International cooperation in banking regulation: past and present

International and European cooperation in banking regulation goes back almost forty years. When institutional cooperation first started, the main idea was for banking supervisors to exchange views and findings. Since then, cooperation has become considerably more extensive. As financial institutions stepped up their global activities, the need for more intensive and comprehensive worldwide cooperation between supervisory authorities when developing and coordinating minimum supervisory standards likewise grew. This greater cooperation is also required to ensure a level playing field and to combat regulatory arbitrage. The logical response to increasingly internationally interconnected financial players was a more globally oriented debate and coordination of measures to ensure financial stability, and to prevent and manage crises.

This process of intensifying and harmonising banking regulation is closely mirrored at the European level, where it is actually even more visible as a result of the committees which were created mainly on a legal basis. In terms of banking regulation, it reached its (preliminary) peak with the establishment of the European Banking Authority (EBA).

The following article aims to provide an overview of international and European cooperation in the key committees and authorities dealing with banking regulation.

International cooperation in banking regulation: the Basel Committee on Banking Supervision

Established in 1974

The Basel Committee on Banking Supervision was established at the end of 1974 as the Basel Committee on Banking Regulations and Supervisory Practices, a permanent subcommittee, by the central bank governors of the Group of Ten (G10) countries.[1] Its permanent secretariat is still located at the Bank for International Settlements (BIS) in Basel. The Committee's founding members were senior staff from the central banks and supervisory authorities of the G10 countries and Luxembourg. Germany is represented by the Deutsche Bundesbank and the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, or BaFin). The Committee was specifically set up in response to banking problems with an international impact, in particular the collapse of the US Franklin National Bank and the Cologne-based Bankhaus Herstatt.

Objectives of the Basel Committee

From the outset, the Basel Committee was intended to strengthen the stability of the international banking system by enabling committee members to exchange ideas and information with a view to improving their respective supervisory systems. In addition, the Committee was to be a platform allowing banking problems with international consequences to be recognised early and ensuring that no foreign bank was able to escape supervision. These objectives have lost none of their relevance in today's world.

Early milestone publications; Concordat

The "Concordat" can be described as the first milestone in the Basel Committee's work. This paper, which was originally published in 1975 and revised in 1983, contains recommendations on the cooperation between home and host authorities in supervising the cross-border activities of banks. It forms the basis for the many memoranda of understanding that international supervisory bodies usually conclude bilaterally. These memoranda of understanding and the regular exchange of information that they entail have developed into key components of the consolidated supervision of cross-border banking groups in Europe.

Basel Capital Accord

In 1988, the Basel Committee published a document entitled "International Convergence of Capital Measurement and Capital Standards." This framework, nowadays also known as the Basel Capital Accord or Basel I, contained the first internationally harmonised rules on determining a comparable capital ratio for large internationally active banks. Key elements were the division of regulatory capital into tier 1 capital and tier 2 capital, and the assignment of borrowers to one of three classes: public-sector entities, banks and other borrowers. As a capital standard, the minimum ratio of capital to risk-weighted assets was set at 8%. In publishing the Basel Capital Accord, the Basel Committee issued the first regulatory recommendations to its member states. Besides the G10 countries, more than 100 other nations worldwide implemented the Basel Capital Accord, in other

1 Belgium, Canada, Germany, France, Italy, Japan, the Netherlands, Sweden, the United Kingdom and the United States, plus Switzerland.

The Basel Committee – organisation and fields of activity

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words transposed it into national legislation or regulations in a binding manner.

Market risk

In 1996, the Basel Committee amended the Basel Capital Accord to include market risk. That meant that price risks associated with debt securities, equity instruments and commodities now had, like credit risk, to be backed with capital.

Basel II

In order to align the capital rules for credit institutions more closely to actual risk and to take account of the most recent developments in the financial markets and in banks' risk management, the Basel I standard was subjected to a fundamental overhaul at the end of the 1990s. In mid-2004, the revised framework "International Convergence of Capital Measurement and Capital Standards", Basel II for short, was endorsed. Conceptually, the new framework comprises three pillars: minimum capital requirements (Pillar 1), the supervisory review process (Pillar 2) and greater market discipline through extended disclosure requirements for banks (Pillar 3). Basel II was transposed into European and German law according to an internationally agreed schedule and, in the EU, entered into force in 2007 for banks applying simpler approaches to determining compliance with the minimum regulatory requirements and in 2008 for those using advanced risk measurement approaches.

Core Principles

Building on the harmonised capital adequacy rules set out in the Basel Capital Accord, the "Core Principles for Effective Banking Supervision" were published in 1997. The Core

Principles contain provisions on the organisation of banking supervision, cooperation between supervisory authorities, requirements in banking business and the entire supervisory process from licensing to resolution. They were first revised in 2006 – after Basel II was endorsed. The implementation and observance of the Core Principles serves as an indicator, for instance, for the International Monetary Fund (IMF) and other supranational organisations, in assessing the stability of national financial markets.

Institutional development of the Basel Committee

Nowadays, most of the Basel Committee's individual projects and decisions are prepared and pressed ahead with by four working groups. The Policy Development Group identifies and reviews current developments and, where appropriate, puts forward regulatory proposals that promote a stable banking system. The Standards Implementation Group examines *inter alia* whether and how the member states implement the Committee's guidance and standards, and monitors cooperation between the national supervisory authorities. This is intended to achieve global consistency in the application of the recommendations and a comparable supervisory standard. As many prudential supervisory standards are based on accounting regulations, the Accounting Task Force helps to develop international accounting and auditing standards and practices, not least with the aim of promoting sound risk management at banks. In addition, it supports market discipline by drawing up transparency requirements. Finally, in order to involve non-member states in its deliberations at an early stage in the process, the Committee has set up the Basel Consultative Group, which provides a forum for exchanging information and facilitates dialogue with supervisory authorities that are not members of the Committee.

Each of these four groups has a number of subgroups or task forces to work on the details of the individual issues, discussing in particular the technical aspects of the subjects allocated to them. For instance, the Policy Development Group has established special working groups to look at issues relating to prudential liquidity requirements, the regulatory definition of capital and trading book risk.[2]

As in the Basel Committee, Bundesbank and BaFin staff usually jointly represent German banking supervisors in the subordinated working groups.

Members

The number of countries involved in the Committee's work has increased significantly over its almost 40-year history. Important milestones in international banking regulatory cooperation, such as the Concordat or the Basel I (1988) and Basel II (2004) capital frameworks (see above) were developed and endorsed with the participation of the G10 countries. Owing to the global consequences of the recent financial crisis and the much increased significance of further financial centres and several emerging market economies in the years preceding that, the Group

2 For a complete overview of the Basel Committee's organisational structure, see http://www.bis.org/bcbs/organigram.pdf.

of Twenty (G20)[3] has assumed a leading role and taken charge of setting objectives for developing financial market regulation, which is also reflected in the composition of the relevant specialist prudential supervisory committees. Since 2009, the Basel Committee has representatives from 44 central banks and the supervisory authorities of 27 member states.[4] Moreover, the IMF, the European Central Bank (ECB), the European Commission, the EBA and the BIS-hosted Financial Stability Institute take part in Committee meetings as observers.

Reporting structure

The management and reporting structures of the international banking regulatory committees have also changed over the years. While the relevant committees were being established, reports and recommendations for action were addressed primarily to central bank governors. Later, they were addressed to central bank governors and heads of supervision.

Link to G20 and FSB

The recent financial crisis marked another watershed event. The Basel Committee now reports the results of its work not only to its members' central bank governors and heads of supervision, but also to the G20 heads of state or government. This reporting line goes via the Financial Stability Board (FSB), which coordinates all aspects of and measures relating to international financial market regulation.

FSB's role and mandate in financial market regulation

The FSB was established at a G20 summit meeting in 2009 as the successor to the Financial Stability Forum[5] with an extended group of members and a broadened mandate. With a view to promoting financial stability, its mandate prescribes as its main tasks the assessment of the stability of the global financial system to identify potential vulnerabilities and the promotion of the implementation of regulatory and supervisory measures. It therefore ensures that the G20 resolutions on financial stability measures are implemented consistently, and advises and liaises with regulatory standard setting bodies (eg the Basel Committee).

Implementation of the resolutions

The inclusion of the Basel proposals for regulation in the G20 action plans and the (subsequent) explicit approval of the committee results as well as the G20 leaders' voluntary commitment to consistently implement the Basel Committee's resolutions help to ensure timely and parallel implementation worldwide. This is imperative in order, first, to strengthen the resilience of banks and therefore reduce the likelihood and gravity of future financial crises and, second, to create a level playing field for all banks. Even though the resolutions and/or recommendations of the Basel Committee are not legally binding, they are recognised internationally and often form the basis for supervisory practices in countries that are not Committee members. The broad implementation of the Basel rec-

3 Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom and the United States, and the European Union as a non-state member.
4 Argentina, Australia, Belgium, Brazil, Canada, China, Germany, France, Hong Kong, India, Indonesia, Italy, Japan, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Sweden, Switzerland, Singapore, Spain, South Africa, South Korea, Turkey, the United Kingdom and the United States.
5 The Financial Stability Forum was founded in 1999 on the proposal of the then President of the Deutsche Bundesbank, Professor Hans Tietmeyer, in response to the financial market crisis in Asia.

ommendations – in particular for the group of countries directly involved in negotiations – is therefore evidence, not least, of the Committee's excellent reputation and its status as an international standard setter in banking regulation.

The Basel Committee's responses to the financial crisis[6]

Basel II.5

More recently, the Basel Committee's work has been dominated, in particular, by the financial crisis. At the request of the G20, the Basel Committee has taken the action believed to be necessary as a result of the crisis. In the autumn of 2008, for instance, it published revised recommendations on liquidity risk management. At the same time, the Committee developed a first package of measures increasing the capital requirements for securitisation transactions and market risk in the Basel II framework, formulating more clearly the requirements for banks' risk management and enhancing disclosure requirements. This Basel II enhancement package, also referred to as Basel II.5, was finalised in mid-2009; it is scheduled to come into force at the end of 2011.

Basel III

In a second step, in December 2010, the Basel Committee decided on further measures to enhance the resilience of the banking system. The document entitled "Basel III: A global regulatory framework for more resilient banks and banking systems" comprises a series of new prudential regulatory standards. The Basel II rules have been supplemented and, in part, further developed. Specifically, Basel III places a focus on the following key points: strengthening the quality and quantity of the regulatory capital framework, introducing a global liquidity standard, covering further risks with capital, deploying measures to reduce cyclicality, introducing a leverage ratio and providing a basic concept for regulating systemically important banks.[7] The rules are to come into force from 2013 onwards, with appropriate transitional arrangements planned in order to prevent negative consequences for the real economy.

Banking regulatory legislation in the European Union

Close interaction between international and European banking regulation

The Basel requirements are a major component of the regulatory harmonisation process within the European Union. Through its role as an observer in the Basel Committee, the European Commission helps to develop the Basel standards from scratch so as to achieve close interlinkages at the international and European level. In addition, it is a member of the FSB. This guarantees that the European legislative process is able to proceed in parallel with the development and implementation of international agreements.

Publication of CRD IV on 20 July 2011

For instance, on 20 July 2011 – ie just a few months after the publication of the Basel III rules on 16 December 2010 – the European Commission presented both a proposal for a

6 For more details, see Deutsche Bundesbank (2011), "Basel III – Leitfaden zu den neuen Eigenkapital- und Liquiditätsregeln für Banken", a set of guidelines for the new Basel III equity and liquidity rules.
7 For more information on special measures relating to systemically important banks, see the Basel Committee press release of 19 July 2011.

directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and a proposal for a regulation on prudential requirements for credit institutions and investment firms (Capital Requirements Directive or CRD IV), with which the Basel III rules are to be implemented in the European Union. They will replace the existing capital guidelines in their current versions, which have already been revised several times,[8] as soon as this new European legal framework has been approved through the democratic process of the codecision procedure pursuant to Article 294 of the Treaty on the Functioning of the European Union (TFEU)[9]. However, whereas the Basel Committee addresses mainly major credit institutions, the European regulations – in order to achieve a level playing field – apply to all credit institutions and investment firms within the meaning of CRD IV.

Paradigm shift in European banking regulation: CRD IV as a combination of a directive and a regulation

With the recent revision of its capital standards, the European Commission is also effecting a paradigm shift in the legislative approach applied in European banking regulation. Up to now, the key provisions of European banking supervision law had always been laid down in directives (eg CRD I to III). Pursuant to Article 288 third subparagraph of the TFEU, directives are binding only as to the result to be achieved, and member states are free in their choice of form and methods for national implementation. That leaves national legislators a certain degree of flexibility which, in the currently applicable capital standards, is still supplemented by numerous options designed to take national particularities into account.

Single rulebook

In the light of the financial crisis, a group of experts chaired by the former IMF president Jacques de Larosière concluded that precisely this flexibility and these options meant that the European regulatory framework lacked coherence and a consistent set of rules.[10] The group therefore recommended that such scope for national exceptions should be avoided going forward, with greater focus to be laid on the instrument of regulation.[11] The Economic and Financial Affairs Council (ECOFIN), in its conclusions of 9 June 2009 – which were confirmed by the European Council on 19 June 2009 – agreed to strengthen the quality and coherence of national supervision and to improve the supervision of cross-border financial groups, *inter alia* through a single European rulebook that applies to all financial institutions active in the single market.[12]

Against this backdrop, large parts of the regulatory framework are intended to be put into place through a regulation, which does not involve implementation as it is directly applicable in all member states and therefore no longer allows for any national deviations.[13] In particular, binding figures and ratios (capital requirements, a definition of capital, a li-

8 Directives 2006/48/EC and 2006/49/EC of the European Parliament and of the Council of 14 June 2006 as amended by Directives 2009/111/EC of 16 November 2009 (CRD II), 2010/76/EC of 24 November 2010 (CRD III) and 2010/78/EC (omnibus directive).
9 In force since 1 December 2009.
10 See the report of the de Larosière Group of 25 February 2009, numbers 99 and 102 (http://ec.europa.eu/internal_market/finances/docs/de_larosière_report_en.pdf).
11 See the report of the de Larosière Group of 25 February 2009, recommendation 10 and number 109.
12 See conclusions of the Council to improve financial supervision of 9 June 2009, number 9.

quidity standard, a large exposure threshold and a leverage ratio) as well as disclosure requirements will be laid down by means of a regulation. The directive, by contrast, is mainly – as before – intended to set out the basic principles for conducting banking business (eg the taking-up and pursuit of banking business or terms for the freedom of establishment and the freedom to provide services, but also principles for better supervision, uniform sanctions, corporate governance requirements and the introduction of capital buffers).

The interaction between the regulation and the directive, which should be seen as two parts of one and the same package, will, it is hoped, maximise harmonisation in banking regulation. In combination with the powers of the newly established EBA, this will significantly limit the scope for divergent implementation and application in the member states. Nonetheless, the particularities of the various national banking landscapes should not be allowed to slip out of focus.

Cooperation in European banking regulation: the EBA

European System of Financial Supervision

The European Council, in its conclusions of 19 June 2009, confirmed the establishment of the European System of Financial Supervision (ESFS). This is a network consisting of the national supervisory authorities of the 27 EU member states, the three new European Supervisory Authorities (ESAs) for banking, securities and insurance, their Joint Committee and the European Systemic Risk Board (ESRB).

EBA helping to improve coherence in European regulatory framework and supervisory practices

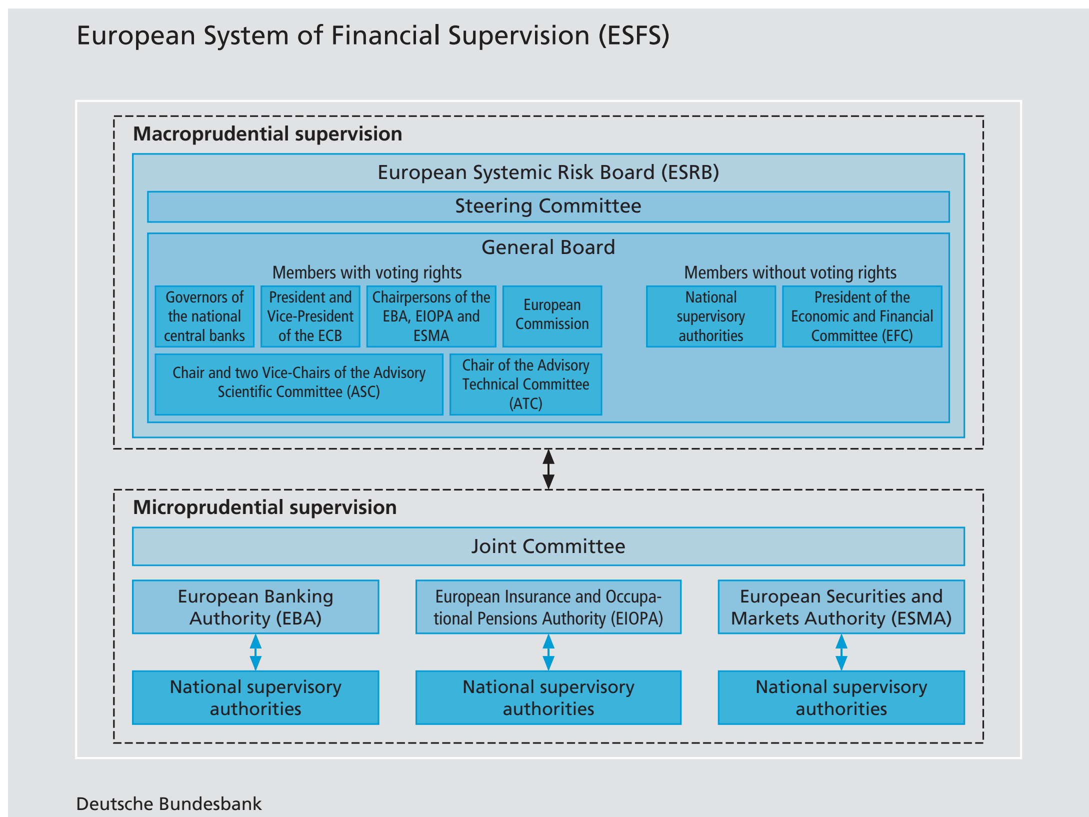
The ESFS started work on 1 January 2011. The EBA is responsible for banking supervision.[14] Together with the national supervisory authorities it will help to improve the quality and coherence of banking supervision in Europe, strengthen the oversight of cross-border groups and introduce a single European rulebook for financial institutions.

EBA's dual status

Nonetheless, the competence and responsibility for overseeing financial institutions and markets in principle remains at the national level. The EBA therefore has a dual status: on the one hand, it is an EU agency with its own legal personality; on the other hand, it is also a members-driven organisation characterised to no small degree by the involvement of banking supervisors from its 27 member nations. Its "parallel" and balanced focus on both the European and the national level are evident in the recitals of the EBA Regulation. They require that the EBA "should act with a view to improving the functioning of the internal market, in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States and the different nature of financial institutions."[15]

13 Article 288 second subparagraph of the TFEU.
14 The organisation, tasks and scope of the EBA are laid down in Regulation (EU) No 1093/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Banking Authority) of 24 November 2010 (EBA Regulation).
15 See recital 11 of the EBA Regulation.

European System of Financial Supervision (ESFS)



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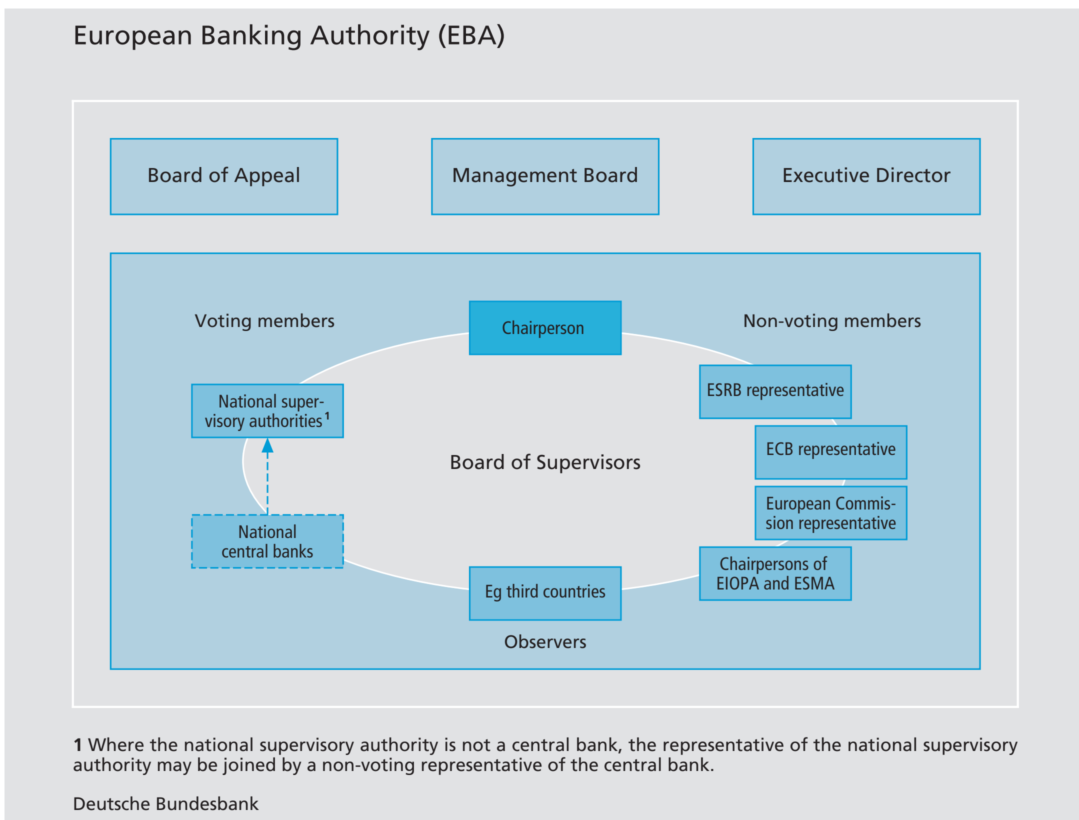
The EBA, as a legally independent body headquartered in London, should have administrative and financial autonomy. It is accountable to the European Parliament and the Council, and consists of the Board of Supervisors, the Management Board, a Chairperson, the Executive Director and the Board of Appeal.

Highest decision-making body made up of representatives of the national supervisory authorities

The EBA's highest decision-making body is the Board of Supervisors. Its voting members are the heads of the national authorities responsible for supervising credit institutions in each EU member state. In addition, there are non-voting members, namely one representative from each of the European Commission, the ECB, the ESRB and the two other ESAs, and the Chairperson of the EBA. The Board of Supervisors may decide to admit observers (as in the case of non-EU members of the European Economic Area, in other words Iceland, Liechtenstein and Norway). Where the competent supervisory body is not a central bank, the representative of the national supervisory authority may be joined by a non-voting representative of the respective country's central bank. Germany is represented on the Board of Supervisors by BaFin (with voting rights) and the Bundesbank as an institution involved in ongoing supervision (without voting rights).

The Chairperson represents the EBA in all issues. He or she is nominated by the Board of Supervisors for a term of five years, which may be extended once. The European Parliament has the right to object to the designation of the candidate up to one month after



1 Where the national supervisory authority is not a central bank, the representative of the national supervisory authority may be joined by a non-voting representative of the central bank.

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selection, after having heard the person selected. The Board of Supervisors is supported and advised by the Management Board. The six members of the Management Board are selected from the ranks of the Board of Supervisors. An Executive Director, who is chosen by the Board of Supervisors for a term of five years, which may be extended once, is responsible for the day-to-day management of the EBA. A Board of Appeal has been set up to deal with appeals against decisions taken by the EBA. This is a joint body of the three new ESAs. The six members of the Board of Appeal are independent in making their decisions and are not bound by any instructions. Appeals against decisions taken by the Board of Appeal may be brought before the Court of Justice of the European Union.

Banking industry expertise taken on board

The Banking Stakeholder Group is intended to ensure that the banking industry is involved in the EBA's ongoing work at an early stage and that its expertise is exploited. The group's 30 members represent credit and investment institutions as well as their employees, and consumers, users of financial services, representatives of small and medium-sized enterprises, and academic circles.

Tasks

The EBA has not only taken over the tasks of the Committee of European Banking Supervisors (CEBS), which was dissolved when the EBA was set up, but has also been equipped with additional powers. Of the range of tasks which it is expected to fulfil, two core areas are particularly important: improving cross-border supervisory practices and supervisory cooperation, and ensuring the harmonisation

and coherent application of EU supervisory legislation.

EBA representatives therefore take part in supervisory college meetings. Supervisory colleges have now been established for more than 100 EU cross-border banking groups. Germany is the consolidating supervisor (home supervisor) in 18 EU supervisory colleges and participates in another 24 EU supervisory colleges as the host supervisor.[16] Another important function of the EBA is its legally binding mediation role to resolve disputes between national supervisory authorities in the supervision of a banking group with EU-wide activities. In addition, the EBA is to support the national supervisory authorities in times of crisis. It can, however, also decide to take its own measures. In the event of a crisis, the EBA may even, under certain circumstances, exercise its power to adopt decisions addressed to individual institutions. It may likewise make use of this option in its mediation role and in monitoring compliance with EU banking supervisory legislation.

Whereas CEBS issued legally non-binding guidelines and recommendations, …

The EBA has also been equipped with greater regulatory powers than its predecessor, CEBS. The latter could only issue legally non-binding guidelines and recommendations, albeit with a caveat of requiring an explanation in the event of non-implementation ("comply or explain").

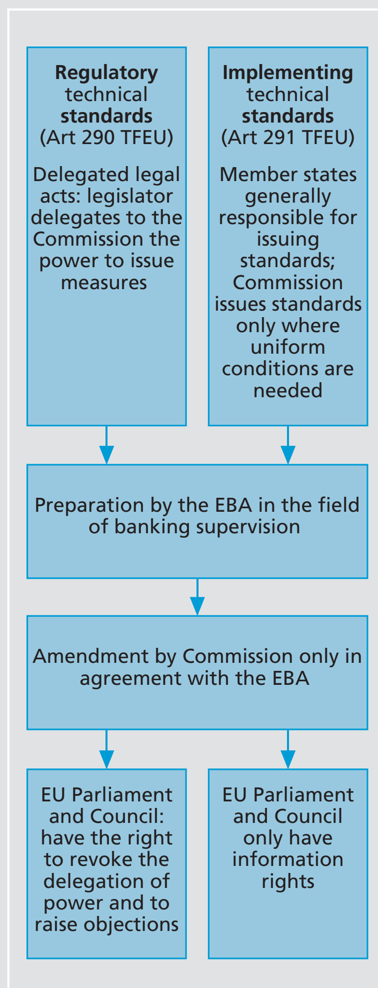
With the entry into force of the TFEU, the comitology, ie the system of administrative and expert committees within the European Union, was reorganised. In order to reduce the abundance of details and thus the length of negotiations in legislative procedures, the Council of Ministers and the Parliament may use a legislative act (eg a directive) to delegate to the Commission the power to adopt delegated acts pursuant to Article 290 of the TFEU. However, these legislative powers may be exercised only to supplement or amend non-essential elements of a legislative act. The relevant legislative acts explicitly lay down the objectives, content, scope and duration of the delegation of power. In principle, the member states are responsible for implementing the legislative acts and must adopt the necessary measures of national law. However, where uniform conditions for implementing legally binding Union acts are needed, pursuant to Article 291 of the TFEU, implementing powers may be conferred on the Commission and in exceptional cases – of no relevance to banking regulation – on the Council in order to ensure the uniform application of a basic legal instrument by the member states.

… the EBA, as a body with its own legal personality, is equipped with quasi-legislative powers

In banking supervision, the EBA plays an important role in this process. The EBA Regulation states that the EBA may, in explicitly predefined areas, elaborate draft technical standards which are submitted to the Commission for endorsement in the form of delegated acts or implementing acts. Both the delegated acts and the implementing acts are then adopted by means of a regulation or decision of the Commission and therefore become directly applicable law. Although these

16 For more information on supervisory colleges, see Deutsche Bundesbank, International cooperation in the area of ongoing banking supervision, Monthly Report, December 2009, pp 47-57. The number of colleges given here refers to January 2011.

Technical standards in banking supervision by the EBA and the European Commission



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technical standards are intended to be "only" supplements or amendments to non-essential elements of a legislative act, they have a clearly visible and perceptible impact on both supervisory practices and credit institutions' activities. As per the latest draft, the proposals for a directive and a regulation to implement Basel III in the EU allow for 108 technical standards[17] relating to numerous areas, for instance, the definition of capital or joint risk assessments and the valuation of capital in the supervisory colleges.

Regulatory technical standards

There are two types of technical standards. The EBA elaborates draft "regulatory technical standards" and submits these to the Commission for endorsement. The Commission may not change the content of a draft regulatory technical standard without prior coordination with the EBA. Indeed, such drafts should be subject to amendment by the Commission only in very restricted and extraordinary circumstances, as the EBA is deemed to be the actor in close contact with and knowing best the financial markets.[18] Where the EBA has submitted a draft legislative act and the Commission has adopted it without amendment, the European Parliament and the Council have just one month to object pursuant to Article 13 of the EBA Regulation.

Implementing technical standards

Moreover, pursuant to Article 15 of the EBA Regulation, the EBA may develop "implementing technical standards." There is no limitation like the one applicable to regulatory technical standards stating that the Commission may make amendments only in very restricted circumstances. In the area of implementing technical standards, the involvement of the European Parliament and the Council is limited to information rights.

The special significance that technical standards have for supervisory practices and credit institutions' activities is reflected in the decision-making procedure in the Board of

17 As at 20 July 2011.
18 See recital 23 of the EBA Regulation.

Qualified majority for decisions on the introduction of technical standards

Supervisors. As a general rule, decisions of the Board of Supervisors are taken by a simple majority of its members, with each voting member having one vote. However, in the case of decisions relating to the elaboration of regulatory technical standards, implementing technical standards or guidelines and recommendations, votes are weighted according to Article 16 (4) of the Treaty on European Union and Protocol (No 36) on Transitional Provisions, thus ensuring that the size and economic power of the member states is reflected in the voting (qualified majority).

Tension between legislating European authority and ultimate responsibility at national level

The EBA and the national supervisory authorities, as part of the ESFS, should work together to further enhance cross-border supervision and regulation in Europe. Attempts have been made to balance the rights and duties of those involved. In doing so, the rights at the "European level" – ie those of the EBA – have been extended, as reflected in the tasks and responsibilities as well as the powers to issue instructions to individual institutions outlined above. However, the dictate that the fiscal sovereignty of the EU member states must be guaranteed means that basic responsibility for banking supervision must remain at the national level, as incidentally also reiterated by the European Council in its conclusions of 19 June 2009. It stressed that decisions taken by the ESAs should not impinge on the fiscal responsibilities of member states.[19] This demand is spelled out in Article 38 of the EBA Regulation, which states that decisions taken by the EBA pursuant to Article 18 (action in emergency situations) and Article 19 (settlement of disagreements) must not impinge on member states' fiscal responsibilities.

The challenge inherent in this concept is to find an appropriate balance between a European authority equipped with both quasi-legislative powers and the right to issue instructions to individual institutions under certain circumstances, and the fact that ultimate responsibility for all measures taken lies at the national level. With this in mind and in order to increase acceptance, it is therefore very important that the work of the EBA is largely based on the contributions of the member states, despite it being an independent EU authority. This must be the case not merely when decisions are taken by the Board of Supervisors, but must also apply and be practiced in the preliminary stages of the substructures (members-driven approach).

In closely tying in national supervisory authorities, national particularities can also be taken into consideration – as stipulated in the recitals of the EBA Regulation. The need for greater harmonisation of EU supervisory legislation towards a single rulebook and greater coherence in ongoing supervision across national borders is acknowledged in principle. However, judgement needs to be exercised in practice.

Implementation at the national level

When transposing European and international requirements into German law, their

19 See recital 5 of the EBA Regulation.

International recommendations and standards not legally binding, but European legal framework is binding for member states

legal nature needs to be taken into account. For instance, the standards negotiated in the Basel Committee are legally non-binding recommendations. However, the results of the European legislative process are binding for German legislators and generally reflect agreements reached at the international level.

As mentioned above, the implementation of CRD IV is slightly different in that the Commission proposal envisages a combination of a directive and a regulation.[20] A combination of this kind requires considerable amendments to the applicable German legal framework, specifically the Banking Act *(Kreditwesengesetz)*, the Solvency Regulation *(Solvabilitätsverordnung)* and the Liquidity Regulation *(Liquiditätsverordnung)*. As a regulation has general application pursuant to Article 288 second subparagraph of the TFEU, it is binding in its entirety and directly applicable in all member states. Transposition into national legislation is therefore not only unnecessary, it is actually not permissible (prohibition of implementation).[21] National legislation that runs counter to the provisions of a regulation must be amended to avoid ambiguities.[22]

Consequently, any provisions that, in future, are to be covered by the regulation must in principle be removed from German banking supervision law. However, the CRD IV regulation applies only to credit institutions and investment firms, and therefore does not cover all institutions within the meaning of the German Banking Act. This raises the question of the extent to which the requirements of the regulation should also apply to the other institutions governed by the Banking Act. The regulation must thus either be declared to be applicable to these institutions too or the relevant German legal provisions must be amended.

By contrast, the provisions laid down in the directive must be transposed into German legislation before they become directly applicable. Here too, deviations are allowed only in individual cases, namely to safeguard financial stability or where required by an institution's specific risk profile.

Commission's technical standards

As outlined above, the EBA elaborates regulatory technical standards or implementing technical standards that are endorsed by the Commission in the form of regulations or decisions.[23] In this context, there is no provision for the issue of directives. The technical standards therefore have direct effect; national implementation is not permissible.

EBA guidelines

In addition, the EBA – like CEBS before it – can issue guidelines and recommendations pursuant to Article 16 of the EBA Regulation.[24] Although these guidelines and recommendations are not legally binding, national authorities must make every effort to comply with them or must, if they fail to do so, inform the EBA, stating their reasons. The EBA will also publish this fact. This "comply or explain" mechanism is intended to increase the

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20 See p 85.
21 ECJ, case 94/77, Zerbone, ECR 1978, 99.
22 ECJ, case C 307/89, Commission v France, ECR 1991, I 2903, no 13.
23 See p 90f.
24 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010.

pressure on member states to apply such guidelines or recommendations.

The proportion of directly applicable provisions in European banking regulation has therefore increased, as has the implementation pressure in other areas. The European legislator is thus being given further powers vis-à-vis national lawmakers with the aim of creating a single market in the financial sector.