LESS IS MORE

PROPOSALS TO SIMPLIFY AND IMPROVE
EUROPEAN RULE-MAKING
IN THE FINANCIAL SERVICES SECTOR

REPORT BY AN EXPERT GROUP

10 FEBRUARY 2025

WITH THE SUPPORT OF EUROPEAN ASSOCIATIONS

“La semplicità è il massimo della raffinatezza”
LEONARDO DA VINCI

“Weniger ist mehr” (Less is more)
LUDWIG MIES VAN DER ROHE

“La simplicité absolue est la meilleure manière de se distinguer”
CHARLES BAUDELAIRE

FOREWORD BY JACQUES DE LAROSIÈRE

I am very pleased to have been invited to introduce the "Less is more" report. I have been following the work done by its authors and am keen to make a contribution. Having been involved, through the committee I chaired in 2009, in the early stages of the creation of the European Supervisory Authorities (ESAs), I believe I have some basis for sharing my reactions to the report with readers.

The authors of "Less is more" share with me a simple but fundamental conviction: the importance of working for the unification of European financial standards and supervision in the service of the development, competitiveness, and stability of our economies. From the standpoint of unification, the ESAs have done a good job.

But as the report points out, these fundamental objectives are far from having been fully achieved.

In particular, I think that in order to correct the shortcomings highlighted in the report, and especially the overabundance of texts and the concerns about their restrictive effects, we need to change the point of view and the mindset with which these problems are approached.

So, beyond the various solutions outlined in the report, if the ESA boards are to make an even greater contribution to perfecting the common project, it seems to me it would be better if the ESA directors were chosen from among the authorities responsible for regulation rather than among supervisors, and in any case if their origins were more diversified.

Another suggestion might be to reduce the number of meetings, but have senior regulators attend in person. This proposal may seem superficial. It is in fact essential, because regulators at the decision-making level are the most capable of reaching fruitful compromises that focus on the essentials.

At the end of the day, I share with "Less is more" a fundamental idea that goes far beyond the subject of standards: what is important is to move things forward towards the common good rather than to defend governments or institutions that are not ends in themselves.

JACQUES DE LAROSIÈRE
FORMER MANAGING DIRECTOR OF THE IMF,
HONORARY GOVERNOR OF THE BANQUE DE FRANCE,
FORMER PRESIDENT OF THE EUROPEAN BANK
FOR RECONSTRUCTION AND DEVELOPMENT

COMPOSITION OF THE EXPERT GROUP

Scientific Council

Prof. SOUSI Blanche
Professor Emeritus - Jean Monnet Chair (*ad personam*) in European Banking and Monetary Law, Jean Moulin Lyon 3 University, Member of the Scientific Committee of the ESBFL/AEDBF

Prof. ROUAUD Anne-Claire
Professor of Private Law at Paris 1 Panthéon-Sorbonne University, co-director of Sorbonne Business/Finance, President of ESBFL/AEDBF France

Prof. PAILLER Pauline
Professor of Private Law at Paris Cité University, member of the Scientific Committee of ESBFL/AEDBF France

Prof. MARTUCCI Francesco
Professor of Law at Paris-Panthéon-Assas University, Director of the Master's Degree in European Law, Market and Regulation programme

Leadership

DELAHOUSSE Elisabeth
Head of European Affairs, Fédération Nationale de Crédit Agricole, founding member of the ESBFL/AEDBF and member of the Board of Directors of ESBFL/AEDBF France
elisabeth.delahousse@ca-fnca.fr
eulessismore@gmail.com

List of contributors in alphabetical order

ABBOU Jennifer
Legal counsel, Legal watch & Public affairs, Crédit Agricole Personal Finance & Mobility

AKBAL Ismail
Regulatory Affairs Advisor, Österreichischer Genossenschaftsverband (ÖGV)

Prof. ANNUNZIATA Filippo
Professor of Financial Market Law at the Università Commerciale Luigi Bocconi, Milan

Prof. BERCEA Lucian
West University of Timisoara, Romania, Member of the Scientific Committee of the ESBFL/AEDBF

BOUCARD François
Lawyer at the Conseil d'Etat and the Cour de cassation, Member of the Board of Directors of ESBFL/AEDBF France

BOUMA Peter
Legal Expert, Legal Department, Rabobank

BOURIN DION Catherine
General Manager at the Ministry of Justice, Anti-Money Laundering and Counter-Terrrorism Financing Directorate, Luxembourg

BRECHOT Yasmina
Lawyer, Banking Regulation Expert, Confédération Nationale du Crédit Mutuel

de BROUWER Sébastien
Deputy Chief Executive Officer, European Banking Federation

CARRIOU Dominique
Head of Regulatory Affairs, European Savings and Retail Banking Group

Prof. CATALIN-SILVIU Săraru
Associate Professor, Faculty of Law, University of Economic Studies, Bucharest, Member of ESBFL/AEDBF Romania

CHAMPSAUR Amélie
Lawyer at the Paris Bar, Cleary Gottlieb

CHEIKH Asmaa
Director, Banking and Financial Regulation, Legal Department, Société Générale Group

Prof. CONAC Pierre Henri
Professor at Luxembourg University, Acting Director of the Centre for European Law, Fellow of the Max Planck Institute, Luxembourg

CREMERS Thiebald
Doctor of law, Director of Legal Affairs, Association française des marchés financiers (AMAFI), France, member of the Board of Directors of ESBFL/AEDBF France

DELAHOUSSE Elisabeth
Head of European Affairs, Fédération Nationale de Crédit Agricole, founding member of the ESBFL/AEDBF and member of the Board of Directors of ESBFL/AEDBF France

DE MEULENEERE Inez
Chair of the Board of Directors of ESBFL/AEDBF Belgium, Member of the Board of Directors of the ESBFL/AEDBF

DOMERACKA-SMOLNA Ewelina
Legal Counsel SOZ BPS, cooperator of National Association of Cooperative Banks (KZBS), Poland

Prof. Dr. DONATH Philipp
Professor of Constitutional Law, EU Law and Labour Law, University of Labour, Frankfurt am Main

FERRETTI Roberto
Vice-President of the ESBFL/AEDBF, Adjunct Professor of Business and Digital Law at the Università Ca' Foscari di Venezia, Italy, Lawyer at the Milan Bar

FOREST Jean-Baptiste
Lawyer at the Paris Bar

FUNERED Urban
CEO, Swedish Securities Markets Association

GEHLER Svetlana
Representative of the German Savings Banks Association (DSGV) for European banking supervisory authorities

GILLEN Marie-Paule
Attorney at law, Partner in the Banking & Financial Services Practice of DSM Avocats à la Cour, Luxembourg, Chair of the Board of Directors of ESBFL/AEDBF Luxembourg, Member of the Board of Directors of the ESBFL/AEDBF

GILLOUARD Marie
Head of Institutional Relations, Crédit Agricole Personal Finance and Mobility

HASCOËT Pauline
Senior advisor sustainable finance and corporate governance, European Association of Cooperative Banks

HEEGEMANN Volker
Head of Department, European Association of Cooperative Banks

JOUFFIN Emmanuel
Head of SSI Repository and Regulatory Watch, Cyber Security Department, La Banque Postale Group

JOVET Caroline
Legal Expert in Insurance Distribution, BNP Paribas Cardif

KACZMAREK Marcin
Head Specialist, IPS-SGB, cooperator of National Association of Cooperative Banks (KZBS), Poland

KRAKOWIAK Michał
Management Consultant, National Association of Cooperative Banks (KZBS), Poland

LACROIX Frederick
Member of the Paris Bar, Member of the Board of Directors of ESBFL/AEDBF France

Prof. Dr LEHMANN Matthias
Professor at the University of Vienna and Radboud University Nijmegen

LIEGL Silvia
Managing Director of professional Association of Volksbanken, Head of Regulatory Affairs

LOUIS Isabelle
Head of Regulatory Watch, Crédit Mutuel Alliance Fédérale

Prof. LUCANTONI Paola
Professor of Financial Market Law, Università di Roma Tor Vergata, Member of the Scientific Committee of the ESBFL/AEDBF

MACOURS Kristof
Group Company Secretary Euroclear, Member of the Board of Directors of ESBFL/AEBDF Belgium

Prof. MARTUCCI Francesco
Professor of Law at Paris-Panthéon-Assas Univers**i**ty,
Director of the Master's Degree in European Law Market and Regulation programme

MEYER Glenn
Attorney at law, Partner in Banking & Financial Services Practice of Arendt & Medernach, Luxembourg

MOLDOVAN Cristina Helena
PhD candidate, West University of Timisoara, Romania / Paris 1 Panthéon-Sorbonne University

Prof. MONDINI Paolo Flavio
Professor of Economics at the Università Cattolica del Sacro Cuore, Milan

NAVARRO GARCÍA, María Paz
Head of Regulatory, Interbank Services and Cooperation Projects, Confederación Española de Cajas de Ahorros

NOGUEIRA Tiago
Attorney at law, Partner at Elvinger Hoss Prussen, Luxembourg

Prof. PAILLER Pauline
Professor of Private Law at Paris Cité University, Member of the Scientific Committee of ESBFL/AEDBF France

PANETTA Gianpaolo
PhD Candidate, Università di Roma Tor Vergata

PARTSCH Philippe-Emmanuel
Attorney at law, Partner in charge of the EU Financial & Competition Law Practice of Arendt & Medernach, Luxembourg

PEDRIZZETI Jérôme
Head of regulatory watch, Crédit Agricole SA Legal Department

PERCIE du SERT Gonzague
Head of the Regulatory Watch Department, La Banque Postale Group

POPA TACHE Cristina Elena
Chair for the International Institute for Analysis of Legal and Administrative Mutations, Romania

QUELHAS Daniela
Financial Standards Expert, BNP Paribas, Lecturer in the Master 2 Business Law programme at Paris I Panthéon-Sorbonne University, Member of the Institut de recherche Juridique de la Sorbonne

RADOMIŃSKI Łukasz
Head of the Credit Analysis Department, Bank Spółdzielczy w Brodnicy, Poland

Prof. ROUAUD Anne-Claire
Professor of Private Law at Paris 1 Panthéon-Sorbonne University, co-director of Sorbonne Business/Finance, President of ESBFL/AEDBF France

ROUSSEAU Elisabeth
Legal Expert Adviser in banking and financial regulations, Groupe BPCE

SCACCHI Ines
Head of regulatory Affairs, European Savings and Retail Banking Group

Dr. SCHMATZBERGER Thomas
Lawyer, Association of Austrian Raiffeisenbanks

SORENSON Dan
Managing Director, Nykredit bank

Prof. SOUSI Blanche
Professor Emeritus - Jean Monnet Chair (ad personam) in European Banking and Monetary Law, University of Jean Moulin Lyon 3, Member of the Scientific Committee of the ESBFL/AEDBF

STERZENBACH Michael H.
Secretary General, Bundesverband der Wertpapierfirmen, Federal Association of Investment Firms

ȘUMANDEA-SIMIONESCU Ioan
Researcher, Babeș-Bolyai University of Cluj-Napoca, Romania

TRESCHER Piotr
Legal Counsel, Head of the Legal Department IPS-SGB, National Association of Cooperative Banks (KZBS)

Prof. VENTORUZZO Marco
Professor of Company Law and Financial Markets, Commercial University Luigi Bocconi, Milan, and Chairman AMF Italia – Italian Association of Financial Markets Intermediaries

WILK Michał
Director of the Aid and Restructuring Department SOZ BPS, National Association of Cooperative Banks (KZBS), Poland

The academic members of the expert group, including the members of the Scientific Committee, contributed as part of their academic work and without being paid by any organisation.

ACKNOWLEDGMENTS

Our thanks go to the members of the ad hoc working group, to all who contributed via European associations or on an individual basis, and also to those who supported the Less is more project, in particular:

Jacques de Larosière

Stéphanie Yon-Courtin,
Member of the European Parliament

Markus Ferber,
Member of the European Parliament

Roberto Ferretti,
President until October 2024 of the European Society for Banking and Financial Law (ESBFL) / Association Européenne pour le Droit Bancaire et Financier (AEDBF)

Pierre Minor,
President until October 2024 of the European Society for Banking and Financial Law - France (ESBFL-France) / Association Européenne pour le Droit Bancaire et Financier France (AEDBF-France)

Nina Schindler,
Chief Executive Officer of the European Association of Co-operative Banks (EACB), President of the European Banking Industry Committee (EBIC) since February 2025

Wim Mijs,
Chief Executive Officer of the European Banking Federation (EBF)

Peter Simon,
Chief Executive Officer of the European Savings and Retail Banking Group (ESBG) and President of the European Banking Industry Committee (EBIC) until February 2025

Stéphanie Hubert,
General Manager, Association Française des Marchés Financiers (AMAFI)

Thomas Groh,
Deputy Deputy Director-General, Fédération Nationale du Crédit Agricole (FNCA)

Alban Aucoin,
Head of Public Affairs, Crédit Agricole Group SA (CAsa)

Céline Haye-Kioussis,
General Counsel, BPCE and President, Association Nationale des Juristes de Banques (ANJB)

We would also like to thank the representatives of institutions and authorities we consulted informally.

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EXECUTIVE SUMMARY

The European Union's declining competitiveness, particularly in the financial sector, and the perceived disconnect between EU citizens and EU regulation, are increasingly mentioned in public debate. However, the root causes of these issues are rarely analysed.

Explanatory factors include the continuing inflation of Level 1 European regulation (directives and regulations), but also the proliferation of Level 2 texts (delegated and implementing acts, Regulatory Technical Standards (RTS) or Implementing Technical Standards (ITS) and Level 3 texts (soft law, for example: guidelines, guides, Q&A). Undoubtedly, new fields of activity have emerged (for example: digitalisation, sustainable finance) and crises have prompted the tightening of prudential regulations. These texts are, however, increasingly numerous and detailed, capital-intensive, bureaucratic and unstable. Ultimately, **the body of European rules and standards is highly complex, difficult to read, costly, and all too often lacking political or legal basis or effective control mechanism.**

An *ad hoc* group of European law professors, lawyers and banking law experts has worked for over two years with the help of the European Society for Banking and Financial Law (ESBLF/AEDBF Europe) and the main European banking associations (European Banking Federation, "EBF", European Association of Co-operative Banks, "EACB", European Savings and Retail Banking Group, "ESBG"), supported by the European Banking Industry Committee ("EBIC") and the European Forum of Securities Associations ("EFSA").

This work has resulted in the *Less is more* report, foreworded by Jacques de Larosière, which highlights the observed shifts in the European regulatory process in the financial services sector, their causes and consequences, and proposes solutions thereto.

The first observation pertains to the number and volume of texts. By way of example, the 1,000-page "banking package" published in spring 2024 conferred 139 mandates to the European Banking Authority (EBA) for drawing up technical standards or guidelines, whereas the previous "banking package", from 2019, was 500 pages long and provided for 62 mandates.

In principle, the usefulness of these mandates issued by the European Parliament and Council as co-legislators is undisputable, particularly in terms of facilitating the rapid and harmonised implementation of European legislation. However, the proliferation of these mandates, with minimal oversight, results in a de facto shift of normative power from the EU's co-legislators to the European Commission and even more so to the European Supervisory Authorities (ESAs), especially when, as is often the case, essential aspects are dealt with at Level 2 even though they would require political arbitration. These shifts undermine the institutional balance of the Union, the democratic principle, and the principle of legal certainty.

In addition, these texts are often adopted without any real prior impact assessment and without sufficient dialogue with stakeholders.

Moreover, the ESAs, the Single Resolution Board, and the European Central Bank (ECB) are multiplying their own interventions, without specific mandates, in the form of soft law (recommendations, opinions, guidelines, guides, letters, Q&As, public statements, etc.), which often add new obligations to those set out in the directives and regulations. As an example, around thirty guides were published by the ECB. While these are non-binding, supervisors and the ECB in particular apply them almost systematically and expect financial institutions to do the same.

Lastly, the various levels of European standards sometimes contradict each other, and Level 3 texts in particular can be at odds with national law.

Yet, it is difficult to obtain genuine control of these acts by the Commission, the European Parliament, the Council, and in the courts. Thus, the ECON parliamentary committee was invited to scrutinise 193 delegated acts between 2019 and 2023, amounting to over 3 acts to be reviewed each month, which appears difficult in practice.[1]

In light of these observations, it would appear **necessary, on the one hand, to stabilise and simplify the existing body of standards** and, on the other, where further unification of the European market requires new regulations, to **return to a better institutional balance, taking greater account of the objective of competitiveness** while retaining those of financial stability and consumer and investor protection.

This report in no way advocates for the deregulation of the banking and financial sector nor deals with supervision issues, but rather proposes a range of solutions, a toolbox designed to simplify and improve the framework for the production of standards, to better distinguish regulation and supervision and strengthen the control of Level 2 and 3 acts.

The solutions envisaged include 4 axes, in essence:

1/ Stabilising and simplifying the regulatory framework and renew the interinstitutional agreement on "Better Regulation"

- Assessing and simplifying the existing regulatory framework;
- Limiting review clauses (also known as "rendez-vous" clauses), which are factors of legislative instability;
- Assessing the need to revise or add a Level 1 text with a standardized, controlled and more transparent impact assessment, taking real account of the competitiveness of the European financial services sector and, more broadly, the European economy;
- Introducing a new approach to consultation at Level 1, e.g. by involving stakeholders informally, at a very early stage, via meetings;
- Reviewing the system of expert groups;
- Limiting the number and scope of delegations granted to the Commission and of mandates granted to the ESAs.

2/ Strengthening consultation and transparency at Levels 2 and 3

- Simplifying by eliminating technical standards and soft law that have become obsolete, ensuring consistency between the various texts;
- Systematizing impact assessments and improving their quality through standardising and monitoring;
- Strengthening the stakeholder consultation process by :
  - Amending the ESA founding regulations to ensure systematic consultation prior to the adoption of RTS / ITS;
  - Guaranteeing the effectiveness of the consultation process, via an appropriate response deadline and an appropriate timetable, allowing open responses and more precise feedback.
- Publishing the composition of expert committees, the eligibility criteria, their mission and remuneration; reviewing the way stakeholder groups operate;
- Facilitating access to the amendments proposed by the Commission on RTS and ITS;
- Establishing mechanisms to resolve timing conflicts, when Level 1 comes into effect while Level 2 is not ready.

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1 Committee on Economic and Monetary Affairs (ECON), Activity Report 2019-2024, *May 2024, p. 46.*

"It is necessary to take a step back and make sure that the complexity of cumulative layers of regulations in Europe does not constitute an obstacle to achieving our goals"[1]

3/ Reviewing the founding regulations of ESAs

- Diversifying the governance of ESAs, according to their role and markets;
- Taking greater account of the competitiveness of the European financial services sector and, more broadly, of the European economy;
- Limiting the right to adopt recommendations and guidelines, which could only be adopted on the basis of a mandate provided in a Level 1 text;
- Clarifying the "comply or explain" process, and in particular :
  - Recalling that guidelines must respect the principles of proportionality and subsidiarity;
  - Specifying that financial institutions, whether or not they are under ECB supervision, must make their best efforts to comply with the guidelines only when the NCA has declared its compliance; and furthermore, that they may achieve the objectives of the Level 1 act by adopting other practices, explaining, if necessary;

4/ Strengthening the control of Level 2 and 3 acts

- Strengthening political control by the Commission, European Parliament and Council
  - Regarding Level 2 acts:
    - the Commission's right of amendment;
    - the ability of the European Parliament and the Council to object, notably by allowing them to partially reject a technical standard adopted by the Commission.
  - Regarding Level 3 acts:
    - clarifying the reasoned opinion procedure in the event of the Authority's excess of power, and making the conditions of admissibility more flexible, so that the competent authorities and financial institutions to which the guidelines are addressed are entitled to send reasoned advice to the Commission;
    - a review of the basis for the ECB's supervisory requirements.
- Developing the possibility of pre-litigation appeals concerning Level 3 acts, by expanding the role of the ESAs' Board of Appeal, reinforcing the guarantees of independence of the ECB's Administrative Board of Review and expanding its role;
- Strengthening judicial review of Level 3 acts, in particular by ensuring compliance with the obligation to refer preliminary questions to the CJEU.

This work, which began more than two years ago in a momentum conducive to change, coincides with the conclusions of the Letta and Draghi reports, the objectives of the new Commission, and the reflections of Member States, MEPs, Central Banks and supervisors, all of which highlight the need for an overall assessment, simplification of the existing regulatory framework and its improvement for the future.[1]

The priorities of the new European Commission, along with the post of Commissioner for Simplification and the presentation by the Commission of a report on the functioning of the ESAs, expected in 2025, are all opportunities to improve our normative framework at the service of European projects.

[1] *See in particular the draft Banking Union annual report of the European Parliament, 7 November 2024 (2024/2055 (INI)) and the letter to Commissioner Maria Luis Albuquerque dated 17 January 2025 signed by the Governors of the Banco de Espana, Banca d'Italia, Banque de France and the President of the Deutsche Bundesbank.*

LIST OF ACRONYMS

ACPR: French Prudential Supervision and Resolution Authority (in French: Autorité de contrôle prudentiel et de résolution)

AMF: French Financial Markets Authority (in French: Autorité des marchés financiers)

AMLA: Anti-money-laundering authority

AML/CFT: Anti-money laundering and countering the financing of terrorism

APR: Annual percentage rate of charge

BaFin: German Federal Financial Supervisory Authority (in German: Bundesanstalt für Finanzdienstleistungsaufsicht)

EBA: European Banking Authority

ECB: European Central Bank

EIOPA: European Insurance and Occupational Pensions Authority

EMIR: European Markets Infrastructure Regulation (Derivatives Regulation)

ESAs: European Supervisory Authorities (*)

ESCB: European System of Central Banks

ESG (risks): environmental, social and governance risks

ESMA: European Securities and Markets Authority

CJEU: Court of Justice of the European Union

CMF: French Monetary and Financial Code

CRD VI: Capital Requirements Directive (6th Directive on minimal capital requirements)

CRR III: Capital Requirements Regulation (3rd Regulation on capital requirements)

CRU: Single Resolution Board, in English: SRB

CSDR: Central Securities Depositories Regulation

CSRD: Corporate Sustainability Reporting Directive

DGSD: Deposit Guarantee Scheme Directive

EU: European Union

ITS: Implementing technical standard

MiCAR: Markets in Crypto-Assets Regulation

MiFID: Markets in Financial Instruments Directive

MiFID 2: 2nd directive on markets in financial instruments

MiFIR: Markets in Financial Instruments Regulation

NCA: National Competent Authority

Q&A: Questions and Answers

PSD 2: 2nd Payment Services Directive

RTS: Regulatory technical standard (*)

SFDR: Sustainable Finance Disclosure Regulation

SRB: Single Resolution Board

SSM: Single Supervisory Mechanism

TFEU: Treaty on the Functioning of the European Union

TEU: Treaty on European Union

(*) indicates that the definition appears in the Glossary

INTRODUCTION

The production of European standards in the financial services sector (banking, financial markets and investment services, insurance) is the product of a complex organisational arrangement between the European Commission, the Council and the European Parliament, and the European Supervisory Authorities ("ESAs"). To this must be added the soft law produced by the European Central Bank ("ECB") and the Single Resolution Board ("SRB").

In this sector, the directives and regulations adopted by the EU co-legislators (the European Parliament and Council), known as **Level 1** texts, may provide, in accordance with the Treaty on the Functioning of the European Union (TFEU), that they will be supplemented and clarified with respect to certain points (in principle, technical and non-essential points) by legal texts known as **Level 2.** These are adopted by the European Commission either by delegation (Article 290 TFEU), directly or on the basis of draft regulatory technical standards (RTS) prepared by the ESAs, or as implementing acts (Article 291 TFEU), directly or on the basis of draft implementing technical standards (ITS) prepared by the ESAs.

The Commission's normative action at Level 2 may be direct, but it relies heavily on the intervention of the ESAs: the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA). These authorities are EU bodies established by three regulations of 24 November 2010[1] ("the ESAs regulations"), implementing one of the recommendations of the report by the high-level group chaired by Jacques de Larosière published on 25 February 2009 ("the Larosière report"). The (European) Anti-Money Laundering Authority (AMLA) created by the regulation of 31 May 2024 will also be responsible for preparing draft Level 2 texts in its scope of action.[2]

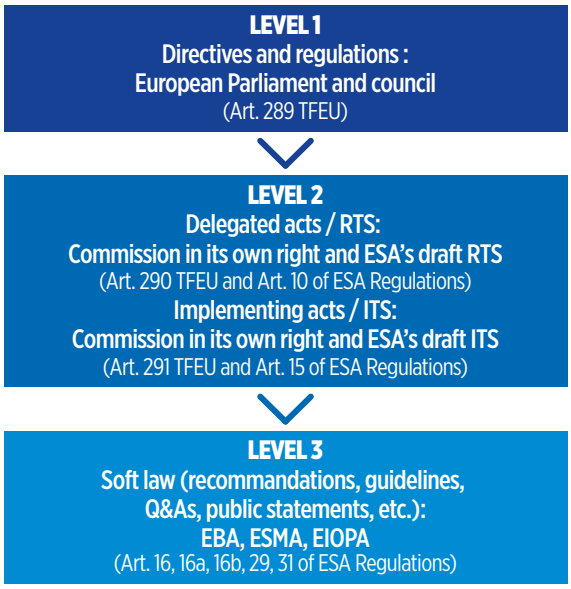
Although ESAs have no regulatory powers of their own, their technical expertise means that they are responsible for preparing draft regulatory technical standards or implementing technical standards, which are then formally adopted by the European Commission. **Given that these drafts are most often adopted by the Commission without amendment, and that the European Parliament and the Council very rarely make use of their power to object to delegated acts, the ESAs are mostly, in practice, the real authors of these Level 2 standards** (see Appendix 11).

In addition to these Level 1 and Level 2 acts (which, taken together, run to hundreds or even thousands of pages on a given topic), there are also **Level 3** acts, which are soft law acts adopted by the ESAs to promote the uniform application of Level 1 and 2 texts in the Member States and the convergence of the supervisory practices of national authorities without any intervention from the EU co-legislators. Soft law acts represent a large volume and take a variety of forms, for instance comprehensive Guidelines, Opinions and Question and Answers. Furthermore, the ESAs are not the only bodies to

[1] *Regulations no. 1093/2010, 1094/2010 and 1095/2010 establishing respectively EIOPA and ESMA respectively.*
[2] *Regulation (EU) no. 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) no. 1093/2010, (EU) no. 1094/2010 and (EU) no. 1095/2010.*

adopt such acts at European level. The ECB and the SRB also adopt them, as will the AMLA.

The Lamfalussy process, which emerged from the report published in 2001 and has been progressively implemented for the adoption of texts in the financial services sector, is the origin of this tiered system of legislation. The aim of this process was to achieve an integrated financial services market in response to the globalisation of financial flows, and to remedy the slowness of the European decision-making process, which was considered less responsive to technical developments than US regulation (see Appendix 1). In the wake of the 2008 crisis, the Lamfalussy process was substantially modified to follow the recommendations of the Larosière report, which had advocated replacing the committees of national regulators with European authorities endowed with sufficient powers to set up a European system of financial supervision (see Appendix 2). **While the ESAs founding regulations have given concrete form to this recommendation, their implementation resulted in a far too complex set of European banking and financial standards,** applied in conjunction with texts issued by national authorities, the ECB, and the SRB.



Level 2 and 3 acts play **an essential role.** Technical by nature, they serve to clarify the meaning and scope of Level 1 texts, provide legal clarity, and are vectors of standardisation as regards the behaviour of all relevant actors, which is to some extent useful in building the single European market. Adopted at the European level, they promote both the convergence of supervisory practices (of the national competent authorities (NCAs) and the ECB in its supervisory role within the Single Supervisory Mechanism) and the harmonised implementation of European legislation by their intended addressees. In addition, they respond to the need for an accelerated timeframe and less formalism, enabling supervisory authorities and professionals to adapt quickly to changes in the economic and social environment and to the difficulties encountered.

However, although the usefulness of these acts is not disputed, they are not immune to the phenomenon of **normative inflation.**

Not only has the number of legislative proposals increased (431 over the 2019-2024 period, compared with 374 between 1999 and 2004), but their length has doubled: an average of 8,600 words under the von der Leyen I Commission, compared with 4,500 previously.[1] The areas covered are more numerous and the rules increasingly detailed, even though the number of delegations for the adoption of Level 2 texts is increasing.

Moreover, the EU's co-legislators have made a habit of setting automatic review clauses for Level 1 texts, which greatly contributes to their inflation, and the corresponding increase of Level 2 and 3 texts, and they adopt and reform Level 1 acts **at an ever-increasing pace,** avoiding a second reading. To reach a political agreement, a text worded imprecisely or ambiguously might be adopted, conferring an increasing number of mandates on the European Commission and the ESAs to adopt Level 2 and 3 acts. **Essential elements are thus relegated to Level 2 even though they involve political arbitration** by the co-legislators.

Moreover, not infrequently, the number of mandates given to the ESAs and the review of Level 1 texts which is being carried out at an accelerated pace and requires corresponding changes at Levels 2 and 3, create **scheduling difficulties** for the entry into force of the texts, as well as **inconsistencies** between them or with national laws, and unjustified far-reaching requirements, complexities and additional costs.

Supervisors themselves are calling for a simplification of the 15,000 pages of regulation.[2] This is particularly true of the application of the

[1] *Marcus (J.S),* How to achieve better EU laws, *Centre for European Policy Studies (CEPS), October 2024.*

[2] *See remarks of Louise Caroline Mogensen, Director General of the Danish authority Finanstilsvnet,* « From single to simpler: making EU financial services rulebook smarter & stronger », *EUROFI Magazine, Budapest 2024, p. 52, accessible here :* views-the-eurofi-magazine_budapest_sept-2024.pdf. *See also the speech of François Villeroy de Galhau, Governor of Banque de France and President of the ACPR, ACPR conference of 26 Novembre 2024 :* « Realistic simplification: untying some of the knots in European banking regulation », *accessible here :* https://www.banque-france.fr/fr/interventions-gouverneur/pour-une-simplification-realiste-denouer-quelques-noeuds-de-la-reglementation-bancaire-en-europe.

Basel III Agreement, of which the transposition into Union law was not intended to significantly increase capital requirements. The same may be said of texts relating to retail banking. For instance, the EBA guidelines on loan origination and monitoring[1] extend the scope of Directive 2008/48 on consumer credit, and encourage banking institutions to carry out numerous external checks and assessments. They also enshrine a single view of the customer within the same banking group, with no regard for banking secrecy as regarding the protection of private data.[2]

Similarly, requirements on formal independence were set out in the EBA/ESMA guidelines of July 2, 2021 on the assessment of the competence of members of boards of directors and Key Function Holders (KFH), without any legal basis and taking no account of the specificities of certain European organisations.

Spontaneous acts of soft law generated by authorities or institutions sometimes aim to trigger a revision of the Level 1 act. For example, a letter from the ECB in January 2022 asked credit institutions to adopt an *ex-ante* assessment by the supervisor of the managing director and executive members of the central body, whereas Directive 2013/36 leaves it to Member States to decide between an *ex-ante* or *ex-post* valuation (see Appendices 4 and 6, which mention examples in all banking, financial and insurance activities).

In addition, although soft law is by nature non-binding, it nonetheless has ***de facto* binding effects,** in particular because of the operational changes it implies, related costs, and the often expressed supervisory expectations that it should be duly implemented by financial institutions.

Finally, Level 2 acts are **excessively granular** and do not take sufficient account of the principle of **proportionality**, particularly in terms of reporting.

Key figures

As of June 2024, 26% of the 1,634 delegated acts published and in force (all subjects combined)[3] concern the financial services sector. Between 2021 and 2023, an average of 83 delegated acts per year have been published concerning this sector.

For example, 19 RTS and 42 other delegated acts have been adopted based on the MiFID 2 package (MiFID 2[4] and MiFIR[5]). More than 50 delegated acts have been adopted under the EMIR Regulation, including more than 25 RTS.

More recently, the "banking package" consisting of the CRD VI Directive and the CRR3 Regulation gives the EBA 139[6] mandates, including 60 new mandates for drafting technical standards (RTS and ITS) and 28 mandates for adopting guidelines, not counting reports and other Commission acts, while the CRR2-CRD5 "package" of 2019 provided for 62 mandates in total. As a reminder, the original CRR and CRD4 legislation of 2013 already purported to establish a body of RTS, ITS is and Level 3 instruments on approximately 100 topics.

In terms of soft law, for example, EBA published 16 guidelines in 2021 and is responding to an increasing number of questions and answers (Q&As): more than 650 on the CRR/CRD package and 240 on PSD2.[7] ESMA has published 96 guidelines since 2011 and 377 Q&As.

Finally, the AMLA is mandated under the new AML-CFT Regulation to develop at least 80 standards (ITS/RTS).

The **shift of normative power from the EU's co-legislators to the European Commission and ultimately to the ESAs,** which are, in law, European Union bodies with no democratic legitimacy, undermines the Union's institutional balance, the principle of democracy,[8] respect for the Rule of Law (see Part 1, section 1.1.2) and the principle of legal certainty. Yet, **this phenomenon is not offset by sufficient transparency and stakeholder consultation processes, nor by effective control** by the EU's co-legislators or the Courts of the standards produced by these authorities.[9]

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[1] *European Banking Authority, Guidelines on loan origination and monitoring, EBA/GL/2020/06, 29 May 2020.*
[2] *Banking secrecy is protected under the right to privacy by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.*
[3] *Source:* https://webgate.ec.europa.eu/regdel/#/delegatedActs?lang=en *(consulted on 19/06/24)*
[4] *Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.*
[5] *Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.*
[6] EBA roadmap on the implementation of the EU Banking Package, *December 2023, accessible here:* https://www.eba.europa.eu/publications-and-media/press-releases/eba-publishes-roadmap-implementation-eu-banking-package
[7] *Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.*
[8] *Article 10 of the Treaty on the European Union.*
[9] *The conditions and means of ex post control do not allow co-legislators to exercise it fully; see point II, 2.*

Concerns relating to the excessive use of Level 2 and/or Level 3 acts and the need to exercise control over the action of ESAs have already been expressed by national parliaments and in the output of a think tank specialising in European affairs.[1] At EU level, the European Parliament and Council have on several occasions called for a stronger control of these acts. The European Parliament in particular repeatedly expressed concerns about the proliferation of soft law acts (see Appendix 3). As part of the reform of the ESAs that took place in 2019, the EU legislator reiterated that these authorities must act *'within [their] respective competences'.*[2] However, this reform only concerned some of the factors involved and was therefore of limited scope.

Therefore, the combination of these various factors, contrary to the desired effect, becomes **a source of legal uncertainty and of constraints, risks, and high costs for the players in the sectors concerned.** It should be emphasised that all activities of banking and financial institutions are affected. The complexity of regulation, which no single person or unit (including within supervisory authorities) can now keep track of in its entirety, becomes a risk in itself.

The issue of European competitiveness, particularly in the financial sector, is increasingly prevalent in public debate. It is worth underlining, among the possible explanatory factors for the European competitiveness issue, the continued inflation of Level 1 regulations, but also the multiplication of Level 2 and 3 acts, and their evolution. We are of the opinion that **it should be possible for the objective of competitiveness to be better accounted for in the regulatory framework,** in application of Article 173 TFEU which states that *"the Union and the Member States shall ensure that the conditions necessary for the competitiveness of Union industry exist",* as well as Recital 13 of the common preamble to the three ESAs founding regulations calling them to *"take due account of the impact of [their] activities on competition and innovation within the internal market, on the Union's global competitiveness, on financial inclusion, and on the Union's new strategy for jobs and growth".*

Purpose and method of the report

This report in no way advocates for deregulation of the banking and financial sector nor deals with supervision issues. Its aim is to contribute to the simplification, quality and clarity of the European regulatory framework in the financial services sector, in service of the European project and of the financing of the economy.

It highlights the consequences of the excessive use of Level 2 acts and soft law produced by the ESAs, as well as the ECB and the SRB, in its various forms (recommendations, opinions, guidelines, Q&As, supervisory expectations, public statements, press releases, notes, etc.).

It is intended as a source of proposals and recommendations, particularly in the context of the next report from the European Commission on the functioning of the ESAs, and for the Member States.

An ad hoc working group convened over two years and, via a questionnaire, gathered the findings and proposals of experts from Member States (academics, lawyers, jurists, and other experts from the banking, financial and insurance sectors, acting individually or as representatives of national and European scientific and professional associations). For reasons of confidentiality, the responses have not been published, but this report summarises their content (see namely Appendices 4 and 10).

Certain experts contributed to the drafting for parts of the report or its appendices. All are warmly thanked for their contributions, as are the representatives of institutions or authorities that were consulted informally.

While the excessive normative inflation and the shift in normative power are sources of difficulty (I), solutions are emerging and are within reach (II).

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[1] CEP Study, European Supervisory Authorities, Room for improvement at Level 2 and Level 3, *Study on Behalf of the fpmi Munich Financial Centre Initiative, 4 October 2016, accessible here:* https://www.cep.eu/eu-topics/details/the-european-supervisory-authorities-room-for-improvement-at-level-2-and-level-3.html

[2] *Article 1(5) of Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds. See also Recital 5:* "When performing their tasks and exercising their powers, the ESAs should act in accordance with the principle of proportionality laid down in Article 5 of the Treaty on European Union (TEU), as well as with the better regulation policy. The content and form of the ESAs' actions and measures including instruments such as guidelines, recommendations, opinions or questions and answers should always be based on and within the boundaries of the legislative acts referred to in Article 1(2) of the founding regulations or within the scope of their powers."

I.

NORMATIVE INFLATION AND A SHIFTING STANDARD-SETTING POWER, SOURCES OF DIFFICULTY

Normative inflation begins at Level 1. While the increase in the number of texts since the early 2010s is due in large part to the financial crises and the need to deal with new topics, the texts, adopted and revised at an ever-increasing pace, are also increasingly detailed. This is true not only for the Level 1 itself, but also for Levels 2 and 3. These are the subject of this report, which aims to assess the causes and consequences of this issue.

1. THE FACTS

1.1. THE PROLIFERATION OF MANDATES GIVEN TO THE EUROPEAN COMMISSION AND THE ESAS

1.1.1. The principle: Level 2 acts, acts without political choice

In accordance with Article 290 TFEU, the EU legislator may delegate to the Commission the power to adopt non-legislative acts of general application which supplement or amend certain non-essential elements of a legislative act. In the financial services sector, Level 1 texts can require ESAs and AMLA to prepare draft regulatory technical standards (RTS), which are then adopted by the European Commission in the form of delegated acts.

As specified in Article 290 TFEU, delegated acts may not relate to essential elements of the legislative act, defined by the Court of Justice of the European Union (CJEU) as elements the adoption of which requires *"political choices falling within the responsibilities of the EU legislature, in that it requires the conflicting interestsat issue to be weighed up on the basis of a number of assessments, or if it means that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the EU legislature is required"*.[1] In the same vein, the ESAs Regulations and the AMLA Regulation specify that the regulatory technical standards *"shall be technical, shall not imply strategic decisions or policy choices"*.[2]

The CJEU has reiterated that this requirement applies to the co-legislators, when determining the matters which may be delegated, and to the Commission, when exercising the powers delegated to it. Accordingly, the determination of the essential elements of a legislative act *"must be based on objective factors amenable to judicial review"*, which must be determined in the light of the *"characteristics and particular features of the field concerned"*.[3] A delegated act may not amend or disregard essential elements of the legislative act, nor may it supplement the latter by new essential elements.[4] Furthermore, the delegation of the power to supplement non-

[1] *CJEU, 26 Jul 2017, Case C-696/15,* Czech Rep v Commission, *paragraph 78.*
[2] *Article 10 of the ESAs Regulations; article 49 of the AMLA Regulation.*
[3] *CJEU, 22 June 2016,* DK Recycling und Roheisen GmbH v. Commission, *C-540/14 P, ECLI:EU:C:2016:469, paragraph 48.*
[4] *CJEU, 5 September 2012, C-355/10, ECLI:EU:C:2012:516, paragraph 66; CJEU, 22 June 2016,* DK Recycling und Roheisen GmbH v. Commission, *C-540/14 P, paragraph 47; CJEU, 11 May 2017, C44-16 P,* Dyson v. Commission.

essential elements of a legislative act is intended, as the CJEU points out, *"only to authorise the Commission to flesh out that act"*, so that *"its authority is limited, in compliance with the entirety of the legislative act, adopted by the legislature, to development in detail of non-essential elements of the legislation in question that the legislature has not specified"*.[1]

Moreover, under Article 291 TFEU, the EU legislator may confer on the Commission the power to adopt implementing acts to ensure the uniform implementation of legislative acts.[2] Here again, in the financial services sector, Level 1 texts may require ESAs and AMLA to prepare draft implementing technical standards (ITS), which will then be adopted by the European Commission. Like RTS, ITS *"shall be technical, shall not imply strategic decisions or policy choices"*. [3] The Commission's exercise of this implementing power is also subject to judicial review. The Court of Justice of the European Union has pointed out that the implementing power conferred on the Commission consists in providing further details which are necessary or appropriate for the implementation of the legislative act, in compliance with the essential general aims pursued by the latter, without supplementing or amending it, even as to its non-essential elements.[4]

1.1.2. The assessment: a principle often overlooked

According to the TFEU, the definition of essential elements is confined to Level 1 acts, which refer to Level 2 and 3 texts for their practical and technical implementation. In a Union based on the Rule of Law, the institutions and agencies must act within the limits of the powers conferred on them respectively by the Treaties and by Level 1 legislative acts. Compliance with the mandate conferred by the Level 1 text with a view to the adoption of Level 2 or 3 texts is therefore essential, and in the event of inconsistencies, in accordance with the principle of hierarchy of norms, the Level 1 text takes precedence over texts of lesser value.

In practice, however, it is not uncommon for Level 1 texts to delegate to the Commission the supervision of elements that are far from purely technical. In several cases, this comes from the Commission in its proposal for a Level 1 act. For example, the EMIR 3 proposal published in December 2022 stipulated that the concept of an active account, which is in fact central to the regulation's objective of reducing the EU's dependence on third-country central counterparties, would be specified in a Level 2 text.

There is also a fundamental tendency on the part of the Council and the European Parliament to leave to Level 2 acts, on the grounds of their "technicality", issues that should be settled in the Level 1 text but on which the co-legislators have not reached an agreement.

While it is simpler in practice and makes it easier to reach a political agreement without a second reading, this process is based on a subjective assessment of what constitutes a technical standard or, on the contrary, "essential elements". For example, as numerous essential elements are not defined or are unclear in the CRR 3/CRD VI banking package, the numerous mandates given to the ESAs will in practice significantly define the obligations of the banking sector.

In addition to these issues associated with Level 2, there has been a proliferation of mandates for the adoption of soft law by the ESAs. Level 1 directives and regulations provide for a growing number of mandates for the ESAs to take on new fields of study (see Appendix 5) and to issue guidelines on crucial points. For example, MiCAR requires ESMA to specify in guidelines the criteria for the qualification of crypto-assets as financial instruments, which determines the respective scopes of application of this regulation (which does not apply to crypto-assets that qualify as financial instruments) and the regulations on financial markets (MiFID, Market Abuse, etc.).[5]

As regards the adoption of PSD2, several RTS have been developed on different aspects, followed by guidelines, opinions and Q&As to provide for additional clarity around the same topics (e.g. RTS on SCA (Strong Customer Authentication) & CSC (Common and Secure Communications) were followed by guidelines on the exemption from the fall back mechanism opinion on the implementation of RTS, opinion on SCA elements, several Q&As, etc). This resulted in measures being scattered across several regulatory instruments, which neither enhances the accessibility of

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[1] *CJEU, 17 March 2016,* Parliament v. Council, *C-286/14, ECLI:EU:C:2016:183, paragraph 41.*
[2] *Although implementing powers are in principle vested in the Member States, they may be entrusted to the Commission where uniform conditions for implementing legally binding Union acts are required.*
[3] *Article 15 of the ESAs regulations; Article 53 of the AMLA Regulation.*
[4] *TEU, 22 March 2023,* Tazzetti v. Commission, *T-825/19 and T-826/19, ECLI: ECLI:EU:T:2023:148, paragraphs 154-161, 165, 166, 184-207, 210, 211. - TEU, 29 May 2024,* Hypo Vorarlberg Bank AG v. CRU, *T-395/22, ECLI:EU:T:2024:333, paragraphs 21-88.*
[5] *Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, Article 2(5).*

the rules nor legal certainty, and is a source of fragmentation.

Not only do the co-legislators themselves confer on the Commission and the ESAs delegations and mandates on elements that should be settled in the Level 1 text, but the mandates are not always respected by the Commission and the ESAs. Some Level 3 acts add to Level 1 and 2 texts, while some RTS operate political choices for which the co-legislators are responsible.

Numerous examples in all three financial services sectors (see also the introduction and Appendix 4)

Concerning the banking sector, the EBA guidelines on remuneration[1] introduce requirements that several NCAs considered lacking legal basis in the CRD and CRR.[2]

Concerning the financial services sector, in a communication dated 6 March 2024[3], the European Commission stated that it considered that the draft RTS drawn up by ESMA under the ELTIF 2 Regulation[4] on liquidity requirements for ELTIF-labelled open-ended funds did not reflect a sufficiently proportionate approach and reiterated that RTS are technical standards and do not involve strategic decisions or political choices.

Similarly, ESMA has interpreted the EMIR 3 Regulation[5] in a broad sense, with regard to the implementation of the active account and the derivatives transactions that must be included in this active account. This interpretation not only exacerbates the complexity of the system devised at Level 1, but also revisits the political agreement reached at that level. It imposes a de facto relocation of the clearing of certain derivatives within the Union, jeopardising the competitiveness of European players on this market.[6]

Finally, in the field of insurance distribution, the integration of the concept of Product Governance provides another illustration of the delicate articulation of Level 2 and Level 3 acts. The IDD introduced the concept without giving a definition.[7] By way of application, the Commission adopted a delegated regulation[8], which gives rise to two comments. Firstly, the new regulatory framework applicable to Product Governance is the result of a delegated act, in fact a full delegated regulation, which in practice calls into question the minimum harmonisation nature of the Directive on this subject. Secondly, this delegated regulation is based on 'preparatory guidance' issued by EIOPA in April 2016 (currently referenced on the EIOPA website with an erroneous publication date of 1 January 2019).

These preparatory guidelines, which predate the adoption of the delegated regulation, were adopted to *"establish consistent, efficient and effective supervisory practices regarding the product governance and supervisory arrangements defined in Article 25 of the Insurance Distribution Directive until such time as these provisions of the Directive are fully applicable."* The guidelines were published (Level 3 measures) even before the content of the delegated acts (Level 2 measures) was known, which was condemned at the time by all European insurance professionals.

In addition, the authorities publish reports on their own initiative containing definitions and proposals which the Commission is then invited

[1] *EBA, Guidelines on sound remuneration policies under Directive 2013/36/EU (EBA/GL/2021/04), 2 July 2021.*

[2] *As stated by the BaFin:* "BaFin cannot comply with the provisions on formal independence in relation to the members in the remuneration committee (paragraph 55 of the Guidelines). This exception results from the corresponding non-compliance confirmation regarding the Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU as well as the non-compliance confirmation regarding the EBA Guidelines on internal governance under Directive 2013/36/EU (EBA/GL/2021/05). In our view, there is no legal basis in Directive 2013/36/EU that justifies such an expectation. Such a requirement would also severely restrict institutions in their right to appoint supervisory board members without a sound legal basis".

[3] *European Commission, Communication on the intention to adopt with amendments the Commission Delegated Regulation supplementing Regulation (EU) 2015/760 of the European Parliament and of the Council with regard to regulatory technical standards specifying obligations concerning hedging derivatives, redemption policy and liquidity management tools, trading and issue of units or shares of an ELTIF, and transparency requirements and repealing Delegated Regulation (EU) 2018/480 (C(2024) 1375 final).*

[4] *Regulation No. 2023/606 of the European Parliament and of the Council of 15 March 2023 amending Regulation (EU) 2015/760 as regards the requirements relating to the investment policies and operating conditions of European long-term investment funds and the definition of assets eligible for investment, the requirements relating to portfolio composition and diversification and the borrowing of liquid assets and other provisions of the fund statutes.*

[5] *Regulation (EU) 2024/2987 of the European Parliament and of the Council of 27 November 2024 amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets (OJEU 4 December)*

[6] *ESMA, Consultation paper, Conditions of the Active Account Requirement, 20 November 2024, ESMA91-1505572268-3856.*

[7] *See Article 25(2) of Directive No. 2016/97 of the Parliament and Council of 20 January 2016 on insurance distribution, which confers a vaguely defined mandate on the Commission, according to which* "The Commission shall be empowered to adopt delegated acts in accordance with Article 38 in order to specify further the principles set out in this Article, taking proportionate account of the activities carried out, the nature of the insurance products sold and the nature of the distributor".

[8] *Delegated Reg. (EU) 2017/2358 of 21 Sept. 2017 supplementing Directive (EU) 2016/97 as regards supervisory and product governance requirements for insurance undertakings and insurance product distributors.*

to include in its legislative proposals. Sometimes as well, the Commission itself requests technical advice from the ESAs, which often sets the scene for future legislative proposals.[1] Unfortunately, the publication of certain Level 3 acts, depending on the timetable, pre-empts discussions underway at legislative level. It is in this way that today's soft law is intended to be tomorrow's hard law, as Advocate General Michal Bobek put it in his Opinion in the *Commission v. Kingdom of Belgium case*[2], which seems questionable.

1.2. THE SHORTCOMINGS OF THE STANDARD-SETTING PROCESS

1.2.1. Insufficient consultation

Before submitting draft regulatory technical standards or implementing technical standards to the Commission, ESAs and AMLA are in principle required to carry out public consultations and an impact assessment. However, this requirement may be waived in urgent cases or if it proves disproportionate in view of the scope and impact of the standards.[3]

The ESAs must also seek the opinion of the group of interested parties in the sector concerned. However, the heterogeneous composition of these groups makes it difficult in practice for them to reach a consensus.

Regarding guidelines and recommendations, ESAs and AMLA are not mandatorily required to systematically carry out prior public consultation or to seek advice from the relevant stakeholder groups.[4] If an analysis of the potential costs and benefits of issuing a Level 3 act is required, it will depend on the respective act's scope, nature, and impact.

In addition, it can be difficult for stakeholders to respond in a timely manner to consultations, which, although non-systematic, are numerous due to regulatory inflation; even more so when the consultation period is short or coincides with summer or winter holiday seasons. It is also regrettable that no explanation is given when the industry's comments are not taken into account.

Furthermore, the ESAs sometimes include in the final versions of draft technical standards submitted to the Commission, proposals that were not included in the draft initially submitted for consultation and therefore could not be subject to any public debate.[5] It also happens that draft ITS relating to reporting obligations are submitted to the Commission without the standard forms, which in principle appear as an appendix to the ITS, but which the EBA sometimes chooses to publish separately on its website. According to the EBA, this practice is intended to "simplify" the Commission's supervisory role, but in reality it deprives the Commission of the power to examine forms whose content and scope directly affect the position of affected persons, since they constitute the practical application of the ITS concerned. The Commission recently expressed its concern about this situation.[6]

1.2.2. Proposals endorsed often without amendment by the European Commission

The Commission has three months to examine the draft technical standards (regulatory or implementing) submitted by an ESA or by AMLA. It may adopt the draft as it stands or request the ESA or AMLA to amend it. On the other hand, the Commission cannot amend the draft without first having unsuccessfully requested the ESA or AMLA to amend it.

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[1] *This was the case for example regarding inducements: Final Report ESMA's Technical Advice to the Commission on the impact of the inducements and costs and charges disclosure requirements under MiFID II, ESMA35-43-2126, 31 March 2020.*

[2] *CJEU, 20 Feb 2018,* European Commission v Kingdom of Belgium*, Case C-16/16 P, paragraph 95.*

[3] *Article 10 and 15 of the ESAs Regulations; Article 49 and 53 of the AMLA Regulation.*

[4] *They do so "where appropriate": Article 16(2) of the ESAs Regulations; Article 54(2) of the AMLA Regulation.*

[5] *There are indeed discrepancies between the draft ITS submitted for consultation (see Consultation Paper on the ITS on Supervisory Reporting regarding COREP, AE and GSIIs, EBA/CP/2021/24, 23/06/2021 and its annexes, partially modified in the final version submitted to the Commission via Final report Draft implementing technical standards on supervisory reporting requirements, amending Commission Implementing Regulation (EU) 2021/451 regarding COREP, asset encumbrance, ALMM and G-SII reporting, EBA/ITS/2021/08 20 December 2021. The ITS were subsequently adopted by the Commission without amendments in the form of Commission Implementing Regulation (EU) 2022/1994 of November 21, 2022 amending the implementing technical standards set out in Implementing Regulation (EU) 2021/451 regarding own funds, asset encumbrance, liquidity and information to be reported for the purpose of identifying globally systemically important institutions (Text with EEA relevance)).*

[6] *It should be noted that the Commission's letters proposing amendments to the ITS, in particular to append standard forms, have not been made public. Their existence is nevertheless known, as the EBA mentions them in a letter addressed to the Commission on this subject, attached to the Opinion on the same subject. The letter can be consulted here:* https://www.eba.europa.eu/sites/default/files/2024-11/4aad5af6-99b3-4546-ad40-1a7766e0d928/EBA%20letter%20on%20the%20European%20Commissions%20amendments%20relating%20to%20the%20final%20draft%20Implementing%20Technical%20Standards%20on%20Supervisory%20reporting%20and%20P3%20disclosures_.pdf*; The Opinion, dated 14 October 2024, is referenced as follows :* « Opinion of the European Banking Authority on the European Commission's proposed amendments relating to the draft Implementing Technical Standards on supervisory reporting in accordance with Article 430 (7) of Regulation (EU) No 575/2013 and to the draft implementing technical standards on public disclosures by institutions of the information referred to in Part Eight, Titles II and III of Regulation (EU) No 575/2013 », *EBA/Op/2024/07.*

The Commission's power to amend draft technical standards prepared by the ESAs or by AMLA is subject to restrictive conditions both in the regulations themselves and in case law. Recital 23 of the ESA Regulations states that the Commission *"should endorse these draft regulatory technical standards by means of delegated acts pursuant to Article 290 [TFEU] in order to give them legally binding effect"* and that "*[t]hey should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and knowing best the daily functioning of financial markets"*.[1]

It should be noted that the General Court of the European Union, recognising the limited room for manoeuvre available to the Commission in this respect, stressed the even greater importance of the consultation process which must be carried out upstream by the Authority when drafting the technical regulatory standards, ruling that: *"the content of the draft technical standards, as proposed by the [Authority] to the Commission, is not, in principle, subject to change, so that, in order to guarantee the quality of those standards, it seems all the more important that the public should have the opportunity to express its views in the context of an open public consultation prior to the adoption of the draft by the [Authority]".* [2]

Consequently, in order for the Commission to exercise control over the technical standards drafted by the ESAs or AMLA, it must be convinced of the seriousness of the conflict with the Level 1 acts – or of a possible lack of legal basis or of the violation of another major principle of Union law, and it must be able to act quickly. It should be borne in mind that the Commission has only three months to adopt delegated acts.

In practice, in most cases the European Commission adopts the draft technical standards as they stand. For example, in the case of ESMA, the European Commission has requested amendments to a dozen RTS out of a total of more than 250.[3]

However, it must be noted that in certain cases the Commission intervened where it considered the draft RTS/ITS submitted to it did not properly address the needs of the industry in practice. For instance, in a letter dated 24 May 2017, the Commission expressed its intention to amend the draft regulatory technical standards on strong customer authentication and common and secure open standards of communication submitted by the EBA in accordance with Article 98(4) PSD2. Recently, the Commission issued reservations concerning ESMA's draft RTS under the ELTIF 2 Regulation (see above).

1.2.3. The European Parliament's and the Council's right to object is limited and little used

In the case of RTS, the European Parliament and the Council are informed at every stage of their development and may raise objections within a period of three months – extendable at the request of either institution – from the date of notification of the technical regulatory standard adopted by the Commission.[4] They may revoke at any time the delegation of power given to the Commission to adopt regulatory technical standards by means of delegated acts prepared by the ESAs.[5] It should be noted, however, that the AMLA Regulation only provides for the right to object, but not the right to revoke the delegation at any time.

In fact, although there has been a slight increase, the European Parliament and the Council have so far presented very few objections to delegated acts: 23 objections (16 from the Parliament and 7 from the Council) out of 1874 acts published (all topics combined)[6], including just one objection[7] in the field of financial services (concerning the PRIIPS regulation[8]). A chart of the reasons for objections from the European Parliament (the Council's reasons for objections are not made public) shows that objections have been justified in particular by the fact that the delegated act adds essential elements falling within the competence of the co-legislators, exceeds the powers delegated to the Commission, is not compatible with the objectives of the legislative act and/or is contrary to the intention of the co-legislators, or because of the lack of proportionality of the solution proposed in the delegated act.

The fact that the European Parliament and Council's right to object relates to the delegated

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[1] *See also Recital 12 and 14 of the AMLA Regulation.*
[2] *TEU, Ord. of 27 Nov. 2013,* MAF v. AEAP, *case T-23/12, paragraph 42.*
[3] *Source: ESMA technical standards, table published by ESMA, updated to 29 June 2022.*
[4] *Article 13 of the ESAs Regulations; Article 51 of the AMLA Regulation. Note that this objection period may be reduced to one month if the Commission adopts the draft RTS as submitted by the Authority.*
[5] *Article 12 of the ESAs Regulations.*
[6] *Source:* https://webgate.ec.europa.eu/regdel/#/delegatedActs?lang=en *(consulted on 19/06/24).*
[7] *European Parliament, Objection to a delegated act: Key information documents for packaged retail and insurance-based investment products (P8_TA(2016)0347).*
[8] *Regulation No. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products.*

act in its entirety, without the possibility of referring to only some of its provisions, is likely to dissuade them from exercising this right.[1]

As for implementing acts, as they are not considered as falling within the exercise of a political mandate, no power of objection is granted to the European Parliament and the Council. However, case law[2] and certain publications from the institutions[3] show that, in practice, the question as to whether a measure is indeed an implementing measure or whether its adoption involves making political choices does arise.

Even beyond the legal basis of these so-called implementing instruments, at times it is the delegating institution's exercise of the mandate that is called into question. Case law shows that both the Council[4] and the Commission[5] sometimes depart substantially from the mandate they have been given.

1.3. SOFT LAW, A SOURCE OF LEGAL UNCERTAINTY

1.3.1. An ever-increasing number of legal acts

While the ESAs Regulations have provided, either from the outset or since the 2019 reform, for the adoption by these authorities of certain types of soft law (guidelines, recommendations, Q&A, etc.), they also stipulate that these authorities may *"develop new convergence tools"*,[6] to promote common supervisory approaches and practices. The same applies to AMLA.[7] The ECB and the SRB also issue different kinds of soft law instruments. The result is a profusion of diverse texts of uncertain legal scope that sometimes add on with no legal basis and sometimes deviate from or even contradict the original spirit of the legislative act.

1.3.1.1. ESAs' and AMLA's guidelines

The ESAs' and AMLA's guidelines are addressed to the competent (national) authorities and/or regulated institutions. While a Level 1 act may expressly give mandate to an ESA to adopt guidelines on a given point, ESAs also take the initiative to adopt guidelines autonomously, based on Article 16, to establish *"consistent, efficient and effective supervisory practices"* and to ensure *"the common, uniform, and consistent application of Union law"*.[8]

Guidelines provide clarification or help to interpret Level 1 and 2 texts. They are not supposed to add to the body of law, but may nevertheless, according to the Court of Justice of the EU, *"supplement binding European Union provisions"*.[9]

Under the terms of Article 16 of the ESAs Regulations and of Article 54 of the AMLA Regulation, supervisory authorities and financial institutions must *"make every effort to comply with those guidelines"*. However, these provisions give the NCAs and financial institutions some room for maneuver.

National authorities may, as such, refuse to apply guidelines or recommendations, in whole or in part, justifying their decision by means of the *"comply or explain"* mechanism (see Appendix 9).

About this mechanism, transparency might be enhanced. On the one hand, the ESAs do not systematically state in their annual reports the reasons for decisions of total or partial non-compliance by the NCAs. This practice, implemented by the EBA in its reports in a section

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[1] *There is a constitutional debate on the possibility of a partial objection, on the grounds that Article 290 TFEU refers to delegated acts in their entirety. However, this debate is based on an extremely restrictive reading of the Treaty, which does not seem to correspond either to the role played by the legislator in legislative and non-legislative production, or to the needs arising from the democratic principle otherwise protected by the Treaty on European Union.*

[2] *See in particular: CJEU, 5 September 2012,* Parliament v. Council, *C-355/10, ECLI: ECLI:EU:C:2012:516, paragraphs 64-68; CJEU, 22 June 2016,* DK Recycling und Roheisen v. Commission, *C-540/14 P, ECLI: ECLI:EU:C:2016:469, paragraphs 47, 48.*

[3] *European Parliament, Directorate-General for Internal Policies of the Union - Directorate for Legislative Coordination and Conciliations, Conciliations and Codecision Unit,* Handbook on delegated and implementing acts, *February 2013. See also : European Economic and Social Committee, Appendices to the information report on Better regulation: implementing acts and delegated acts, INT/656, September 2013, available here:* https://www.eesc.europa.eu/sites/default/files/resources/docs/ces248-2013_00_00_ref_pri_en.pdf. *See also publication of the Commission:* "Delegated and Implementing Acts (Articles 290 and 291 Treaty on the Functioning of the European Union) - *Guidelines for the services of the Commission, November 2020, available here:* https://www.aaronmcloughlin.com/wp-content/uploads/2024/06/2020.11.223.-DA-IA-guidelines-copy.pdf. *See also:* "Non-binding criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union - 18 June 2019", *(2019/C 223/01), published in the Official Journal of the European Union on 3 July 2019.*

[4] *See in particular: TEU, 29 May 2024,* Hypo Vorarlberg Bank AG v. SRB, *T-395/22, ECLI:EU:T:2024:333, paragraphs 21-88.*

[5] *See in particular: TEU, 13 December 2018,* Ville de Paris v. Commission, *T-339/16, T-352/16 and T-391/16, ECLI: ECLI:EU:T:2018:927, paragraph 130; TEU, 22 March 2023,* Tazzetti v. Commission, *T-825/19 and T-826/19, ECLI: ECLI:EU:T:2023:148, paragraphs 154-161, 165, 166, 184-207, 210, 211.*

[6] *Article 29(2) of the ESAs Regulations.*

[7] *Article 10(1) of the AMLA Regulation.*

[8] *Article 16 of the ESAs Regulations; Article 54 of the AMLA Regulation.*

[9] *Regarding recommendations: CJEU, 13 Dec. 1989,* Grimaldi, *case C-322/88, paragraph 18; CJEU, 15 Sept. 2016,* Koninklijke KPN and others, *case C28/15, paragraph 41; CJEU, 25 March 2021,* Balgarska Narodna Banka, *case C-501/18, paragraph 80. Regarding guidelines: CJEU, 15 July 2021 paragraph 71.*

entitled *"Regulatory compliance of guidelines and recommendations"* and discontinued in 2019, presented the legal objections of the authorities, thereby ensuring greater transparency of the *"comply or explain"* process but also of the debates between NCAs when the guidelines are adopted by the EBA Board of Supervisors. On the other hand, compliance tables are not always easily accessible and do not always show the reasons why an NCA has not declared itself compliant, which may pose a problem in terms of level playing field.

Although NCAs give their assent in most cases, in some cases they declare themselves partially non-compliant. This might be due to a lack of legal basis in the Level 1 acts that the guidelines are intended to supplement, inconsistency with another act, redundancy with national law which proposes different measures but with equivalent effect, a contradiction with national law, or a lack of proportionality.

A few examples of partial non-compliance by NCAs

In Germany, BaFin decided in 2018 not to apply certain sections of the guidelines on the competence assessment of management body members and key function holders[1] because of a lack of legal basis in Directive n° 2013/36 and a potential conflict with German labour law on the formal independence criteria[2]. In France, the ACPR recognised practices as equivalent to the guidelines' requirements. It also recently took the view that it did not have a sufficient legal basis to fully comply with the guidance on the exclusion of "limited networks" in PSD2. Previously, it had only declared partial compliance with the guidelines relating to the granting and monitoring of loans.

In Germany, Denmark, Spain, France, Ireland, Italy and Sweden, compliance was only partial for ESMA's guidelines on the exemption for market making activities,[3] for various reasons (lack of legal basis in Level 1, distortion of competition, etc.). It is worth noting that one NCA has reversed its position and, after declaring itself compliant, declared only partial compliance a year later, after realising that the guidelines added obligations without a legal basis in the Level 1 text and conflicted with national measures.

As for financial institutions and obliged entities, while they must *"make every effort"* to comply with the guidelines under the terms of Article 16 of the ESAs Regulations (and of Article 54 of the AMLA Regulation), they remain free to decide otherwise by justifying their decision within the framework of the supervisory dialogue, by proposing equivalent measures. For instance, in terms of internal governance, some credit institutions have pointed to pre-existing internal organisations that incorporate the principles of the CRD.

Recent legal developments, particularly at Member State level, have highlighted the uncertain legal scope of the ESA guidelines and the question of whether the obligation on financial institutions to do everything possible to comply with them is conditional on a declaration of compliance from their national authority (see section 1.3.2 below).

1.3.1.2. ESAs' Q&As

ESA's Q&As, a practice established in the ESAs founding regulations during the 2019 reform, are a tool designed to provide answers to questions from stakeholders (national authorities, financial institutions, etc.) on how to deal with certain technical aspects of the regulations. They are published on the website of the ESA in question. In view of the large number of questions sent to the EBA, and the difficulties encountered in publishing answers within a reasonable timeframe, in February 2022 the EBA issued a press release stating that it was aiming to close all questions within nine months of receipt, and specifying certain admissibility criteria.[4]

Q&As are intended to clarify the application and/or practical implementation methods of Level 1 or 2 texts. If a question involves interpretation of EU law,

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

[2] *According to BaFin, the formal criteria set out in the guidelines for assessing the independence of members of the management body are not compatible with German labour law and the provisions on co-determination (employee participation in company decisions), nor with the laws of the Länder relating to public savings banks, their management bodies, and their supervisory function.*

[3] *ESMA, Guidelines, Exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps, ESMA/2013/74.*

[4] *The EBA announced its intention to give priority to Q&As that contribute most to the harmonisation of regulation and supervision in the EU, based on the following eligibility criteria: i) are relevant to a wide range of stakeholders, ii) are important from a prudential, payments, consumer protection, resolution or other perspective within the EBA's remit, iii) require guidance or clarification. These criteria should also be taken into account when resubmitting issues that have been rejected as indicated above. The EBA is also taking steps to aim for closure of Q&A within 9 months, in particular by focusing the process on answering those Q&A that raise important issues relevant to a wide range of stakeholders and for which further guidance or clarification from the EBA would add real value. If, exceptionally, this deadline is unlikely to be met, the author of the submission will be informed and additional measures will be taken to ensure rapid finalization.*

the relevant ESA must refer it to the Commission, which adopts a formal decision.[1] Because it is impossible to understand a legal text other than by interpreting it, the distinction between what falls within the remit of the authorities and what falls within that of the Commission is currently unclear to financial institutions, which never know who, as a final analysis, will provide the awaited clarification. Moreover, the criteria by which the authorities distinguish what falls within their remit remain unknown.

The answers, whether formulated by the Authority or Commission, are not binding. They are however substantially reproduced in the explanatory documents of the supervisory authorities (NCAs and ECB), who in practice tend to require their application, or conversely, to reject them, depending on the circumstances. In practice, some Q&As are updated once per trimester, which is inconvenient for financial institutions and entails significant adaptation costs. It also happens that certain Q&As contradict previously published answers, without this leading to a finding of obsolescence, which is also a factor of insecurity and confusion for financial institutions.

Q&As
Under Article 16b of the ESAs Regulations, Q&As help to clarify *"the practical application or implementation of the provisions of legislative acts referred to in Article 1(2), associated delegated and implementing acts, and guidelines and recommendations, adopted pursuant to those legislative acts"*. They may be submitted to the ESA *"by any natural or legal person, including the competent authorities and Union institutions and bodies, to the Authority in any official language of the Union"*.
The response, which must be written in English as well as in the language of the question, is compiled on the ESA website in an Excel spreadsheet and is classified according to date (of submission/response) or textual basis. It is issued by the ESA or, if the question requires the interpretation of European Union law, by the European Commission. Article 16b specifies that the answers are not binding and, where the European Commission interprets a concept, it attaches a warning (sometimes referred to as a disclaimer) to the effect that the interpretation is in principle a matter for a court of the European Union, that alone can give a binding interpretation.
The ESA is completely at liberty to refuse to answer, without justification. Rejected questions must simply be published on the ESA website within 2 months.

1.3.1.3 Other ESAs' soft law instruments

The ESAs produce many complementary texts.

In addition to the guidelines and recommendations set out in the founding regulations, ESMA publishes several other soft law instruments: a "supervisory manual", "best practices", "warnings", "supervisory statements" and "public statements", addressed to national supervisory authorities, supervised operators, and/or investors.

EIOPA is not lagging behind. It publishes warnings for market participants with a supervisory purpose[2] that goes beyond the traditional purpose of these instruments, which are intended to protect investors/consumers.[3] Another example is its work on the concept of Value for Money: based on the concept of product governance_enshrined in the IDD[4], EIOPA initiated work on the concept of Value for Money[5], which was subsequently taken up in the proposed RIS Directive.[6] Without waiting for the outcome of the work on this

[1] *Article 16b of the ESAs Regulations as amended by Regulation (EU) 2019/2175.*
[2] *EIOPA Warning to insurers and banks on Credit Protection Insurance (CPI) products, 30 September 2022. The text of the warning highlights EIOPA's desire to influence the behavior of market participants. See p. 5, "EIOPA will follow up on the implementation of this Warning by insurers and banks including on the measures taken by the competent authorities to address the issues identified by the thematic review in their markets". See p. 4: "If insurers and banks fail to comply with the requirements set out in the IDD and the POG Delegated Regulation, they can expect the competent authorities to exercise their supervisory powers - taking into account the principle of proportionality - including on-site inspections and other investigative powers. In the event of an infringement and depending on the seriousness of the infringement, insurers and banks can expect appropriate sanctions to be imposed and/or administrative measures to be taken."*
[3] *Article 9(3) of the EIOPA Regulation: "The Authority may also issue alerts when a financial activity poses a serious threat to the objectives set out in Article 1 para.(6)".*
[4] *Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on the distribution of insurance.*
[5] *See EIOPA, Consultation Paper on framework to address value for money risk, 13 April 2021; Supervisory Statement on assessment of value for money of unit-linked insurance products under product oversight and governance, 30 November 2021:* https://www.eiopa.europa.eu/document/download/090082ab-0e6b-4a9a-b167-ddb840a89599_en?filename=Supervisory%20statement%20on%20assessment%20of%20value%20for%20money%20of%20unit-linked%20insurance%20products%20under%20product%20oversight%20and%20governance.
[6] *Proposal for a Directive of the European Parliament and of the Council amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards Union rules on retail investor protection, Brussels, 24 May 2023, COM(2023) 279 final 2023/0167(COD).*

legislative proposal, EIOPA continued its own work,[1] supporting in particular the development of benchmarks[2], the principle of which is nevertheless being debated.[3] EIOPA denies anticipating the RIS, citing the texts applicable to insurance distribution (IDD) currently in force to justify its work.

1.3.1.4. ECB's soft law

Outside of its monetary policy remit[4], within the Single Supervisory Mechanism (SSM), (EU) Regulation 1024/2013 ('the SSM Regulation') only gives the ECB regulatory power to organize the operating procedures of the SSM.[5] For the rest, the exercise of its powers of constraint is solely a matter of individual decisions adopted in the context of prudential supervision, or of any sanctions pronounced against a directly supervised credit institution.

Nonetheless, to conduct its prudential supervision tasks, the ECB *"shall adopt guidelines and recommendations"*, as provided for in Article 4(3) of the SSM Regulation.

On this basis, the ECB produces an abundance of soft law. For example, it has published recommendations addressed to credit institutions in the Banking Union on dividend payments.[6] The guides, guidance, guidelines, standards, methodologies, and supervisory letters that it regularly publishes also provide details on how it applies the regulations and specify what it expects of a *"prudent institution"*. For example, the ECB has published guides on options and discretions in national law,[7] procedures relating to qualifying holdings,[8] internal models,[9] climate and environmental risks,[10] credit risk coverage in relation to non-performing loans,[11] and the internal governance of credit institutions.[12] Lastly, after having had its sanctions annulled on the grounds of insufficient justification for the amount of financial penalties, the ECB is now basing the amount of a fine on its own methodological guide to sanctions.[13]

To clarify its soft law practices, in 2019 the ECB published a taxonomy of acts, including non-binding acts, adopted under its prudential supervision remit.[14] The clarification initiative remains incomplete, however, as the ECB sometimes publishes documents expressing supervisory expectations that are not included in the taxonomy. The ECB acknowledges this when it states that: *"Although most of the documents made public by the ECB in the exercise of its supervisory tasks can be classified in one of the broad categories, not all of these documents fit neatly into one of these categories".*

This is the case for press releases setting out supervisory expectations, such as those on non-performing loans,[15] which are not included in the taxonomy proposed by the ECB. These press releases, which relate to stocks of "doubtful" loans not covered by Level 1 regulations and the legal status of which is uncertain, are nonetheless the ECB's benchmark for supervising the risk associated with these categories of liabilities.

Furthermore, certain guides or letters sent to credit institutions add to the obligations set out in Level 1 and Level 2 texts, sometimes in contradiction with national implementing texts. For example, the

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[1] *See, in particular, EIOPA, Technical Opinion of April 29, 2022, in which the authority promotes its work on VFM. EIOPA, Methodology to assess value for money in the unit-linked market, 31 October 2022:* https://www.eiopa.europa.eu/document/download/418147ff-ac93-4829-9055-b3bf96c1f03e_en?filename=Methodology%20to%20assess%20value%20for%20money%20in%20the%20unit-linked%20market.pdf. *The notion of benchmarks is mentioned for the first time on page 16 of the document:* "It is expected that with the implementation of the methodology more evidence would be gathered and benchmarks for relevant cluster could be gradually considered".

[2] *On 15 December 2023, EIOPA launched a Consultation on Methodology on Value for Money Benchmarks, which closed in March 2024.*

[3] *See the draft report by S. Yon Courtin, which calls for the deletion from the RIS proposal of the provisions introducing these benchmarks into the IDD: Draft report, 9 Oct. 2023, 2023/0167(COD), spec. Amendment 9,* https://www.europarl.europa.eu/doceo/document/ECON-PR-753711_FR.pdf.

[4] *These are outside the scope of this report.*

[5] *Article 4(3) of the SSM Regulation: "The ECB may also adopt regulations only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation ».*

[6] *Recommendation of the European Central Bank of 27 March 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/1, ECB/2020/19.*

[7] *ECB Guide on options and discretions available in Union law, March 2022.*

[8] *ECB Guide on qualifying holding procedures, March 2023.*

[9] *ECB Guide to internal models, February 2024.*

[10] *ECB Guide on climate-related and environmental risks, November 2020.*

[11] *ECB Guidance to banks on non-performing loans, March 2017.*

[12] *ECB Guide to fit and proper assessments, December 2021.*

[13] *TEU, 8 July 2020,* Crédit Agricole v. ECB, *T-576/18.*

[14] *Rinke Bax et Andreas Witte,* The taxonomy of ECB instruments available for banking supervision, *ECB Economic Bulletin, Issue 6/2019.*

[15] *ECB announces further steps in supervisory approach to stock of NPLs, 11 July 2018, press release; ECB revises supervisory expectations for prudential provisioning for new non-performing loans to account for new EU regulation, 2 August 2019, press release.*

ECB's guide on "Fit & Proper" states that *"the ECB and the NCAs endeavour to interpret national rules in a manner consistent with policy guidelines".* A letter from the ECB in mid-January 2022 sought to impose in France an ex-ante assessment, by the supervisory authorities (NCAs and ECB), of the chief executive and executive members of the management body, whereas Directive 2013/36 leaves Member States the choice between ex-ante and ex-post assessment. The ECB finally acknowledged that it could not impose this under the current state of the law. Another example relates to the addendum to the guide on loans that have become non-performing, the first version of which was criticised by the legal services of the Parliament and the Council for adding general rules to the relevant Level 1 act, which were also different from those laid down by the EBA.[1]

This example illustrates another type of difficulty, namely the relationship between ECB soft law and EBA guidelines. Firstly, the ECB sometimes adds to the EBA's detailed requirements, as in the case of the draft guidelines on cloud outsourcing. Secondly, the ECB sometimes publishes a draft guide even before the texts for which the ESAs have received a mandate from the co-legislators are published, as in the case of the draft ECB guide on governance and risk culture published at the end of July 2024.

Finally, there can sometimes be contradictions between the guidelines issued by the EBA, with which the ECB quasi systematically declares itself to be compliant, and the methodologies the ECB publishes to further clarify its own expectations. For example, the EBA SREP Guidelines[2] describe a supervisory assessment based on expert judgement with findings specific to each institution and taking into account its size, business model, nature, scale and complexity of its activities. In fact, this is contradicted by the SREP methodology currently being reviewed by the ECB, which is based on ever greater comparability and "horizontalization" of supervision, both in in terms of methods and outcomes.

If the ECB were to deviate from the EBA's guidelines addressed to credit institutions, the latter could be led to deploy the two divergent bodies of soft law; one resulting from the work of the EBA, whose primary responsibility is to harmonise the interpretation of EU law and converge supervisory practices, and the contradictory body of law resulting from the ECB's work. In addition to the lack of coherence and the legal uncertainty that would result from such a situation, those expectations of the ECB call into question the uniqueness of the Single Rulebook, thus contradicting the objectives pursued by the co legislators.

1.3.1.5. SRB's soft law

Similarly, the Single Resolution Board has been extremely prolific in the area of soft law, publishing numerous "Policies", often without public consultations or controls, detailing its expectations regarding the implementation of the Single Resolution Mechanism Regulation, such as: the Expectations for Banks,[3] the MREL Policy,[4] the MREL Dashboard, Operational Guidances,[5] or its approach relating to Public Interest Assessments, or Critical functions.

For example, the "Expectations for Banks 2019" state that *"service providers may not terminate, suspend or amend the terms and conditions of service provision on the grounds of resolution/ restructuring, provided that the material obligations of the contract continue to be performed".* The term "expectations", which does not correspond to any known legal category, opens the door to questions and, consequently, to legal uncertainty. The repetition of a disclaimer relating to the lack of binding effect in each of those publications does not appear to reduce the requirement of their application in practice.

It should also be noted that the SRB's supervisory expectations are not only based on the SRM Regulation. For example, the DORA Regulation, Article 30, which is devoted to the minimum content of contractual agreements relating to the use of ICT services, refers to *"termination rights and corresponding minimum notice periods for the termination of contractual agreements, in accordance with the expectations of competent authorities and resolution authorities".*[6] It is surprising that the Level 1 text should defer to the expectations expressed by the authorities. In a

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[1] *See Appendix 3.*
[2] *Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP), EBA/GL/2022/03, 18 March 2022.*
[3] *SRB, Expectations for banks, March 2020.*
[4] *SRB, MREL Policy, May 2024. Documents on the same subject had previously been published by the SRB, notably in 2017, 2018, 2020 and 2022.*
[5] *As at today's date, the SRB has published 11 operational guidances, available here:* https://www.srb.europa.eu/en/content/operational-guidance.
[6] *Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011.*

speech in February 2023, the Chair of the Board, welcoming the role entrusted to the agencies responsible for the resolution, announced that the Board was working on the implementation of DORA.[1]

1.3.1.6. Private standards, as a new source of soft law

This inflation of soft law is further amplified in the banking and financial sector by the influence of private standards on European rule-making.[2] Two very sensitive areas concerned by this situation are sustainable finance and cybersecurity.

Concerning sustainable finance, there are two opposing visions regarding the evaluation by banks of the use of funds granted to companies and the real sustainability of the activity financed in this way. Indeed, on November 3, 2021, the Basel Committee supported the announcement by the International Financial Reporting Standards (IFRS) Foundation of the creation of the International Sustainability Standards Board (ISSB) to develop global standards to improve the consistency, comparability, and reliability of sustainability reporting.[3] At the same time, at the European level, the European Commission has given the European Financial Reporting Advisory Group (EFRAG) an identical mandate to carry out work on the standardisation of non-financial data. However, while the ISSB advocates the implementation of a "simple materiality" analysis, also known as financial materiality,[4] EFRAG has chosen to ask companies to carry out a "double materiality" analysis, measuring both the company's impact on the environment and the impact of the environment on the company. Thus, international standards may not be consistent with a directive reflecting the values of a Europe that is very committed to sustainable finance.

Regarding cybersecurity, the ECB considers that the NIST (National Institute of Standards and Technology)[5] standards constitute a reference framework creating a tailor-made analysis tool, called the "cybercrime risk questionnaire".[6] This framework can even be taken up by the NCA of the Member States.[7] This again raises the question as to whether European institutions are in practice subject to US standards, outside any regulatory process, via the ECB's supervisory practices.

1.3.2. Acts of uncertain normative force

The principle of institutional balance within the EU implies that each of its institutions acts within the limits of the powers conferred on it by the Treaties, in accordance with the division of competences. This principle, laid down by the Meroni judgment of the Court of Justice of the European Union (CJUE),[8] prohibits any encroachment by one institution on the powers attributed to another. It also means that competences involving the exercise of discretionary powers cannot be delegated to autonomous entities - such as agencies - which have not been provided for in the Treaties. Thus, the adoption of binding decisions by agencies should, in general, be limited to strictly technical matters, without exceeding the narrow limits defined in the basic act.

As regards the ESAs, the SRB and AMLA, which are European agencies, according to the *"Meroni doctrine"* as reiterated recently by the Court of Justice of the European Union (CJEU) in a judgment relating to the powers of the SRB, delegations of power to bodies established by the EU legislature cannot be presumed and must be strictly delimited.[9] In this respect, the delegation of a normative power is excluded, implying as it does the exercise of a *"discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy".*[10]

Soft law acts are not legally binding.[11] However, the state of the law and institutional practices are

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[1] *"The role of the SRB and its priorities for the coming months", Florence Financial Regulation and Governance Bank Resolution Academy, speech by SRB Chairperson Dominique Laboureix, 24 February 2023.*

[2] *The influence of private standards affects not only the production of European soft law, but also Level 1 texts, as noted by the European Parliament in a resolution adopted in 2016, concerning the influence of Basel standards: European Parliament resolution of 12 April 2016 on the EU role in the framework of international financial, monetary and regulatory institutions and bodies (2015/2060(INI)), P8_TA(2016)010.*

[3] *Press release, «Basel Committee supports the establishment of the International Sustainability Standards Board », 3 November 2021:* https://www.bis.org/press/p211103.htm.

[4] *« Outside-In » approach, measuring the impact of the environment on the company.*

[5] *Attached to the United States Department of Commerce.*

[6] *ECB Annual Report on supervisory activities 2015.*

[7] *See for example the French banking supervisory authority:* https://acpr.banque-france.fr/sites/default/files/medias/documents/20180615_asf.pdf

[8] *CJEC, 13 June 1958,* Meroni & Co. v High Authority of the European Coal and Steel Community. *Case 9-56.*

[9] *CJEU, 18 June 2024,* European Commission v Fundación Tatiana Pérez de Guzmán el Bueno et al, *C-551/22 P, paragraph 70.*

[10] Ibid., *paragraph 70.*

[11] *Article 288 TFEU provides that opinions and recommendations of the institutions of the Union are not binding. The CJEU case law extends the principle to the opinions and recommendations of EU agencies, including the ESAs and the SRB; See CJEU, 25 March 2021, BT v.* Balgarska Narodna Banka, *Case C-501/18.*

much more ambiguous. On the one hand, EU soft law acts are sometimes integrated into national law or other binding instruments of domestic law. For example, the legal basis for assessing suitability, derived from the EBA/ESMA Guidelines on the Assessment of the Suitability of the Members of Management Body and Key Function Holders,[1] has been incorporated into Polish Banking Law.[2] On the other hand, supervisory authorities tend, in practice, to require operators to fully comply with their soft law, referring to the possible consequences of non-compliance, i.e., the imposition of additional prudential requirements. On occasion, bank management has been asked to agree in writing to comply with the soft law of the ESAs and any other formally non-binding instrument deemed relevant by the supervisor.[3] The ECB regularly asks credit institutions to adopt remedial measures when they deviate from EBA guidelines. Similarly, stress tests conducted under the aegis of the EBA and in accordance with its guidelines – the methodologies of which are not always open to public scrutiny or debate – contribute in practice to the determination of additional prudential requirements, even if the "quality test" of the final methodology remains quite opaque.

In addition to this ambivalence in scope that characterises soft law, there is another ambivalence specific to ESA (and AMLA) guidelines that are subject to a *"comply or explain"* mechanism.

ESAs' and AMLA's guidelines

The subparagraphs of Article 16(3) of the ESAs Regulations (and of Article 54(3) of the AMLA Regulation) are difficult to reconcile. They provide that:

The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations (first subpara).

Within two months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation (second subpara.).

If required by that guideline or recommendation, financial institutions shall report, in a clear and detailed way, whether they comply with that guideline or recommendation (fourth subpara.).

According to the case law of the CJEU, the guidelines cannot be regarded as producing binding legal effects vis-à-vis NCAs[4] because of the comply or explain mechanism, nor can they be regarded as producing, as such, binding effects vis-à-vis financial institutions.[5]

However, guidelines cannot be regarded as devoid of any legal effect. Like recommendations,[6] they confer *"a power to exhort and to persuade, distinct from the power to adopt acts having binding force"*[7]. The Court of Justice adds, not without ambiguity, that guidelines may *"supplement a legally binding act"*,[8] so that national courts are obliged to take them into account in resolving disputes brought before them.

In *FBF v ACPR,* the CJEU held that guidelines produce, in and of themselves, no legally binding effects. That said, the Court noted that guidelines can produce legal effects through the NCAs, whether they adopt national legislation encouraging financial institutions to make significant changes to their practices and/or take account of the guidelines when conducting individual prudential assessments. The EBA itself stresses in a recent study[9] that the *"comply or explain"* mechanism, insofar as it imposes on the competent authorities the obligation to ensure that financial institutions in turn comply with the guidelines, forces them to *"incorporate the guidelines into their national legal order"* via the adoption of acts that are sometimes of a binding nature. Although in most cases the national

[1] *EBA/GL/2021/06; ESMA35-36-2319.*
[2] *Article 22 et seq.*
[3] *For example, some NCAs proposed standard forms in which the effective managers and members of the management board of a credit institution declare:* "I am aware of the responsibilities conferred by European and national legislation and international standards, including regulations, codes of conduct, guidance notes, guidelines and other rules or directives issued by the ECB, national competent authorities and the European Banking Authority (EBA), to which the function for which a positive assessment is sought belongs, and also confirm my intention to comply with them at all times".
[4] *Nevertheless, once an EU institution or agency has declared that it complies with an act of European soft law, it can be challenged by third parties on the grounds of the principle of protection of legitimate expectations, as indicated in a CJEU research paper on the admissibility of actions against acts of soft law, in the following terms:* "The perception that such an instrument is binding and mandatory may then either form the basis of an action based on 'legitimate expectation' or provide access to justice, so that an applicant is not without a remedy, in particular when he has acted in accordance with the instrument in question"*, see: Research note,* Admissibility of court actions against 'soft' law measures, *2017, accessible here:* https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/ndr_admissibility_of_court_actions_against_soft_law_measures_en.pdf.
[5] *CJEU, 15 July 2021 paragraphs 45 and 46.*
[6] *Article 288(5) TFEU: "Recommendations and opinions shall have no binding force".*
[7] *CJEU, 20 February 2018, Case C-16/16 P, Belgium v Commission, paragraph 26; CJEU, 15 July 2021 paragraph 48.*
[8] *CJEU, 15 July 2021 paragraph 71. In the same vein, regarding recommendations: CJEU, 13 December 1989, Case C-322/88, Grimaldi, paragraph 18. - CJEU, 15 September 2016, Case C-28/15,* Koninklijke KPN and others, *paragraph 41. - CJEU, 25 March 2021, Case C-501/18,* Balgarska Narodna Banka, *paragraph 80.*
[9] *Rafael Nebot Segui,* "The characteristics and the legal nature of the supervisory and resolution handbook of the EBA"*, EBA Staff paper Series, n° 15 - 07/2023, available here* EBA staff paper - Legal force of EBA Handbook.pdf (europa.eu).

authorities use non-binding instruments to introduce guidelines into national law, this is not always the case (see above).
However, in 2022, the French *Conseil d'État* ruled that financial institutions must do their utmost to comply with the guidelines *"even if the competent regulatory authorities, whether the ECB or the national competent authorities, declare compliance with only part of the guidelines".*[1] A declaration of partial non-compliance or deferred compliance by the competent authority would therefore not exempt financial institutions from their obligation to make every effort to comply with the guidelines. This analysis is highly debatable. It deprives the *"comply or explain"* mechanism provided for in the text of any useful effect. It is questionable whether there is any point in requesting national authorities to express an opinion if no consequences arise from their position.
In this respect, an additional difficulty arises regarding the EBA's guidelines, which are in a specific situation. Whereas the guidelines of the other two ESAs, in the absence of integrated supervision, are subject to compliance declarations only at national level, the EBA's guidelines are subject to declarations by the competent authorities of the Member States but also by the ECB, under the SSM, in respect of the institutions under its direct supervision. As the competent authority for the supervision of credit institutions under the SSM Regulation, the ECB is bound by Article 16 of the EBA Regulation. Consequently, it must notify the EBA whether it complies or intends to comply with the guidelines or recommendations. However, it may happen that the national authority declares only partial or deferred compliance with the guidelines, while the ECB declares its full and immediate compliance.[2] The question of whether the ECB is obliged to apply a partial statement of compliance issued by an NCA, including to credit institutions that would fall under its direct supervision, is not settled in EU law.[3] This hypothesis is however not unprecedented (see, in France, the case of the guidelines on loan origination) and is, to say the least, delicate for the major credit institutions under the direct supervision of the ECB (see Appendix 6).

Uncertainties about the legal scope of soft law instruments, in particular guidelines, have a direct impact on the possibility of subjecting such instruments to judicial review.

1.3.3. Acts subject to insufficient judicial review

1.3.3.1. Restricted access to the courts

Regarding soft law, access to the courts is relatively limited. Such acts, being devoid of binding legal effect, are not amenable to direct action before the courts of the European Union based on Article 263(4) TFEU as interpreted by the CJEU.

The European Commission itself acknowledged, in its 2014 report on the ESAs[4] that the production of guidelines presented many challenges that judicial review, which was essentially inaccessible, could not resolve given the Court of Justice's case law on their justiciability. Subsequent case-law did not resolve this issue.

Article 263, paragraph 1 of the TFEU states that *"the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties".* In application of this provision, the CJEU considers that soft law acts cannot be subject to an action for annulment.

However, they may be referred to the CJEU for a preliminary ruling, for interpretation or to assess their validity (see Appendix 6). According to the *FBF* and *BT v Balgarska Narodna Banka* judgments,[5] the CJEU has jurisdiction to give preliminary rulings, respectively, on the validity of guidelines issued on the basis of Article 16 of the ESAs Regulations and of recommendations addressed on the basis of Article 17 of said regulation to an NCA not complying with Union law and setting out the action necessary to comply with Union law.

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[1] *CE, 22 July 2022,* FBF, ASF et CASA c/ ACPR, *n° 449898.*
[2] *To our knowledge, there are no cases in which the ECB has notified its intention not to comply. See, to that end:* https://www.bankingsupervision.europa.eu/legalframework/regulatory/compliance/html/index.en.html
[3] *Existing case law on the application by the ECB of national law transposing European law might suggest this, assuming that the acts by which NCAs incorporate EBA guidelines do indeed fall within the scope of "national law" within the meaning of article 4(3) of the SRMR.*
[4] *European Commission, Report of 8 August 2014 on the operation of ESAs (COM/2014/0509 final).*
[5] *See CJEU, 25 March 2021,* BT v Balgarska Narodna Banka, *Case C-501/18*

The avenues for challenge are therefore narrow: guidelines cannot be the subject of a direct action for annulment before the General Court.[1] The aggrieved applicant may challenge the legality of an act of soft law only by means of a reference for a preliminary ruling (Article 267 TFEU) or by raising an objection as to its illegality (Article 277 TFEU), in other words in the context of proceedings concerning an act of national law or another act of Union law, the illegality of which stems from the soft law act.

When the instrument of European soft law has been incorporated by a domestic legal instrument, this entails applying to the national court to annul the domestic act implementing the European instrument in question, and invoking by way of exception the invalidity of said instrument, asking the national court to refer a question to the CJEU for a preliminary ruling.

For this to be the case, there must be an act of national law which can be challenged before the national court and the latter must agree to make a reference for a preliminary ruling.

The first condition poses a problem when the guidelines have been received in domestic law by means of an act of soft law and national law does not provide for judicial review of such an act. This right exists in some Member States, such as France, but not in all.[2] An appeal is then only possible if an individual decision has been made based on the soft law act, as in Austria, Luxembourg, the Netherlands and Sweden. Assuming that the credit institutions under the direct prudential supervision of the ECB are covered by its declaration of compliance with the EBA guidelines, to the exclusion of that which could have been issued by the competent authority of the relevant Member State, they would not be able to challenge the ECB's statement of compliance either before the EU courts (since an act of EU soft law cannot be the subject of an action for annulment before the Court of Justice) or before the national courts, which would necessarily lack jurisdiction, preventing them from challenging the validity of the guidelines themselves by way of a reference for a preliminary ruling. In some Member States (such as Germany), there might be remedies arising from Constitutional law, before the Constitutional Court.

As for the second condition, while a reference for a preliminary ruling is obligatory in the event of doubt as to the validity of an act of the Union, the national court may refuse to make such a reference if it considers that there is no doubt as to the interpretation or validity of an act of Union law, as a recent case provides an unfortunate example.[3] The national court does not have the power to declare an act of Union law invalid and must therefore, if it considers it critical, refer the matter to the Union court.[4] While courts against whose decisions there is no judicial remedy under national law are in principle obliged to refer to the CJEU whenever a question relating to the validity of an act of Union law is raised before them (Article 267(3) TFEU), they may dispense with doing so if they find that the question is irrelevant, that the provision of Union law at issue has already been interpreted by the Court, or that the correct interpretation of Union law is so obvious as to leave no room for reasonable doubt.[5]

Finally, as regards the possibility of raising the illegality of a soft law act by way of exception, based on Article 277 TFEU, it requires to prove to the European Court that the contested act is based on a non-binding instrument. However, it is rare in practice for supervisors to explicitly base their decisions other than by reference to Level 1 and 2 texts. Assuming that the obstacle has been overcome, the Court's case-law attests to a two-tier interpretation of the *Meroni* doctrine: although it is accepted that the agencies cannot exercise a binding power implying discretion of a political nature, in the case of soft law acts, the margin of maneuver granted to the agencies by the European courts is, as the case law on the subject stands, very broad.[6] The success of such an appeal is therefore nothing short of doubtful.

1.3.3.2. Ineffective control

As mentioned above, delegation cannot be presumed and only clearly delimited powers may be delegated,[7] which in principle justifies rigorous

[1] *In principle, soft law acts are not subject to appeal, as they do not produce legal effects. The European court looks to see whether they produce "binding legal effects", and to this end examines the substance of the act, the author's intention and the context in which it was enacted; to date, no soft law act resulting from the work of the ESAs has been recognized as being subject to appeal, the European court considering that the conditions were not fulfilled.*

[2] *See CJEU, Research note,* Admissibility of court actions against acts of 'soft' law, *June 2017.*

[3] *See French Conseil d'État (CE), 22 July 2022,* FBF, ASF et CASA c/ ACPR, *n° 449898.*

[4] *CJEU, 22 October 1987,* Foto-Frost c/ Hauptzollamt Lübeck-Ost, *Case 314/85, paragraphs 14 and 15.*

[5] *CJEC, 6 October 1982,* Cilfit e.a., *Case 283/81, paragraph 21; CJEU, 6 October 2021,* Consorzio Italian Management, *Case C-561/19, paragraph 33 et seq.*

[6] *See 1.3.3.2 below.*

[7] *In its judgment of 22 May 1990, the CJEU stated that* "respect for the institutional balance means that each of the institutions must exercise its powers with due regard for those of the others. It also requires that any breach of this rule, should it occur, may be penalised".

review by the EU courts, including in respect of acts that are not binding.[1]

Unfortunately, case law demonstrates the limited nature of the control exercised by the Court of Justice over the validity of the ESAs' guidelines.[2] In the *FBF v ACPR* case concerning the validity of the EBA guidelines on the governance of retail banking products referred to above, the Court took a very broad approach to the EBA's powers, holding that it is sufficient for the guidelines to be considered *"necessary to ensure the consistent and effective application"*[3] of the binding texts that they purport merely to interpret, which in fact relate not to product governance but to corporate governance. The CJEU even went so far as to state that there is nothing in the EBA's founding regulation to suggest that measures relating to the design and marketing of retail banking products would be excluded from the power to adopt guidelines, *"provided that those measures fall within the EBA's scope of action".*[4] In short, in the eyes of the Court of Justice it is sufficient that the guidelines have a connection with a material area of competence of the EBA to ensure the validity of their legal basis and of their content.

In practice, therefore, we are a long way from the 'rigorous' control that respect for the principle of institutional balance demands.

It is worth noting that following the *FBF* ruling by the Court of Justice, the French *Conseil d'État* also adopted a very broad interpretation of the EBA's scope of action and powers (see Appendix 6).

2. THE CONSEQUENCES

2.1. INFLATION, INSTABILITY AND INCREASING COMPLEXITY OF STANDARDS

Excessive reference to delegated acts and soft law, combined with the ever-increasing pace of reforms (due to automatic revision clauses which have a multiplier effect in this respect), feeds the phenomenon of normative inflation and generates considerable instability in standards, undermining the principle of legal certainty, which requires European regulation to be clear, coherent and accessible.

The accelerating pace and the intertwining of different levels of legislation also frequently lead to **scheduling difficulties,** which are challenging to manage for financial institutions and supervisors.

Timetable difficulties

These difficulties are most obvious when a proposal to amend a Level 1 regulation (such as CSDR or EMIR) is presented when some of the obligations set out in the latter have only just come into force,[5] or have not yet come into force,[6] which makes it impossible to assess the effects of the text.

Difficulties are also evident when Level 2 texts have not been adopted before the date set for the entry into force of Level 1 measures. In fact, the increasing number of mandates given to the ESAs to prepare draft RTS and ITS is making it difficult for ESAs to meet the deadlines set by the texts. One example is the CRD VI and CRR 3 "banking package". In its roadmap published in December 2023, the EBA highlighted its difficulties in meeting the demands of the European co-legislators, particularly in terms of deadlines.[7] The EBA considered that the implementation of these standards would take

[1] *CJEU, 15 July 2021, paragraph 67.*

[2] *Some authors point to the restricted nature of the judicial review exercised by the Court of Justice in this case, an approach which would have made it possible to evade examination of the fundamental underlying issue, namely the EBA's compliance with the legislative process:* "In its examination of the act and its legal basis, the Court showed great restraint, contrary to the opinion of the Advocate General and, unusually, of the Commission, which shared the complainant's view that the EBA had exceeded its mandate. (...) The Court sidestepped the more important issue raised by the Advocate General's opinion, namely the threat of circumventing the legislative process". *Marco Lamandini and David Ramos Munoz,* 10 years of Banking Union's case-law: How did European courts shape supervision and resolution practice in the Banking Union?, *Economic Governance and EMU Scrutiny Unit (EGOV) - Directorate-General for Internal Policies, Study commissioned by the ECON Committee, September 2024, see page 30.*

[3] *CJEU, 15 July 2021 paragraph 94 et seq.*

[4] *CJEU, 15 July 2021, paragraph 84.*

[5] *For example, the proposal for a Regulation amending the CSDR Regulation (Regulation (EU) 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories) was presented by the Commission in 2022, one month after the financial penalties' regime came into force.*

[6] *For example, the application of the automatic redemption regime has been postponed until the entry into force of the Level 2 measures to be adopted based on the future regulation amending the CSDR. Similarly, in 2019, the EMIR REFIT Regulation has "recalibrated" certain obligations under the EMIR Regulation (Regulation (EU) n° 648/2012 of the European Parliament and of the Council of 4 July 2012 on over-the-counter derivatives, central counterparties, and trade repositories) to remedy flaws revealed during the EMIR review - a review that began in 2015 even though certain obligations (such as the clearing obligation) had not yet fully entered into force.*

[7] *EBA Roadmap on strengthening the prudential framework, December 2023, accessible here :* https://www.eba.europa.eu/publications-and-media/press-releases/eba-publishes-roadmap-implementation-eu-banking-package#:~:text=EBA%20Roadmap%20on%20strengthening%20the%20prudential%20framework

three years for the main mandates, which would lead to publication after the entry into force of these Level 1 texts. The Commission identified similar difficulties in its 2022 report on the ESAs.[1] This situation is inconvenient for both professionals and consumers.

In practice, however, this situation is dealt with in different ways. It is not uncommon for the entry into force of new obligations provided for in a Level 1 text to be postponed because the Level 2 texts on which it depends could not be adopted by the deadline.[2] However, in other cases, the Commission has indicated to the Joint Committee of the ESAs that delays in drafting RTSs did not affect the date of entry into force of the corresponding Level 1 text,[3] even though doubts about the interpretation of this text were raised by the ESAs in various letters sent to the Commission.[4] It is easy to understand, in this context, the difficulties encountered by entities called upon to comply with the principles of a text whose content is uncertain even for the European supervisory authorities (ESAs).

For instance, PSD2 saw a proliferation of EBA's mandates, resulting in the development of numerous Level 2 and 3 acts (Guidelines and Opinions) and the process of drafting these requirements was quite lengthy and complex. This not only created problems for market participants when it came to the application of provisions, but also contributed to divergent requirements and adoption timelines at national level. Indeed, although, looking at the overall framework of PSD2, consistency of the topics covered has been maintained throughout the articulated legislative acts (Directive, RTS), there have been some important asymmetries and deviations from the regulatory requirements in their implementation (especially following Guidelines and Q&As). Specifically, as far as SCA & CSC is concerned, the different timeline for adoption (e.g., EBA Guidelines on fallback exemption were adopted according to different national processes and timelines) created many operational, technical, and functional misalignments in a business which operates across boundaries, thus introducing barriers to APIs expansion between countries and increasing costs for the market.

When faced with this type of difficulty, ESMA issued in certain cases public statements asking NCAs not to make compliance with the obligations in question a priority of their supervision and to apply their supervisory powers in this area in a proportionate manner.[5] These difficulties are particularly illustrated by a public statement in which ESMA regrets that it does not have the power to suspend the application of a mandatory act of EU law in exceptional circumstances, while the timing difficulties are due, in this case, to the late transmission by this Authority of the draft RTS to the Commission.[6]

However, it should be noted that the 2019 reform of the ESAs introduced a No Action Letter mechanism precisely to deal with this type of situation. When the provisions of a Level 1 or 2 act are likely to be in direct conflict with another act, when the absence of a Level 2 text would raise legitimate doubts as to the proper application of the Level 1 act, or when the absence of guidelines would pose practical difficulties for the application of the Level 1 act, the competent ESA may send the Commission a non-binding opinion on the measures it deems appropriate.

The Commission can, for example, postpone the date of entry into force of a Level 2 text if it has been delegated the power to do so.[7] However, practice shows that the Commission has done so even in the absence of a delegation.

It may, of course, also propose a new text. Pending the adoption of these measures, the ESA may issue opinions with a view to promoting consistent practices and the uniform application of EU law by NCAs.[8]

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[1] *Report from the Commission to the European Parliament and the Council - On the operation of the European Supervisory Authorities (ESAs), Brussels, 23.5.2022, COM(2022) 228 final, see page 14.*

[2] *For example, in the case of the Taxonomy Regulation, the Commission issued a public statement explaining that compliance with certain disclosure obligations would be impossible until the relevant delegated act (in this case, concerning the technical selection criteria) had been adopted. This was also the case for MIFID2 and PRIIPS.*

[3] *Concerning the RTS drafted on the basis of Regulation n° 2019/2088 (known as SFDR), the Commission has indeed stated in a letter addressed to the three ESAs, dated 20 October 2020, that:* "in terms of substance, the application of the Regulation is not conditional on the formal adoption and entry into force of the regulatory technical standards as soon as it lays down at Level 1 general principles of sustainability-related reporting in three distinct areas".

[4] *See in particular the letter drafted by the JC of the ESAs on the RTS to be adopted in connection with the SFDR regulation, dated 07 January 2021, which, after mentioning the interpretative doubts, expresses concern that the SFDR regulation will come into force on 10 March 2021 while the numerous RTS to be drafted (13 at the time) have not been completed, given their complexity and technicality.*

[5] *See e.g., ESMA, Public statement on the derivative trading obligation in the context of the migration of credit default swap contracts out of ICE Clear Europe, 30 March 2023 (ESMA70-156-6473).*

[6] *See ESMA, Public statement, Implementation of the clearing and derivative trading obligations regarding the benchmark transition, Dec. 16, 2021 (ESMA-70-156-5151).*

[7] *This is the case, for example, of the RTS under the SFDR Regulation, which were adopted on 6 April 2022, even though the date initially set for their application was 1 January of that same year.*

[8] *Article 9c of the EBA Regulation; Article 9a of the ESMA and EIOPA Regulations.*

In addition, the ESAs Regulations authorise them to *"develop new practical instruments and convergence tools to promote common supervisory approaches and practices"* (Article 29(2)) and to take appropriate measures to promote a coordinated response by the NCAs concerned at EU level, particularly in the event of developments that could undermine the orderly functioning of financial markets (Article 31). These provisions thus enable the ESAs to ask the NCAs not to make compliance with the obligations set out in a Level 1 text a priority in their supervision and to apply their supervisory powers in this area in a proportionate manner.
These measures might seem insufficient to provide the actors concerned with the necessary legal certainty, especially regarding third parties. However, it seems that these difficulties could, at least in part, be dealt with upstream, at the legislative level (see Part 2).

In addition, the increasing complexity of the regulatory framework resulting from the growing number of references to Level 2 and Level 3 acts multiplies the number of cases of **inconsistency between regulations,** a factor of legal uncertainty that undermines the sought-after coherence and convergence.

Conflicting standards at different levels
Inconsistencies between Level 1 and Level 3 acts. In practice, financial institutions must comply with two bodies of rules that sometimes conflict, at risk of sanction: compliance with Level 1 standards, on the one hand, and compliance with soft law publications that sometimes conflict with them, on the other. These conflicts, which should be easily settled according to the principle establishing hierarchy between norms, are in practice not easily resolved. For example, the EBA and ESMA guidelines on assessing the suitability of members of the management body and holders of key positions (fit and proper)[1] introduce a formal independence criterion that does not appear in the CRD. The ECB's draft guide on internal governance, published for consultation in autumn of 2024, does as well.
Looking at PSD2, we have seen discrepancies with e-IDAS[2] and EBA Guidelines on remote customer onboarding[3] as well as new AML/CFT legislation[4] and EBA Guidelines on Risk factors.[5] Indeed, there are several points of divergence, namely, regarding definitions (*e.g.,* the definition of "group" of PSD2 is not identical to the definition of "group" in terms of AML-CFT), security requirements (e.g. the definition and usage of behavioural biometrics data in the GL on remote customer onboarding) and onboarding processes (e.g. authentication checks in the GL on remote customer onboarding) which could introduce, again, operational difficulties and inconsistency among solutions.
Another example is the ECB's Addendum to its Guidelines for Banks on Non-Performing Loans. Drafted in response to the Council's Action Plan on Non-Performing Loans at a time when legislative work was underway on the subject, the Addendum was criticised by the legal services of the Council and the European Parliament for setting quantitative supervisory expectations that went beyond the powers conferred on the ECB by the TFEU and the SSM Regulation.[6]
Inconsistency between Level 3 acts, in particular guidelines, and provisions of national law. The difficulty also arises for professionals and market participants when the competent authorities decide to comply with

[1] *EBA/ESMA Guidelines on the Assessment of the Suitability of the Members of Management Body and Key Function Holders, EBA/GL/2021/06; ESMA35-36-2319, 2 July 2021.*
[2] *Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC*
[3] *EBA, Guidelines on the use of Remote Customer Onboarding Solutions under Article 13(1) of Directive (EU) 2015/849, EBA/GL/2022/15, 21 November 2022.*
[4] *In addition to the Regulation establishing the AMLA, other texts have been adopted: Regulation on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing; Directive on mechanisms to be put in place by Member States to prevent the use of the financial system for the purpose of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849; Directive on access to centralized registers of bank accounts, 21 May 2024; Regulation on information accompanying transfers of funds and certain crypto-assets.*
[5] *EBA Guidelines on customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions ('*The ML/TF Risk Factors Guidelines*') under Articles 17 and 18(4) of Directive (EU) 2015/849, repealing and replacing Guidelines JC/2017/37, EBA/GL/2021/02, 1 March 2021.*
[6] *Memos written by the Council's Legal service, 23 November 2017 (points 18 to 21) and the European Parliament Legal Service, 8 November 2017. The Council's Legal Service notably contends that:* "The SSM Regulation prevents the ECB from adopting instruments of soft law, such as the draft addendum to the ECB guidance to banks on non-performing loans, intended to ensure compliance by banks of criteria for minimum provisioning which are not, or not yet, the object of harmonisation by the EU legislator and for which application banks themselves are granted a margin of discretion under current legislation". *The EP's Legal Service further states that the relevant legislation provides:* "no legal foundation for the adoption of measures such as those included in the Addendum (…) [that] introduces minimum prudential provisioning requirements, which have no legal effects and are designed to apply to all (significant) banks directly supervised by the ECB, regardless of the specific situation of each individual bank. Neither the CRD IV not the SSM Regulation confer on the ECB regulatory powers which would be needed for that purpose. Nor, for that matter, any such power is provided for in the Treaties or in other pieces of secondary law".

guidelines despite contradictions with national law. The situation is particularly delicate for large institutions under the direct supervision of the ECB, when the latter issues a declaration of full compliance while the national authority has issued a declaration of partial compliance due to the contradiction between certain guidelines and provisions of national law (see, in France, the case of EBA/GL/2020/06).

In short, delegated acts and soft law de facto constrain financial institutions, depending on the position of the supervisors, to a greater or lesser extent, with consequences for their governance, operations, costs, and risk policies, sometimes without sufficient legal basis.

Lack of accessibility of texts

The production of standards by the ESAs also creates accessibility issues. Pursuant to Article 8(1) of the Regulations, these authorities must *"(ka) publish on [their] website, and (…) update regularly, all regulatory technical standards, implementing technical standards, guidelines, recommendations and questions and answers for each legislative act referred to in Article 1(2), including overviews that concern the state of play of ongoing work and the planned timing of the adoption of draft regulatory technical standards and draft implementing technical standards".*

However, a look at the ESAs' websites shows that this goal is far from having been achieved. In the first place, there is no common website model for the three ESAs, which would make it possible to navigate the sites in a uniform manner. Only ESMA and EBA, to the exclusion of EIOPA[1], offer access to a Single Interactive Rulebook, providing a single access route to Level 2 and 3 texts. Secondly, the search tool on the EIOPA website includes all the technical standards, guidelines, recommendations, and Q&As relating to the applicable legislative acts, but it is still necessary to search by keyword, date of publication and/or type of document.

Extensive searches on the websites of the three ESAs also reveal that the document libraries are incomplete from one site to another. The search tool on the EBA website does not provide access to documents that are known to exist. Until recently, ESMA published on its website a table of technical standards that had been adopted or were in the process of being developed, which provided a useful overview, but it seems that this table is no longer accessible. Similarly, the ESMA website contains letters exchanged between the Joint Committee of the ESAs and the Commission on the RTS relating to SFDR, and letters sent by the Commission to the Chairman of the European Parliament's ECON Committee, which are not available on the EIOPA website. Better accessibility to documentary sources would nevertheless be useful in helping the industry understand the regulatory environment and navigating the sometimes-complex timetable for the adoption of RTS,[2] particularly on sensitive subjects that are causing delays in adoption. This example reveals the need to create a taxonomy of exchanges between ESAs and EU institutions, linked to a documentary classification method that enables financial institutions, and even researchers, to find the information they need more easily.

The Commission also sometimes adopts RTS that differ from the draft submitted to it by the competent ESA,[3] without the correspondence between the Commission and the Authority being systematically accessible.[4] These shortcomings do not allow financial institutions to fully understand the meaning of the delegated regulations. All exchanges between the Commission and the ESAs should be made available and, more generally, the joint working methods between the institutions and the ESAs should be clarified.

Ultimately, the advantages of adopting Level 2 and 3 instruments are now largely outweighed by the fact that they make the rules laid down in Level 1 texts more difficult to read, understand and apply, and are a source of legal risk and of costs, sometimes without any legal basis.

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[1] *EIOPA's website refers to two Single Rulebooks: IDD (*https://www.eiopa.europa.eu/rulebook/idd-insurance-distribution-directive_en*) and Solvency II* (https://www.eiopa.europa.eu/rulebook/solvency-ii-single-rulebook_en*). Many texts are therefore not listed, such as those relating to PEPP or PRIIPS. Furthermore, no reference is made to the Single Rulebooks via the Legal Framework tab, which refers to the IDD and Solvency II directives (without referring to Level 2 and 3 texts in the case of Solvency II).*

[2] *For example, the EBA-Dashboard is especially useful, notably the "EBA roadmap on the implementation of the EU Banking Package", December 2023, available here:* https://ebprstaewspublic01.blob.core.windows.net/public/tools-prod/assets/roadmap/roadmap_progress_list.html.

[3] *For example the Commission Delegated Regulation (EU) 2023/2779 of 6 September 2023 supplementing Regulation (EU) 575/2013 of the European Parliament and of the Council as regards technical regulatory standards specifying criteria for the identification of entities of the shadow banking system referred to in Article 394(2) of that Regulation, the preamble to which has been completely rewritten compared to the draft RTS submitted by the EBA.*

[4] *EBA publishes on its website its correspondence with the Commission in relation to the modification of RTS :* https://www.eba.europa.eu/about-us/organisation-and-governance/accountability/correspondence

2.2. UNDERMINING THE INSTITUTIONAL BALANCE, THE DEMOCRATIC PRINCIPLE, AND THE COMPETITIVENESS OF THE EUROPEAN UNION

The adoption of an increasing volume of Level 2 and 3 acts which add to or even contradict Level 1 texts, sometimes pre-empting discussions underway at legislative level, results in a shift of legislative power from the European Parliament and the Council to the European Commission and, ultimately, to the ESAs. From this point of view, RTS are problematic, as they too often cover matters which, far from being technical, involve political choices incumbent on co-legislators, with a substantial impact on those subject to them. The conditions for controlling the adoption of these standards - which render control hypothetical - also reinforce questions about institutional imbalance (see Part 2 below).

In addition, the treatment in Level 3 acts of issues that should be dealt with in Level 2 or even Level 1 acts paradoxically leads to disparities in the application of European Union law due to the "comply or explain" mechanism. From a competition point of view, this causes inequalities between financial institutions, which are subject to varying levels of supervision from one Member State to another or even from one institution to another (absence of a level playing field).

The adoption of texts without any real democratic debate, and in many cases without any prior public consultation, in-depth impact study or cost-benefit analyses, also runs counter to the principles of subsidiarity and proportionality, as well as the principles of "better regulation".

The principle of subsidiarity applies to the Commission's legislative proposals in areas of shared competence between the EU and the Member States. In these areas, the EU can only act when its action is necessary and provides manifestly greater benefits than measures taken at national, regional or local level (Article 5 TEU). Compliance with the principle is guaranteed by the subsidiarity control mechanism set up by Protocol 2 on the application of the principles of subsidiarity and proportionality: when national parliaments consider that a draft legislative act does not comply with the principle of subsidiarity, they may send a reasoned opinion to the Commission within 8 weeks. The Commission must take account of the reasoned opinions it receives.

However, nothing comparable exists for the adoption of Level 2 and 3 acts. While some may consider that subsidiarity checks are included in the analysis of the Level 1 text mandating the ESAs to draw up technical standards and guidelines,[1] and recital 66 of the preamble common to the three ESAs regulations affirms that the authorities may *"adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union",* it is difficult to be satisfied with an abstract examination and a petition of principle that takes no account of the reality of the (quasi) normative production at stake.

The principle of proportionality, the constitutional value of which is established in Article 5 TEU and which applies to all EU institutions and bodies in the exercise of their powers, is also at issue. Under this principle, the financial and administrative implications of the various texts must be proportionate to the objectives to be achieved and *"... any financial or administrative burden falling (...) on economic operators and citizens must be the least possible and commensurate with the objective to be achieved".*[2]

Yet, the proliferation of these acts leads financial institutions to continuously adapt their internal systems, which is a source of legal uncertainty and entails high costs in practice.

In addition, the stakes are high since failure to comply with this regulatory framework may result in increased prudential requirements, or even the risk of sanctions. A supervisory authority may impose a sanction for non-compliance with a mandatory text as interpreted by a soft law text. Prudential supervisors may also impose additional capital requirements when they consider, based on an examination of the financial institution's individual situation, that certain risks are insufficiently covered.[3] However, at a time when the risk-based approach is increasingly emphasised (particularly in relation to AML/CFT, but also in relation to internal governance or environmental standards), European soft law, including that adopted by the ECB itself, leads to general and abstract requirements taking precedence over an analysis of the specificities of the supervised institutions.

Moreover, the shift of normative power from the EU's co-legislators to the European Commission and ultimately to the ESAs does not appear to be offset by increased transparency and a real

[1] CEP Study, European Supervisory Authorities, Room for improvement at Level 2 and Level 3*, Study on Behalf of the Munich Financial Centre Initiative (fpmi), 4 October 2016, accessible here:* https://www.cep.eu/eu-topics/details/the-european-supervisory-authorities-room-for-improvement-at-level-2-and-level-3.html.
[2] *Article 5, Protocol 2, TFEU.*
[3] *Article 16(2)(a), SSM Regulation.*

stakeholder consultation process, or effective supervision, by the EU's co-legislators or by the courts, of the standards produced by these authorities.[1]

As pointed out in an information report on the place of delegated acts in European legislation,[2] this situation deprives business professionals and consumers of upstream control and political arbitration by the European Parliament and the Council. In practice, this regulatory overstep linked to the proliferation of EU Level 2 and 3 instruments generates costs for the European financial and banking industries and consequently a loss of competitiveness for European institutions, and, ultimately, the European Union. Financial institutions based in the European Union are thus at a disadvantage compared to players from third countries.

[1] *It should be noted that in a recent report, the EBA points out that it must comply with these principles when carrying out its duties: Zoi Jenny Giotaki, Pauline de la Bouillerie and Rafael Nebot Segui, "The characteristics and the legal nature of the supervisory and resolution handbook of the EBA", EBA Staff paper Series, n°15 - 07/2023.*

[2] *S. Sutour, Rapport d'information fait au nom de la Commission des affaires européennes sur la place des actes délégués dans la législation européenne, Sénat, Session ordinaire 2013-2014, janv. 2014, n° 322 ; J.-F. Rapin, D. Marie et C. Morin-Desailly,* Rapport d'information fait au nom de la Commission des affaires européennes sur la dérive normative de l'Union européenne, *French Senate, Ordinary session 2024-2025, December 2024, n° 190.*

II.
SOLUTIONS WITHIN REACH, IN THE SPIRIT OF THE LAROSIÈRE REPORT

While it does not seem conceivable to return to the Lamfalussy process, given that the former committees of regulators involved in the comitology procedure have been replaced by the ESAs which carry out a considerable amount of work requiring highly technical skills, it would be advisable to revisit the idea underlying this procedure: a strict division of powers between the various EU institutions and authorities involved in the production of European financial services legislation, to limit the excessive inflation of standards and detailed obligations without legal foundation, sometimes contradictory, and excessive bureaucratic and reporting burdens, which are holding back European competitiveness.[1]

Returning to the spirit of the Lamfalussy process and the recommendations of the Larosière report (see Appendix 2) and taking better account of the principles set out in the Better Regulation approach: these guiding principles have led us to propose a better distinction between binding regulations, on the one hand, and supervisory expectations and institutional best practices on the other.

This entails better law-making, but also simplifying the existing framework and allowing more controls.

1. EVALUATING, SIMPLIFYING AND IMPROVING THE STANDARDS PROCESS

This report, the fruit of a work which began more than two years ago in a momentum for change, coincides in this respect with the conclusions of the Letta and Draghi reports, the objectives of the new Commission, as well as the reflections of Member States, MEPs, Central Banks and supervisors, all of which highlight the need for an overall assessment and simplification of the existing regulatory framework and its improvement for the future.

1.1. ASSESSING AND SIMPLIFYING THE EXISTING REGULATORY FRAMEWORK

Following the crisis of 2007-2009, regulation of the financial sector was considerably tightened. We have now reached the end of a cycle, with the implementation of the final Basel III package. It is now necessary to take a step back and check that the complexity of existing regulations, particularly prudential regulation, does not hinder the achievement of the objectives being pursued.[2]

As highlighted in a letter to Commissioner Maria Luis Albuquerque dated 17 January 2025 signed by the Governors of the Banco de Espana, Banca

[1] *Recent debates on the disproportionate nature of reporting costs are a good illustration of the problems associated with the regulatory burden. On November 8, 2024, in a declaration issued in Budapest, the European Council stated that: "*Among the main objectives to be implemented without delay by the Commission are the formulation of concrete proposals to reduce reporting obligations by at least 25% in the first half of 2025, as well as the inclusion in its proposals of impact analyses relating to administrative burdens and competitiveness". *At a press conference on the same day, Commission President Ursula Von der Leyen confirmed this trend, referring to the possible adoption of an Omnibus Regulation designed to streamline the reporting obligations arising from three existing texts (CSRD, the Taxonomy Regulation and CSRD).*

[2] *See the speech of François Villeroy de Galhau, Governor of the Banque de France and President of the ACPR, ACPR conference of 26 November 2024 :* « Pour une simplification réaliste : dénouer quelques nœuds de la règlementation bancaire en Europe », *accessible here :* https://www.banque-france.fr/fr/interventions-gouverneur/pour-une-simplification-realiste-denouer-quelques-noeuds-de-la-reglementation-bancaire-en-europe.

d'Italia, Banque de France and the President of the Deutsche Bundesbank:
" It is necessary to take a step back and make sure that the complexity of cumulative layers of regulations in Europe does not constitute an obstacle to achieving our goals. Financial stability requires a clear, predictable and proportionate framework, and resolute and reasoned actions to streamline regulations would help the effective implementation of these rules.
In that regard, we believe that the priority should now be to develop a "holistic" view of the rules that apply to European banks. To this end, a comprehensive analysis of the implications of all the standards produced in Europe should be carried out, including level 2 and 3 standards to ensure that they do not cumulatively add unintended layers of rules and expectations in addition to what is provided for in the political agreement in respect of the level 1 text. This in-depth assessment, which must include the microprudential, the macroprudential and the resolution frameworks, could also assess the proliferation of additional regulatory projects which might prevent the stabilization, the predictability and, hence, the simplification of the EU overall regulatory framework. By identifying areas where the European framework is unduly complex and may create competitive distortions at international level, without any significant financial stability benefits, this analysis could also contribute to ensuring a level playing field with other major jurisdictions."

An example of the need for simplification is regulation in the field of climate change, which is complex and difficult to comprehend, with different definitions in different texts and duplicated data requests in particular. Simplification would lead to better understanding, therefore better application of the rules and even better supervision.[1]

The European Commission has made regulatory streamlining one of the priorities of its new mandate, in particular to reduce reporting obligations by at least 25%.[2] It indeed appears essential to reduce administrative burdens and eliminate excessive bureaucracy.[3] The Commission is committed to assessing the acquis, proposing the elimination of overlaps and contradictions between texts, and ensuring that the principles of proportionality, subsidiarity and Better regulation are respected, with impact assessments and broad consultations. It has announced a revised inter-institutional agreement on simplification and better drafting of legislation. Omnibus texts may also be proposed.

The EBA itself recognises the need to simplify its production of legal texts, stating, regarding the amendment of the guidelines on arrears and foreclosure: *"EBA assessed the impact of this amendment and concluded that, in order to adhere to the principle that EBA Guidelines must not repeat, amend or contradict requirements set out in Level 1 legislation, said Guidelines need to be amended. Consequently, through the Amending Guidelines on hand, Guideline 4 on the resolution process has been deleted from the EBA Guidelines on arrears and foreclosure".*[4]

Nevertheless, it is crucial that streamlining and simplifying the texts does not, in turn, entail unjustified new adaptations (particularly in IT) for financial institutions, which would be a source of additional costs and run counter to the objective pursued. Consultations therefore are necessary. Political agreements should not be called into question.

1.2. LIMITING PROPOSALS AND REVIEW CLAUSES

The reflections undertaken by the EU institutions in the context of "Better law-making" highlight the need to reduce the proposals for legislative and

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[1] *See statement of Louise Caroline Mogensen, Director-General of the Finnish authority Finanstilsynet, «* From single to simpler: making EU financial services rulebook smarter & stronger », *EUROFI Magazine, Budapest 2024, p. 52, accessible here :* views-the-eurofi-magazine_budapest_sept-2024.pdf.

[2] *On this topic. see: Ursula Von Der Leyen, Mission Letter to Valdis Dombrovskis, Commissioner-designate for Economy and Productivity and Commissioner-designate for Implementation and Simplification, 17 September 2024, Brussels, available here:* https://commission.europa.eu/document/download/71c3190f-0886-4202-846e-5750f188f116_en?filename=Mission%20letter%20-%20DOMBROVSKIS.pdf

[3] *See Harald Waiglein, Director General for Economic Policy and Financial Markets – Federal Ministry of Finance Austria,* "Innovation is the key to competitiveness", *EUROFI Magazine, Budapest 2024, p. 52, accessible here:* views-the-eurofi-magazine_budapest_sept-2024.pdf. *See also the letter sent by representatives of the Italian Ministero dell'Economia e delle Finanze - Dipartimento del Tesoro Direzione V Ufficio II, the French Ministère de l'économie, des finances et de la souveraineté industrielle et numérique I Direction générale du Trésor, and the German Bundesministerium der Finanzen, addressed to John Berrigan, Director General of the Directorate General for Financial Stability, Financial Services and Capital Markets Union, 24 September 2024.*

[4] *EBA, Final Report on Guidelines amending Guidelines EBA/GL/2015/12 on arrears and foreclosure, EBA/GL/2024/10, 28 June 2024.*

regulatory acts. As underlined by Member States[1] and supervisors,[2] a pause would be necessary to assess the impact of directives and Level 2, perhaps even Level 3, acts.

In this spirit, the production of Level 1 texts should be limited, by better observing the principles of subsidiarity and proportionality, and with reasoned use of review or "rendez-vous" clauses, *i.e.* "core review clauses[3] (see the Glossary) which call on the Commission to redefine all or part of the terms of a directive or a regulation. These clauses are not only a source of instability, as the Level 1 framework is continually being called into question, but also the primary source of the inflation of Level 2 and 3 texts.

When such clauses are indispensable – to enable political agreement or because the text has not been subject to a prior impact study, in particular – revision should only take place at the end of a period of at least four (4) years after the entry into force of the texts, to allow for the collection of the data needed for an ex post evaluation of the text and its implementation, in order to assess the need and appropriateness of a modification (see, in particular, the recommendations of the European Commission's Better regulation Toolbox). However, the proposed review periods are often two years.[4]

In all other cases, rather than being revised periodically as a matter of principle, Level 1 texts should only be revised where necessary, and in particular when justified by impact studies, significant changes in the market or changes affecting the competitiveness of regulated entities. Conversely, if a Level 1 act is considered to be fulfilling the overall purpose for which it was adopted, updates made *"for the sake of modernisation"* should be avoided.

Any legislative proposal to revise an existing act should be preceded by a prior examination of the framework already in force on the subject in question, from Level 1 to Level 3 where appropriate. This exercise would make it possible to identify gaps between the existing framework and the proposed text. The legislative process could conclude with a call to revise - or delete - the relevant Level 2 texts, as well as an address to any agencies and/or EU institutions that have published supervisory expectations on the subject at hand, with a view to ensuring consistency. With this in mind, the Commission and agencies could develop working methods that allow for a holistic vision of regulation.

1.3. LIMITING THE NUMBER AND FURTHER SPECIFYING THE CONTENT OF DELEGATIONS

Regarding the ever increasing proliferation of mandates conferred on the Commission for adoption of Level 2 texts, an automatic limit on the number of delegations could be considered. Reflections could be initiated with a view to cap the number of delegations and mandates provided for in a Level 1 text, for example in the form of a ratio based on the number of articles in the Level 1 text.

Furthermore, a review of the application of the principles of proportionality and subsidiarity[5] should be conducted, since although Level 1 legislation is in principle adopted in light of these principles, their application remains theoretical when it comes to delegated and implementing acts, for which no dedicated control system is provided for in the EU Treaties (see above, Part 1). Compliance with these principles should also be observed at this level.

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[1] *See the letter from representatives of the Italian Ministero dell'Economia e delle Finanze - Dipartimento del Tesoro Direzione V Ufficio II, from the French Ministère de l'économie, des finances et de la souveraineté industrielle et numérique I Direction générale du Trésor, and the German Bundesministerium der Finanzen, addressed to John Berrigan, Director General of the Directorate General for Financial Stability, Financial Services and Capital Markets Union, 24 September 2024.*

[2] *See statements of Louise Caroline Mogensen, Director-General of the Finnish authority Finanstilsynet,* « From single to simpler: making EU financial services rulebook smarter & stronger », *EUROFI Magazine, Budapest 2024, p. 52, accessible here:* views-the-eurofi-magazine_budapest_sept-2024.pdf.

[3] *These clauses are distinct from those which simply provide for the submission of a report on the application of a text, and which are not true "review clauses".*

[4] *For 40 acts out of 150 in the second half of the 9th parliamentary term, i.e. from January 2022 to September 2024: cf. Study, European Parliamentary Research Service, Review clauses in EU legislation adopted during the second half of the ninth parliamentary term (January 2022-September 2024) - A Rolling Check-List, 20 December 2024.*

[5] *Article 5 (3) and (4) TEU state that:* "3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."

Moreover, the European legislator should specify more precisely the content, scope and meaning of its delegations and the limits of the power granted to the Commission (and to the Council, as the case may be), so that the use made of them can be better controlled (see below, section 2.). Greater clarity and precision in the drafting of mandates would allow for a better understanding of the objectives pursued by the legislator and would further prevent interpretations that go beyond the text.

The Council has initiated work on this subject, concerned about the growing number of delegated acts and their adoption procedures. In 2014, the Financial Services Committee (FSC),[1] began work on the adoption process for Level 2 texts, published in 2015 in the form of a report,[2] some conclusions of which are shared here. Thus, the FSC invited:

- the Commission, the Council and the European Parliament to ensure that all political issues are addressed as far as possible in the Level 1 text;
- alternatively, to provide the Commission with sufficient guidance in the mandate for Level 2;
- to insert in the base act appropriate deadlines for the adoption of Level 2 texts, to allow adequate involvement of Member States;
- to ensure that authorisations for Level 2 acts take due account of the specific features of the financial services in question and their characteristics, and that they provide for reasonable adoption deadlines allowing adequate participation of Member State experts in the preparation of delegated acts;
- the Commission to consult the ESAs on the authorisations granted to them to draft technical standards, to ensure the coherence of their mandate and the feasibility of the envisaged timetable.

Furthermore, as regards the adoption of Level 3 texts such as ESA guidelines, a revision of the ESAs regulations could be envisaged to specify in Article 16 that the ESAs may only adopt guidelines based on mandates granted by the legislator in a Level 1 text. This proposal is in line with Recital 23, common to the three ESAs regulations. This recital recommends a framework for the ESAs' right of initiative: guidelines should not in principle, be adopted on points which have been the subject of RTS and ITS. In this vein, this proposal would have the effect of abolishing the initiative of the ESAs in the field of guidelines, nowadays adopted without national parliaments exercising a control of subsidiarity, even though the guidelines' effects at the level of the Member States are not negligible, as the relevant case-law on the subject has pointed out.[3]

The ESAs would continue to refine Level 1 texts, on the basis of a mandate, to promote full harmonisation. Guidelines should be adopted at least 2 years before the application of Level 1 texts.

Alternatively, and if the ESAs deem it appropriate, they could have recourse to opinions adopted under Article 29[4] of the ESAs regulations, which would allow them to develop a common supervisory culture. The full freedom currently enjoyed by the ESAs to adopt guidelines would as such be framed, without affecting their primary missions.

Finally, guidelines formulated under a mandate should be drafted more concisely.

1.4. IMPROVING THE STANDARD-SETTING PROCESS

1.4.1. Enhancing the content of impact assessments

Regarding the conduct of impact studies accompanying the Commission's legislative proposals, reflections could be initiated to ensure better quality, representativeness and objectivity. To this end, better account should be taken of (i) the entire market affected by the act in question,[5] (ii) the contributions of stakeholders, as well as

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[1] *Set up by Council Decision 2003/165/EC of 18 February 2003, it works in close cooperation with the Economic and Financial Committee (EFC), in particular to prepare the meetings of the Economic and Financial Affairs Council (ECOFIN). Its remit is: (i) to conduct cross-sectoral strategic reflection, (ii) to help define the medium- and long-term strategy for financial services issues, (iii) to examine sensitive short-term issues, (iv) to assess progress and implementation, (v) to provide political advice and monitor both internal issues (e.g. Single Market) and external issues (e.g. WTO).*

[2] *FSC Report on Level 2 Processes, 23 June 2015, 1759/15, available here:* https://data.consilium.europa.eu/doc/document/ST-1759-2015-INIT/en/pdf

[3] *CJEU, 15 July 2021,* French Banking Federation (FBF) v. Autorité de contrôle prudentiel et de résolution, *Case C-911/19, paragraph 70.*

[4] *Article 2 of the ESA Regulations, titled "Common supervisory culture", reads: "*1. The Authority shall play an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union. The Authority shall carry out, at a minimum, the following activities: a) providing opinions to competent authorities;"

[5] *The Commission's impact study on the EU's retail investment strategy has been widely criticised in this respect. See COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investor protection rules and Regulation of the European Parliament and of the Council amending Regulation (EU) No 1286/2014 as regards the modernisation of the key information document, SWD/2023/278 final.*

(iii) competitiveness issues, echoing the proposals of the Letta Report.[1]

This assessment of the impact of regulation should be both **ex-ante,** in the case of the adoption of legislative acts on subjects newly harmonised or revised, and **ex-post,** assuming that such assessments:

- are carried out only in the event of significant changes in the market and/or difficulties in terms of competitiveness (see above, section 1.2.); or
- linked to reports that the Commission may have adopted on the basis of a Level 1 mandate relative to targeted issues calling for a test phase.

This means that the issues at stake must be identified and policy objectives and policy options need to be validated against possible future developments, with quality instruments for evaluating regulation and more standardised and efficient procedures. One might also question the relevance of outsourcing impact studies to consulting firms.

Tools have been put in place as part of Better Regulation to facilitate this assessment. This is the case with the Fit for Future platform, which is a high-level expert group made up of representatives of the Member States, the Committee of the Regions, the European Economic and Social Committee, civil society, business, and non-governmental organisations that helps the Commission to improve EU legislation, providing advice on the possibilities for simplification, burden reduction and modernisation regarding the current legislation.

Alongside this Fit for Future platform, a real toolbox[2] for better regulation has been developed. It provides advice to the Commission regarding the adoption of impact assessments, relating namely to:

- compliance with the general principles of Better Regulation;[3]
- the methodology applicable when carrying out impact assessments;
- identification of the impact of proposed legislation on the various economic sectors relevant to EU action;[4]
- procedures for parties with an interest in the legislative proposal;
- compliance tools relating – among other things – to carrying out impact assessments with a view to the adoption of delegated and implementing acts;[5]
- the procedure for carrying out a competitiveness test as part of an impact assessment, with analysis of the international competitiveness of European players in relation to third countries constituting one of the components of this test.

The Regulatory Scrutiny Board (RSB), an independent body within the Commission which examines, among other things, the quality of impact assessments, is designed to assist the Commission in making decisions on the basis of the best available data. Composed of a chairman and eight full-time members appointed by the Commission for a non-renewable three-year term (extendable for a maximum of one year in exceptional circumstances), it must act with complete independence. It therefore prepares its opinions autonomously, and neither seeks nor accepts instructions from the Commission, any other decentralised national or European agency, or any other EU body.

The idea of an independent body producing evidence-based analyses is an attractive one. It has also been proven effective, and the work of the RSB is rightly praised. It does, however, raise the question of what constitutes relevant "evidence" for the purposes of impact assessment.

Questions were also put to the European Ombudsman concerning the appointment procedures for RSB members, the existence of hypothetical conflicts of interest, and access

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[1] *The Report states notably that:* "One potential approach would involve incorporating into the Inter-institutional Agreement on Better Law-Making an obligation for the Commission and the two co-legislators to consider, prior to any legislative proposal and discussion related to the Savings and Investments Union, the objectives of fostering a self-sufficient, diverse, and competitive ecosystem, along with a competitiveness test ensuring an appropriate balance between ordinary legislation and delegated or implementing acts, thereby providing the flexibility needed to enable rapid competitive responses to innovation within the Single Market". *See Enrico Letta, Much more than a market, April 2024, available here:* https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf

[2] « Better regulation » toolbox – *July 2023 edition, accessible here :* https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=BR%20toolbox%20-%20Jul%202023%20-%20FINAL.pdf.

[3] *These principles are set out in the form of "tools", concerning for example the REFIT program and the Fit for Future platform, the role of the Regulatory Scrutiny Board, the idea that legislation should be "evidence informed", and respect for the principles of legality, subsidiarity and proportionality.*

[4] *The list is long and need not be quoted in extenso here. Nevertheless, it is interesting to note that sectoral competitiveness is one of the areas to be examined by the Commission during the drafting of legislative proposals.*

[5] *The tools proposed on this subject are in line with the Commission's publication entitled:* "Delegated and Implementing Acts (Articles 290 and 291 Treaty on the Functioning of the European Union) - *Guidelines for the services of the Commission, November 2020, accessible here:* https://www.aaronmcloughlin.com/wp-content/uploads/2024/06/2020.11.223.-DA-IA-guidelines-copy.pdf. *They also echo the criteria set out in "Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union — 18 June 2019", (2019/C 223/01), published in the OJEU on 3 July 2019.*

to the analyses produced by this committee: its website gives the public access to a great deal of information, but sometimes certain works are not published, and the RSB refuses to give access to them. In response to these questions, the EU Ombudsman[1] has, for example:

- suggested that the Commission should ensure that the composition of the RSB clearly reflects the diversity of skills required in the field concerned;[2]
- invited the Commission to clearly describe the criteria it uses to select members of the committee for this purpose;
- suggested that the Commission provide access to the documents requested, once any personal data (such as the member's name) has been removed;[3] and
- suggested that in future the Commission should proactively publish declarations of interest made by members.[4]

Other cases are of interest to the RSB even when it is not the direct source of the complaint: two of them concern a refusal by the Commission to grant public access to the RSB's Opinion on a draft Commission impact assessment in the food sector. In her decision, the Ombudsman found that the Commission's refusal constituted maladministration, and urged the Commission to give full effect to the case law of the CJEU, which requires EU institutions to apply a particularly high level of transparency to legislative documents.[5]

1.4.2. Strengthening the ESAs' consideration of competitiveness

The report published in September 2024 by Mario Draghi[6] has made competitiveness an "absolute priority", putting forward strategic recommendations on how to make the EU's economy more competitive. The report's conclusions underline the necessity to ensure the financing of the great challenges that the EU will face in the next decades. To that end, the report insists on the reduction of the complexity and volume of European regulations, seen as an obstacle to competitiveness, and on improving EU's governance: while around 3,500 pieces of legislation and 2,000 resolutions were passed by the US Congress between 2019 and 2024, 13,000 acts were issued at the European level during the same period.

Indeed, as recently highlighted by the Commission in its draft annual report on the Banking Union,[7] a healthy and resilient European banking sector is crucial in order to achieve a globally competitive EU, as Europe faces major challenges, notably regarding the digital and sustainability transformations which call for robust European financing capacities. The recently published Mission letters from President Ursula von der Leyen to Commissioners Valdis Dombrovskis and Maria Luis Albuquerque[8] notably state that:

> *"New legislation must ensure that our rules are simpler, more accessible to citizens and more targeted. You will ensure the principles of proportionality, subsidiarity and Better Regulation are respected, including through wide consultations, impact assessments, a review by the independent Regulatory Scrutiny Board and a new SME and competitiveness check."*

Member States have recently called for greater consideration to be given to the competitiveness of the financial sector, via its regulatory framework, in order to finance European objectives. In particular, they stressed the need to ensure that Levels 2 and 3 are proportionate and consistent with Level 1, *"without going beyond what is strictly necessary,*

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[1] *See the speech of Emily O'Reilly, EU Ombudsman,* "Presentation of a study on the Regulatory Scrutiny Board"*, Brussels, 7 June 2023.*

[2] *Decision on the composition of the European Commission's Regulatory Scrutiny Committee and its interaction with interest representatives (439/2023/KR), Case 439/2023/KR, 13 September 2024.*

[3] *The Commission argued that the information they contain is personal data which should remain confidential.*

[4] *Decision concerning the European Commission's refusal to give the public full access to the declarations of interest of the members of its Regulatory Scrutiny Committee (case 74/2023/MIK), case 74/2023/MIK, 2 October, 2023.*

[5] *Decision on the European Commission's refusal to grant public access to documents concerning an impact assessment and the corresponding opinion of the Scrutiny of Regulations Committee on the revision of the Regulation on the provision of food information to consumers (cases 2347/2023/MIK and 177/2024/MIG), 3 October 2024.*

[6] *The report was commissioned by the European Commission and the Hungarian Presidency of the Council. Mario Draghi,* The future of European competitiveness – A competitiveness strategy for Europe, *9 September 2024*

[7] *Communication from the Commission to the European Parliament, Council, EESC and Committee of the Regions, « Long-term competitiveness of the EU: looking beyond 2030 », 16 March 2023, COM (2023) 168 final ; Council Conclusions « A competitive European industry driving our green, digital and resilient future », 24 May 2024, 10127/24. See also : Motion for a European Parliament resolution on introducing competitiveness mainstreaming for EU legislation, B10-0155/2024, 31 October 2024 and the draft annual report of the European Parliament on the Banking Union of 7 November 2024, 2024/2055 (INI) .*

[8] *Ursula von der Leyen, Mission Letter to Valdis Dombrovskis, Commissioner-designate for Economy and Productivity and Commissioner-designate for Implementation and Simplification, 17 September 2024, Brussels, available here:* https://commission.europa.eu/document/download/71c3190f-0886-4202-846e-5750f188f116_en?filename=Mission%20letter%20-%20DOMBROVSKIS.pdf. *Mission Letter to Commissioner-designate for Financial Services and the Savings and Investments Union, 17 September 2024, Brussels, available here:* https://commission.europa.eu/document/download/ac06a896-2645-4857-9958-467d2ce6f221_en?filename=Mission%20letter%20-%20ALBUQUERQUE.pdf

particularly in view of what has been adopted at international level".[1]

As evidenced by a recent study conducted under the auspices of the Bank for International Settlements (BIS), mandates for regulators and supervisors to take competitiveness into account, in addition to the pursuit of financial stability, are not uncommon.[2] In the UK, for example, a recent Financial Services and Market Act gives the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) a secondary mandate to take competitiveness into account.[3] In the United States, the Securities and Exchanges Commission ("SEC") is required to exercise certain of its powers with due regard to the competitiveness of the US banking sector.[4]

This would mean rebalancing regulatory strategies so that they take better account of the impact of standard-setting on those subject to them, particularly from an international perspective, without hindering the pursuit of the objectives of financial stability and consumer/investor protection. This would entail the ESAs taking greater account of the objective of competitiveness, a theme already mentioned in the ESAs founding Regulations, but perhaps without defining it sufficiently:

> *"(13) The Authority should take due account of the impact of its activities on competition and innovation within the internal market, on the Union's global competitiveness, on financial inclusion, and on the Union's new strategy for jobs and growth."*

A revision of the ESAs regulations on these points appears necessary (see Appendix 7).

1.4.3. Strengthening the stakeholder consultation process

The adoption process for Level 2 and 3 texts does not in practice allow for sufficient participation by the parties concerned by the texts in question, or for any legitimate objections they may have, to be considered. Greater transparency in the preparation of Level 2 and 3 texts would therefore be desirable. To this end, several avenues could be explored:

- Amending Articles 10, 15 and 16 of the ESAs Regulations (and articles 49, 53 and 54 of the AMLA Regulation) to make consultation prior to the adoption of draft technical standards and guidelines systematic (consultations from which the ESAs may exempt themselves, see above Part 1, section 1.2.1.) (see proposals in Appendix 8);
- Guaranteeing the effectiveness of the consultation process;
- Making cost-benefit analyses mandatory (with results accessible to the public).

It is important to ensure that the consultation process is effective and gives rise to genuine exchanges, to ensure better stakeholder buy-in and to build greater trust in the regulatory framework and in the supervision to which it is subject. To this end, it is essential to ensure systematic consultations upstream of Level 2 and 3 texts. Technical exchanges with hearings of interested parties could also be organised prior to and at the end of the consultation, based on the main sticking points, before the finalisation of

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[1] *See the letter from representatives of the Italian Ministero dell'Economia e delle Finanze - Dipartimento del Tesoro Direzione V Ufficio II, from the French Ministère de l'économie, des finances et de la souveraineté industrielle et numérique I Direction générale du Trésor, and the German Bundesministerium der Finanzen, addressed to John Berrigan, Director General of the Directorate General for Financial Stability, Financial Services and Capital Markets Union, 24 September 2024.*

[2] *Sasin Kirakul, Jeffery Yong and Raihan Zamil,* The universe of supervisory mandates – total eclipse of the core?, *March 2021, FSI Insights on policy implementation N° 30, p. 5.*

[3] *See the Financial Services and Markets Act 2023. For a summary of the legislative formalization of this secondary mandate for the benefit of the FCA in particular, see in particular: Secondary international competitiveness and growth objective, 14 July 2023, accessible here:* https://www.fca.org.uk/publication/corporate/secondary-international-competitiveness-growth-objective-statement.pdf.

[4] *The SEC's Strategic Report for the 2014-2018 cycle is unambiguous on the subject, stating that:* "Many of the initiatives outlined in this Strategic Plan are designed to address specific problems brought to light by the global financial crisis and its aftermath. Despite best efforts, however, it is impossible to predict and plan for all potential challenges. The degree of the SEC's success in achieving its goals and strategic objectives may depend upon factors such as those listed below.. (...) Over-regulation or under-regulation may undermine the competitiveness of the U.S. capital markets in an increasingly competitive global marketplace ». *See : U.S. Securities and Exchange Commission,* "STRATEGIC PLAN - FISCAL YEARS 2014–2018, Protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation", https://www.sec.gov/files/sec-strategic-plan-2014-2018.pdf. *More recently, the SEC reiterated its concerns regarding competitiveness:* "The United States cannot take its remarkable capital markets for granted. New financial technologies continue to change the face of finance for investors and businesses. Global markets are inextricably linked, with money flowing between them in microseconds. While more retail investors than ever before are accessing U.S. markets, other countries are developing competitive markets.", *U.S. Securities and Exchange Commission,* STRATEGIC PLAN - FISCAL YEARS 2022-2026, https://www.sec.gov/files/sec_strategic_plan_fy22-fy26.pdf.

the draft technical standards.[1] Exchanges could be informal with a view to facilitating dialogue.

This presupposes, first, that an appropriate response time is allowed so that participants have enough time to analyse the situation and respond. It also presupposes that consultations are not organised during long holiday periods, such as the end of year or summer period.[2] More generally, the timetable for the adoption of Level 2 texts should be published by the Authorities and updated if an event delays their submission to the Commission, to allow the actors concerned to prepare properly.

This then implies that the consultation must be accessible. If the consultation is not to be translated into the language of each Member State (in practice, it is generally drafted in English), it could at least be accompanied by a glossary and precise definitions of the main terms used, in the language of each Member State, to avoid misunderstandings and misinterpretations. "Open" answers should always be allowed, in addition to answers to specific questions. Answers by letter should be systematically authorised, to ensure genuine confidentiality of responses (anonymisation is not always sufficient).

Finally, it is important to ensure transparency regarding the results of the consultation. It would be very useful if at the end of any consultation, the ESAs could systematically express their observations and comments clearly and concretely and set out the reasons why the suggestions and recommendations of the experts, professionals and consumers consulted have, or have not, been considered. The results of every consultation could thus be made public within three months from the close of the consultation period.

In line with this idea of transparency, ESAs should not include in the final versions of drafts submitted to the Commission proposals that are not included in the draft submitted for consultation and have not been subject to any public debate.

These various guarantees could be provided by a textual framework for the consultation process (opening cases, procedures, timetable, etc.).

1.4.4. Clarifying the way expert committees operate

The Commission sometimes decides to create expert groups and other similar bodies to assist it in the consideration of delegated acts that it is itself mandated to draft, such as:

- the Non-Performing Loans (NPL) Advisory Panel, a group of experts assisting the European Commission in implementing its action plan on non-performing loans, and advising it on proposals for future action;[3] or
- the "Expert Group on Banking, Payments and Insurance" (EGBPI), an advisory body made up of experts appointed by EU Member States, which provides advice and expertise in the preparation of draft delegated acts in the field of banking, payments and insurance for the Commission and its departments.

These two examples illustrate not only the diversity of these expert groups' missions, but also the variety of their composition. While the NPL Advisory Panel is made up of EU agencies and interested institutions such as the ECB, it also brings together private players, with representatives of financial institutions and professional associations. The EGBPI, on the other hand, brings together only experts appointed directly by the Member States, even though its mission is to assist the Commission in drafting delegated acts, a task which in principle is its sole responsibility (unless the ESAs have been mandated to draft the proposed texts).

The diversity of these very useful groups and the tasks assigned to them could be clarified. The procedures for the appointment of experts to the various committees and working groups should also be more transparent, and it would be useful for the Commission to publish eligibility criteria, such

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[1] *This proposal builds on what already exists, since Article 8(2) of the EBA Decision on Rules of Procedure for the Drafting of Draft Technical Standards, Guidelines and Recommendations provides, inter alia, that:* "If the analysis of the consultation responses reveals significant problems, or where a revised proposal differs significantly from the original proposal, the EBA shall, where possible, seek to proceed to a second round of consultation (as per its public statement on consultation practices). In this case, the project leader, on behalf of the project team, with the consent of the EBA Chairperson, shall proceed with a further consultation round in accordance with this Decision taking account of the overall project timetable."

[2] *By way of comparison, point 14 of the Annex to the Interinstitutional Agreement on Better Law Making provides that:* "In order to enable the European Parliament and the Council to exercise the rights provided for in Article 290 of the Treaty on the Functioning of the European Union within the time limits set out in each basic act, the Commission shall not transmit any delegated act during the following periods: — from 22 December to 6 January, — from 15 July to 20 August."

[3] *In particular, this expert group has published an article examining how securitisation contributes to the development of a mature EU secondary market for NPLs, described as enabling banks to reduce their NPLs by selling them to third-party investors. The article states that it is in line with the Commission's action plan to reduce NPL stocks in the Union. While it states that it does not provide legal advice, it nonetheless suggests ways of improving NPL securitisation processes, and thus plays a role in any proposals that the Commission may make. See "Further developing secondary markets for non-performing loans: the role of securitisation", November 2023, available here:* https://finance.ec.europa.eu/document/download/4f537f03-1193-41b8-b06f-97ba84cb7f74_en?filename=2311-npl-advisory-panel-securitisation-paper_en.pdf

as competence or good repute. Decisions relating to the composition of these committees should be justified and published to avoid any conflict of interest. Where necessary, the remuneration of the members of these committees, when that is the case, and the list of beneficiaries should be made public.

Similar principles should apply to the expert groups that assist the ESA committees responsible for drafting technical standards and guidelines.[1] Such requirements would enhance the transparency and independence of ESAs in the conduct of their tasks, in view of the Commission Legal Service's *Early Legal Review.*[2]

Transparency could also be enhanced concerning the functioning of the ESAs' internal committees and sub-committees they may be required to set up, including their agenda, the timetable of their work and the composition of the groups dedicated a technical standard or guideline. Interim reports could be published, along the lines of the Parliament's work, to ensure greater transparency regarding any amendments drafted by the Committees. Proposed amendments to the draft technical standard and guidelines could be made public, together with their justification.

1.4.5. Changing the way stakeholder groups operate

The functioning of the ESA stakeholder groups[3] for the various sectors (namely: Banking Stakeholder Group, Securities and Markets Stakeholder Group, Insurance and Reinsurance Stakeholder Group, Occupational Pensions Stakeholder group) could be improved, for instance:

- by conducting a study on the appropriate length of terms of office (currently four years);
- by removing the possibility of renewal of the mandate, so that a single term ensures greater independence;
- by ensuring greater transparency in the member selection procedure;
- by providing for clauses to prevent "revolving doors" between members of these groups and the possibility of a future position in the ESAs, for a period of three years;
- by ensuring more effective rotation of the financial institutions represented;
- by increasing the frequency of meetings (currently four per year).

Additionally, the ESAs should ensure transparency on how the recommendations of stakeholder groups are implemented, or they should justify their non-implementation.

1.4.6. Making the process for adopting Level 2 acts more transparent

Without necessarily being confidential, the (rare) proposals for amendments that the Commission allows itself to formulate are not listed in any dedicated tool on the ESAs' websites. Access to documents in this area is difficult or even incomplete (see above, Part 1, section 1.2.).

The creation by the ESAs of a systematic documentary filing system, distinguishing exchanges between the authorities and the Commission about RTS and ITS from other types of correspondence exchanged by these entities, would guarantee better access to the process of drafting Level 2 texts involving the ESAs.

Adding a tab to the register of delegated acts to systematically list these exchanges would be an important step forward in this respect. Search criteria should make it possible to identify the cases in which the amendments proposed by the Commission have been taken on board and the situations in which the dialogue has proved fruitless.

Overall, the role played by the ESAs in the adoption of these instruments should be made more transparent: a calendar of meetings dedicated to the drafting of these instruments would useful to the public, as well as identifying any expert groups involved and the arrangements for their participation.

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[1] *Article 2(8) of the EIOPA Decision detailing the rules of procedure of its Board of Supervisors states that the Council will adopt acts referred to in Chapter II of the EIOPA Regulation – including the technical standards and the guidance of Article 16 – based on a proposal from the relevant Internal Committee. These committees are based on Article 41 common to the three ESA regulations. The rules of procedure of the ESMA Board of Supervisors do not detail the identity of the authors of the draft technical standards/ guidelines, but the "terms of reference" of the various internal committees at ESMA, for some of them, explicitly invest them with these functions; this is the case, for example, of the Committee on Consumer Protection (terms of reference available here:* https://www.esma.europa.eu/sites/default/files/2023-03/ESMA35-30-778_IPSC_Terms%20of%20reference.pdf*). Finally, with regard to the EBA, the rules of procedure of its Board of Supervisors do not further detail the role of the Internal Committees, merely indicating, like ESMA, that tasks may be assigned to them by and by decision of the Board (see Article 13 of the Rules of Procedure, available here:* https://www.eba.europa.eu/sites/default/files/document_library/1037182/Rules%20of%20Procedure%20of%20the%20Board%20of%20Supervisors.pdf*).*

[2] *See CEP Study, European Supervisory Authorities, Room for improvement at Level 2 and Level 3, Study on Behalf of the Munich Financial Centre Initiative (fpmi), 4 October 2016.*

[3] *Article 37 of the ESAs Regulation. These groups are set up within each ESA to help facilitate consultation of the parties concerned in the fields for which these Authorities are respectively responsible. In particular, they are consulted on draft technical standards, as well as on guidelines and recommendations made on the basis of the article.*

The Council has expressed similar concerns via the FSC report cited above. Regarding the preparation of delegated acts, the Council namely invited the Commission:

- to improve transparency and dialogue with the ESAs, Member States and the European Parliament, particularly in cases where amendments are introduced by the Commission following submission of a draft RTS by an ESA;
- to set up an early warning system to alert the Member States, the Council, the European Parliament and the relevant ESA, when it intends to deviate from the draft RTS, and specifying the reasons for this deviation;
- when introducing modifications to the draft RTS, to systematically refer its amendments to the competent ESA in order to avoid disagreements over their nature (and possible materiality);
- to consult Member State experts during the three-month monitoring period after a draft RTS has been submitted by ESA to the Commission:
  - for high-priority RTS, or
  - when the Commission intends to introduce a significant change to the draft RTS;
- to systematically justify and explain the changes made to the draft submitted by the ESAs, as provided for in the ESAs Regulations.

In addition, the FSC recommends that the ESAs be invited to present and discuss the progress of the preparation of the RTS prioritisation by the Council.

Finally, the FSC recommends that the co-legislators and the Commission determine the criteria justifying the extension of the RTS objection period. In particular, cases where the final RTS are not identical to the initial draft should be clarified, to justify extending the objection period to three months.[1]

All of these measures would contribute to ensuring that the ESAs adhere to the political compromise negotiated by the co-legislators in the text awarding their mandate.

1.4.7. Anticipating scheduling difficulties

Inconsistencies in the implementation of texts at various levels, linked in particular to the multiplication of mandates granted to the ESAs to adopt ITS/RTS, are a real issue both for the agencies tasked with the drafting against a set timeline and for market players (see box p.38).

In addition to more frequent use by the ESAs of the possibility of publishing public statements or sending notices to NCAs (see above, section 1.2.1.), there are several avenues of reflection that can be envisaged for the future and to address difficulties from the past, via RTS, more systematic transition clauses, Omnibus regulations or tacit renewal clauses for exemption or equivalence.

Where scheduling difficulties are linked to the application of an existing Level 2 text, the ESAs could, on their own initiative or at the invitation of the NCAs, propose to the Commission that it adopt technical regulatory or implementing standards, the purpose of which would be to suspend the application of Level 2 texts posing scheduling difficulties.[2]

The adoption procedure would be identical to that of an RTS or an ITS, depending on the nature of the act to be suspended, except that it would follow an accelerated timetable: the ESA would submit draft suspensive technical standards to the European Commission, which would have one month from the date of receipt to adopt them. Before the expiry of this period, it could formulate amendments communicated to the relevant ESA, which would then have the right to modify its proposal within 15 days. At the end of this period, the Commission could adopt or reject an amended draft standard.

Once the act has been adopted by the European Commission, the European Parliament and the Council would have a period of 15 days, renewable once, to formulate objections. If objections were formulated, the standard could not enter into force. The European Parliament and the Council would therefore have a right of veto. The suspension would necessarily be temporary and limited to nine months, renewable once.

With respect to difficulties linked to the application of a Level 1 text in the absence of the necessary Level 2 measures, two hypotheses need to be distinguished, for the future and the past.

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[1] *The FSC reports that the Commission sometimes considers adopted RTS to be "identical" (in accordance with Article 13(1) of the ESA regulations) to the draft submitted by the Authority concerned. In such situations, the Council, and through it the experts from the Member States, have an average of just one week to examine the texts. According to the FSC, this has caused concern in the European Parliament, which has questioned the way in which deadlines for objections are set by the Commission, when in many cases the delegated regulation as adopted by the Commission and the draft RTS submitted by the ESA could not be considered "identical". In such circumstances, the one-month deadline set by the Commission is not justified, and a three-month objection period should have applied.*

[2] *This proposal echoes, albeit in a different form, the report of the Haut Comité Juridique de la Place de Paris published in 2018, which proposed the creation of a new type of technical standards called technical standards relating to suspension ("TSRS"), described as "a hybrid between regulatory technical standards and execution technical standards and [borrowing] from their respective regimes." Faisabilité de la consécration par le législateur de l'Union d'une procédure de forebearance faisant intervenir l'autorité européenne des marchés financiers, Working Group chaired by Gérard Rameix, October 2018, available here:* https://www.banque-france.fr/system/files/2023-10/rapport_24_f.pdf.

In the future, a reduction in the number of delegations would reduce the number of cases in which scheduling difficulties are likely to arise. In addition, improved dialogue with stakeholders and a more effective consultation process would enable better identification of the provisions of the Level 1 text that would be problematic to apply in the event of delay in the adoption of Level 2 texts and, where appropriate, to anticipate these difficulties by inserting transitional provisions.

In this respect, implementation of certain provisions of a Level 1 act could be made subject to the entry into force of a Level 2 act where they are essential to their operational implementation. Such provisions have, for example, been included in the PSD2,[1] as well as the CSDR[2] and the Pilot Regime Regulation[3] with respect to settlement discipline. To avoid the entry into force of the provisions of the Level 1 text from being postponed indefinitely, a deadline could be set.

The Interinstitutional Agreement on Better Law-Making,[4] particularly the appendix of standard clauses, could be amended along these lines to propose, in relation to regulations, a standard clause which could be worded as follows:

> *"The measures referred to in Article(s) ... of this Regulation ... shall apply from the date of application specified for each measure in the delegated act adopted by the Commission pursuant to Article(s) (...)."*

With respect to directives, which give rise to specific problems, particularly in relation to transposition deadlines, the standard clause could be worded as follows in the Article on the transposition of the text:

> *"Member States shall ensure that the measures referred to in Article(s)... shall apply from the date of application specified for each measure in the delegated act adopted by the Commission pursuant to Article(s)..."*

For the past, when existing tools prove insufficient, an Omnibus regulation could be adopted to incorporate into the articles of a series of exhaustively listed texts giving a mandate for the adoption of technical standards by the Commission, a new paragraph that could be worded as follows:

> *"In order to ensure consistency in the measures taken by obliged entities to apply this Regulation/Directive, the measures referred to in Article(s) ... shall apply from the date of application specified for each measure in the delegated act adopted by the Commission pursuant to Article(s)..."*

This text, intended as an "Omnibus", would solve the existing problem of the numerous mandates already granted by the legislator for the adoption of delegated acts and implementing acts, whenever there are timing difficulties.

Finally, with regard to the timing difficulties related to expiring exemptions or equivalence decisions in the banking and financial sector (such as decisions on the equivalence of the regulatory framework for central counterparties in third-countries), which are the subject of work to renew them but which have not been completed within the set deadline, a tacit renewal clause of the exemption or of the equivalence decision could be inserted in the Level 1 texts, accompanied by a mechanism for review by the Commission that would allow it to be revoked in the event of a change in circumstances.

It should be noted that ESMA, in its response of 22 November 2024 to the consultation launched in June by the European Commission on the European macro-prudential framework applicable to Non-bank financial intermediaries (NBFIs),[5] calls for more powers in the context of no-action letters, for situations in which the timing of Level 1 and Level 2 measures are not aligned, as well as situations in which urgent temporary measures are necessary. The tools proposed above could offer interesting alternatives.

1.4.8. Reforming the governance of the ESAs

The current composition of the ESAs' Board of Supervisors does not appear to be optimal. Indeed, the voting members on technical standards and guidelines are the heads of the national supervisory authorities, who often have no regulatory powers at the level of the Member State and who are not required to attend all meetings in person.

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[1] *Dir. 2015/2366, Article 115 (4).*
[2] *Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (" CSDR "), Article 76 (4), (5) and (6).*
[3] *Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU, Article 17.*
[4] *Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, 13 April 2016.*
[5] *ESMA50-43599798-9960.*

Given that the ESAs play a normative or quasi-normative role, it would be appropriate, each time that the adoption of a soft law text or the finalisation of draft RTS/ITS is at hand, that representatives of national regulators also be present alongside the representatives of competent supervisory authorities. In addition, when examining the acts referred to in Articles 10 to 16 of the ESAs Regulations, the Board of supervisors could be open, for example, to former professionals, without voting rights but with an observer status, as is the case with the college of certain national authorities.

Such an approach would reinforce the legitimacy of the Level 2 texts and guidelines based on Article 16. Independent counsels could examine controversial texts and give advice.

To facilitate decision-making, it would also be useful for decision-makers to attend meetings in person rather than sending an alternate.

Internal audit and compliance units could also be developed to ensure that all procedures and actions comply with established legal standards.

However, a distinction should be made between EBA and EIOPA, on the one hand, and ESMA, on the other, in order to take account of the direct supervisory role which ESMA, unlike EBA and EIOPA, has in relation to certain financial market players and markets. Governance and voting procedures could thus be adapted to reflect the role of each ESA and to suit the markets in question.

1.4.9. Reforming the conditions under which the ECB and the SRB adopt soft law

While the adoption of some ECB guides setting out its expectations has been the subject of public consultations, these are not systematic. This finding also applies to the adoption of soft law instruments by the SRB. For example, some communication tools, such as press releases about non-performing loans or letters on the topic of governance (see above), despite their real effects, according to current practice, on supervised institutions, are not the subject of consultations. It would be desirable to hold prior and regular exchanges with stakeholders more systematically and with more "open" forms of consultation. This of course does not mean systematic consultation before each letter or press release, but only when these soft law instruments are intended to fundamentally change the practices of financial institutions.

The same recommendations as those made for consultations by the ESAs could apply: the consultations would be accompanied by a draft text and accompanied by a series of questions to guide stakeholders in reading the document; the industry could supplement its response with a letter and data on a confidential basis. Reasonable consultation periods would be provided, outside the summer period. The ECB – and the SRB – would publish, within a reasonable period after the end of the consultation period, a report aggregating stakeholder feedback, including a justification where the remarks and comments of those stakeholders have not been accepted.

1.5. IMPROVING THE STANDARDS ACCEPTANCE PROCESS

1.5.1. Clarifying the *"comply or explain"* process

The wording of Article 16 of the ESAs Regulations (and of Article 54 of the AMLA Regulation) is subject to different interpretations as regards the scope of the guidelines, declarations of (non) compliance by the national authorities (see above, Part 1, sections 1.3.1.1. and 1.3.2.).

The text therefore needs to be clarified in order to:
- point out that the guidelines are subject to compliance with the principles of proportionality[1] and subsidiarity;
- specify that ESAs may only adopt guidelines based on an express mandate from one of the acts referred to in Article 1(2) or an act within the scope of Article 1(3) of the ESAs Regulations (consistent application of the listed acts)[2] with a set cap (see above);
- specify that financial institutions must make

[1] *Article 60a common to the three ESAs Regulations already notes this. The possibility of not applying, in whole or in part, EBA guidelines has also been recognised in France by the Conseil d'Etat (CE, 12 July 2022, aforementioned), provided that the institution (i) demonstrates that the guidelines in question would impose an excessive burden in relation to the risks they seek to cover, taking into account the size, nature and complexity of the institution), provided that the institution (i) demonstrates that the guidelines in question would impose an excessive burden in relation to the risks they seek to cover, given the size, nature and complexity of the institution, its business model (e.g. retail banking only), or its legal structure (e.g. group, network of cooperatives with a central body); (ii) by demonstrating that it would achieve an identical result by following another practice. See Appendix 6.*

[2] *For example, Article 1(2) of Regulation 1093/2010 defines the EBA's scope of action: it shall act within the powers conferred by several directives and regulations listed in that text (such as the CRD IV, consumer credit or payment services directives),* "as well as any other legally binding act of the Union [conferring tasks on it]". *Paragraph 3 adds that it shall act* "in relation to issues not directly covered by the legislative acts referred to in paragraph 2 (...) provided that such actions are necessary to ensure the effective and consistent application of those acts".

every effort to comply with the guidelines only to the extent that the NCA has declared itself compliant and provided that these guidelines or recommendations comply with European Union law and are compatible with the national law of the Member State concerned;
- specify that even where the NCA has declared itself to be compliant, financial institutions can achieve the objectives of the Level 1 text by adopting other practices that achieve an equivalent result and by explaining when necessary (see Glossary) and that such practices should not be presumed to be bad practices;
- specify that when the NCA has declared itself to be not-compliant with regard to certain provisions, all financial institutions in the Member State concerned benefit from this declaration, whether or not they are under the direct supervision of the ECB;
- ensure the systematic publication, in the compliance tables and in the ESAs' annual report, of the reasons given by NCAs or the ECB[1] for not complying with a guideline or recommendation;
- highlight that no Pillar 2 prudential requirements can be adopted based on the guidelines, which are Level 3 texts with no binding legal scope;
- highlight that no sanction can be adopted by a supervisory authority, whether the NCAs or the ECB under the SSM, based on a breach of guidelines.

(See proposals in Appendix 9)

In fact, soft law (guidelines, guides, Q&A…) should not in practice be considered by supervisors as legally binding and subject to sanctions.

Furthermore, the practice of showing in red in the guideline's compliance table those authorities that have declared that they do not comply with the guidelines, should be abandoned. This practice of "name and shame" acts as a "hardening" agent for the legal effects of the guidelines and puts political pressure on the NCAs, even though the ESAs Regulations expressly recognise their right not to apply guidelines, particularly with respect to national law.

1.5.2. Facilitating access to Level 3 texts

For standards to be accepted by the stakeholders concerned, they must first and foremost be accessible and legible. Efforts have been made in this direction with the implementation of Single Rulebook, but this remains insufficient (see above, box p. 41).

Access to the soft law texts drawn up by the ESAs (guidelines and Q&As) should be facilitated on their respective websites. A systematic and standardised presentation format, from one ESA to another, would also make the standards easier to read and would allow a review to ensure the coherence of standards (see below).

A search engine based on keywords, dates and any other criterion facilitating the identification of documents would guarantee better access and more transparency in the ESAs' standard-setting processes.

Thematic and chronological classifications could also be provided.

Ideally, and where relevant, the search criteria and methods for citing and identifying documents (for example, by type,) could be harmonised between the three ESAs.

1.6. DRAWING UP A TAXONOMY OF EUROPEAN SOFT LAW IN THE FINANCIAL SERVICES SECTOR

As mentioned above, the ECB has in certain cases adopted soft law acts adding to the Level 1 and 2 texts, contradicting them, or contradicting the objectives pursued elsewhere by EBA guidelines. These difficulties could be overcome by a series of measures:
- the preparation by the ECB of an amended version of its taxonomy (i.e. a classification presenting the different types of soft law acts adopted by this institution; see above, Part 1, section 1.3.1.4.) which would be comprehensive, ensuring greater clarity and consistency in its supervisory disclosures, in terms of their legal effects;
- the publication by the ECB of an annual report dedicated to its non-binding publications.[2] This report would be presented to the European Parliament at a hearing of the Chairman of the ECB's Supervisory Board;
- the establishment by the ECB of a systematic classification plan for all its communications expressing expectations, regardless of their form, including press releases, to ensure transparency and accessibility.

ESAs, for their part, could also adopt a taxonomy of their acts, which would be subject to harmonisation and would associate the AMLA, whose powers are similar to those attributed to ESAs in this regard.

[1] *To date, this has never happened, but it cannot be ruled out that the ECB may one day declare itself partially compliant with EBA guidelines, should these contradict its own soft law.*
[2] *As already exists concerning its monetary policy remit, pursuant to Article 15 of the ESCB Statute.*

2. STRENGTHENING CONTROL OF THE PRODUCTION OF LEVEL 2 AND 3 TEXTS

To ensure compliance with the institutional framework and the quality of Level 2 and 3 acts, it would appear necessary to strengthen the political control which is exercised, in the case of Level 2 acts, through the Commission's right to amend draft technical standards, the scrutiny sessions organised within the European Parliament prior to the adoption of technical standards by the Commission, as well as the Parliament and the Council's right to object and, in the case of Level 3 acts, through the reasoned opinion procedure. Last but not least, it also seems essential to strengthen judicial control.

2.1. STRENGTHENING POLITICAL CONTROL

2.1.1. Controlling Level 2 acts

2.1.1.1. Strengthening the Commission's right of amendment

As has been pointed out, the Commission has very little involvement in amending the technical standards drafted by the ESAs, no doubt due to a lack of resources, but also due to legal limitations: the right of amendment, which has been strictly interpreted in case law - only one order has been issued by the General Court of the EU in this area - is too restricted to be able to be exercised with the necessary equanimity (see above, Part 1, section 1.2.2.).

A revision of the ESAs Regulations could therefore be considered, to make the conditions for exercising the Commission's right of amendment more flexible and to make the procedural follow-up given by the Authority concerned more transparent, by:

- rewording Recital 23 of the ESAs Regulations (and Recital 14 of the AMLA Regulation), to strengthen the Commission's right to amend[1] and notably to state that the Commission is entitled to make amendments to draft technical standards (RTS / ITS) where the competitiveness of the EU internal market in financial services vis-à-vis third countries is at stake;
- setting a deadline for processing amendments;
- requiring the agency concerned (ESA or AMLA) to publish a response to the Commission's requests for amendments, stating the reasons for its decision to accept or reject the proposed amendments;
- publishing all related communications on the ESA or AMLA website and in the register of delegated acts (see above).

2.1.1.2. Strengthening accountability before the European Parliament and the Council

The issue of political control ("accountability") of the agencies, including the obligation to report to the co-legislators and responsibility towards them, is crucial, in Europe as in the United States,[2] including with regard to the production of norms.

Various mechanisms are provided in the ESAs Regulations. In this respect, Article 3 of the ESAs Regulations sets out the procedures by which the ESAs must report on the exercise of their activities to the European Parliament and the Council. Each Authority must report periodically on its activities in its annual report and at the hearing of its President before the Parliament (at least once a year). It must also report on request: the President must report in writing on the activities of the Authority to the European Parliament at the latter's request, and the Authority must answer any questions addressed to it by the European Parliament or the Council. Furthermore, the annual and multiannual work programmes of each Authority are transmitted to the European Parliament, the Council and the Commission for

[1] *The following amendment could be considered: "*The Commission should approve these draft technical regulatory standards by means of delegated acts under Article 290 of the Treaty on the Functioning of the European Union in order to make them legally binding. They could be amended by the Commission if it deems this necessary after consultation with the Authority, given that the Authority is the actor in close contact with the financial markets and most familiar with their day-to-day operation. Draft technical regulatory standards would be subject to amendment where they are incompatible with Union law, do not comply with the general principles of Union law, including proportionality, infringe the fundamental principles of the internal market in financial services as set out in the "acquis communautaire" in the field of financial services, or are likely to affect the competitiveness of the internal market in financial services in relation to that of third countries. The Commission should not amend the content of draft technical regulatory standards developed by the Authority without prior coordination with the Authority. To ensure that these standards are adopted in a flexible and timely manner, a maximum period should be set for the Commission to decide on their approval."

[2] *In the United States, Michelle Bowman, a member of the FED's Board of Governors, was quick to point out that* "accountability does not compromise independence (of the agencies). Independence in banking regulation must go hand in hand with accountability, both to Congress and to the American public. Accountability is no less important for bank regulators than it is for banks. Banking regulators perform an important public function, and the stakes are high. Bank failures and stresses in the banking system pose significant risks, not only to bank customers, depositors and creditors of a failed bank, but also to the financial system as a whole, the U.S. economy and American taxpayers. (...) Accountability also requires transparent policies and procedures and predictable, fair supervision. These measures demonstrate to the public and to regulated institutions that the agencies demand not only high standards from these institutions, but also from themselves" *(Governor Michelle W. Bowman, Essay or Startling Insights, 13 February 2024).*

information[1] and a clear and complete report of each meeting of the Board of Supervisory Authorities, *"which allows a full understanding of the discussions and includes an annotated list of decisions"*, must be provided to the European Parliament.[2] Budgetary control is also exercised.[3]

However, control of the ESAs' normative activity is limited in several aspects.

The European Parliament, which in principle has only *ex-post* competence to object to RTS adopted by the Commission in the form of delegated acts, has already expressed its desire to ensure closer scrutiny of these instruments. The task is difficult as the texts concerned are both numerous and technical, and the time left for Members of the European Parliament (MEPs) to take an interest in them is short. As such, the ECON Committee was invited to examine 193 delegated acts between 2019 and 2024, which in practice represents a little more than 3 acts to be examined each month.[4] Also, as indicated above, out of 1858 delegated acts, only 23[5] were the subject of an objection, and only one concerning financial services.[6]

Because objections can only be voted by an absolute majority of MEPs and within a period of three months, sometimes reduced to only one month, the European Parliament, instead of requesting the strengthening of its right to "call back" which seems difficult to do in practice, has set up examination sessions before the ESAs submit the final version of their draft RTS.

This *ex-ante* review takes the form of monthly sessions, known as "scrutiny slots" or "scrutiny sessions", that are organised by the political coordinators: they select one or two delegated acts currently being drafted to be discussed in the competent committee by the rapporteur and the shadow rapporteur of the Level 1 text on which the delegated acts submitted for consideration are based. In banking and financial matters, it is therefore the ECON committee that sits.[7] Within each committee, the persons responsible for the subject covered by the delegated act then contact the agencies involved in drafting the texts, as well as the political groups. Documents are sometimes prepared in advance of the scrutiny sessions to support the discussions.[8] Sessions are held every month to allow the ESAs that have prepared draft technical standards to present them in detail, with explanations on the context and to discuss possible amendments. [9] On occasion, the Parliament drafts letters addressed to ESAs and the Commission expressing an opinion or even presenting amendments.[10] Although this is a rare case, it attests to the possibilities offered in practice, when explanations have allowed MEPs to analyse the draft.

The European Parliament website unfortunately contains little information on these sessions, which are not systematically published. But above all, the sheer number of technical standards and delegated acts, combined with the technical nature of the texts in question, means that the departments concerned are unable to carry out any real control

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[1] *Article 43 ESAs Regulations.*
[2] *Article 43a ESAs Regulations.*
[3] *Article 63 ESAs Regulations.*
[4] *Committee on Economic and Monetary Affairs (ECON),* Activity Report 2019-2024, *May 2024, p. 46*
[5] *See above, first section, point 1.2.3.*
[6] *In particular, the Commission was criticized for the fact that the technical standards adopted by the Commission in application of the PRIIPS Regulation on the advice of the Joint Committee of the ESAs contained methodological flaws that prevented it from satisfying the requirement laid down in the PRIIPS Regulation for the provision of "accurate, fair, clear and not misleading" information to consumers. In addition, the draft did not go into sufficient detail on the level of information that should accompany the financial products concerned, generating a risk of inconsistencies in the application of the text across the Union. In short, the Parliament criticized insufficient standardization, likely to produce effects contrary to the spirit and purpose of the legislation. It therefore objected to the RTS as it stood, and invited the Commission to amend the ESAs' draft to take account of its criticisms. The RTS was published a few months later, in March 2017.*
[7] *Recently, the ECON Committee organized two scrutiny sessions, one on September 30, 2024 concerning the technical standards drawn up in application of Regulation no. 2015/760 (known as "ELTIF") and the other on September 23, 2024 concerning the delegated act adopted by the Commission with a view to postponing the entry into force of certain obligations relating to the Fundamental Review of the Trading Book (FRTB). Both were the subject of Briefings intended to support the work of the ECON Committee, respectively :* https://www.europarl.europa.eu/cmsdata/289027/ECON%20Scrutiny%20Paper-Eltif-30%20September%20(002).pdf, *and* https://www.europarl.europa.eu/cmsdata/288753/ECON%20Scrutiny%20Paper_FRTB_23%20September%202024.pdf.
[8] *See for example : EU Parliament, Briefing, PSD2/Regulatory Technical Standards (RTS) on Strong Customer Authentication and Secure Communication, and IFR/RTS on separation of payment card schemes and processing entities Committee on Economic and Monetary Affairs, Scrutiny Session, 21 November 2017, accessible here:* https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/606780/IPOL_BRI(2017)606780_EN.pdf
[9] *See for example: European Parliament, Briefing, PSD2/Regulatory Technical Standards (RTS) on Strong Customer Authentication and Secure Communication, and IFR/RTS on separation of payment card schemes and processing entities Committee on Economic and Monetary Affairs, Scrutiny Session, 21 November 2017, accessible here:* https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/606780/IPOL_BRI(2017)606780_EN.pdf
[10] *See for example: Letter from the Chairman of the ECON Committee and the MiFID 2 rapporteur dated November 27, 2015 to the European Commission regarding the MiFID/MiFIR RTS. In it, the committee expresses its dissatisfaction that ESMA has only partially amended the RTS along the lines requested by the committee in its letter of 23 July 2015. The letter mentions a whole series of amendments that the Commission would have to adopt in order to avoid an objection to the RTS, thus threatening the text with a legislative veto.*

over their substance. In practice, this is usually limited to control of the publication schedule of Level 2 acts, which sometimes shows the delays in this area by the ESAs or the Commission. The monthly gathering dedicated to Level 2 texts therefore does not necessarily give rise to debates, which explains why little information is available on the European Parliament website concerning the scrutiny sessions.[1]

To enable the European Parliament to exercise the control incumbent upon it and to ensure a better institutional balance, a review of the number of acts subject to the control of MEPs within tight deadlines should be initiated. The legislative and regulatory ambitions cannot be achieved without first addressing the budgetary issue. The European Parliament's resources for controlling delegated acts could therefore be strengthened. In this context, a redeployment of budgets could be envisaged, in particular to better equip (i) the secretariats of the relevant committees, and (ii) the corresponding legal units of the committees.

Furthermore, the use of the European Parliament's right to object would be easier if it were limited only to certain provisions of the delegated act and not the act as a whole. Indeed, this right to object, which today can only relate to the entire act itself, is such a powerful right (a "nuclear weapon" according to some) that the European Parliament is reluctant to exercise it.

Finally, concerning the Council's right to object, there is little available data. However, a study commissioned by the European Parliament's research service revealed that between 2009 and 2018, the Council had only objected twice to the adoption of a delegated act and never in the field of banking and financial services.[2] The FSC report cited above included some proposals on this subject that could stimulate further reflection on the Council's review of Level 2 texts:

- The FSC points out that the Council should be able, as a last resort and if necessary, to express objections to proposals for texts adopted on the basis of each authorisation relating to the adoption of a delegated act, even when several texts have been grouped together in a "bundle" and notes in this respect the importance of the opinion of the Council's legal service on the matter.[3]
- The FSC also proposes to draw up a list of delegated acts considered to be "high priority", if possible in collaboration with the Commission, taking into account the timetable, political and practical aspects, to be approved in particular by COREPER.
- These high priority acts should benefit from strengthened mechanisms, including enhanced consultation of Member States' experts and a possible review of progress made at FSC level, where appropriate.
- With regard to the ex-post control exercised by the Council, the FSC recommends that the co-legislators establish enhanced coordination, including convening at least one working group to discuss priority acts. The FSC proposes that the Council Secretariat use its information exchange system to strengthen coordination of delegations, with a view to a possible objection to a delegated act.

2.1.2. Controlling Level 3 acts: the reasoned opinion procedure

The 2019 revision[4] of the ESAs Regulations introduced a new Article 60a entitled *"Excess of powers by the Authority"*, which states that *"Any natural or legal person may send reasoned advice to the Commission if that person is of the opinion that the Authority has exceeded its competence, including by failing to respect the principle of proportionality referred to in Article 1(5), when acting under Articles 16 and 16b, and that is of direct and individual concern to that person".*

It seems that this new right has never been applied. As the wording of this provision is particularly laconic, it is in fact difficult to assess the effectiveness of such a mechanism.

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[1] *While the current legislature appears to provide information on the subject, the ECON Committee's archives for previous legislatures are incomplete or even non-existent; it is possible that the lack of information is linked to the absence of substantive exchanges concerning Level 2 texts on the agenda, due in particular to a lack of time and resources.*

[2] *Milan Remáč,* Parliamentary scrutiny of the European Commission: implementation of the Treaty provisions, *EPRS | European Parliamentary Research Service, October 2018, page 73*

[3] *This opinion namely states :* « whenever a delegated act groups several empowerments of a basic act without any objective justification, the Council may regard that delegated act as a "bundle" of separate delegated acts and exercise accordingly its right to object in respect of each of them ». *The document has not been made public, but it is mentioned in other official EU documents. See : 2493rd meeting of the Permanent Representatives Committee (Part 2), Brussels, 9 April 2014 and Luxembourg, 14 April 2014, 8807/14, CRS/CRP 15.*

[4] *Regulation No 2019/2175, 18 Dec. 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) n° 2016/1011 on indices used as benchmarks in financial instruments and contracts or to measure the performance of investment funds and Regulation (EU) No 2015/847 on information accompanying transfers of funds.*

A first uncertainty relates to the grounds of illegality justifying referral to the Commission, which Article 60a restrictively defines as referring only to cases of excess of competence or breach of the principle of proportionality. However, the hierarchy of norms in Union law presupposes that the acts of the Union's institutions and agencies, even if they are based on soft law, comply with all higher-level European law, in particular general principles of law as well as the Charter of Fundamental Rights of the European Union.

A second uncertainty relates to the conditions of admissibility laid down in this text. Indeed, the cumulative conditions relating to the existence of a direct and individual concern would, if interpreted in the same way as in the context of an action for annulment under Article 263 TFEU, have a high risk of inadmissibility (see Appendix 9).

A third uncertainty relates to the consequences of this procedure. In the absence of any power to do so, the Commission could not, on its own, annul the guidelines of an ESA, even if they were found to be illegal. The measures available to the Commission, such as submitting a proposal for a Level 1 text, require a longer timeframe.

As a result, this procedure does not appear to be sufficient to resolve the difficulties identified.

An amendment to Article 60a to broaden the grounds for illegality would be welcome. In particular, an additional and specific ground for referral to the Commission could be added to Article 60a, to cover cases in which the guidelines in question are perceived as leading to a gap in competitiveness between the internal market for financial services and third countries.

Conditions of admissibility could also be clarified, namely to explicitly state that the competent authorities and financial institutions to which the guidelines are addressed are entitled to send reasoned advice to the Commission.

Article 60a could also be supplemented to specify the procedural framework applicable to the reasoned advice procedure, as well as the Commission's powers in the event of a finding of lack of proportionality or excess of power on the part of the ESA concerned. The Commission could be given two months from receipt of the reasoned advice to respond, in the form of a notice binding the Authority and inviting it to revise the contentious text within a specified period. In this case, the Commission could be asked to re-examine the text adopted by the ESA to take into account its recommendations, within one year of its amendment.

Regularly published reports on the functioning of the ESAs could review this experience and provide periodic assessments, reinforcing the responsibility of the ESAs in adopting Level 3 texts.

A similar mechanism could also be provided for in the AMLA Regulation.

2.2. STRENGTHENING JUDICIAL REVIEW OF LEVEL 3 ACTS

Regarding Level 2 acts, the Court of Justice of the European Union reviews the granting and exercise of the powers conferred on the Commission (see Part 1, section 1.1.1. above). Soft law acts, on the other hand, are not currently subject to sufficient judicial review by the Court of the European Union, nor even before the ESAs Board of Appeal, the SRB Appeal Panel or the ECB Administrative Board of Review.

2.2.1. Strengthening the channels of contestation by ensuring compliance with the obligation to transfer questions for preliminary ruling to the CJEU

When, in the context of a case before a national court, a new question of interpretation of general interest arises for the uniform application of EU law, or when existing case law does not appear to provide guidance for dealing with a new legal situation, the national judge must stay the proceedings and refer the case to the CJEU.[1] This preliminary reference, which establishes a dialogue between national judges and the Court of Justice of the European Union, is now more accepted by national courts which take it up and more frequently agree to submit questions to the CJEU.[2] However, it is appropriate to continue to raise awareness among national judges on this subject and to invite the European Commission to be attentive to unfounded refusals to refer a question to the CJEU[3] (see Appendix 6).
In any event, in some Member States, a claimant whose request for a preliminary ruling has been

[1] *This mechanism is provided for under Article 267 TFEU. See above, Part I, section 1.3.3.1.*
[2] *For a reminder of the case law concerning the conditions to be met for a court to which a question has been referred as a last resort not to refer the matter to the CJEU, see above, section 1.3.3.1 in the first part of this report.*
[3] *See, for example, the second FBF v. ACPR case, concerning the legality of a Notice of partial compliance by the ACPR with the guidelines on granting and monitoring loans. The Conseil d'État refused to give a preliminary ruling, even though the applicant had raised legitimate questions about the legality of the guidelines.*

unjustifiably refused may bring a legal action against the Member State concerned. However, the success of such an action appears to be uncertain in many cases.[1]

2.2.2. Ensuring rigorous review

Questioned in the context of a reference for a preliminary ruling on the validity of the EBA's guidelines on the governance of retail banking products, the CJEU accepted, in the judgment delivered on 15 July 2021, that the exercise by an ESA of the power to adopt such guidelines *"must be amenable to stringent judicial review"* and that the fact that those guidelines do not produce binding legal effects *"is not of such a nature as to affect the scope of that review".*[2]

As commentators on this decision have pointed out, however, the CJEU's examination of the disputed guidelines has remained very formal, despite the Advocate-General's requests (see Appendix 6).

It would be preferable, therefore, for the Court to conduct a genuinely rigorous review.

2.3. DEVELOPING PRE-LITIGATION APPEALS

Certain ESA decisions may be appealed to the ESA's Board of Appeal.[3]

However, the number of appeals lodged before this Board in its more than ten years of existence shows that this channel is still little used. There have been 6 cases concerning EBA, 12 concerning ESMA and 8 concerning EIOPA.[4]

Firstly, only individual decisions by these authorities, in particular those taken based on Articles 17 (infringement of Union law), 18 (emergency situations) and 19 (disputes between NCAs) of the ESAs Regulations, may be appealed by the addressee or by any other person *"to whom it is of direct and individual concern".*

Secondly, the Board of Appeal considers, in accordance with the jurisprudence of the CJEU, that a draft technical standard (in this case, an ITS) cannot be the subject of an appeal before the Board since it is only a preparatory act, and any factual or legal errors contained in the draft can only be invoked in the context of an action for annulment brought before the General Court against the final act adopted by the European Commission.[5]

In addition, the strict procedural requirements (place of hearing, time limits for exchanging documents, etc.) may not seem very appropriate, particularly for individual applicants.

Consideration could be given to amending Article 60 of the ESAs Regulations, to broaden the range of acts that may be appealed and to lighten the procedural requirements.

To ensure the full independence of the Board of Appeal vis-à-vis the ESAs, a budget could be specifically allocated to the Board.

Similar rules could apply to the SRB Appeal Panel.

Ensuring the effective independence of the ESAs Board of Appeal and the SRB Appeal Panel is even more necessary since a recent reform of the Statute of the CJEU introduced a mechanism for filtering appeals in cases previously referred to these boards. [6] The mechanism requires that, in such cases, the applicant must justify the importance of the issue raised with regard to the unity, consistency or development of EU law, a condition that must be satisfied for the appeal to be admissible. Thus, any case brought before the ESA Board of Appeal or the SRB Appeal Panel and then, on appeal, before the General Court of the European Union, must now demonstrate that this condition is met for the Court to agree hear it.

The legitimate objective of this reform is to reduce the workload of the Court of Justice, whose case list is congested. For the legislator, because the cases submitted for screening will have benefited from a dual examination, the right to effective judicial protection is sufficiently guaranteed. However, this would require:

- that the procedural guarantees enjoyed by applicants before the administrative appeal boards are equivalent – if not identical – to those enjoyed by the parties before the EU Courts;
- that the independence of the members of these committees is ensured, whereas they do not have a dedicated secretariat;

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[1] *See, in France, CE joined 9th and 10th chambers, 1 April 2022, n° 443882, published in the Recueil Lebon.*
[2] *CJEU, 15 July 2021, paragaphs 67-68.*
[3] *Articles 58 to 60 of the ESAs Regulations.*
[4] *As of 1 February 2025. See :* https://www.esma.europa.eu/databases-library/esma-library?f%5B0%5D=basic_%3A43&f%5B1%5D=basic_section%3A355&page=0 *(consulted 1/02/2025).*
[5] *ESAs Board of Appeal,* Creditreform Rating AG v/ EBA *(BoA-D-2019-05).*
[6] *Regulation 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, Recital 23 and Article 58a.*

- that the quality of the decisions of these committees is equivalent to that of the judgments of the EU Courts, whereas these committees are not assisted in their functions by legal assistants as is the case before the EU Courts.

The resources available to these committees and the procedural guarantees applicable before them would therefore have to be on par with those of the General Court of the EU so that access to their courtroom could be considered "equivalent" to that of the General Court.

Even under these conditions, the question of the scope of the control that these appeal committees can exercise over the acts taken by the agencies to which they belong remains unresolved. A judgment of the Court of Justice[1] has certainly held that control must be normal, and not restricted, but the discussions on the subject are far from complete.[2]

In the case of the ECB, certain decisions taken by this authority as part of its prudential supervision remit may be submitted to the Administrative Board of Review.[3] Nonetheless, as with the ESAs Board of Appeal, only individual decisions may be referred to the Administrative Board of Review.

In addition, unlike the ESAs' Board of Appeal, this is not a truly independent pre-litigation body, but it provides an internal administrative review that is integral part of the ECB's decision-making process. While the principle of its independence is affirmed, this independence is not surrounded by the same level of guarantees. The functions of a member of the Administrative Board of Review are incompatible with the exercise of another function within the ECB, but unlike the ESAs Regulations, the SSM Regulation does not stipulate that the mandate is irrevocable and does not provide for a challenge procedure.[4] Nor is there any provision for the members of the Administrative Board of Review to be heard by the European Parliament, as is the case for the members of the ESA's Board of Appeal.[5]

It should be noted that the AMLA Administrative Board of Review panel is built on the same model than that of the ECB (except that an objection procedure is provided in the case of a conflict of interests).[6]

Consideration could be given to broadening the scope of acts that may be submitted to the administrative review committees and to strengthening the transparency of the functioning of these committees. Publication of the decisions of the administrative review committees, in an anonymous form, would also guarantee greater transparency and a better understanding of the interpretation of the supervisor's powers by the parties subject to the supervision.

The question of the process of developing supervisory expectations (Are stakeholders sufficiently consulted? What is their legal basis? Etc.) as well as their control, remains an area to be studied.

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[1] *CJEU, 9 March 2023,* ACER v. AQUIND, *case C-46/21*
[2] *David Ramos Munoz and Marco Lamandini,* "Aquind and the standard of review of the ESAs joint board of appeal and of the SRB appeal panel"*, Proceedings of the Final conference of the Jean Monnet Module on EU Specialized Judicial Protection 'Quo vadis, Boards of Appeal?' 8th-9th February 2024 | University of Ferrara, Contribution to the Roundtable debate on 'Boards of Appeal, standard of review and the right to an effective judicial protection'.*
[3] *Article 24 of the SSM Regulation.*
[4] *Article 59 of the ESAs Regulations.*
[5] *Article 58(3) of the ESAs Regulations.*
[6] *Articles 72 to 75 of the AMLA Regulation.*

3. REVIEWING THE PRACTICES OF FINANCIAL INSTITUTIONS

Certain solutions also depend on industry players, which could, namely:

- better coordinate between experts in the fields concerned, the legal department, the compliance department, the department dealing with the ECB, etc. to respond to the consultations in a detailed manner and analyze the value of the texts and their possible contradictions[1]; their job descriptions should include participation in the responses to European consultations, with a margin of availability to do so;
- not systematically ask ESAs to provide clarifications on the interpretation of Level 1 and 2 texts, to avoid too much granularity at Level 3;
- make greater use of the option of not applying guidelines to the letter and implement other practices, provided that they achieve an equivalent result, where appropriate by informing the NCA in advance, as financial institutions in some countries have been able to do;
- be less reluctant to resort to the reasoned opinion of the Commission, to pre-litigation appeals and to judicial review, so that controls are exercised with a view to a better balance of institutional skills and risks in relation to European growth objectives.

[1] *M. Gillouard and D. Quelhas, « Juristes de banque, un métier en pleine mutation »,* Revue Banque *July 2024, n° 894, p. 33.*


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Appendix 1
RECAP OF THE LAMFALUSSY PROCESS

BLANCHE SOUSI

Recommended by the report of the working group chaired by Alexandre Lamfalussy, published in February 2001, this process was intended to complete an integrated market in financial services in response to the globalisation of financial flows, and to address the slow pace of the European legislative procedure, which was deemed less responsive to technological developments than US regulations. The process was based on a renewed comitology procedure, with a four-level regulatory approach:

Level 1
The European Parliament and the Council obviously remained competent to adopt, under the co-decision procedure, texts (directives or regulations) which were still initiated by the European Commission, but from now on these texts were only to lay down framework principles and were to delegate to the Commission the power to adopt the technical implementing measures expressly listed.

Level 2
It was therefore up to the European Commission to adopt these technical implementing measures. It was assisted by two committees:
the European Securities Committee, made up of senior representatives of the Member States, which had the power to vote on measures proposed by the Commission,
the Committee of European Securities Regulators, made up of representatives of national market authorities, which had only consultative powers.

Level 3
The Committee of European Securities Regulators (the same as for Level 2) was to ensure convergence of national regulations and practices in the application of the provisions adopted at Levels 1 and 2. The emphasis was therefore on the need for greater cooperation between national regulators; the system was based on the goodwill of national regulators rather than on a binding mechanism.

Level 4
The European Commission, as guardian of the Treaties, remained responsible for ensuring that the texts were properly applied, but it had to be assisted in this by all the players, including the Member States and the private sector.

When the Lamfalussy process was extended to the banking and insurance sectors in 2003, Level 3 committees were created as a result: the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS).

In 2010, following one of the recommendations of the Larosière report, the ESAs were to replace the three Level 3 committees (see Appendix 2).

Appendix 2

STRENGTHENING THE POWERS OF LEVEL 3 COMMITTEES IN ACCORDANCE WITH THE RECOMMENDATIONS OF THE LAROSIÈRE REPORT

BLANCHE SOUSI

The Larosière Report's recommendation that the powers of the Lamfalussy Level 3 Committees should be strengthened was enshrined in three European Parliament and Council Regulations of 24 November 2010.

Here's how.

These three regulations set up three European Supervisory Authorities (ESAs) to replace the former Level 3 Committees, which had only advisory powers. The ESAs are therefore Level 3 authorities: but what powers do they hold?.

The Larosière Report stated that these three ESAs "would be given clear mandates, well-defined missions and sufficient powers" (point 187 of the report).

However, such powers had to be with due respect for the institutional balance. According to this principle, each of the institutions of the European Union must act within the limits of the powers conferred on it by the Treaties and must not encroach on the powers of the others1.

Consequently, it was not possible to give the ESAs the power to adopt mandatory, impersonal, and general provisions falling within the remit of the European Parliament, the Council, or even the European Commission on delegation.

This problem has been resolved by the 2010 regulations, which stipulate that when the European Commission receives, by delegation from the European Parliament and the Council, the power to adopt technical regulatory or implementing standards, these texts are to be prepared by the ESA concerned and proposed to the European Commission.

The Commission reviews these proposals and if they are not acceptable, it can ask the ESA to modify them provided that it explains the reasons for the request. It can even refuse to accept them, but again, it must give reasons.

When it is satisfied with them, it adopts them in a delegated act (i.e., Level 2).

The institutional balance is thus legally respected and at the same time, the ESAs have greater power, as recommended in the Larosière Report: these Level 3 authorities' draft texts that are intended to become Commission delegated acts, i.e., binding Level 2 acts.

[1] *See the Meroni case.*

Appendix 3

REFERENCES OF PUBLICATIONS CITED IN THE INTRODUCTION RELATING TO THE EXCESSIVE USE OF LEVEL 2 ACTS

DANIELA QUELHAS AND ANNE-CLAIRE ROUAUD

National Parliaments

See for example:

- in France: S. Sutour, Rapport d'information fait au nom de la Commission des affaires européennes sur la place des actes délégués dans la législation européenne, Sénat, Session ordinaire 2013-2014, January 2014, n° 322, ***https://www.senat.fr/rap/r13-322/r13-3221.pdf***; J.-F. Rapin, D. Marie and C. Morin-Desailly, Information report drawn up on behalf of the European Affairs Committee on the European Union's normative drift Senate, Ordinary Session 2024-2025, Dec. 2024, No. 190.
- in Germany: Radwan/Zöllmer Parliamentary report n° 18/4451 Section V and Resolution of the Bundestag of 18.02.2016 (Plenary discussion on 18/7539 of 18.02.2016, vote on the motion and adoption in 15273 A).

Study by the Center for European Policy

CEP Study, European Supervisory Authorities, Room for improvement at Level 2 and Level 3, Study on Behalf of the fpmi Munich Financial Centre Initiative, 4 oct. 2016, available here: ***https://www.cep.eu/eu-topics/details/the-european-supervisory-authorities-room-for-improvement-at-level-2-and-level-3.html.***

EU institutions

The institutions regularly express their concerns about the adoption of delegated legislation.

Considering that the delegation of powers to the Commission may raise issues of considerable political importance, the European Parliament, on 25 February 2015, adopted a "Resolution on the Follow-up on the delegation of legislative powers and the control by Member States of the Commission's exercise of implementing powers", 2012/2323(INI), available here: ***https://www.europarl.europa.eu/doceo/document/TA-7-2014-0127_EN.html***

The Interinstitutional agreement on better law-making of 16 December 2003 (OJ C 321, 31.12.2003, p. 1; ***https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003Q1231(01)***, replaced by the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016 (OJ L 123, 12/05/2016, p. 1; available here: ***https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016Q0512(01)***, with provisions devoted to delegated legislation, already attempted to address the concerns raised by the multiplication of mandates. However, the persistence of the problems has led the Council, Parliament and Commission to adopt in 2019 "Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union — 18 June 2019", 2019/C 223/01, available here: ***https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019Q0703(01)***.

In the resolutions accompanying the discharge decisions concerning the implementation of the ESAs' budget, the European Parliament frequently points out that the Authority, when carrying out its activities, needs to pay particular attention to ensuring compatibility with Union law, to respecting the principle of proportionality and to complying with the fundamental principles of the internal market (see for example Resolution n° 2020/1945 of the European Parliament of 14 May 2020 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Banking Authority (EBA) for the financial year 2018, OJ L 417 11.12.2020, p. 325, available here; ***http://data.europa.eu/eli/res/2020/1945/oj***; Resolution n° 2021/1642 of the European Parliament of 29 April 2021 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Securities and Markets Authority for the financial year 2019, OJ L 340 24.09.2021, p. 405, available here: ***http://data.europa.eu/eli/res/2021/1642/oj***.

See also Council Financial Services Committee, Report on Level 2 Processes-Endorsement, 1759/15, 23 June 2015, available here: ***https://data.consilium.europa.eu/doc/document/ST-1759-2015-INIT/en/pdf.***

See also the report of the European Economic and Social Committee (EESC): Information report of the Section for the Single Market, Production and Consumption on « Better Regulation: Implementing acts and delegated acts », 30 July 2013, available here: ***https://www.eesc.europa.eu/fr/sections-other-bodies/sections-commission/single-market-production-and-consumption-int/information-reports.***

Appendix 4

EACB TABLE OF EXAMPLES OF DIFFICULTIES POSED BY LEVEL 2 AND LEVEL 3 TEXTS

TEXT	ISSUE	EXPLANATION
AML/CFT Level 3	Inconsistency	**Guidelines on AML/CFT when it requires Member States to appoint a board member responsible for AML/CFT, when that can only be required by the national transposition of the Directive.** EU Directive 2015/849, which has been transposed by each Member State, includes within its article 8 the "appointment of a compliance officer at the management level" as a requirement to be incorporated into the policies within its scope of application. The definition of the concept of management included in the Directive is broad, considering that membership in the board of the Entity is not necessary. On the other hand, Article 46 of the same EU Directive urges that "Member States shall require, where appropriate, that obliged entities appoint the board member who will be responsible for the implementation of the legislative, regulatory, and administrative provisions necessary to comply with this Directive". The European Banking Authority (EBA) issued Guidelines EBA/GL/2022/05 in accordance with the Articles 8 and 46. Article 8 requires the appointment of a responsible person "at the management level." Article 46 urges that "Member States shall require, where appropriate, that obliged entities appoint the board member who will be responsible for the implementation of the legislative, regulatory, and administrative provisions necessary to comply with this Directive." **Inconsistency:** In light of the first-level regulatory texts (Directive) and the supervisory Guides, there is an evident first inconsistency in the way all entities are required to appoint a person responsible for compliance with the AML/CFT requirements. Firstly, within the Directive itself (Level 1), this designation foresees two differentiated levels of designation: Article 8: gives the option that, within the policies that the Board must establish, the responsible person does not have to be a member of that body. This has been envisaged in national regulation in Spain by primarily identifying the Representative before the SEPBLAC (who must be a senior executive, not necessarily a member of the Board), and the Internal Control Body, which can be a collegiate body within the organizational structure of each Entity. Article 46: urges Member States, and therefore the legislators in charge of transposing the Directive (remember that it is not directly applicable like a Regulation, but requires transposition by each Member State), to request this designation. The Spanish legislation considered it in the same way as set out in the argumentation of the previous Article 8. Therefore, the aforementioned EBA GLs are inconsistent when referring to the development of Articles 8 and 46 previously indicated (inconsistent in themselves), highlighting also that the responsibility of a Board as a whole (referred to in turn in CRD IV and CRR) is to establish the policies and risk management models, and this body must have the capacities, knowledge, and experience (as a whole) to establish and supervise their effective compliance. To this, it should be added that the governance model of cooperative credit institutions, by their nature, includes mostly non-executive directors without direct remuneration for their position (except for the widely developed system of allowances in that sector). We understand that the differences in governance and the European corporate system, when transposing the mentioned Directive and therefore with the mandate to "demand" the appointment (Article 46), have already foreseen for their full alignment this reality, by not contemplating in any case the appointment of a Board member as responsible for AML/CFT, but figures that effectively cover the community requirements such as the aforementioned "Representative before the SEPBLAC" and "Internal Control Body." In conclusion, we consider that the aforementioned EBA GLs, which as their own name includes, develop Articles 8 and Chapter VI of the Directive (chapter where the aforementioned Article 46 is included) are inconsistent with the requirements of the mentioned first-level Directive, by not contemplating the option that the appointed responsible at the highest level can be part of the "management," and therefore may not include members of the Board, paying special attention to corporate realities, and cooperatives in particular, as it is evident that it has been considered in the national transposition to date.
Basel III Level 2	Regulatory inflation / mandate exceeded	The RTS concerning market risk (and the roll out of the Fundamental Review of the Trading Book) are clear examples of the stretch of Level 2 laws.
Basel BCBS 239,	Undue burden, lack of clarity	Principles are very unspecific leaving a lot of room for interpretation. Aside from not having a direct transposition, they are audited by authorities under the umbrella of Art 74 CRD which is very unspecific.

TEXT	ISSUE	EXPLANATION
RDARR principles	Undue burden, Mandate exceeded	The ECB's Guide on how to implement RDARR principles lacks democratic foundation by legal implementation. They have never been evaluated via the legislative process but are fully enforced by inspection teams, leading to big discrepancies in how they should be considered and therefore high costs.
BRRD Level 2	Temporal articulation	Lack of clarity about for instance the MREL definition and perimeter of older RTS, where it is unclear whether they should be reconsidered in view of the introduction of the overhaul in BRRD2. Delays: There are still a handful of mandates not being followed up by EBA and it is unclear why this is the case or what exactly causes the delay in the work.
CCD / MCD Level 3	Mandate exceeded	**Example on the validity of the EBA guidelines of 29 May 2020 on the granting and monitoring of loans (EBA/GL/2020/06)** The EBA's Guidelines of 29 May 2020 on the granting and monitoring of loans (EBA/GL/2020/06) extend the scope of Directive 2008/48 on consumer credit and Directive 2014/17 on mortgage credit by imposing general internal governance requirements on credit institutions as provided for in Articles 74 and 79 of Directive 2013/36/EU, in the context of the existing requirements on consumer credit assessment, new requirements, including addressing environmental, social, and governance factors in credit risk, regulating automated delivery models, and requiring a clear list of credentials for consumer creditworthiness assessments.
CRD Level 3	Mandate exceeded	Regarding the EBA Guidelines on internal governance (EBA/GL/2017/11) and the EBA Guidelines on sound remuneration policies under Directive 2013/36/EU (EBA/GL/2021/04) the Austrian Financial Markets Authority (FMA) declared itself "partially compliant". The reason was a lack of legal basis in Art 29 (composition of the nomination committee) and respectively Art 39c Austrian Banking Act (composition of the remuneration committee).
CRD Level 3	Mandate exceeded	**EBA/ESMA Guidelines on the Assessment of the Suitability of the Members of Management Body and Key Function Holders** The Guidelines provide for a new criterion of formal independence of a sufficient number of members of the (non-executive) management body ("formal independence"). Neither Art. 74 (1) and (3) CRD nor Art. 88 and Art. 91 (12) CRD empower the EBA to develop additional requirements - that are not prescribed by secondary law - for the members of a management body of an institution.
CRD Level 3	Mandate exceeded	**EBA Guidelines on sound remuneration policies under Directive 2013/36/EU** According to the Guidelines, in G-SIIs and O-SIIs, the remuneration committee should include a majority of members who are independent and be chaired by an independent member. The relevant Article 95(1) CRD in conjunction with Article 75(2) CRD do not provide a legal basis for such a composition requirement regarding the remuneration committee in systemically relevant institutions. Hence, EBA obviously went beyond its mandate by establishing further guidance and regulations on independent members in the remuneration committee for G-SIIs and O-SIIs.
CRD Level 2, Level 3	Temporal articulation	**Long-lasting legislative process regarding the adoption of RTS, that enables proper an in-time implementation of the Guidelines by the entities of the banking sector.** Example: In 2022 European Banking Authority published EBA/GL2022/14 - Guidelines issued on the basis of Article 84 (6) of Directive 2013/36/EU specifying criteria for the identification, evaluation, management, and mitigation of the risks arising from potential changes in interest rates and of the assessment and monitoring of credit spread risk, of institutions' non-trading book activities. On the same day, EBA also published the following drafts: a. EBA/RTS/2022/09 - Draft Regulatory Technical Standards specifying standardised and simplified standardised methodologies to evaluate the risks arising from potential changes in interest rates that affect both the economic value of equity and the net interest income of an institution's non-trading book activities in accordance with 84(5) of Directive 2013/36/EU. b. EBA/RTS/2022/09 - Draft Regulatory Technical Standards specifying supervisory shock scenarios, common modelling, and parametric assumptions and what constitutes a large decline for the calculation of the economic value of equity and of the net interest income in accordance with Article 98(5a) of Directive 2013/36/EU. The drafts of regulatory technical standards were submitted to the Commission that finally adopted and published them in May 2024.The above-mentioned Guidelines applied from 30 June 2023 (with the exception of sections referred to credit spread risk from non-trading book activities (CSRBB) that applied from 31 December 2023), whereas the RTS providing a specific provisions necessary for proper implementation of Guidelines was published one year later (May 2024). It should be noticed that access to the specific requirements set forth in RTS is crucial to comply with the Guidelines' requirements. Usually, the wide scope of changes within the IT systems is required which also takes time. Adoption and publishing RTS based on guidelines after the date of its application date impedes implementation of the relevant requirements set forth in Guidelines by banks in time.

TEXT	ISSUE	EXPLANATION
CRD EBA Guidelines on loan origination	Mandate exceeded Inconsistency with national law	In 2018, the French Banking Federation (FBF) challenged the EBA Guidelines on loan origination (EBA/GL/2020/06). In 2022, the French Conseil d'Etat ruled that it was not necessary to refer the questions raised by the appellant to the ECJ. It is surprising as paragraphs 90 and 247 of the Guidelines requiring credit institutions to have a single, consistent view of all of a customer's assets and liabilities held at an institution or a creditor on a consolidated basis is not consistent with provisions of at least French law on banking secrecy as if the same customer holds assets in legally distinct entities of the same banking group (whether in another institution of the same group or in an insurance or asset management subsidiary), the French law provisions on professional secrecy prohibit the lending institution from collecting information enabling it to implement this obligation. Also, Annex II of the guidelines gives an exhaustive list of the information and documents to be collected from the applicant for the loan. The guidelines mention a general principle of proportionality, but this does not apply to Annex II, which is not covered. While the European co-legislators, whether in the successive directives relating to consumer credit or in the "Mortgage credit" directive, haves left it to the lender to assess the elements to be taken into account in the context of the creditworthiness assessment, the EBA adds, without a legal basis, new obligations which apply uniformly to situations that are objectively very different (credit for the purchase of a main residence or for the purchase of a vacuum cleaner).
CRD Level 3	Mandate exceeded	In several cases, French authorities decided to comply only partially with a set of guidelines and/or to comply with a delay. The most notable concerns the guidelines on sound remuneration policies (EBA/GL/2021/04) (bonus caps), due to a lack of legal basis. For instance: The scope of several requirements of Articles 92 and 94 CRD (e.g. remuneration policy in line with the business strategy, incorporates measures to avoid conflicts of interest) is extended by the Guidelines to all staff, while the reading of the above-mentioned articles, which have been faithfully transposed in French law, indicates these articles only apply to identified staff. • CRD requires that instruments shall be subject to an appropriate retention policy, to align incentives with the longer-term interests of the institution but does not establish a more precise requirement regarding the retention period applied to awarded instruments. Paragraph 289 of the Guidelines imposes a specific requirement for the retention period, which should be at least 1 year. The ACPR noted that "The Guidelines are not the appropriate venue to establish new requirements".
CRD, PSD Level 3	Mandate exceeded	**Guidelines of 22 March 2016 on the governance and supervision of retail banking products (EBA/GL/2015/18)** EBA has exceeded its powers as provided for in Regulation 1093/2010 by establishing procedures for the governance and supervision of retail banking products not provided for in the 4 Tier 1 texts (the Capital Requirements Directive (CRD) 2013/36/EU and Articles 74 to 95/ Payment Services Directive (PSD) 2015/2366/ Directive 2009/110/EC on electronic money Directive/ Directive 2009/110/EC 014/17/EU on loans for immovable property). Indeed, all those directives apply to corporate governance, not to retail banking product governance. Thus by transposing in its guidelines of 22 March 2016 concepts relating to the governance of financial products to the governance of retail banking products put in the market by credit institutions, EBA would require retail banking producers to comply with best practices whose level of requirement would not be justified and would not derive from any European directive or regulation whose task it is to ensure the correct application throughout the European Union.
CRR Level 1, Level 2, Level 3	Inconsistency	We have seen some cases where an authority has not applied parts of level 1, 2 and ESA guidance, even past the formal entry into force and/or formal application date, however this is typically something that is less explicit and more implied and there is often a transitional context (in other words, something that isn't applied or fully enforced now may not necessarily be given that treatment indefinitely). Article 77/78/78a CRR in connection with Commission Delegated Regulation n° 2023/827 (then at its draft stages). This, in the early stages of CRR2 amendments entering into force, was temporarily and primarily due to inconsistencies.

TEXT	ISSUE	EXPLANATION
CRR Level 2, Level 3	Undue burden	Commission Implementing Regulation n° 2021/1751 and the associated ITS which entail an elaborate form of reporting on impracticability issues in connection with certain contractual requirements. As of yet we have chosen to approach this in a more pragmatic manner that in fairness meets the same substantive goals (as we do not dispute the rationale) but in a less operationally burdensome way. Another example is EBA/GL/2024/04 of 8 April 2024, "Guidelines on resubmission of historical data under the EBA reporting framework". As the CRR does not contain a materiality concept, like auditing standards do, the EBA is of the view that errors, inaccuracies, or other changes in the data should be reported in accordance with the supervisory and resolution reporting framework developed by the EBA (technical standards, guidelines). According to this resubmission guideline, banks must resubmit without undue delay their prudential reporting in case of an error within the range of EUR 10,000 (i.e., EUR 5,000 upwards or EUR 5,000 downwards. With balance sheet totals of billions of Euros, this working assumption is totally unworkable. In this regard the Dutch Central Bank has also informed us that they will provide the Dutch banks with a separate instruction.
CRR level 2	Overlapping requirements. Incoherence with level 1; Mandate exceeded	BI Item does not match the definition of underlying component in CRR. In at least one instance, the RTS/ITS list one component item that does not correspond to the underlying definition in the CRR: Article 314(2) of the CRR 3 explains that "the asset component, is the sum of the institution's total gross outstanding loans, advances, interest bearing securities, including government bonds, and lease assets, calculated as the annual average over the last three financial years on the basis of the amounts at the end of each of the respective financial years"; However, the Article 3 (a) of the RTS and corresponding article of the ITS state that the "gross carrying amount of cash balance at central banks and other demand deposits" are also part of the sum that determine the asset component. Duplicate information in RTS/ITS There is duplicated information in both the draft RTS and ITS. For example, the list of items of each Business Indicator Component is repeated in both standards. Clarification issues in the RTS/ITS Some RTS articles do not provide much clarification in addition to what was already described in the original CRR3 regulation, like Article 16 of the RTS (Scope of the exclusions from the business indicator) and Article 4 of the same document (Dividend Component), which presents basically the same content of the corresponding Article 314(2) of the CRR3, albeit in a summarized form. On the other hand, clarification is missing for the definition of financial and non-financial services, in the CRR and the technical standards when it comes to the inclusion of the outsourcing fees in the calculation of the business indicator.

TEXT	ISSUE	EXPLANATION
CRR Level 2	Mandate exceeded; Temporal articulation; Inconsistency	**Too large scope of EBA's mandate to develop implementing technical standards (ITS)** EBA's carte blanche regarding mandates under CRR to develop implementing technical standards (ITS) - in contrast to the position with delegated acts, the European Parliament and the Council do not play any role in the adoption of implementing acts and once the "comitology process" is complete and the Commission formally adopts an implementing act, it will be published in the Official Journal and take effect. It seems that the European Commission and the members of EP have a tendency to confer the power on the Commission to develop rules that may seem technical or "blocking" but which may be potentially very impactful and burdensome. One of the most prominent examples is the ITS developed under the mandate stipulated in article 434a CRR - Uniform disclosure formats - especially amendments implementing the disclosure of environmental, social and governance risks. According to the purpose set out in this article: "Those uniform disclosure formats shall convey sufficiently comprehensive and comparable information for users of that information to assess the risk profiles of institutions and their degree of compliance with the requirements laid down in Parts One to Seven". Whereas, the granularity of information required under the "ITS on prudential disclosures on ESG risks in accordance with Article 449a CRR" departs from the usual level of granularity of Pillar 3 disclosures - it's more like a supervisory reporting and not like the "comparable information" for users / investors and the whole responsibility for collecting ESG data is imposed on the banking sector. The other example of "obligatory reporting like" disclosures are "NPE/FBE disclosures" - it is doubtful that "mere mortals" would be interested in e.g., credit quality of performing and non-performing exposures by past due days as devised in EU CQ3 form. There is also a substantial number of new deliverables under EBA's mandates resulting from CRR3/CRD6 roadmap, which could have a significant impact on capital requirements - to name just two: a. GL on proportionate diversification methods of "retail exposures" under Article 123 CRR given that the objective "granularity criterion" was not introduced in the level 1 act, there is a potential risk of a future uneven playing field for the EU institutions resulting from a different application of the GL b. GL specifying the terms "substantial cash deposits", "financing ensured in an equivalent manner", "significant portion of total contracts" and "appropriate amount of obligor-contributed equity" under Article 126a. **Late response within Q&A process resulting in uncertainty in interpretation of Level 1 regulations.** Another issue is the uncertainty in interpretation of Level 1 regulations which results from late response during EBA's Q&A process. Question ID n° 2021_5805 might be an example. The question regarding the application of the Article 49 CRR was submitted in April 2021, but as of the date of the analysis, EBA had not published a binding answer, which should consider the European Commission answer. In this case, it is not possible to properly apply the Level 1 text with sufficient certainty. **Lack of consistency in the application of some prudential regulations to groups of banks operating as IPS.** There is a noticeable lack of consistency in the application of some prudential regulations to groups of banks operating as IPS. CRR indicates clearly that it applies in a manner proportionate to the nature, scale and complexity of the risks associated with an institution's business model and activities. In terms of IPS, business model is crucial as the regulations changed not only the risk management process in single banks, but also affected the associations. In case of IPS, Article 8 CRR allows use of waivers and derogation from the application of liquidity requirement on an individual basis i.e., members of IPS can fulfill the LCR and NSFR requirements on a consolidated situation of all institutions. This is vital because of the business model which assumes the functioning of a central institution for cooperative bank members of IPS. What is more, some IPS groups according to Article 49 CRR are to meet together on a consolidated or extended aggregated basis the requirements laid down in Article 92 CRR, i.e. members of IPS must properly calculate own funds to the satisfaction of the competent authorities and this is annually verified by an external auditor and fulfill the CET1, Tier1 and TCR requirements. It is justified for IPS members to also meet the requirements of Art. 92 par. 1 (a)-(c) CRR on the individual basis, but in terms of (d) leverage ratio the business model, not only the risk level, determines the change of the indicator value.

TEXT	ISSUE	EXPLANATION
CRR/ CRD EBA mandates Level 2, Level 3	Regulatory inflation; Mandate exceeded	**Mandate on off-balance sheet items and unconditionally cancellable commitments:** For unconditionally cancellable commitments, in its RTS project EBA relies on the same factors as those suggested by the Basel Committee (which used them to explain CCF's increase from 0% to 10%) to justify CCF's increase from 10% to 40%. This is an example of over-transposition on the one hand and contradicts the Level 1 text on the other (the mandate given in CRR3 does not pave the way for this change). • Mandate for regulatory reporting: In its draft RTS, EBA is calling for a fully loaded ratio to be published as early as 2025, i.e., without application of the transitional provisions that were decided by the co-legislators to last at least until the end of 2032 or even the end of 2036 for some. • Mandate for prudent assessment: EBA in its draft SDR goes beyond the mandate given to it by CRR3 to define an exceptional treatment allowing to reduce AVAs in exceptional circumstances. Indeed, the draft RTS also introduces provisions to promote a more harmonised application of the RTS. At the end of February 2024, the EBA published three consultations on RTS and ITS on Operational Risks in accordance with its mandates in the CRR. The EBA goes beyond its mandate on how to calculate the Financial Component. CRR3 which specifies that there is no preference between the application of the accounting approach and the prudential approach, the latter being available to institutions where appropriate. However, the EBA specifies in the draft RTS that the accounting method is the default approach, while the prudential approach may be used in derogations under certain conditions: approach applicable to all entities in the group if an entity decides to apply it, dossier to be established by each entity in the group and to be sent to the supervisor 90 days before it can be applied. The implementation of this prudential approach entails administrative burdens. This application for authorization must be renewed annually. Moreover, the timing of responses to these consultations is inconsistent. The EBA has set an expected return date of 21 May on the consultation on the Business Indicator while the return on regulatory reporting and pillar 3 was expected by 30 April. The building blocks of the Business Indicator have an impact on reporting. These three consultations should have been dealt with at the same time. Finally, the EBA requests elements for the calculation of the "Service Component" that are difficult to collect in the accounting statements. This is the case for the financial amounts of operational risk events that are otherwise tracked in specific regulatory statements as required by regulation.
RRC/CRD Level 3	Proportionality	**Principle of proportionality - necessity to provide a specific solution considering the diversity of cooperative banking sector, including especially small non-complex cooperative banks.** The principle of proportionality is strongly emphasized in the content of EU regulations, including the Regulation n° 575/2013 of the European Parliament and of the Council of 26 June 2013. The principle of proportionality should be applied through, among others: considering both the scale and complexity of the institution, its systemic importance, the institution's geographic presence and the size of its operations, the institution's internal organization and financial structure. it is desirable that the principle of proportionality, defining the scope of exemptions for particular provisions of the law, be laid down at Level 1 of European legislation. The establishment of the detailed rules for the implementation of the principle of proportionality, should already take place at the level of the individual associations or IPSs, which, within the limits set by the law, will be best able to adapt these rules to the specificities of their operation. Indeed, the law, as well as the guidelines, apply to both large corporations and small local banks. Each bank is different, operating in a different territory, with a different range of services offered. It is impossible to create regulations that are tailored to each of them. Examples of EU regulations to which the principle of proportionality has not been properly applied. 1. **Guidelines on the assessment of the suitability of members of the management body and key function holders** EBA/GL/2021/06 ESMA35-36-2319 July 2, 2021, which significantly influenced the selection of staff of the supervisory body in small and non-complex institutions referred. 2. **Guidelines on sound remuneration policy under Directive 2013/36/EU EBA/GL/2021/04 of 2 July 2021** - i.e., applying remuneration policy within the scope of variable remuneration components to persons taking an independent positions in compliance/risk functions in small non-complex institutions - where only the members of the management board have a significant impact on the functioning of the institution. Therefore, it shall emphasize that the policy within the scope of variable remuneration components applies only to members of the management board. 3. **EBA/GL2022/14 - Guidelines issued on the basis of Article 84 (6) of Directive 2013/36/EU specifying criteria for the identification, evaluation, management and mitigation of the risks arising from potential changes in interest rates and of the assessment and monitoring of credit spread risk, of institutions' non-trading book activities.** In accordance with the principle of proportionality, the regulations provide a simplified standard method for measuring interest rate risk. This method is dedicated to small and non-complex institutions. However, considering the size of certain cooperative banks, even the simplified method is too complicated and imposes obligations that are disproportionate to the risk.

TEXT	ISSUE	EXPLANATION
DAC7 / CESOP	Overstepping mandate Overlapping requirements	As of January 1, 2024, banks and other PSPs are obliged to report details of cross border payment transactions to EU tax authorities (CESOP, Central Electronic System on Payment information). This reporting obligation follows from Directive 2020/284. The purpose of CESOP is combatting VAT fraud that could be committed by certain suppliers of e-commerce services. Banks and PSPs should however report all cross-border transactions (threshold 25 payments per calendar quarter) for this purpose. The obligation thus reaches much further. In fact, most transactions that are reported have nothing to do with e-commerce services for which VAT is not yet paid. Next to that, another EU initiative has resulted in a reporting obligation for platforms to combat e-commerce VAT fraud too (DAC7). In our view, DAC7 and CESOP result in unnecessary reporting obligations that are overshooting the mark.
DORA interaction with Level 3 (EBA GLs on ICT and security risk management providing details on certain provisions of Directive 2013/36/EU (CRD) and Directive 2015/2366/EU (DSP2) and the EBA Outsourcing GLs)	Overlapping requirements; temporal articulation	**ICT Risk, Resilience and Third Party Management (Outsourcing) Regulation: articulation between DORA and EBA Guidelines** In the area of ICT risk and outsourcing: prior to the entry into force of DORA in 2023, with a deadline for compliance until January 2025, the EBA had published in 2019 the EBA GLs on ICT and security risk management providing details on certain provisions of Directive 2013/36/EU (CRD) and Directive 2015/2366/EU (DSP2) and the EBA Outsourcing GLs 2010 9 which come under soft law. However, the supervisory checks are still based on these ABB GLs. This therefore leads to the maintenance of different repositories, methods, and tools. The compliance costs are therefore very high and at the expense of creating value for customers. In addition, in terms of substance, this leads to the existence of several regulatory reports for IT risks: currently, there are already three types of reports (2 incident reports and a register for outsourcing). In the future, the DORA regulation will add three new reports which take over elements of the reports already existing but do not replace them. A total of 6 different reports will have to be carried out by the banks on the same subject.
EMIR Level 2		In 2019 EMIR Refit has introduced mandatory delegated reporting of OTC derivatives entered by non-financial counterparties below the clearing threshold to the financial counterparty they transact with. Due to the drafting of the requirements, derivatives entered by the same counterparties do not constitute OTC derivatives, so exchange traded derivatives are not subject to the same delegation mechanism. This dual approach is not efficient as both transaction types can occur in parallel, but due to the split in reporting responsibility require different documentation and processes. Also under EMIR, the various types of participants/products are not properly considered and distinguished. E.g., clearing members are required to offer all their clients the option between an omnibus or individually segregated account at the CCP, while for retail and NFC that offer does not make sense, as the cost of an individually segregated account will outweigh the profits of their limited portfolio on exchange traded derivatives.
EMIR / CRD Level 1	Incoherence	References to regulations or directives that have been repealed or replaced. For instance, EMIR article 1(5), refers to "multilateral development banks, as listed under Section 4.2 of Part 1 of Annex VI to Directive 2006/48/EC" (CRD III), which has meanwhile been repealed by CRD IV with corresponding provisions being placed in CRD IV and CRR. The transposition/correlation tables are useful at the point of repeal, but after subsequent amendments to the replacing legislative pieces, it can become opaque what should be captured by the reference to the repealed legislation.
EMIR Refit Level 1 and 2	Incoherence	Reference to "non-financial counterparties as referred to in Article 10 of EMIR". Prior to EMIR Refit those references meant NFCs acting above the clearing threshold (NFC+), but since EMIR Refit, article 10 refers to NFCs in general, so technically those references now cover NFC+ but also non-financial counterparties acting below the clearing thresholds (NFC-), but that was not intended by EMIR Refit.

TEXT	ISSUE	EXPLANATION
Financial Reporting CRR Level 2	Overlapping requirements. Incoherence; Fragmentation (not applicable to parts of the industry)	The draft ITS provides the mapping of the BI components using FINREP template cells. It is designed for institutions reporting a full FINREP report. Many European banks report FINREP as data point or simplified approach users. A review of the mapping has shown that most of the reporting items referenced here cannot be reported by data point or simplified approach users based on this mapping. Further, the consultation paper explains that: • "a list of typical items has been developed for each component of the BI, which were then mapped to their corresponding reporting cells in FINREP. This list of items is mainly based on the work carried out for the EBA Policy Advice on the Basel III Reform: Operational Risk", and • "these draft ITS provide the references of the BI items to the FINREP items. Such references can be exact or, for certain BI items, approximate in reason of the adjustments to be done to the FINREP ones to reflect the qualifications envisaged by the CRR for the calculation of those BI items". The draft ITS uses 101 different FINREP cells for the calculation of the BI. However, we note that: • In the list of FINREP items, seventeen cell adjustments must be made to comply with ITS, by applying certain criteria (e.g., by selecting accounting entries linked to leased assets, interest earning/bearing assets, outsourcing fees paid for financial services, trading/non-trading gains/losses, operational risk events, etc.), • From these FINREP cells, nine are listed twice or three times in the ITS with different adjustments in the calculation, and • Several of the FINREP cells indicated in the ITS contain elements that the CRR regulation explicitly states that they should not be included in the calculation (e.g., administrative expenses, staff costs, depreciation, etc.). Thus, these proposed FINREP adjustments in the draft ITS make the calculation cumbersome and time-consuming and increases the risk or inaccuracies, whether by understating or overstating these figures.
Instant Payments Regulation	Undue burden	The Instant Payments Regulation, only 5 articles in a level 1 text without any associated lower-level texts, teaches us that this alone is no guarantee for properly implementable legislation. The IPR now 'solves' problems that no one considered a problem (except apparently the civil servants at the negotiating table), existing solutions were ignored in favour of new pan-European solutions yet to be developed (the VoP/CoP/IBAN Name Check), a scheme followed by the market (SCTinst) is being overruled on essential points and measures that provide effective consumer protection are suddenly at risk of being made impossible. Moreover, it introduced the IBAN/name check that is also taken up in the PSR/PSD3 proposal but with different timing and requirements, thus there is the possibility of a discrepancy in the timing of implementation.
CRD Level 3		**Unintended consequence of the Directive 219/878 mandate to EBA regarding interest rate risk to develop a standardised methodology and a simplified standardised methodology for small and non-complex institutions, resulting in a disruption of the balance of fair competition.** The EBA/GL/2022/14 on IRRBB only states one cap when banks use internal models, to be specific, a 5-year cap for retail and non-financial wholesale non-maturity deposits that should be applied as an average to the full amount, core, and non-core, of the cited non-maturity deposits. Under the standardized method, the RTS limits the average duration of the best class of the core component of non-maturity deposits to 5 years, and it requires to multiply by 0,8 the core component of the stable part of the non-maturity deposits in an increase shock scenario, meaning that the average duration is effectively of 4 years. This type of measure is also applied in a punitive way to retail to non-transactional non-maturity deposits and to wholesale non-financial non-maturity deposits. Therefore, while a bank with internal models can give loans with a maturity of more than 5 years funded with the best non-maturity deposits, a bank with the standardised method must limit itself to 4 years loans. Under the simplified standardised methodology for small and non-complex institutions the end result is more punitive. In the increase of interest rates scenario, only 48,46%, for the retail transactional non-maturity deposits can be treated as core deposits, and the average durations of the standardised method apply, meaning that the average duration is effectively of 3 years. Therefore, while a bank with internal models can give loans with a maturity of more than 5 years funded with the best non-maturity deposits, a bank with the standardised method must limit itself to 3 years loans. While the Directive mandates EBA to develop the methodologies for managing interest rate risk, it is unlikely that the aim of legislators was that small non-complex banks could only give loans at about half of the maturity of banks with internal models. Also with the standardised method, going from more than 5 years to not more than 4 years is a major change; a simple limit to 5 years for core deposits would have been more reasonable for promoting satisfactory internal methods while avoiding disruptions in competitiveness. Moreover, when deciding whether internal systems are satisfactory, the principle of proportionality is difficult to apply due to the methodological complexity, the wide scope of data needs, the need for senior quantitative personnel in several areas, or the investment in advanced IT systems for interest rate risk. These broad differences in deposit maturities are possible regardless of the real stability of banks' deposits, and they can significantly affect the banks' profitability and business models

TEXT	ISSUE	EXPLANATION
IRRBB	Undue burden	**EBA ITS on reporting (EBA/ITS/2023/03), EBA RTS on SOT (EBA/RTS/2022/10)** With all the new regulatory efforts, it is important to consider that small institutions often adopt supervisory models and methods like the supervisory outlier tests for internal management purposes (no capacities for double modelling). This can have undesirable consequences, as the models currently in use are well developed, tested, understood, and well suited to the business models of small banks. Supervisory metrics are generally used to provide an initial assessment of the risk of institutions and, hence, are not suitable for IRRBB management. **EBA ITS on reporting (EBA/ITS/2023/03)** The high degree of detail and the specification of certain product breakdowns mean a new dimension in the management of interest rate risk for most institutions. Further - even if this dimension is already present, it does not yet exist in the specified form in any institution in Europe and that also does not lead to any improvements in the interest rate risk management. Furthermore, not even the Guidelines (EBA/GL/2022/14) specifically describe such a level of detail. This conveys the impression that the requirements of the Guidelines have been extended retrospectively through the draft ITS regarding IRRBB reporting. Because of the level of detail of the templates, institutions must develop a revised interest rate risk management system without any need for it from a business perspective. This runs counter to the principle of proportionality and undermines methodological freedom. The short implementation period in the context of the complexity and novelty of much of the information means that the established implementation chain from the technical concepts to the software implementation could not be adhered to. Too short implementation periods jeopardize the usual high-quality standards.
CSRBB Level 3	Undue burden	The Guidelines **(EBA/GL/2022/14)** seem to ignore solutions already existing and functioning in the market. The ex- ante product perimeter is too large, and the specified market credit spread might produce misleading management impulses.
SRMR, BRRD Level 3	Undue burden	The MREL policy reviewed and published annually by the Single Resolution Board is an example of a Level 3 text with provisions that add constraints to institutions. While the SRB initially relies on an existing legal basis (provisions of the BRRD Directive and/or the SRMR. Regulation), it nevertheless adds on this basis additional requests. This is particularly the case for the conditions imposed on the formulation of an application for an exemption from internal MREL, which are defined exhaustively by Article 12h of the SRMR. The latest version of the SRB's MREL policy encloses a dedicated annex adding significant additional documentation constraints for the formulation of such a waiver.
PSD2 Level 2 Level 3	Regulatory inflation. Fragmented implementation. Temporal articulation	The EC has recognized that the entire PSD2 file is not worth repeating in terms of the legislative and regulatory process followed. For example: a. PSD2 contains eleven mandates to the EBA (6 RTSs and 5 Guidelines), while the implementation also revealed the need for additional Guidelines and even more level 3 texts. The Single Rulebook tool now has more than 240 Q&As for PSD2 and the flow had still not dried up in 2023, even this year they sometimes still appear. The successor to PSD2, the PSR/PSD3 contains various provisions that come from the current RTS SCA & CSC. b. The PSD2 contains 21 Member State options that have resulted in varying country implementations, one of the reasons why a regulation (PSR) is now chosen. The fact that various supervisors are involved (in the Netherlands 4: AFM, DNB, AP, and ACM, but the situation in other European countries is not much different) means that supervisory practice is fragmented and diverse - another reason for a regulation. to choose. Not a panacea, but an improvement. c. Discussion between the Dutch Central Bank (DNB) and the Authority on Personal Data (AP) over supervisory primacy (the Dutch legislator had initially also given DNB the supervision of privacy aspects) was the main reason why PSD2 only came into effect in the Netherlands in February 2019 (instead of January 2018). This Dutch affair was later repeated at European level when the EBA clashed with the EDPB over the applicability of the data minimization principle (GDPR) to the dataset to be supplied as "account information" by banks to (regulated) financial institutions (PSD2 & RTS SCA). The two opposing views were expressed through respective Opinions. However, it was the AP that, as the only privacy regulator in Europe, wanted to see its own vision implemented by the Dutch banks (ACM and DNB withdrew their hands from it), the Dutch banks pragmatically found a solution for this, which resulted in a Dutch special compared to the rest of Europe - even less of a uniform single market. d. It was not only the Directive that led to different temporal articulation s: the provisions of the RTS SCA were only implemented in September. Effective 2019 in Europe. And here too, an exception was necessary, for online payment card transactions, for which the EBA elegantly offered the sector a one-year deferral of enforcement.
Retail Investment Strategy	Incoherence	Scoping of legislation is not always done considering the context of the regulation. For example, the proposals for legislative amendments as part of the Retail Investment Strategy are not consequently limited to retail investors. In some instances, it refers to retail investors and in other to investors. The interpretation could be that if in an article no limitation is made to retail investor, it will also include professional investors. Specific example is the cost disclosure. Under the MIFID quick fix cost disclosure requirements are alleviated in relation to professional investors. Now on the basis of the RIS MIFID proposals of the EC they could be reintroduced.

TEXT	ISSUE	EXPLANATION
Retail Investment Strategy, MiFID	Unnecessary complexity, Limitation/ impairment of entrepreneurial freedom	Instead of providing better information and understanding to the retail client, the proposed RIS framework is leading to comprehensive obligations in terms of disclosure regimes. This over-regulation leads to the customer being overloaded with information, that retail clients cannot properly grasp. Value for Money: the ESAs should elaborate delegated acts on benchmarks for the pricing of financial instruments. This kind of price regulation is very intrusive for the market.
RTS/ITS for liquidity management supervision		Introduction of the Additional Liquidity Monitoring Metrics in the ITS on Supervisory Reporting, and language contained in the LCR Regulation.
Sustainable Finance Framework (SFDR MiFID ESG, Taxonomy) SFDR level 2 MiFID level 2	Undue complexity Excessively detailed	Information to be provided to clients and requested from clients in the context of ESG is far too complicated and detailed. This is especially the case for retail clients. We refer especially to the disclosure required in Level II in the SFDR and intake of sustainability preferences of clients in MIFID ESG, whereby the client has to decide on up to 20 options (first step: yes or no, second step: between lit. a), b), c) or no further specification; third step: In case of lit. a) and b) at least three categories of minimum proportion or no further specification respectively; in the case of lit. c) at least five PAIs or no further specification). In the case of investment advice with portfolio approach or portfolio management detailed ESG preferences come into conflict with the necessity to diversify the portfolio. Moreover, ESG preferences are added as level II (Commission Delegated Regulation 2021/1253) despite being essential elements that should have been stipulated in Level I. Adding sustainability preferences on Level II is not in line with Article 290 TFEU and statements from the Court of Justice. Simplification with regard to information to be provided to clients/ investors, is needed. Instead of an overload of technical information on sustainable financial products and underlying investments, it is better to work with sustainability labels. The obligatory questions to be asked to customers to assess their related sustainability preferences (questions relate to SFDR and Taxonomy) are often not understandable for them. To avoid these difficult questions, many clients indicate not to have sustainability preferences.
SSM	Undue burden; mandate exceeded	**Example relating to the EBA 2025 Stress test.** The EBA announced that the results of the 2025 stress test, which will cover a period from 2025 to 2027, will display ratios established according to Basel IV standards which might however only be applicable in 2033, knowing in addition that certain transitional provisions may be extended and that others will be the subject of a review which could lead to their recasting. Calculating ratios which are not in force in a stress test is a source of very important load for SSM financial institutions
SSM	Legal protection against decisions of the ECB	According to Article 24(1) Regulation n° 1024/2013 ('SSM Regulation') the ECB shall establish an Administrative Board of Review for the purposes of carrying out an internal administrative review of the decisions taken by the ECB in the exercise of the powers conferred on it by this Regulation after a request for review submitted in accordance with paragraph 5 of Article 24. Pursuant to Article 24(5) any natural or legal person may in the cases referred to in paragraph 1 request a review of a decision of the ECB under this Regulation which is addressed to that person or is of a direct and individual concern to that person. According to Article 24(8) a request for review pursuant to paragraph 5 shall not have suspensory effect if the Administrative Board of Review does not consider suspending the application of the contested decision. This provision constitutes a massive lack of legal protection for banks which are addressees of decisions of the ECB as - in general - in the national administrative procedure laws of the MS legal remedies against administrative acts shall have suspensory effect. Only in exceptional cases is there no suspensory effect. This basic approach should apply to ECB decisions, too.
Transaction reporting MIFIR, EMIR, SFTR and MMSR Level 2, Level 3	Undue burden; Overlapping requirements	Based on specific regulations, for transactions in financial instruments, multiple transaction reporting regimes are introduced in the European Union, particularly under MIFIR, EMIR, SFTR and MMSR. The reporting requirements are partly similar/ overlapping and partly different. The specific requirements can be found in level 2 regulations and guidance/ Q & A of the ESA's. Over the years the reporting requirements have become increasingly detailed. It is a huge effort to comply with all these detailed requirements.
SSM Regulation n° 1024/2013	Lack of legal recourse against decisions of the ECB	The Regulation foresees that the ECB shall establish an Administrative Board of Review for the purposes of carrying out an internal administrative review of the decisions taken by the ECB. Any natural or legal person may request a review of a decision which is addressed or is of a direct and individual concern to that person. According to Article 24(8) a request for review pursuant to paragraph 5 shall not have suspensory effect if the Administrative Board of Review does not consider suspending the application of the contested decision. This constitutes a massive lack of legal protection for banks which are addresses of decisions of the ECB as - in general - in the national administrative procedure laws of the MS legal remedies against administrative acts have suspensory effect. Only in exceptional cases is there no suspensory effect.

Appendix 5
FOCUS ON SUSTAINABLE FINANCE

ISABELLE LOUIS AND PAULINE HASCOET

The acceleration in the inflation of European texts and its consequences in terms of complexity can be illustrated in the area of "sustainability".

The EU has adopted and initiated several directives and regulations in this area. The common aim of this body of legislation is to create a favourable and harmonised legal framework for channelling capital towards sustainable activities in the EU, incorporating sustainability into risk management and fostering transparency and long-termism.

However, this framework as a whole is immensely complex, being made up of texts that sometimes propose different definitions, vary in their implementation timetable and establish redundant obligations. Thus, the overall framework is extremely difficult to understand and apply.

To date, the European Action Plan on Financing Sustainable Growth has resulted in seven key legal instruments: the Taxonomy Regulation, the Sustainable Finance Disclosure Regulation (SFDR), the Corporate Sustainability Reporting Directive (CSRD), the EU Climate Benchmark Regulation, the EU Green Bonds Regulation as well as various ESG-Rules within the MiFID II Directive and the banking package (CRR3 / CRD6). Some of these are already in force, while others are still under negotiation or awaiting the publication of Level 2 texts or Level 3 recommendations.

This set of rules on sustainable finance is complemented by additional due diligence obligations and, for example, environmental law texts ("Fit for 55" package), which integrate financial services and/or announce their inclusion within the scope of the texts in question (i.e., the Directive on Corporate Sustainability Due Diligence, the Regulation against Deforestation, the Directive on the Energy Performance of Buildings, the Mortgage Credit Directive, which could introduce provisions on green mortgages).

The complexity of the regulatory framework poses problems of interpretation and implementation, resulting in legal risks and unjustified costs. This also applies to Level 2 acts - for example, MiFID's sustainability preferences have proved ineffective, or even counter-productive, for retail investors (see examples in Appendix 4); the European Sustainability Reporting Standards (ESRS) developed by EFRAG in line with the CSRD's mandate are extremely complex and time-consuming.

In addition, stakeholders have highlighted the problems associated with the sequencing of the various texts. The often late delivery of Level 2 legislation, FAQs and expected guidance makes it difficult for market players to understand and apply the requirements correctly and in a way that does not incur an undue burden and bureaucracy.

As regards the European supervisory bodies, each of them has produced a very elaborate and precise action plan and regulatory priorities in terms of sustainability, involving numerous technical publications, sometimes issued in several successive versions (in particular RTS), making it difficult to understand and then implement them.

- For example, ESMA has identified three priorities for its sustainable finance activities over the period 2022-2024: 1. combating money laundering and promoting transparency; 2. strengthening the capacity of national competent authorities (NCAs) and ESMA (multi-year training programme, active sharing of supervisory experience between NCAs, etc.); 3. monitoring, assessing and analysing ESG

markets and risks. ESMA intends to respond to these priorities with an exhaustive list of actions and publications in the following areas: investment management, investment services, issuer disclosure and governance, benchmarks, ESG credit ratings, trading and post-trading, and financial innovation.

- Similarly, the EBA has committed to a substantial regulatory action plan. These include, but are not limited to
  - Under CRR2 and CRD5, EBA must assess the potential inclusion of ESG risks in the Supervisory Review and Evaluation Process (SREP) - Pillar 2; develop a technical standard on ESG risk disclosure - Pillar 3; and assess the potential inclusion of ESG risks in Pillar 1 capital requirements.
  - Under the CRR3/CRD6 legislative proposals, the EBA has received in particularly the following mandates:
    - Article 87a (CRD6) would require EBA to specify the criteria for assessing ESG risks, including how they should be identified, measured, managed, and monitored, as well as how credit institutions should develop action plans to address ESG risks, conduct internal stress tests and determine the long-term negative impacts of these risks.
    - Article 98 (CRD6) would empower EBA to publish guidelines on the consideration of ESG risks in the SREP.
    - Article 100 (CRD6) would allow the EBA, in collaboration with the other ESAs, to develop common standards for ESG risk stress testing exercises.
    - Article 434a (CRR3) would extend EBA's mandate to develop implementing technical standards (ITS) concerning the content and format of ESG risk reporting to be submitted by small and non-complex institutions to the competent authorities, considering the principle of proportionality. Correspondingly, Article 449a (CRR3) extends disclosure obligations on ESG-risks to all banks. This will necessitate further work on ITS.
- From the ECB's point of view, it is worth mentioning that the guide to climate and environmental risk covers a very wide range of topics, and contains numerous recommendations and "expectations". Although they are intended to be non-binding, these recommendations can in practice be interpreted as monitoring measures, or even binding requirements applicable to the players concerned. The draft revised guide on governance and risk culture includes points relating to sustainable finance, particularly in terms of "good practices", which could in practice be considered by the ECB as "expectations"...

Appendix 6

ANALYSIS OF CJEU AND CONSEIL D'ÉTAT JURISPRUDENCE ON EUROPEAN SOFT LAW

FRANÇOIS BOUCARD AND DANIELA QUELHAS

In November 2018, the French Banking Federation ("FBF") filed with the French Conseil d'Etat a request for annulment of an ACPR Avis dated September 8th, 2017, by which it declared that it would comply with EBA guidelines on product oversight and governance arrangements for retail banking products1. These guidelines import, for these products (accounts, payment services, mortgage credit, etc.), the concept of "product governance" introduced by MiFID 22 for the marketing of financial products, later extended to insurance distribution by the Insurance Distribution Directive3, which refers to procedures (as part of the organisational requirements for investment firms) relating to the design, marketing and monitoring of products throughout their life cycle. For producers, it involves identifying the relevant target market of end clients and ensuring that all relevant risks to such identified target market are assessed and that the intended distribution strategy is consistent with the identified target market, operating a process for the approval of each financial instrument before it is marketed or distributed to clients and regularly reviewing financial instruments it offers or market.
This obviously entails significant costs. While regarding financial instruments and insurance products these new requirements were decided by the EU co-legislators in the relevant Level 1 acts, no such provisions are made in the Level 1 acts concerning retail banking products, which do not present the same type of risks. In addition, while investment firms had a few years to adapt their internal organisation and processes (the MiFID 2 proposal was published in 2012, the Directive was published in May 2014 and its entry into application, initially scheduled for January 2016, was postponed to January 2018), EBA guidelines concerning retail banking products were published in March 2016 with an implementation date set in January 2017.

Since the French legal system recognises the right to challenge soft law issued by French authorities4, the Conseil d'Etat first ruled in favour of the admissibility of the request files for annulment against the ACPR Avis5 on its compliance with the EBA guidelines, thus opening the possibility of referring the case to the ECJ for a preliminary ruling (provided there was a reasonable doubt as to the application of EU law).

In its judgment on the FBF v. ACPR case6, the ECJ ruled that soft law acts such as the EBA guidelines at hand fall under its scrutiny. Unfortunately, the Court did not follow the conclusions issued by Advocate General Bobek on the case7, ruling that the guidelines could not be the subject of an action for annulment under Article 263 of the Treaty on the Functioning of the European Union ("TFEU"), since they could not be regarded as producing binding legal effects vis-à-vis the competent authorities and did not, as such, entail binding effects vis-à-vis financial institutions.

However, the ECJ also ruled that it has authority to give a preliminary ruling on the validity of Guidelines under Article 267 TFEU yet concluding that the contested guidelines fell within the EBA's powers and that their examination disclosed no factor as to affect their validity. It pointed out that Regulation n° 1093/2010 provides a precise framework for the EBA's power to issue guidelines, based on objective criteria: "to accept that the

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[1] *EBA guidelines on product oversight and governance arrangements for retail banking products (EBA /GL/2015/18).*
[2] *Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.*
[3] *Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution.*
[4] *CE, 21 March 2016, Sté Fairvesta International GmbH et a., n° 368082, whereby the Conseil d'Etat stated that: "opinions, recommendations, warnings and positions adopted by regulatory authorities in the exercise of the missions entrusted to them [may be the subject of such an appeal] if they are likely to produce significant effects, in particular of an economic nature, or are intended to have a significant influence on the behaviour of the persons to whom they are addressed".*
[5] *E, 4 December 2019, FBF v. ACPR, n° 415550.*
[6] *CJEU, 15 July 2021, FBF v. ACPR, Case C911/19.*
[7] *Conclusions of advocate general Bobek in the case C-911/19, Fédération bancaire française (FBF)/Autorité de contrôle prudentiel et de résolution (ACPR), 15 April 2021.*

EBA may freely issue guidelines, irrespective of the specific framework established by the EU legislature, would be liable to undermine the allocation of powers between the institutions, bodies, offices and agencies of the European Union". The ECJ then held that the guidelines in question fall within the EBA's power to issue guidelines relating to the prudential supervisory obligations incumbent on institutions, as well as within the scope of the acts referred to or considered as such by Article 1(2) of Regulation n° 1093/2010, or they were necessary to ensure their consistent and effective application.
Following up on the ECJ's ruling, on December 21st, 2021, the Conseil d'État rejected1 the request for annulment filed by the FBF against the ACPR's Avis. Following the ECJ decision, it reiterated that guidelines hold no legally binding effects on financial institutions. As regards the contested ACPR Avis, since it had encouraged financial institutions to significantly modify their practices, the action for annulment against it was admissible. However, since the ACPR's Avis was, like the guidelines themselves, strictly speaking devoid of legally binding effects, the ACPR could not be regarded as having exceeded its own mandate when adopting the contested act. Finally, the Conseil d'Etat found that the request for annulment did not sufficiently establish the possible violations of national law by the ACPR, when expressing its willingness to comply with the guidelines via the adoption of the contested Avis.

The FBF, the Crédit Agricole and the ASF have also challenged the ACPR's decision of December 18th, 2020, by which it declared that it would partially comply with the EBA's May 29th, 2020, guidelines on loan origination and monitoring2. They also requested that the Conseil d'État refer various questions on the validity of the guidelines to the ECJ.

In these guidelines, the EBA requires among other things the lender to have "a single, consistent view of all of a customer's assets and liabilities held at an institution or a creditor on a consolidated basis, including information on all financial commitments, including their repayment history at the institution or the creditor" (paragraphs 90 and 247 of the Guidelines). However, if the same customer holds assets in legally distinct entities of the same banking group (whether in another institution of the same group or in an insurance or asset management subsidiary), the French law provisions on professional secrecy prohibit the lending institution from collecting information enabling it to implement this obligation. Although the ACPR has made it clear that its decision to comply with the guidelines does not extend to these paragraphs, it reserves the benefit of the partial non-compliance solely to institutions under its direct supervision, excluding French institutions directly supervised by the ECB. Another issue concerns the information and data to be considered for the assessment of the creditworthiness of the customer prior to granting a loan (mortgage or consumer credit). Annex II of the guidelines gives an exhaustive list of the information and documents to be collected from the applicant for the loan. The guidelines mention a general principle of proportionality, but this does not apply to Annex II, which is not covered. While the European co-legislators, whether in the successive directives relating to consumer credit or in the 2014/17 mortgage credit directive3, has left it to the lender to assess the elements to be taken into account in the context of the assessment of the creditworthiness of the customer, EBA adds, without a legal basis, a new obligation which applies uniformly to situations that are objectively very different (credit for the purchase of a main residence or for the purchase of a vacuum cleaner).

In a judgment dated July 22nd, 2022 (n° 449898), the Conseil d'État ruled that it was not necessary to refer the questions raised by the appellant to the ECJ4. Citing the ECJ ruling of July 15th, 2021 in case C-911/19, the Conseil d'Etat recalled that EBA guidelines have no legally binding effect, as the EBA only has the power to encourage institutions and not to adopt binding acts yet without mentioning paragraph 70 of the said ECJ ruling by which the Court stated that compliance with the guidelines may be considered when examining the individual situation of credit institutions.

The Conseil d'État went on to point out that the guidelines at issue "must be implemented in a proportionate manner, taking into account the different types of risk that may arise in the internal governance of credit institutions, in loan-granting procedures and in the valuation of real estate and movable assets that serve as collateral for a credit facility". Thus, notwithstanding their non-binding nature, the application of the guidelines, when determined, must be on a case-by-case basis and proportionate to the "types of risk" that are likely to arise.

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[1] CE, 21 December 2021, FBF v. ACPR, n° 415550.
[2] European Banking Authority, Guidelines on loan origination and monitoring, EBA/GL/2020/06, 29 May 2020.
[3] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.
[4] CE, 22 July 2022, FBF v. ACPR, n° 449898.

Surprisingly enough, the Conseil d'Etat then contended that financial institutions are the direct addressees of ESAs guidelines, are expected to make every effort to comply with them, regardless of the existence of a declaration of (partial) non-compliance with the said guidelines, issued by their national competent authority or the European Central Bank (ECB) or national competent authorities. In other words, the Conseil d'Etat seemed to admit that the acts issued by the ACPR to express its willingness to comply (totally or partially) with EBA guidelines do not have legal effects towards financial institutions, which is the precondition for any legal action taken against them to be admissible. Consequently, the Conseil d'Etat contradicted its own case law1: if such ACPR instruments now are considered as "transparent" in terms of legal effects towards financial institutions, why would any legal action taken against them be reviewable by the Conseil d'Etat?

As regards the legality of the guidelines themselves, the Conseil d'État considered that this question did not raise sufficient difficulty to justify a referral to the ECJ and, after reiterating that issuing guidelines falls within the EBA's power and scope of action, it stated that the guidelines at issue were not mandatory and that, in any event, their implementation had to be proportionate. In other words, it was because the guidelines were non-binding and only implemented on a case-by-case basis that they were valid.

[1] *See CE, 21 December 2021, FBF v. ACPR, n° 415550.*

INDICATIVE BIBLIOGRAPHY

F. Annunziata, *"The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni",* November 2021, European Banking Institute Working Paper Series 2021, n° 106, 2021.

Th. Bonneau, *« Le juge, l'ABE, la cryptolégislation et l'Etat de droit »,* Revue de Droit bancaire et financier, n° 4, juillet-août 2021, repère 4.

Th. Bonneau, *Régulation bancaire et financière européenne et internationale,* Bruylant, 6e éd., 2022.

A. Gourio et M. Gillouard, *« Autorité bancaire européenne - La CJUE entérine la fuite vers le droit souple »,* Revue de Droit bancaire et financier, n° 5, septembre-octobre 2021, comm. 141.

P. Hubkova, *"Judicial review of EU soft law: a revolutionary step which has not fully happened (Case note on BT v. Balgarska Narodna Banka, C-501/18)",* Revista General de Derecho Europeo, p. 174.

E. Jouffin, *« Arrêt du Conseil d'État du 22 juillet 2022 sur les orientations EBA du 29 mai 2020 relatives à l'octroi et au suivi des prêts : comprenne qui pourra… »,* Banque et droit sept.-oct. 2022, n° 205, p. 56.

H. Marjosola, M. van Rijsbergen et M. Scholten, *"How to exhort and to persuade with(out legal) force: Challenging soft law after FBF"*, Common Market Law Review 2022, p. 1523.

D. Quelhas, *"The relative normativity of European Supervisory Authorities' guidelines and their judicial review– A look at the FBF v. ACPR Case before the CJEU"*, RISF/IJFS 2021/4, p. 100.

D. Quelhas, *"The hazards of ESAs guidelines judicial review: direct applicability of the EBA guidelines and the position of the French Conseil d'Etat",* EU Law Live 19 sept. 2022.

D. Quelhas, *"The EBA guidelines on retail banking products' saga learnings from an attempt at European Supervisory Authorities guidelines' judicial review",* EU Law Live, Weekend Edition, 23 April 2022, n°97.

D. Quelhas, *"EBA recommendations' referability and limited invocability, the difficult road towards EU soft law judicial review A look at the BT v. BNB case"*, International Journal for Financial Services (IJFS), Jan 1, 2023.

A.-C. Rouaud, *« L'arrêt du Conseil d'État relatif aux orientations de l'ABE sur l'octroi et le suivi des prêts : un pas en arrière concernant la justiciabilité des actes de droit souple des Autorités européennes de surveillance ? CE, 9e – 10e ch. réunies, 22 juillet 2022, n° 449898, FBF, ASF et CASA c. ACPR »,* Rev. juridique de la Sorbonne déc. 2022, n° 6, p. 40, https://irjs.pantheonsorbonne.fr/revue-juridique-sorbonne-ndeg6.

A.-C. Rouaud et J. Stoufflet, *Droit bancaire,* LexisNexis, 10e éd., 2023.

Th. Samin et S. Torck, *« Les orientations de l'ABE sur la gouvernance des produits bancaires de détail devant la CJUE : une validation au forceps »*, Revue de Droit bancaire et financier, n° 5, septembre-octobre 2021, comm. 122.

Appendix 7

PROPOSALS TO AMEND THE REGULATIONS ESTABLISHING THE ESAS TO STRENGTHEN THE AUTHORITIES' CONSIDERATION OF THE IMPACT OF THEIR ACTIVITIES ON THE EU'S INTERNATIONAL COMPETITIVENESS

DANIELA QUELHAS AND ELISABETH DELAHOUSSE

Recital 13 of the preamble to the ESAs Regulations is currently worded as follows:

"The Authority should take due account of the impact of its activities on competition and innovation within the internal market, on the Union's global competitiveness, on financial inclusion, and on the Union's new strategy for jobs and growth."

Note that the regulation also states that:

"The objective of the Authority shall be to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses."... The Authority shall contribute to "promoting equal conditions of competition".

The ESAs must carry out their missions and tasks in light of these provisions, which may be supplemented to reflect the concerns and recent work of the Union's institutions in this area, including, inter alia:

- The guidelines set out by the Commission in its communication of 16 March, 2023, "The EU's long-term competitiveness: looking beyond 2030";
- The conclusions of the European Council of April 17-18, 2024, on the "New European Competitiveness Deal".

Drawing on this work and the recent reports on the competitiveness of EU industry mentioned previously in this report, the following elements would be added to the current Recital 13, common to all three ESA regulations:

"In particular, the Authority should take into account the principles identified by the European Council and the Commission when establishing the "Single Rulebook". The guidance set out by the Commission in its Communication of 16 March 2023 entitled "The EU's long-term competitiveness: Looking beyond 2030", aimed at ensuring the attractiveness of the Union and maintaining its position in the global economy, should be followed by the Authority. In particular, the Commission affirms the importance of a regulatory framework conducive to growth, based on the introduction of a new competitiveness control. This would ensure that the impact assessments of legislative proposals consider the expected effects of each proposal on price and cost competitiveness, international competitiveness, and capacity for innovation. The Commission also reiterates the need to better assess the cumulative effects of the various measures adopted at EU level with a view to developing a methodology, for example by insisting on the 'one up, one out' approach which aims to avoid unnecessary burdens by ensuring that the administrative costs incurred, for instance, by information obligations are compensated for in the same policy area. The Authority should also follow the Commission's leadin actively examining the ""Single Rulebook" to determine whether it is fit for purpose and more conducive to innovation. In the same spirit, the Authority should take into account the conclusions of the European Council of 17 and 18 April 2024 on the "New Competitiveness Deal ", which call for a significant reduction in the administrative and regulatory burden on businesses and national authorities, the avoidance of over-regulation and the enforcement of EU rules and underline the importance of correct and timely implementation of EU legislation by Member States, avoiding over-transposition. A regulatory committee should be set up by the Authority to examine whether the single rulebook meets the objective of growth and competitiveness, the progress made and what the implementation of this competitiveness objective could mean for the financial services sector in the Union. To this end, the Committee should examine the balance between the objectives of financial stability, regulatory harmonisation, and competitiveness, and assess the extent to which the Authority has consulted effectively with industry regarding this secondary objective of growth and competitiveness. It should also determine how the Authority could draw on examples of regulatory policies in other jurisdictions to help implement

this objective of competitiveness and growth. The Committee should publish its findings in an annual report, which should be made public, and the conclusions should be presented during annual hearings by the European Parliament."

Competitiveness could also be mentioned more specifically in the body of the regulation.

In Article 1(5) of the ESAs Regulations, a new subparagraph could thus be added :
([•]) promoting and supporting the competitiveness of financial markets."

In addition, in Article 8 paragraph 3 of the ESAs Regulations, regarding the tasks and powers of the Authority, the insertion of a subparagraph 3 is proposed:

"For the implementation of the acts listed in paragraph 2, the Authority shall monitor the competitiveness of those acts, to facilitate:

a. the international competitiveness of the EU economy (including, in particular, the financial services sector), and
b. its medium and long-term growth".

Appendix 8

SUGGESTIONS FOR IMPROVING THE CONSULTATION PROCESS

ELISABETH ROUSSEAU

The adoption process for Level 2 and 3 texts is still too opaque and does not allow for sufficient participation by the parties concerned by the texts in question, or for any legitimate objections they may have to be considered.
The distance taken by EU institutions and/or agencies from the operators concerned, while a guarantee of independence, does not allow for a proper exchange of views on the impact of the proposals,, thus generating numerous difficulties and misunderstandings.
Greater transparency in the drafting of texts and more open dialogue with the stakeholders concerned would therefore be desirable.
To this end, a few avenues could be explored.

1. DISCUSSION POINTS

To support and underpin this discussion, several benchmarks and principles have been identified in European regulations, in particular in the context of the work on "Better Regulation" (guidelines and toolbox), which led the Commission itself to set out broad principles and clear, explicit standards on the value and characteristics of public consultations.
For a long time now, the Commission has expressed a clear commitment to improving the public consultation process.

A. 2002 COMMUNICATION FROM THE EUROPEAN COMMISSION

In the 2002 Communication from the European Commission entitled:

Communication from the Commission – Towards a strengthened culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission / COM/2002/0704 final */*[1]

It is very interesting to note the objectives, principles, and standards it has set itself and which it is adopting for consultation under an "action plan for better regulation" and for a new approach to impact assessment.
The Commission's main objectives for public consultation are:

- To encourage greater stakeholder involvement through a **more transparent consultation** process, which will strengthen the Commission's accountability.
- To define **general standards and principles enabling the Commission to rationalise its consultation procedures and to carry them out in a relevant and systematic way.**
- To establish a consultation framework that is coherent but sufficiently flexible to take account of the specific requirements of the various categories of interest, as well as the need to **develop appropriate consultation strategies** for each policy proposal.
- To encourage mutual learning and the exchange of best practice within the Commission.

In this communication, the Commission also highlights the general principles of consultation:

- **Participation**
  "The quality [...] of the Union's policies depends on the broad participation of citizens at all stages, from the design to the implementation of policies."
- **Openness and responsibility**
  "The [European] institutions should operate in a more transparent way [...] to improve confidence in complex institutions"... "Each EU institution must explain its action within Europe and take responsibility for it".
- **Efficiency**
  "Measures must be effective and timely; they must produce the required results".
  "To be effective, consultation should take

[1] *EUR-Lex - 52002DC0704 - FR (europa.eu)*

place as early as possible. The involvement of interested parties in the development of a policy should therefore begin at a time when they can still influence the definition of the main objectives, implementation methods, performance indicators and, where appropriate, the initial outlines of the policy. Several phases of consultation may be necessary.

The prerequisite for effectiveness is respect for the principle of proportionality. The method and scope of consultation must therefore always be proportionate to the impact of the proposal and must take account of its specific constraints".

- **Coherence**

  "The policies pursued and the actions undertaken must be consistent [...]. The Commission will ensure the consistency and transparency of the consultations carried out by its departments. It will include mechanisms for feedback, evaluation, and analysis. This will be achieved through appropriate coordination and reporting on the Commission's better regulation activities."

  "The Commission encourages interest groups to set up their own monitoring mechanisms in order to learn from this process and ensure the effectiveness of their contribution to a transparent, open and accountable system."

This communication also lays down minimum standards on the subjects of:

- **The clarity of the subject of the consultation**

  Particularly noteworthy is the focus on the following elements:

  - summary of the context, scope and aims of the consultation, description of specific issues open to debate or those of particular importance to the Commission, details of hearings, meetings, or conferences, contact details, deadlines, explanation of how the Commission deals with contributions, information likely to be expected in return, details of next steps in policy development, references of relevant documents not attached.

- The target group for the consultation

  Note particularly the focus on the following elements:

  - Identification of the targets concerned, of those involved in implementation, of anybody which, by virtue of its well-known objectives, has a direct interest, taking account of the overall impact in other policy areas or of consumers and, where appropriate, taking account of the need for specific experience, expertise or technical knowledge, of the need to involve non-organised interests, of the need to incorporate contributions from participants in previous consultations, and of the need to maintain a fair balance between representatives. Where appropriate, the Commission encourages contributions from interested parties organised at European level.

  - Where a formal or structured consultation body already exists, the Commission should ensure that its composition accurately reflects the sector represented. Where this is not the case, the Commission should consider how to ensure that the interests at stake are considered (for example, through other forms of consultation).

- **Publication**

  Note particularly the focus on the following elements:

  - Ensure adequate publicity for awareness-raising purposes and adapt its means of communication to the needs of the target audience.

  - A single point of access to all relevant information and documents.

- **Participation timelines**

  Note particularly the focus on the following elements:

  - Allow sufficient time for the organisation and receipt of responses to invitations and written contributions. (at least 8 weeks for responses to written public consultations and 20 working days' notice for meetings).

  - A consultation period longer than eight weeks may be necessary (to take account of: the need for European or national organisations to consult their members to present a consolidated point of view, the specific nature of a given proposal, the diversity of interested parties, the complexity of the issue under consideration, the main holiday periods).

- **Acknowledgement of receipt and feedback**

  Note particularly the focus on the following elements:

  - An acknowledgement of receipt of contributions must be provided. The results of the open public consultation must be published.

  - Depending on the number of contributions received and the resources available, the acknowledgement of receipt may be in the following form:

    • an individual response

    • a collective response

  - The contributions are carefully analysed to determine whether - and to what extent - they should be considered. They are then published.

  - Feedback is given to the parties who

responded to the consultation and to the public. An explanation is also given of how the consultations were carried out and how the results have been considered in the proposal. The results of the consultations carried out as part of the impact assessment process will be summarised in the reports.

B. THE GUIDELINES AND THE "BETTER REGULATION" TOOLBOX

If we refer directly to the more recent guidelines and the Better Regulation toolbox:

- Better Regulation - Guidelines 2021- (see Chapter II)[1]
- Better Regulation - Toolbox 203 Chapter 7 "Stakeholder Consultation[2]

The very essence of the principles and standards laid down in 2002 has been reiterated and reaffirmed.

Four **general** consultation **principles are** therefore confirmed in Better Regulation:

1. Participation :
- an inclusive approach consulting as widely as possible.

2. Openness and responsibility:
- to ensure a transparent consultation process;

2. Efficiency:
- to ensure that the consultation takes place at an appropriate time - when the views of stakeholders can still make a difference, taking into account proportionality and any constraints that may be highlighted.

4. Consistency:
- consultation processes, analyses, reviews, and quality controls

These principles are supplemented by **five** minimum **standards** that apply to all consultations:

1. A clear consultation process
- all consultation documents must be clear and concise and include all the information needed to facilitate responses, with details for technical questions.

Box 3. General principles and minimum standards for consultation

Relations with stakeholders are governed by **four general principles**:

- *participation* – take an inclusive approach by consulting as widely as possible;
- *openness and accountability* – make the consultation process and how it has affected policymaking transparent to those involved and to the general public, including to persons with disabilities;
- *effectiveness* – consult at a time when stakeholder views can still make a difference, taking account of proportionality and specific restraints; and
- *coherence* – ensure the consistency (across all services) of consultation processes, analysis, review and quality control.

These principles are complemented by **five minimum standards** that apply to all consultations:

- ✓ *clarity* – all consultation documents should be clear and concise[43], and include all necessary information to facilitate responses. It is advised that questionnaires that are very technical in nature include a set of more general questions for non-specialists;
- ✓ *targeting* – ensure that the consultation strategy targets all interested parties so that they have an opportunity to express their opinions;
- ✓ *outreach* – ensure adequate awareness-raising and publicity, and adapt communication channels to the needs of all target audiences. Without excluding other communication tools, public consultations should be published on the '*Have Your Say*' web portal (the 'single entry point')[44];
- ✓ *sufficient time for participation* – allow sufficient time for planning and responses to invitations and written contributions. As a rule, 'calls for evidence', which include public consultations, are published for 12 weeks; and
- ✓ *publication of contributions and results* – of public consultations on the '*Have Your Say*' web portal and, if possible, on DGs' websites (with an appropriate link to '*Have Your Say*')[45].

[1] *swd2021_305_en.pdf (europa.eu)*
[2] *BRT-2023-Chapter 7-Stakeholder consultation_0.pdf (europa.eu)*

2. **Targeted consultation**
   - to ensure that interested parties have the opportunity to express their views.
3. **Transparency/dissemination**
   - to ensure adequate information and publicity and to adapt its communication channels to reach interested parties without excluding any means of communication.
4. **Enough time to participate**
   - to allow time to get organised and respond to the consultation.
5. **Publication of the results of the contributions**

C. COMMISSION STAFF WORKING DOCUMENT OF 15 APRIL 2019[1]

In its report "Commission Staff working document" of 15 April 2019 - Taking stock of the Commission's Better Regulation Agenda, the Commission points out that its consultation policy **"also serves to promote legitimacy, help identify obstacles in the implementation of European rules and avoid the drafting of technocratic rules".**
The Commission is therefore advocating a win/win model for consultation.

D. PARLIAMENTARY REPORT OF 27 OCTOBER 2023[2]

Much more recently, the European Parliament published its report of 27 October 2023 on the adequacy, subsidiarity, and proportionality of EU regulation - the Better Regulation report covering the years 2020, 2021 and 2022.
The aim of this report on subsidiarity and proportionality is to analyse the application of these principles by the European institutions and their partners, with a view to meeting the expectations of citizens and their national institutions as fully as possible.
With a focus on better regulation and the development of EU legislation for a more efficient single market, the report highlights that:

- **impact assessment is an essential tool** in the better regulation programme.
  - to ensure compliance with the principles of subsidiarity and proportionality and that it is used to promote accountability for Commission initiatives likely to have a significant economic, social, or environmental impact; calls on the Commission to carry out gender impact assessments when designing legislative proposals.
- **the quality of the EU's regulatory framework** is essential.
  - for the Union's competitiveness.
- In the absence of a **coherent and comprehensive set of codified rules of good administration applicable throughout the Union,** it is difficult for citizens and businesses to fully understand their rights under Union law.
  - Considers that codifying the rules of good administration would strengthen citizens' rights and transparency and respond to the need for investment and reform in the European Union; calls on the Commission to present a legislative proposal on a European law of administrative procedure, considering the steps it has taken in this area.
- Insists that the purpose of the **Scrutiny of Regulations Committee** is to ensure effective, independent, and impartial scrutiny of the Commission's work; calls, in this regard, for the Committee's independence to be strengthened, including by ensuring a balanced composition that reflects a wide range of experience and expertise.
  - Calls for greater transparency on the part of the Committee, including the publication of all its opinions immediately after adoption, the declaration of meetings with interest groups and the compulsory use of the transparency register by its members; insists that, while the Commission should take account of the Committee's opinion in order to improve its impact assessments, evaluations and quality assessments, this should in no way undermine the Commission's capacity for legislative initiative; calls for closer cooperation between the Committee and the co-legislators.

The framework thus provided for public consultations by the European Commission already offers many solutions that seem to respond directly to the concerns expressed in relation to the current public consultation process observed with the ESAs.

[1] *EUR-Lex - 52019SC0156 - EN - EUR-Lex (europa.eu)*
[2] *exts adopted - Better lawmaking report covering the years 2020, 2021 and 2022 - Thursday 23 November 2023 (europa.eu)*

2. SUGGESTIONS FOR IMPROVING THE ESA CONSULTATION PROCESS

Based on these concrete elements, and in adopting the European Commission's approach, several avenues could be explored to improve the ESAs' public consultation process by increasing the "transparency", "confidence" and "coherence" of their actions. They are presented below.

Make consultations systematic and clear consultation prior to the adoption of all draft technical standards and acts of flexible law

- Identifying target groups
- Ensure a principle of "responsibility".
- Ensure "appropriate coordination" at "all stages from design to implementation".

Systematically carry out impact studies, which are considered an essential element, particularly for reasons of competitiveness

- **To ensure** that "the principles of subsidiarity and proportionality are respected and that it is used to promote the responsibility of initiatives".

Guarantee the effectiveness and efficiency of the consultation process by ensuring that

- **the timelines for participation are adapted to the time required for the examination of and response to the consultation,** so that the consultation takes place at an appropriate time, *i.e.,* a **time when the views of the stakeholders can still make a difference,** taking into account the difficulty of the subjects dealt with, the importance of their impact, proportionality and the constraints and obstacles to implementation that may be identified by the stakeholders:

  "To be effective, consultation should take place as early as possible. The involvement of interested parties in the development of a policy should therefore begin at a time when they can still influence the definition of the main objectives, methods of implementation, performance indicators and, where appropriate, the initial outlines of the policy. Several phases of consultation may be necessary".

  If necessary, the timelines may be longer than the standard rule.
- **consultation is fully accessible.**
  - If the consultation is not translated into the language of each Member State (in practice, it is generally drafted in English), it should at least be accompanied by a glossary and precise definitions of the main terms used, to avoid misinterpretations and misunderstandings.
- **contributions are « carefully analysed »**

Strengthening dialogue

- **Create closer interactions** with stakeholders.
- **Develop intermediate stages** between the launch of the consultation, the hearing, and the final publication, to create places and times for exchanges and technical and operational debates (Expert Workshops, conferences, etc.).
  - "Put in place a consultation framework that is consistent but sufficiently flexible to take account of the specific requirements of different categories of interest, as well as the need to develop appropriate consultation strategies for each policy proposal."

Improve publication of the results of contributions:

- The ESAs should set out their observations and comments clearly and concretely in a dedicated, published document, and ultimately justify why they have or have not taken on board the suggestions and recommendations made by the experts, professionals and consumers consulted.
- The results of the consultations could therefore be made public within a maximum period of two months from the end of the consultation period.
- Provide analytical summary reports to supplement the very factual reports that may be produced in response to a consultation.
  - "Feedback is given to the parties who responded to the consultation and to the general public. As well as explanations of how the consultations were carried out and how the results have been considered in the proposal. The results of consultations carried out as part of the impact assessment process will be summarised in reports".
- By considering the quality of the stakeholders and the reliability and credibility of their responses to introduce a form of weighting in the assessment of responses to the consultation according to the interest and impact of the stakeholders. Better Regulation tools identify this as an area for consideration when interpreting data.

The Commission distinguishes four categories of stakeholders who have an influence on the assessment of results:

- stakeholders with a high level of influence, but little at stake in the text being drafted.
- those with a high level of influence and a major stake in the text being drafted.
- stakeholders with a low level of influence and little at stake, and
- those with a low level of influence, but with a lot at stake.

Stakeholders can also be considered according to their position within their category (based on their size, location, and activities) to help assess their level of influence in the decision-making process and the value and usefulness of their intervention.

Box 2. Interpretation of data – key aspects

Consultations aim to gather evidence, which is used as input for policy preparation and contributes to informed decision-making. It is therefore **essential to provide the right context of the consultation when presenting the outcome**, including information on who participated and whom respondents represent:

- when analysing[790] and presenting the results, **distinction should be made between the different stakeholder categories** that contributed to the consultation. A short description should be provided about the different stakeholders (background, whom they represent, etc.);
- do, preferably, the **'stakeholder credibility test'** and consider its outcome in the analysis:
  - *longevity*: Has the stakeholder organisation been established long enough to acquire the wisdom in the policy field?
  - *expertise*: How well does it know the subject matter?
  - *representativeness*: Who exactly does it represent and how well does it do so?
  - *track record*: How useful/credible has its contribution been in the past?
  - *reputation*: How seriously do other people take this organisation?
- contributions from **citizens** should be analysed as a separate stakeholder category;
- **campaigns should be identified** and the relevant responses should be segregated, analysed and presented separately from the non-campaign responses (see para 1.2.2);
- **avoid using only percentages** when presenting results; they should be linked to the corresponding amount of responses (see para 1.3.1).

Provide for individual responses (in addition to a collective response summarising the overall position)

- To enable each stakeholder to assess directly and specifically whether the elements raised have been considered - at least when the response to the stakeholder's consultation is remarkably unusual.

Provide for a self-assessment of ESAs' compliance with their mandate:

- This self-assessment would complement the feedback from the ESA consultation. Its goal is:
  - Compliance with general principles and consultation standards
  - Respecting the limits of their mandate
  - Checking that the text is consistent with the existing regulatory framework.

Managing the consultation process:

- To guarantee the legal certainty of the consultation process, it is proposed that a consultation system be established, setting out the resources, deadlines, objectives, the requirement for the various texts to be permanently consistent with each other, and the general principles and rules governing the ESA consultation process.
  - "Codify the rules of good administration".
  - "The Commission encourages interest groups to set up their own monitoring mechanisms in order to learn from this process and ensure the effectiveness of their contribution to a transparent, open and accountable system".
  - "Define general principles and standards to enable the Commission to rationalise its consultation procedures and carry them out in a relevant and systematic way.
- Create an obligation for ESAs to publish in their annual report a chapter on their activity relating to public consultations, specifying the points of disagreement encountered with stakeholders.

Create an independent body to monitor the consultation process.

- See the Regulatory Scrutiny Board.

Appendix 9

ANALYSIS OF THE REASONED OPINION PROCEDURE UNDER ARTICLE 60A OF THE ESA REGULATIONS AND PROPOSED AMENDMENTS TO ARTICLES 16 AND 60A OF THE ESA REGULATIONS AND TO ARTICLE 54 OF THE AMLA REGULATION

DANIELA QUELHAS AND ANNE-CLAIRE ROUAUD

The 2019 revision[1] of the ESAs Regulations introduced a new Article 60a entitled *"Excess of jurisdiction by the Authority"* which states that *"Any natural or legal person may send reasoned advice to the Commission if that person is of the opinion that the Authority has exceeded its jurisdiction, including by failing to comply with the principle of proportionality referred to in Article 1r (5), when acting under Articles 16 and 16b, and that this concerns that person directly and individually."*

It seems that this new right has never been applied. As the wording of this provision is particularly terse, it is difficult to assess the effectiveness of such a mechanism for financial and credit institutions.

1. The first uncertainty relates to the conditions of admissibility laid down in this text. The cumulative conditions relating to the existence of a direct and individual link between the applicant and the excess of jurisdiction would, if interpreted in the same way as in the context of an action for annulment under Article 263 TFEU, give rise to a high risk of inadmissibility.

The twofold - cumulative - condition of direct and individual concern echoes Article 263(4) TFEU, which lays down the rules of admissibility applicable to natural and legal persons seeking the annulment of an act of European law[2]. The classic case law in this area, established in 1963 and from which the Court has never departed[3], requires:

- That the act in question be of such a nature as to **directly** affect the position of the legal person, **without the application of other intermediate rules.** If intermediate rules are nevertheless necessary for the implementation of the act, the national authority must have no room for manoeuvre, no discretion. **However, the competent authorities in each Member State do have discretionary powers when implementing the guidelines,** since they can declare themselves to be compliant, partially compliant, or not compliant at all.
  In any event, because the institutions remain free to deviate from the guidelines and from the act of reception into national law if they give reasons for their position, it cannot be said that the guidelines apply "directly" to them.
  Consequently, if we adhere to the case law relating to annulment proceedings under Article 263(4) TFEU, it cannot be said that an institution, taken individually, satisfies the condition of being directly affected. As the two conditions are cumulative, there is a real risk of inadmissibility to the reasoned opinion procedure.
- A person **other than the person to whom** the act is **addressed** must, to be individually concerned, be affected by the rule by reason of certain qualities peculiar to him or her, or of factual situations which characterise him or her, in a manner analogous to that of the person to whom the act is addressed[4].

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[1] *Regulation n° 2019/2175 of the European Parliament and of the Council of18 December 2019 amending Regulation (EU) n° 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) n° 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) n° 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) n° 600/2014 on markets in financial instruments, Regulation (EU) n° 2016/1011 on indices used as benchmarks in financial instruments and contracts or to measure the performance of investment funds and Regulation (EU) n° 2015/847 on information accompanying transfers of funds.*

[2] *Excluding regulatory acts not involving implementing measures, for which only the criterion of direct effect is required. It should also be noted that Article 263(4) refers only to acts producing legal effects, to the exclusion of acts issuing opinions and recommendations within the meaning of Article 288 TFEU. We are therefore reasoning here by analogy, based on terminology whose scope is firmly established in case law.*

[3] *CJEU, 15 July 1963, Plaumann v. Commission, case 25/62. See more recently: CJEU, 17 September 2015, Confederazione Cooperative Italiane et al C. Anicav et al, C-455/13 P:* "in accordance with the settled case-law of the Court of Justice, the condition that the contested decision must be of direct concern to a natural or legal person, as laid down in the fourth paragraph of Article 263 TFEU, requires that the contested EU measure must directly affect the legal situation of the individual and leave no discretion to its addressees responsible for implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules" *(see paragraph 46).*

[4] *The condition, laid down in the aforementioned* Plaumann *judgment, is reiterated very regularly, see for example: CJEU, judgment of 17 September 2015,* Mory and Others v Commission, *C-33/14 P, paragraph 93.*

Institutions do not seem to satisfy the second condition any better when the guidelines indicate that they are intended for them.

The institutions therefore do not meet the cumulative conditions of Article 60a, assuming that their meaning is modelled on the relevant case law of the CJEU.

Paradoxically, they are designated as "addressees" in most ESA guidelines. But Article 60a of the ESAs Regulations makes no mention of this when determining access to the reasoned opinion procedure.

Did the drafters of Article 60a intend to restrict access to the reasoned opinion procedure to the competent authorities alone? Probably not, since they are also the addressees of the guidelines, and therefore do not satisfy the twofold condition set out in Article 60a. To conclude that neither the institutions nor the competent authorities would be entitled to submit a reasoned opinion to the Commission seems absurd: it is hardly likely that the drafters of the text intended to devise a procedure to... close off access to it. Unless we assume that a reasoned opinion is admissible only in respect of, for example, an institution that has been the subject of a sanction explicitly taken based on a guideline, but this seems highly unlikely: an act that only has the value of a recommendation, even a European one, cannot be the basis for a sanction.

Given the imprecise nature of Article 60a, the words "directly and individually" probably refer to the "addressees" of the guidelines, *i.e.,* the competent authorities and the institutions, although, in the absence of any previous experience on the subject, we cannot completely rule out the risk of inadmissibility.

2. A second uncertainty relates to the modalities and effects of this procedure. No formal requirements are laid down for the procedure, nor is there any time limit. In particular, the Article does not specify the powers of the Commission for the purposes of examining the legality of the guidelines referred to it: can it annul them, substitute its assessment for that of the ESA concerned, or should it confine itself to issuing an opinion? Does its assessment constitute an act that the rejected petitioner can appeal, or does the silence of Article 60a mean that the exchange between the petitioner and the Commission is not subject to any judicial review?

In the absence of any power to do so, the Commission cannot, on its own, annul the guidelines of an ESA, even if an illegality is found. The measures available to the Commission, such as submitting a proposal for a Level 1 text, take more time.

Proposed amendments to Articles 16 and 60a of the ESAs Regulations

NB: The proposed amendments to Article 16 of the ESAs Regulations also apply to Article 54 of the AMLA Regulation, which is worded identically. Regarding the reasoned opinion procedure, it is proposed to amend Article 60a of the ESAs Regulations and to insert identical provisions in the AMLA Regulation.

CURRENT WORDING	PROPOSED CHANGES	COMMENTS
	Article 16 **Guidelines and recommendations**	
1. The Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines addressed to all competent authorities or all financial institutions and issue recommendations to one or more competent authorities or to one or more financial institutions. Guidelines and recommendations shall be in accordance with the empowerments conferred by the legislative acts referred to in Article 1(2) or in this Article.	1. The Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines addressed to all competent authorities or all financial institutions and issue recommendations to one or more competent authorities or to one or more financial institutions. Guidelines and recommendations shall be in accordance with the empowerments conferred by the legislative acts referred to in Article 1er, paragraph 2 **in areas not covered by technical regulatory or implementing standards. They shall respect the principle of proportionality and take full account of the diversity of financial institutions, their size and business model, and the systemic benefits of diversity in the EU banking sector.**	*Another option would be to stipulate that the guidelines and recommendations are addressed solely to NCAs, and not to institutions. However, this would have an impact on the ability of institutions to use the reasoned opinion procedure (art. 60a).* *So there is a trade-off here between two possible solutions that are not compatible with each other.* *The reference to the areas covered by the RTS/ITS comes from Recital 26 of the ESAs Regulations.* *The wording relating to the principle of proportionality is based on Recital 17 of the SSM Regulation.*
2. The Authority shall, where appropriate, conduct open public consultations regarding the guidelines and recommendations which it issues and analyse the related potential costs and benefits of issuing such guidelines and recommendations. Those consultations and analyses shall be proportionate in relation to the scope, nature and impact of the guidelines or recommendations. The Authority shall, where appropriate, also request advice from the Banking Stakeholder Group referred to in Article 37. Where the Authority does not conduct open public consultations or does not request advice from the Banking Stakeholder Group, the Authority shall provide reasons.	2. **Except in cases of urgency duly substantiated prior to the adoption of guidelines or recommendations,** the Authority shall conduct open public consultations regarding the guidelines and recommendations which it issues and shall analyse the related potential costs and benefits of issuing such guidelines and recommendations. Those consultations and analyses shall be proportionate in view of the scope, ~~**nature, impact**~~ **and purpose** of the guideline or recommendation. **The Authority shall notify the public of the consultation by making the draft guidelines and recommendations available on its official website.** **The consultation shall be organised in due course and over a sufficiently long period to enable those who wish to participate to do so. Within the same timeframe, the Authority shall also seek the advice of the Banking Stakeholder Group referred to in Article 37. Their aggregated and anonymised comments are to be included in the document prepared by the Authority in response to the consultation.**	*The aim is to make it clear that public consultation and consultation with the group of interested parties are the principle and that the Authority can only dispense with them in exceptional cases.* *The addition is based on proposals from the Research Network on EU Administrative Law (ReNUEAL), available here : "Briefadresse (reneual.eu)* *See page 90.* *Alternative: instead of "The consultation shall be organised in due course and over a sufficiently long period to enable those who wish to participate to do so", provide that "the consultation period shall last at least three months".*

CURRENT WORDING	PROPOSED CHANGES	COMMENTS
2a. Guidelines and recommendations shall not merely refer to, or reproduce, elements of legislative acts. Before issuing a new guideline or recommendation, the Authority shall first review existing guidelines and recommendations, to avoid any duplication.	2a. Guidelines and recommendations shall not merely refer to, or reproduce, elements of legislative acts. Before issuing a new guideline or recommendation, the Authority shall first review existing guidelines and recommendations, to avoid any duplication **and inconsistency. Where appropriate, it will remove previous guidelines or recommendations.**	*In line with the principles of Better Regulation, the aim is to remove soft law that has become obsolete and to ensure compatibility and consistency between the various texts.*
3. The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations. Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons. The Authority shall publish the fact that a competent authority does not comply or does not intend to comply with that guideline or recommendation. The Authority may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation. The competent authority shall receive advanced notice of such publication. If required by that guideline or recommendation, financial institutions shall report, in a clear and detailed way, whether they comply with that guideline or recommendation.	3. The competent authorities ~~**and financial institutions**~~ shall make every effort to comply with those guidelines and recommendations. Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons. The Authority shall publish the fact that a competent authority does not comply or does not intend to comply with that guideline or recommendation **and the reasons given by the competent authority for not complying with the guideline or recommendation in question.** **In the report referred to in Article 43(5), the Authority shall inform the European Parliament, the Council and the Commission of the arrangements for incorporation at national level of the guidelines and recommendations by the competent authorities.** **3a. Financial institutions shall make every effort to comply with those guidelines or recommendations insofar as the competent authority has indicated that it will comply with them and provided that these guidelines or recommendations comply with European Union law and are compatible with the national law of the Member State concerned.** **Financial institutions may deviate from the guidelines and recommendations if the objectives pursued by the legislative act on the basis of which the guidelines or recommendations were adopted are achieved by other means.**	*The aim is to make a clear distinction between the scope of the guidelines and recommendations for NCAs and for institutions, with the latter being dealt with in a separate paragraph.* *The aim is to ensure the systematic publication of the reasons given by ACN for not complying.* *The aim is to have a clear map of the instruments of incorporation, where applicable, to have greater transparency on the real legal effects of the guidelines and recommendations at Member State level.* *The provisions of this new paragraph are crucial in clarifying the scope of the guidelines (or recommendations) for institutions and bringing them into line with the national authorities' comply or explain requirements. By "doing everything possible", we mean "making their best efforts".* *These are the objectives of the Level 1 text and not the objectives set by the EBA in its guidelines.*
4. In the report referred to in Article 43(5), the Authority shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations that have been issued.	4. In the report referred to in Article 43(5), the Authority shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations that have been issued. **The report shall systematically set out the reasons given by the competent authority for not complying with the guidelines or recommendations issued.**	*In line with the provisions inserted in paragraph 3 aimed at ensuring the systematic publication of the reasons given by the ACN for not complying.*

CURRENT WORDING	PROPOSED CHANGES	COMMENTS
	Article 60a **Exceeding of competence or power by the Authority**	
Any natural or legal person may send reasoned advice to the Commission if that person is of the opinion that the Authority has exceeded its competence, including by failing to respect the principle of proportionality referred to in Article 1(5), when acting under Articles 16 and 16b, and that is of direct and individual concern to that person.	1. Any natural or legal person **to whom an act adopted on the basis of Articles 16 or 16b is addressed may, within two months of the publication of such act,** send reasoned advice to the Commission if that person is of the opinion that the Authority has exceeded its competence and/or powers, **either:** **a. because it has not complied with the delegations of power conferred by the legislative acts referred to in Article 1 , paragraph 2;** **b. because, when it adopts guidelines and/or recommendations, it has not complied with the letter of the legislative acts referred to in Article 1 (2) or of any other legislative act which the guidelines and/or recommendations are intended to interpret;** **c. because it failed to comply with the principle of proportionality referred to in Article 1, paragraph 5.** **Any natural or legal person directly and individually concerned by an act adopted on the basis of Articles 16 and 16b may also request an opinion under the conditions laid down in this paragraph.** **2. After having decided on the admissibility of the application referred to in paragraph 1, the Commission shall deliver an opinion within a reasonable time and at the latest within two months from the date of referral, and shall refer the matter back to the Board of Supervisors for the preparation of a new act if it finds that the Authority has exceeded its competence and/or powers and/or failed to respect the principle of proportionality. The Board of the Authority shall take due account of the Commission's opinion and shall promptly submit a new draft for adoption.** **The new draft act repeals the original act, replaces it with an act of identical content, or replaces it with an amended act.** **A request for an opinion pursuant to paragraph 1 shall not have suspensory effect. However, the Commission may, at the request of the natural or legal person initiating the procedure, suspend the application of the act in question if it considers that circumstances so require.** **3. The opinion issued by the Commission, the new draft act submitted by the Authority's Board and the final version of the act adopted pursuant to this Article shall state the reasons on which they are based and shall be notified to the parties.** **4. The Commission shall adopt a decision laying down the operating rules for the procedure provided for in this Article.** **On expiry of a period of one year following referral to the Council of Supervisory Authorities, the Commission shall re-examine the revised act in order to assess whether the excess of power and/or breach of the principle of proportionality have ceased.** **5. If the Commission fails to act on the request for an opinion submitted in accordance with this Article, an action for failure to act may be brought before the Court of Justice of the European Union in accordance with the Treaty.** **6. This Article shall be without prejudice to the right to an effective remedy in accordance with the Charter of Fundamental Rights of the European Union.** **7. The report provided for in Article 81 of the present regulation is to assess the functioning of the procedure provided for in this Article.**	*The aim is to clarify the reasoned opinion procedure in terms of both procedure (admissibility, deadlines) and substance (effects).* *A deadline is specified (the starting point should probably be adapted when a Q&A is updated).* *With regard to the persons who may refer cases to the Commission, it seemed important to remove the reference to the criterion of direct and individual effect (which, on the basis of Article 263 TFEU, is interpreted very restrictively by the CJEU), so that there is no ambiguity as to the possibility for the recipient institutions (and, where applicable, the NCAs) to refer cases to the Commission.* *The criterion of direct and individual effect is included, but in a sweeping provision.* *The second paragraph sets out the effects of a referral to the Commission, in particular by setting a deadline for a response, giving the referral and the Commission's opinion suspensive effect and providing for a follow-up mechanism.* *The aim is to give the Commission full latitude to provide for written or oral exchanges, and even the right to put questions to both the applicant and the Authority concerned.*

Appendix 10

SUMMARY TABLE OF NATIONAL SITUATIONS

MULTI - JURISDICTIONAL QUESTIONNAIRE

SUMMARY OF ANSWERS

See below :
- for details about the questions
- interpretation keys

Member States / Questions	Austria	Belgium	Finland	France	Germany	Greece	Italy	Luxembourg	Netherlands	Poland	Portugal	Romania	Spain	Sweden
Question 1.	√(G)(P)	NA	√(G)(P)	√(G)(P) (R)	√(P)(M)	√(P)(E) (G)	NA	NA	√(P)(R) (E)(EM) (PS)	√(P)	NA	√(P)(A)	√(E)	√(E) (D)
Question 2.	√	√	NA	√	√	≈	√	√	√	✖	✖	√	√	√
Question 3. (a)	≈	≈	NA	√	√	≈	√	√	√	√	√	√	≈	≈
(b)	(NB)	≈	NA	(B)(NB)	NB	≈	(B)(NB)	(NB)	(NB)	(B)(NB)	(B)(NB)	(B)(NB)	NB	≈
(c)	✖	✖	NA	√	✖	NA	✖	√	√	√	✖	✖	NA	NA
(d)	✖	NA	NA	√	√	NA	NA	NA	✖	✖	√	✖	NA	✖
(e)	✖	NA	NA	≈	✖	NA	NA	NA	✖	✖	✖	✖	NA	NA
Question 4.	✖	NA	NA	≈	√	NA	NA	NA	✖	√	✖	✖	NA	Not relevant

KEYS	
✔	Positive answer
✖	Negative answer
≈	Qualified or nuanced answer (e.g. Question 3(a): some GLs are endorsed by national instruments, sometimes not)
NA	No aswer to the question
(A)(D)(E)(EM)(G)(M)(P)(PS)(R)	Question 1: denotes the matter concerned: **(A)**: AML-CTF; **(D)**: DORA; **(E)**: ESG, Taxonomy, SFDR, etc.; **(EM)**: EMIR; **(G)**: governance requirements (CRD); **(M)**: MiFID ; **(P)**: prudential requirements **(PS)**: PSD; (CRR); **(R)**: bank resolution (BRRD)
(B)	Binding instrument under the national law of the Member State
(NB)	Non-binding instrument under the national law of the Member State
(LPF)	Answer to Question 5: Justification linked to a situation of uneven level playing field with other Member States
(LLB)	Answer to Question 5: justification linked to a lack of legal basis for imposing the soft law (including where the relevant ESA has exceeded its powers)
(c/MS-L)	Answer to Question 5: justification linked to the inconsistency of the soft law with national law or the constitution of the Member State
(c/MS-MARK)	Answer to Question 5: justification linked to the inconsistency of the soft law with established national market practices in the Member State
(c/EU-L)	Answer to Question 5: justification linked to the inconsistency with another piece of EU legislation

Member States / Questions	Austria	Belgium	Finland	France	Germany	Greece	Italy	Luxembourg	Netherlands	Poland	Portugal	Romania	Spain	Sweden
Question 5.	√(P) (LLB)	NA	NA	√(P) (LLB) (c/MS-L)	√(P) (LLB) (c/MS-L) (c/EU-L)	NA	√(P) (LPF)	√(P) (c/EU-L)	√(P) (c/EU-L)	×	×	×	√	√(P) (c/MS-L)
Question 6.	×	NA	×	√	×	NA	NA	NA	NA	×	×	×	×	×
Question 7.	(i) Limitation on ESA's mandates and less regulations (ii) Better compliance with legal hierarchy (iii) Stronger judicial control	(i) establish a clear and effective control mechanism on the rules and regulations issued by the regulators (ii) avoid dealing with the system of implementation or utilisation of guidelines at the national level (iii) better interaction between the European rules and the national rules, especially in areas such as product governance, where the national authorities may impose additional or different requirements than the European	SSM should make proposals to the EU Commission on regulatory changes	(i) Better and less regulations (ii) respecting institutional balance (iii) more transparent process (iv) more effective dialogue with stakeholders (v) reforming ESA's governance (vi) more effective judicial review (vii) greater scrutiny by EP and Council (viii) Better scoping of ESA's mandates and limiting their discretion thereunder (ix) impact assessment; (x) ex ante compliance checks with Level 1 standards	(i) Respecting institutional balance (ii) less disparities between MS; less and more concise regulations (iii) stronger ECJ judicial control (iv) ESA mandates more specific	(i) Continuous and better dialogue with stakeholders (ii) regular workshops through industry associations with the participation of supervised entities regardless their size or activity (iii) proactive guidance and interpretation or provision of examples, tools, etc. for the implementation or adjustments (iv) Clearer and simpler language in L1 and L2 texts (v) L3 texts should give examples	NA	NA	(i) Official repealing, updating or replacement process of outdated L2 instruments following changes in L1 instruments (ii) more uniformity in ESA's consultation process (iii) more systematic release and follow up of calendars of work in progress (iv) maintain strict regulation; (v) increase budget of ESAs for better work	(i) Better implementation of the principle of proportionality (ii) reduction of the mass production of regulations	Better and less regulation preserving level playing field across MS	Better and less regulations underpinned by (i) a risk-based approach and clearer policy goals (ii) improvement of consultation and functioning of expert committees (iii) improved collaboration between industry and authorities in the rule making process and (iv) introducing standardised compliance procedures	NA	(i) Too short consultation process to submit questions (ii) impact assessment to be more systematic ,be improved and better adapted to reality, incl. Via better dialogue with stakeholders (iv) better delineate matters for L1 vs L2/3 and limit scope of mandate to L2 technical matters (v) shorten time periods for issuing and updating Q&As

Questions

Question 1	Are there examples of Level 2 or 3 texts that have blatantly included a provision which should have appeared at Level 1, and/or that contradict a Level 1 text and/or which add constraints without legal basis?	
Question 2	Are there Legal articles or research by academics or legal commentators, or debates or policy statements within or from trade associations, that discuss the inflation of Level 2 instruments (Commission's delegated acts, RTSs) and /or EU Soft Law?	
Question 3	(a)	Is EU Soft Law implemented into your national supervisory framework by way of national law instruments?
	(b)	Are these national law instruments legally binding or non -binding?
	(c)	Are you aware of any ongoing proceedings or court decision in your jurisdiction having decided on (either by challenging or confirming) the binding effect of EU Soft Law?
	(d)	Does your jurisdiction's legal system recognize any right of appeal or recourse against EU Soft Law?
	(e)	If so, are you aware of any cases where a national competent authority has withdrawn its own national law instrument transposing EU Soft Law following challenges to its legality?
Question 4	Is there a distinction in the application of these tools between banks supervised by national competent authority (NCA) and b anks directly supervised by the ECB?	
Question 5	Are you aware of situations where a national competent authority in your jurisdiction decided not to comply, in whole or part , with any ESA's guidelines (within the meaning of article 16 of EBA/ESMA/EIOP Regulation)? If that is the case, please provide examples and the reasons for not complying (please do not provide an extended list; a cou ple of examples will be enough). Please classify the reasons according, but not limited, to the following items (and give details): •Lack of legal basis (including where the relevant ESA has exceeded its powers) •Inconsistency with national law / Constitution •Inconsistency with another piece of EU legislation •Inconsistency with established national market practices •Unlevel playing field •Other?	
Question 6	Are you aware of situations where banks or insurance companies officially decided not to comply, in whole or part, with ESA's guidelines? If that is the case, please provide examples and the reasons for not complying.	
Question 7	Suggestions for improvements?	

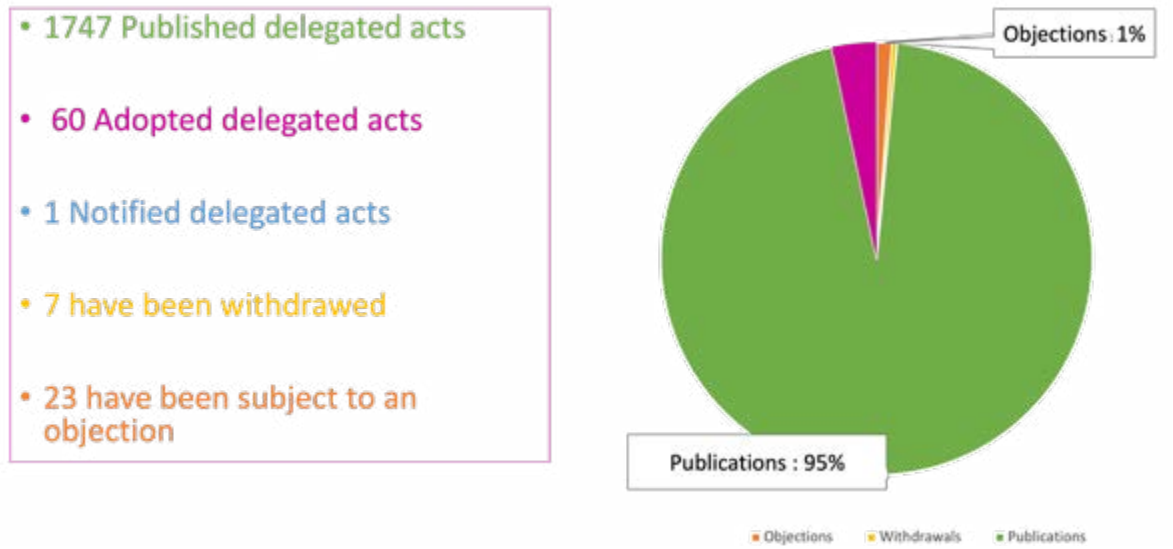
Appendix 11

KEY FIGURES

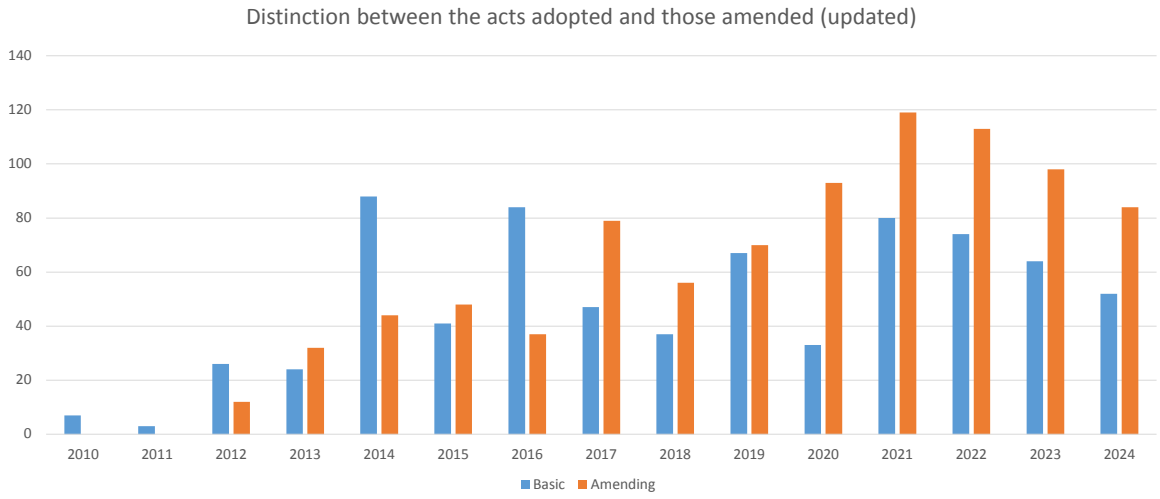
Sources:
https://www.eba.europa.eu ;
Register of delegated and implementing acts
(https://webgate.ec.europa.eu/regdel/#/home)

SNAPSHOT : DELEGATED ACTS VOLUME SINCE 2010

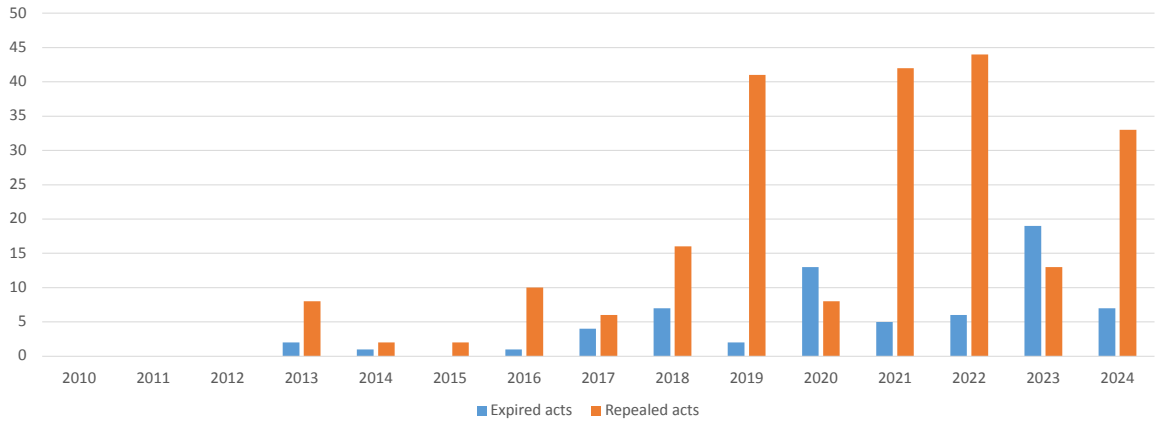
- 1747 Published delegated acts
- 60 Adopted delegated acts
- 1 Notified delegated acts
- 7 have been withdrawed
- 23 have been subject to an objection



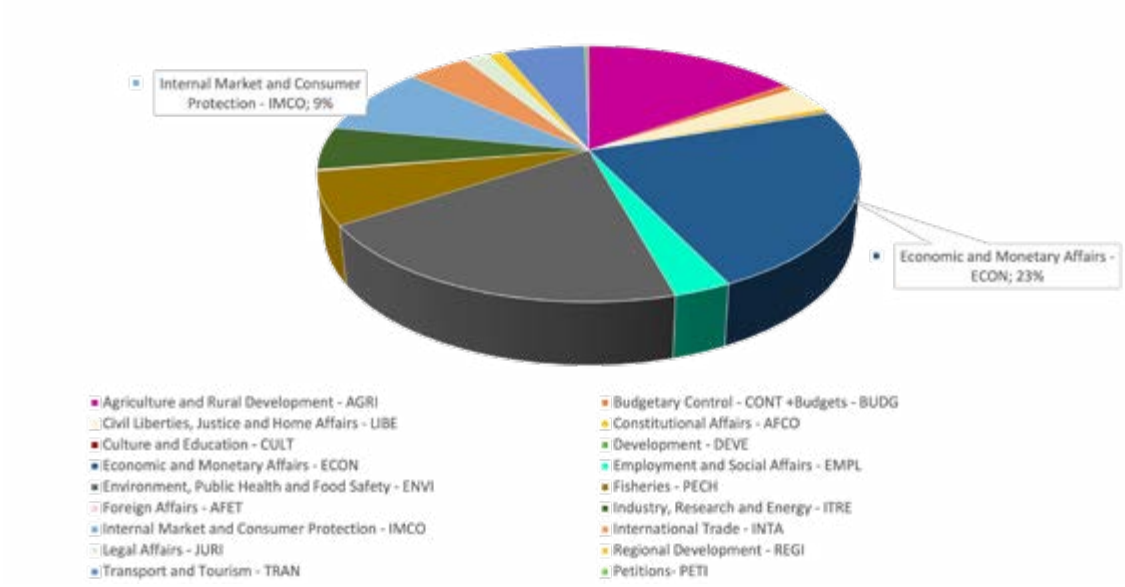
NUMBER OF DELEGATED ACTS ADOPTED PER YEAR



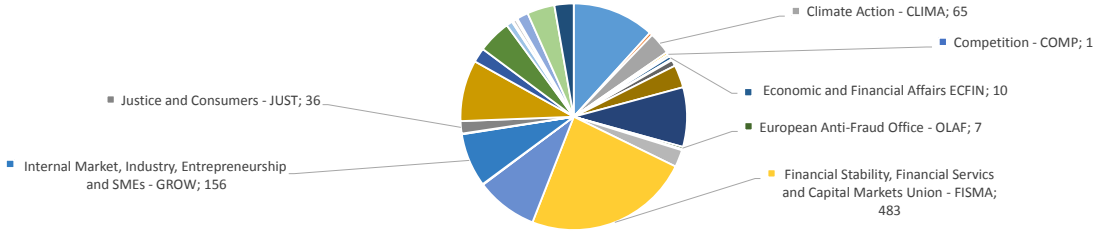
REPEALED OR EXPIRED DELEGATED ACTS



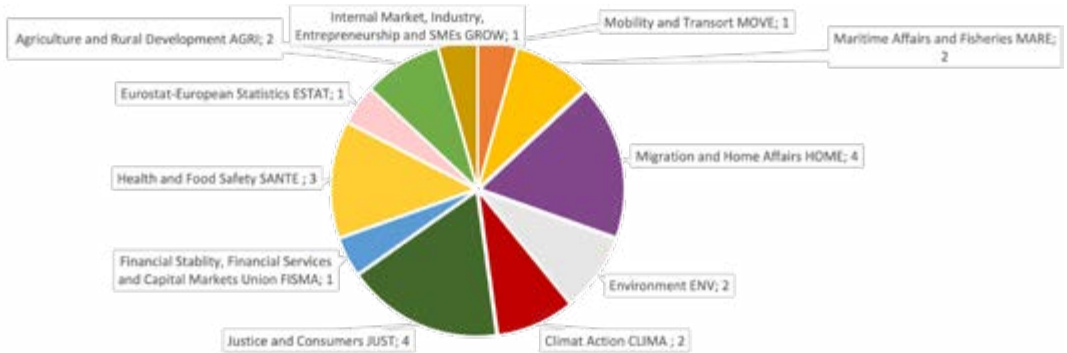
DELEGATED ACTS ALLOCATED TO PARLIAMENTARY COMMISSIONS



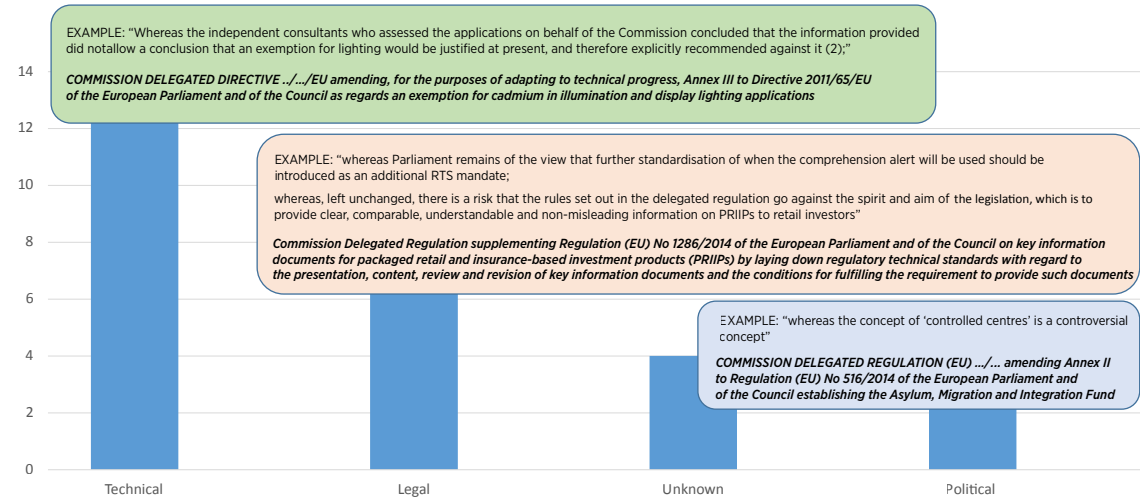
DELEGATED ACTS ALLOCATED BY THEMES



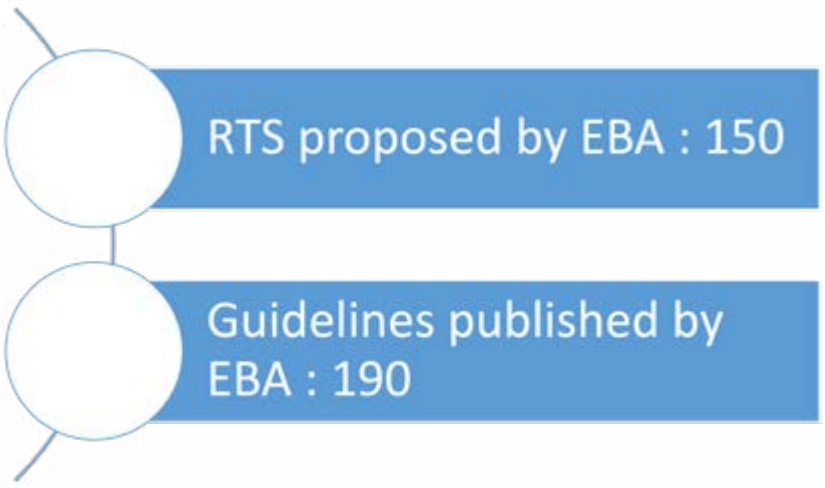
OBJECTIONS TO THE DELEGATED ACTS ALLOCATED BY THEMES



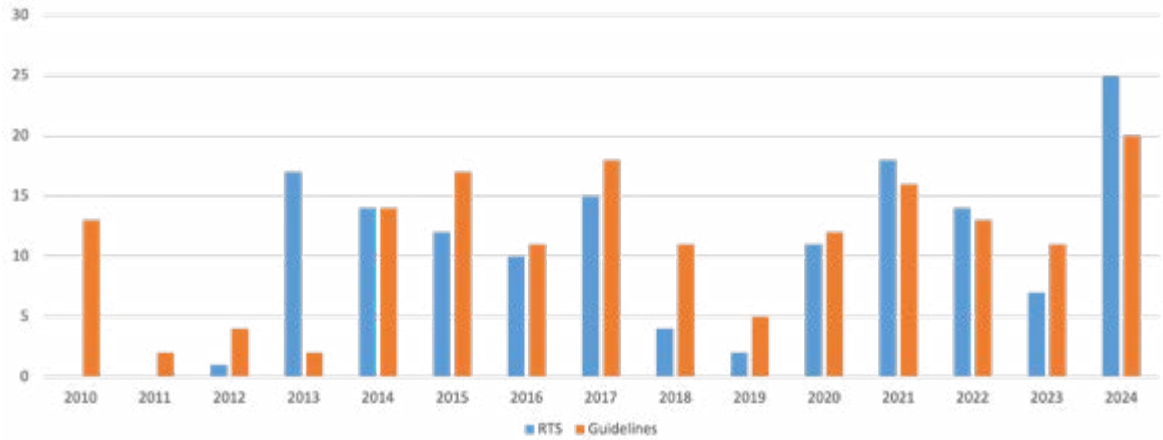
OBJECTIONS MOTIVES



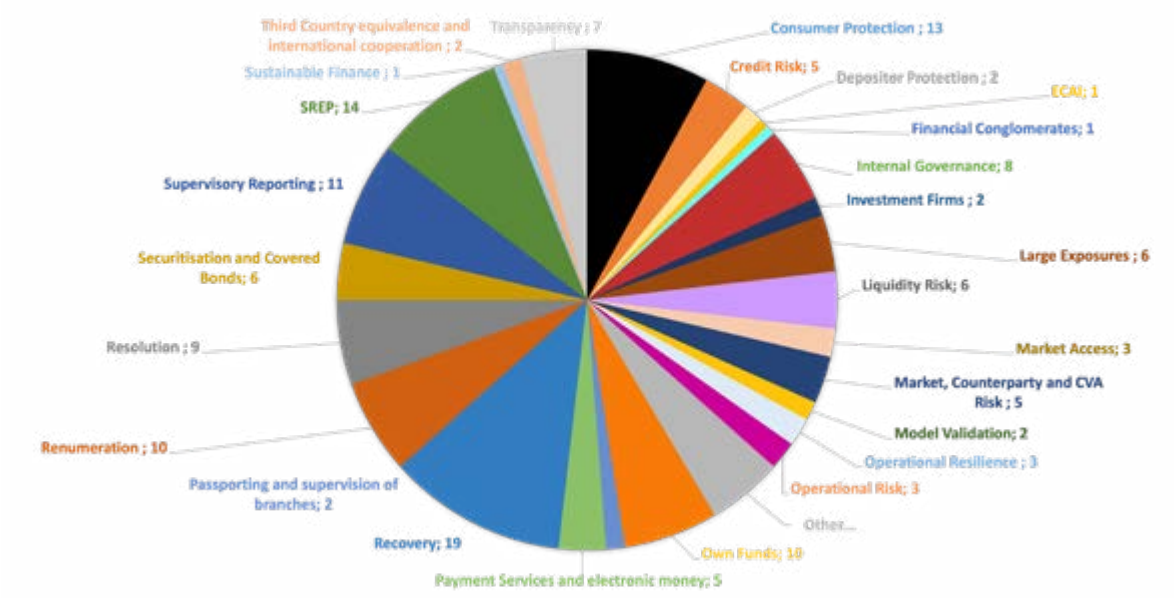
TOTAL NUMBER OF REGULATORY TECHNICAL STANDARDS (since 2007) AND GUIDELINES PUBLISHED BY THE EBA (since 2013)



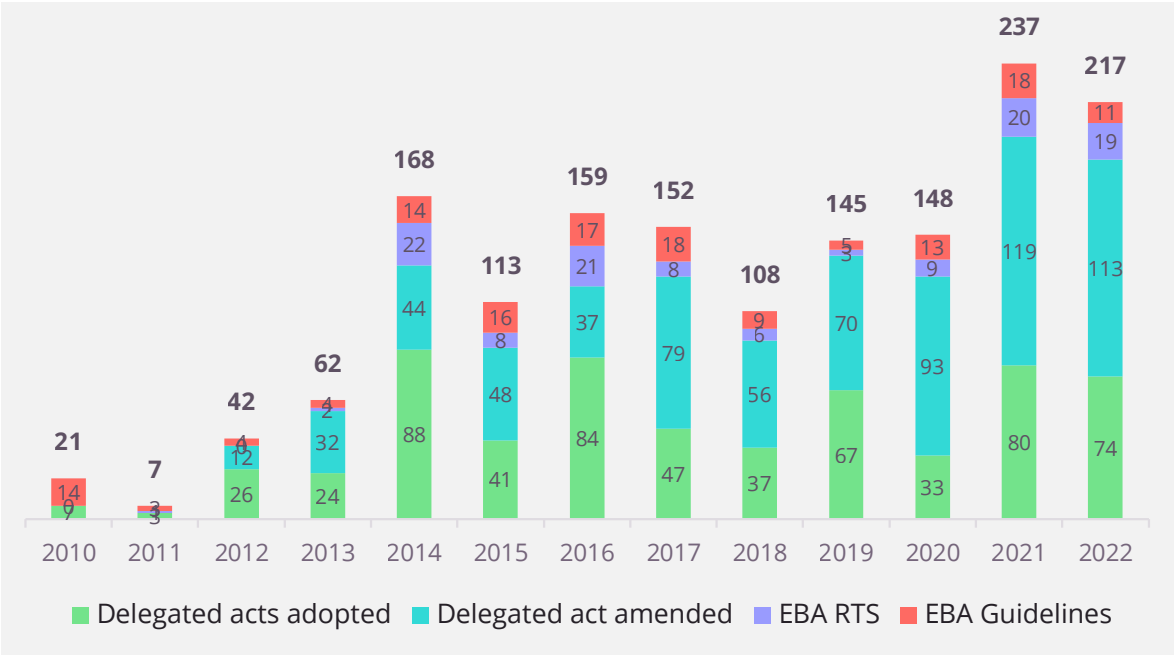
PUBLICATION OF RTS AND GUIDELINES EBA PER YEAR



EBA GUIDELINES BY THEME

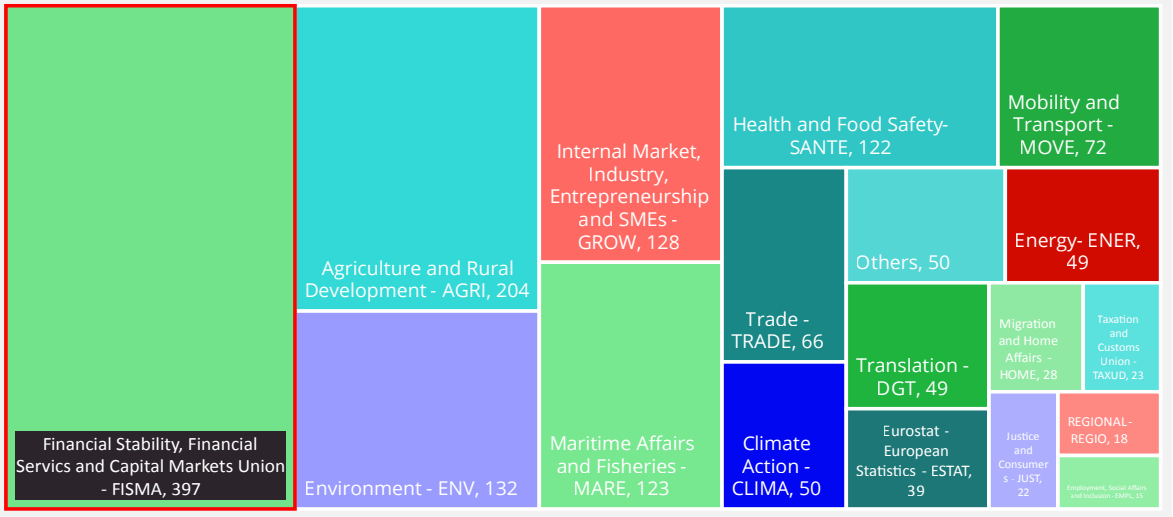


LEVEL 2 AND 3 TEXT VOLUMES EVOLUTION



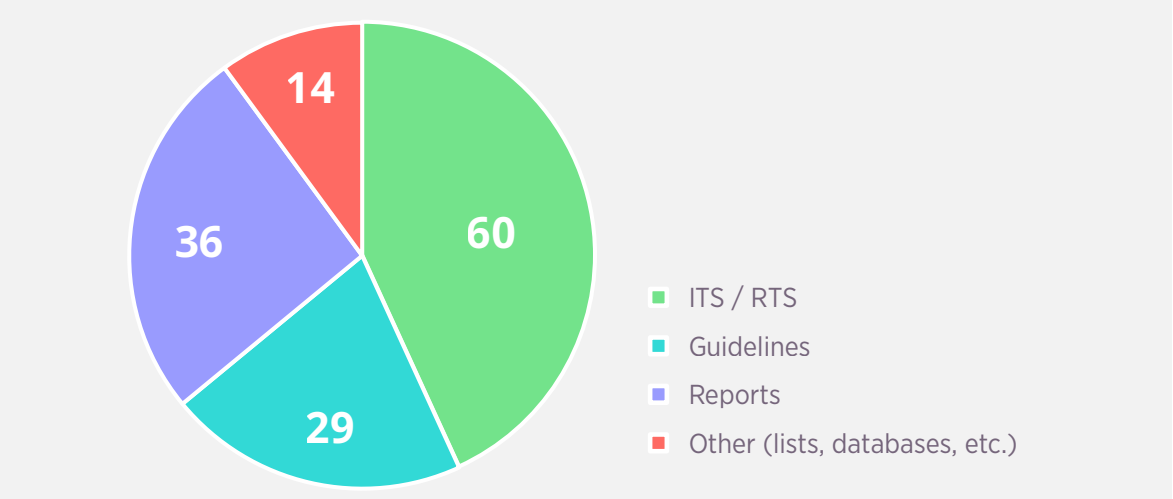
+43% over the last 5 years (2017-2022)
With the volume of delegated acts growing significantly (83/year from 2021 to 2023) and the number of RTS doubled since 2020.

BREAKDOWN OF DELEGATED ACTS BY THEME (As of end of September 2023)



25% of delegated acts (397) concern financial stability and financial services

EBA MANDATES VOLUME : CRR3/CRD6



139 mandates assigned to EBA for the CRR3/CRD6 banking package
(Including 60 new mandates for drafting technical standards and 29 for the adoption of guidelines, for a total of 89, compared with 62 under CRR2/CRD5, which represents a growth of +44%). Source : EBA mandate on the application of the banking package

DELEGATIONS OF LEVEL 1 TEXTS IMPACTING ALL BANKING ACTIVITIES...

MIFID	Payment services Directive	EMIR	ECB Guides
19 RTS	**11** EBA Mandates	**25** RTS	**30** Guides
42 Other Delegated Acts	**240** Q&A EBA	**25** Other Delegated Acts	

GLOSSARY

JEAN-BAPTISTE FOREST AND BLANCHE SOUSI

Action for annulment

An action for annulment is a procedure whereby the Court of Justice of the European Union reviews the legality of a decision adopted by an institution, body, office, or agency of the European Union.

Actions for failure to fulfil obligations

An action for failure to fulfil obligations enables the Court of Justice of the European Union (CJEU) to monitor Member States' compliance with their obligations under EU law. Referral to the CJEU is preceded by a preliminary procedure initiated by the European Commission, which consists of giving the Member State concerned the opportunity to respond to the objections made against it. If this procedure does not result in the Member State putting an end to the infringement, an action for infringement of EU law may be brought before the CJEU.

This action may be brought either by the European Commission - in practice, this is the most frequent case - or by a Member State. If the CJEU finds that the Member State has failed to fulfil its obligations, the State must put an end to the infringement without delay. If, following a new referral by the European Commission, the CJEU finds that the Member State concerned has not complied with its ruling, it may impose a lump sum and/or penalty payment.

Comitology

Generally speaking, the procedure whereby the European Parliament and the Council confer on the European Commission, in an instrument they adopt (directive or regulation) known as a basic instrument or Level 1 instrument, the power to implement certain provisions of that instrument, a power which the Commission must exercise under the supervision of committees made up of representatives of the Member States (Article 291 TFEU).

With regard to the financial services sector in particular, this procedure, which had already been reformulated following the Lamfalussy Report in 2001, has been substantially modified following the recommendations of the Larosière Report (see Appendices 1 and 2). Since 2010, the European Commission may, in the basic instrument, be empowered to adopt certain technical implementing standards whose drafts have been prepared by the European Supervisory Authorities (Article 15 of the ESAs Regulations).

See also: *Implementing act, European supervisory authorities, Implementing Technical Standards.*

Better regulation

This is the name given to the "Better Lawmaking" agreement reached on 13 April 2016 between the European Parliament, the Council, and the European Commission, aimed at promoting simplicity, clarity, and consistency in the drafting of European Union legislation, as well as greater transparency in the legislative process.

The aim is to make European legislation comprehensible and easy to implement, to enable citizens, administrations, and businesses to easily understand their rights and obligations, to provide for appropriate information, monitoring and evaluation requirements, and to avoid over-regulation and red tape.

Comply or explain

This is the rule whereby the competent national authorities must indicate whether they intend to comply with a guideline or recommendation issued by a European Supervisory Authority (ESA). If they do not intend to comply, in whole or in part, they must explain why.

In the case of institutions, "if the guidance or recommendation so requires, they must give a precise and detailed account of their compliance or non-compliance with that guidance or recommendation" (article 16 point 3 paragraph 4 of the ESAs Regulations).

Council (or Council of the European Union)

Together with the European Parliament, the Council is the co-legislator of the European Union. It is made up of ministers from the 27 Member States, depending on the policy area concerned. It is therefore organized into configurations: for example, for financial services regulation, the Council's Economic and Financial Affairs configuration (ECOFIN) is responsible; for the internal market, the Council's Competitiveness configuration (COMPET) is responsible, and so on. Given the composition of the Council, it is sometimes referred to as the Council of Ministers. The Council should not be confused with the European Council, which is made up of the heads of state or government of the 27 Member States, and defines the EU's general political orientations and priorities.

Delegated act

Generally speaking, an act adopted by the European Commission by virtue of a power delegated to it by the European Parliament and the Council in an act which they adopt (regulation

or directive), known as a basic or Level 1 act, to supplement it or amend certain non-essential elements of it (Article 290 TFEU).

More specifically, if the basic instrument concerns the financial services sector, the European Commission may also be empowered to adopt, by delegated act, certain regulatory technical standards (Article 10 of the ESAs Regulations).

In any event, the European Parliament and the Council have supervisory authority (right to call back) over the exercise of the delegation.

The delegated act is a Level 2 act. It is entitled, for example, "delegated regulation of the European Commission" or "delegated directive of the European Commission".

See also: *Regulatory technical standards, European supervisory authorities.*

Cf. *Implementing act.*

European Supervisory Authorities (ESAs)

The three ESAs are the European Banking Authority (EBA), the European Securities & Markets Authority (ESMA), and the European Insurance & Occupational Pensions Authority (EIOPA).

They were set up by three regulations dated 24 November 2010, following the recommendations of the Larosière Report. They replaced the three former Level 3 committees of the Lamfalussy process (see appendices 1 and 2).

They work primarily to harmonise the supervision of financial services institutions within the EU and, to this end, issue soft law (recommendations, guidelines, etc.) to the competent national authorities and institutions.

They also prepare draft technical regulatory or implementing standards to be adopted by the European Commission.

See: *Regulatory Technical Standards, Implementing Technical Standards.*

ESAs Regulations

This is the name given to the three regulations adopted by the European Parliament and the Council on 24 November 2010, each establishing a European Supervisory Authority (ESA). These regulations implement one of the recommendations of the Larosière Report (on this point, see Appendix 2).

See: *European Supervisory Authorities.*

Financial services

These services include banking, securities and financial markets, insurance, and occupational pensions.

Implementing act

Generally speaking, an act adopted by the European Commission by virtue of an implementing power conferred on it by the European Parliament and the Council in an act they adopt (regulation or directive), known as a basic or Level 1 act, to ensure uniform implementation in all EU Member States.

As implementing powers are, in principle, a matter for the Member States, the latter must be able to supervise the Commission's exercise of such powers, which are conferred on it from time to time. To this end, it is assisted by committees composed of representatives of the Member States (Article 291 TFEU).

More specifically, since 2010, in the financial services sector the European Commission may, in the basic act, be empowered to adopt certain implementing technical standards which are prepared by the European Supervisory Authorities. The European Parliament and the Council only have a right of scrutiny over the development and adoption of these implementing technical standards (Article 15 of the ESAs Regulations).

The implementing act is a Level 2 act. It is entitled, for example, "implementing regulation of the European Commission" or "implementing directive of the European Commission".

See: *Comitology, Technical implementation standards.*

Cf. *Delegated act.*

Implementing Technical Standards (ITS)

Standards adopted by implementing act of the European Commission, in accordance with the powers conferred on it by the European Parliament and the Council in a regulation or directive (basic or Level 1 act)

These standards must determine the conditions of application of the basic act. They do not imply any strategic decision or political choice.

Draft standards are drawn up by the European supervisory authorities and proposed to the European Commission. The Commission may refuse to adopt them if they are not satisfactory, provided it gives reasons for its refusal (article 15 of the ESAs Regulations).

The European Parliament and the Council have a simple right of information throughout the process.

See: *Implementing act*

Lamfalussy process

Recommended by the report of the working group chaired by Alexandre Lamfalussy, published in February 2001, this process was intended to complete an integrated market in financial services in response to the globalisation of financial flows, and to remedy the slowness of the European legislative procedure, which was deemed less responsive to technical developments than US regulations. The process was based on a renewed comitology procedure.

See: *Comitology and Appendix 1.*

Level 1 or basic acts

In the ordinary legislative procedure, this refers to legislative texts adopted by the European co-legislators, i.e., the European Parliament and the Council. This applies to regulations and directives. These are obviously binding acts.

Level 2 acts

Binding acts adopted by the European Commission by virtue of a delegation of power or competence provided for in a Level 1 act. These Level 2 acts usually set technical regulatory or implementing standards to be prepared by the European Supervisory Authorities.

See also: *Delegated act, Implementing act.*

Level 3 acts

Non-binding acts issued by the European supervisory authorities and the competent national authorities. For example, guidelines, directives, guides, etc.

See: *Soft law and Appendices 1 and 2.*

Preliminary question (reference for a preliminary ruling)

A reference for a preliminary ruling is a procedure whereby the courts of the Member States of the European Union refer questions to the Court of Justice of the European Union on the interpretation of the European Treaties or on the interpretation or validity of an act of secondary EU legislation (e.g., a regulation or directive) before determining a dispute in which the text in question is invoked.

Principle of proportionality

According to this principle, "the content and form of Union action shall not go beyond what is necessary to achieve the objectives of the Treaties" (Article 5 of the Treaty on European Union). The financial and administrative implications of the various texts must therefore be proportionate to the objectives to be achieved and "...any financial or administrative burden falling (...) on economic operators and citizens must be the least onerous possible and proportionate to the objective to be achieved" (Article 5 of Protocol 2 of the Treaty on European Union).

Regulatory Technical Standards (RTS)

Standards adopted by delegated act of the European Commission in accordance with the powers delegated to it by the European Parliament and the Council in a regulation or directive (basic or Level 1 act).

As their name suggests, they are technical in nature; moreover, they do not involve any strategic decision or political choice, and their content is delimited by the basic act.

Draft standards are drawn up by the European supervisory authorities and proposed to the European Commission. The Commission may refuse to adopt them if they are not satisfactory, if it gives reasons for its refusal.

The European Parliament and the Council have call-back rights throughout the process (articles 10 to 14 of the ESAs Regulations).

See: *Delegated act, right to call back.*

Rendez-vous clause (or review clause)

A provision inserted into a European law instrument obliging the parties to reconvene after the date of entry into force of the text to negotiate or redefine all or part of its terms if a specific event events or at the end of a predetermined period.

Right to call back (or object)

The right of the European Parliament and the Council to reject decisions adopted by the European Commission following a delegation they have given it to supplement or amend a regulation or directive, or to revoke the delegation (Article 290 TFEU).

See: *Delegated act, Technical Regulatory Standards.*

Soft law

This term is used to describe legal acts that are non-binding in nature.

In the financial services sector, these are Level 3 acts, for example, guidelines, directives, questions/answers, instructions, etc. issued by the European supervisory authorities or the competent national authorities.

Other bodies and institutions, such as the ECB, also produce soft law.

EDITÉ PAR LE GROUPE DE TRAVAIL ***LESS IS MORE*** - RÉALISÉ PAR CA IMMOBILIER - PRODUCTION GRAPHIQUE - VISUELS @ISTOCK - FÉVRIER 2025