regulation and supervision: the legal dimension. New York, NY: Routledge, 2010. ISBN 0203856414, page 32

⁵ The High-Level Group on Financial Supervision in the EU chaired by Jacques de Larosière – Report, Brussels: 2009. available at http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf, par. 38

⁶ Ibid.

these definitions we can see that these two areas are interconnected, as the “*competent supervision cannot make good failures in financial regulatory policy; but without competent and well-designed supervision good regulatory policies will be ineffective.*”⁷ However, in this thesis I will only concentrate on the regulation in the narrower sense, as the topic is quite extensive by itself and I also believe that the supervisory framework deserves at least as much attention as the regulatory one.

When defining the credit institution regulatory framework, it is useful to first define the objectives of the credit institutions regulation, of which the two most important are (i) protection of consumers and (ii) the stability of the financial system. Consumer protection regulation sets rules that provide for appropriate behavior and business practices of the credit institutions towards their customers, by providing rules for setting up guarantee schemes, and rules for obligatory information that must be provided to consumers. The second objective, the so-called prudential regulation, has a preventative nature and is intended to ensure the soundness and safety of individual institutions (micro-perspective) and the financial system as whole (macro-perspective). However by ensuring the safety of the system, the prudential regulation manages to pursue both objectives: financial stability and consumer protection. There is also a third category of credit institution regulation dealing with the resolution of failures of credit institutions by setting up rules for intervention and rescue policies.⁸

⁷ Ibid., par. 144

⁸ DRAGOMIR, Larisa, op. cit. page 53 - 54

2. CREATION OF MARKET FOR FINANCIAL SERVICES

Daily operation of credit institutions represents the most popular and the least expensive method of moving capital within the internal market. The creation of a true internal market for financial services (i. e. a market without internal borders where the free movements of financial services is guaranteed) is therefore dependent on the possibility of transferring money and capital between the Member States⁹, and on the possibility to offer services across the borders of the Member States. The free movement of capital and the freedom to provide services are two of the four fundamental freedoms of the internal market of the EU.^{10,11}

I believe that the regulation of credit institution is inherently connected to internal market for financial services and that it is important to describe its development in order to see the way it evolved and why it is the way it is.

2.1. EEC TREATY

The foundations for internal market for financial services were included in the EEC Treaty.¹² Its objective was to transform segmented national markets into a single internal market.

The objective was to be completed in several stages.¹³ The progress was divided into three stages of four years each, however the lengths of each could be altered in accordance with the provisions of the EEC Treaty, should the objectives of the particular stage not be attained during such period. However, the provisions dealing with the free movement of capital did not specify a timetable that should have been kept. It only stipulated that the Council shall

⁹ Member states of the European Union („**Member States**“)

¹⁰ European Union, in this thesis also including the European Economic Community and European Community

¹¹ TOMÁŠEK, Michal. Bankovníctví jednotného vnitřního trhu Evropské unie. Praha: Linde, 1997. ISBN 80-7201-052-2. page 24

¹² The Treaty Establishing the European Economic Community, March 25, 1957 („**EEC Treaty**“).

¹³ EEC Treaty, art. 8

liberalize the market by issuing directives based on the proposal of the Commission. I believe that this approach was predestined to be slow as it did not provide for concrete obligations of the Member States.

Abolition of obstacles to free movement of capital as well as free movement of services were listed as the main activities of the EU.¹⁴ EEC Treaty constituted a right for all nationals of Member States to set up and manage undertakings, in particular companies or firms.¹⁵ A hindrance for a swifter evolution of the internal market for financial services was the required unanimity voting in the Council for the adoption of any measure concerning the protections of savings, in particular the granting of credit and the exercise of the business of credit institutions.¹⁶ This, once again represented an enormous difficulty, because this issue was seen by the Member States as quite sensitive and therefore unanimity was very hard to achieve. To have a full account of the EEC Treaty provisions related to this topic I also need to mention the obligation of the Member States to abolish obstacles to provide services in another Member State.¹⁷

The connection between the free movement of capital and the free movement of services was found in the provision stating that “*the liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalisation of movement of capital.*”¹⁸ It was further stated that “*to the extent necessary to ensure the proper functioning of the common market, the Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons*

¹⁴ Ibid., art. 3, let. a

¹⁵ Ibid., art. 52

¹⁶ Ibid., art. 57

¹⁷ Ibid., art. 59

¹⁸ Ibid., art. 61

resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested."¹⁹ EEC Treaty also required Member States to be as liberal as possible in granting such exchange authorisations that were still necessary after the entry into force of the EEC Treaty.²⁰ Finally, there was a so-called standstill provision, which instructed Member States to endeavour to avoid introducing any new exchange restrictions on capital movements.²¹

As it can be seen from wording of these articles, they did not ensure a true free movement of capital, as it only required Member States to abolish obstacles to free movement of capital only to the extent of ensuring the functioning of the internal market, and only to endeavour to avoid introducing new ones. I consider these lax and non-concrete obligations as only light attempt to create an internal market for financial services. In reality, the obstacles that interfered with the internal market stayed in place. Many Member States not only kept existing safeguard measures such as subjecting financial operations with other Member States to prior authorisation requirements known as exchange controls, but even introduced new ones.²²

2.2. CAPITAL MOVEMENTS DIRECTIVE

The EEC Treaty establishment of the free movement of capital neither specified what constitutes capital and its transfer, nor gave individuals the right to enforce their rights stemming from this freedom. To give the free movement of capital some effect, the Council adopted Article 67 Directive.²³

¹⁹ Ibid., art. 67

²⁰ Ibid., art. 68

²¹ Ibid, art. 71

²² Completing the internal market, White Paper from the Commission to the European Council (Milan, 28-29 June 1985), COM (85) 310 final, (“**White Paper**”) par. 128

²³ First Directive for the Implementation of Article 67 of the Treaty, 1960 OJ 43 („**Article 67 Directive**“)

This directive contained the lists of different types of capital movements sorted into four categories in Annex I and their detailed description in Annex II. Based on the sorting into the different groups Member States were required to treat these capital movements accordingly. However the possible direct effect of the free movement of capital has not been resolved until the Casati judgement of the Court of Justice of the European Union²⁴ (“**Court of Justice**”) in which it stated that *“free movement of capital differs from the provisions on the free movement of goods, persons and services in the sense that there is an obligation to liberalize capital movements only “to the extent necessary to ensure the proper functioning of the Common Market”. The scope of that restriction, which remained in force after the expiry of the transitional period, varies in time and depends on an assessment of the requirements of the Common Market and on an appraisal of both the advantages and risks which liberalization might entail for the latter, having regard to the stage it has reached and, in particular, to the level of integration attained in matters in respect of which capital movements are particularly significant.”*²⁵ In this decision Court of Justice did not find the EEC Treaty to impose on Member States such obligations that would give individuals enforceable rights related to free movement of capital.

2.3. SEGRÉ REPORT

In November 1966, the Commission appointed a group of experts to give a report on the development of the European capital market.²⁶ It stated *“that because of the faster advance towards economic integration and agreement on common policies, the rates of progress in the*

²⁴ Judgment of 11 November 1981, Criminal proceedings against Guerrino Casati, Case 203/80, EU:C:1981:261

²⁵ Ibid., par. 10

²⁶ SEGRE, Claudio, The development of a European capital market, Report of a Group of Experts appointed by the EEC Commission, November 1966

various sectors got out of phase."²⁷ Therefore it needed a new drive. The Commission entrusted this group of experts to prepare a study of the problems confronting the capital market and especially to provide a clear picture of objectives, conditions and implications of the integration in this field. This was to help the effectiveness of the measures so they could be more successful, should they have a clear goal to achieve.²⁸

The need for the internal market for financial services, or more precisely, a need for a better intermediation of the savings, was seen in the large amount of savings held in some Member States while there was a growing lack of capital available in others.²⁹ European market was considered as an ideal solution to this problem, mainly because of its potential to offer more profitable and more diverse products.³⁰ The report also emphasised that in all Members States the economic growth is starting to depend more and more on the capital market. It also stated that the creation of European capital market would facilitate the implementation of the internal market policies.

The report concludes that less progress had been made in the capital market area than in other elements of the EU. However I find this conclusion quite obvious, as the EEC Treaty clearly provided for different rules in the capital market compared to the others and therefore could not have reached the same progress at the same time.

2.4. WHITE PAPER 1985

As I described above, the progress in realizing the internal market, especially that of financial services was slow and the situation twenty years after adoption of the EEC Treaty has not

²⁷ Ibid., page 5

²⁸ Ibid.

²⁹ Ibid., page 40 - 41

³⁰ Ibid., page 40

much improved. Therefore the Commission issued a White Paper³¹ in 1985. It suggested several regulatory steps to be taken in order to achieve its goal by 1992³². In this document the Commission repeated the statements of European Council from which it could be seen that completing the internal market was one of the most important goals the EU had to achieve.

The free movement of capital was seen by the Commission as the opposite side of the other three freedoms, because the free movement of goods, services and persons must mean ability of individuals to have access to efficient financial services.³³ The White paper repeated conclusions of the Court of Justice that the provisions on free movement of capital do not apply directly and established that any progress must therefore be made through widening of the obligations set by directives.³⁴ The Commission furthermore stated that effectiveness of regulation of activities of financial intermediaries would be reduced if restrictions to corresponding capital movements remained in place and thus restricted the provision of these services. The Commission reasoned that the liberalisation of financial services, linked to that of capital movement, would have represented a major step towards EU financial integration.³⁵

The Commission then suggested principles that should rule the financial services regulation. It included the principle that the market for financial services should have a set of minimum coordination rules to facilitate the exchange of financial products. These minimal coordination rules would serve as the basis for mutual recognition by Member States.³⁶ Further, it proposed to use the home country control principle.

I believe that these simply defined notions have formed the world we live in and that they

³¹ White Paper, op. cit.

³² Ibid., par. 3

³³ Ibid., par. 125

³⁴ Ibid., par. 130

³⁵ Ibid., par. 101

³⁶ Ibid., par. 102

represent one of the greatest achievements in the actual facilitation of a true internal market for financial services. These are the rules that substantially changed the (financial part of) lives of all citizens of the EU and effectively enabled the provision of cross-border services of the credit institutions. In order to be able to grasp their potential I find it necessary to provide a short description of these principles.

Minimum coordination rules

The minimum coordination principle means that Member States are obliged to implement at least the minimum standards contained in a specific piece of legislation, but are also allowed to introduce higher national standards. However this sometimes lead to the phenomenon known as gold-plating, where the Member State, while transposing the rule uses the opportunity to impose additional requirements.³⁷

Mutual recognition principle

The principle of mutual recognition implies trust between the Member States of each other's regulations. It essentially states that goods and services produced in one Member State must be allowed to be marketed in other Members States without any further conditions. The basis for mutual recognition rules was first set in the Cassis de Dijon judgment,³⁸ where it is stated that *“there is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member states, [goods] should not be introduced into any other Member state.”*³⁹

The mutual recognition is based on the minimum coordination rules where the minimum

³⁷ European Commission. Guidelines for better regulation – Glossary, available at: http://ec.europa.eu/smart-regulation/guidelines/ug_chap8_en.htm

³⁸ Judgment of 20 February 1979, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, Case 120/78, EU:C:1979:42 (“Cassis de Dijon”),

³⁹ Ibid., par. 14

standards enable the Members States to which the goods and services are being exported to trust that it has attained a certain level of reliability.

Home country control principle

The home country control principle determines that it will be the rules of the Member State in which an undertaking has its seat that will apply to its business, as well as the business of any branches that the undertaking establishes under its original licence in other Member States. It will also be the authority of that Member State that will be responsible (with exceptions) for the control of said branches.

Justificatory grounds for restrictions and rule of reason based restrictions

The mutual recognition principle is complemented with some exceptions. The first exception, the public policy exception, stems directly from the primary legislation. It provides for a possible different treatment of persons, undertakings and goods originating from a different Member States on the grounds of public policy, public security and public health.

The restrictions based on rule of reason were extensively dealt with by the Court of Justice. For the first time, it held in the van Binsbergen judgement⁴⁰ that *“specific requirements imposed on the person providing the service cannot be considered incompatible with the treaty where they have as their purpose the application of professional rules justified by the general good (...) which are binding upon any person established in the state in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another Member state.”*⁴¹

In the Cassis de Dijon judgement the Court of Justice developed this principle further in order

⁴⁰ Judgment of 3 December 1974, Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, Case 33-74, EU:C:1974:131

⁴¹ Ibid., par. 12

to provide a tool for differentiation between the public policy, public security and public health exception, and the regulations that burden the provision of service or movement of goods which cannot be justified by reference to public policy but by reference to general good. The Court of Justice in the Cassis de Dijon judgement stated that the provisions that restrict or even render impossible the free movement of goods: *“must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer”*.⁴² In the Commission v. the Netherlands judgement⁴³ the Court of Justice held that: *“it follows that, in order to establish whether a Member State may exclude the provision of certain services from free competition, it is a matter of determining whether the restrictions on the freedom to provide services thereby created can be justified on the grounds relating to the general interest”*.⁴⁴ The Court of Justice held that the exception from the prohibition of restrictions of the freedoms may not be permitted should it not be *“justified by overriding reasons relating to the public interest or if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.”*⁴⁵ The restrictions based on the general interest may be only justified in the absence of harmonisation measures in that area, as the Court of Justice stated in the Gambelli judgement⁴⁶. Therefore it can be seen that the general good exception can be used provided these rules are intended to protect the general interest, they apply to everyone without distinction and that they can be

⁴² Cassis de Dijon judgement, op. cit., par. 8

⁴³ Judgment of 25 July, Commission of the European Communities v Kingdom of the Netherlands, Case 353/89, EU:C:1991:325

⁴⁴ Ibid., par. 35

⁴⁵ Ibid., par. 37

⁴⁶ Judgement of 6 November 2003, Criminal proceedings against Piergiorgio Gambelli and Others, Case 243/01, EU:C:2003:597

objectively justified, i. e. they are not disproportionate.

2.5. SINGLE EUROPEAN ACT

To achieve the true internal market as described in the White Paper, an amendment to the EEC Treaty, the Single European Act, was adopted in 1986⁴⁷. The internal market was defined as “*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty*”.⁴⁸ From this definition, we can see an attempt to put the free movement of capital to the equal footing as the other freedoms.

The Single European Act authorised the Council to determine by a qualified majority, based on a proposal from the Commission, guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.⁴⁹ The Council was given the power to adopt measures for approximation of regulation which had as their object the establishment and functioning of the internal market. The principle of mutual recognition, as suggested by the White Paper, was included in the Single European Act.⁵⁰ That procedure was laid down in Article 100b of the amended EEC Treaty. It allowed the Council to decide that the provisions in force in one Member State must be recognized as being equivalent to those applied by another Member State.

I believe that the Single European Act represented an immense step forward, as a binding document that brought major changes to the development of the internal market. However, I find the concrete timetable for the completion of internal market to be the most important for

⁴⁷ Single European Act, 1987 O.J. L 169/1

⁴⁸ Ibid., art. 13

⁴⁹ Ibid., art. 14

⁵⁰ Ibid., art. 19

the topic of this thesis.

2.6. DIRECTIVE 88/361

As the next step towards a true free movement of the capital, the Directive 88/361⁵¹ was adopted. It finally provided for a removal of all remaining exchange controls and therefore at last enabled a true internal market for capital movements. Its Article 1 also required the Member States to abolish restrictions on movements of capital taking place between persons resident in Member States⁵². I see this as a positive development, as the wording of this article provides a clear obligation for the Member States.

Even though the Directive 88/361 also contained an Annex with a list of different capital movements, it was not to be seen as exhaustive and was not supposed to restrict the scope of the principle of full liberalization of capital movement. The aim of the Annex was not to set up any differences in treatment of capital movements, but it was to facilitate the application of this directive. The main question was whether the Article 1 of the Directive 88/361 was precise enough that it had a direct effect. That question was answered by the Court of Justice in *Bordessa* judgement.⁵³

In this case the Court of Justice dealt with an arrest of Spanish and Italian nationals who allegedly attempted to export sums of money in an amount that exceeded the limit imposed by the respective national legislation. Such excessive amounts were supposed to be declared to the authorities or, should it reach the next threshold, the exporters even needed to obtain a prior authorisation from the respective authorities. The other question brought by the national

⁵¹ Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty replacing the Article 67 Directive, 1988, O.J. L 178/5 (“**Directive 88/361**”)

⁵² *Ibid.*, art. 1

⁵³ Judgement of 23 February 1995, Criminal proceedings against Aldo Bordessa, Vicente Mari Mellado and Concepción Barbero Maestre, Joined cases 358/93 and 416/93, EU:C:1995:54

court was, whether the requirement of prior authorisation was compatible with the Directive 88/361. On the direct effect of the Directive 88/361 the Court of Justice ruled that *“the principle of free movement of capital included in Article 1 is of precise and unconditional nature and does not require a specific implementing measure⁵⁴ (...) and may be relied upon by individuals before the courts and the national courts must uphold such claims.”⁵⁵* On the requirement of prior authorisation it was stated that: *“requirement of that nature would cause the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory.”⁵⁶* *“Prior declaration, on the other hand, may be one of the requisite measures which Member States are permitted to take since, unlike prior authorization, it does not entail suspension of the transaction in question but does still allow the national authorities to exercise effective supervision in order to prevent infringements of their laws and regulations.”⁵⁷*

I believe that it is the Bordessa judgement that in fact brought the freedom of capital movements in the same line as the other freedoms. However since the sources for the provisions were different, there were still some consequences emerging from these differences, i. e. the statuses of the primary and secondary law. Therefore there was still a need to implement an improved version of the provisions on capital movements.

2.7. MAASTRICHT TREATY

Maastricht Treaty⁵⁸ basically reproduced the Article 1 of the Directive 88/36 in its article 73b.

The reproduction not only consisted of the sense of the article, i.e. the abolition of all

⁵⁴ Ibid., par. 33

⁵⁵ Ibid., par. 34

⁵⁶ Ibid., par. 25

⁵⁷ Ibid., par. 27

⁵⁸ Treaty on European Union (Maastricht text), July 29, 1992, 1992 OJ C 191/1 (“**Maastricht Treaty**”)

restrictions on capital movements, but more importantly carried its direct effect. This was later confirmed in a judgement by the Court of Justice in Sanz de Lera judgement⁵⁹, where it stated that Article 73b “*laid down a clear and unconditional prohibition for which no implementing measure is needed.*”⁶⁰

⁵⁹ Judgement of 14 December 1995, Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu, Joined cases C-163/94, C-165/94 and C-250/94, EU:C:1995:451

⁶⁰ Ibid., par. 41

3. CREDIT INSTITUTION REGULATION THROUGH SECONDARY LAW

As I presented the ups and downs of the evolution of internal market for financial services and the reasons it evolved the way it did, now it is time to analyse the credit institution regulation and its evolution. As described above, the goal of the EEC Treaty was to constitute an internal market and for that reason the General Programmes for the Abolition of Restrictions on Freedom to Provide Services⁶¹ and Freedom of Establishment⁶² were adopted in 1962.

The goal of the latter, stated in Title III – Restrictions, was to “*eliminate any restrictions that whether they affected the person providing the services directly, or indirectly through the recipient of the service or through the service itself any measures which hinder the person providing services in his pursuit of an activity as a self-employed person by treating him differently from nationals of the State concerned.*”⁶³ As for the timetable related to financial services, it provided for abolishment of restrictions related to services other than those connected with movements of capital, before the end of the second year of the second stage. Based on these the Council has adopted a Directive on the Abolition of Restrictions⁶⁴.

3.1. DIRECTIVE ON THE ABOLITION OF RESTRICTIONS

This directive chose to apply the national treatment principle, i.e. the principle where the Member State is prohibited to treat anyone less favourably than its own nationals in a comparable situation. It stipulated the requirement of Members States to abolish to in particular the following restrictions: “*(a) those which prevent beneficiaries from establishing*

⁶¹ General Programme for the abolition of restrictions on freedom to provide services, 15 January, 1962, 1962 OJ 2, 32/62

⁶² General Programme for the abolition of restrictions on freedom of establishment, 15 January, 1962, 1962 OJ 2, 36/62

⁶³ Ibid. Title III, let. A.

⁶⁴ Council Directive 73/183/EEC of 28 June 1973 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions, 1973 OJ L 194/1 (“**Directive on the Abolition of Restrictions**”)

themselves or from providing services in the host country under the same conditions and with the same rights as nationals of that country; and (b) those existing by reason of administrative practices which result in treatment being applied to beneficiaries that is discriminatory by comparison with that applied to nationals.”⁶⁵

Even though entry restrictions could as a result not be discriminatory, the objective was still far from being met. Furthermore, there was no coordination of supervision, so that credit institutions operating in different countries were subject to different rules. I find this quite important as it was later shown that this principle is unsuitable for the world of financial services and the principles proposed in the White Paper have to prevail. I can conclude that the only significance of this directive was that it allowed the Member States to explore further possibilities to regulate the financial sector.

3.2. FIRST BANKING DIRECTIVE

The need for a coordinated approach towards internal market in financial services led to preparation of corresponding directive as early as 1966. First proposals appeared in 1968 – 1973.⁶⁶ However the first important piece of legislation aimed at the financial services was adopted by the Council in 1977⁶⁷. The First Banking Directive can be considered as the first serious attempt to give effect to the objective to develop internal market in financial services⁶⁸. In its preamble it explained that given the extent of the differences between the laws of the Member States regarding the rules to which the credit institutions are subject, the approach for the creation of internal market for credit institutions needs to be different from the other areas.

⁶⁵ Ibid., art. 3, par. 1

⁶⁶ TOMÁŠEK, Michal. op. cit., page 46

⁶⁷ First Banking Directive, op. cit.

⁶⁸ MOHAMED, Sideek. European Community law on the free movement of capital and EMU. Stockholm: Norstedts Juridik, c1999. ISBN 9139004708, page 189

It emphasised that a single directive cannot at once accomplish the single market, but rather successive steps need to be taken. It specifically explained that: *“the eventual aim is to introduce uniform authorization requirements throughout the Community for comparable types of credit institution. At the initial stage it is necessary, however, to specify only certain minimum requirements to be imposed by all Member State.”*⁶⁹

The First Banking Directive itself did not change the approach to the regulation, as it attempted to create an internal market by fully harmonising legislation. It still maintained the national treatment principle. I believe that the national treatment principle represented a major disadvantage for credit institutions established in another Member State, as it needed to fulfil two different sets of regulations. These differences stemming from the national treatment standards while not being discriminatory, still in fact burdened creation of branches by credit institutions by e.g. the costs spent on compatibility issues of different legal requirements in host and home Member State, or the requirement for paying-up of the required capital as if establishing a new credit institution.⁷⁰ The problem was not only theoretical, as in practice the rules for taking up of business of credit institutions were quite different, for example United Kingdom was the only Member State with an extensively liberal regulation, which did not require any initial capital requirement.

The achievements of the First Banking Directive were mainly the adoption of conditions for taking-up of business of credit institutions and the setting up of the cooperation between the supervisory authorities in the Member States.⁷¹ Another of the achievements of the First Banking Directive was the creation of an Advisory Committee of the Competent Authorities

⁶⁹ Ibid., preamble

⁷⁰ TOMÁŠEK, Michal. op. cit., page 48

⁷¹ TOMÁŠEK, Michal. op. cit., page 47

of the Member States of the European Economic Community. Its task was to ensure proper implementation of the First Banking Directive and the Directive on the Abolition of Restrictions. It was further endowed with tasks prescribed by the First Banking Directive, such as examining the conditions under which the Member States grant authorisation to the credit institutions.

However, I believe that as the national treatment principle created de facto restrictions for expansion by creating branches in other Member States, the First Banking Directive actually managed to limit potential cross-border business. Any benefits that came hand in hand with expansion were reduced by the administrative and legal costs of this expansion and thus not helped the creation of internal market for financial services. Even though I consider it a positive thing that the First Banking Directive was adopted at all, I find that it only managed to lay foundations for the legislative actions that were to come.

3.3. SECOND BANKING DIRECTIVE

As explained above, the First Banking Directive did not reach the goal of creation of an internal market for financial services. It was clear that a further work needed to be done. Consequently the Council adopted the Second Banking Directive.⁷² It was to be “*an essential instrument for the achievement of the internal market, a course determined by the Single European Act and the White Paper*”.⁷³ However the aim of the Second Banking Directive was not to create a unified regulation of credit institutions but mainly to set mutual obligations of Member States to recognize credit institutions regulation and licences of other Member

⁷² Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, 1989 OJ L 386/1 (“**Second Banking Directive**”).

⁷³ Ibid., preamble

States.⁷⁴

The Second Banking Directive therefore abandoned the full harmonisation model and instead incorporated the minimum legal harmonisation rules. It was adopted “*to achieve only the essential harmonization necessary and sufficient to secure the mutual recognition of authorization and of prudential supervision systems, making possible the granting of a single licence recognized throughout the Community and application of the principle of home Member State prudential supervision*”.⁷⁵

It also introduced some of the most crucial ideas recognized by the White Paper for the credit institutions regulation such as home country control and mutual cooperation, and single banking licence based on the mutual recognition principle. It presumed adoption of several other pieces of legislation relating to credit institutions’ own funds, solvency ratios, supervision of liquidity and other associated issues while stating that it needs to be interpreted in context of this other legislation.

3.3.1. SINGLE BANKING LICENCE

The single banking licence, also known as the “single passport”, authorises a credit institution established in one Member State to carry on activities in any other Member State by either exercising the right of establishment in a form of a branch establishment or by providing cross-border services without any other requirements. The single banking licence is not a sort of EU banking licence, but rather a national banking licence only enabling to carry out certain activities in other Member States.⁷⁶ The activities that fall under the mutual recognition, i. e. those that can be passportable’ provided the undertaking obtained a licence for them, are set

⁷⁴ TOMÁŠEK, Michal. op. cit., page 51

⁷⁵ Second Banking Directive, op. cit., preamble

⁷⁶ MOHAMED, Sideek, op. cit., page 192

out in the Annex of the Second Banking Directive. Activities that are not included in the Annex, may be pursued in other Member States in accordance with the rules on freedom of provision of services and right of establishment.

However, the mutual recognition of licences under non-harmonised credit institutions regulation throughout the Member States may lead to an absurd situation, where credit institution with licence acquired in a more liberal Member State pursues more activities from the Annex I in a less liberal host state than the credit institutions that acquired licence in said host state.⁷⁷

The Home state control principle is not however inviolable. Apart from those responsibilities under Article 14 of the Second Banking Directive, i.e. the residual supervisory powers of the host state, the host state is also entitled to adopt regulation in the name of general interest that can potentially establish obstacles to the pursuit of activities that fall under the mutual recognition principle.

Even though the concept of business of credit institutions based on the single banking licence is quite flexible, I find it to be a double-edged sword as it can lead to quite extensive differences between the legislation of different Member States. As a result this may lead to the so-called supervisory shopping, where the credit institutions may be able to find certain advantages or even loopholes in legislations of other Member States and tempt them to move its seat there.

The Second Banking Directive in my opinion represented a huge step towards a true internal market for financial services. It allowed for a smoother expansion of credit institutions without the administrative and regulatory costs and therefore allowed the market to become more

⁷⁷ TOMÁŠEK, Michal. *op. cit.*, page 54

competitive.

3.4. AMENDMENT OF THE BANKING DIRECTIVES

In 1995 the first two banking directives were amended by the Amending Directive⁷⁸. The importance of this directive lies with the strengthening of the principle of prudential supervision. The prudential supervision is introduced in relation to (i) credit institutions linked with other undertakings, and (ii) with abusing the right of the credit institution to choose its home state. The preamble of the Amending Directive stating that: *“the authorities should not authorize or continue the authorization of a financial undertaking where they are liable to be prevented from effectively exercising their supervisory functions by the close links between that undertaking and other natural or legal persons.”*⁷⁹ The close link may be represented by a participation in or a control over an undertaking. I believe that this principle ideally complemented the previous directives. I think that while the Member States are obliged to authorise any credit institution that fulfils all necessary requirements, the national authorities’ job must not end there. I find that the provisions on prudential supervision and the related obligation of the national authorities for continuing assessment of their capability of effective supervision of the credit institutions can be seen as a progress.

3.5. DIRECTIVE ON CONSOLIDATED SUPERVISION

The first two banking directives were aimed mainly at regulating the business of credit institutions itself. The Amending Directive shifted the focus even more on the supervision of

⁷⁸ European Parliament and Council Directive 95/26/EC of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view to reinforcing prudential supervision, 1995 OJ L 168/7 (“**Amending Directive**”)

⁷⁹ Ibid., preamble

credit institutions while the Directive on Consolidated Supervision⁸⁰ was adopted. The aim of this directive was to strengthen supervision on those credit institutions that were part of bigger groups and whose parent companies were not credit institutions, as the previous directive on consolidated supervision⁸¹, while “*establishing a framework for the introduction of supervision of credit institutions on a consolidated basis*”, regulated only supervision of credit institutions which had some participation in other credit institutions or financial institutions. I find this shift towards a more responsible national authorities as a development in the right direction as it provided for a more precise assessment of financial situation of a credit institution belonging to a group with diversified activities. The competent authorities were entitled and expected to require all information necessary for the effective exercise of the consolidated supervision from the parent company.

3.6. DIRECTIVE ON OWN FUNDS OF CREDIT INSTITUTIONS

The importance of regulation of own funds of credit institutions arose in the 1989 when a Directive on Own Funds⁸² was adopted. This Directive emphasised the importance of credit institutions’ own funds as they ensure their continuity, protect savings and can serve to absorb losses which are not matched by a sufficient volume of profits.⁸³ This directive set minimum standards for the capital adequacy ratio as for the variety and reliability of the composition of the credit institutions’ own funds. The Directive distinguished between original own funds (i.e. the highest quality capital as the equity capital and discloses reserves) and additional own

⁸⁰ Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis (“**Directive on Consolidated Supervision**”)

⁸¹ Council Directive 83/350/EEC of 13 June 1983 on the supervision of credit institutions on a consolidated basis, 1983 OJ L 193/18

⁸² Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions, 1989 OJ L 124/16 (“**Directive on Own Funds**”)

⁸³ *Ibid.*, preamble

funds (i.e. a lower quality capital, such as subordinated loans), and gave their detailed definitions. It also stipulated that the additional own funds could not exceed the original own funds. This Directive, according to my opinion, showed where the regulatory focus will be in the future.

3.7. SOLVENCY RATIO DIRECTIVE

As a follow up on the Directive on Own Funds, the Solvency Ratio Directive⁸⁴ was adopted. It was a result of work carried out by the Banking Advisory Committee established by the First Banking Directive. The purpose of this directive was to set rules regarding assessment of credit institutions' solvency by setting the ratio in which the credit institutions maintain its own funds against its risk weighted assets. The own funds of the credit institutions were to be calculated based on the Directive on Own Funds. However the directive only dealt with credit risk while the Commission was set to continue to study and to propose further harmonisation of rules relating to other risks.

3.8. ANTI-MONEY LAUNDERING DIRECTIVE

Money laundering generally means conversion, concealment, acquisition, of property that is derived from criminal activity or from an act of participation in such activity⁸⁵. At the time of its adoption, this issue was considered more and more important by the Council and that is why the first Anti Money Laundering Directive⁸⁶ was adopted. Its objective was especially to fight the situation where the *“credit and financial institutions are used to launder proceeds from*

⁸⁴ Council Directive 89/647/EEC of 18 December 1989 on a solvency ratio for credit institutions OJ 1989 L 386/14 (**“Solvency Ratio Directive”**)

⁸⁵ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Adopted in Vienna, 19 December 1988

⁸⁶ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, 1991 OJ L 166/77 (**“Anti Money Laundering Directive”**)

*criminal activities, the soundness and stability of the institution concerned and confidence in the financial system as a whole could be seriously jeopardized, thereby losing the trust of the public”.*⁸⁷ This directive was aimed not only at credit institutions, but on the whole financial system. *“since money laundering can be carried out not only through credit and financial institutions but also through other types of professions and categories of undertakings.”*⁸⁸

I find this directive quite successful (while understandably not perfect) as it introduced several key concepts related to fight against money laundering. It provided for systematic control of clients’ behaviour and obliged the credit institutions to report suspicious transactions. However, it fell short mostly on the scope of the criminal behaviour to be reported, as it only provided the mandatory reporting related to the drug trafficking offenses. This was remedied by later amendments to this directive.

3.9. LARGE EXPOSURE DIRECTIVE

Related to the above-mentioned capital adequacy ratios and credit risk is the concept of large exposure of credit institutions, such as excessive concentration of exposures to a single client or group of connected clients that may result in an unacceptable loss⁸⁹ because of the client’s failure due to unexpected circumstances. The issue of large exposure was temporarily dealt with by a Commission Recommendation,⁹⁰ but as its goal (i. e. to gradually adjust existing systems and to introduce new systems), was completed, the Large Exposure Directive⁹¹ was adopted. The aim of this directive was to introduce a requirement of risk diversification by

⁸⁷ Ibid., preamble

⁸⁸ Ibid.

⁸⁹ 87/62/EEC: Commission Recommendation of 22 December 1986 on monitoring and controlling large exposures of credit institutions, 1987 OJ L 33/10

⁹⁰ Ibid.

⁹¹ Council Directive 92/121/EEC of 21 December 1992 on the monitoring and control of large exposures of credit institutions, 1993 OJ L 29/1 (“**Large Exposure Directive**”)

limiting the maximum loss that a credit institution may incur, therefore the exposure was based on the nominal values of exposures, but no weightings of risk as described by the Solvency Ratio Directives was applied. The Large Exposure Directive coined important terms, such as large exposure bank, which was a credit institution with a credit exposure to a client or a group of connected clients that was equal or exceeded 10% of its own funds. It was also stipulated that a credit institution cannot incur an exposure to a client or a group of connected clients that would exceed 25% of its own funds.

I consider this directive to be an appropriate addition to the Directive on Own Funds and Solvency Ratio, as it has the same objective -- to limit losses. This directive however only requires the credit institutions to diversify their portfolio, rather than to maintain certain levels of capital.

3.10. DEPOSIT GUARANTEE SCHEMES

The regulation of the business of credit institutions and the corresponding regulation of supervision promoted single market for credit institutions. With that however arose a need for a consumer protection, in order to increase the consumer's trust of the foreign credit institutions. Therefore a Directive on Deposit Guarantee Schemes⁹² was adopted.

In its preamble it stated: *“when restrictions on the activities of credit institutions are eliminated, consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States become unavailable.”*⁹³ It further noted that *“it is indispensable to ensure a harmonized minimum level of deposit protection*

⁹² Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, 1994 OJ L 135/5 (“**Directive on Deposit Guarantee Schemes**”)

⁹³ Ibid., preamble

wherever deposits are located in the Community”⁹⁴ and that “such deposit protection is as essential as the prudential rules for the completion of the single banking market.”⁹⁵ The offered solution to this problem was to set-up and maintain a deposit guarantee scheme in each of the Member States. It prohibited the credit institutions to accept deposits, unless they were member of an officially recognized deposit guarantee scheme. In my opinion the harmonisation of the deposit guarantee schemes strengthens the trust of the consumers in foreign credit institution, and as such this directive must be seen as a step forward towards harmonised deposit insurance. However the main objective of this directive was to set up deposit guarantee schemes that would be similar in their scope. As such, the objective was not attained because the schemes set up under this directive differed quite extensively, i.e. in the scope of the coverage or in their financing.

3.11. CONSOLIDATING DIRECTIVE

A new approach was seen with the adoption of a Consolidating Directive.⁹⁶ The aim of this directive was to consolidate several of the aforementioned directives that were frequently and substantially amended into one. Together with the new approach – attempt to create a single piece of legislation to govern the financial sector, a new approach to legislative procedure began to emerge.

3.12. FRAMEWORK FOR ACTION AND FINANCIAL SERVICES ACTION PLAN

In June 1998 The Cardiff European Council invited the Commission to “*table a framework for action to improve the single market for financial services, in particular to examine the*

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, 2000 OJ L 126/1 (“**Consolidating Directive**”).

*effectiveness of implementation of current legislation and to identify weaknesses which may require amending legislation.*⁹⁷ As a first response, the Commission published a communication: Financial Services: Building a framework for action⁹⁸, in which it highlighted among others the following imperatives:

- *“any remaining capital market fragmentation should be eliminated, thereby reducing the cost of capital raised on EU markets;*
- *Users and suppliers of financial services should be able to exploit freely the commercial opportunities offered by a single financial market, while benefiting from a high level of consumer protection.*”⁹⁹

Based on this the Commission adopted in May 1999 a Financial Services Action Plan.¹⁰⁰ In it the Commission concluded that even though important strides have been made towards providing a secure prudential environment in which financial institutions can trade in other Member States, the financial markets remain segmented and business and consumers continues to be deprived of direct access to cross-border financial institutions.¹⁰¹

It also stated that *“with the introduction of the euro, there is a unique window of opportunity to equip the EU with a modern financial apparatus in which the cost of capital and financial intermediation are kept to a minimum. Corporate and household users of financial services will benefit significantly, and investment and employment across the Union will be stimulated. The structural changes triggered by the euro also herald new challenges for financial*

⁹⁷ Communication from the Commission - Financial services: building a framework for action COM (1998) 625, page 5

⁹⁸ Ibid.

⁹⁹ Commission Communication of 11 May 1999 entitled "Implementing the framework for financial markets: action plan" [COM(1999) 232 final], (“**Financial Services Action Plan**”)

¹⁰⁰ Ibid., page 3

¹⁰¹ Ibid.

regulators and supervisors which call for effective answers, with a view to ensuring the balanced regional distribution of the benefits of competitive and integrated financial services markets.”¹⁰²

The Commission identified several key areas for action. The ones related to the financial services were those on information and transparency issues, redress procedures for disputes settlements, consumer protections rules and cross-border retail payments. In March 2000 European Council meeting in Lisbon approved the Financial Services Action Plan and set a tight deadline for implementation by 2005.¹⁰³

On 17 July 2000 a 2283rd Council meeting of ECOFIN (a council composed of economy and finance ministers from all Member States) was held. Even though the following was said about the securities market, it can be also applied to the market of credit institutions: *“Growth and competitiveness will be hampered unless the administrative, regulatory or other types of obstacles which in practice impede cross-border securities transactions are eliminated. This legislation, which was drawn up in the context of fragmented national markets, may need to be adjusted in the light of market developments.”*¹⁰⁴

Taking all that into account the ECOFIN set up a committee of independent persons, the so-called Committee of Wise Men, whose goal was to *“evaluate practical arrangements for implementation of the Community rules concerning the areas identified by the Action Plan and to propose various approaches to adjusting the practice of regulation and cooperation*

¹⁰² Ibid.

¹⁰³ Lisbon European Council 23 and 24 March 2000 Presidency Conclusions available at http://www.europarl.europa.eu/summits/lis1_en.htm

¹⁰⁴ Press release Conseil/00/263 of 2283rd Council meeting- ECOFIN –Brussels on 17 July 2000 , available at http://europa.eu/rapid/press-release_PRES-00-263_en.htm?locale=en

between regulators in response to current developments.”¹⁰⁵

3.13. LAMFALUSSY REPORT

The Lamfalussy Report¹⁰⁶ reported that *“one of the major challenges is to make sure that the European regulatory system can adjust continuously, flexibly and rapidly to future developments which are unpredictable today. Yet it needs to do this in a way which does not inhibit legitimate market development and is neutral as regards competition between different financial service providers.”¹⁰⁷*

The Lamfalussy Report considered the current legislative procedure too slow, too rigid, and too ambiguous, which resulted in inconsistent implementation and over-reliance on primary legislation for detailed rules determination. Therefore it suggested a new, speedier approach for the legislative process (“**Lamfalussy Process**”) regarding the securities market. It can be described as a four level approach, as follows:

- The most general framework legislation enacted at EU level in accordance with standard EU legislative procedure. (level one)
- Detailed technical implementing measures prepared by the Commission with the help of specialist committees ¹⁰⁸ (level two)
- Common implementing standards by the ESAs (level three)

¹⁰⁵ Ibid.

¹⁰⁶ Committee of Wise Men’s initial report on the Regulation of European Securities Markets, chaired by Alexandre Lamfalussy, Brussels, 15 February 2001 (“**Lamfalussy Report**”) available at http://ec.europa.eu/finance/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf

¹⁰⁷ Ibid., page 71

¹⁰⁸ European Banking Committee (“**EBC**”), the European Securities Committee (“**ESC**”), the European Insurance and Occupational Pensions Committee (“**EIOPC**”). These specialist committees were later replaced by the European Supervisory Committees (“**ESAs**”), i.e. European Banking Authority (“**EBA**”) the European Securities and Markets Authority (“**ESMA**”) and European Insurance and Occupational Pensions Authority (“**EIOPA**”).

- Compliance check by the Commission eventually resulting in enforcement measures (level four)

As described above, the 1980s and 1990s were quite productive in the area of credit institutions regulation, while the legislative procedure was still quite cumbersome and lengthy. The Lamfalussy Process, originally developed for the securities sector, was extended by the European Council in December 2002 to the entire EU financial sector. The Council noted that *“the experience, while still limited to date, shows the introduction of Lamfalussy framework to have been successful, meeting its key objectives. The application of the framework has generated additional momentum to, and increased the flexibility of the legislative process in allowing it to respond to technological change and market developments, by adopting implementing rules on a faster and more flexible basis.”*¹⁰⁹

However successful the Lamfalussy process turned out to be¹¹⁰, there were still some drawbacks. The four level approach may be seen as too detailed and as a result it lags the legislative process instead of speeding it up. Sometimes it can be difficult to foresee on which level the decision on the policy should be taken, i. e. whether it presents a framework legislation or an implementing measure.¹¹¹

3.14. CAPITAL REQUIREMENT DIRECTIVES

Two of the directives that were adopted under the Financial Services Action Plan and

¹⁰⁹ Press release 14429/04 (Presse 313) of the 2617th Council Meeting Economic and Financial Affairs in Brussels on 16 November 2004, available at

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/82790.pdf

¹¹⁰ Communication from the Commission, Review of the Lamfalussy process, Strengthening supervisory convergence, Brussels, 20 November 2007, COM(2007) 727 final, available at

http://ec.europa.eu/internal_market/finances/docs/committees/071120_final_report_en.pdf

¹¹¹ EGENHOFER, Christian a Kyriakos GIALOGLOU. Rethinking the EU regulatory strategy for the internal energy market. Brussels: CEPS, 2004. ISBN 9290795344, available at

<http://aei.pitt.edu/9540/2/9540.pdf>

according to the Lamfalussy Process¹¹² were the Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006, relating to the taking up and pursuit of the business of credit institutions (recast), and the Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (“**Capital Requirements Framework Directives**”). Their objective was to modernise the regulation of the financial sector and to better regulate the risk management of the credit institutions. The Capital Requirements Directives were based on Basel II (as explained below). Unlike Basel II, the directive was applicable not only to internationally active credit institutions, but to all EU active credit institutions.

¹¹² Communication from the Commission, Review of the Lamfalussy process, Strengthening supervisory convergence, op. cit., page 3

4. BASELS ACCORDS

It is now time to continue the analysis of the credit institution regulation with a focus on the soft law of credit institution regulation.

The Basel Committee on Banking Supervision (“**Basel Committee**”) was established in 1974 by governors of national banks of G10 countries. Its aim was and is “*to enhance financial stability by improving supervisory knowhow and the quality of banking supervision worldwide.*”¹¹³

The national authorities of nine Member States are members of the Basel Committee, namely Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom. The EU is represented on the Basel Committee by the European Central Bank and the European Central Bank Single Supervisory Mechanism.¹¹⁴

The main focus of the Basel Committee’s work is “*to close gaps in international supervisory coverage so that (i) no foreign banking establishment would escape supervision; and (ii) supervision would be adequate and consistent across member jurisdictions*”. In 1988 the Basel Committee, in order to “*halt erosion of capital standards in banking systems*”, started to focus on capital adequacy issues.

The Basel Committee issues so-called Basel Accords. These documents have no legal force, they only formulate supervisory standards and guidelines and recommend them for implementation individually by its members.¹¹⁵ However, the legislation adopted by the EU is

¹¹³ Bank for International Settlements, Basel Committee on Banking Supervision, A brief history of the Basel Committee, October 2015, available at <http://www.bis.org/bcbs/history.pdf>

¹¹⁴ Bank for International Settlements, Basel Committee on Banking Supervision, Basel Committee membership, available at <http://www.bis.org/bcbs/membership.htm>

¹¹⁵ Bank for International Settlements, Basel Committee on Banking Supervision, A brief history of the Basel Committee, op. cit.

often more than inspired by the Basel Accords,¹¹⁶ which I consider as a negative side of the Basel Accords, because the Basel Committee is de facto a non-elected EU policymaker in the area of credit institution regulation.

4.1. BASIC NOTIONS USED BY THE BASEL ACCORDS

In order to assess the Basel Accords, several basic concepts need to be defined first.

Credit risk

Credit risk is a risk of a loss incurred by credit institution resulting from a failure of contractual party by not fulfilling its obligations in accordance with the contract based on which the credit institution became the creditor of said contractual party.¹¹⁷

Operational risk

Operational risk is a risk of loss incurred by credit institution caused by a failure of internal processes, human factor or systems, or risk of loss incurred by the credit institution caused by external events, including risk of loss incurred by the credit institution caused by breach or non-fulfilment of legal norms.¹¹⁸

Market risk

Market risk or systemic risk stems from the particulars and development of the whole economy. It is a collective term that includes risks incurred by the credit institutions due to interest rate, currency and other risks related to movements in market prices.¹¹⁹

¹¹⁶ Capital Requirements Directives, op.cit., preamble, or Capital Requirements Directive 2013, op. cit., preamble

¹¹⁷ Czech National Bank, Glossary, available at <http://www.cnb.cz/cs/obecne/slovník/u.html>

¹¹⁸ Czech National Bank, Glossary, available at <https://www.cnb.cz/cs/obecne/slovník/o.html>

¹¹⁹ Czech National Bank, Glossary, available at <https://www.cnb.cz/cs/obecne/slovník/t.html>

Liquidity risk

Liquidity risk is a risk of loss that the credit institution may incur should it lose its ability to meet its financial obligations when they become due or is unable to finance its assets.¹²⁰

4.2. BASEL I

The first Basel Accord¹²¹ was published in 1988. The Basel Committee emphasised two main objectives of this document, i. e. to strengthen the soundness and stability of the international financial system; and to have a consistent application to banks in different countries. The document was only applicable to internationally active credit institutions. Basel I was adopted in more than 110 countries in the world.¹²²

The capital adequacy ratio was set at 8%. Basel I divided the credit institution's assets into five groups, where each had a weighting connected to it. These weightings were set at 0, 0 – 50 (based on the discretion of the national authority) 20, 50 and 100%, and essentially meant that if a credit institution held an asset of the first, 0%, group amounting to 10, it did not need to hold any corresponding own funds. However if that asset fell in the 100% weighting group, it would need to hold 100% of that amount in own funds. To give an example, the 0% weighting, in other words the safest assets of a credit institution, included cash, gold, claims on central governments, etc. As opposite, the most risky assets, i. e. those weighted at 100%, were claims on the private sector, or capital instruments issued by other credit institutions, etc.

¹²⁰ Czech National Bank, Glossary, available at <http://www.cnb.cz/cs/obecne/slovník/r.html>

¹²¹ Bank for International Settlements, Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards, July 1988, available at <http://www.bis.org/publ/bcbs04a.pdf> (“**Basel I**”)

¹²² DRAGOMIR, Larisa, op. cit., page 98

4.3. BASEL I DEFICIENCIES

Although it brought an international standard for capital adequacy and credit risk management, there were some drawbacks to the Basel I that need to be mentioned.

4.3.1. LACK OF RISK SENSITIVITY

Under the Basel I, all loans provided to private companies were in the 100% weightings group and thus needed the 100% of corresponding credit institution's own funds. However this system of risk assessment possessed an *“obvious defect that loans in one group will never exactly possess the same amount of credit risk.”*¹²³ Another issue with this method was the sometimes irrational weighting of the risk among the categories, for example when *“an unsecured loan to the Microsoft Corporation is currently deemed twice as risky as a family mortgage.”*¹²⁴

I find this to be the most important problem of Basel I, as it only attempted to cover the credit risk. Instead of successfully preparing the credit institutions for potential losses, it gave them an ineffective rigid system of risk weightings, quite significantly neglecting the realities of the market.

4.3.2. SUPERVISORY FRAMEWORK AND DISCIPLINE

Basel I dealt with the capital adequacy rules, but also completely neglected to recommend any rules for supervision of compliance of the credit institutions with those rules. The provisions under Basel I moreover did not provide any incentives to credit institutions to develop their own risk management systems. Basel I only stipulated the rules that the credit institutions

¹²³ TARBERT, Heath Price, Are international capital adequacy rules adequate? The Basle Accord and beyond, 2000 University of Pennsylvania Law Review 148, No 5, page 1800

¹²⁴ Ibid.

were required to follow, which in my opinion allows the credit institution management to adopt a lax attitude in relation to their risk assessment.

4.4. BASEL I BIS

Basel I only covered credit risk. However, credit institutions faced and still continue to face other types of risks, such as market risk, operational risk, or reputational risk. These risks can also cause unexpected losses for which the credit institutions should also hold capital. In this sense I find Basel I only satisfactory as to the fact that it was the beginning of the risk regulation as the required capital levels set according to Basel I did not ensure that the credit institution would be prepared to cover all possible failures that might arise.

However, in order to respond to this source of criticism, the Basel Committee amended Basel I in 1996 to include market risk assessment, especially the interest rate risk (i.e. a risk of loss incurred by credit institution caused stemming from the movement of the interest rates), foreign exchange risk (i.e. a risk of loss incurred by credit institution stemming from the movement in the exchange rate of the currency in which the transaction is made) and commodity risk (i.e. a risk of loss incurred by the credit institution stemming from the movement of the commodities prices).¹²⁵

4.5. BASEL II

Based on the experiences from the application of Basel I and on the feedback from credit institutions, national authorities and other market players, Basel II¹²⁶ was adopted in 2004.

¹²⁵ Bank for International Settlements, Basel Committee on Banking Supervision, Amendment to the Capital Accord1 to incorporate market risks, January 1996, (“**Basel I bis**”), available at <http://www.bis.org/publ/bcbs24.pdf>

¹²⁶ Bank for International Settlements, Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards, A Revised Framework, June 2004 (“**Basel II**”), available at <http://www.bis.org/publ/bcbs107.pdf>

Basel II is built on a three pillar structure, the first one being the foundations set up by Basel I, i. e. the capital adequacy requirements. The other two pillars are Supervisory Review Process and Market Discipline.

4.5.1. FIRST PILLAR

Basel II builds its asset risk assessment on three types of risk, credit risk as in Basel I, market risk as established by Basel I bis, and a new type of risk, the operational risk.

4.5.1.1. CREDIT RISK UNDER BASEL II

Credit risk, while being set on the same principles as in Basel I, became more risk sensitive and flexible. Under Basel II there are two broad methodologies that the credit institution may choose from to assess its capital requirements for credit risk, the Standardised Approach and the Internal Rating Based Approach.

The Standardised Approach measures credit risk with a method prescribed by Basel II. This methodology is supported by external credit assessments carried out by credit rating agencies, which allows differentiating between debtors on the basis of their creditworthiness, whereas the Internal Rating Based Approach allows credit institutions (under the condition of supervisory approval) to “*rely on their own internal estimates of risk components in determining the capital requirement for a given exposure.*”¹²⁷ The idea behind the Internal Rating Based Approach is that the credit institution may possess more and more precise information on their debtors than the credit rating agencies on whose assessment is the creditworthiness evaluated. Therefore the credit institutions should be able to assess their credit risk more accurately.

¹²⁷ Basel II, op. cit., par. 211

Basel II sets different indicators that need to be taken into account when assessing the credit risk, i.e. probability of default, (likelihood of defaulting of borrowers over a one-year period) loss given default (proportion of the exposure that will be lost if a default occurs), and the exposure at default (exposure amount that is likely to be outstanding if a default occurs).¹²⁸

Basel II also allows credit institutions to take into account credit protection instruments when assessing the credit risk. Such instruments, for example collaterals, can reduce its capital requirements.¹²⁹

4.5.1.2. OPERATIONAL RISK UNDER BASEL II

The operational risk aspect was employed in Basel II. However it did not include strategic risk (i. e. a risk of loss incurred by the credit institution caused by a poor strategic business decision) and reputational risk (i.e. a risk of loss incurred by the credit institution resulting from damages to its reputation). Even though the inclusions of operational risk was a step forward, I consider the lack of regulation of the reputational risk quite problematic, as the reputation of a credit institutions proved to be a greatly important asset of credit institutions in recent years

The operational risk under Basel II can be also determined by multiple methods. The three methods available sorted by their complexity and risk sensitivity were Basic Indicator Approach, the Standardised Approach and Advanced Measurement Approaches. Basel II suggested that *“internationally active credit institutions and credit institutions with significant operational risk exposures (for example, specialised processing banks) are expected to use an approach that is more sophisticated than the Basic Indicator Approach and that is*

¹²⁸ Ibid.

¹²⁹ Basel II, op. cit. par. 109

*appropriate for the risk profile of the institution”.*¹³⁰

Once the credit institution selected a more advanced approach it will not be allowed to go back to a simpler approach. Nonetheless, supervising authority may determine that the approach selected is too advanced, as the credit institution does not meet the criteria for implementation of this approach, and to require the credit institution to adopt a simpler approach.¹³¹

4.5.1.3. MARKET RISK UNDER BASEL II

Once again Basel II offered two methodologies for market risk assessment, a Standardised Measurement Method and Internal Models Approach, or a combination of both. The former uses a building-block approach in which specific risk and the general market risk arising from debt and equity positions are calculated separately. The Internal Models Approach allows banks to use risk measures derived from their own internal risk management models.¹³² The four types of market risks included in Basel II were interest rate risk, foreign exchange risk, commodities risk, and equity position risk.

4.5.2. SECOND PILLAR

The second pillar adds a qualitative element to Basel II.¹³³ It builds on the rules under the first pillar, as it not only requires the credit institution to adhere to rules under the first pillar, but it also encourages them to develop and use better risk management techniques in monitoring and managing their risks. It is therefore not only aimed at the supervisory authorities but also at credit institutions, as it notes that it is the management of the credit institutions that “*continues*

¹³⁰ Basel II., op. cit., par. 647

¹³¹ Basel II., op. cit., par. 648

¹³² Bank for International Settlements, Basel Committee on Banking Supervision, Amendment to the Capital Accord to incorporate market risks, November 2005 available at <http://www.bis.org/publ/bcbs119.pdf>

¹³³ Deutsche Bundesbank, Basel II - the new Capital Accord, available at https://www.bundesbank.de/Navigation/EN/Tasks/Banking_supervision/Basel2/basel2.html

*to bear responsibility for ensuring that the bank has adequate capital to support its risks beyond the core minimum requirements.”*¹³⁴ Following this, the supervisory authorities evaluate the risk assessment and, where appropriate, intervene. This arrangement serves to create “*an active dialogue between banks and supervisors such that when deficiencies are identified, prompt and decisive action can be taken to reduce risk or restore capital*”.¹³⁵

Four main principles are used under the Basel II supervisory framework:

1. Obligation of credit institutions to manage their own risk management systems (“**Internal Capital Adequacy Assessment Process**”).¹³⁶
2. Supervisory authorities’ review of the credit institution’s risk management systems, its evaluation and potential intervention.¹³⁷
3. Supervisory authorities should expect credit institutions to hold more than minimum mandatory capital and should be able to require the credit institutions to increase the capital.¹³⁸
4. Early supervisory intervention in case of the possibility of the capital falling below the required minimum.¹³⁹

4.5.3. THIRD PILLAR

The third pillar is based on the assumption that information enables market participants to evaluate the financial performance of credit institutions. The obligation to disclose information induces market participants to carry out their activities in sound and efficient manner.

¹³⁴ Basel II, op. cit., par. 721

¹³⁵ Ibid., par. 722

¹³⁶ Ibid., par. 726

¹³⁷ Ibid., par. 746

¹³⁸ Ibid., par. 757

¹³⁹ Ibid., par. 759

Therefore it provides for regular public disclosure of information by the credit institutions. Basel II explains that such disclosures are particularly important when the risk assessment and related capital requirements levels are based on credit institution's own risk management system, and considers them an effective means of informing the market about a credit institution's exposure to those risks, providing a consistent and understandable disclosure framework that enhances comparability.¹⁴⁰ However in my opinion the disclosures may often be written in a language that only the professionals may understand and/or important pieces of information may be buried under other non-significant details and therefore the disclosure obligation may not reach its objective.

4.6. BASEL II DEFICIENCIES

4.6.1. CREDIT RATING AGENCIES

The Standardised Approach for credit risk assessment was heavily based on the rating of credit rating agencies. However these proved to be very inaccurate quite often. One of the causes of the inaccurate ratings were the conditions under which the ratings were issued.

The model generally used was the so-called issuer-paid rating. It essentially means that it is the person that is being rated, e.g. a bond issuer, that pays the credit rating agency for the initial rating. That means that the credit rating agencies have *“an incentive structure that allows them to cater well to issuer demands and hence, inflate ratings. (...) However issuers prefer inflated ratings and therefore either opt for issuer-paid ratings or pressure rating producing investor to reduce their skin-in-the-game to the minimum. This undermines the*

¹⁴⁰ Ibid., par. 810

disciplining incentive structure of investor-produced ratings.”¹⁴¹ A different method is the investor-pays model, where, as the name suggests, the rating is paid for by the investors. As for the reliability of the ratings this method will produce a “*less inflated if (partially) funded by the rating party, due to a skin-in-the-game effect.*”¹⁴² The used issuer pays model was therefore appropriately seen as a drawback, since the ratings issued were often too optimistic and therefore the credit risk calculated with their help was not accurate.

4.6.2. INTERNAL RATING BASED APPROACH

Basel II allowed credit institutions choose between the two above-mentioned methodologies for credit risk assessment and, based on the Internal Rating Based System, they often chose models that were overly optimistic and that offered them incentives to underestimate their credit risk and to minimise required regulatory capital and to maximise return on equity.¹⁴³ The credit institutions’ own risk management systems were to be assessed by a supervisory authority. However they were quite often based on sophisticated mathematical conclusions that the supervisory authorities were not capable of correctly analysing.

4.6.3. PROCYCLICAL EFFECTS

Related to the first two problems of Basel II was the pro-cyclical effect of Basel II capital adequacy requirements, i.e. the effect of magnifying or worsening of the crisis by requiring the credit institutions to increase their capital when the risks are considered higher. Basel II rules effectively undervalued capital requirements at times of economic growth, as the investment

¹⁴¹ BONGAERTS, Dion, European Central Bank Working Paper 1703, Alternatives for issuer-paid credit rating agencies, August 2014, page 6, available at <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1703.pdf>

¹⁴² Ibid.

¹⁴³ BENINK, Harald, KAUFMAN, George, Turmoil reveals the inadequacy of Basel II, February 27 2008, Financial Times, available at: <https://www.ft.com/content/0e8404a2-e54e-11dc-9334-0000779fd2ac>

risk are being considered low, the debtors' business are generally thriving and the probability of their default is low. However when the economy suffers a hit, the input data worsens and thus the debt is considered more risky and more capital is needed. That is why the supervisory authorities were able and expected to require the credit institution to lower their optimism and to force them to a more prudential behaviour even at the times of economic growth.¹⁴⁴

4.6.4. BASEL II AMENDMENT

Even though Basel II emphasised that *“liquidity is crucial to the on-going viability of any banking organisation. (...) Banks should evaluate the adequacy of capital given their own liquidity profile and the liquidity of the markets in which they operate.”*¹⁴⁵, in reality its proper regulation was neglected. That was remedied by a Basel II amendment from 2008. It was determined that the financial crisis *“highlighted the crucial importance of market liquidity to the banking sector. (...) It emphasised the links between funding and market liquidity risk, the interrelationship of funding liquidity risk and credit risk, and the fact that liquidity is a key determinant of the soundness of the banking sector.”*¹⁴⁶

4.7. DE LAROSIÈRE REPORT

From the mid-2007 the world faced one of the most severe financial crisis that spread around the globe. Many parts of the financial system were put under stress, and some institutions even completely failed. The crisis strongly impacted the cost and availability of credit.¹⁴⁷ Following the financial crisis, the Commission authorised the High-level group on financial supervision

¹⁴⁴ HOLMAN, Robert, Budoucnost kapitálové regulace bank, 22 May 2009, Bankovníctví, page 18

¹⁴⁵ Basel II, op. cit., par. 741

¹⁴⁶ Bank for International Settlements, Basel Committee on Banking Supervision, Liquidity Risk: Management and Supervisory Challenges, February 2008, available at <http://www.bis.org/publ/bcbs136.pdf?noframes=1>

¹⁴⁷ The High-Level Group on Financial Supervision in the EU chaired by Jacques de Larosière – Report, op. cit., par. 2

in the EU, chaired by Jacques de Larosière (“**Group**”) to report on the future of financial regulation and supervision. On 25 February 2009, the Group presented its report.¹⁴⁸ It laid a framework for a new regulatory and supervisory approach in the EU.

The Group’s opinion was that the cause of the financial crisis was not only the inappropriate regulation, but a complex interaction of many variables. It held that quality regulation is a “*necessary condition for the preservation of financial stability*”¹⁴⁹. I find it quite important (especially in context of the following chapters) that the Group also held that “*over-regulation, of course, should be avoided because it slows down financial innovation and thereby undermines economic growth in the wider economy*”.¹⁵⁰ It proposes solution to several regulatory questions, such as the pro-cyclicality of Basel II or capital adequacy. On that topic, the Group states that “*there should be more capital, and more high quality capital, in the banking system, over and above the present regulatory minimum levels.*”¹⁵¹ However, I do not believe that such an emphasis on the capital adequacy is either necessary or desirable. EU-wide setting of high capital adequacy standards may lead credit institutions with conservative business models that survived the financial crisis without noticeable losses to adopt business models of credit institutions that were not so successful in dealing with the consequences of the financial crisis and for which the capital adequacy rules were invented and thus making the market riskier instead of safer as intended.¹⁵² I see another point against the high capital adequacy rules in the fact that the financial crisis had other, more important causes than low capital adequacy. However as can be seen from the following chapter, it is the capital

¹⁴⁸ Ibid.

¹⁴⁹ Ibid., par. 39

¹⁵⁰ Ibid., par. 42

¹⁵¹ Ibid., par. 59

¹⁵² VITÁSEK, Jan, Monika Laušmanová k evropské regulaci bank: Chceme větší flexibilitu, 8 August 2016, <http://euractiv.cz/rozhovory/ekonomika-a-euro/monika-lausmanova-012784/>

adequacy rules on which regulators put the most faith.

Another issue the Group considered important is the remuneration of the workforce in the credit institutions. The Group stated that the pre-financial crisis state-of-play induced too high risk-taking and encourage short-termism to the detriment of long-term performance. In my opinion, any regulation of remuneration must be considered very carefully as we saw in past that regulating some forms of reward schemes may lead to increase of other remuneration methods that are not so easily detectable. A fitting example of this behaviour may be seen in the fact that even in 2014, almost forty credit institutions in the EU tried to circumvent the remuneration rules by rewarding their employees and handing out allowances.¹⁵³

4.8. BASEL III

As a response to the financial crisis the Basel Committee prepared in 2010 – 2011 Basel III,¹⁵⁴ building on the foundations set by Basel II. Basel I and Basel II had as its objectives the strengthening of the soundness and stability of the international financial system, whereas Basel III's objective is more specifically worded as measures aiming to “*improve the banking sector's ability to absorb shocks arising from financial and economic stress, whatever the source, thus reducing the risk of spill over from the financial sector to the real economy*”.¹⁵⁵

The Basel Committee states that one of the main reasons the economic and financial crisis became so severe was that (i) banking sectors had built up excessive on and off-balance sheet

¹⁵³ VERLAINE, Julia-Ambra, Banker Bonuses Have Nowhere to Hide Under EU's Final Pay Rules, available at <https://www.bloomberg.com/news/articles/2015-12-21/banker-bonuses-have-nowhere-to-hide-under-eu-s-final-pay-rules>

¹⁵⁴ Bank for International Settlements, Basel Committee on Banking Supervision, Basel III: A global regulatory framework for more resilient banks and banking systems, December 2010, („**Basel III, part I**“) available at http://www.bis.org/publ/bcbs189_dec2010.pdf and Basel III: International framework for liquidity risk measurement, standards and monitoring, December 2010, („**Basel III, part II**“) available at <http://www.bis.org/publ/bcbs188.pdf> (together as “**Basel III**”)

¹⁵⁵ Basel III, op. cit., par. 1

leverage, (ii) the level and quality of the capital base gradually eroded (iii) credit institutions were holding insufficient liquidity buffers. Basel III therefore not only deals with strengthening of the capital requirements, but also adds new requirements on liquidity of the credit institutions as well as requirements of the leverage ratios.

4.8.1. FIRST PILLAR UNDER BASEL III

The new rules for capital requirements aim at *“raising both the quality and quantity of the regulatory capital base and enhance the risk coverage of the capital framework”*¹⁵⁶

The minimum capital adequacy ratio remained at 8% under Basel III. However, in fact the credit institutions are required to hold more capital than that, as Basel III adds two so-called buffers that the credit institutions must maintain and thus effectively the real capital adequacy ratio the credit institutions must maintain is raised by these two, quite variable buffers. Even though I do not consider simple raising of the capital reserves as the solution to crisis prevention, in my opinion this represents a step forward from the previous capital adequacy rules as they were quite static and did not succeed in addressing potential systemic risks. The new rules allow for a more variation and faster responses to risks identified in the market.

4.8.2. RISK WEIGHTINGS AMENDMENT

Basel III amends the risk weightings assigned to certain securities so that they may serve to better capture risks the credit institutions are exposed and also adds new risk weightings for risks stemming from the exposure in trading portfolios.

4.8.3. CAPITAL CONSERVATION BUFFER

The capital conversation buffer is a tool that is supposed to deal with the cyclical nature of the

¹⁵⁶ Ibid., par. 7

banking market development. Specifically it aims at “*building up capital buffers outside periods of stress which can be drawn down as losses are incurred*”¹⁵⁷, i. e. it serves as a cushion in tougher times. The capital conservation buffers essentially adds 2, 5% to the 8% of the minimum capital adequacy ratio.

Should the credit institution exhaust its capital buffer, distribution constraints (i.e. restrictions on pay-outs of dividends, share buybacks, and bonuses) will be imposed on it, until it reaches the required levels of the capital conservation buffer. The reasoning behind the distribution constraints is that the credit institution may be induced to “try and use the distribution of capital as a way to signal their financial strength.”

4.8.4. COUNTER CYCLICAL BUFFER

Another buffer introduced by Basel III, the counter cyclical buffer, is intended to deal with variables that are beyond the scope of a single credit institution, i. e. with the macro-financial environment in which it operates. The Basel Committee establishes that “*losses incurred in the banking sector can be extremely large when a downturn is preceded by a period of excess credit growth. These losses can destabilise the banking sector and spark a vicious circle, whereby problems in the financial system can contribute to a downturn in the real economy that then feeds back on to the banking sector.*”¹⁵⁸ Essentially, the counter cyclical buffer serves as an extension for the capital conservation buffer.

The level of the counter cyclical buffer is not set in the same way as the capital conservation buffer, i.e. with a precise number. Its aim is to fight the ever-changing market conditions, and therefore its levels may change. The deployment of counter cyclical buffer is set in the

¹⁵⁷ Ibid., par. 122

¹⁵⁸ Ibid., par. 136

following way: (i) identification of an excess aggregate credit growth associated with a build-up of system-wide risk by the national authorities; (ii) setting up of the appropriate level of counter cyclical buffer ranging from 0% to 2,5% based on the extended of the build-up of the system-wide risk; (iii) calculation by internationally active credit institutions of their private sector exposure in each country (e.g. if the counter cyclical buffer in country A is set to 1% and in country B to 2% and the credit institution's asset is equally divided between these two countries, it will need to set its internal counter cyclical buffer level at 1,5%).

Basel III does not leave the national authorities to make the buffer decision exclusively to their discretion, but it refers to the Guidance for national authorities operating the countercyclical capital buffer, which sets general guidelines to assess the risks and the appropriate levels of the buffer. The same logic behind the capital conservation buffer is used in the counter cyclical buffer. Thus, should the credit institution fail to meet this requirement, distribution constraints will be applied.

The counter cyclical buffer is, in my opinion, a powerful tool that helps the credit institutions be stronger and enables them to find a way out of the pro-cyclical paradox. However as it focuses on the consequences, not the sources of risk, it might still prove not to be as useful as it is supposed to be.

4.8.5. LEVERAGE RATIO

Leverage ratio, i. e. the ratio between the credit institutions core capital and its total assets is dealt with by Basel III as the Basel Committee states that *“in many cases, banks built up excessive leverage while still showing strong risk based capital ratios. During the most severe part of the crisis, the banking sector was forced by the market to reduce its leverage in a manner that amplified downward pressure on asset prices, further exacerbating the positive*

feedback loop between losses, declines in bank capital, and contraction in credit availability."¹⁵⁹

The leverage ratio under Basel III is set to 3%, meaning that for the exposure of 10, there needs to be a minimum Tier 1 capital amounting to 0.3, not taking into account its risk assessment. The leverage ratio is therefore a non-risk based ratio (i. e. a ratio not based on the relative risk represented but rather on the absolute amount of the exposure) and is intended to supplement the other, risk based capital requirements.¹⁶⁰ However, in my opinion the leverage ratio should not serve only as the backstop to the risk-based approach, but should be considered at least as equally important.

4.8.6. LIQUIDITY STANDARDS

Even though Basel II amendments dealt with liquidity issues, it did so only to a limited extent. Basel III therefore introduced two minimum standards dealing with the liquidity of the credit institutions, because the Basel Committee saw the need for this regulation as the financial crisis illustrated how quickly liquidity can evaporate, and that illiquidity can last for an extended period of time. It also states that difficulties experienced by some credit institutions were caused by failures in liquidity risk management "¹⁶¹ Basel III amendments are meant to build on Basel II amendments regarding liquidity, and to ensure their implementation by the credit institutions and the follow-up of the national supervisors. The objectives of these minimum standards are to promote resilience of a bank's liquidity risk profile.

4.8.6.1. LIQUIDITY COVERAGE RATIO

The financial crisis enabled the market to see the effects of liquidity problems, demonstrating

¹⁵⁹ Ibid., par. 151

¹⁶⁰ Ibid., par. 152

¹⁶¹ Basel III, part II, op. cit., par 3

that they may indeed cause an otherwise solvent credit institutions to fail (e.g. the Northern Rock¹⁶²). In order to ensure that credit institutions will be able to endure stressful situations, the liquidity coverage ratio was introduced. It aimed to ensure that credit institution maintain high-quality liquid assets.

The liquidity coverage ratio is built on the stress tests. The stress test as specified by national authorities presupposes a 30 calendar day time horizon under a significantly severe liquidity stress scenario. The credit institution needs to prove to the supervisors that it can survive “*until Day 30 of the stress scenario, by which time it is assumed that appropriate corrective actions can be taken by management and/or supervisors, and/or the bank can be resolved in an orderly way.*”¹⁶³ The proposed scenarios that the credit institution must consider include those we saw in the financial crisis.

4.8.6.2. NET STABLE FUNDING RATIO

Just like the liquidity coverage ratio deals with the short-term aspects of liquidity of credit institution, the net stable funding ratio is aimed at promoting a medium to long term funding of the assets and activities of credit institutions.¹⁶⁴ It was designed to ensure that credit institutions had enough stable funding (such as capital or liabilities with effective maturities of one year or greater) to survive a stressful year while avoiding default.

4.8.6.3. LIQUIDITY MONITORING METRICS

Apart from the two minimum standards Basel III also provides for setting up of adequate procedures and systems for detection, measurement, management and control of liquidity risk.

¹⁶² The Economist, Northern Rock Lessons of the fall, 18 October 2007, available at: <http://www.economist.com/node/9988865>

¹⁶³ Basel III, part II, op. cit., par. 15

¹⁶⁴ Ibid., par. 119

They are supposed to aid supervisors in assessing the liquidity risk of a credit institution.

4.8.7. BASEL III DEFICIENCIES

Even though Basel III increased the capital adequacy requirements up to 13% (8% of the risk weight assets + 2, 5% of the capital conservation capital + up to 2, 5% of the counter cyclical buffer), many argue that it remains too low to mitigate excessive risk taking and *“that equity requirements need to be very much higher, perhaps as high as 20 or 30 per cent, without the risk-weighting. It would then be possible to dispense with the various forms of contingent capital that are far more likely to exacerbate panic in a crisis than assuage it.”*¹⁶⁵ Some also see that the leverage ratio should be increased to e.g. 10% *“as the higher limit on the absolute amount of activity undertaken by an organisation would serve as a useful and efficient safeguard against both excessive idiosyncratic and systemic risks.”*¹⁶⁶ However as I repeatedly stated I do not share the opinion that increasing the capital reserves is a solution to all the failures arising within the market.

5. CAPITAL REQUIREMENTS PACKAGE

Just as the Capital Requirements Directives were based on the Basel II, the Capital Requirements Package¹⁶⁷ was adopted in 2013 transposing Basel III into the regulatory framework of the EU.

¹⁶⁵ WOLF, Martin, Basel: the mouse that did not roar The new banking rules are simply insufficient, Financial Times, 14 September 2010, available at <https://www.ft.com/content/966b5e88-c034-11df-b77d-00144feab49a>

¹⁶⁶ Deloitte Southeast Asia Ltd, Basel III framework The butterfly effect, 2015, available at: <https://www2.deloitte.com/content/dam/Deloitte/sg/Documents/financial-services/sea-fsi-basel-III-framework-noexp.pdf>

¹⁶⁷ Capital Requirements Directive 2013, op. cit., and the Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, 2013 OJ L 176/1 (“**Capital Requirements Regulation**” together with Capital Requirements Directive as “**Capital Requirements Package**”)

However, the Capital Requirements Package did not merely transpose Basel III in the wording adopted by Basel Committee, but also added several important notions and rules. The Capital Requirements Regulation is to serve as a single rule book and implements the rules on capital, liquidity and leverage from Basel III. The Capital Requirements Directive 2013 sets the rules relating to capital buffers, remuneration, and corporate governance, and to other issues that do not require rules that need to be applied in all Member States directly and identically.

5.1. SYSTEMIC RISK RELATED BUFFERS

Apart from the buffers introduced by Basel IV, the Capital Requirements Directive also introduced new typed of buffers.

5.2. SYSTEMIC RISK BUFFER

In order to prevent the systemic failure, the Capital Requirements Directive enables the national regulators to appoint a national authority that would set the level for a systemic risk buffer in order to prevent non-cyclical systemic or macro-prudential risk.¹⁶⁸ The systemic risk buffer shall be at least an additional 1% to the other capital requirements. Even though I expressed my concerns about higher capital adequacy requirements, I find this arrangement quite satisfactory, as it is almost surprisingly flexible. This buffer may set for all credit institution in one Member State, or only for credit institution in one segment of market, or even set individually for each credit institution¹⁶⁹. A fitting example of this can be seen in the Czech Republic, where only five credit institutions were considered as systematically important and had their buffer levels set in the following way¹⁷⁰:

¹⁶⁸ Capital Requirements Directive 2013, op. cit., art. 133 par. 1 a 2

¹⁶⁹ Ibid., art. 133, par. 3

¹⁷⁰ Czech National Bank, The systemic risk buffer, available at:
https://www.cnb.cz/en/financial_stability/macprudential_policy/systemic_risk_buffer/index.html

Institution name	Rate from 1 Nov 2014	Rate from 1 Jan 2017
Česká spořitelna, a.s.	3.0%	3.0%
Československá obchodní banka, a. s.	3.0%	3.0%
Komerční banka, a.s.	2.5%	3.0%
UniCredit Bank Czech Republic and Slovakia, a.s.	1.0%	2.0%
Raiffeisenbank a.s.	-	1.0%

5.2.1. GLOBAL AND OTHER SYSTEMATICALLY IMPORTANT INSTITUTIONS

Another buffer introduced by the Capital Requirements Directive is related to the so-called too large to fail credit institutions, or systematically important institutions. They are defined as institutions, the failure or malfunction of which could lead to systemic risk. The national authorities are entitled to impose higher capital requirements on the global systemically important institutions or to other systemically important institutions.

Should one credit institution be subjected to systemic buffer as well as the systematically important institution buffer, only the higher buffer shall (under some exceptions) be applicable.¹⁷¹

5.3. REMUNERATION

As a response to the financial crisis and the critical views of the Group, EU attempted to reduce the excessive and imprudent remuneration practices that often prompted the management to make risky decisions. The Credit Regulation Directive states that:

¹⁷¹ Capital Requirements Directive 2013, op. cit., art. 133, par. 4

“remuneration policies should be aligned with the risk appetite, values and long-term interests of the credit institution or investment firm.” It also adds that *“distinction should be made between fixed remuneration (...) and variable remuneration (...) Both monetary and non-monetary benefits should be included.”*¹⁷² The rules under the Capital Requirements Directive 2013 are set on principles that, although quite logical, were not present in the pre-financial crisis world. Just to give an example, remuneration policies under this directive should:

- be based on a clear and sound remuneration policy¹⁷³, promoting effective risk management¹⁷⁴
- make a clear distinction between criteria for setting basic fixed remuneration (reflecting professional experience and organisational responsibility) and variable remuneration (reflecting sustainable and risk adjusted performance);¹⁷⁵
- not allow the variable component to exceed 100 % of the fixed component of the total remuneration.¹⁷⁶

Even though setting up the rules regarding the previously extravagantly high remuneration schemes in the market is a sound and logical step, I believe that said rules may have an even wider impact than intended. As the regulation becomes stricter and more complex, I believe that the managing of human capital may become more robust with less potential for quick changes and that setting of the remuneration policies may induce many talented professionals to relocate to countries with more flexible regulation.

¹⁷² Ibid., preamble, par. 63 - 64

¹⁷³ Ibid., art. 74, par. 1

¹⁷⁴ Ibid., art. 92, par. 2, let. a

¹⁷⁵ Ibid., art. 92, par. 2, let. g

¹⁷⁶ Ibid., art. 94, par. 1, let. g, point (i)

5.4. DIVERSITY

The Capital Requirements Directive 2013 also deals with other, seemingly non-financial issues, such as diversity in the board composition. Diversity has been in the centre of attention in the recent years and therefore it made its way also to the often quite technical legislation on credit institutions. The reasoning behind it is that “*more diverse management bodies should more effectively monitor management and therefore contribute to improved risk oversight and resilience of institutions.*”¹⁷⁷ The need for the regulation still continues and is derived from statistical data that show that even 2016 only 13, 6% of the management functions and 18, 9% of the supervisory functions are held by women.¹⁷⁸ I find this topic quite important as multiple studies show that the inclusion of women in the highest management positions has only a positive effect on the function of undertakings. However I do believe that this issue should be regulated separately for all the undertakings, not just the financial sector.

5.5. BANK RECOVERY AND RESOLUTION DIRECTIVE

Another issue that the EU felt the need to address was the recovery and resolution of credit institutions. It was especially considered that “*the financial crisis has shown that there is a significant lack of adequate tools at Union level to deal effectively with unsound or failing credit institutions*”. In order to harmonise these procedures, the Resolution Directive¹⁷⁹ was adopted. This directive grants new powers to the national authorities to preserve critical

¹⁷⁷ Ibid., preamble, par. 60

¹⁷⁸ European Banking Authority, EBA publishes a report on the benchmarking of diversity practices at European Union Level, 08 July 2016, available at: <https://www.eba.europa.eu/-/eba-publishes-a-report-on-the-benchmarking-of-diversity-practices-at-european-union-level>

¹⁷⁹ [Directive 2014/59/EU of the European Parliament and of the Council](#) of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, 2014 OJ L 173/190 (“**Resolution Directive**”).

functions and assets of the clients. The main principle behind the recovery and resolution procedures is to “*ensure that shareholders bear losses first and that creditors bear losses after shareholders, provided that no creditor incurs greater losses than it would have incurred if the institution had been wound up under normal insolvency proceedings.*”¹⁸⁰

The Resolution Directive requires all credit institutions to draw up a resolution plan, detailing their potential restructure or winding-up, and have them assessed by the national authorities¹⁸¹

I find the reasoning behind this directive proposed procedure quite sensible, however the directive also adds some new capital requirements under the guise of credit institution recovery and resolution solutions. The reason for its implementation is the aforementioned bearing of the losses by the shareholders of the failed credit institution. In order to accomplish this goal, i.e. to assure that the credit institution will hold sufficient (quantitatively and qualitatively) funds and liabilities, the minimal requirement for own funds and eligible liabilities (“**MREL**”) was introduced by the Resolution Directive.

MREL is defined as a percentage of credit institution’s total liabilities including capital under the capital adequacy requirements. MREL serves as a cushion that will absorb the losses in the event of a crisis (the loss absorption amount), and additionally as a funds for recapitalisation (the recapitalisation amount). Moreover another buffer is required. The model for MREL is quite problematic, as it once again does not take into account different business models of the credit institutions. It may especially cause problems for those credit institutions that finance their assets not only by capital, but also by insured deposits.¹⁸²

¹⁸⁰ Resolution Directive, op. cit., preamble, par. 5

¹⁸¹ Ibid., art. 6

¹⁸² TOMŠÍK, Vladimír, Změny v regulaci bankovního sektoru, 28 January 2015, available at https://www.cnb.cz/miranda2/export/sites/www.cnb.cz/cs/verejnost/pro_media/konference_projevy/vy_stoupeni_projevy/download/tomsik_20150128_vse.pdf

It is appropriate to note, that an overlapping, even though in some aspects different rule - the Total Loss-Absorbing Capacity Requirements (“TLAC”) was set up by the Financial Stability Board. Both have the same objective, to be able to deal with financial crises and protect the creditors. However the range of the affected credit institutions is different. Whereas the MREL applies to all credit institutions in the EU, TLAC is only applied to the global systemic important ones. Another, important difference is that while TLAC is set at the same level for each credit institution, MREL rules once again show some flexibility by being decided on a case-by-case basis.

CONCLUSION

In this thesis I described and analysed stages of development of credit institution regulation, from their modest beginnings to the extensive hundred pages long pieces of legislation. I studied the positive and negative aspects of the different parts of the regulation.

I believe that the early legislative attempts had their justification in developing internal market and promoting cross border provision of financial services. Especially the abandoning of national treatment principle and the adoption of the principles suggested by the White Paper turned out to be very effective and suitable strategies for the regulation of credit institutions.

However the later, much stricter regulation adopted after the financial crisis went too far. I understand the rationale behind the capital adequacy rules. I welcome the new flexibility and variability of the buffers introduced by the Capital Requirements Package. However, such a massive accent that is put on it, may, in my opinion, represent a potentially dangerous path for the future development of credit institutions regulation.

The financial crisis showed us that the rules under Basel I and II were not enough to prevent financial crisis. However, even though credit institutions were compliant with the capital adequacy rules, it did not help them to avoid these troubles. The capital adequacy rules, i. e. the first pillar under the pillar structure, continue to be put into the first place. The other two, in my opinion, just as important, are not stressed enough. I believe that we need a better, more flexible and dynamic supervisors, and that the supervision should be based on information provided by the credit institutions themselves.

At this place I find it important to repeat two short statements. The first is from the Lamfalussy report, which stated that the regulation must not inhibit legitimate market development.

However, I believe that unfortunately, the direction the regulation is taking is heading the opposite way. In the Capital Requirements Package, we see an abundance of various buffers, intended to save the credit institutions from their potential failure. There is capital conservation buffer, counter-cyclical buffer, systemic risk buffer, the capital buffer for global or other systemically important institutions. The Resolution Directive then adds yet another capital adequacy rules. However, there is no proof or even consensus amongst scholars and professionals that the financial crisis was caused by low capitalisation of credit institutions. These rules will however change the market. The credit institutions will have to think hard and long whether they are able to provide loans to a completely reliable debtor, as there might not be room for them under their risk weighted assets.

The second important statement was by the Group, which indicated that over-regulation should be avoided. However, the inclusion of several seemingly unrelated topics into the Capital Requirements Package does not show a path of less complicated regulation.

I believe that these two statements are the principles that the future regulation of credit institutions should actively follow.

The regulation the financial market is in need of, is one which incentivizes the credit institution to behave in a prudential and safe way. Any rules that are simply applied to all the credit institutions, without considering their differences and the impact of these rules, should be abandoned.

TEZE DIPLOMOVÉ PRÁCE V ČESKÉM JAZYCE / MASTER'S THESIS SUMMARY IN CZECH LANGUAGE

1. OBECNĚ O REGULACI ÚVĚROVÝCH INSTITUCÍ

Cílem této práce je zodpovědět na otázku, jak se regulace úvěrových institucí vyvíjela a jak její vývoj ovlivnil současnou úpravu. Mou snahou je posoudit potenciál regulace úvěrových institucí zabránit dalším finančním krizím. Úvěrové instituce jsou definovány jako podniky, jejichž předmětem činnosti je přijímat vklady a jiné splatné peněžní prostředky od veřejnosti a poskytování úvěrů na vlastní účet¹⁸³. Kromě těchto dvou základních činností, které jsou úvěrové instituce povinny uskutečňovat, je nutné vzít v úvahu přílohu 1 Směrnice o Kapitálových Požadavcích 2013¹⁸⁴, která obsahuje seznam všech činností, které mohou být na základě jednotné bankovní licence prováděny. Avšak tuto definici považuji za příliš rozsáhlou, protože její znění může vést k podstatně odlišným národním úpravám. Nicméně chápu důvody pro takto zvolenou definici činnosti úvěrových institucí, neboť ponechává prostor pro přizpůsobení se zvláštnostem úprav jednotlivých členských států.¹⁸⁵

2. UMOŽNĚNÍ EXISTENCE TRHU S FINANČNÍMI SLUŽBAMI

Činnost úvěrových institucí představuje nejpoblárnější a nejméně nákladný způsob přesunu peněz v rámci vnitřního trhu a vytvoření vnitřního trhu pro finanční služby je tedy závislé na možnosti převodu peněz mezi členskými státy a na možnosti poskytovat služby přes hranice

¹⁸³ První směrnice rady 77/780/EHS z 12. prosince 1977 o koordinaci právních a správních předpisů týkajících se zahájení a výkonu činnosti úvěrových institucí 1977 OJ L 322/30 (“**První Bankovní Směrnice**”)

¹⁸⁴ Směrnice 2013/36/EU Evropského parlamentu a Rady ze dne 26. června 2013 o přístupu k činnosti úvěrových institucí a o obezřetnostním dohledu nad úvěrovými institucemi a investičními podniky, kterou se mění směrnice 2002/87/ES a o zrušení směrnic 2006/48/ES a 2006/49/ES, 2013 L 176/338 (“**Směrnice o Kapitálových Požadavcích 2013**”)

¹⁸⁵ DRAGOMIR, Larisa. European prudential banking regulation and supervision: the legal dimension. New York, NY: Routledge, 2010. ISBN 0203856414, strana 32

jednotlivých členských států.¹⁸⁶

Základy vnitřního trhu pro finanční služby byly zahrnuty ve Smlouvě o EHS.¹⁸⁷ Jejich cílem bylo přeměnit roztržštěné národní trhy do jednoho vnitřního trhu. Nicméně Smlouva o EHS tohoto cíle nedosáhla, neboť pouze stanovila povinnost členských států, aby odstranily překážky bránící volnému pohybu kapitálu pouze v rozsahu, v jakém to bylo nutné pro fungování jednotného vnitřního trhu a aby nezaváděly překážky nové. Členské státy nejen že nechaly v platnosti stávající ochranná opatření, jako například devizové kontroly, mnohé z nich dokonce zavedly opatření nová.¹⁸⁸

Pokrok při uskutečnění vnitřního trhu byl tedy pomalý a situace dvacet let po přijetí Smlouvy o EHS se mnoho nezlepšila. Proto byla vydána Bílá Kniha¹⁸⁹, ve které byly navrženy některé legislativní kroky, které byly třeba pro dosažení tohoto cíle. V ní bylo řečeno, že liberalizace finančních služeb, spojená s volným pohybem kapitálu, představuje významný krok směrem k finanční integraci v EU.

V Bílé Knize Komise dále navrhla principy, kterými by se měla regulace finančních služeb řídit. Zahrnovaly princip, dle kterého by se trh s finančními službami měl řídit souborem minimálních koordinačních pravidel za účelem usnadnění přeshraničního poskytování služeb. Tato pravidla by poté sloužila jako základ pro vzájemné uznání ze strany členských států.¹⁹⁰ Dále bylo navrženo zavést zásadu kontroly domovského státu.

¹⁸⁶ TOMÁŠEK, Michal. Bankovníctví jednotného vnitřního trhu Evropské unie. Praha: Linde, 1997. ISBN 80-7201-052-2. strana 24

¹⁸⁷ Smlouvy o založení Evropského hospodářského společenství dne 25. března 1957 („**Smlouva o EHS**“).

¹⁸⁸ Dokončení vnitřního trhu, Bílá Kniha Komise Evropské Radě, COM (85) 310 final, („**Bílá Kniha**“) par. 128

¹⁸⁹ Ibid., par. 101

¹⁹⁰ Ibid., par. 102

Domnívám se, že tyto jednoduše formulované myšlenky představují jeden z nejlepších kroků pro umožnění přeshraniční poskytování služeb úvěrových institucí. Domnívám se, že tento dokument představuje významný krok vpřed v souvislosti s vývojem vnitřního trhu.

Směrnice o odstranění omezení¹⁹¹ přijatá v roce 1973 si zvolila jako svůj základ princip národního zacházení, tedy takový princip, podle kterého nemohou členské státy zacházet méně příznivě s osobou z jiného členského státu, která se nachází ve srovnatelné situaci jako osoba, pro níž je tento stát státem domovským.

I přesto, že omezení na vstupu na trh tedy v důsledku této směrnice nemohla být přímo diskriminační, cíl této směrnice zdaleka naplněn nebyl a omezení snadného poskytování přeshraničních služeb odstraněna nebyla. Považuji za velmi důležité, že v následné regulaci bylo od tohoto principu upuštěno, neboť se prokázalo, že je pro trh finančních služeb nevhodným a že principy uvedené v Bílé knize musí převážet.

3. REGULACE ÚVĚROVÝCH INSTITUCÍ POMOCÍ SEKUNDÁRNÍHO PRÁVA

Potřeba koordinovaného přístupu k vnitřnímu trhu finančních služeb vedla k přípravě příslušných směrnic již v roce 1966. Nicméně prvním opravdu významným předpisem určeným pro regulaci finančních služeb byla První Bankovní Směrnice z roku 1977. Tato směrnice opět zaujala přístup plné harmonizace a přejala princip národního zacházení ze Směrnice o Odstranění Omezení. Domnívám se, že tento princip představoval velkou nevýhodu pro úvěrové instituce usazené v jiných členských státech, neboť byly nuceny podrobit se zcela odlišným pravidlům. I přesto, že tyto rozdíly vyplývající z principu národního zacházení nebyly samy o sobě diskriminační, ve skutečnosti zatížily zřizování

¹⁹¹ Směrnice Rady 73/183/EHS ze dne 28. června 1973 o odstranění omezení svobody usazování a volného pohybu služeb, pokud jde o samostatně výdělečně činné činnost bank a jiných finančních institucí, 1973 OJ L 194/1 ("**Směrnice o Odstranění Omezení** ")

poboček náklady vynaloženými na přizpůsobení se požadavkům hostitelského států.¹⁹² Veškeré výhody, které nastávají spolu s expanzí úvěrové instituce byly tedy sníženy o administrativní náklady související s touto expanzí.

Cílem Druhé Bankovní Směrnice přijaté v roce 1989 nebylo vytvoření jednotné regulace úvěrových institucí, ale zejména vytvoření vzájemných povinností členských států uznávat regulaci úvěrových institucí a licencí jiných členských států.¹⁹³

Tato směrnice tedy opustila model úplné harmonizace a místo něj zavedla pravidlo minimální harmonizace. Druhá Bankovní Směrnice dále zavedla tzv. jednotnou bankovní licenci, která umožňuje úvěrové instituci z jednoho členského státu zřídit pobočku, nebo poskytovat služby v hostitelském členském státě a to bez nutnosti plnit požadavky stanovené hostitelským státem. Nicméně vzájemné uznávání licencí v rámci neharmonizované regulace úvěrových institucí může vest k absurdním situacím, kdy úvěrová instituce s licenci z jedno členského států s liberálnějšími předpisy může na území hostitelského státu vykonávat více činností, než úvěrová instituce, která má tento stát za svůj domovský.¹⁹⁴ Druhá Bankovní Směrnice nicméně umožnila snadnější expanzi služeb úvěrových institucí bez administrativních nákladů, které s ním byly dříve spojeny a tak umožnila, aby tento trh poskytl prostor pro větší konkurenci.

Důležitost regulace kapitálu úvěrových institucí se dostala na scénu v roce 1989, kdy byla přijata Směrnice o Vlastním Kapitálu.¹⁹⁵ Tato směrnice zdůraznila důležitost vlastního kapitálu jako prostředku, který zajišťuje kontinuitu úvěrových institucí, chrání úspory

¹⁹² TOMÁŠEK, Michal. op. cit., strana 48

¹⁹³ TOMÁŠEK, Michal. op. cit., strana 51

¹⁹⁴ TOMÁŠEK, Michal. op. cit., strana 54

¹⁹⁵ Směrnice Rady 89/299/EHS ze dne 17. dubna 1989 o kapitálu úvěrových institucí, 1989 OJ L 124/16 („Směrnice o Vlastním Kapitálu“)

spotřebitelů a může sloužit ke krytí ztrát.¹⁹⁶ Stanovila minimální požadavky na kapitálovou přiměřenost zejména, co se týče jejího složení. Za nejdůležitější ovšem považuji skutečnost, že tato směrnice určila, na kterou oblast regulace úvěrových institucí bude kladen největší důraz.

V návaznosti na Směrnici o Vlastním Kapitélu byla v roce 1989 přijata Směrnice o Ukazateli Kapitálové Přiměřenosti¹⁹⁷, jejímž cílem bylo stanovit pravidla pro posuzování platební schopnosti úvěrových institucí nastavením poměru, v němž musí úvěrové instituci udržovat vlastní kapitál proti svým rizikově váženým aktivům. Tato směrnice ovšem obsahovala pouze úvěrové riziko.

Lamfalussyho zpráva uvedla, „že jedním z hlavních cílů je vytvoření podmínek, za kterých se evropská regulace bude schopna soustavně, pružně a rychle adaptovat na budoucí vývoj, který je dnes nepředvídatelný“¹⁹⁸. Ovšem je třeba, aby tak činila způsobem, který nebude omezovat legitimní tržní vývoj a aby byla neutrální z hlediska soutěže mezi různými poskytovateli finančních služeb.¹⁹⁹

4. BASILEJSKÉ DOHODY

Basilejský výbor pro bankovní dohled ("**Basilejský výbor**") byl založen v roce 1974 guvernéry národních bank zemí skupiny G10. Vydává tzv. Basilejské dohody, které nemají žádnou právní sílu, ale stanovují standardy a pokyny pro dohled. Nicméně právní předpisy přijaté EU jsou často více než inspirované Basilejskými dohodami. Toto považuji na negativní aspekt Basilejských smluv, neboť Basilejský výbor je tedy ve skutečnosti tvůrcem politiky EU

¹⁹⁶ Ibid., preambule

¹⁹⁷ Směrnice Rady 89/647 / EHS ze dne 18. prosince 1989 o ukazateli kapitálové přiměřenosti úvěrových institucí OJ 1989 L 386/14 ("**Směrnice o Ukazateli Kapitálové Přiměřenosti**")

¹⁹⁸ Výbor moudrých pro regulaci evropských trhů s cennými papíry, jemuž předsedal Alexandre Lamfalussy, Brusel, 15. února 2001 ("**Lamfalussyho zpráva**") dostupná na http://ec.europa.eu/finance/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf

¹⁹⁹ Ibid., strana 71

v oblasti regulace úvěrových institucí, aniž by byl její řádně zvolenou institucí.

První Basilejská Dohoda²⁰⁰ byla vydána v roce 1988. Rozdělila aktiva úvěrových institucí do pěti skupin, z nichž každá měla přiřazenou svou rizikovou váhu. Ačkoliv tedy tato dohoda přinesla mezinárodní jednotný standard pro kapitálovou přiměřenost a řízení úvěrového rizika, měla své nedostatky. První Basilejská Dohoda se pouze pokusila o pokrytí úvěrového rizika, ale tohoto cíle nedosáhla. Místo toho, aby připravila úvěrové instituce na potenciální ztráty, jim dala neefektivní rigidní systém rizikových vah, které výrazně neodpovídaly skutečné situaci na trhu. První Basilejská Dohoda také neposkytla žádný podnět pro úvěrové instituce k vytvoření a rozvíjení vlastního systému řízení rizik. Pouze stanovila pravidla, které musela být úvěrovými institucemi dodržována. To ovšem vedlo k situaci, kdy úvěrové instituce přijaly lhostejný postoj ve vztahu k posuzování svých rizik.

Tato dohoda se také pouze zaměřila na úvěrové riziko a zanedbala další druhy rizik, jako je riziko tržní, operační, nebo reputační. Tato rizika mohou, stejně jako riziko úvěrové, způsobit neočekávané ztráty, a úvěrové instituce by tedy na ně měly být obdobně připraveny. V tomto ohledu považují První Basilejskou Dohodu za uspokojivou pouze do té míry, v které představuje začátek regulace rizik úvěrových institucí, jelikož takto nastavený systém nebyl schopen zajistit potřebnou ochranu.

Na základě zkušeností s První Basilejskou Dohodou byla v roce 2004 přijata Druhá Basilejská Dohoda.²⁰¹ Tato dohoda nově staví na tři pilířové struktuře, kde první pilíř jsou základy zavedené První Basilejskou Dohodou, druhý pilíř je představován výkonem dohledu nad

²⁰⁰ Banka pro mezinárodní vypořádání, Basilejská komise pro bankovní dohled, Mezinárodní konvergence měření kapitálu a kapitálových standardů, červenec 1988, dostupná na <http://www.bis.org/publ/bcbs04a.pdf> (“První Basilejská Dohoda”)

²⁰¹ Banka pro mezinárodní vypořádání, Basilejská komise pro bankovní dohled, Mezinárodní konvergence měření kapitálu a kapitálových standardů, revidovaný právní rámec, červen 2004 (“Druhá Basilejská Dohoda”), dostupná na <http://www.bis.org/publ/bcbs107.pdf>

trhem a třetí pilíř tržní disciplínou.

Úvěrové riziko zde bylo nastaveno daleko flexibilnějším způsobem. Podle této dohody si může úvěrová instituce zvolit ze dvou metody pro hodnocení svého úvěrového rizika a to buď standardizovaný přístup a nebo přístup založený na vnitřním hodnocení rizik. Chybu standardizovaného přístupu vidím zejména ve skutečnosti, že byl z převážné části založen na hodnocení ratingových agentur. Ty se ovšem ukázaly jako velmi nepřesné a to zejména kvůli modelu, jakým bylo vydávání těchto hodnocení financováno. Tento model, kdy vydání hodnocení bylo placeno emitentem hodnoceného produktu měl takovou povahu, která ratingové agentury podněcovala k umělému zlepšování vydávaného hodnocení, jelikož takové hodnocení emitenti vyžadovali. Takto vydaná hodnocení byla teda velmi často přehnaně optimistická a řízení úvěrového rizika na jejich základě nepřesné. S tímto problémem souvisela také namítaná procykličnost Druhé Basilejské Dohody, neboli taková vlastnost, která situaci úvěrových institucí zhoršuje tím, že je v době finanční krize nutí zvyšovat jejich kapitál. V dobách ekonomického růstu naopak rizika podceňuje. Jakmile ale finanční trh zasáhne krize, informace, na základě kterých se kapitálová přiměřenost počítá se automaticky zhoršují a úvěrové instituce musí vynakládat mnohdy rizikově neopodstatněné prostředky na splnění pravidel kapitálové přiměřenosti.

Druhý pilíř přináší kvalitativní prvek, který vychází z pravidel prvního pilíře. Tento systém vyžaduje nejen, aby úvěrové instituce požadavky prvního pilíře dodržovaly, ale podněcuje je, aby tento systém samy vyvíjely a využívaly lepších technik posuzování rizik při jejich monitorování a řízení. Dohled nad těmito procesy je pak základním kamenem druhého pilíře. Druhý pilíř je tedy zaměřen nejen na samotné orgány dohledu, ale také na úvěrové instituce, když uvádí, že je to právě vedení úvěrových institucí, která nadále nese odpovědnost za

zajištění dostatečného kapitálu pro ochranu riziky a to i nad rámce minimálních pravidel stanovených prvním pilířem.

Třetí pilíř poté staví na předpokladu, že informace, které úvěrová instituce zveřejňuje o své situaci umožňují účastníkům trhu zhodnocení její finanční výkonnosti. Tato povinnost má tedy přimět úvěrové instituce vykonávat svou činnosti rozumným a efektivním způsobem. Domnívám se ovšem, že tyto informace mohou být často poskytnuty nesrozumitelným jazykem, který mohou pochopit pouze odborníci, kteří se v daném prostředí pohybují a/nebo mohou být důležité detaily ukryty vedle dalších, pro účastníky trhu nevýznamných, informací.

V návaznosti na finanční krizi byla vydána zpráva Skupiny na vysoké úrovni pro finanční dohled v EU, jíž předsedal Jacques de Larosière (**“Skupina”**) a ve které byl položen rámce pro nový přístup k regulaci v EU.²⁰² Považuji za velmi důležitý poznatek Skupiny, že *“ je nutné se vyhnout nadměrné regulaci, jelikož zpomaluje finanční inovace a tím podkopává hospodářský růst v celé ekonomice.”*²⁰³ Skupina jako řešení procykličnosti druhé Basilejské dohody navrhuje, že *“ by mělo být více kapitálu a více kvalitnějšího kapitálu a to nad rámec současných minimálních úrovní.”*²⁰⁴

Nicméně nejsem toho názor, že takový důraz na kapitálovou přiměřenost je nutný, nebo žádoucí. Jednotné nastavení pro všechny úvěrové instituce v EU může vést k situaci, kdy úvěrové instituce s konzervativnějšími modely, které bez úhony přežily finanční krizi, jsou nuceny přijmout obchodní modely těch úvěrových institucí, které takto úspěšné nebyly a kvůli kterým jsou tato pravidla pro kapitálovou přiměřenost přijata. Na základě toho je možné, že se

²⁰² Zpráva skupiny na vysoké úrovni pro finanční dohled v EU, jíž předsedal Jacques de Larosière - Zpráva Brusel 2009, dostupná na http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf,

²⁰³ Ibid., odst. 42

²⁰⁴ Ibid., odst. 59

situace na trhu stane pouze rizikovější.²⁰⁵ Nicméně je to právě kapitálová přiměřenost, na níž se regulace nejvíce spoléhá.

V reakci na finanční krizi přijal Basilejský výbor Třetí Basilejskou Dohodu²⁰⁶. V ní na první pohled zůstal ukazatel kapitálové přiměřenost na 8%. Nicméně, ve skutečnosti jsou úvěrové instituce nuceny udržovat kapitál na daleko vyšší úrovni, jelikož tato dohoda přidává rezervy, které ve skutečnosti představují pouze další kapitálové požadavky. I přesto, že nesouhlasím s prostým zvyšování kapitálových požadavků, tyto rezervy vyplývající z Třetí Basilejské Dohody představují pozitivní vývoj, neboť jsou, oproti předchozím statickým normám, překvapivě flexibilní a umožňují rychlejší reakce na tržní pohyby.

I přesto, že Třetí Basilejská dohoda tedy ve skutečnosti zvýšila požadavky na kapitálovou přiměřenost na 13%, mají někteří autoři za to, že jsou přesto stále příliš nízké na to, aby efektivně zmírňovaly nadměrná rizika a že tyto požadavky musí být: *“mnohem vyšší, možná až na 20-30 % úrovni. a to bez ohledu na jejich rizikovou váhu*²⁰⁷ Tento názor nesdílím a nadále se domnívám, že vysoká kapitálová přiměřenost není řešením všech možných tržních selhání.

5. SOUČASNÁ ÚPRAVA KAPITÁLOVÉ PŘIMĚŘENOSTI

Třetí Basilejská Dohoda byla v rámci EU implementována do Právního Rámce o Kapitálových

²⁰⁵ VITÁSEK, Jan, Monika Laušmanová k evropské regulaci bank: Chceme větší flexibilitu, 8. srpna 2016, <http://euractiv.cz/rozhovory/ekonomika-a-euro/monika-lausmanova-012784/>

²⁰⁶ Banka pro mezinárodní vypořádání, Basilejská komise pro bankovní dohled, Basilejská dohoda III : Globální Právní rámec pro odolnější banky a a bankovní systémy, prosinec 2010, dostupný na http://www.bis.org/publ/bcbs189_dec2010.pdf a Basilejská dohoda III: Mezinárodní rámec pro měření, standardy a monitorování rizika likvidity, prosinec 2010 dostupný na <http://www.bis.org/publ/bcbs188.pdf> ("Třetí Basilejská Dohoda")

²⁰⁷ WOLF, Martin, Basel: the mouse that did not roar The new banking rules are simply insufficient, Financial Times, 14. září 2010, dostupné na <https://www.ft.com/content/966b5e88-c034-11df-b77d-00144feab49a>

Požadavcích²⁰⁸ v roce 2013. V něm je představena nová rezerva pro tzv. systemické riziko. Aby se zabránilo selhání celého systému mohou národní orgány dohledy stanovit úroveň pro systemickou rezervu. Další rezervou uvedenou Třetí Basilejskou Dohodou je rezerva pro tzv. too-big-to-fail úvěrové instituce. Jimi se rozumí takové úvěrové instituce, jejichž selhání by vedlo k rozšíření systemického rizika a k možnému rozšíření krize na celý trh. Národní orgány dohledu jsou oprávněny určit ty nejdůležitější úvěrové instituce a výši jejich rezervy.

Za účelem harmonizace ozdravných procesů a řešení krizí úvěrových institucí byla v roce 2014 přijata směrnice²⁰⁹, jejímž cílem bylo aby ztráty úvěrových institucí byly primárně neneseny jejími akcionáři. Za účelem dosažení tohoto cíle, tedy tak, aby bylo zajištěno, že úvěrová instituce bude mít dostatečný kapitál, jsou zavedeny další kapitálové požadavky, tentokrát v podobě minimálních požadavků na vlastní prostředky a způsobilé závazky.

6. ZÁVĚR

V návaznosti na výše uvedené považuji za nutné uvést, že rozumím odůvodnění, které stojí za přijetím pravidel pro kapitálovou přiměřenost. V souvislosti s přijetím Právního Rámce o Kapitálových Požadavcích považuji za velmi dobrý krok flexibilní nastavení jím představených rezerv. Nicméně stále zastávám názor, že tak velký důraz, jaký je kladen na tato pravidla představuje riskantní směr vývoje regulace úvěrových institucí. Směrnice o ozdravných procesech navíc přináší další kapitálové požadavky. Nicméně neexistuje žádný

²⁰⁸ Směrnice o kapitálových požadavcích 2013, op. cit., a Nařízení (EU) č 575/2013 Evropského parlamentu a Rady ze dne 26. června 2013 o obezřetnostních požadavcích na úvěrové instituce a investiční podniky a kterým se mění nařízení (EU) č 648/2012, 2013 OJ L 176/1 (spolu se Směrnicí o Kapitálových Požadavcích 2013 jako „**Právní Rámec o Kapitálových Požadavcích**“)

²⁰⁹ Směrnice 2014/59/EU Evropského parlamentu a Rady ze dne 15. května 2014 o stanovení rámce pro ozdravné procesy a řešení problémů úvěrových institucí a investičních podniků a kterou se mění směrnice Rady 82/891/EHS a směrnice 2001/24/ES, 2002/47/ES, 2004/25/ES, 2005/56/ES, 2007/36/ES, 2011/35/EU 2012/30/EU a 2013/36/EU, a nařízení (EU) č 1093/2010 a (EU) č 648/2012, Evropského parlamentu a Rady 2014 L 173/190 (“**Směrnice o Ozdravných Procesech**”)

důkaz, ani shoda mezi vědci a odborníky, že finanční krize byla způsobena právě nízkými kapitálovými požadavky.

Regulaci úvěrových institucí je nutno přenastavit tak, aby sama od sebe podněcovala úvěrové instituce k obezřetnému a bezpečnému chování. Pravidla, která pouze stanovují jednotné standardy a jsou bez uvážení jejich dopadů aplikována na celý trh by měla být opuštěna.

SEZNAM ZKRATEK / LIST OF ABBREVIATIONS

První Bankovní Směrnice	První směrnice rady 77/780/EHS z 12. prosince 1977 o koordinaci právních a správních předpisů týkajících se zahájení a výkonu činnosti úvěrových institucí 1977 OJ L 322/30
Směrnice o Kapitálových Požadavcích 2013	Směrnice 2013/36/EU Evropského parlamentu a Rady ze dne 26. června 2013 o přístupu k činnosti úvěrových institucí a o obezřetnostním dohledu nad úvěrovými institucemi a investičními podniky, kterou se mění směrnice 2002/87/ES a o zrušení směrnic 2006/48/ES a 2006/49/ES, 2013 L 176/338
Smlouva o EHS	Smlouvy o založení Evropského hospodářského společenství dne 25. března 1957
Bílá Kniha	Dokončení vnitřního trhu, Bílá Kniha Komise Evropské Radě, COM (85) 310 final,
Směrnice o Odstranění Omezení	Směrnice Rady 73/183/EHS ze dne 28. června 1973 o odstranění omezení svobody usazování a volného pohybu služeb, pokud jde o samostatně výdělečně činné činnost bank a jiných finančních institucí, 1973 OJ L 194/1
Směrnice o Vlastním Kapitálu	Směrnice Rady 89/299/EHS ze dne 17. dubna 1989 o kapitálu úvěrových institucí, 1989 OJ L 124/16
Směrnice o Ukazateli Kapitálové Přiměřenosti	Směrnice Rady 89/647 / EHS ze dne 18. prosince 1989 o ukazateli kapitálové přiměřenosti úvěrových institucí OJ 1989 L 386/14
Lamfalussyho zpráva	Výbor moudrých pro regulaci evropských trhů s cennými papíry, jemuž předsedal Alexandre Lamfalussy, Brusel, 15. února 2001
První Basilejská Dohoda	Banka pro mezinárodní vypořádání, Basilejská komise pro

	bankovní dohled, Mezinárodní konvergence měření kapitálu a kapitálových standardů, červenec 1988,
Druhá Basilejská Dohoda	Banka pro mezinárodní vypořádání, Basilejská komise pro bankovní dohled, Mezinárodní konvergence měření kapitálu a kapitálových standardů, revidovaný právní rámec, červen 2004
Skupina	Skupina na vysoké úrovni pro finanční dohled v EU, již předsedal Jacques de Larosière
Právní Rámec o Kapitálových Požadavcích	Směrnice o kapitálových požadavcích 2013 a Nařízení (EU) č 575/2013 Evropského parlamentu a Rady ze dne 26. června 2013 o obezřetnostních požadavcích na úvěrové instituce a investiční podniky a kterým se mění nařízení (EU) č 648/2012, 2013 OJ L 176/1, spolu se Směrnicí o Kapitálových Požadavcích 2013
Směrnice o Ozdravných Procesech	Směrnice 2014/59/EU Evropského parlamentu a Rady ze dne 15. května 2014 o stanovení rámce pro ozdravné procesy a řešení problémů úvěrových institucí a investičních podniků a kterou se mění směrnice Rady 82/891/EHS a směrnice 2001/24/ES, 2002/47/ES, 2004/25/ES, 2005/56/ES, 2007/36/ES, 2011/35/EU 2012/30/EU a 2013/36/EU, a nařízení (EU) č 1093/2010 a (EU) č 648/2012, Evropského parlamentu a Rady 2014 L 173/190

First Banking Directive	The First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, 1977 OJ L 322/30
Capital Requirements Directive 2013	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 L 176/338
Member States	Member states of the European Union
EEC Treaty	The Treaty Establishing the European Economic Community, March 25, 1957
White Paper	Completing the internal market, White Paper from the Commission to the European Council (Milan, 28-29 June 1985), COM (85) 310 final,
Article 67 Directive	First Directive for the Implementation of Article 67 of the Treaty, 1960 OJ 43
Cassis de Dijon	Judgment of 20 February 1979, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, Case 120/78, EU:C:1979:42
Directive 88/361	Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty replacing the Article 67 Directive, 1988, O.J. L 178/5
Maastricht Treaty	Treaty on European Union (Maastricht text), July 29, 1992, 1992 OJ C 191/1

Directive on the Abolition of Restrictions	Council Directive 73/183/EEC of 28 June 1973 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions, 1973 OJ L 194/1
Second Banking Directive	Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, 1989 OJ L 386/1
Amending Directive	European Parliament and Council Directive 95/26/EC of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view to reinforcing prudential supervision, 1995 OJ L 168/7
Directive on Consolidated Supervision	Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis
Directive on Own Funds	Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions, 1989 OJ L 124/16
Solvency Ratio Directive	Council Directive 89/647/EEC of 18 December 1989 on a solvency ratio for credit institutions

Anti Money Laundering Directive	Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, 1991 OJ L 166/77
Large Exposure Directive	Council Directive 92/121/EEC of 21 December 1992 on the monitoring and control of large exposures of credit institutions, 1993 OJ L 29/1
Directive on Deposit Guarantee Schemes	Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, 1994 OJ L 135/5
Consolidating Directive	Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, 2000 OJ L 126/1
Financial Services Action Plan	Commission Communication of 11 May 1999 entitled "Implementing the framework for financial markets: action plan" [COM(1999) 232 final],
Basel I	Bank for International Settlements, Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards, July 1988
Basel I bis	Bank for International Settlements, Basel Committee on Banking Supervision, Amendment to the Capital Accord ¹ to incorporate market risks, January 1996
Basel II	Bank for International Settlements, Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards, A Revised Framework, June 2004

Basel III, part I	Bank for International Settlements, Basel Committee on Banking Supervision, Basel III: A global regulatory framework for more resilient banks and banking systems, December 2010,
Basel III, part II	Basel III: International framework for liquidity risk measurement, standards and monitoring, December 2010
Basel III	Basel III, part I and Basel III, part II
Capital Requirements Regulation	Capital Requirements Directive 2013, op. cit., and the Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, 2013 OJ L 176/1
Capital Requirements Package	Capital Requirements Regulation and Capital Requirements Directive

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- Treaty on European Union (Maastricht text), July 29, 1992, 1992 OJ C 191/1
- Council Directive 92/121/EEC of 21 December 1992 on the monitoring and control of large exposures of credit institutions, 1993 OJ L 29/1
- Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, 1994 OJ L 135/5
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ABSTRAKT / ABSTRACT

Abstrakt:

Tato diplomová práce hodnotí regulaci úvěrových institucí. Jejím cílem je zodpovědět na otázku, jak se regulace úvěrových institucí vyvíjela a jak její vývoj ovlivnil současnou úpravu. Práce posuzuje potenciál regulace úvěrových institucí zabránit dalším finančním krizím. Nejprve se autorka zabývá vývojem trhu finančních služeb a následně vývojem regulace úvěrových institucí. V úvodní části tedy autorka analyzuje pozitivní a negativní aspekty jednotlivých úprav, důvody pro jejich přijetí, změnu či naopak dalšímu použití.

Zejména se práce zabývá požadavky kapitálové přiměřenosti. Rozebírá postupně jejich vývoj a důvody pro jejich změny, především v souvislosti s finanční krizí.

Autorka dochází k závěru, že současné nastavení regulace úvěrových institucí a zejména její očekávaný vývoj klade příliš velký důraz na zvyšování kapitálové přiměřenosti. Tento aspekt spatřuje autorka zvláště ve směrnici o kapitálových požadavcích z roku 2013, která představuje nové rezervy, které jsou úvěrové instituce povinny držet a ve směrnici o ozdravných procesech z roku 2014, která přidává další nové, přesto obdobné požadavky. Autorka zejména nesouhlasí s posouzením kapitálových požadavků jako všemocného řešení problémů, které se na trhu vyskytují.

Autorka sdílí názor, že neexistuje žádný důkaz, ani shoda mezi vědci a odborníky, že finanční krize byla způsobena právě nízkými kapitálovými požadavky. Autorka uzavírá, že regulaci úvěrových institucí je nutno usměrnit tak, aby sama od sebe podněcovala úvěrové instituci k obezřetnému a bezpečnému chování.

Abstract:

This thesis evaluates the regulation of credit institutions. Its aim is to answer the question of how the regulation of credit institutions evolved and how this development influenced current regulation. This thesis examines the potential of credit institution regulation to prevent further financial crises. At first the author deals with the development of the market of financial services and subsequently with the development of regulation of credit institutions. In the first part the author analyses the positive and negative aspects of each piece of legislation, reasons for their adoption, changes or their further use.

This thesis deals particularly with capital adequacy requirements. It analyses their gradual development and reason for their amendments, especially in the context of the recent financial crisis.

The author concludes that that current set-up of the credit institution regulation and its expected development puts too much emphasis in increasing of the capital adequacy requirements. The author sees this aspect especially in the directive on capital requirements from 2013 which presents new buffers that the credit institutions are required to hold and in the resolution directive from 2014 which adds new, yet similar requirements. The author particularly disagrees with the assessment of capital adequacy requirements as an omnipotent solution to the problems on the market.

The author shares the view that there is no evidence or consensus amongst scientist and experts that the financial crisis was caused by low capital requirements. The author concludes that the direction of the regulation of credit institution needs to be changed in order to encourage credit institutions to conduct their business in a prudent and safe manner.

Klíčová slova / Key words

Klíčová slova:

Právo Evropské unie

Regulace úvěrových institucí

Basilejské dohody

Kapitálová přiměřenost

Key words:

European Union law

Regulation of credit institutions

Basel Accords

Capital requirements