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LAW AND ECONOMICS YEARLY REVIEW

ISSUES ON FINANCIAL MARKET REGULATION, BUSINESS DEVELOPMENT AND GOVERNMENT'S POLICIES ON GLOBALIZATION

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The "Law and Economics Yearly Review" is an academic journal to promote a legal and economic debate. It is published twice annually (Part I and Part II), by the Fondazione Gerardo Capriglione ETS (an organization aimed to promote and develop the research activity on financial regulation) in association with Queen Mary University of London. The journal faces questions about development issues and other several matters related to the international context, originated by globalization. Delays in political actions, limits of certain Government's policies, business development constraints and the "sovereign debt crisis" are some aims of our studies. The global financial and economic crisis is analysed in its controversial perspectives; the same approach qualifies the research of possible remedies to override this period of progressive capitalism's turbulences and to promote a sustainable retrieval.

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THE IMPACT OF EU REGULATION ON MODELS OF BANKING AND FINANCE

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Proceedings of the 2th Italian - Norwegian Conference January 13-14, 2025 Rome

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EDITED BY

MADS ANDENÆS AND VALERIO LEMMA

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THE EVOLVING KNOWLEDGE, SKILLS AND EXPERIENCE OF "SUITABLE" BANK BOARDS IN THE EU REGULATORY FRAMEWORK

Gianfranco Alfano - Lorenzo Rodio Nico

ABSTRACT: *This article examines the recent evolution of EU legislation on the "suitability" of bank boards, particularly in light of the amendments introduced by Directive (EU) 2024/1619 (CRD6). After outlining the rationale for fit and proper assessments in the banking sector, the paper illustrates the fragmented legal framework that has arisen across Member States. It explores how CRD6 seeks to harmonize rules by revising Article 91 of the Directive 2013/36/EU, introducing Article 91b on key function holders, and strengthening the requirements and procedural aspects for assessing individual and collective suitability.*

A key development is the explicit inclusion of ESG and ICT risks as part of the collective suitability criterion. While these competencies are assigned to the management body as a whole, the need for board members to maintain at least a baseline understanding of sustainability and digital risks is highlighted. Finally, the importance of training programs is emphasized, as they enable bank boards to maintain broad and up-to-date knowledge, skills and expertise in constantly evolving fields.

SUMMARY: 1. A brief introduction. - 2. The purpose of (the discipline on) the suitability assessment of the management body and key function holders of banks. - 2.1. The five criteria for the assessment of 'suitable' boards. - 3. The (fragmented) regulatory framework on fit and proper across Member States. - 4. Enhancing the convergence of supervisory practices on fit and proper assessment: the new articles 91 and 91b of Directive 2013/36/EU. - 5. The consideration of ESG

factors in the context of the collective suitability criterion. - 6. Emerging ICT Risks, Artificial Intelligence, and preemptive training. - 7. Better rules for better boards? The role of training programs.

1. The European rules governing the suitability assessment of the management body (and key function holders) of banks have recently been amended by Directive (EU) 2024/1619 ("CRD6"), which partially redesigned Article 91[1] of the Directive 2013/36/EU and introduced *ex novo* the Article 91b, concerning the suitability assessment of key function holders in banks. The present work aims to analyze the potential impact of the new provisions set by CRD6 on the fragmented framework of fit and proper assessment across Member States and on the overall quality of bank boards. In particular, it will focus on the provisions regarding ESG and ICT knowledge that the management body is required to possess, in order to identify the impact of these requirements on the individual and collective suitability of boards, on the (initial and ongoing) procedures for the suitability assessment, and on the training programs set by credit institutions, verifying whether the rules established by the European legislator are appropriate to ensure that board members maintain continuously updated expertise on matters (and risks) that, by their very nature, are subject to constant evolution.

2. To analyze the evolutionary trajectory of the regulation concerning the requirements of bank directors, it is first necessary to consider its underlying rationale and the public interests that the legal system seeks to protect through it. One must address the question: why do we need to assess a specific "suitability" for the management body (and its members) of banks?

* This paper is the result of a unitary approach and a common reflection by the two authors. However, paragraphs 1, 2, 2.1, 5 and 7 can be attributed, in particular, to Gianfranco Alfano; paragraphs 3, 4 and 6 can be attributed, in particular, to Lorenzo Rodio Nico.

[1] Article 1(30) of the CRD6.

To answer this question, it is helpful to begin by noting that, especially in the banking sector, the need to protect general interests may justify the intervention of public authorities, whose remit extends to influencing the "organizational structures" of enterprises.[2] It is therefore based on these considerations that the abstract justification arises for introducing, at the European level, specific rules on the corporate governance of banks[3] - rules that are not replicated in the framework governing enterprises operating outside of financial markets.

The current regulatory framework on bank governance is, to a large extent, shaped by the "lessons" drawn from the great financial crisis:[4] indeed, Directive 2013/36/EU, in justifying the introduction of more stringent rules on bank corporate governance, noted that weaknesses in corporate governance in a number of institutions have contributed to excessive and imprudent risk-taking in the banking sector which has led to the failure of individual institutions and systemic problems in Member States and globally.[5] This was not an isolated phenomenon: the regulatory and supervisory developments of the past decade have clearly been influenced by other, more recent crises that have affected the banking sector[6] (such

[2] OPPO, *Princìpi*, Torino, 2001, p. 79.

[3] BODELLINI, *Corporate Governance of Banks and Financial Stability: Critical Issues and Challenges Ahead*, in *Business Law Review*, 2018, p. 160. See FRIGENI, *L'idoneità all'incarico degli esponenti aziendali delle banche*, in *Nuove leggi civ. comm.*, 2023, n. 2, p. 280, who underlines the "specific public value" of the European rules on banking corporate governance.

[4] CAPRIGLIONE, *Regolazione europea post-crisi e prospettive di ricerca del diritto dell'economia: il difficile equilibrio tra politica e finanza*, in *Riv. dir. proc. civ.*, 2016, n. 2, p. 537 ff. Also see ROSSANO, *Diversity e parità di genere: il contributo delle scienze psicologiche nell'analisi della normativa sulla composizione dei boards*, in *Riv. trim. dir. econ.*, 2015, n. 3, p. 253.

[5] Recital n° 53 of Directive 2013/36/EU. On these premises, the fit and proper framework aims «to remedy weaknesses that were identified during the financial crisis regarding the functioning of the management body and its members».

[6] PORTALE, *La corporate governance delle società bancarie*, in *Riv. società*, 2016, p. 49. As underlined by FERRARINI, *Understanding the Role of Corporate Governance in Financial Institutions: A Research Agenda*, in *ECGI Law Working Paper*, 2017, n. 347, p. 7, it's quite usual for regulatory interventions regarding the corporate governance of banks to be adopted in response to «*either corporate scandals or financial crises*».

as, recently, the failure of Silicon Valley Bank in the United States).[7]

Among the various aspects of bank governance addressed by the European legislator, particular importance has been placed on the quality of the human capital on which the bank relies, beginning with highest-ranking figures (board members and key function holders). Systemic crises have highlighted critical issues related to the qualifications and composition of banks' management bodies:[8] in this regard, it is worth noting several studies that have specifically identified a correlation between (insufficient) board competencies and the emergence of crises in German[9] and Spanish banks.[10] From a broader perspective, scholars have observed that during the financial crisis, «many bank boards did not fully understand or underestimated the risks taken by the management they had to control».[11]

Thanks to these studies, awareness has increased regarding the impact of the management body's suitability not only on the safety and soundness of the bank itself, but also on the broader banking sector. This, in turn, has laid the groundwork for targeted regulatory measures inspired by the principle that «well-run banks are the bedrock of a stable banking system».[12]

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[7] See ELDERSON, *Effective management bodies - the bedrock of well-run banks*, in *ECB supervision blog*, 20 July 2023, who, in examining the causes of the failure of Silicon Valley Bank, states – quoting the words of the U.S. Federal Reserve (FEDERAL RESERVE SYSTEM, *Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank*, April 2023) - that «Silicon Valley Bank's board of directors and management failed to manage their risks», thus underlining the parallel need to pay due attention to the suitability assessment of the management body of banks in the EU.

[8] TOUNTOPOLOUS, *Composition and Qualifications of Credit Institutions' Board of Directors: European Requirements and the Principle of Proportionality*, in *ECFR*, 2021, p. 79 ff.

[9] See HAU - THUM, *Subprime Crisis and Board (In-)Competence: Private vs. Public Banks in Germany*, in *ECGI Working Paper Series in Finance*, n. 247/2009, available at *www.ssrn.com*.

[10] CUNAT - GARICANO, *Did Good Cajas Extend Bad Loans? The Role of Governance and Human Capital in Cajas 'Portfolio Decisions*, 2009, available at *www.ssrn.com*.

[11] HOPT, *Better Governance of Financial Institutions*, in *ECGI Working Paper Series in Law*, n° 7/2013, available at *www.ssrn.com*, p. 52.

[12] ELDERSON, *Effective management bodies*, *cit.*; ID., *Banks' governance and risk culture a decade*

In other words, while recognizing the importance of provisions concerning, among other things, the allocation of duties and responsibilities among directors (and bodies) and remuneration and incentive policies,[13] it has also been noted that «in the end, everything depends on the people».[14]

Based on these observations, the idea that «a fit and proper management body is a key driver of good governance»[15] has gained widespread acceptance; this has led to the introduction of a «robust 'fit-and-proper' framework for assessing the suitability of members of the management body and key function holders», which the European legislator explicitly considers «a crucial factor in ensuring that institutions are adequately run and their risks are appropriately managed».[16] It is precisely in this context that the rules concerning the (qualitative and quantitative) composition of the bank's management body come into play, grounded in the principle that «the basis for quality in a board of directors lies in its composition».[17]

Hence, the fit and proper requirements simultaneously serve as both a prerequisite and a reflection of the special governance rules laid down by European regulations for banks. The curtailment of private autonomy that these rules imply[18]

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on: progress and shortcoming, 24 July 2024.

[13] Recital n° 62 of the Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013.

[14] HOPT, *Corporate Governance of Banks after the Financial Crisis*, in WYMEERSCH - HOPT - FERRARINI (eds.), *Financial Regulation and Supervision*, Oxford, 2012, p. 366. Also see MUCCIARONE, *L'adeguatezza degli "amministratori" della banca. Dal capitale al capitale umano*, Milano, 2019, *passim*, spec. p. 4 ff.

[15] BUSCH - TEUBNER, *Fit and proper assessment within the Single Supervisory Mechanism*, in BUSCH - FERRARINI (eds.), *European Banking Union*, Oxford University Press, 2nd ed., 2020, p. 281 ff.

[16] Recital n° 45 of the CRD6.

[17] EUROPEAN COMMISSION, *Green Paper on "Corporate governance in financial institutions and remuneration policies"*, Brussels, 2 June 2010, par. 3.3. Cfr. TURELLI, *Professionalità, competenza degli amministratori e* board diversity, in *Riv. soc.*, 2022, p. 433.

[18] See CAPRIGLIONE - SACCO GINEVRI, *Metamorfosi della governance bancaria*, Milan, 2019, p. 186.

is thus justified, in principle, to protect broader public interests.[19] At the same time, the powers conferred upon public authorities - which may result in preventing an individual's appointment or in removing an unsuitable member[20] - serve as an expression of these public interests.[21]

It therefore appears appropriate to conduct a concise examination of the criteria established by the European legislator, in order to assess whether their specific formulation effectively safeguards the general interests underlying the relevant legislation without exceeding what is necessary.[22]

2.1. The five criteria on which the assessment is based are set out in Article 91 of the Directive 2013/36/EU, as recently amended by CRD6.

The rules on the suitability of bank directors are primarily intended to ensure that banks are run by the right people[23], *i.e.* individuals who are "fit" (meaning they possess the necessary professional qualifications and leadership qualities) and "proper" (meaning they are of good repute). Directors must have sufficient knowledge, skills, and experience to perform their duties and to fully understand the bank's operational structure ("know your structure"), the types of activities the bank intends to pursue ("know your business"), and their role in the bank's

[19] DE POLI, *Ordinamento e impresa bancaria*, in CORRIAS - LENER (eds.), *Manuale di diritto dell'economia. I mercati finanziari e dell'energia*, Torino, 2024, p. 199.

[20] ARRIGONI - RIVOLTI, *Fit and Proper Requirements in the EU Banking Sector. A Step Further*, in *European Business Organization Law Review*, 2022, p. 983, highlight the «gatekeeper role» played by the ECB «in preventing individuals who would pose a risk to the proper functioning of the management body from joining the board or from continuing in their role».

[21] VESE, *Gli interessi pubblici nelle crisi bancarie*, Milano, 2024, p. 236.

[22] It is worth noting the opinion of some scholars who consider the regulatory framework on the fit and proper of bank directors to be excessively broad: see BRESCIA MORRA, *Le norme sulla corporate governance delle banche: un ritorno all'antico?*, in CALLEGARI - CERRATO - DESANA (eds.), *Governace e mercati. Studi in onore di Paolo Montalenti*, vol. II, Torino, 2022, p. 1115 ff.; MIRONE, *Regole di governo societario e assetti statutari delle banche tra diritto speciale e diritto generale*, in *Banca imprese società*, 2017, n. 1, p. 67.

[23] Recital n° 45 of CRD6.

corporate governance ("know your role").[24] In addition, each member of the management body must have leadership qualities, codified in the requisite of "independence of mind" (admittedly more challenging to define and verify)[25], and honesty. Furthermore, the rules on suitability aim to ensure that bank directors should always be in a position to act in the best interest of the bank. Consequently, particular attention is devoted *inter alia* to the issue of conflicts of interest[26], as well as to the requirement of time devotion.

The criteria identified therefore first focus on the individual profile, highlighting the technical and behavioral qualities of board members. Specifically, members must possess knowledge and experience acquired over the course of their professional careers and/or education, as well as personal and behavioral qualities[27] (particularly honesty and leadership). Combined, these qualities enable board members to adopt a «skeptical posture»[28] (founded, of course, on solid grounds rather than on *a priori* assumptions)[29] toward the views of other members and the information provided by management.[30]

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[24] BISCHOF, *Fitness and Propriety of bank Directors in the Light of the Global Financial Crisis 2007-2009*, in *GPR*, 2013, n. 6, p. 325.

[25] LENER - DI CIOMMO, *Esponenti aziendali: indipendenza e indipendenza di giudizio*, in *www.dirittobancario.it*, March 2021, p. 9.

[26] According to ECB, *Draft guide on governance and risk culture*, cit., par. 3.3.3, the ECB expects that «no member of the management body, whether in its supervisory function or in its management function, can have any potential or perceived conflict of interest that may impede their ability to perform their duties independently and objectively without influence from other persons or due to other position held».

[27] Behavioral qualities (such as the requirement of independence of mind) are very difficult to define and to asess, in the absence of a normative typification of the "virtuous" behavioral standards: see LENER, *Il coraggio, la convinzione e la forza dell'amministratore bancario*, in *AGE*, 2022, n. 2, p. 479.

[28] EISENBERG, *The Board of Directors and Internal Controls*, in *Cardozo Law Review*, 1997, p. 246.

[29] LENER, *Il coraggio*, *cit.*, p. 479.

[30] ECB, *Draft guide on governance and risk culture*, July 2024, available at *https://www.bankingsupervision.europa.eu/framework/legal-framework/public-consultations/pdf/ssm.pubcon202407_draftguide.en.pdf*, July 2024, par. 3.1, emphasize the importance of the

Nonetheless, there is an increasingly pressing need for the management body as a whole to have an adequate composition in order to be capable of making appropriate decisions.[31] This supports the emphasis on diversity[32] and heightens the importance of developing constructive criticism through genuine debate[33] - enriched precisely by heterogeneous composition[34] - and of counteracting groupthink[35] and herd behavior.[36]

As a result, there is a growing focus on the collective quality of the board, based on the assumption - supported by empirical studies - that «the degree of collective suitability of the board of directors positively affects bank economic and financial performance and risk-adjusted performance, and also, to a lesser extent, the ability to control risks».[37] In this regard, heterogeneity in the board's composition (both in professional terms and in the demographic characteristics of

«constructive challenge» by non-executive members of the board, that can be described as «asking the right question at the right time with the right intent, thereby providing insight and support to the executive function».

[31] See ECB, *Annual Report on Supervisory activities 2023*, par. 1.2.3.2.

[32] According to ECB, *Draft guide on governance and risk culture*, *cit.*, par. 3.3.2, «diverse management bodies make better business decisions». See MCCORMICK - MINTO, *Governance of banks in an era of regulatory change and declining public confidence*, in *Law and Economics Yearly Review*, 2014, n. 1, p. 43.

[33] ECB, *Draft guide on governance and risk culture*, cit., par. 3.1: «substantial discussion and debate are expected to take place within the management body and its committees (…). The ECB considers that this presupposes that all management body members are included in the discussions and have the opportunity to express their opinions».

[34] MIRONE, *cit.*, p. 65.

[35] ROSSANO, *Diversity e parità di genere: il contributo delle scienze psicologiche nell'analisi della normativa sulla composizione dei boards*, in *Riv. trim. dir. econ*., 2015, n. 3, p. 256 ff.

[36] These phenomena, combined with the lack of a wide range of knowledge and experience among the board members, can lead to phenomena of so-called "board myopia", which induces to underestimate the risks that the entity is facing (see AVGOULEAS - CULLEN, *Market Discipline and EU Corporate Governance Reform in the Banking Sector: Merits, Fallacies, and Cognitive Boundaries*, in *Journal of Law and Society*, 2014, p. 39).

[37] DI BATTISTA - L. NIERI - M. RESTA - TANDA, *Does Board Collective Suitability Affect Performance and Risk? Evidence from European Banks*, in *International Journal of Economics and Finance*, 2022, n. 2, p. 17.

its members - among which gender diversity is particularly salient)[38] proves crucial. Gender diversity, in turn, can be justified on efficiency grounds, linked to improved decision-making performance;[39] such diversity fosters a genuine exchange of views before decisions are reached[40]. Additionally, attention must also be paid to "quantitative" aspects of the management body's composition, such as the board's size, which should not be excessive to avoid undermining its proper functioning.[41]

Although the regulations on board composition do set out certain more or less stringent guidelines, the rules are characterized by a high degree of flexibility. The preferred composition is the one best suited to the specific needs of the bank, since no "one-size-fits-all" solution can be deemed valid for all entities.[42] Otherwise, there is a risk - certainly to be avoided - that strict compliance with the rules might hinder, rather than encourage, the board's effective functioning.[43] On the other hand, it is not excluded that the banks themselves - in light of their specific needs -

[38] Recital n° 60 of Directive 2013/36/EU.

[39] See PELLEGRINI - DAVOLA, *Indipendenza economica ed empowerment femminile: riflessioni in prospettiva di genere sul diritto del mercato finanziario*, in *RTDE*, 2024, suppl. n. 1, p. 406 ff.

[40] LEMMA - CLEMENTS, *Being a banking director: regulatory difficulties between sanctions and interlocking directorates*, in *Open Review of Management, Banking and Finance*, 2016, available at *https://wp.me/p5r4Oe-c1*, underline that supervisors «*do not appreciate boards that are limited to a role of mere approval of decisions already taken (by CEOs)*».

[41] ECB, *Draft guide on governance and risk culture*, cit., par. 3.3: «it is expected that the size of the management body is appropriate to allow it to effectively carry out its oversight role and other responsibilities». See FINESI, *Suitability of Bank Directors in Europe: Just a Matter of Being 'Fit & Proper'?*, in *European Company and Financial Law Review (ECFR)*, 2015, p. 67.

[42] In general, as highlighted by MAGNIER, *Makeup of Boards: A New Corporate Paradigm, For Which Governance?*, in *EBLR*, 2019, p. 238 ff., «there is no consensus on the best way to compose a board»; this implies that the same assessment conducted first internally and then by the supervisory authority on the collective suitability of the board follows a case-by-case approach.

[43] For example, scholars has focused on the danger that certain requirements (i.e. that of independence of mind) translate into a (not very useful) burden on the functioning of the managing bodies (for example, in the process of taking minutes of meetings) rather than in the desirable improvement of the overall quality of the board: see LENER, Il *coraggio, cit.*, p. 479; LEMMA, *Quali orizzonti per la corporate governance? (Spunti dal libro "Metamorfosi della governance bancaria" e dal nuovo Regolamento della Banca d'Italia in materia di governo societario del 5 dicembre 2019)*, in *Riv. trim. dir. econ.*, 2020, n. 1, p. 113.

may elevate the selection requirements for (certain) members in their internal suitability policies by identifying specific criteria (e.g., on soft skills) that «go beyond standard fit and proper criteria»[44] and can help achieve a more heterogeneous and appropriate composition for the bank.

3. The European regulatory framework on fit and proper is supplemented by national law, which the ECB is also required to apply during its activities pursuant to the SSM Regulation.[45]

This framework can vary considerably, in light of the broad discretion conferred upon Member States by the Directive. The criteria laid down in the Directive 2013/36/EU «are vague and must be further specified before they can be applied to a banking institution»; on the other hand, the rules set out in the Directive are not rules of maximum harmonization, thus «national legislators retain the discretion to impose stricter criteria reflecting national particularities and needs».[46] Moreover, in certain jurisdictions, the CRD's provisions have been transposed at least in part via secondary legislation,[47] thereby creating a patchwork of national specificities.

The Guidelines issued by the ESAs (*i.e.* the Joint EBA and ESMA *Guidelines on the assessment of the suitability of members of the management body and key*

[44] This is one of the best practices suggested in the ECB, *Draft guide on governance and risk culture*, cit., par. 3.5.1.

[45] According to art. 4, par. 3, of the Regulation (EU) 1024/2010 of 15 October 2010 ("SSM Regulation"), «the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives». According to ECB, *Draft guide on governance and risk culture*, cit., par. 2.2, in its supervisory approach, «first, the ECB considers the national law applicable to the bank which transposes and implements the CRD; second, it interprets that law in accordance with the applicable European and international standards and applies it».

[46] TOUNTOPOLOUS, *op. cit.*, pp. 82-83.

[47] PORTALE, *La corporate governance delle società bancarie*, in *Riv. società*, 2016, p. 54.

function holders, published on 2 July 2021, hereinafter "EBA-ESMA Guidelines")[48] and the ECB *Guide to fit and proper assessment*, updated in December 2021 ("ECB Guide"),[49] could not resolve the aforementioned inconsistencies: in both cases, these sources - clearly falling within the category of soft law - establish principles that do not impose new obligations on entities or authorities;[50] nor can they serve as a basis for requiring national legislators to introduce consistent national rules.[51]

Consequently, the resulting framework remains highly fragmented. As outlined by the European Commission in the explanatory memorandum accompanying the CRD6 proposal, «the fit & proper assessment framework is one of the least harmonized areas of EU bank supervisory law». This fragmentation can evidently lead to inefficiencies, particularly for cross-border entities (which may, for instance, be required to be compliant with many different and diverging legal frameworks)[52], and it prevents the ECB from adopting a fully unified approach.[53]

It is worth recalling that the assessment of directors' suitability follows a two-stage process. The first stage consists of the internal evaluation conducted by the bank itself[54] (specifically by the management body itself, which moves from being

[48] EBA-ESMA *Guidelines on the assessment of the suitability of members of the management body and key function holders*, EBA/GL/2021/06 - ESMA35-36-2319, 2 July 2021.

[49] ECB *Guide to fit and proper assessment*, December 2021.

[50] REVIGLIONO, *Short considerations on members of the management body and key function holders requirements in the light of ECB Guidelines (...awaiting new internal and European regulations)*, in *Nuovo dir. soc*., 2017, n. 7, p. 681.

[51] MIRONE, *op. cit.*, p. 68, who has identified in these documents the ambition of the supervisory authorities to play a "supplementary" role with respect to the European legislator, for the purposes of the harmonization of the regulatory framework on fit and proper.

[52] Recital n. 45 of CRD6.

[53] According to ECB, *Annual Report on supervisory activities 2015*, «the large number of fit and proper assessments was particularly difficult to manage, on the one hand because all subsidiaries of significant institutions are subject to the fit and proper process and, on the other, because of the diversity of the applicable legal regimes». More recently, see ECB, *Annual Report on supervisory activities 2019*, par. 2.1.2, available at *https://www.bankingsupervision.europa.eu/press/other-publications/annual-report/pdf/ssm.ar2019~4851adc406.en.pdf*.

[54] ALEXANDER, *Regulating Bank Governance and the EU Capital Requirements Directive*, in *EBLR*, 2017, p. 813 s.

a mere recipient of a given set of rules to playing an active role in the entire process, thus becoming a 'guarantor' of the proper composition of the board).[55] This underscores the principle that the bank itself bears the primary responsibility for selecting fit and proper members, as well as for conducting both initial and ongoing suitability assessments.[56] Nevertheless, this initial internal assessment is followed by an external evaluation carried out by the competent supervisory authority,[57] which is entrusted with enforcing the European rules as duly transposed into the relevant national legal framework. For example, while some Member States have fully adopted the so-called *ex ante* assessment approach, others (such as Italy)[58] generally permit an *ex post* assessment (unless banks themselves choose to consult the competent authority beforehand, as recommended by the ECB).[59]

Furthermore, certain scholars highlight an additional challenge: the difficulty of determining the applicable rules when national provisions diverge from the Directive's (albeit general) principles.[60] This may occur, for instance, in jurisdictions

[55] GALLUCCIO, *La verifica di idoneità degli amministratori delle banche quotate "alla prova" del nuovo voto di lista: prime riflessioni alla luce delle recenti novità della legge 21/2024 (legge capitali)*, in *Riv. dir. banc.*, 2024, p. 171. However, national legal systems do not attribute "investigative" powers to the board; thus, internal suitability assessments must be based principally on the information provided by board members (see LENER, *Il coraggio*, *cit.*, p. 476).

[56] TOMIĆ - TOMAŠEK - ZUNIĆ, *Fit and proper assessment of board members*, in *InterEULawEast Journal for the international and european law, economics and market integration*, 2020, n. 2, p. 276.

[57] As recalled by MOLONEY, *The governance of the Single Supervisory Mechanism and EBC/NCA relations: legal resilience and operational innovation*, in *Quaderni di Ricerca Giuridica Banca d'Italia*, n° 101, July 2024, p. 42, «most of the decisions adopted by the ECB as regards SIs relate to the CRD-required 'fit and proper' assessment of certain bank officers (in the region of 40%-50% of decisions)».

[58] ROSSANO, *Prime riflessioni sul decreto sui requisiti degli esponenti aziendali*, in *dirittobancario.it*, December 2020, p. 3 ff.

[59] According to ECB, *Annual Report on supervisory activities 2021*, par. 2.2.1, the ECB «encourages specific credit institutions that are required under national law to adopt an ex-post assessment regime to provide the ECB with information related to their suitability assessments of executive members of the management body before making appointments».

[60] ANNUNZIATA - D'AMBROSIO, *L'applicazione del diritto degli Stati membri da parte della Banca Centrale Europea*, in *Giur. comm.*, 2019, n. 4, II, p. 715.

where national legislators establish predefined eligibility thresholds that constrain the supervisory authority's discretion; as a result, the absence of disqualifying factors may be deemed sufficient to fulfill the suitability requirements, as is the case in Italy.[61]

These varying regulatory regimes complicate both the tasks of supervisors and the activities of cross-border entities, which must navigate conflicting legal frameworks[62]. Some scholars even contend that «diverging substantive and procedural national requirements contradicted so far the very essence of the SSM, yet could not find a solution in the supervisory practice».[63]

Consequently, it is hardly surprising that one of the principal aims declared for CRD6 is to strengthen harmonization efforts[64], particularly with respect to procedural aspects.[65]

4. While the fit and proper framework introduced by Directive 2013/36/EU has substantially addressed many of the critical issues that emerged in the aftermath of the crisis[66], certain vulnerabilities still persist. In 2023, the ECB itself highlighted shortcomings related to the formal independence requirements for directors and to board diversity[67]; Similar concerns have been raised regarding directors' time commitments, which the ECB has described as a «recurring issue» since 2018[68] . These challenges underscore the ongoing need to strengthen supervisory practices and ensure the robust European standards. It is therefore

[61] FRIGENI, *op. cit.*, p. 292.
[62] Recital n° 45 of CRD6.
[63] LAMANDINI, *SSM ten years since. Where are we*, in *Giur. comm.*, 2024, n. 3, p. 527.
[64] Recital n° 45 of CRD6.
[65] TOUNTOPOLOUS, *op. cit.*, p. 106.
[66] BERTAY - HUIZINGA, *Has the application of the "fit and proper" regime improved governance structures in the Banking Union?*, 2020.
[67] ECB, *Annual Report on supervisory activity 2022*, par. 1.2.2.2.
[68] LAPOMARDA - GALLI, *Il "time commitment" dei consiglieri non esecutivi: alcune note a margine del benchmark BCE*, in *dirittobancario.it*, 7 October 2019.

unsurprising that management body effectiveness – particularly with respect to board composition and collective suitability – has remained one of the ECB's key supervisory priorities for 2022–2024.[69]

The persistence of certain critical issues justifies the recent regulatory attention devoted to this matter. Fit and proper requirements reflect the evolving duties and responsibilities of directors, which have undoubtedly expanded amid the ongoing "twin transitions"[70] in the financial sector.[71]

The risks that financial intermediaries must face (and, consequently, understand) are changing, as are the challenges and strategic objectives that management bodies must pursue to steer their respective entities.[72] Consequently, the regulatory framework governing the suitability of bank directors is presently in a "decisively expansive phase".[73]

Simultaneously, considerable attention is being directed toward procedural aspects of the suitability assessment process, with the aim of fostering greater regulatory harmonization and streamlining procedural efficiency.

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[69] ECB, *SSM Supervisory Priorities for 2022-2024*, 7 December 2021.

[70] FOÀ, *Corporate social e digital responsibility e obiettivi del PNRR: confini e intrecci*, in *LLR*, 2023, n. 2, p. 66 ff.; MUENCH - STOERMER - JENSEN - ASIKAINEN - SALVI - SCAPOLO, *Towards a green and digital future. Key requirements for successful twin transitions in the European Union*, Publications Office of the European Union, Luxembourg, 2022, available at *https://publications.jrc.ec.europa.eu/repository/handle/JRC129319*.

[71] SARTORI, *Attività bancaria e processi di transizione*, in *Riv. trim. dir. econ.*, 2024, suppl. n. 1, p. 276 ss. The interrelationship between the two transitions (sustainable and technological) are highlighted *inter alia* by AMMANNATI, *I nuovi paradigmi dell'impresa bancaria in epoca di transizione*, in *A 30 anni dal Testo unico bancario (1993-2023): The Test of Time - Quaderni di Ricerca Giuridica Banca d'Italia*, n. 99, February 2024, p. 21 ff.; EAD., *Transizione energetica, "just transition" e finanza*, in *Riv. trim. dir. econ.*, 2022, suppl. n. 1, p. 293 ff.; PASSALACQUA, Green Deal *e transizione digitale verso un diritto eventuale*, in EAD. (ed.), *Diritto e mercati nella transizione ecologica e digitale*, Milano, 2021, p. 3 ff.

[72] According to ECB, *Draft guide on governance and risk culture*, cit., par. 2.2, «all institutions should continue to adapt to evolving risks and challenges that may arise owing to a bank's specific risk profile and business model as well as externalities (...) including cyber and environmental, social and governance (ESG) risks».

[73] ANNUNZIATA, *La disciplina del mercato dei capitali*, 12 ed., Torino, 2023, p. 78.

CRD6 introduces significant modifications, not only in form but also, in many respects, substantive, primarily by extensively revising Article 91 of the Directive 2013/36/EU to harmonize certain procedural aspects. In addition, it introduces Article 91b, which standardizes both the definition and the suitability requirements of «key function holders»[74] (e.g., the CFO and the heads of internal control functions). This change necessitates substantial adjustments in legal systems (such as Germany's)[75], where these provisions were previously absent.[76]

A salient example of the Directive's effort to harmonize (and enhance) the regulatory framework is the broader requirement to conduct an assessment of prospective board members prior to their appointment[77] - when consistent with the national rules related to directors' selection mechanisms, which are governed by the *lex societatis* of each Member State and remain unaffected by the Directive.[78]

The preference for an *ex ante* approach is firmly justified and aligns with "soft" regulations[79] long promoted by European and national supervisory authorities, which encourage banks to conduct internal (and, in some cases, external) assessments prior to appointing members of the management body.[80]

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[74] Pursuant to Art. 3(1), n° 9a, of Directive 2013/36/EU (as amended by CRD6), the "key function holders" are «the persons who have significant influence over the direction of an institution but are not members of the management body, including the heads of internal control functions and the chief financial officer, where those heads or that officer are not members of the management body». Cfr. FINESI, *op. cit.*, pp. 61 and 78.

[75] WUNDENBERG, *Reform des Fit-and-Proper-Regimes nach den Kommissionsentwürfen (CRD VI)*, in *ZBB*, 2022, n. 4, p. 213 ss.

[76] The percentage of suitability assessments relating to key function holders in 2021 was around 4% out of the total fit and proper assessments carried out by the ECB (see ECB, *Annual Report on supervisory activities 2021*, par. 2.2.

[77] Cfr. Recital n° 49 of CRD6.

[78] According to Art. 91(14) of CRD6, the discipline enshrined in Art. 91 «shall be without prejudice to provisions of the Member States (...) on appointments where the management body does not have any competence in the process of selecting and appointing its members».

[79] On the relevance of "soft law", see CAPRIGLIONE, *Fonti normative*, in CAPRIGLIONE (ed.), *Manuale di diritto bancario e finanziario*, Milano, 2023, p. 30 ff.

[80] Cons. Stato, 6 October 2020, n° 01034/2020.

The superiority of this approach arises from its capacity to forestall the adverse consequences associated with an ex post approach[81] - namely, the appointment of one (or more) unsuitable individuals. Even the removal of such individuals not only harms the reputation of the bank and the person concerned[82] but also undermines public confidence in the broader banking sector.

In this regard, CRD6 introduces provisions concerning the assessment of certain members of the management body in large institutions (paragraph 1d), mandating (when possible) an *ex ante* approach.[83] Specifically, it requires that «the competent authority receives a suitability application without undue delay, and as soon as there is a clear intention to appoint a member of the management body in its management function or the chair of the management body in its supervisory function and, in any event, at the latest 30 working days before the prospective members take up their position». Moreover, the suitability application is expected to initiate a dialogue between the "large institution" and the competent supervisory authority; this process, which must be conducted in «a spirit of cooperation»[84] and in accordance with the Guidelines to be issued by the EBA,[85] aims to resolve any obstacles related to the suitability of the prospective member. However, the harmonization process on this specific topic will benefit from the adoption of a Delegated Regulation by the European Commission[86], based on the RTS formulated

[81] Cfr. BLANDINI, *Verso i nuovi requisiti e criteri di idoneità degli esponenti bancari*, in *Sole24Ore*, 20 November 2020, available at *https://www.ilsole24ore.com/art/verso-nuovi-requisiti-e-criteri-idoneita-esponenti-bancari-ADKytc3*.

[82] TOUNTOPOLOUS, *op. cit.*, p. 80.

[83] PRESTI, *Requisiti e criteri di idoneità degli amministratori di banche: il consiglio come giudice di se stesso*, in *Banca impresa società*, 2022, p. 24, who highlights the potential disadvantages of such an "anticipation" of the assessment «as soon as there is a clear intention to appoint a member of the management body».

[84] Recital n° 49 of the CRD6.

[85] Art. 91(1e) of the CRD6.

[86] PALM - STEYERBERG, *Sustainability and fit and proper testing in the boards of banks, insurers and investment companies*, in ALEXANDER - GARGANTINI - SIRI (eds.), *The Cambridge Handbook of EU Sustainable Finance. Regulation, supervision and governance*, Cambridge, 2025,

by the EBA by July 10, 2026, «to further specify the minimum content of the suitability questionnaire, *curricula vitae* and the internal suitability assessment to be submitted to the competent authorities for conducting the suitability assessment referred to in paragraph 1f».

Continuing the analysis of the innovations introduced by CRD6, it may be seen as a first (implicit) indication of the European legislator's interest in the *tenure* of directors (or, more precisely, in the coordination of term expirations). This interest emerges in the provision that excludes the *ex ante* procedure carried out by the outgoing management body when the majority of its members are replaced by newly appointed directors. Although there is no explicit reference to a maximum term limit, paragraph 1a implicitly suggests the need for structured succession planning, including mechanisms such as staggered boards. These mechanisms would not only facilitate the *ex ante* assessment but could also enable adjustments in board composition, so to «ensure over the time the adequate composition of the overall management body».[87]

A final observation concerns CRD6's explicit emphasis on the *ongoing assessment* of directors' suitability. The Directive establishes the primary responsibility of institutions to maintain up-to-date information on the assessment of their board members.[88] This approach is undoubtedly well-justified, aligning with the broader focus on ensuring the *effective* and *continuous* suitability of the board. Moreover, it contributes to reducing the administrative burden on both banks and supervisory authorities when management bodies are renewed.

5. Among the most significant innovations introduced by CRD6 in the domain

p. 573 ss.

[87] SACCO GINEVRI, *Staggered Boards, Banks and Public Companies: Quo vadis?*, in *EBLR*, 2017, p. 585.

[88] Recital n° 47 of the CRD6.

of suitability assessments is the explicit consideration of ESG factors (and, as will be discussed in greater detail, ICT risks).[89] Paragraph 2b of Article 91 states that «the management body shall possess adequate collective knowledge, skills and experience to be able to understand the entity's activities, as well as the associated risks it is exposed to, and the impacts it creates in the short, medium and long term, taking into account ESG factors».

First and foremost, this decision is hardly surprising given the growing significance of ESG issues - often referred to as a «megatrend»[90] - in recent European banking regulations,[91] particularly within the new banking package,[92] which assign specific duties to the management body and its members in this domain.[93] The complexity of banking activities has increased not only due to

[89] BEVIVINO, *Il prossimo cambio di paradigma del governo delle banche: annotazioni dal diritto francese e idee statunitensi sul fit and proper degli amministratori*, in *Giur. comm.*, 2023, n. 2, p. 276.

[90] BUEREN, *Sustainable Finance*, in *ZGR*, 2019, n. 5, p. 814.

[91] BROZZETTI, *La transizione verde europea e lo sviluppo sostenibile: rinnovate coordinate di fondo per sistema finanziario e imprese*, in *Dir. banca merc. fin*., 2022, n. 3, p. 413; BEVIVINO, *L'attività ESG delle banche e la prospettiva di riforma della regolazione prudenziale delle informazioni*, *in Riv. trim. dir. econ.*, 2022, n. 4, p. 484 ff. In a partially critical key see BRESCIA MORRA, *Chi salverà il pianeta: lo Stato o le grandi corporation? ESG: una formula ambigua e inutile*, in *Riv. trim. dir. econ.*, 2022, suppl. n. 4, p. 84; LENER - LUCANTONI, *Sostenibilità ESG e attività bancaria*, in *Banca borsa tit. cred*., 2023, n. 1, p. 6 ff.

[92] According to PERESTRELO DE OLIVEIRA, *"Fit for Paris". Banking and the sustainability governance*, available at *www.ssrn.com*, p. 3, the new banking package made up of the CRR3 and CRD6 is focused on «integrating ESG factors into the risk management of European banks»; similarly, see BRINKMAN, *Climate-related risks and banking supervision: From climate change risk mitigation to double materiality*, in *Maastricht Journal of European and Comparative Law*, 2023, p. 406; ADDAMO, *Il dovere di diligenza ai fini della sostenibilità nel settore bancario*, in *Riv. dir. banc*., 2024, p. 580.

[93] BODELLINI, *Environmental sustainability, business and banking: making the case for sensible regulation*, in *Law and economics Yearly Review*, 2023, special issue, p. 88, highlights the «radical revision of directors' duties». Also see CAPO - DE CHIARA, *Private economic initiative and bank corporate governance at the time of sustainability: reflections on current trends*, in *Law and Economics Yearly Review*, 2024, n. 1, p. 185 ff.; RIGANTI, *Sostenibilità non finanziaria, "sana e prudente gestione" e governo societario delle banche. "Arlecchino" nel c.d.a.?*, in *Riv. trim. dir. econ*., 2022, suppl. n. 1, p. 336 ff.; PANCALLO, *Fattori ESG e governance bancaria*, in *Riv. trim. dir. econ*., 2022, Suppl. n. 4, p. 212 ff.

digitalization and the broader technological transformation of processes,[94] as a result of legislators' expectations that banking intermediaries contribute to achieving the ambitious climate targets outlined in the Paris Agreement[95] (most notably the goal of EU climate neutrality by 2050)[96] and to the promotion of intergenerational solidarity.[97] Under the double materiality approach, in which ESG factors become relevant through both outside-in and inside-out dimensions, banks face significant challenge.[98] Institutions are required to realign their business models and corporate governance structures,[99] not only by adjusting their selection processes to appoint directors with greater ESG expertise, but also by redefining the allocation of roles and responsibilities within the management body (*e.g.* by establishing ESG-committees).[100] This realignment is essential to ensure compliance with evolving regulations and to prepare for future scenarios arising from climate change.[101]

It follows that strengthening internal governance and enhancing the managerial capabilities of bank directors - including those related to

[94] TUOMINEM, *Enhancing banks' resilience against cyber threats - a key priority for the ECB*, 26 July 2024.

[95] Recital n° 37 and n° 39 of CRD6. Cfr. EUROPEAN COMMISSION, *A Competitive Compass for the EU*, 29 January 2025, par. 2.3: «The EU faces massive financing needs to deliver on its already-agreed objectives».

[96] BUCH, *Working together for climate neutrality: what role do stable banks play?*, Berlin, 4 June 2024; EAD., *The transition towards a low-carbon economy: What supervision can contribute*, Luxembourg, 21 November 2024. See also CÂMARA, *The systemic interaction between corporate governance and ESG: the cascade effect*, in *Governance Lab Working Paper No.04/2023*, June 2023, available at *www.ssrn.com*, who emphasizes that banks can potentially activate a so-called «ESG cascade effect».

[97] OPPO, *Princìpi*, Turin, 2001, p. 78.

[98] See *ex multis* VELLA, *Sostenibilità bancaria?*, in *Banca impresa società*, 2024, n. 1, p. 5 ff.; BODELLINI, *Environmental*, cit., p. 67 ff.

[99] ALEXANDER, *Bank governance and sustainability*, in *EUSFiL Research Working Paper Series*, June 2024, available at *https://www.eusfil.eu/working-papers*.

[100] RIGANTI, *op. cit.*, p. 338.

[101] CARRETTA - SCHWIZER - PIERDICCHI (eds.), *Directors*, Milano, 2022, p. 58 ff.

sustainability[102] - is warranted, given the increasing complexity of banking activities[103] and the recent, substantial changes in the associated risk landscape.[104]

Moreover, under the European regulatory framework, banks - and particularly their management bodies - are assigned a proactive role concerning ESG matters. This role extends beyond mere regulatory compliance, representing a novel conception of ESG compliance as "a strategic guiding element" within banks' ESG policies:[105] indeed, banks are expected to demonstrate a distinct «environmental protection attitude» (EPA), a mindset originating within the management body and permeating the entire organizational structure of the institution.[106]

On the empirical front, numerous studies underscore the strong correlation between the quality of a bank's management body (and, more broadly, its corporate governance) and effective environmental and social risk management.[107] This concern transcends strict adherence to legal mandates and instead pivots toward fostering a robust ESG risk culture (and, more generally, an ESG-oriented culture) consistent with the *tone-at-the-top* model.[108]

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[102] PERESTRELO DE OLIVEIRA, *op. cit.*, p. 15.

[103] PELLEGRINI - TROISI, *Gli operatori del mercato finanziario: regolazione e supervisione*, in PELLEGRINI (ed.), *Diritto pubblico dell'economia*, Milano, 2023, p. 394.

[104] BUCH, *Reforming the SREP: an important milestone towards more efficient and effective supervision in a new risk environment*, 28 May 2024; EAD., *Evolving risks - evolving supervision, at the Bundesbank Symposium*, Frankfurt, 12 June 2024. According to DONNERY - QUAGLIARIELLO, *Navigating the risk landscape: supervisory priorities 2025-27*, in *ECB Supervision Blog*, 14 January 2025, «the increasingly complex and uncertain environment requires banks' board to make timely and informed decisions, to steer the business in the right direction, and to understand the risks and set appropriate limits».

[105] BENAZZO, *Compliance and ESG in large companies: a possible new frontier?*, in *Riv. ODC*, 2024, n. 3, p. 960.

[106] For an empirical study of the factors in the composition of the board that are likely to affect the overall EPA of credit institutions, see COSMA - SCHWIZER - NOBILE - LEOPIZZI, *Environmental attitude in the board. Who are the "green directors"? Evidences from Italy*, in *Business Strategy and the Environment*, 2021, p. 3330 ff.

[107] ALEXANDER, *Bank governance and sustainability*, *cit*.

[108] VILLIERS, *Boardroom Culture: An Argument for Compassionate Leadership*, in *EBLR*, 2019,

As has already occurred with other aspects of bank directors' suitability, the European legislator codifies principles that had already been partially articulated in *soft law* sources, such as the *EBA-ESMA Guidelines* and the *ECB Guide*, and in the Basel Committee's *Principles for the effective management and supervision of climate-related financial risks*, published on June 2022.[109] Moreover, outside the banking sector, paragraph 28 of the recent *Joint EBA and ESMA Guidelines on the assessment of the suitability of the members of the management body of issuers of asset-referenced tokens and of crypto-asset service providers* (27 June 2024) stipulates that the management body «as a whole» must collectively possess sufficient knowledge, competence and experience concerning ESG factors and risks.

In all the circumstances mentioned above - including the new par. 2b of Article 91 of Directive 2013/36/EU - the "ESG requirement" is expressed in strictly collective terms,[110] thus ESG-related knowledge, competence and experience is mandated solely for the management body "as a whole".

The rationale behind this choice seems to lie in the fact that, in ESG matters, the obligations introduced by the European legal framework are mostly entrusted to the management body *as a whole*[111] - particularly when an *ad hoc* committee has not been established by the bank[112] - given the cross-cutting nature of sustainability

p. 263 ff.

[109] According to par. 16 of the Principles, «banks should ensure that the board and senior management have an adequate understanding of climate-related financial risks».

[110] BRINKMAN, *Climate-related risks and banking supervision: From climate change risk mitigation to double materiality*, in *Maastricht Journal of European and Comparative Law*, 2023, p. 396 ff. *Contra*, see I. PALM - STEYERBERG, *op. cit.*, p. 573 ff.

[111] FRIGENI, *op. cit.*, p. 281.

[112] IRRERA - SCARABELLI, *I comitati di sostenibilità nella governance delle società quotate: tra funzioni gestorie e di controllo*, in *Nuovo dir. soc.*, 2023, n. 11, p. 1583 ff.; RIGANTI, *op. cit.*, p. 338.

issues[113] and the significance of ESG-compliance as a moment of a company's "strategic guidance".[114]

In light of the broader set of duties and obligations imposed on bank directors, it seems unlikely that one or more members of the management body could be wholly incapable of understanding the ESG risks faced by the bank, as well as the impacts that bank's activities generate in the short, medium, and long term. According to ECB *Draft guide on governance and risk culture*, published on July 2024, «*although each member of the management body is not expected to know everything, each should have a basic knowledge in every area, and collectively they should have expert knowledge covering all areas*».[115] It is therefore quite plausible that supervisors would incorporate ESG topics into (harmonized) questionnaires and interviews conducted with board members. However, the European framework does not seem to legitimize negative individual assessment decisions by supervisors solely based on the lack of knowledge, experience and skills on ESG matters. In other words, the new provisions introduced by CRD6 do not appear, in themselves, to substantially alter the individual selection process of bank directors toward "green" profiles.[116]

It is more likely that the new provisions will chiefly influence the training programs implemented by banks with respect to ESG issues. In this regard, it should be recalled that Article 91(7) of the Directive 2013/36/EU - through a vague provision, which will be better clarified by the EBA - requires banks to devote «adequate human and financial resources» for induction and training activities del

[113] PASSADOR, *On the usefulness of ESG disclosure and the role of risk and sustainability committees*, in *Banca impresa società*, 2023, p. 160.
[114] KALFAOGLOU, *ESG risks: a new source of risk for the banking sector*, in *Bank of Greece Economic Bulletin*, July 2021, p. 106.
[115] ECB, *Draft guide on governance and risk culture*, cit., par. 3.3.2.
[116] COSMA - SCHWIZER - NOBILE - LEOPIZZI, *Environmental attitude in the board. Who are the "green directors"? Evidences from Italy*, in *Business Strategy and the Environment*, 2021, p. 3371.

management body, «including on ESG risks and impacts and on ICT risk». This approach, which highlights the pivotal role of training programs, aligns with the *Guidelines on the management of environmental, social and governance (ESG) risks*, issued by the EBA on 8 January 2025. These Guidelines state that «institutions should ensure, *as part of their training policy*, that their management body and staff are adequately trained to understand the implications of ESG factors and ESG risks».[117]

6. The training policy adopted for ESG risks also aligns with the management of ICT risks, which, with the introduction of CRD6, have finally been recognized as a relevant collective criterion, thus addressing a significant gap in previous regulations. The latter had been conceived in a historical context in which the importance of technological competencies within the management body was already acknowledged but not yet perceived as an urgent priority. The Digital Operational Resilience Act (DORA),[118] as discussed further, reinforces this perspective.

The European legislator's focus on emerging technologies and ICT risks has significantly increased, particularly with the proliferation[119] of sophisticated AI

[117] EBA, *Guidelines on the management of environmental, social and governance (ESG) risks*, 8 January 2025, EBA/GL/2025/01, par. 54.

[118] Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011.

[119] It has also been observed that «digital technological innovation, particularly that related to developments in artificial intelligence, follows an exponential trajectory» (SEPE, *Innovazione digitale, tra rischi di deriva algocratica e possibili rimedi*, in *Rivista trimestrale di diritto dell'economia*, suppl. of n. 4, 2023, p. 237).

models.[120] The European Union's approach to AI regulation[121] can be understood as a prudential model structured on two main levels. On the one hand, there is a need to continuously monitor the technological frontier,[122] as the refinement and widespread adoption of new technologies lead to a proportional increase in cyber risks, necessitating progressively stricter regulation. On the other hand, the pervasive integration of technology across both public and private organizations amplifies ICT risks, even at a merely potential level.

Artificial Intelligence represents one of the most disruptive technologies[123] capable of radically transforming the status quo, reshaping the way individuals live and work, restructuring entire economic sectors, and introducing entirely new products and services. This transformative potential stems from AI's ability to process vast amounts of data, automate complex processes, and enhance decision-making. However, AI's pervasive adoption raises critical concerns, particularly in the

[120] The AI case is recognized as a «situation of more complex arrangement [...] in its various applicative modalities» (LUCHENA, *Orizzonti del Diritto dell'economia: un'introduzione oggetto, metodo, dottrine*, in *Riv. trim. dir. econ.*, 2023, n. 4, p. 428).

[121] According to LUCHENA, *Tecnologie, mercati e regolazione dell'economia: il caso dell'intelligenza artificiale*, in *Dialoghi di Diritto dell'Economia*, October 2024, pp. 10-11, «the AI regulation represents a potential (but perhaps only illusory) limit to the power of corporations that can influence the lives of European citizens/consumers and the economies of member countries».

[122] MADSEN - ISLAM - ANG, *Catching up to the technology frontier: the dichotomy between innovation and imitation*, in *The Canadian Journal of Economics*, Vol. 43(4), November 2010, pp. 1389-1411; DELL'ACQUA et al., *Navigating the Jagged Technological Frontier: Field Experimental Evidence of the Effects of AI on Knowledge Worker Productivity and Quality*, in *Harvard Business School Technology & Operations Mgt. Unit Working Paper*, no. 24-013, in *The Wharton School Research Paper*, 15 September 2023; PETRALIA, *Mapping the Technological Frontier*, 27 March 2019.

[123] MCKINSEY GLOBAL INSTITUTE - MANYIKA - CHUI - BUGHIN - DOBBS - BISSON - MARRS, *Disruptive technologies: Advances that will transform life, business, and the global economy*, May 2013; also see SCHUMPETER, *Capitalism, Socialism, and Democracy*, London, 2003, p. 81 ff.; HILDEBRANDT, *Smart Technologies and the End(s) of Law. Novel Entanglements of Law and Technology*, Edward Elgar eBooks, 2015.

banking[124] and financial[125] sectors. Key issues include algorithmic transparency, accountability for automated decisions, the black box effect (referring to the opacity of AI decision-making processes), and algorithmic bias.

For this reason, AI market regulation aims to ensure ethical and secure use while safeguarding fundamental rights. The EU's approach is distinguished by its effort to balance market integration with responsible AI development and enhanced cybersecurity.[126] This regulatory model is trying to follow a pacing strategy,[127] seeking to reconcile technological innovation with the protection of core European legal principles.

Regulating frontier technology such as AI has proven to be a long and complex process, characterized by an interplay of soft law, pre-law, and para-law[128] instruments that have laid the foundation[129] for the AI Act and that have given out different challenges.

The first one lies in the inherently dynamic nature of digital technologies,

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[124] See also on credit scoring and new technologies GAGGERO - VALENZA, *Le moderne tecniche di credit scoring tra GDPR, disciplina di settore e AI Act*, in *Riv. Dir. Banc.*, 2024, iss. 3.

[125] SEPE, *Innovazione tecnologica, algoritmi e intelligenza artificiale nella prestazione dei servizi finanziari*, in *Riv. trim. dir. econ.*, 2021, suppl. of n. 3, p. 197; BUCKLEY - ARNER - ZETZSCHE - SELGA, *The Dark Side of Digital Financial Transformation: The New Risks of FinTech and the Rise of TechRisk*, in *EBI Working Paper Series 54*, 2019.

[126] ANDRAŠKO - MESARČÍK - HAMULÁK, *The regulatory intersections between artificial intelligence, data protection and cyber security: challenges and opportunities for the EU legal framework*, in *AI and Society*, n. 36, 2021, p. 623 ff.

[127] MARCHANT, *Addressing the Pacing Problem*, in MARCHANT et al. (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight: The Pacing Problem*, Springer Netherlands, 2011.

[128] SENDEN, *Soft Law in European Community Law*, Oxford, 2004, p. 478 ff.; POGGI, *Soft law nell'ordinamento comunitario*, in *Annuario 2005. L'integrazione dei sistemi costituzionali europeo e nazionali. Atti del XX Convegno Annuale. Catania, 14-15 ottobre 2005*, Padova, 2007, p. 369 ff.

[129] Soft law is considered a «reliable system of *enforcement* in the absence of which (the new substantive and procedural rights related to the use of new technologies) would remain only prescriptions without any claim to bindingness» (PAJNO - BASSINI - DE GREGORIO - MACCHIA - PATTI - POLLICINO - QUATTROCOLO - SIMEOLI - SIRENA, *AI: profili giuridici – Intelligenza Artificiale: criticità emergenti e sfide per il giurista*, in *Rivista di Biodiritto*, vol. 3, 2019, pp. 210-211).

whose continuous evolution necessitates ongoing regulatory updates. A striking example is General-Purpose AI (GPAI),[130] which reached mainstream markets in less than three years (e.g., ChatGPT), prompting specific regulatory interventions and their inclusion in the AI Act (Article 51).

If governance is defined too early, there is a risk of overlooking crucial information regarding AI's societal impact, leading to inadequate regulatory solutions. Conversely, delayed intervention exposes markets to potentially harmful consequences, justifying the EU legislator's decision to adopt an *ex-ante* control system with regulations directly linked to AI producers and a risk-based approach.[131]

Notably, the AI Act differs from frameworks like the GDPR, which are primarily focused on fundamental rights protection. Instead, it aligns more closely with market regulation instruments such as the Digital Markets Act,[132] as it seeks to prepare the European market for the safe, reliable, and ethical deployment of AI products, reducing regulatory fragmentation and encouraging national authorities to engage in regulatory experimentation (e.g., sandboxes).[133]

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[130] BOTUNAC - PARLOV - BOSNA, *Opportunities of Gen AI in the Banking Industry with regards to the AI Act, GDPR, Data Act and DORA, 2024 13th Mediterranean Conference on Embedded Computing (MECO)*, Budva, Montenegro, 2024, pp. 1-6.

[131] LEMME, *La proposta di Regolamento europeo sulla intelligenza artificiale e la gestione dei rischi: una battaglia che può essere vinta?*, in *Rivista trimestrale di Diritto dell'economia*, 2024, suppl. of n. 1, spec. 259; DE GREGORIO - DUNN, *The European risk-based approaches: Connecting constitutional dots in the digital age*, in *Common Market Law Review*, vol. 59(2), 2022, p. 473 ff.

[132] ALMADA - PETIT, *The EU AI act: a medley of product safety and fundamental rights?*, in *Robert Schuman Centre for Advanced Studies Working Paper*, n. 59, 2023, pp. 11-12.

[133] RANCHORDAS - VINCI, *Regulatory Sandboxes and Innovation-Friendly Regulation: Between Collaboration and Capture*, in *Italian Journal Of Public Law*, Vol. 16(1), 2024, 113); RANCHORDAS, *Experimental lawmaking in the EU: Regulatory Sandboxes*, *EU Law Live [Weekend Edition, 22 October 2021],* in *University of Groningen Faculty of Law Research Paper* 12, 2021.

However, some scholars[134] argue that recent European technological regulations fail to fully account for the rapid pace of technological change,[135] which demands a more flexible and adaptive regulatory approach.[136] The early adoption of stringent regulations may prove ineffective if not accompanied by continuous update mechanisms.

Another critical issue concerns the illicit use of AI (AI-Crime), which complicates law enforcement efforts in cases of harmful incidents. Moreover, AI evolution presents not only exogenous threats but also endogenous risks stemming from incorrect or unintentional system usage. This issue is particularly relevant in critical sectors such as banking and finance, where AI applications extend beyond

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[134] See CONTISSA - GALLI - GODANO - SARTOR, *Il Regolamento Europeo sull'Intelligenza Artificiale. Analisi informatico-giuridica*, in *i-lex*, vol. 14(2), 2021, pp. 32-33; GRIECO, *Sorveglianza e controllo. Il modello di governance nella nuova proposta di regolamento sull'IA*, in *i-lex*, vol. 14(2), 2021, pp. 95-99; Comitato delle Regioni, 147ª *Sessione Plenaria del CDR, 1.12.2021 - 2.12.2021. Parere del Comitato europeo delle regioni - Approccio europeo in materia di intelligenza artificiale - Legge sull'intelligenza artificiale*, in Gazzetta ufficiale dell'Unione Europea C 97/60, 28 febbraio 2022, 2.

[135] MOKYR, *The Lever of Riches: Technological Creativity and Economic Progress*, Oxford, Oxford University Press, 1992, spec. pp. 376-377.

[136] RODI, *Gli interventi dell'Unione europea in materia di intelligenza artificiale e robotica: problemi e prospettive*, in ALPA (ed.), *Diritto e intelligenza artificiale*, Pisa, 2020, pp. 187-210; PARONA, *Prospettive europee e internazionali di regolazione dell'intelligenza artificiale tra principi etici*, soft law *e* self regulation, in *Rivista della Regolazione dei Mercati*, n. 1, 2020, p. 70 ff.; ZANICHELLI, *Ecosistemi, opacità, autonomia: le sfide dell'intelligenza artificiale in alcune proposte recenti della Commissione europea*, in D'ALOIA (ed.), *Intelligenza artificiale e diritto. Come regolare un mondo nuovo*, Milano, 2020, pp. 67-87; ADINOLFI, *L'Unione europea dinanzi allo sviluppo dell'intelligenza artificiale: la costruzione di uno schema di regolamentazione europeo tra mercato unico digitale e tutela dei diritti fondamentali*, in DORIGO (ed.), *Il ragionamento giuridico nell'era dell'intelligenza artificiale*, Pisa, 2020, p. 13 ff.; AMIDEI, *La governance dell'intelligenza artificiale: profili e prospettive di diritto dell'Unione europea*, in RUFFOLO (ed.), *Intelligenza artificiale. Il diritto, i diritti, l'etica*, Torino, 2020, p. 571 ff.; CELOTTO, *Come regolare gli algoritmi. Il difficile bilanciamento fra scienza, etica e diritto*, in *Analisi Giuridica dell'Economia*, n. 1, 2019, p. 47 ff.; RESTA, *Governare l'innovazione tecnologica: decisioni algoritmiche, diritti digitali e principio di uguaglianza*, in *Politica del Diritto*, n. 2, 2019, p. 199 ff.; PROIETTI, *Intelligenza artificiale: una prima analisi della proposta di regolamento europeo*, in *Diritto bancario*, 2021; DI ROSA, *Quali regole per i sistemi automatizzati?*, in *Riv. Dir. Civ.*, n. 5, 2021, p. 823; CRAGLIA (ed.), *Artificial Intelligence - A European Perspective*, Lussemburgo, 2018.

simple input-output operations, developing learning capabilities that may alter system behavior over time, thereby exposing users to unforeseen risks.

Another significant vulnerability is the proportional relationship between ICT risks[137] and the size of an organization.[138] In Europe, the trend toward the consolidation of large banking groups could exponentially increase exposure to cyber risks. While no single solution can fully address these challenges, the EU's prudential approach to regulating emerging technologies reflects the need to prevent potential systemic crises. In this regard, the role of the management body in financial institutions has become increasingly central, as codified in Article 5(4) of DORA, which mandates that management members continuously update their competencies through specific and ongoing training on ICT risks.

The growing digitalization and widespread adoption of AI in economic and financial sectors[139] have underscored the dynamic and evolving nature of ICT risks. Unlike traditional risks, which can be defined and mitigated through well-established strategies, cyber risks are characterized by a high degree of unpredictability due to technological innovation and the emergence of new vulnerabilities. This constant evolution necessitates a continuous reassessment of mitigation strategies, making an ongoing assessment approach essential - a systematic and continuous evaluation of threats and corresponding containment measures. It is no longer sufficient to implement rigid and static protocols; organizations must develop flexible and adaptive models capable of responding promptly to emerging threats.

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[137] See also SCHUETT, *Risk Management in the Artificial Intelligence Act*, in *European Journal of Risk Regulation*, n. 15(2), 2024, pp. 367-385.

[138] IRSHAAD - THEMBEKILE, *The impact of artificial intelligence on organizational cyber security: An outcome of a systematic literature review*, in *Data and Information Management*, Vol. 8(2), 2024; AWAMLEH - ERTUGAN, *The Relationship Between Information Technology Capabilities, Organizational Intelligence, and Competitive Advantage*, in *Sage Open*, 11(2), 2021.

[139] DAVOLA, *Innovazione tecnologica e disciplina del mercato finanziario*, in PELLEGRINI (ed.), *Diritto Pubblico dell'Economia*, Cedam, 2023.

This necessity is reflected in the DORA, which marks a significant advancement in the European regulatory framework for digital resilience. The Act establishes a harmonized regulatory framework to ensure that financial operators can withstand, respond to, and recover effectively from cyber incidents and operational disruptions. The regulation imposes stringent obligations concerning ICT risk management, operational resilience stress testing, incident reporting and management, oversight of third-party digital service providers, and information sharing on cyber threats. The adopted approach is based on the recognition that cybersecurity cannot be ensured solely through technical measures but must be integrated into corporate governance strategies and decision-making processes.

A key innovation introduced by DORA is its emphasis on continuous training for the management body, which must possess the knowledge and competencies necessary to understand and assess ICT risks.

This principle is reinforced by Article 5(4), which mandates that management body members «shall actively keep up to date with sufficient knowledge and skills to understand and assess ICT risk and its impact on the operations of the financial entity, including by following specific training on a regular basis, commensurate to the ICT risk being managed».

This requirement represents a paradigm shift in ICT risk governance: corporate leadership can no longer delegate technological management solely to IT departments but must take an active role in overseeing and strategically directing cybersecurity policies.

Continuous training thus becomes an indispensable requirement for ensuring effective operational resilience and responding to new cyber threats in a timely and informed manner.

The acceleration of technological innovation necessitates a paradigm shift in the skills required of financial institution executives. A strong economic and

financial background[140] is no longer sufficient; leaders must also develop an in-depth understanding of emerging technologies, cybersecurity dynamics, and the regulatory implications of new European legal frameworks. In this context, the concept of "tech-savvy" governance[141] assumes a central role, emphasizing the need for a management body that is aware of digital transformations and capable of making informed decisions while ensuring compliance with security and regulatory requirements.

Furthermore, the AI Act, particularly Article 15, establishes rigorous cybersecurity requirements for high-risk AI systems, highlighting the need for resilience against unauthorized modifications, adversarial attacks, and systemic vulnerabilities. This provision aligns with DORA's emphasis on proactive risk assessment and preparedness, reinforcing the necessity of integrating cybersecurity considerations into AI governance. Both regulatory frameworks underscore the EU's commitment to fostering a secure digital ecosystem in which AI-driven innovation is balanced with robust safeguards against cyber threats.

Given the continuous evolution of cyber threats, organizations must adopt a model of constant learning, based on periodic skill updates and the use of advanced monitoring and prevention tools. The implementation of threat intelligence, cyberattack simulations, penetration testing, and crisis management scenarios enhances organizational responsiveness and ensures an adequate level of

[140] BUCKLEY - ZETZSCHE - ARNER - TANG, *Regulating artificial intelligence in finance: Putting the human in the loop*, in *The Sydney Law Review*, 43(1), 2021, pp. 43-81.

[141] It refers to the capability of an organization's board and senior management to understand, integrate, and effectively leverage emerging technologies in their strategic decision-making and risk management processes. This concept encompasses not only a basic technical literacy but also the ability to assess how digital innovations—such as artificial intelligence, blockchain, and big data analytics - can transform business models, enhance operational efficiencies, and introduce new risks that need to be managed (on this matter see WEILL - ROSS, *IT Governance: How Top Performers Manage IT Decision Rights for Superior Results*, in *Harvard Business School Press*, 2004; WESTERMAN - BONNET - MCAFEE, *Leading Digital: Turning Technology into Business Transformation*, in *Harvard Business Review Press*, 2014.

protection.

Moreover, the ongoing assessment of cybersecurity risks and continuous training of board members are critical to fully leveraging AI-based solutions while mitigating their associated risks. This approach is essential given the rapidly evolving nature of AI technologies, where new vulnerabilities and threats emerge constantly.

Research has shown that organizations with board members who possess strong digital competencies are better equipped to balance innovation with risk management.[142] In this context, continuous training and ongoing assessment become indispensable tools. They enable the board to regularly update their knowledge of evolving cyber risks and adapt their risk management strategies accordingly - a principle that aligns perfectly with the proactive regulatory approach advocated by the DORA.

Starting from the fact that «the history of computing technologies is one of instability,[143] owing to the relentless process of recombining hardware and software components towards new purposes. To cope with this instability, regulators can use strategies to future-proof law, such as proactive updates of legislation and experimental legislation»,[144] the ability to quickly adapt to shifts in the digital landscape, combined with a well-prepared management body, is a key

[142] CHEN - WANG, *The Impact of Board Digital Savviness on Corporate Innovation: Evidence from Listed Companies*, in *Journal of Management Information Systems*, n. 35(3), 2018, pp. 845-875; LI - WANG, *Board Digital Competence and Firm Performance: The Mediating Role of Digital Transformation*, in *Technological Forecasting and Social Change*, n. 155, 2020, p. 119976.

[143] This is also one of the reasons why the European Union has adopted a *regulatory brutality* regarding AI (see PAPAKONSTANTINOU - DE HERT, *The Regulation of Digital Technologies in the EU: The Law-Making Phenomena of 'Act-ification', 'GDPR Mimesis' and 'EU Law Brutality'*, London, 2024).

[144] ALMADA - PETIT, *The EU AI Act: a medley of product safety and fundamental rights?*, RSC Working Paper 2023/59, 2023, p. 14. See also RANCHORDÁS - VAN SCHIP, *Future-Proofing Legislation for the Digital Age*, in RANCHORDÁS - ROZNAI (eds.), *Time, Law, and Change: An Interdisciplinary Study*, Hart Publishing 2020.

factor in guaranteeing the security and competitiveness of financial institutions in the era of digital transformation.

7. The challenges that banks have to face in the immediate future[145] require their directors to broaden their horizons[146], also in terms of skills and experience to be necessarily included within the management body, to meet the sustainability commitments assumed by the European legislator (which continue to evolve),[147] and to harness the potential (while mitigating the risks) of the digital transition involving the banking sector.[148]

In this context, training programs, if carried out seriously and substantively (rather than treated as mere formalities)[149] and supported by «adequate human and financial resources» (as indicated by the EBA),[150] can help banks address both current and future challenges.[151] Such initiatives can foster "widespread" knowledge among all directors, and promote additional diversity within the board, perhaps varied training opportunities.

The significance attached to these programs by the EU legislator also reflects

[145] GORTSOS, *Challenges Ahead for the EU Banking System*, in *EBLR*, 2022, p. 364 ss.
[146] BODELLINI, *Environmental*, *cit.*, p. 87.
[147] MELON, *Navigating the complexity: challenges for banks in understanding and adapting to EU sustainability legislation*, in *Law and economics yearly review*, 2023, special issue, p. 102.
[148] BASKERVILLE - CAPRIGLIONE - CASALINO, *Impacts, challenges and trends of digital transformation in banking sector*, in *Law and economics yearly review*, 2020, part. 2, p. 341 ff.
[149] As noted by EDMANS, *Response to the European Commission Study on Sustainable Corporate Governance*, 2020, available at *https://alexedmans.com/wp-content/uploads/2020/10/European-Commission-Sustainable-Corporate-Governance.pdf*, ESG initiatives often «lead to compliance rather than commitment».
[150] Pursuant to art. 91(11) of Directive 2013/36/EU, by 10 July 2026 EBA shall issue guidelines on «the notion of adequate human and financial resources devoted to the induction and training of members of the management body».
[151] SOBCZAK - DEBUCQUET - HARVARD, *The impact of higher education on students' and young managers' perception of companies and CSR: An exploratory analysis*, in *Corporate Governance*, 2006, p. 463 ff.; WYCHERLEY, *Environmental managers and accounting*, in *Journal of Applied Management Studies*, 1997, p. 167 ff.

the need for board skills to remain continually updated,[152] particularly given the rapid evolution of ESG and technological issues. [153]

Additionally, training makes it possible to enhance board members' competencies over time, partly easing the longstanding difficulty banks face in finding candidates who collectively meet all specialized skill requirements under European legislation:[154] it is worth remembering that the selection processes of bank directors are complicated by other factors beyond the fit-and-proper domain (*i.e.* the rules on gender quotas, especially for listed banks;[155] interlocking directorates restrictions existing in some Member States' legislations;[156] possible adverse selection phenomena, that could induce «the most prudent managers to shy away» from positions on bank boards).[157]

The hope is that - in a geopolitical context that appears visibly more complex than in the recent past[158] - training programs (and any other measure aimed aiming to improve the board's knowledge, skills, and experience regarding ESG and ICT matters) could really help making banks' management bodies better equipped to face all the aforementioned challenges.

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[152] FINESI, *op. cit*., p. 72.

[153] MIRRA, *The evolution of the fit & proper of corporate representatives*, in *dirittobancario.it*, September 2024.

[154] ARRIGONI - RIVOLTI, *op. cit.*, p. 985.

[155] See Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures.

[156] GHEZZI - PICCIAU, *The Curious Case of Italian Interlocking Directorates*, in *Intersection Between Corporate Law and Antitrust*, CORRADI - NOWAG (eds.), Cambridge, 2023, p. 208 ff.; PETERSEN, *Interlocking Directorates in the European Union: An Argument for Their Restriction*, in *EBLR*, 2016, p. 821 ff.

[157] LEMMA, *Bank Directors between Business Risk and Individual Responsibility*, in *Riv. Trim. Say. Econ*., 2023, n. 3, p. 65; LEMMA - CLEMENTS, *op. cit.*, p. 38, who highlight «the risk of an exit - from the market for bank's managers - of the people that are not amenable to accept compensation unable to compensate the increasing commitment and the forecast of higher amount to pay in the event of sanctions». The risk of overdeterrence and possible difficulties for banks in finding adequate resources for non-executive roles is also highlighted by PISTOCCHI, *op. cit.*, p. 237.

[158] CAPRIGLIONE, *Il diritto dell'economia tra passato e futuro*, Milan, 2025, p. 110.