

# The Single Rulebook in banking: is it 'single' enough?

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*Check Against Delivery  
Seul le texte prononcé fait foi  
Es gilt das gesprochene Wort*

## **1. Introductory remarks**

In 2016, the EBA will celebrate five years since its establishment. Few periods have witnessed such a major overhaul in the EU financial regulatory architecture and the EBA has been one of the key players in the reform process. We contributed to the repair of the EU banking sector by deploying several tools, the most important of which is the Single Rulebook, a set of truly unified and directly applicable rules for all the banks operating in the Union. Now the time has come to take stock of what has been done and what could be improved to the benefit of a genuine Single Market in banking.

The open question is not so much what should be in the Single Rulebook, but whether the Single Rulebook is 'single' enough and supports the objective of achieving financial integration. To answer this question, the focus should be placed less on rules themselves and more on the potential threats to their uniform application across the EU. Central to the current debate is, therefore, the governance of the Single Rulebook and the allocation of the regulatory powers among EU institutions.

I will develop my analysis and provide my views along two lines. First, the inconsistency between the goal of a centralised regulation at EU level and the room left to national authorities for exercising domestic options, discretions and practices. Second, the tension between the rigidity of the EU rule-making process and the flexibility required by banking regulators to keep abreast with changes in financial markets and innovative practices. These factors affect the uniformity and

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effectiveness of the Single Rulebook and weaken its contribution to financial integration. I will argue that the way forward is further centralisation and harmonisation of regulation at the EU level and an increase in delegation to the EBA of directly applicable and easily amendable rules on clearly identified technical matters.

Achieving a more uniform and flexible regulatory framework is not just a matter of interest for legal scholars, or a quest for power from an authority. It reflects deep-rooted needs for both the smooth functioning of the currency union and the integrity of the Single Market as a whole.

## **2. Why a Single Rulebook?**

The Single Rulebook was an intuition of Tommaso Padoa-Schioppa, when the ECB was developing its contribution to the Committee of Wise Men on the regulation of securities markets chaired by Alexandre Lamfalussy. The final report of the Committee incorporated a general recommendation to consider a wider use of Regulations, which are directly applicable in all Member States, and more limited use of Directives, which are to be implemented into national law, to enhance the degree of harmonisation in financial regulation. Although such recommendation had little practical follow-up, the rationale for a Single Rulebook became much clearer and more widely understood during the financial crisis.

In early 2009, few months after the Lehman crisis, the de Larosière report stated that a single financial market in the EU cannot properly function if rules are significantly different from one country to another. The regulatory approach based on minimum harmonisation coupled with the home-host cooperation allowed national authorities to use the regulatory lever to favour national champions and attract business to national markets, thus weakening the overall regulatory framework and creating an uneven playing field.

In addition, compliance costs for cross-border groups remained high due to differences in national rules, preventing them from reaping the efficiency gains of the internal market. Last but not least, home-host cooperation collapsed when the crisis hit cross-border banks and national approaches prevailed, which included massive ring-fencing of domestic markets – *chacun pour soi* beggar thy neighbour solutions, as de Larosière called them. As a result, between the end of 2007 and the end of 2008 the degree of financial openness dropped by 16% in Germany, 18% in Italy and 21% in France. This was clearly in contrast with the aim of the fundamental freedoms enshrined in the Treaty, notably to provide the legal support for the achievement of financial integration.

The Single Rulebook, a comprehensive set of common standards for banks was introduced to restore a legal framework consistent with such ultimate goal. In particular, the EBA (as well as its sister authorities in the areas of securities markets – ESMA – and insurance and occupational funds – EIOPA) was created to strengthen financial regulation and develop “regulatory technical standards” (RTS) and “implementing technical standards” (ITS), rules delegated by the primary (Level 1) legislation and endorsed by the Commission in the form of Regulations. Moreover, the

EBA was also tasked to issue Guidelines (GL) or Recommendations, non-binding legal acts that national authorities have to make every effort to comply with (“comply or explain” mechanism).

### *3. The progress so far in the banking sector*

The implementation of the global regulatory reform endorsed by the G20 Leaders in 2009 was a unique opportunity for developing the Single Rulebook in the European banking sector. The EBA was mandated to prepare a massive amount of standards and guidelines. Notwithstanding the limited amount of resources, and thanks also to the support of national authorities, so far we have submitted 112 technical standards to the Commission and adopted 46 Guidelines.

This comprehensive body of secondary rules completes the primary (Level 1) Directives and Regulations, which form the common legal infrastructure for the supervision of institutions operating in the EU. To give you a few examples, we have specified the definition of bank capital, one of the weak points of the regulatory framework in the run up to the crisis; developed for the first time a common definition of non-performing and forborne loans, allowing to assess and compare banks’ asset quality according to a common metric; specified the criteria to identify systemically important banks at both the global and domestic level; clarified the contents of recovery and resolution plans and the criteria for identifying banks that are failing or likely to fail; established a common supervisory reporting framework, setting out common templates, procedures and IT platforms; defined the methodology and processes for the supervisory review and evaluation process that underpins the joint decisions on additional capital and liquidity requirements for cross-border groups.

The EBA also developed a “questions and answers” (Q&A) tool, which facilitates the relevant stakeholders, both industry and competent authorities, in the interpretation and application of the Rulebook. We have already provided answers to **734** questions arising from the Capital Requirements Directive and Regulation (CRDIV-CRR), and the Bank Recovery and Resolution Directive. Although not legally binding, the answers are drafted and approved by the network of supervisory or resolution authorities and by the Commission (as to the questions on the Level 1 text), providing clear directions to the users of the Rulebook.

This process has made us well aware of the multi-tiered structure of legal sources, which may make it difficult to navigate EU banking regulation. In order to make consultation easier and to ensure that rules are accessible to all interested parties – a precondition for their correct application – we have developed the ‘interactive Single Rulebook’ on the EBA website, a user friendly tool bringing all the different legal sources (Directives, Regulations, RTS, ITS, GL and Q&A) together in an orderly manner to the benefit of the general public.

The development of the Single Rulebook is not completed yet, as we still have several mandates to fulfil in the coming months, but the finishing line is now close and a much more unified regulatory framework is finally emerging.

#### ***4. Weaknesses of the Single Rulebook and threats to its effectiveness***

Producing EU regulation is a delicate legal and diplomatic exercise, which requires a balance between legal and policy considerations. The governance is not easy either.

A first challenge is due to the fact the EBA rule-making power is delegated by the co-legislators, with mandates and timelines seldom decided in prior consultation with us. Mandates, in particular, are very often the outcome of political negotiations on the Level 1 text, which can lead – and did lead – to unreasonably tight schedules and ambiguous wording.

Another contradiction is that, in some cases, our mandates to develop technical standards come from minimum harmonisation Directives. Implementing those Directives through immediately applicable Regulations is a source of complexity and it is often used to refrain from full harmonisation. The coordination with international standards developed by the Basel Committee has also given rise to legal difficulties.

Furthermore, the complex governance of the EBA required a careful and intensive preparation in order to get our rules approved on time. The EBA Board comprises 28 voting members – the Heads of banking supervision in all the Member States of the Union – and approves the standards and guidelines via qualified majority (which is computed according to the weights envisaged in the Lisbon Treaty) and double simple majority of Member States participating and non-participating in the Banking Union. Moreover, the EBA founding Regulation requires that we strive to achieve consensus.

Through time we improved the dialogue with the Commission and the co-legislators and managed to develop positive dynamics in the Board's decision making, which allowed delivering products that achieved consensus or broad majorities, without compromising on the quality and clarity of the legal texts. Yet, the Single Rulebook is still a work in progress or, better, an intrinsically evolving work: first, maximum harmonisation has not yet been fully achieved and is threatened by the existence of too many national options and discretions; second, national practices can contribute to preserving a differentiated application of the common rules; finally, in order to ensure that regulation adapt over time to market developments, a legal infrastructure needs to be in place, which enables to swiftly adjust the Single Rulebook.

##### ***4.1 Options and national discretions: some way to go for maximum harmonisation.***

The CRDIV-CRR includes 80 options and national discretions left to Member States or competent authorities. The number goes up to 155 if we consider also the options and discretions that are applied by competent authorities on a case by case basis (i.e., to individual institutions). In some areas, the impact is significant. For instance, when conducting EU-wide stress test exercises both the EBA and, more recently, the ECB observed that the options and national discretions hamper the comparability of the outcomes of supervisory assessments.

It is worth clarifying that I am not arguing against the exercise of supervisory discretion, since this is obviously an intrinsic feature of banking supervision. I rather think that options and discretions should be limited in the regulatory field and governed at the EU level. Otherwise, they could undermine the uniformity of the Single Rulebook and be used for protectionist purposes or supervisory forbearance, eventually conducing to distortions of competition and threatening the integrity of the Single Market. This is why I am firmly convinced that we should iron out national discretions from the Single Rulebook and avoid resorting to them again in future legislation.

If there are good reasons for tailoring the regulatory treatment to the specific features of certain business models and practices, this may well be done with common rules even if when the rules are designed such business models and practices are present only in one or few Member States. The issue is particularly relevant for small, local banks, which may find it unreasonably cumbersome to adjust to standards originally developed at the global level for internationally active banks. This is a legitimate concern. But the solution is a thorough application of the principle of proportionality *within* the Single Rulebook, as already envisaged in Level 1 legislation, rather than leaving the option for national legislators to substitute common European rules with national ones. The risk, otherwise, is to remain trapped in the contradiction of a EU system that claims to be uniform whilst being prisoner of several 'localisms', which ultimately affect the achievement of a true single market.

#### *4.2 Differentiated national implementation and application of standards and guidelines*

Differentiated national practices for the implementation and application of the common rules pose another threat to the uniformity of the Single Rulebook. Room for local discretion is often generated via additional quasi-rules embedded in administrative guidance, supervisory manuals and similar tools.

This affects particularly our Guidelines, which by nature need to be implemented at the national level and follow a “comply or explain” approach. The implementation of Guidelines into domestic supervisory practices is often very diverse across countries and may differ depending on the subject matter. Sometimes Guidelines are transposed via primary legislation adopted by national parliaments, while in other cases they are embodied in administrative circulars issued by the competent authority or even in informal internal practices of the supervisor. Whilst the EBA has no say on the national implementation of the Guidelines – since this is a matter of national law – we would certainly favour a written implementation in an orderly hierarchical framework. The differences across Member States introduce a lack of clarity and transparency, which creates confusion among stakeholders as to the appropriate order of the different layers of legislations.

To a lower extent, the same issue may appear also in areas where EU Regulations are in place. For instance, international accounting standards (IFRS) are adopted at the EU level via Regulations, but additional administrative guidance is often issued at the national level, sometimes by

prudential supervisors, which may adversely affect the uniform application of the standards. Another example is given by the relationship between the national implementation of Directives and technical standards issued in line with the mandates laid down in the same Directives. The appropriate delimitation between national implementing provisions and technical standards is not always straightforward and creates ambiguities as to the scope of application of the different legal sources.

This is obviously an unintended consequence of the multi-tiered legal articulation of the Single Rulebook that warrants further reflections at the political level, in particular with a view to increasing the adoption of Regulations and restricting the enactment of Directives to the very specific areas where maximum harmonisation is not yet possible.

#### *4.3 Too many technical details in legislation*

The Single Rulebook has brought transparency, predictability and legal certainty into technical supervisory standards, which are now set out in binding written legal sources to be applied uniformly to all institutions in the Single Market. Against these advantages, the downside is the risk of an excessive rigidity due to the cumbersome process for amending our standards. There are two main open questions in my view: (i) whether the Level 1 legislation should be as detailed as it is today; and (ii) whether very technical details should at all be included in technical standards.

Let us consider the Level 1 legislation to start with. The CRR is a huge five hundred articles piece of legislation, setting out prudential strategic choices as well as very technical details. The consequence of such detailed legislation is that it risks becoming too rigid and inadequate to keep up with market changes and financial innovations. Flexible interpretations of its provisions are often barred by the strict nature of regulatory provisions and the amendment of the Regulation is just too difficult both from a political as well as procedural point of view.

The issue is probably best illustrated by an example. The EBA is mandated to review the framework for credit value adjustments (CVA). Apart from the main critical question relating to the exemptions from the regime, we have devoted a great deal of attention to the technical aspects of the mandate, as laid down in the CRR, which we have also reviewed. The EBA has in this regard developed, in line with the mandate in the Level 1, a regulatory technical standard on proxy spreads to be used when calculating the capital requirements. The CRR requires ensuring that proxy spreads are calculated based on rating, region and industry. This has proven very difficult to fulfil in practice, as liquid credit default swaps (CDS) spreads are not available for every combination along the three dimensions. The EBA has tried to partly fix this in the technical standard, but the CRR, nonetheless, clearly provides for that requirement, which stems from the expectation that more liquid CDS spreads would be available, and we cannot work too much around it. As a consequence, the EBA's report on CVA contains several technical recommendations calling for revisions of the CRR.

Also technical standards – which were meant to be quicker to adopt and to amend than the Level 1 legislation – have to go through a long process, including the approval by the Board of the EBA, endorsement by the Commission, scrutiny by the European Parliament and the Council. This implies a rather lengthy path for changes that are sometimes trivial and down to very practical, technical details. In most national rule-making processes that the new institutional set-up has been replacing, technical authorities were delegated greater leeway in adjusting technical rules, subject to strict accountability criteria.

Supervisory regulation entails a high degree of technical expertise, which is the very reason of existence of the EBA, but requires also flexibility to adapt to evolving contexts. Excessively rigid legislative processes, whilst justified for the adoption of legislation entailing political choices, are not appropriate for supervisory tasks.

The EBA's implementing technical standards on supervisory reporting are a case in point. They contain the templates to be used by the institutions to communicate the relevant supervisory information to the competent authority. They also include instructions allowing a structured representation of the data, validation rules to check the quality and consistency of the data, and IT solutions. As a Regulation, the standard has been published in the Official Journal of the European Union (OJEU) in all official languages. It is the longest piece of legislation ever published in the OJEU.

Of course, as the first data were reported to supervisors, we realised that some technical adjustments had to be introduced, for instance in the validation rules. The Commission understood the need for quick fixes and allowed a speedy reaction, but the overall process for approval and amendment remains ill-suited to this type of regulatory products. I know of no jurisdiction in the world where such technical details are to be found in the Official Journal.

So my call today, after almost five years of experience, is for a more autonomous exercise of the prerogatives of the EBA in line with the case law of the Court of Justice, in particular for the possibility of full delegation of clearly defined, purely technical matters that do not entail the exercise of economic policies.

Supervisory regulation should be the outcome of the combination of three legislative layers. Level 1 legislation, approved in co-decision by the European Parliament and the Council, should contain the most relevant political choices, providing the general direction of banking legislation and the decisions that may have a significant effect on the role of the banking sector in financing the real economy. Level 2 delegated regulations should be organised in two layers: the first should include quasi-legislation, such as technical standards setting out clarifications and specifications of the Level 1 text entailing political choices, and be developed by the EBA and endorsed by the Commission under the scrutiny of the European Parliament and the Council; the second should cover technical regulations governing purely technical aspects, to be fully and directly entrusted to the EBA.

The original proposal for the Single Rulebook put forward by Padoa-Schioppa entailed a very radical solution, in which only high level principles should be embodied in Level 1 legislation (for instance the need to develop a certain requirement according to certain principles), while the actual specification of the requirements (including their calibration) should be delegated to technical authorities at the EU level. The current, post-Lamfalussy and post-de Larosière, regulatory set-up ultimately considers all delegated legislation to entail political choices, thus requiring the constant involvement in the process of the Commission, the European Parliament and the Council.

My proposal lies between these two alternatives and aims at adequately reflecting the nature and the specific prerogatives of all subjects involved without affecting the EU institutional balance.

Going back to the previous example on reporting, data gathering templates and IT solutions for supervisory purposes should not need to go through a two-tier approval process requiring the involvement of the Commission; in addition, their entry into force, including of any update, should be possible by simple publication on the EBA's website, provided sufficient notice is given to the banks.

It is well understood that such allocation of independent regulatory competence to the EBA should go hand in hand with strong transparency and accountability in the rule-making process. The EBA should remain committed to the neutrality of its decisions and the respect of a procedure that entails appropriate public consultations and thorough impact assessments. Moreover, the framework designed in the EBA's founding Regulation, which envisages strong accountability of the EBA vis-à-vis the European Commission, Parliament and Council and other EU institutions, including the Court of Justice, should find thorough application.

Already now, the dialogue with and scrutiny by the European institutions is intense and not limited to formal annual hearings and reports. The Commission's staff actively participates in the technical work of the EBA and at the Board of Supervisors. The EBA management and staff often participate in technical meetings with the Parliament's Rapporteurs and their teams to discuss specific regulatory products – we have an average of three meetings of this sort for each important technical standard. We also regularly report to the Financial Services Committee and the Financial Stability Table of the Economic and Financial Committee, thus ensuring a clear accountability line also with the Council. I think this is working well and has contributed to a good understanding of our work on the side of the co-legislators, who have so far never vetoed or raised objections to our standards. Let me also point out that co-legislators have all the necessary tools to correct cases of EBA's misconduct, should any arise.

Whilst in the early years of experience with the new framework some reluctance to delegate responsibilities to the EBA might have been justified by the need to test and review the conduct of this newly established authority, I believe that now there could be more recognition of the EBA's ability, in limited areas, to autonomously and efficiently deploy its technical expertise.



## ***5. The need for greater harmonisation after the Banking Union***

What I said so far could be seen as the quest for power by an authority, for its own sake. But I believe that the Banking Union is injecting a sense of urgency in this debate on the appropriate level of harmonisation in the Union.

As I mentioned before, the crisis has reversed the process of financial integration within the Single Market. As banks were bailed out by national taxpayers, they started repatriating business, de-risking in foreign jurisdictions and concentrating their efforts in supporting the domestic economy and the national sovereign. Ring-fencing measures were widely adopted to limit contagion from other jurisdictions, also within the Union. As a result, markets started assessing the banks on the basis of the credit quality of the sovereign providing them with the safety net, and on the outlook for the economy and the sovereign they were most exposed to.

The adverse sovereign-banks loop led us close to a breakdown of the single currency. Only the extraordinary support measures taken by the ECB (the Long-Term Refinancing Operations – LTROs – the Outright Monetary Transactions – OMTs – and more recently the assets purchase programme) have allowed avoiding dramatic developments. The spreads between sovereigns, as well as the differentials in the interest rate charged to households and corporates, including small and medium enterprises, in the Union narrowed significantly as a result of these policies. While price indicators of financial integration have much improved, we cannot say that the problem has been resolved.

Still, cross-border banking has not recovered from the double hit experienced following the Lehman crisis in 2008 and the sovereign debt crisis in 2011-12 and remains at levels registered before the start of stage three of EMU. The degree of financial integration is an essential ingredient in a well-functioning Monetary Union. An important stream of research, recently summarised in a paper by the IMF, shows that cross-country risk sharing via banking and financial markets is the most important channel to respond to shocks hitting one state or region in existing federations, such as the United States, Canada or Germany. The euro area lacks such a degree of risk sharing and in the long run this can hamper its ability to absorb shocks.

The relevance of the issue is made even clearer by the establishment of the Banking Union. The progress made in the establishment of the Single Rulebook immediately benefited the Single Supervisory Mechanism (SSM) of the ECB – and the same is happening with the newly established Single Resolution Board (SRB). For instance, the SSM used the harmonised definition of non-performing and forborne loans developed by the EBA last year in its asset quality review, coming to truly comparable outcomes that would have been very difficult to achieve beforehand. Also, the SSM started its supervisory tasks relying on a fully harmonised reporting framework. Still, the lack of a fully uniform body of rules is incompatible with the set-up of a common supranational authority operating in a multi-jurisdictional context. A supervisor cannot apply different requirements to two banks facing similar risks, just because they are headquartered in different parts of its jurisdiction. And indeed, the SSM has been very vocal in flagging the impact of options and national discretions on the results of last year's comprehensive assessment. The initiative of

the SSM to move in the direction of exercising options and discretions in a consistent way for the euro area is an important step. There are, however, cases where a legislative change would be needed and the EBA has for long time advocated the need to intervene in this field.

The key point is that there can be no significant progress in financial integration without progress in the harmonisation of the rules. Full harmonisation is not a sufficient condition, but it certainly is a necessary one. The euro area and the Banking Union will need to move speedily in that direction, as this is an existential need for both the single currency and the single supervisor.

In the medium term, I see three possible avenues for the euro area and the Banking Union to move towards greater harmonisation. First, there could be an upgrade in the Single Rulebook under the EBA aegis, covering all the 28 Member States of the EU, both those within the euro area and those not participating in the Banking Union. Second, the legislative framework might be changed and the SSM/ECB could be attributed direct regulatory powers in the banking field, via the issuance of ECB Regulations, as originally envisaged in the Commission's proposals for the Regulation establishing the SSM. Third, the SSM might try to use non-legislative tools, such as its supervisory manual, to achieve greater consistency in supervisory outcomes, in the presence of a still differentiated regulatory framework.

You will not be surprised that I support the first option. In fact, it is the only one that can allow the SSM to achieve its objectives of further harmonisation while maintaining, and actually further promoting, the integrity of the Single Market. Indeed, the second option could address the problems of the euro area, but it would accept that a lower degree of harmonisation continue to prevail for the EU as a whole. This would *de facto* introduce a two-tier system, with truly single rules within the Banking Union and potential differences between "ins" and "outs". Regulatory barriers could become a permanent feature within the Single Market. The third option would be even less appealing, as it would present the same shortcoming of the previous option and add to them a lack of transparency and a confusing overlapping between the EU-wide Single Rulebook and the local implementation and application of the same rules.

The EBA's regulatory mission of levelling the playing field needs to be further reinforced. We should act as the bridge between the "ins" and "outs", ensuring that the same rules apply across the EU, and ultimately as the guarantor of the preservation of the unity and integrity of the Single Market.

From a EU perspective, the decoupling of regulatory functions and direct supervisory responsibilities – an unknown governance model at the national level – is a necessary feature to avoid the fragmentation of the Single Market. The attribution of regulatory tasks to the EBA, together with its role on supervisory convergence and cooperation, is an essential pillar of an institutional set-up in which supervision is not centralised for the whole EU, which remains a multi-currency area. It also ensures that appropriate "checks and balances" are in place in the EU governance. Only an effective role of the EBA as the 'guardian' of the Single Rulebook can ensure that institutions subject to different supervisors have to comply with the same rules.

## 5. Conclusions

We have always known that achieving a Single Rulebook was not going to be an easy task, as it entails a huge change process. And where there is change, there is resistance. I understand that in many cases some or even all parties (national authorities, banks, bank customers and investors) in a Member State have difficulties in understanding why something that in their view has worked well should be changed for the sake of harmonisation and convergence. Such discomfort with maximum harmonisation, which is often seen as an annoyance rather than an achievement, is well visible in current regulatory debates.

This sentiment is made even stronger by the fact that changing rules often bring up immediate costs, sometimes material ones; the benefits, on the other hand, are not easily visible and often quite postponed in time.

Such natural resistance to change also explains why the EBA's work has so frequently faced pushback and adverse press. We have been harshly criticised in Germany for our exclusion of silent partnerships from regulatory capital in the stress test; in Italy and Spain for the treatment of sovereign bonds during the recapitalisation exercise; in Denmark for our proposals on the treatment of covered bonds in liquidity requirements; in the UK for our strict application of the requirements on bankers' bonuses; and the list could go on. I take this as a testimony of our neutrality in addressing the issues we deal with, having the interest of the Single Market as our only guiding principle. The Union can be strong only if we are able to decide and move forward also in presence of disagreements.

But even though this is something to be taken into account in all processes of reform, I think there should be a greater focus on what is really at stake and on the collective interest in truly achieving a regulatory framework that is conducive to greater integration of banking markets. We need to move towards greater integration. Slowing down the process to protect local interests is only going to make the process more painful and reduce its legitimacy, as benefits will take longer to materialise. Focusing only on the euro area would hamper the integrity of the Single Market.

In his opening comments to the press at the presentation of his report on the regulation of securities markets in 2001, Alexandre Lamfalussy defined the European regulatory system as "...a cocktail of kafkaesque inefficiency that serves no-one – neither consumers, not investors, nor SMEs, nor large companies, nor governments". We have done a lot to put our house in order, although it took a crisis of massive proportions to take bold action. But my experience brought me to the conclusion that regulatory harmonisation is a "black or white" concept: either you have it or you don't. If we really want to re-establish a well functioning Single Market we need to go all the way to a true Single Rulebook.