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The single rulebook is overflowing – it's time to hit the brakes

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Following the regulatory rollercoaster of the last five years, the next European Commission will have the difficult task of slowing down the pace of rulemaking in finance, and consolidating what is already in place. However, with the Banking Union and the Capital Markets Union (CMU) as ongoing objectives, a staff of only around 2 600 people in financial supervision at EU level, review clauses for regulations every three to five years, as well as an ever-growing surge of financial lobbying in Brussels, applying the brakes is easier said than done.

The EU has added an impressive amount of new regulation under the von der Leyen Commission, with several pieces still in the pipeline. The regulatory framework affects capital market operators and infrastructures, investment, payments, crypto assets services providers (including prudential rules for banks and insurance companies), and a framework for digital resilience in financial institutions. On top of that all, an extra layer has been added with the Sustainable Finance Framework. As a result, and due to the objective of a single rulebook, rules have become increasingly detailed.

The 'single rulebook' was coined by the European Council during the height of the 2008-09 global financial crisis and describes the ambition of a unified regulatory framework for the EU financial sector. The aim was to ensure the uniform application of the Basel III rules in all Member States, as the crisis had starkly highlighted the detrimental nature of regulatory competition stemming from the minimum harmonisation approach adopted. It became the standard for rulemaking in finance, with the help of the newly created European Supervisory Authorities (ESAs) to propose implementing measures.

Today, almost all basic rules in EU finance – whether a regulation or a directive – rely on delegated and implementing acts, regulatory and implementing technical standards (RTS and ITS), guidelines and recommendations, and related Q&As. In other words, level 2 and level 3 implementing measures (see Table 1).

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In banking, the centrepiece rule is the Capital Requirements Regulation and Directive (CRR and CRD), which have well over 300 implementing measures, including guidelines. In capital markets, the revised Markets in Financial Instruments Directive (MiFID) framework governing capital markets (referred to as 'MiFID II') is estimated to have more than 30 000 pages alone. And this concerns only the core acts, not what is still being discussed among the legislators in the form of amendments.

Table 1. Number of articles, level 2 and 3 measures under core EU financial services acts

	Articles	Level 2 measures (RTS, ITS, Delegated Acts)	Level 3 measures (Guidelines, Opinions, Q&A)
CRR	519	53	282
CRD	165	13	88
MiFIR	54	41	64
MiFID	97	40	48
UCITS	119	22	74

Notes: MiFIR stand for Markets in Financial Instruments Regulation. UCITS stands for Undertaking for Collective Investment in Transferable Securities.
Sources: EBA and ESMA interactive single rulebook.

A recent example is the Green Bond proposal, which links the EU's financial regulatory set-up with the green taxonomy. The compromise reached under the Swedish Presidency of the Council was viewed as acceptable by industry but was still very prescriptive. Companies issuing green bonds will have to align the use of proceeds with the green taxonomy, which raises usability challenges given the widespread lack of data and the challenge of assessing proportionality for smaller projects and SMEs.

But what actually is a single rulebook?

The notion has never been legally defined in EU law or at least more clearly specified in any official document. It gives rises to horizontal and vertical inconsistencies across EU financial law, as well as the appropriate level of regulation. It's open to the vicissitudes of the political process, with politically sensitive issues moving to level 1, and unresolved matters adding to technical standards in level 2. An overview of the progress made to establish a unified rulebook and the level-playing field among market participants across the EU/European Economic Area would therefore be useful.

When compared to other major jurisdictions, in particular the UK and the US, the EU has – given its structure and need for a level playing field – legislated a lot at level 1, through the co-decision procedure between the European Parliament and the Council. On the other hand, the US has managed to maintain a more principles-based approach and left implementing issues to the discretion of the supervisory agencies accountable to Congress. Similarly, the UK is now attempting to move back towards the principles-based system, using the common law approach, which raises questions about accountability and control. But this doesn't seem to be easy, as the UK currently has its own MiFID II, 'onshoring' the parts of MiFID that applied directly when it was an EU Member State. The UK has only made minor amendments to ensure that the regime operates effectively in a UK-only context (e.g. moving the European Securities and Markets Authority's functions to the Financial Conduct Authority). And revoking other parts of the rules raises a host of problems.

The biggest issues concern market integration and competitiveness. According to data from the European Central Bank, financial market integration has declined. The Banking Union and the CMU seem to be stuck, even though the EU has a well-functioning Single Supervisory Mechanism (SSM) (supervising about 120 significant banks in 20 Member States). Although EU banks' performance is satisfactory, questions can be raised about the ever-growing compliance function that banks have. The growing number of rules is also an issue for supervisors, which are essentially paid for by those they supervise. Since the financial crisis, the EU institutions have only added about 2 600 jobs in financial sector supervision (ESAs, the European Systemic Risk Board, the Single Resolution Board, and the SSM).

The current pace of regulation will need to be reduced, regulatory consolidation and finetuning need to be applied, and further simplification should be considered. However, and given the process that has been set into motion and its various spillover effects, the three-to-five-year review clauses in almost all pieces of EU financial law, as well as the unforeseeable nature of events (e.g. Covid-19, the war in Ukraine), it remains to be seen whether a much-needed regulatory decompression will happen.

Judging from the UK's difficulty in disentangling itself from MiFID II's market rules, it may prove much more difficult than it appears on the surface. With the European elections and a new Commission in place in less than a year, now is the right moment to slow down and have a proper rethink about what needs to happen next.

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