OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
derivered on 20 November 2014 (1)

Case C-507/13

United Kingdom of Great Britain and Northern Ireland
v
European Parliament
and
Council of the European Union

(Supervision of credit institutions and investment firms – Action for annulment – Directive 2013/36/EU – Articles 94(1)(g) and 94(2) and Article 162(1) and (3) – Setting of ratios between the fixed and variable components of the remuneration payable to employees of credit institutions and investment firms whose professional activities have a material impact on the institution’s risk profile – Regulation 575/2013 – Articles 450(1)(d)(i) and (j) and 521(2) – Disclosure of certain information appertaining to remuneration – Choice of legal basis – Principles of proportionality, subsidiarity and legal certainty – Ultra vires – Protection of personal data – Customary international law – Extra-territorial effect of Article 94(1)(g) of Directive 2013/36/EU)

I – Introduction


2. The United Kingdom seeks to challenge Articles 94(1)(g), 94(2) and 162(1) and (3) of the CRD IV Directive, and Articles 450(1)(d), 450(1)(i), 450(1)(j) and 521(2) of the CR Regulation.

3. In essence, the United Kingdom objects to the CRD IV Directive in so far as it contains, in Article 94(1)(g), provisions indexing variable remuneration to fixed remuneration with respect to individuals whose professional activities impact on the risk profile of credit institutions and investment firms (4) (‘financial institutions’) by whom they are employed. For the purposes of resolving the legal issues at hand, in my opinion this arrangement should be described as a ‘maximum fixed ratio for variable remuneration’, rather than a ‘cap on bankers bonuses’. (5) As I will illustrate in the analysis that follows, this is crucial to assessing the legality of the percentage ratio that lies at the heart of the United Kingdom’s challenge.

4. Article 94(1)(g)(i) of the CRD IV Directive provides that the variable component of remuneration shall not exceed 100% of the fixed component of the total remuneration for each individual, and adds some additional rules, including an option permitting Member States to allow shareholders to increase the ratio by up to 200%, subject to conditions, and an authorisation for the Member States to set a lower maximum percentage (Article 94(1)(g)(ii) of the CRD IV Directive)

5. With regard to the CR Regulation, the United Kingdom challenges Article 450(1)(d) and (i) thereof, which provide for, respectively, compulsory disclosure by financial institutions of the ratios between variable remuneration set out in accordance with Article 94(1)(g) of the CRD IV Directive and the number of individuals being remunerated over a certain threshold. The United Kingdom further challenges the validity of Article 450(1)(j) which requires disclosure by the financial institutions of remuneration information, upon demand from the Member State or competent authority, concerning the total remuneration for each member of the management body or senior management.

6. The action of the United Kingdom is divided into six pleas. According to the first plea the legal base for each of the contested measures, save for Articles 162(1) and (3) of the CRD IV Directive and 521(2) of the CR Regulation, is incorrect. The second plea challenges the validity of Article 94(1)(g) of the CRD IV Directive and Article 450(1)(i) and (j) of the CR Regulation by reference to the principle of proportionality and/or the principle of subsidiarity, while the third plea is grounded in the principle of legal certainty and is confined to challenge to Article 162(3) of
the CRD IV Directive. Pursuant to the fourth plea, the conferral of powers on the European Banking Authority (‘the EBA’) under Article 94(2) of the CRD IV Directive is said to be ultra vires. Pursuant to the fifth plea, the United Kingdom claims that Article 450(1)(j) of the CR Regulation offends the right to privacy and legal principles governing the protection of personal data. According to the sixth plea, to the extent to which Article 94(1)(g) the CRD IV Directive is required to be applied to employees of institutions outside of the EEA, it infringes the principle against extraterritoriality under customary public international law.

7. All of the above pleas are vigorously contested by the European Parliament and the Council, supported by the Commission as intervener.

8. The arguments presented by the United Kingdom are of varying degrees of merit, with the first of them providing the most cogent reasons for questioning the validity of the measures impugned. That being so, I will first dispose of the five less meritorious pleas, starting with the sixth plea and ending with the second, and address the first plea last.

II – The proceedings before the Court

9. The United Kingdom, by application received at the Court on 20 September 2013, brought an action against the European Parliament and the Council of the European Union under Article 263 TFEU, asking the Court to annul Articles 94(1)(g), 94(2) and 162(1) and (3) of the CRD IV Directive, and Articles 450(1)(d), 450(1)(i), 450(1)(j) and 521(2) of the CR Regulation and order the defendant to pay the costs of the application.

10. In their defence the European Parliament and the Council of the European Union contend that the Court should dismiss the application in its entirety on substantive grounds and order the United Kingdom to pay the costs. The United Kingdom has replied to the defendant institutions who in turn have lodged rejoinders to the United Kingdom’s reply.

11. The European Commission has intervened in support of the Parliament and the Council. The United Kingdom has lodged observations on the statement in intervention of the Commission.

12. The United Kingdom, the Parliament, the Council and the Commission participated at the hearing which took place on 8 September 2014.

III – Preliminary observations

A – Background to the CRD IV Directive and the CR Regulation

13. The global financial crisis, which was linked to the collapse of the Lehman Brothers investment bank in September 2008, exposed the weaknesses in the EU
legal regime for regulating financial institutions. In order to restore financial stability, the European Union and its Member States adopted a broad range of unprecedented measures, addressing both short-term needs and long-term developments. This included, in the short term, approval of more than 5 trillion EUR in aid to financial institutions by October 2012. Long term, reform of the regulatory framework relating to financial institutions was also undertaken. This was aimed at putting in place a comprehensive and risk-sensitive framework with respect to capital requirements for financial institutions and at fostering their more effective risk management.


15. However, the first years of the financial crisis saw two important changes to the CRD I Package. First, in 2009 a new directive, which came to be known as the ‘CRD II Directive’ and which was aimed at improving the management of large exposures, the quality of the capital of banks, liquidity risk management and risk management for securitised products, was passed. These were the areas that were considered by the EU legislature to be relevant to the causes of the crisis. In addition to this, a further directive was adopted in 2010 by the Union, the so-called ‘CRD III Directive’, to strengthen the rules on banking capital and remuneration in the banking sector. Both of these measures were passed on the basis of Article 53 TFEU.

16. The CRD III Directive saw the adoption of remuneration principles in order to ensure that incentives were aligned with the long-term interest of financial institutions. The need for such measures was explained in recital 4 in the preamble to the CRD III Directive by reference to the proposition that ‘excessive and imprudent risk-taking may undermine the financial soundness of credit institutions or investment firms and destabilize the banking system’.

17. The CRD III Directive imposed certain principles on remuneration policies. In particular, it required the fixed and variable components of total remuneration to be appropriately balanced, with the fixed component representing a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy on variable remuneration, including the possibility of paying no variable remuneration. However, the specific ratio between the variable and the fixed
component of the remuneration could be chosen by the financial institutions themselves, within the framework provided by remuneration provisions contained in the CRD III Directive.

18. In 2011 the Commission proposed further legislation in order to implement the global regulatory standards developed by the Basel Committee on Banking Supervision. This resulted in the passage of the CRD IV Directive, which was passed under Article 53 TFEU, and the CR Regulation, which was based on Article 114 TFEU. These measures came to be known collectively as the CRD IV Package.

19. The initial Commission proposal contained a number of provisions dealing with the remuneration of material risk takers and, in particular, the variable part of such remuneration. In its preparation, the Commission had issued a Green Paper on corporate governance in financial institutions and remuneration policies, which initiated an extensive consultation process with the interested parties. This included the question of whether additional measures were needed regarding the structure and governance of remuneration policies in financial services.

20. In the subsequent legislative process, the European Parliament suggested a number of amendments to the Commission’s proposal. In a report published on 30 May 2012, the Parliament proposed limiting the variable amount of remuneration to one times the fixed component of the total remuneration. In subsequent negotiations the co-legislatures agreed to raise the permissible variable amount to twice the fixed component of the total remuneration, if a defined quorum of the shareholders approved such augmentation.

21. It is the adoption of this maximum fixed ratio for variable remuneration that is primarily contested by the United Kingdom in these proceedings. Thus, the United Kingdom’s case is directed at an amendment originally proposed by the European Parliament, and which, according to the United Kingdom, fixes the level of pay of the persons falling within its remit.

B – The relationship between variable remuneration and risk management of credit institutions

22. According to the statement of intervention of the Commission, the specific problems attached to remuneration policies in the financial sector only became apparent after the financial crisis. The design of remuneration schemes, often including massive bonus pay-outs in comparison with the fixed components of salaries were, according to the Commission, one of the key drivers of the crisis. Inappropriate incentives were said to have led employees to exacerbate short-term risk, since the employees benefiting from them shared in the bank’s short-term profits but not in the cost of its failure. In the worst case scenario losses were ultimately borne by taxpayers. Hence, the asymmetry between the beneficiaries of eventual profits and sufferers of eventual losses may have created incentives for

excessive risk taking when profits lead to bonus payments to the risk takers. The statement of intervention of the Commission further states that the structure of remuneration thus became a crucial part of the EU’s post-crisis regulatory agenda. (18)

23. There seems to be no disagreement between the United Kingdom, on the one hand, and the Parliament, Council and the Commission on the other, on the need to combat excessive risk taking that may destabilise the financial markets and financial institutions. What the United Kingdom opposes is the specification of a maximum percentage for the ratio of variable remuneration vis-à-vis fixed remuneration of material risk takers, and that this is imposed in legally binding EU measures.

IV – Analysis

24. As noted above, the pleas will be discussed in reverse order. I will therefore address the sixth plea first.

A – Sixth plea relating to infringement of customary international law

25. Article 94(1)(g) of the CRD IV Directive is entitled ‘Variable elements of remuneration’. Article 94(1)(g)(i) provides that institutions shall set the appropriate ratios between the fixed and the variable component of total remuneration, whereby the variable component shall not exceed 100% of the fixed component of the total remuneration for each individual, and that the Member States may set a lower maximum percentage. Further, pursuant to Article 94(1)(g)(ii) of the CRD IV Directive, Member States may allow shareholders or owners or members of the institution to approve a higher maximum level of the ratio between the fixed and variable components of remuneration provided the overall level of the variable component shall not exceed 200% of the fixed component of the total remuneration for each individual. Here too Member States may set a lower maximum percentage.

26. The United Kingdom has formulated its sixth plea as follows: ‘infringement of the customary international law principle against extra territoriality’. The United Kingdom contends that, as a general proposition, the territoriality principle in customary international law dictates that one State should not seek to legislate in respect of the conduct of nationals established in another State in the absence of a sufficient nexus for so doing. In the present case, Article 94(1)(g) of the CRD IV Directive is said by the United Kingdom to infringe that principle when it is applied to ‘group, parent company and subsidiary’ entities established outside the EU entirely, which is said to be the effect of Article 92(1) of the CRD IV Directive, read with Article 109(2) thereof, although neither of those two provisions are challenged.
27. Pursuant to Article 92(1) of the CRD IV Directive, the application of, inter alia, Article 94 of the CRD IV Directive shall be ensured by competent authorities for institutions at group, parent company and subsidiary levels, including those established in offshore financial centres. Article 109(2) of the CRD IV Directive states, inter alia, that competent authorities shall ensure that parent undertakings and subsidiaries subject to that directive implement arrangements, processes and mechanisms referred to in Section II of Chapter II of the directive in their subsidiaries not subject to the directive. Those arrangements, processes and mechanisms shall also be consistent and well-integrated and those subsidiaries shall also be able to produce any data and information relevant to the purpose of supervision.

28. This set-up, it is argued, offends a customary principle of public international law appertaining to territoriality. According to the United Kingdom, ‘it is well-established that the principle of sovereignty includes the exclusive competence of a State to adopt legislation to regulate conduct which occurs on its own territory; not just to enforce such legislation.’ (My emphasis) (19)

29. Before discussing the merits of this plea I recall that the Court stated in its judgment in Air Transport Association of America and Others, C-366/10, that ‘since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles.’ (20) (My emphasis)

30. The sixth plea raises two separate issues which are of an entirely different nature. The first concerns the question of whether validity of a provision can be affected by the fact that it potentially applies to subjects and/or acts outside of the European Union due to the impact of other provisions of EU legislation, the annulment of which is not sought by the applicant. This is so because, as mentioned above, the United Kingdom’s case is confined to challenge to Article 94(1)(g) of the CRD IV Directive without seeking the annulment of Articles 92(1) or 109(2) of the directive.

31. The second question is whether the supposed principle of international law against extraterritoriality relied on by the United Kingdom exists in the form described by the Member State, and whether that principle has manifestly been infringed by the EU legislature.

1. Consequences flowing from the absence of challenge to Articles 92(1) and 109(2) of the CRD IV Directive
32. As to the first issue, it will be recalled that the United Kingdom has confined its challenge under the sixth plea only to Article 94(1)(g) of the CRD IV Directive. In my opinion, this means that the sixth plea should be rejected as inoperative. In fact, it is difficult to even imagine any international law complaint against this provision in so far as its intra-EU applicability is concerned. From this it follows that the sixth plea is incapable of affecting the validity of Article 94(1)(g) of the CRD IV Directive in its primary scope of application.

33. Indeed, the alleged illegality in terms of public international law of Article 94(1)(g) of the CRD IV Directive stems, according to the United Kingdom, from Articles 92(1) and 109(2) of the CRD IV Directive. Therefore, in my opinion the applicant should have sought their annulment in so far as they afforded any unlawful extraterritorial effect to Article 94(1)(g) and not of this latter provision.

34. For the sake of completeness I submit that the Council’s argument derived from the fact that according to the wording of Article 92(1) of the CRD IV Directive the application of Articles 92(2), 93 and 95 is to be ensured by the ‘competent authorities’ for institutions at group, parent company and subsidiary levels, including those established in offshore financial centres, is not convincing. Pursuant to Article 4(40) of the CR Regulation, ‘competent authority’ means a ‘public authority or body officially recognised by national law, which is empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned’. (21) According to the Council it is therefore entirely unclear how a competent authority may offend ‘the customary principle of public international law’ simply by operating within the remit already available to it under the relevant national prudential legislation.

35. It is true that Member States define their competent authorities for the purposes of the CRD IV Directive and the CR Regulation. Nevertheless, these authorities are as a matter of EU law obliged to exercise prudential control of EU financial institutions on a consolidated basis which includes, for the purposes of remuneration policies, pursuant to Articles 92 and 109(2) of the CRD IV Directive, their group companies outside the EU. Hence, the Member States have an EU law obligation to vest their competent authorities with sufficient powers to this effect.

2. Does international law include a principle against extraterritoriality as relied on by the United Kingdom and has it been manifestly infringed?

36. As to this second issue, in my opinion an EU legislative measure cannot be invalid simply because it has effects on conduct in territory located outside of the EU. The case of the United Kingdom makes no reference to any case of the Court to support such a contention, and nor does such a precedent appear to exist. On the contrary, it has long been established that conduct taking place outside the EU that impacts internally on it can be regulated by EU law. (22)
37. Further, this aspect of the sixth plea ignores the *Lotus* judgment of the Permanent Court of International Justice, (23) in which it was held that customary international law did not contain a general prohibition on extending legislative jurisdiction of a State (‘jurisdiction to prescribe’) beyond its own territory. In this respect the Opinion of Advocate General Darmon in *Wood Pulp* (24) remains current today. There he noted that ‘even though, for other reasons, the question has been asked “is the Lotus still sailing”’, that judgment can be relied on in the determination of a State’s or other comparable subject’s jurisdiction to prescribe, in other words to subject facts and conduct to the scope of application of its legislation, in contradistinction with the jurisdiction to enforce its power in any form in the territory of another State. (25)

38. In my opinion the United Kingdom would simply be wrong if it sought to claim that only territorial jurisdiction to legislate is permitted under international law. On the other hand, if it were to accept, which appears to be the case, the personality principle and even the effects doctrine as alternative bases for jurisdiction, it has failed to demonstrate that international law requires something more specific in terms of a ‘sufficient nexus’, (26) and that this requirement was unfulfilled by the contested provision in the CRD IV Directive.

39. In my opinion, the *Lotus* judgment established a kind of burden of proof rule, entailing that the link invoked by a State to justify its legislative jurisdiction will be sufficient, absent a rule of international law to the contrary. However, international law necessarily imposes some limits on the assertion of jurisdiction by States, so that any claim of universal jurisdiction needs to be based on a positive rule of international law. (27) Such universal jurisdiction is not sought by the relevant provisions of the CRD IV Directive but only subjection of foreign group companies of EU financial institutions to the EU regulatory framework.

40. Finally, the case-law arising in international law relied on by the United Kingdom does not support its contentions. The arbitrator’s decision in the *Island of Palmas* case (28) concerned the question of whether the disputed territory belonged to the Netherlands or to the United States. It was of no relevance to the jurisdictional issue alleged to arise in the case at hand. The same conclusion applies to the reference by the United Kingdom to the *Anglo-Norwegian fisheries* case, (29) which concerned delimitation of a Norwegian fisheries zone. Equally unhelpful is the *Nottebohm* case (30) where the International Court of Justice defined the criteria of effective citizenship for the purposes of diplomatic protection. The *Arrest Warrant* case (31) has been interpreted as a tacit reconfirmation of the *Lotus* judgment, although the judgment, unlike the separate opinions of the judges, did not discuss the various heads of possible jurisdiction, but rather focused on the issue of immunity from prosecution. Equally, as Advocate General Darmon observed in the *Wood Pulp* case, (32) Sir Gerald Fizmaurice’s separate opinion in *Barcelona Traction* was a restatement and redefinition of the *Lotus* judgment as submitted in paragraph 39 above.
41. Finally, the United Kingdom relies on breach of Article 3(5) TEU as a ground for invalidating Article 94(1)(g) of the CRD IV Directive. Article 3(5) TEU refers to an obligation on the EU to contribute to, inter alia, ‘the strict observance and the development of international law’. However, there can be no violation of Article 3(5) TEU because no such principle of international law against extraterritoriality as described in the United Kingdom’s application exists.

3. Conclusion on the sixth plea.

42. For all these reasons I have no doubt in concluding that the United Kingdom has failed to demonstrate that in adopting Article 94(1)(g) of the CRD IV Directive, the Council and the Parliament made manifest errors of assessment concerning a principle of public international law. Therefore the sixth plea should be dismissed.

B – Fifth plea relating to the compatibility of Article 450(1)(j) of the CR Regulation with the right to privacy and EU data protection law

43. Article 450 of the CR Regulation is entitled ‘Remuneration policy’. Article 450(1) states that financial institutions ‘shall disclose at least the following information, regarding the remuneration policy and practices of the institutions for those categories of staff whose professional activities have a material impact on its risk profile’. It then goes on to specify at point (d) ‘the ratios between fixed and variable remuneration set in accordance with Article 94(1)(g)’ of the CRD IV Directive; at point (i) ‘the number of individuals being remunerated EUR 1 million or more per financial year, for remuneration between EUR 1 million and EUR 5 million broken down into pay bands of EUR 500 000 and for remuneration of EUR 5 million and above broken down into pay bands of EUR 1 million; and at point (j) ‘upon demand from the Member State or competent authority, the total remuneration for each member of the management body or senior management’.

44. The United Kingdom contends that Article 450(1)(j) of the CR Regulation infringes Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (‘the Charter’), addressing respectively respect for private and family life and protection of personal data, along with the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. (33) Article 450(1)(j) of the CR Regulation allows the Member State or the competent authorities to require disclosure of more detailed information on remuneration than that required by Article 450(1)(i) of the regulation in the form of the total remuneration for each member of the management body or senior management. It is not disputed by the Council or the Parliament that disclosure of remuneration information in accordance with the contested provision would amount to processing of personal data, thus falling within the ambit of EU data protection law.
45. In my opinion, Article 450(1)(j) of the CR Regulation, read in combination with recital 99 thereof, complies with the principles elaborated by the Court in *Volker und Markus Schecke and Eifert*. (34) Recital 99 of the CR Regulation states that both Directive 95/46 and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (35) ‘should be fully applicable to the processing of personal data for the purposes of this Regulation’.

46. In *Volker und Markus Schecke and Eifert* it was held that the institutions had failed to properly balance the objectives of contested provision in that case against the rights which natural persons are recognised as having under Articles 7 and 8 of the Charter in terms of privacy and data protection. (36)

47. In the case at hand it is relevant that the impugned provision is not applicable to all so-called material risk takers but only to management or senior management, and it does not lead to any automatic disclosure of protected personal data. In fact, Article 450(1)(j) of the CR Regulation imposes no automatic obligation to require such disclosure. It simply vests the Member States or competent authority with discretion to do so. As noted above, recital 99 of the regulation binds the Member States to comply with EU data protection legislation when considering any demand for such information. To this I would add Articles 7 and 8 of the Charter given that a demand for the further information mentioned in Article 450(1)(j) of the CR Regulation would undoubtedly amount to an implementation of EU law with the meaning of Article 51 of the Charter. (37) Thus, in my opinion, and contrary to the apparent concerns of the United Kingdom, Article 450(1)(j) of CR Regulation imposes no automatic preeminence of the objective of transparency over the protection of personal data that would be in conflict with the above mentioned case-law of the Court.

48. Moreover, in accordance with Article 450(2) of the CR Regulation, financial institutions shall comply with the requirements set out in that article without prejudice to Directive 95/46. It is therefore beyond doubt that the Member States and the competent authorities may not require any disclosure in contradiction with EU data protection law.

49. It is true that after disclosure has been required by the Member State or the competent authority, that requirement constitutes for the financial institution concerned a legal obligation as referred to in Article 7(c) of Directive 95/46. This renders the data processing concerned legitimate. However, the financial institution may of course challenge the legality of any decision imposing such a disclosure obligation before a competent judicial authority, like any other national decision applying EU law and affecting fundamental rights of individuals.

50. For these reasons I consider that the fifth plea must also be dismissed.
C – Fourth plea on whether the conferral of powers on the EBA and the Commission under the CRD IV Directive is ‘ultra vires’

51. The fourth plea appears to be somewhat ambiguous as there is an incoherent mixing of an objection to the powers conferred on the EBA under Article 94(2) and those exercisable by the Commission. Given the latter is confined to an objection to the ‘width’ of the powers conferred on the Commission, without including any challenge based on either the Meroni doctrine (38) or failure to respect the parameters set by the pertinent Treaty provisions, namely Articles 290 and 291 TFEU, in my opinion only the challenge to the powers of the EBA is elaborated with sufficient detail to enable the Court to assess their legality.

52. Article 94(2) of the CRD IV Directive states that the EBA ‘shall develop draft regulatory technical standards with respect to specifying the classes of instruments that satisfy the conditions set out in point (l)(ii) of paragraph 1 and with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on the institution’s risk profile as referred to in Article 92(2)’. The provision adds that the EBA is to submit those draft regulatory technical standards to the Commission by 31 March 2014, and a power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (39) (‘the EBA Regulation’).

53. The United Kingdom argues that the conferral of these powers must comply with the second paragraph of Article 10(1) of the EBA Regulation, in addition to the general principles regulating conferral of power to the Commission. The second paragraph of Article 10(1) of the EBA Regulation states that ‘[r]egulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based.’

54. The UK contends that Article 94(2) of the CRD IV Directive should be annulled because, in the first place, the tasks that have been conferred on the EBA exceed the scope of the powers granted under the EBA Regulation, particularly given that these tasks entail the ‘taking of strategic decisions or policy choices’ in breach of the second paragraph of Article 10(1) of the EBA Regulation.

55. The United Kingdom argues, in the second place, that since the EBA was established under Article 114 TFEU, it cannot lawfully be required to address matters that fall within the terms of Article 114(2) TFEU. This provision excludes, inter alia, provisions ‘relating to the rights and interests of employed persons’ from
the scope of Article 114(1) TFEU. In other words, Article 114(1) TFEU cannot form the legal basis for measures of this kind.

56. I start by noting that Article 94(2) of the CRD IV Directive, read together with Article 10(1) of EBA Regulation, confers on the Commission the power to adopt a delegated act in the sense of Article 290(1) TFEU. The delegated act, by means of which a regulatory standard is adopted, must be based on a draft regulatory technical standard prepared by the EBA. However, Article 94(2) of the CRD IV Directive confers no binding decision-making power on the EBA. I further recall that when the EU legislature confers on the Commission, in a legislative act, a power to delegate, the Commission is being called on to adopt measures that complement or modify non-essential elements of this act. (40)

57. As to first line of argument relating to the EBA Regulation, it is difficult to understand how the EU legislature could be said to have acted ultra vires if it having, pursuant to the ordinary legislative procedure, adopted one provision, in this case Article 10 of the EBA Regulation, then, pursuant to same procedure a second provision, in this case Article 94(2) of the CRD IV Directive, even if the content or scope of the first provision is narrower than that of the second one. The fact that these provisions purport to establish a certain task for an EU agency does not change this.

58. In my opinion, the EBA Regulation cannot invalidate any provision of the CRD IV Directive because the latter may depart from the former. This would even be the case where the CRD IV Directive conferred upon the EBA a competence to take binding strategic or policy decisions. In this latter case the conferral of powers would undoubtedly be unconstitutional in terms of the Meroni doctrine but not because of Article 10 of the EBA Regulation. (41)

59. More generally, a potential conflict between provisions of two legislative acts, as is alleged between Article 94(2) of the CRD IV Directive and the second paragraph of Article 10(1) of the EBA Regulation, and belonging to the same level in the hierarchy of norms, does not establish or imply any lack of competence by the legislature or the existence of any other ground of annulment in the sense of Article 263 TFEU, even if it may be indicative of poor quality legislative decision making. In consequence, in such a situation neither of the conflicting provisions can be annulled on this ground. However, asserting which takes priority over the other is a matter of applying such principles as lex posterior or lex specialis, unless they can be given an interpretation which eliminates the potential conflict. In other words, neither of the provisions is lex superior in relation to the other.

60. This applies even in circumstances where the legislature has not intended to depart from the first provision by adopting the second, which, as explained by the Parliament, the Council and the Commission, is the situation in the case at hand, due account taken of the fact that, according to Article 94(2), third subparagraph, of
the CRD IV Directive, the power is delegated to the Commission to adopt the regulatory technical standard in question in accordance with Articles 10 to 14 of the EBA Regulation.

61. This said, Article 94(2) of CRD IV Directive only empowers the Commission to complete the non-essential elements of legislative acts. The CRD IV Directive lays out the essential elements for the regulatory technical standards in question by providing that it applies to certain categories of the personnel of financial institutions, that is so-called material risk takers in the sense defined in detail in Article 92(2) of the CRD IV Directive.

62. In fact, Article 94(2) of the CRD IV Directive empowers the Commission, on the basis of a draft elaborated by the EBA, to adopt technical regulatory standards ‘with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on the institution’s risk profile as referred to in Article 92(2)’. The directive therefore aims at the adoption ‘of rules coming within the regulatory framework as defined by the basic legislative act’. (42) Hence, strategic and political choices have been taken in the basic legislative act rather than in measures elaborated by the EBA and adopted by the Commission.

63. With regard to the United Kingdom’s second line of argument to the effect that the powers conferred on the EBA are illegal because they can affect the rights and interests of salaried workers as envisaged by Article 114(2) TFEU, in circumstances in which the agency was established on the basis of Article 114(1) TFEU, in my opinion the tasks of an EU agency may have a legal base that is different from that upon which the legislative act establishing the agency was based. The tasks of an EU agency may, for example, partly be based on provisions on the four freedoms, with its initial setting up being grounded on internal market harmonization provisions or Article 352 TFEU. (43) By making resort to a given legal basis for the establishment of an EU agency, the legislature is not thereby precluded from conferring on it other tasks by reference to a different legal basis. Whether the latter is the appropriate legal base will depend on the content of the new tasks and powers conferred on the agency concerned, and the legal basis on which the agency was originally established will be irrelevant.

64. Further, it must be emphasised that what the EBA is empowered to do is to elaborate draft measures which will not pass into law unless they are adopted by the Commission. By definition, draft legislation cannot amount to measures ‘relating to the rights and interests of employed persons’ ‘which have as their object the establishment and functioning of the internal market’ in the sense of Article 114(1) and (2) TFEU. These draft measures have no legal effects going beyond the internal decision-making process of the Commission, where the Commission may decide to accept, reject or modify them as the case may be. Thus, draft measures proposed by the EBA, or any other EU agency for that matter, are in
themselves incapable of harmonizing any national provisions or affecting the rights and obligations of individuals.

65. For these reasons also the fourth plea should be dismissed.

D – Third plea relating to breach of the principle of legal certainty

66. Article 162(1) of the CRD IV Directive provides inter alia that Member States are to adopt and publish laws, regulations and administrative provisions necessary to comply with the directive by 31 December 2013, and that Member States are to apply them from that date.

67. Article 162(3) of the CRD IV Directive states that the ‘laws, regulations and administrative provisions necessary to comply with Article 94(1)(g) shall require institutions to apply the principles laid down therein to remuneration awarded for services provided or performance from the year 2014 onwards, whether due on the basis of contracts concluded before or after 31 December 2013’.

68. Article 521(1) of the CR Regulation states that the regulation shall enter into force the day following its publication in the Official Journal of the European Union, with Article 521(2) providing that the regulation shall apply from 1 January 2014.

69. According to the United Kingdom, Article 162(1) and (3) of the CRD IV Directive and Article 521(2) of CR Regulation infringe the principle of legal certainty.

70. The United Kingdom further contends that the delegated measures required to determine issues such as how the new rules will be applied in practice, what the applicable discount rate will be for deferred bonuses, and the criteria for determining material risk takers were not available in good time. This was so because the EBA was not obliged to deliver draft regulatory technical standards to the Commission until 31 March 2014 (see Article 94(2) of the CRD IV Directive). This precluded the Commission from adopting the regulatory technical standard until it received the EBA’s proposal. In fact, the Commission did not adopt the regulatory technical standards provided for in the CRD IV Directive until 4 March 2014.

71. The United Kingdom argues that the proper implementation of Article 94(1)(g) of the CRD IV Directive and Articles 450(1)(d)(i) and (j) of the CR Regulation depend on the prior identification of material risk takers. The United Kingdom therefore seeks the annulment of Articles 162(1) and 162(3) of the CRD IV Directive and Article 521(2) of the CR Regulation, because the EU institutions needed to set a different date for the implementation of the suite of measures found in the CRD IV Package in order to respect the principle of legal certainty.
72. The third plea is entitled ‘the contested provisions offend the principle of legal certainty’ and appears to be comprised of the following three arms.

73. In the first place, the United Kingdom argues that Article 162(3) of the CRD IV Directive breaches the principle of legal certainty because it is ‘retrospective in its effect’. This is so, the United Kingdom argues, because Article 162(1) requires the Member States to apply the CRD IV Directive from 1 January 2014, and this will impact on remuneration to be awarded on the basis of ‘contracts concluded before that date’.

74. In my opinion there is no basis on which it can be contended that the CRD IV Directive is retroactive. Under the established case-law of the Court, a retroactive measure is one that takes effect from a point in time before its publication. (44) Further, the Court has expressly held that the application of a provision of EU law ‘to a contract of employment concluded prior to its entry into force, cannot be regarded as affecting a situation arising prior to that date’. (45)

75. Furthermore, in accordance with Article 162(3) of the CRD IV Directive, Article 94(1)(g) thereof only applies to services provided or performance from the year 2014 onwards. Thus the CRD IV Directive does not touch upon the rights previously accrued that are linked to previous services or performance, or in other words rights accrued and performance prior to the entry into force of the CRD IV Directive. The actual right of the employee to receive remuneration only arises, at the very earliest, when he provides the services or demonstrates performance worthy of a bonus, and not when there was an agreement to do so.

76. It is true that the case-law of the Court of Justice provides some protection for the legitimate expectations of traders who have already concluded contracts that are affected by EU legislation having immediate effects, but legitimate expectations can arise in this context in only a narrow set of circumstances.

77. While ‘the principle of the protection of legitimate expectations is among the fundamental principles of EU law, and any economic operator whom an institution has, by giving him precise assurances, caused to entertain justified expectations may rely on that principle’, (46) the Court has consistently held that ‘traders cannot claim a legitimate expectation that an existing situation capable of being altered by the Community institutions in the exercise of their discretionary powers will be maintained’. (47) On the basis of the background to the CRD IV Directive reproduced above in the section entitled ‘Preliminary observations’ any ‘prudent and diligent trader’ (48) would have been able to foresee that the EU may introduce new rules on the ratio between the fixed and variable remunerations of employees of financial institutions.

78. Under the Court’s case-law, if an EU institution has afforded financial institutions ‘justified hope’ that no fixed ratio would be introduced, an objection to
this part of the CRD IV Directive, on the basis of breach of legitimate expectations, might have been made out. (49) However, this is not the case.

79. This brings me to the second arm of the United Kingdom’s application, that is, whether the legitimate expectations of the traders affected have been respected, in the sense of the ‘retroactivity’ line of case-law of the Court. Having said that, it is not necessary, in my opinion, for the Court to consider this aspect of the United Kingdom’s case, given that the measures impugned are not retroactive. Therefore I make the following observations only in the event of the Court deciding otherwise.

80. The application of the United Kingdom contends that the fixed ratio set by the CRD IV Directive offends legal certainty in the sense that the delegated measures required to determine such matters as how the new rules will be applied in practice, what the applicable discount rate will be for deferred bonuses, or the criteria for determining whether an employee is a material risk taker, were not due to be delivered until several months after the specific ‘cap’ on variable remuneration had to be applied at national level. As noted above, this was to occur on 1 January 2014, but pursuant to Article 94(2) of the CRD IV Directive, the EBA was not bound to deliver draft technical regulatory standards until 31 March 2014. These were adopted by the Commission on 4 March 2014. The objection of the United Kingdom also extends to the provisions on the shareholder vote and the 200% discretionary ratio established under Article 94(1)(g)(ii) of the CRD IV Directive. Thus, the United Kingdom argues that the EU institutions should have promulgated further legislation postponing the date of application of the contested measures until the full suite of provisions under the CRD IV Package was ready to be implemented as a whole.

81. In support of an obligation for ‘implementing legislation to be sufficiently precise and certain’ the United Kingdom relies on Article 17 of the EU Charter, Article 1 of Protocol No 1 to the European Convention on Human Rights, and the cases of Hentrich v. France, (50) Čpaček, s.r.o v. the Czech Republic (51) and Teleos and Others, C-409/04. (52)

82. The Court has recently reiterated that ‘the principle of legal certainty, the corollary of which is the protection of the principle of legitimate expectations, requires that rules involving negative consequences for individuals should be clear and precise and that their application should be predictable for those subject to them’. (53)

83. As to the non-existence of regulatory technical standards until 4 March 2014, in my opinion Article 92(2) of the of the CRD IV Directive spells out in a self-standing and detailed manner which employees of the institutions are covered by the remuneration provisions. (54)
84. As the Council points out in its defence, the CRD III Directive had already put in place the constituent elements for setting a ratio between the fixed and the variable part of remuneration. This included the personal scope of the EU remuneration policy defined in Annex I of the CRD III Directive as encompassing ‘senior management, risk takers, staff engaged in control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile’. This provision entered into force on 15 December 2010 and had to be transposed into national law by the Member States by the end of 2011. Thus, since 2011 financial institutions have been applying the EU law concept of a material risk taker.

85. Thus, the CRD IV Directive uses the same, in my opinion sufficiently specific rules regarding variable remuneration which have been in force for some years. Further, I note that the impugned measures of the CRD IV were published in June 2013, entered in force in July 2013, and were applicable from 31 December 2013. Therefore, it can be assumed that the new rules on variable remuneration were duly taken into account in contractual negotiations that took place between financial institutions and their relevant staff for the year 2014.

86. But more importantly, as a matter of EU law, the qualitative or quantitative criteria of Article 92(2) of the CRD IV Directive could not have been altered by the regulatory technical standards that were ultimately adopted by the Commission on 4 March 2014. Thus, there can be no question of legal certainty having been imperilled.

87. In any event, under the case-law of the Court, an EU measure may have retroactive effect provided that the purpose to be achieved so demands and the legitimate expectations of those concerned have been duly respected. (55)

88. The purpose of the contested measures is to create a homogeneous set of rules applicable for variable remuneration granted for services of material risk takers performed throughout the year 2014. Thus, the legitimate aim of Article 162(3) of the CRD IV Directive is to ensure that the measures contained therein are applied from the same date across the EU.

89. Moreover, the legitimate expectations of financial institutions and individuals concerned have been duly respected. The parties concerned received first notice that further legislation on remuneration was envisaged in the Green Book (56) and the initial proposal for the CRD IV Package. (57) When, on 30 May 2012, the European Parliament published its amendments proposing a fixed maximum ratio of 100% for the variable part of remuneration, (58) an initiative of this kind could not have been beyond the legitimate expectations of those concerned. In December 2012, the compromise between the European Parliament and the Council, with respect to remuneration of material risk takers, and which

proposed to set the maximum ratio to 200% of fixed salary, received wide media attention. Moreover, with the publication of the CRD IV Directive in the Official Journal on 27 June 2013, sufficiently clear rules on variable remuneration were available for inspection by everyone, leaving ample time to prepare for their taking effect in the beginning of 2014.

90. For these reasons the third plea should be dismissed.

E – Second plea pertaining to breach of the principles of proportionality and subsidiarity and challenge to Article 94(1)(g) of the CRD IV Directive and Article 450(i) and (j) of the CR Regulation

91. This plea is expressed and argued in rather complex terms, but it can be divided into two main themes, namely: (i) breach of the principles of proportionality (59) and subsidiarity (60) by the adoption of the obligatory maximum fixed ratio of 100% of fixed salary for variable remuneration; and (ii) proportionality of the disclosure requirements. I shall address these themes separately. (61)

1. Maximum fixed ratio for variable remuneration

92. According to the United Kingdom the contested measures fail to comply with the principle of proportionality, since they are not suitable for the purpose of achieving the desired public policy objective. Nor are they necessary to achieve the stated public interest aim of the legislation, since the remaining (unchallenged) provisions of the CRD IV Directive and the CR Regulation provide sufficient prudential supervision of credit institutions in this area, without the additional need for the imposition of an alleged ‘bonus cap’. It is further argued that the proportionality of the amended measures remains untested by the legislature. This, it has been argued, runs counter to the guidance from the Inter-Institutional Agreement on better law-making. (62) The United Kingdom contends that even allowing for the margin of discretion conferred on the EU institutions when legislating to preserve financial stability, the contested measures are manifestly disproportionate, and moreover, breach the principle of subsidiarity since the need for them to rectify competitive distortions in freedom of establishment remain unsubstantiated. (63)

93. I recall that there is a constitutional principle of EU law according to which, within the ordinary legislative procedure of the European Union, the co-legislatures have competence to make amendments to any legislative proposal inasmuch as they remain within the scope of the act as defined in the original Commission proposal. (64) This is what has occurred with respect to the amendment to Article 94(1)(g) of the CRD IV Directive which introduced a stricter rule than that put forward in the Commission proposal. However, Article 94(1)(g) of the CRD IV Directive did not depart from its scope and objectives, in so far as it remained
concerned with the subject of regulating variable elements of remuneration in view of combatting excessive risk taking by management and employees of financial institutions. This subject had already been addressed in the CRD III Directive.

94. As the Council rightly recalls, the co-legislatures may introduce measures that were not foreseen in an initial legislative proposal, without being necessarily bound to enter into a fresh and fully-fledged impact assessment. This is so because impact assessments carried out by the Commission are not binding on either the Council or the Parliament, both of which are entitled to make amendments to a Commission proposal. (65)

95. The Court has stated that ‘the European Union legislature’s broad discretion, which implies limited judicial review of its exercise, applies not only to the nature and scope of the measures to be taken but also, to some extent, to the finding of the basic facts’. (66) The Court has also held that even though such judicial review is of limited scope, the Community institutions which have adopted the act in question must ‘be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate’. (67) The information the institutions may rely on when exercising their discretion includes, but is not limited to information in the public domain, workshops by the Parliament and scientific documents used by Member States in Council meetings, without them having to be official Council documents. (68)

96. It should be remembered that when a large margin of appreciation has been conferred and involves economic and political choices, an applicant seeking a declaration of invalidity must show that the measure concerned is manifestly inappropriate, (69) having regard to the objective which the competent institutions is seeking to pursue. However, all the factors and circumstances have to be taken into account, including ‘the basic facts’. (70) The discretion of the EU legislature may be further restricted in the domain of fundamental rights ‘depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference.’ (71)

97. In my opinion, it is clearly documented in the defences of the Parliament and the Council, and the intervention of the Commission, that the issue of regulating the variable part of remuneration of material risk takers was widely debated from the beginning of the financial crisis, both in academic literature and by various policy makers. During the process leading to the adoption of the CRD IV Directive, and in particular Article 94(1)(g) thereof, there was ample information in the public domain, workshops held by the Parliament and documents discussed by Member States in Council meetings. These reveal the empirical uncertainties relating to the remuneration of material risk takers and reflect different policies and possible regulatory approaches.
98. This said, the material that was available to the decision-makers clearly demonstrated that a priori restricting incentives to excessive risk taking by the management and staff of financial institutions was likely to reduce such risk taking and, in consequence, any risk for the stability of financial markets following therefrom. Under such circumstances, the question where and by whom the concrete limits to such initiatives were to be set concerned, in my opinion, the degree of regulation that was appropriate. This has clearly involved economic and political choices. However, such choices need to have been *manifestly inappropriate* before the legislative measures concerned can be annulled.

99. In view of all of this, I am not of the opinion that it would be either helpful or necessary for the Court to address all of the numerous details included in the case of the United Kingdom on this point. In fact, these details simply demonstrate that the issue was controversial, and that the European Parliament viewed more intense regulation of the variable part of remuneration of the material risk takers of financial institutions as being desirable earlier than the other institutions.

100. In my opinion only two further points need to be addressed with respect to this ground of challenge. First, under the last indent of Article 94(1)(g)(ii) of the CRD IV Directive, staff who are directly concerned by exercise of the option for higher maximum levels of variable remuneration provided for in the provision may not vote as shareholders, owners, or members of the institution when a financial institution decides to make use of it, and raise the level of the variable component of remuneration up to 200% of the fixed component. In my opinion this is a normal and justified restriction of company decision-making, with the objective of preventing conflict of interests in the context of sound risk management of the financial institution in question.

101. Secondly, with regard to the principle of subsidiarity, I recall that the maximum fixed ratio for the variable component of remuneration in Article 94(1)(g) of the CDR IV Directive constitutes a compulsory measure of *minimum harmonization* within the internal market, leaving the Member States leeway for stricter national rules. Member States are allowed to set a lower maximum percentage than 100% of the fixed component.

102. As pointed out in the defence and rejoinder of the Council, there were differences of opinion concerning this ratio both among the Member States and the financial institutions; the idea of introducing a maximum ratio and/or limiting variable remuneration was part of the public debate for several years prior to the adoption of the contested measures. However, freedom of establishment and free provision of services in this sector are based on the principle of home-country control. To my mind this means that there was a danger of regulatory competition downwards and a risk that self-regulation by the financial institutions would not suffice to create the remuneration policies necessary for preventing excessive risk taking. Moreover, it is evident that the goal of creating a uniform regulatory
framework for risk management of relevant parts of remuneration policies of financial institutions could not have been better achieved by measures taken at the national level.

103. Finally, I recall that the European Parliament’s proposals for amendments were intensively analysed and discussed within the preparatory bodies of the Council. Moreover, the Council convened on 5 March 2013 specifically addressed the issues related to the limits on variable remunerations. Therefore, I agree with the Parliament and the Council that all the procedural requirements relating to the assessment of the compliance of the proposal with the principles of proportionality and subsidiarity were duly respected by the EU legislature. Subject to respecting procedural requirements, the legislature possesses a wide margin of discretion when assessing whether a Union measure adheres to the principles of proportionality and subsidiarity. (72)

2. The proportionality of the disclosure required by Article 450(1), (i) and (j) of the CR Regulation

104. Before an assessment can be made of the legality of these provisions by reference to the principle of proportionality it is important to be clear about what these provisions actually require. In fact, Article 450(1)(i) of the CR Regulation merely requires identification of the number of individuals being remunerated over specified levels and for this to be broken down into pay bands. The provision does not inevitably result in the identification of the remuneration of individual persons.

105. Thus, as pointed out in the statement of defence of the Parliament, neither Article 450(1) (i) or (j) of the CR Regulation require disclosure to the public of data pertaining to all material risk takers. Point (i) requires only the disclosure of the number of individuals falling in certain pay categories, while point (j) captures only the members of the management body or the senior management. Moreover, I add that this occurs without revealing the identity of the individual employee or his or her salary. This also means that Article 450(1) (i) and (j) does not touch on the rights or interests of employees in the sense of Article 114(2) TFEU, given that it is addressed to the financial institutions and not the individual employee. (73)

106. Therefore, the publication obligations which result directly from Article 450(1)(d) and (i) do not, in my opinion, result in the exposure of individual salaries, only aggregates. This lies within the legislature’s margin of appreciation and is not problematic from the point of view of data protection. (74)

107. Moreover, as pointed out in the written defence of the Council, Article 450(1)(j) of the CR Regulation merely allows the Member States to demand disclosure of more detailed information on remuneration than that required by Article 450(l)(i) in the form of the total remuneration for each member of the management body or senior management. In no way does it require the Member
108. To conclude my analysis of the second plea, as no breach of the principles of proportionality or subsidiarity has been demonstrated by the applicant, the second plea should also be rejected.

F – First plea challenging the legal bases for the contested measures

109. With regard to the United Kingdom’s objection to Article 53(1) TFEU as the choice of Treaty base for Articles 94(1)(g) and 94(2) of the CRD IV Directive, I commence by noting that the Court has already held that measures aimed at promoting the harmonious development of the activities of credit institutions throughout the EU by eliminating any restrictions on freedom of establishment and freedom to provide services, while increasing the stability of the banking system and the protection of savers, can be based on Article 53(1) TFEU. (75)

110. Since, on the one hand, the variable component of the remuneration of material risk takers can encourage the taking of excessive risk on the part of financial institutions and, on the other hand, the latter operate in the internal market on the basis of a single authorisation in accordance with the EU law principle of home-country control,(76) in my opinion the EU can, on the basis of Article 53(1) TFEU, fix for each category of persons, a mandatory ratio between the fixed component and the variable component of their remuneration. Because this part of the remuneration impacts directly on the risk profile of financial institutions, it can affect the stability of financial institutions, and in consequence that of the financial markets of the EU. In other words, the measures impugned by the United Kingdom in the CRD IV Directive are related to the conditions of access to and pursuit of activities of financial institutions in the internal market.

111. However, according to the United Kingdom, these provisions should have been adopted on the basis of Article 153(2) TFEU. Yet, the United Kingdom adds that, since Article 153(5) TFEU precludes measures relating to ‘pay’, recourse cannot be had to Article 153 as the Treaty base for Articles 94(1)(g) and 94(2) of the CRD IV Directive.

112. Article 153(5) TFEU has been interpreted by the Court to the effect that the fixing of remuneration levels lies in the domain of the social partners at the national level, so that competence lies with the Member States. (77) That being so, in my opinion it is critical to determine whether Article 153(5) TFEU, a provision that must be interpreted strictly, (78) is applicable when the measure challenged does not pursue a social policy objective, as is the case here. This is important because Article 153(5) TFEU derogates only from ‘this article’, and Article 153 appertains...
only to the social policy of the EU, a matter defined in Article 151 TFEU where reference is made to the European Social Charter of 1961 and the 1989 Community Charter of Fundamental Social Rights of Workers.

113. It is evident that the limits on the remuneration of material risk takers are not aimed at affording such employees with any form of social protection. Recitals 62 and 65 in the preamble to the CRD IV directive illustrate that the Directive aims at preventing encouragement of such employees from taking excessive risks, not only with the aim of limiting the exposure of each financial institution to such risks, but equally from the general perspective of the stability of the EU financial markets. Recital 62 states, inter alia, that remuneration policies ‘which encourage excessive risk-taking behaviour can undermine sound and effective risk management’ of financial institutions. Recital 65 states, inter alia, that ‘in order to avoid excessive risk taking, a maximum ratio between the fixed and variable component of the total remuneration should be set’.

114. However, in my opinion, even once this analysis takes place, the United Kingdom’s challenge cannot be rejected simply on the basis that the measures impugned do not pursue a social policy objective. This is so because the Court has held that the ‘establishment of the level of the various constituent parts of the pay of a worker falls outside the competence of the European Union legislature’ and rests with the Member States. (79) Thus, recourse to Article 53(1) TFEU as the legal basis of the CRD IV Directive cannot be made in order to circumvent the limitation imposed by Article 153(5) TFEU.

115. I am also mindful of the fact that, according to the Court’s established case-law, the variable parts of a salary form part of the remuneration of that salary. (80) This therefore needs to be taken into consideration before any definitive conclusion can be reached on the role of Article 153(5) TFEU in resolving the dispute at hand. It is necessary to determine, therefore, whether the EU legislature has, in reality, fixed the pay of material risk takers in the sense of Article 153(5) TFEU.

116. The Court of Justice has held that Article 153(5) TFEU stands for the rule that ‘the establishment of the level of the various constituent parts of pay of a worker … is still unquestionably a matter for the competent bodies in the various Member States’, (81) and that the exception contained in Article 153(5) ‘must therefore be interpreted as covering measures – such as the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed Community wage – which amount to direct interference by Community law in the determination of pay within the Community’. (82)

117. Indisputably the prohibition in Article 153(5) TFEU applies only to the determination of the ‘level’ of pay. (83) As pointed out in the application of the United Kingdom, Advocate General Kokott has expressed, in theImpact case, the view that the EU would not have competence, for example to ‘introduce an upper
limit for annual pay increases or regulate the amount of pay for overtime or for shift-work, public holiday overtime or night work.’ (84) In addition, Article 153(5) TFEU aims to prevent EU wide standardization by the EU legislature of the wage levels applicable in each of the Member States, since such a levelling would represent significant interference in competition between undertakings operating in the internal market. (85) None of these matters are affected by Articles 94(1)(g) and 94(2) of the CRD IV Directive.

118. However, as pointed out in the defence of the Council, the rules set up through Articles 92 to 94 of the CRD IV Directive can, at most, be viewed as having a link with pay, while the Council adds that the amount of the fixed component is left to the remuneration negotiation between the staff and the financial institution. As pointed out in the defences of the Council and the Parliament, the United Kingdom has contended that the likely response to the CRD IV Package is an increase in the amount of fixed remuneration in order to maintain the overall high level of total remuneration. As the Council states in its defence, this adjustment would not be possible had the European Union legislated on a constituent part of pay and, as pointed out in the rejoinder of the Parliament, a ratio in itself is simply not enough to set anything.

119. Thus, as I have already mentioned, and contrary to arguments made in the application of the United Kingdom, Article 94(1)(g) does not impose a ‘cap’ on variable remuneration. This is evident from the fact that no limit is imposed on the amount of fixed remuneration individuals can earn, so that the 100% ratio introduced by Article 94(1)(g)(i) of the CRD IV Directive can attach to any sum of money which a financial institution is prepared to pay by way of fixed salary. The absence of any ‘capping’ effect resulting from the ratio for variable remuneration is further underscored by Article 94(1)(g)(ii) of the CRD IV Directive, which in any event furnishes a mechanism for the ratio to be increased to 200% and at the same time allows for the Member States to fix the maximum ratio at a lower maximum percentage.

120. Therefore, in my opinion, Article 94(1)(g) of the CRD IV Directive, and the limit on variable remuneration that it contains, does not impact directly on the level of pay of persons falling within its scope. The said provision merely establishes a ratio between the fixed and variable element without affecting the level of the remuneration as such. That level is a function of the fixed component of pay agreed between the employer and the employee when added with the variable component. As there is no legal limit to the fixed component, in consequence, there is no such limit to the total level of pay either. (86)

121. In conclusion I submit Article 94(1)(g) of the CRD IV Directive does not impose any limit on the level pay. It only establishes a structure for remuneration in the form of a ratio between the fixed level of remuneration and the variable remuneration in order to avoid excessive risk taking. This constitutes a legitimate
objective to ensure that freedom of establishment of financial institutions and free provision of financial services on the basis of single authorisation and home-country control can function safely in the EU internal market. (87) Moreover, the Court has approved the compatibility with the Treaty of EU law of measures that have only an indirect link with the level of pay. (88)

122. With regard to Article 114 TFEU as the legal basis of Article 450(1)(d), (i) and (j) of the CR Regulation, the United Kingdom claims that recourse to Article 114(1) TFEU is excluded due to the exception contained in Article 114(2) TFEU.

123. In the light of my analysis of the fifth plea, I have difficulty in seeing how the disclosure obligations contained in Article 450(1) of the CR Regulation could be considered to be provisions that are relevant to the ‘rights and interests of employed persons’ within the meaning of Article 114(2) TFEU as the provision only binds financial institutions and not its employees who remain protected by the Charter and EU data protection law. Further, the interpretation of Article 114 (2) TFEU advocated by the United Kingdom would prevent any action taken by the Union on the basis of Article 114 TFEU impacting on the domain of work. That would contradict paragraphs (4) and (5) of Article 114 TFEU permitting regulation of issues related to the working environment on the basis of Article 114 TFEU.

124. For these reasons the first plea of annulment should also be rejected.

V – Costs

125. Since, according to my proposed solution, the United Kingdom has been unsuccessful and the Council and the European Parliament have applied for costs, the United Kingdom must be ordered to pay the costs in accordance with Article 138(1) of the Rules of Procedure. On the other hand, the Commission, as an intervener, must bear its own costs in accordance with Article 140(1) of the Rules of Procedure.

VI – Conclusion

126. In the light of the foregoing observations, I propose that the Court should dismiss the action, order the European Commission to bear its own costs, and order that the United Kingdom of Great Britain and Northern Ireland pay the costs of the Council and European Parliament.

4 – In the text that follows the term ‘material risk takers’ will be used to describe these employees. However, I note that the legislation is not entirely uniform when it comes to choosing the form of words to identify them. Here, I refer to Articles 92(2) and 94(2) of the CRD IV Directive and Article 450(1) of the CR Regulation.

5 – This is the term that has been used in English speaking media to describe the arrangement. I note that the CRD IV Directive does not represent the first time that the EU legislature has sought to regulate bonuses or wage supplements. See for example Article 10 (1) of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (1) OJ 2006 L 102, p. 1.

6 – See COM(2012) 778 final, paragraph 3.1. Between 2008 and 2011 the overall amount of aid used in terms of guarantees, recapitalisation measures, impaired assets and liquidity measures, amounted to 1.6 trillion EUR corresponding to 12.8% of EU GDP.


regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements and crisis management (OJ 2009 L 302 p. 97).


13 – According to recital 3 in the preamble to the CRD III Directive, in ‘order to address the potentially detrimental effect of poorly designed remuneration structures on the sound management of risk and control of risk-taking behaviour by individuals, the requirements of Directive 2006/48/EC should be supplemented by an express obligation for credit institutions and investment firms to establish and maintain, for categories of staff whose professional activities have a material impact on their risk profile, remuneration policies and practices that are consistent with effective risk management. Those categories of staff should include at least senior management, risk takers, staff engaged in control functions and any employee whose total remuneration, including discretionary pension benefit provisions, takes them into the same remuneration bracket as senior management and risk takers.’

14 – COM(2010) 284 final, particularly point 5.7 entitled ‘Remuneration’.


16 – See the provisional agenda of the 3227th meeting of the Council of 1 March 2013 (doc 6864/13) and the subsequently published summary on the debate in the Council of 5 March 2013.
17 – The United Kingdom challenges no other pay related provision of the CRD IV Directive than Article 94(1)(g) and Article 94(2). While Article 94(1)(g)(iii) is covered by the Form of Order sought, it is not discussed in detail in the action.

18 – See also the Liikanen Report of the High-level Expert Group on reforming the structure of the EU banking sector, Brussels, 2 October 2012, paragraph 4.2.5.

19 – The United Kingdom refers here to Jennings, R., and Watts, A., (eds) Oppenheim’s International Law, 9th ed, Longman, Harlow, vol 1 ‘Peace’, at p.456, which in my opinion, however, does not support any contention to the effect that the legislative jurisdiction of States would be limited to conduct occurring on their own territory. On the contrary, in footnote 2 on that page, the authors refer to the Lotus judgment of the Permanent Court of International Justice where it was stated that international law generally left states ‘a wide measure of discretion’ in the application of their laws, limited in certain cases by prohibitive rules.


21 – See also Article 3(36) of the CRD IV Directive, which states that ‘competent authority’ means ‘competent authority as defined in point (40) of Article 4(1) of Regulation (EU) No 575/2013’.


26 – There is apparent consensus amongst many writers that contemporary international law would have departed from the presumption established in the *Lotus* case concerning the States’ freedom to decide on the applicability of their legislation with the boundaries of compulsory international law rules and would require a ‘sufficient’ link or nexus before extraterritorial behaviour of non-nationals and a State before the latter could exercise its jurisdiction to prescribe. For an influential contribution see Mann, F. A., *The Doctrine of Jurisdiction in International Law*, Recueil des Cours 1964:1, vol.111.


28 – Island of Palmas Case (or Miangas), United States v Netherlands, award of 4 April 1928 (II RIAA 829).


41 – Judgment in Meroni v High Authority, EU:C:1958:8 at pp. 171 to 172.

43 – See the discussion of this topic in my Opinion in *United Kingdom v Council and Parliament*, C-270/12, EU:C:2013:562.


45 – Judgment in *Pokrzeptowicz-Meyer*, C-162/00, EU:C:2002:57, paragraph 52. See also Judgment in *Saldanha and MTS*, C-122/96, EU:C:1997:458, paragraph 14, and Judgment in *Elektrownia Pątnów II*, C-441/08, EU:C:2009:698, paragraph 32. See also Judgment in *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712 where it was held at paragraph 22 that it ‘should be borne in mind that, in principle, a new rule of law applies from the entry into force of the act introducing it. While it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations too…. It is otherwise – subject to the principle of the non-retroactivity of legal acts – only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application.’ Citing, the Judgment in *Monsanto Technology*, C-428/08, EU:C:2010:402, paragraph 66 and the Judgment in *Stichting Natuur en Milieu and Others*, C-266/09, EU:C:2010:779, paragraph 32.


48 – Ibid., paragraph 36.

49 – See, in this sense, Judgment in *Greece v Commission*, C-86/03, EU:C:2005:769, paragraph 71. This has classically occurred when the EU has failed to take measures to

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54 – The provision refers to, for example, senior management, risk takers, staff engaged in control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers whose professional activities have a material impact on their risk profile. See also Annex I to the CRD III Directive, discussed below at paragraph 84.

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56 – See COM (2010) 0284 final, section 5.7., entitled ‘Remuneration’.

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58 – See the Report at A7-0170/2012.
59 – Article 5(1) and (4) TEU.

60 – Article 5(1) and (3) TEU.

61 – The written observations of the United Kingdom make a passing reference to the compatibility of the disclosure requirements with the principle of subsidiarity. However, given that the written observations do not develop this arm of the United Kingdom’s challenge any further, I will confine my analysis of the disclosure obligations to their compatibility with the principle of proportionality.


66 – Ibid., paragraph 33.

67 – Ibid., paragraph 34.

68 – See, in this sense, ibid., paragraphs 35 to 41.


71 – See judgment in Digital Rights Ireland, C-293/12 and C-594/12, EU:C:2014:238, paragraph 47 and the case-law cited.

72 – See judgment in United Kingdom v Council, C-84/94, EU:C:1996:431, paragraph 58, and judgment in British American Tobacco (Investments) and Imperial Tobacco, C-491/01, EU:C:2002:741, paragraph 123.

73 – I will return to the United Kingdom’s concerns pertaining to Article 114(2) TFEU in my analysis to follow of the first plea.

74 – This aggregated information is not analogous to the detailed information on pay of named individuals and its compatibility with EU data protection law, considered by the Court in the judgment in Österreichischer Rundfunk and Others (C-465/00, C-138/01 and C-139/01, EU:C:2003:294) and the judgment in Satakunnan Markkinapörssi and Satamedia (C-73/07, EU:C:2008:727).


76 – According to Articles 33 and 34 of the CRD IV Directive, authorised financial institutions may carry out their activities within the territories of other Member States on the basis of their authorisation in the home Member State.


86 – This outcome is not altered by the alleged factual consequences of the introduction of a fixed ratio consisting of increased fixed components of pay or decreased total remunerations for the material risk takers.

87 – See footnote 76 above.
Examples of such EU measures are those relating to anti-discrimination, posted workers and working time. Regarding the Court’s case-law, see, for example, judgment in *Del Cerro Alonso*, EU:C:2007:509, where the Court held at paragraph 41 that the ‘pay’ exception ‘cannot, however, be extended to any question involving any sort of link with pay; otherwise some of the areas referred to in Article 137(1) EC would be deprived of much of their substance’, and the judgment in *Impact*, EU:C:2008:223, where the Court held at paragraph 125 that ‘[i]t cannot, however, be extended to any question involving any sort of link with pay; otherwise some of the areas referred to in Article 137(1) EC would be deprived of much of their substance’, citing, inter alia, the judgment in *Del Cerro Alonso* EU:C:2007:509, paragraph 41.