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A first glimpse at the independence of competent authorities in the banking sector: The EBA report of 18 October 2021

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L’Autorité Bancaire Européenne a publié le premier rapport sur l’indépendance des Autorités Compétentes dans le secteur bancaire le 18 octobre dernier. Ce rapport résume les résultats d’une enquête menée auprès des Autorités Compétentes désignées par les Etats membres en matière de surveillance prudentielle, de résolution, de blanchiment d’argent, de protection et sécurité bancaires et Systèmes de Garantie des Dépôts. Le rapport conclue que des mécanismes d’un bon niveau existent pour garantir l’indépendance des Autorités Compétentes, bien que ces mécanismes diffèrent entre eux et que certaines limites aient pu faire jour.

On 18 October 2021, the Paris-based [European Banking Authority](#) (EBA) published its [Report on supervisory independence of competent authorities \(CAs\)](#) in the banking sector, where CAs are domestic authorities designated by the Member States as the responsible authorities in a specific area. Whereas European integration in banking supervision has been strongly reinforced over the past decade as part of the response to the euro area crisis, this Report presents the findings of the first survey ever conducted among CAs on their independence.

Guaranteeing sufficient independence to supervision and resolution authorities, and to authorities in charge of Deposit Guarantee Schemes is arguably important *per se* because (political or commercial) influence may lead CAs to not act in the way that is most suitable to promote financial stability. But the recent [Wirecard scandal](#) in Germany has made this issue [even more salient](#). In fact, as examined in the conclusion of this blogpost, the proposal of a new [Capital Requirements Directive](#) recently published by the European Commission as part of its [Banking Package](#) seeks to reinforce the independence of banking (prudential) supervisory authorities.

Against this background, this blogpost considers the content of the EBA’s Report and its findings, before it offers some critical reflections.

The EBA’s Report on the independence of CAs: Content

This Report presents the outcome of the 82 survey responses submitted by national CAs active in five different sectors including a) Prudential banking supervision, b) Bank resolution, c) Anti-Money Laundering/Countering the Financing of Terrorism (AML-CFT) supervision, d) Banking and payments conduct and consumer protection supervision, and e) Deposit Guarantee Schemes/ Deposit Guarantee Scheme Designated Authority/relevant administrative authorities. As such, the scope of this Report is particularly broad.

As it is commonly the case when self-assessments are provided, one is perhaps best advised to take these answers with a pinch of salt, among other reasons because CAs’ self-perception may not be totally free of any bias, because the questions may not have been understood in exactly the same manner by all the respondents, or because they may not all have been able to complete the survey with the same level of detail. Notwithstanding this, it remains the case that the results of this survey are tremendously useful to learn more about the status and the independence of CAs across EU Member States.

This survey, like the surveys on the independence of their CAs conducted by the two other European Supervisory Agencies (the [European Securities and Markets Authority](#) and [the European Insurance and Occupational Pensions Authority](#)), considers four dimensions of independence: *Operational independence*, *Financial independence*, *Personal independence*, and *Accountability and transparency*.

The EBA's Report on the independence of CAs: Findings

As regards *operational independence*, CAs generally perceive themselves as being independent, even though around 20 of them are in some way connected to a government ministry. They generally consider that their funding is sufficient, but parliaments, governments, finance ministries or a combination of these authorities are commonly called to approve their budgets, thus hinting to *financial independence* being potentially only partial in some cases. A worrisome number of 9 CAs 'confirmed that mechanisms to protect [*personal*] independence do not exist'. *Transparency* is largely ensured, *inter alia* through the publication of annual reports, budgets or strategic plans. (*Democratic*) *accountability* appears to be provided, too: 'a significant number of CAs [...] are accountable to *some extent* to their national governments or ministries and an even greater number of [them] are accountable to parliaments' (emphasis added). Internal and/or external audit mechanisms are furthermore reported to exist by all CAs.

It appears that, overall, a 'good level of mechanisms [are] in place to support supervisory independence', even if they vary, and even if some limits may have become visible. As is only logical, independence is less of a concern for those CAs that assume banking prudential and resolution responsibilities because they are often placed in, or closely linked to, (independent) national central banks.

Although the 90 page-long Report may not be commented on in much depth here, one of its relevant findings consists, in my view, in its pointing to a *concentration* of functions among CAs: 14 CAs cover all five sectors considered, 13 CAs cover four sectors, and 3 CAs cover three sectors – in this sense, the summarizing table included in Annex 1 of the Report is particularly helpful to gain an overview of the responsibilities assumed by the CAs. This concentration of functions is all the more interesting (and potentially problematic?) as EU legislation ([Bank Recovery and Resolution Directive](#) (BRRD), art. 3(3)) prescribes that 'Member States may *exceptionally* provide for the resolution authority to be the competent authorities for supervision' (emphasis added). It therefore seems that a situation which the EU legislator considered should remain an exception is, in fact, the norm in numerous Member States.

Conclusion: Towards a higher level of protection of (some) CAs' independence?

The findings of this Report are undoubtedly very informative and useful to anyone interested in financial supervision in the EU. They point to the high degree of variety in the institutional setup across the various Member States, and among the various CAs themselves. However, this finding is perhaps unsurprising, for two main reasons.

First, the survey covers a very wide variety of CAs, which operate in policy areas where the level of integration within the EU differs largely and varies among the different Member States. Hence, any more advanced interpretation of the findings presented would require a thorough analysis, which could for instance compare CAs based on the sector in which they are active, even if the Report underlines that it may be unnecessary to develop different standards of independence for the different types of supervisors.

Second, the relevant pieces of EU legislation leave ample margin of manoeuvre to the Member States in the definition of the institutional design of their supervisory and resolution authorities, and of their Deposit Guarantee Schemes. Although this is in line with the EU's duty to respect its Member States' constitutional identity enshrined in Art. 4(2) Treaty on European Union, the EU's legislator could (and

arguably should) still have set Member States under more stringent obligations. As mentioned in the introduction, the European Commission seems to have acknowledged the need to reinforce the independence of banking prudential supervisory Authorities as it has recently proposed that it be defined in much more detail at the EU level, and that, in the future, the EBA issue guidelines on the prevention of conflicts of interests in and independence of CAs ([CRD V proposal](#)). Only time (and the upcoming negotiations in Brussels) will tell whether Member States will accept to see their capacity to freely define the setup of their prudential CAs restricted and, most importantly, whether they are ready to lose power to the benefit of (truly) independent institutions.