

# P.R.I.M.E. Finance

Panel of Recognized International Market Experts in Finance

**African regulatory and monetary developments, sustainable finance, outlook**



**René Smits**

**P.R.I.M.E. Finance Annual Conference 2018  
22 & 23 January, Peace Palace, The Hague**

# A brief contribution on four issues

- *Fundamental changes underway: automation, artificial intelligence, self-driving transport, fintech disruption, social media, and many more*
- *Will affect mediation and arbitration*
- *Our basic humanity remains, calling for humaneness*
- *Looking out to: Africa, the emerging continent & sustainable finance*

Specific issues presented here:

1. Bank (holding) regulation in Africa - research
2. Regional monetary unions outside Europe – focus: Africa
3. European sustainable finance developments
4. Outlook



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# Disclosure and disclaimer

- Alternate Member, Administrative Board of Review (ABoR),  
European Central Bank (ECB)
- Professor of EMU law, University of Amsterdam
- Independent Consultant: EMU law, banking regulation,  
RS Law & Society Consulting B.V.
- Assessor, Belgian Competition Authority



- All views personal



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# Research on bank regulation



## Bank holding company regulation in Kenya, Nigeria and South Africa: a comparative inventory and a call for Pan-African regulation

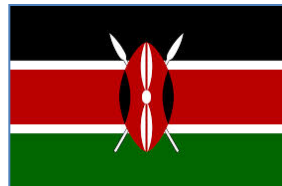
John L Taylor

René Smits

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[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2881819](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881819)

Research by John Taylor of CCLS at London's Queen Mary University and myself showed that three African jurisdictions have far-reaching bank holding regulation: Nigeria, Kenya and South Africa subject the parent companies of banking groups, even when the parent itself is not a bank, to incisive supervision which, in many cases, includes the same requirements as for the banks in their group.



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# Sound BHC regulation and supervision encompasses:


1. Licensing: BHC [corporate structure and authorization](#); authorised kinds of business for BHC
2. Suitability ([fit and proper](#) testing) of the BHC's [shareholders](#) and [corporate governance requirements](#) for the BHC itself.
3. [Fit and proper](#) testing as to the expertise and trustworthiness of [directors of the BHC and its senior management](#).
4. [Capital requirements](#) for the BHC and the group at large.
5. [Liquidity requirements](#) for the BHC and the group at large.
6. Regulations imposed on the BHC and group members on [exposures, intra-group financing and transactions, and stress testing](#).
7. Group [recovery & resolution](#) regulations applying to the BHC, over and above those applying to its banking subsidiaries.
8. [Information and reporting requirements](#) for BHCs vis-à-vis supervisory authorities.
9. [Public disclosure](#) requirements for BHCs.
10. Other rules of best international practice, e.g. the application of [Anti-Money Laundering and Counter-Terrorist Financing \(AML/CTF\) rules](#) to the BHC





## Research findings



- ❑ “advanced and often consistent” BHC regulation
- ❑ Also in UEMOA (WAEMU): [BCEAO Commission Bancaire](#)  
*Avis No. 004-08-2016* relatif aux [dispositif prudentiel](#) applicable aux établissements de crédit et aux compagnies financières de l'Union Monétaire Ouest Africaine (UMOA).
- ❑ Similarities and differences among the jurisdictions led us to **call for pan-African harmonisation** to facilitate expansion of banking groups across Africa and to make their supervision more effective than individual jurisdictions can ensure.
- ❑ Later developments: South Africa's Financial Sector Regulation Act;  
 ‘Twin Peaks’ model – social inclusion, sustainable competition and fair outcomes



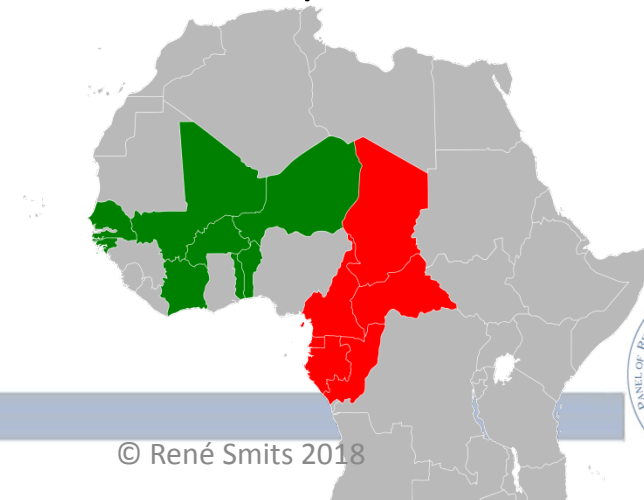
# African monetary unions



- ❑ *Union économique et monétaire ouest-africaine (UEMOA)*
- ❑ *Communauté économique et monétaire de l'Afrique centrale (CEMAC)*
- ❑ CFA francs (XOF; XAF): vestiges of colonial times or guarantee of monetary stability? Economic and political debate on CFA francs intensifies
- ❑ CFA francs linked to euro: € 1=CFA 655,957 through French *Trésor*, authorised by EU Ecofin Council ([Decision 98/683/EC](#), 23 November 1998)
- ❑ Abandonment of CFA francs would still see regulations converge
- ❑ Plans for regional currencies and for a pan-African currency



23 January 2018



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# African monetary unions in the making



**East African Community**

One People, One Destiny



**SADC** harmonisation efforts

Publicly, not very advanced (preparations on-going)

<https://www.eac.int/financial/banking>

<https://www.sadcbankers.org/subcommittees/BankSupervisors>

**EAC** harmonisation efforts

Publicly, not very advanced either

<https://www.eac.int/financial/banking>

**ECOWAS** , [WAMA](#) and West African Monetary Zone: [WAMI](#)



**SOUTHERN AFRICAN DEVELOPMENT COMMUNITY**  
**TOWARDS A COMMON FUTURE**



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# African monetary and regulatory developments

- ❑ Regulations researched largely in line with global standards
- ❑ Fit for further convergence: **pan-African regulation welcome**
- ❑ Top-down (FSB, Basel, IOSCO, FATF > local jurisdictions) and bottom-up (local > regional > continental) developments could converge
- ❑ Not making Europe's mistakes on EMU: imbalance between monetary and economic union, without central budgetary authority or *effective* coordination of economic policies, leaving ECB alone to address crisis: insufficient central authority to combat crisis (ESM, Commission, EU budget restraints, no EA-wide unemployment insurance or deposit guarantee scheme) – absence of single banking supervision & resolution before 2014/16 – slow progress towards a real Single Rulebook – late development of Capital Markets Union
- ❑ Great opportunities for **dispute prevention** through timely regulation

# African dispute resolution mechanisms

- *Organisation pour l'Harmonisation en Afrique du Droit des Affaires / Organization for the Harmonization of Business Law in Africa*
- Wide-ranging uniform law initiatives: 10 uniform laws
- Including a recent (23 November 2017) revised [law on arbitration](#)
- And a [Uniform Act on Mediation](#) (23 November 2017)
- *Cour Commune de Justice et d'Arbitrage (CCJA)...*
- ... with an [arbitration](#) role
- Encompassing 17 countries



LES 17 ETATS  
PARTIES DU  
TRAITE OHADA



UNIDA / www.ohada.com

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## Tableau chronologique d'adoption des Actes uniformes de l'OHADA par le Conseil des Ministres de la Justice et des Finances

<b>Texte</b>	<b>Date d'adoption</b>	<b>Publication</b>	<b>Actualisation</b>
Règlement de procédure de la Cour Commune de Justice et d'Arbitrage	18 Avril 1996	1er Novembre 1997	30 janvier 2014
Acte uniforme portant sur le droit commercial général	17 Avril 1997	1er Octobre 1997	15 décembre 2010
Acte uniforme relatif au droit des sociétés commerciales et du groupement d'intérêt économique	17 Avril 1997	1er Octobre 1997	30 janvier 2014
Acte uniforme portant organisation des sûretés	17 Avril 1997	1er Juillet 1998	15 décembre 2010
Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution	10 Avril 1998	1er Juin 1998	
Acte uniforme portant organisation des procédures collectives d'apurement du passif	10 Avril 1998	1er Juillet 1998	10 septembre 2015
Acte uniforme relatif au droit de l'arbitrage	11 Mars 1999	15 Mai 1999	23 novembre 2017
Règlement d'arbitrage de la CCJA	11 mars 1999	15 mai 1999	23 novembre 2017
Acte uniforme portant organisation et harmonisation des comptabilité des entreprises	23 Mars 2000	20 Novembre 2000	26 janvier 2017
Acte uniforme relatif aux contrats de transport de marchandises par route	22 Mars 2003	31 juillet 2003	
Acte uniforme relatif au droit des sociétés coopératives	15 décembre 2010	15 février 2011	
Acte uniforme relatif à la médiation	23 novembre 2017	15 décembre 2017	

# Sustainable finance: definition

- ❖ Environmentally sound financing
- ❖ Favouring sustainable and inclusive growth, “meeting society’s long-term needs for innovation and infrastructure, and accelerating the shift to a low-carbon and resource efficient economy” (EU High-Level Expert Group on Sustainable Finance)
- ❖ Reflecting financial risks from carbon exposure

*Note our language: ‘environ(ne)ment’ / ‘milieu’ / ‘Umwelt’ implies a distance between ourselves and what is around: an anthropocentric view of the interconnected universe*



# Sustainable Development Goals

Agenda 2030, [UNGA Resolution 70/1](#), 21 October 2015



# Amending EU law for sustainability

- ❑ EU [High-level Expert Group](#) Report out soon
- ❑ [Interim report](#) recommendations:
  - ❑ EU classification of assets and products that captures all acceptable definitions of 'sustainable' – that is, that delivers a positive sustainable impact (environmental, social or economic)
  - ❑ Introduction of EU standard for 'green bonds'
  - ❑ ESG (Environmental, Social & Governance) disclosure by firms and financial institutions



EU HIGH-LEVEL EXPERT GROUP ON  
**SUSTAINABLE FINANCE**

- ❑ Amending CRD IV (Article 84a): European Parliament [Article 84a amendment](#) to CRD-V



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# Article 84a Climate-related risks

*(proposed by the European Parliament as an amendment to CRD IV)*

1. [Supervisory] authorities shall ensure that policies and processes for the **identification, measurement and management of all material sources and effects of climate-specific risks** are implemented.
2. For [these], the [bank/investment firm] shall identify the following: a) the **risks** to which [it] is exposed in the short, medium and long terms; b) a description of **significant concentrations of credit exposures involving carbon-related assets**, if these exposures are material; c) a description of the **impact of the climate-related risks on [its] business, strategy and financial planning**, if these risks are material and financial; d) a description of the **processes which [it] uses to identify, assess and manage climate-related risks**; e) the parameters which [it] used to assess the impact of short-, medium- and long-term climate-related risks on lending and financial intermediary transactions, if these risks are material.
3. The [European Banking Authority] shall issue guidelines to specify: a) what is meant by a short-term, a medium-term and a long-term time frame; b) what is meant by specific climate related problems which may arise in the short, medium or long term and which could have a material, financial impact on the institution; c) what is meant by physical risks and transition risks; d) what is meant by the processes used to determine which risks could have a material, financial impact on the institution; e) what is meant by a carbon-related asset. The EBA shall publish these guidelines by ... [two years after the entry into force of this Directive]



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# Prudential standards for ecological reasons?



*Mark Carney, Governor of the Bank of England >*

*< Frank Elderson, Executive Director of De Nederlandsche Bank*



Is this an acceptable way of reforming prudential standards?

Yes, for two reasons:

1. Need to prepare for a deep reduction in value of current investments once oil becomes obsolete (like tobacco in the past and the meat ‘industry’ in the future); ‘tragedy of the commons’; [Mark Carney: Breaking the tragedy of the horizon](#) – climate change and financial stability
2. As long as the prudential character of standards is maintained, making these also serve other purposes that we, as a global or European society have adopted, is acceptable, even laudable



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# Concluding remarks

- Major societal and economic change underway
- Sustainable finance – regulatory change to come
- African developments: convergence and emergence
- Looking beyond the law and the finance sector ....
- .... to better serve both

