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Prudential Banking Supervision in the EU: principles, rules, Treaty limits.

1.- We guess that, in Silvia's wishes, our role today should be one to offer a helicopter view, both conceptual and operational, of prudential banking supervision in the EU. More specifically, she expects us to provide an introduction on legal theory to the next sessions, to allocate enforcement in its proper theoretical framework and to show the weighing of interests often needed to deliver an effective yet reasonable, predictable yet proportionate, rule-bound yet principles-based enforcement of EU banking rules. Unfortunately, her choice of the speaker(s) was too kind to us, for we will not even attempt to offer a grand theory. We do know our limits We will simply offer a few remarks around an obvious observation: prudential banking supervision, after the crisis, has become a greenfield of EU experimentalism, one where the enforcement of rules cannot be severed from the exercise of supervisory judgment, and administrative discretion. In fact, the expansion in length and complexity of the rules has only expanded, not constrained, the scope for such judgment and discretion.

Our query is to understand the demands of the rule of law in a context where the potential for discretion is large, to discern how such discretion must be used in the first place, and judicially checked in the second place. The centrality of this question rests on the very fact that the ECB has become the lynchpin of a new legal order of EU prudential supervision, and the SSM is, to some extent, a new catalyst of European law. Indeed, the SSM, whose structure was not marginally determined by existing Treaty limits, is likely to offer one of, if not the most advanced experiment of multilevel administration of banking worldwide.

2.- Our attempt today is to adapt the Dworkin/Alexy theoretical framework on principles and rules to European prudential banking supervision and to show how surprisingly operational this theoretical framework may prove. The core finding, if any, is one that we already discussed elsewhere: principles-based interpretativism is a necessity, in this sector at least, and the growing practice of ‘hard cases’ in banking can immensely help in identifying the principles and meta-principles (or postulates, as some call them: H. Avila, 2007, p. 83 ff.) which should guide in the interpretation and enforcement of banking rules. *This fits within the EU constitutional framework, which is populated by EU general principles of law and at the same time connotated by Article 19(1) TEU which requires that in the interpretation and application of the Treaties the law must be observed*. We consider our claim on the centrality of a principles-based enforcement of EU supervisory rules as fully consistent with a long lasting engagement of the GCEU with general principles: as Stephen Weatherill noted (2017, p. 32-37) general principles are relevant both (i) as *an interpretative methodology* (to go beyond the text of the rule relying on its perception of the object and purpose of primary or secondary legislation but also to “provide structure and architecture, systematising the vast body of norms into a coherent whole” as part of “the duty of the Court as a constitutional court in elaborating a coherent legal system”: U. Sadl & J. Bengoetxea, 2017, p. 41 and p. 43 respectively) and (ii) *to dictate how individual rights shall be enforced*, since principles are called to supplement the European legal order “as a means to improve the protection of individuals”.

3.- Let’s start from an obvious observation. In banking, we are flooded by European rules. 165 Articles in CRD IV (Directive 2013/36/EU). 521 Articles, plus annexes, in CRR (Regulation EU No. 575/2013). 132 Articles in BRRD (Directive 2014/57/EU), not to mention the amendments and additions due under the Risk Reduction Package initiative. Against these numbers, and the 99 Articles of the SRM Regulation (Regulation EU No. 806/2014), the only 34 Articles of the SSM Regulation (Regulation EU No. 1024/2013) seem an exercise of self-restraint. Yet this is just an optic illusion, if only one considers the 153 Articles of the Framework Regulation complementing it (Regulation EU No. 468/2014).

All this is to some extent ironical, because under the Lamfalussy arrangements EU legislation (Level I) is expected to retreat within the realm of fundamental policy choices, confining itself in the exercise of setting the general regulatory framework in alignment with international global standards. Detailed rules should be set out by delegated regulation (Level II) and complemented by other supervisory tools and by self-regulatory best practices in a co-regulation scheme. *But this Gargantuan approach to rule-making is also part of the Treaty limits*. Delegation of rule-making, despite the interesting openings made by the CJEU in the “shortselling” case (CJEU, judgement 22 January 2014, case C-270/12, EU:C:2014:18), is still constrained within the strict limits of Articles 290 and 291 TFEU. Neither the European Commission nor the EBA can be granted rule-making powers mimicking those of governments upon delegation of national Parliaments, no matter what their political accountability towards the European Parliament and the Council may be. To this one must add that most of these Level I rules are grounded on different legal bases in the TFEU. Some of them conducive to directives – Article 53 TFEU for CRD IV, Article 114 for BRRD. Some of them to regulations, such as Article 127(6) for SSMR and again Article 114 for SRMR. Some must be adopted by majority of Council and Parliament, others by unanimity of Council alone. This clarifies why it is so difficult – without Treaty amendments – to develop a European consolidated act on banking, as part of an overall simplification exercise. Yet these numbers are nothing if compared with the sheer size of the Level II Single Rule Book. Only artificial intelligence can master the ensemble, but hardly with the essential creativity which takes humans to develop values, weigh competing interests, look for justice.

4.- Risks of "false negatives" and "false positives" in the enforcement of such a complex web of norms are exacerbated by the fact that the prudential framework is a patchwork of rules with different chronology and inspiration (within the same statutory instruments, like CRD IV and CRR, often coexist new rules and old ones, simply re-casted in the new instrument). Oftentimes one wishes that this could work like Indian mythology and be created afresh with each cycle of Shiva's divine breath. However, this is hard reality, not myth! Prudential rules are often underpinned by different philosophies, target different policies and follow a logic of incremental change and adaptation, because they respond to market changes. In such a context, the risk of collision among rules of different intonation and different generation is substantial. Therefore, the only way to handle possible contradictions would be to introduce exceptions to every colliding rule, or to declare one of the two conflicting rules invalid. However, expecting that rule-makers or courts can explicitly solve *ex ante* or *ex post* all these contradictions pursuant to a rule-based approach is simply unrealistic.

The problem is further exacerbated by two aspects. First, the fact that many prudential rules uphold "standards", and thus need to present an open-textured character (e.g. the duty to enforce "high supervisory standards"). Second, the fact that supervisory authorities are, by necessity, given competing mandates (monetary policy, payment system stability, macroprudential stability, micro-prudential soundness, consumer or investor protection). This raises difficult questions about their relative weight and importance, and poses very concrete legal questions such as "how much discretion does the ECB enjoy", "which role should be prioritized, and when", "is it legitimate to use tools associated to one mandate to achieve the goals of a different mandate", difficult to answer, and impossible in the absence of a clearly structured principles-based interpretation. Problems of the sort can be countless, but the general idea is that many cases may require public authorities and the courts that review their acts to trade between principles and weigh their importance. The increase in long and detailed rules after the financial crisis, rather than mitigating the problem, made it worse. The sheer numbers of such rules suggest that an increase in the number of interactions between rules, also increases the probability of inconsistencies.

5.- We think that Dworkin's insights on principles have a perfect fit in this European prudential context, where there is no scarcity of rules and principles, and principles-based interpretativism can offer a workable "coverage" for many, if not all risks associated with an overly complex web of rules. Within the EU legal order, principles co-exist with rules, including the prudential ones. Principles set forth the goals to be achieved dependent on factual circumstances, unlike rules which rather impose specific commands ("what needs to be done, nothing more and nothing less"). Principles have a dimension of weight, because they must be applied to the extent that factual circumstances allow and "if no other principle has a greater weight in the concrete case". As it has been noted (U. Sadl & J. Bengoetxea, 2017, p. 43) "[some] principles can operate as normative statements of legal reasoning, leading to a particular solution to the problem case at hand, other principles make that law into a coherent whole". Moreover, - and this is of particular use to our purposes today – the "incorporation" into EU law of human rights as a "structured network of principles" as the Court called it in its Opinion 2/13 ended up by also subjecting the enforcement of, among others, prudential rules to fundamental principles of procedural and substantive justice.

Our first claim is, therefore, that, since prudential supervision, even where rules-based, is by its very essence often judgmental, it is essential to identify the principles that underpin prudential rules, to have such principles guide the exercise of discretion in the first place, and then its judicial review, which will be full review or marginal review depending on how complex the underlying economic assessment necessary to enforce the rule. Our second claim is that this is something that the CJEU usually does, but it is crucial that in due course this trickles down to national judges and the administration (both at the level of the ECB and SRB and of the national competent and resolution authorities) and principles-based interpretativism becomes the golden standard across the board. To understand our claims, let us first discuss some 'hard cases' recently decided and then some examples of principles enshrined in the regulatory framework for prudential supervision. But let us be clear. The kind of problem we address here is not economic, political, or literary (a simple matter of elegant narratives). *It is a highly consequential legal problem.*

6.- The above puts forward a *normative* argument for principles-based interpretation in banking. Yet, it is important to stress that the normative claim is accompanied by a descriptive, or explanatory claim. Like Moliere's bourgeois monsieur Jourdain (in *Le Bourgeois gentilhomme* édition Louandre, 1910, Scéne IV), who discovered that he had been speaking in prose all his life, principles-based enforcement is what the Court of Justice already does, and what many bodies entrusted with the application of the law (courts, as well as monetary, supervisory and resolution authorities) already do or at least try to do (with margins for improvement). As Sir David Edward noted (2017, p. 401), "the idea that the law includes general principles has a long history. (…) The common lawyer will often seek to extract a principle from a series of precedents. In a rather similar way, the French magistrate, who may not create law, will seek to extract a rule ("norme") from the existing body of law. By contrast, since there is no Code of administrative law, the French Conseil d'Etat has developed a body of *principes generaux* du droit. (…) In German administrative law, the fundamental rights guaranteed by Article 3 of the Basic Law are binding on the administration, as are the general principles of proportionality, equality and respect for legitimate expectations". So, what? *Our claim today is of rather practical character: we argue that principles-based interpretativism in banking needs to be 'operationalized' and to this effect it should convert into a necessary adjunct to the motivation supporting any relevant decision in the application of the rules and standards, showing a straightforward engagement of the decision maker not only with the literary text of the relevant provisions but, more importantly, with their finality, and the principles and values inspiring their adoption*. To our minds, the procedural duty to state reasons is therefore key (also to ward off any risk of "judicial legislation"), to ensure full legitimacy. As Sir William Blair observed once, discussing the importance of an ethical culture in finance, "legal rules need to be supplemented by a clear set of values that are understood through discussion *and application* and that develop into a culture".

7.- As Dworkin showed, far from laboratory experiments, 'hard cases' are those which best test the system. This is very true also in banking.

a) The first example in our context is, obviously, the *Gauweiler* case (judgement of 16 June 2015 *Peter Gauweiler v. Deutsche Bundestag*, case C-62/15 ECLI:EU:C:2015:400), which illustrates the delicate balancing of criteria that is needed when determining a central bank's mandate. The context was the so-called Outright Monetary Transactions (OMT) program, which consisted in the purchase in secondary markets of the debt of troubled sovereigns to restore the monetary policy transmission channel. The measure was challenged by a German member of Parliament before the FCC, which made its first-ever preliminary reference to the CJEU. The CJEU ruled that the program was legal because the primary object of monetary policy encompassed goals such as restoring the monetary policy transmission channel, or preserving the singleness of monetary policy, because the program did not breach the prohibition of financial assistance prohibited by the Treaty, and because these conditions also ensured that the scope and extent of the program were *proportionate* to the end sought. The FCC, in its final ruling, accepted the CJEU's conclusions, not without criticizing them for failing to scrutinize the factual assumptions of the OMT program, and to discuss the role of the principle of conferral, and or democratic legitimacy, but it also held that the use of proportionality established some degree of judicial scrutiny over the decision, and this made the decision acceptable. *Gauweiler* was not a case decided by rules but rather on principles. A follow-up case was, more recently, *Weiss* where the Advocate General Wathelet delivered his opinion on 4 October 2018 suggesting that the Expanded Asset Purchase Program complied with Treaty limits and was in line with the proportionality principle, because all relevant interests were duly weighted and appropriately considered in the design of the Program.

b) A second example are the cases, both in the United States of America and in the European Union, concerning the judicial scrutiny of decisions to allocate supervisory competences. In the United States, a telling example is found in the *Metlife v Financial Stability Oversight Council (FSOC)* case (*Metlife v FSOC,* 1:15-cv-00045-RMC 30, District Court, District of Columbia (March 2016)), where the decision by the US Financial Stability Oversight Council (FSOC) to designate an insurance company's financial distress as "posing a threat to financial stability", and thus subject to the supervision of the Federal Reserve Board, was challenged before the District Court for the District of Columbia (hereafter, DC court) which found that the decision by the FSOC was invalid. In the EU an example is found in the *Landescreditbank v ECB* (Judgement 16 May 2017, Case T-122/15 *Landeskreditbank Baden-Württemberg v ECB,* ECLI:EU:T:2017:337), where the decision by the ECB to classify a financial institution as "significant", and thus subject to the supervision of the ECB, was challenged before the General Court (GC) of the EU, which found that the decision was valid under the applicable provisions of the Framework Regulation, whilst signaling that no pleas of illegality under Article 277 of such provisions was raised in the case at hand (leaving thus unanswered the question on whether the outcome of the case would have been different if the appellants had challenged the rules adopted by the Framework Regulation on ground of general principles, like the one of subsidiarity). In the *Metlife* case the DC court considered the FSOC decision under the usual "arbitrary and capricious" standard of review. To fill the standard with meaning the court had to examine existing precedent, and, in so doing, the court relied upon the principle that an agency had to take into account its prior policy, when this had "engendered serious reliance interest" on the persons subject to the decision, which required the agency to provide a more detailed justification.

This finding, incidentally, sits in sharp contrast with what, in a very different context, the CJEU held in *Tadej Kotnik and Others v Državni zbor Republike Slovenije ("Kotnik")* (Judgment of 19 July 2016, C-526/14, EU:C:2016:570) and in *Gerard Dowling and Others v Minister for Finance*

("Dowling")(Judgment of 8 November 2016, C-41/15, EU:C:2016:836), where the court noted (i) that shareholders or debtholders of a bank cannot harbour the 'legitimate expectation' that the bank would receive financial assistance and (ii) that a transitional period for the States to adjust to this regime was not necessary, since no legitimate expectation had been created, and, even if it had been created, *the objective of ensuring the stability of the financial system while avoiding excessive public spending and minimising distortions of competition* would qualify as the type of overriding policy interest that would justify excluding any transitional period).

In addition, in *Metlife* the US court considered that the FSOC decision was subject to a justification that the measure was "necessary" and "appropriate" and concluded that the FSOC had failed to take into consideration all the "relevant circumstances", thus rendering the decision "not appropriate". In the *Landeskreditbank* case the ECB had decided to classify Landescreditbank as "significant" based on its assets (larger than EUR 30 billion). Yet the appellant argued that the provision of the Single Supervisory Mechanism (SSM) Regulation, and Framework Regulation excluded ECB supervision in case of "particular circumstances". This, in the appellant's view, had to be examined in light of the fact that the whole provision rests upon the concept of "significant" institution, which, being an indeterminate legal concept, had to be interpreted in light of the principle of proportionality and subsidiarity, enshrined in article 5 of the Treaty of the European Union (TEU), which meant that supervision by the ECB must be "necessary", which it was not in the case, since the bank's low-risk model made supervision by the national authority (Bundesbank) sufficient, and the ECB's inappropriate. The Court, as mentioned above, first noted that there was no plea of invalidity of the relevant SSMR and Framework Regulation provisions on grounds of the general principles invoked by the appellants; then accepted the major premise, i.e. that the provision not only had to be interpreted in light of its text, but also of "*its context and of the objectives pursued by the set of rules of which it forms a part"*, in a way that rendered the rule consistent *"with the Treaty and the general principles of EU law"*. Yet, in the face of the clear text of the relevant provisions and in the absence of a plea of illegality of the same, the Court upheld the ECB position. Both decisions heeded to concepts such as "necessity", "appropriateness", or "proportionality".

c) A third example is found in a recent wave of cases on access to documents held by supervisors and resolution authorities. One of these decisions was adopted in the *Banco Popular* case by the Appeal Panel of the Single Resolution Board (one of us being the rapporteur of these decisions). The question revolved around how much access had been granted to shareholders of a bank in resolution to the documents supporting the decision that resulted in their money loss, by the

SRB. The answer by the Appeal Panel of the Single Resolution Board (SRB) was “not enough” [1] and such an answer was given not once but twice (also in respect of the subsequent decisions adopted by the SRB to comply with the first Appeal Panel decisions). The Appeal Panel decisions had to examine the SRB refusal to disclose the documents in light of the right that “any citizen” has to the disclosure of documents and discussed the general criteria to balance the right of access and the public interest, in particular financial stability concerns allegedly raised by the disclosure of the requested documents. T*ransparency, accountability, and judicial review were the guiding principles of the decisions and weighted against the financial stability risks allegedly posed by a complete disclosure.* The same conclusions were reached by the CJEU in *Espirito Santo* (Judgment 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234) *BaFin v Ewald Baumeister,* (Judgment of 19 June 2018, C-15/16, EU:C:2018:464) and *Enzo Buccioni* (Judgment of 13 September 2018, C-594/16, EU:C:2018:717) departing from Advocate General Bot’s opinion.

d) A fourth example is given by another recent decision of the SRB Appeal Panel, the very first on a MREL determination (Decision 16 October 2018, in case 8/18), where the Appeal Panel held that a discretionary determination of the Board to require a MREL at 4,9% of total liabilities including own funds was justified, noting that in the calibration of MREL requirements the Board enjoys a margin of technical discretion because the MREL calibration implies, by its very nature, a technical assessment of all specific factual circumstances and a balancing of interests and that the principle of proportionality must guide in properly calibrating the MREL requirement to ensure that the MREL target of the relevant credit institution (measured against its risk weighted assets) compares in a balanced way with the average national banks and the average Banking Union banks and is duly calibrated to the bank’s size, business model and risk profile, also to prevent competitive distortions.

Many other ‘hard cases’ could and should be added to this list (and our choice is to some extent arbitrary and only by way of example). One further good example is offered by the judgements of 13 July 2018 of the General Court of the European Union, in cases: T-733/16, *Banque Postale v ECB* EU:T:2018:477; T-745/16, *BPCE v ECB*, EU:T:2018:476, T-751/16, *Confédéeration nationale du Crédit mutuel v ECB*, EU:T:2018:475; T-757/16, *Société Générale v ECB*, EU:T:2018:473; T-758/16 *Crédit agricole v ECB*, EU:T:2018:472 and T-768/16, *BNP Paribas v ECB*, EU:T:2018:471. In these cases, the General Court stated a principle to ensure the reasonableness of the application of a prudential rule and acknowledged that, in order to ensure the *effet utile* of prudential rules granting a margin of technical discretion to the competent authorities in assessing *ex ante* future scenarios

[1] Appeal Panel Decisions in cases 37/2017-43/2017, on appeal from SRB decisions of 24 August and 6 September 2017 refusing the appellants’ access to the SRB June 7 decision adopting a resolution scheme for *Banco Popular Español, S.A.*, and the valuation report, resolution plan and other documents supporting that decision

relevant for the implementation of such rules the authorities should adopt as a reference only credible scenarios (GCEU, judgements of 13 July 2018, case T-733/16, Banque Postale v ECB EU:T:2018:477, paragraphs 79 and 90-91). In turn, also the judgements of the Grand Chamber of 20 March 2018 on the ne bis in idem principle (Judgment 20 March 2018, case C-524/15, Luca Menci v Procura della Repubblica, EU:C:2018:197; Joined cases C-596/16 and C-597/16, Enzo di Puma v. Consob, EU:C:2018:192; C-537/16, Garlsson Real Estate v. Consob, EU:C:2018:193) need to be mentioned, albeit they refer to market abuse, because they vividly portray the role of principles-based interpretativism in ensuring fundamental rights protection at the level of enforcement and application of administrative penalties in a context where such penalties are applied at the national level within the frame of a highly harmonized regime (as it happens, to some extent but in different forms, also under Article 18 SSMR).

8.- All the above elaborates a normative argument, which goes as follows: a principles-based approach is the most promising mechanism to ensure, first, that extremely complex sets of rules inspired by different, competing, and sometimes inconsistent, narratives, are rightly woven together and, second, to ensure the protection of fundamental rights. As already mentioned, this normative argument clearly has relevant practical implications for the use of administrative discretion in prudential supervision, in the first place, and then for its judicial review. This is not new. Principles-based interpretativism inspired many judgments of the Court of Justice in the review of antitrust decisions, where however, unlike in the prudential supervisory context, technical discretion is less enshrined in a complex framework of rules, and rather grounded on the few, open-textured rules of European competition law which, so far, contributed to the establishment of the current European standard of judicial review of complex economic assessment (full control as to the questions of law and fact and manifest error appraisal for complex economic assessments) (for a detailed account, see now A. Kalintiri, 2016, 1283-1316). In turn, as Paul Craig noted many years ago (in *The EU Legal Order after Lisbon*, 2010, p. 93 ff.) the judicial review itself of decisions of European agencies emerged first as a general principle - recognized by the Court in *Sogelma* (Judgment of 8 October 2008, T-411/06, EU:T:2008:419) and derived from the rule of law drawing on *Les Verts* (Judgment of 23 April 1986, C-294/83, EU:C:1986:166) – before being explicitly regulated by Article 263 TFEU after Lisbon. The good news is that our prudential rules, *already by design*, cannot be administered in isolation from principles and Treaty limits. Let us make a few examples taken by CRD IV and CRR. Article 7 CRD IV requires competent authorities to exercise their duties having in mind “the Union dimension of supervision” and thus “considering the potential impact of their decisions on the stability of the financial system” of all Member States concerned. In turn, chapter 1 of title VII CRD

IV sets out the relevant “principles of prudential supervision”, and in clarifying competence and duties on EU subsidiaries and branches emphasizes Treaty limits and Treaty principles. “Proportionality” (as a meta-principle) in the exercise of supervisory measures is a recurring theme throughout CRD IV: suffice to mention Article 43(2) on the proportionate use of precautionary measures, Article 73 on internal capital, Article 74(2) on internal governance and recovery and resolution plans, Article 76(1) on the treatment of risks (so as to take into account on an institution-specific basis also of risks posed by the macroeconomic environment or the status of the business cycle), Articles 77(2) and 78(3),(4) and (5) on IRB, Article 86(2) on liquidity risk, Article 104(3) on the exercise of supervisory powers. More in general all the institution-specific exercises of imposition of capital buffers, herein included countercyclical buffer rates under Article 135, as well as of MREL requirements under BRRD and SRMR are, by design, to be proportionate and non-discriminatory. “No discrimination” is also mentioned in Article 49(3) CRD IV. In turn, “diversity” of the banking industry is a “value”, if not yet a principle, mentioned in recital (49) CRD IV. Principles-based are the corporate governance requirements of sufficient good repute, knowledge and experience set out in Article 91(1) or of “adequate collective knowledge” and “diversity” set out in Article 91(7) and 91(10) respectively. But principles do not only guide the exercise of judgment on very broad themes; they do so also on very specific ones. Just take as example Article 150 CRR and its qualification of “immateriality” (in terms of size and risk profile) of exposures to the purpose of the use of the permanent partial use of the standardized approach. Article 150(2) sets out a rule that offers a presumption of materiality, but only for equity exposures. For all other exposures, only a proportionate judgment can flesh the open-texture of the rule. Not to mention, then, all supervisory powers, powers to impose administrative penalties and other administrative measures under Articles 64 and 65 CRD IV: clearly enough, they cannot be legitimately exercised (nor judicially controlled) without a proper calibration governed by a principles-based interpretation.

9.- It is now time to conclude. Our provisional and very rough conclusions are as follows.

In the first place, in an important number of cases, in a prudential decision or in a judgment revising such administrative decision does not suffice to discuss the scope of application of a legal rule in isolation, but it is necessary to understand the considerations of principle supporting that rule, and how they shape its scope and intensity. This must be clearly substantiated in the reasons of both the administrative decision that the supervisor adopts and in the judgment that national or European courts will deliver over the administrative decision.

In second place, fundamental rights and values are (and must be) integrated as part of the positive content of the entire framework. Fundamental rights and values are often examined at the end, as the inconvenient red lines that must not be crossed but are not conceived as principles inspiring the rules. This is insufficient. They are the more basic sources of legal authority, which means that a greater theoretical effort is needed to blend them within the narratives of prudential regulation.

In third place, principles-based interpretativism allows a better understanding of the role of other interpretative criteria, such as cost-benefit analysis (CBA). One confronted with a cost-benefit argument, needs to consider, first, whether the relevant legal sources are conceived with such criterion in mind, or a different one, and whether other sources that are inspired by different considerations of justice clash with, and trump over them.

In fourth place, principles-based interpretativism helps preventing an unchecked oscillation between the opposite poles of acknowledging the agency's "discretion", as a blank check, or ascertaining whether it reached "the" correct answer. One needs to examine, first, what was the legal mandate with which the supervisory authority was vested by the relevant rules, and how that mandate has to be examined in light of its finality. Then, one must examine that mandate in relation with other, potentially competing, mandates by the same agency, or other agencies whose activity may overlap with it. Then, it should analyze what are the legal reasons for vesting the agency with the ability to set goals, and interpret the corresponding provisions, and examine the specific scope of "discretion" in light of those reasons. Even within the scope of discretion it should examine whether the mechanisms of accountability, consisting in transparency duties, duties to give reasons, or the parties' right to be heard, ensured the robustness of the decision-making process.

All this may sound just theoretical. It is not. The law coherence with a set of shared values is its major source of legitimacy.