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FCCR Policy Paper

Financial regulation: a key component for the competitiveness of the EU financial industry

This policy paper by the Frankfurt Competence Center for German and Global Regulation (FCCR) analyzes the challenges facing the competitiveness of the European financial industry. It argues that the current flood of regulations and the nature of regulatory processes are slowing growth. The paper criticizes the disproportionate and complex approach of EU financial regulation, particularly regarding the various Lamfalussy levels. Overregulation is exemplified with respect to capital requirements, the Retail Investment Strategy, sustainability frameworks, and data access. Finally, strategies are proposed, including better compliance with the Better Regulation Guidelines, clear delineation of supervisory authorities' competences, and the introduction of growth and international competitiveness as regulatory objectives.

The project of the EU's single market is a success. However, single market integration has become more difficult in recent years. Moreover, Europe is falling behind in maintaining its competitiveness at a global level. The financial industry, with its particularly critical role for the competitiveness of other sectors, is struggling because of an almost unmanageable umbrella of regulations since the severe financial and banking crisis in the years to 2009 (GFC). Its vulnerability due to regulatory constraints risks affecting European economic performance. It also has the potential to undermine Europe's strategic autonomy in global competition, i.e. the EU's ability to make its own decisions and make its economy resilient. Ultimately, a less competitive European economy could also hinder the twin transitions to sustainability and digitalization.

I. A general concern: What is EU legislation contributing to EU competitiveness?

It is always useful to review past legislation and assess whether it is still fit for purpose. In addition, we must review the way legislation is newly created at the European level. EU Legislature has broad discretion to set priorities where it is necessary to make political, economic and social choices.[1] However, it must take on the task to set priorities. But even

[1] ECJ, Judgment of 13 December 2018, Rittinger and others (C-492/17) ECLI:EU:C:2018:1019, § 77; Judgment of 15 July 2021, Commission / Landesbank Baden-Württemberg and CRU (C-584/20 P and C-621/20 P, Publié au Recueil numérique) ECLI:EU:C:2021:601, § 117.

so, EU legislature must base its choice on objective criteria and examine whether the aims pursued are such as to justify the consequences for market participants.[2] If we do not change our attitude to creating a framework that attempts to be 'all things to all people', we will continue to limit the inherent economic and innovative power of European businesses and inhibit their growth potential.

The European reflect has always been to regulate, which is intrinsically intertwined with the fact that there is one institution that drafts proposals, which then are pushed through a process of 27 opinions on the one side and many more on the other side. Let alone the role that national supervisors play in the run up to the proposals and steering member states opinions in the background. And this is only the public side…the private side equally is feeding in many viewpoints and advice. This all leads to very convoluted proposals and packages where each one aims to apply and appease everyone all the time. This does not even include the steps for executing on level 2 mandates.

→ *EU legislature must set priorities and make choices!*

Many future challenges do not fit very neatly into one specific sectoral/legislative box anymore. Green and digital transitions impact all sectors. However, this does not mean that making choices is not necessary anymore – to the contrary! Moreover, in terms of procedure, even more coordination between those drafting across the policymaking spectrum is needed to ensure there is a wider strategy defining primary and secondary priorities and a balanced and coherent framework to achieve those priorities, and not a murky one-size-fits all approach.

→ *The more complex the world becomes, the more important it is to make choices!*

In terms of substance, we think that Europe should aim for a policy framework that enables its companies across all sectors to scale and succeed in global markets. To this end, Europe should:

- improve the provision of core infrastructure to promote growth, security and competitiveness.
- improve the business environment by reducing the complexity of reporting and streamlining approval procedures, and by making doing business in the EU "simpler and faster" through "less bureaucracy and reporting, less risk aversion, better enforcement and faster permitting".
- complete the development of the European single market and prioritize the creation of an integrated market for financing through its financial services companies and capital markets, while also ensuring the various transition paths.

2 ECJ, Judgment of 13 December 2018, Rittinger and others (C-492/17) ECLI:EU:C:2018:1019, § 79.

→ *The EU should focus on safeguarding essential inputs, procedural simplification, and the completion of the internal market to boost the competitiveness of the European Economy.*

Finally, while it is true that issues increasingly emerge with global implications such as climate/ESG, such issues should be addressed by the EU primarily at global level. It may harm the development of the internal market and weaken the global competitiveness of European industries if the EU pushes forward with its own rules regardless of the associated cost to EU market participants.

II. Financial regulation – a brake for the financial industry and for growing the wider EU industry!

We need a review particularly of the way European financial regulation is created and implemented. The principle of proportionality is enshrined in Article 5(4) of the Treaty on European Union (TEU). Financial regulation, like all regulation, must be proportionate to the pursued legislative objectives. The essential rules governing the matter in question must be laid down in formal legislation and may not be delegated.[3] In turn, the Treaties entrust delegated regulation to the institutions which, in the normal course of events, are responsible for exercising that delegated power.[4]

However, it may be questioned whether current financial regulation is optimally oriented towards its objectives. In accordance with the *Lamfalussy* process, EU financial regulation is composed of three levels. Level 1 was originally meant to consist of framework legislation, Level 2 of implementing measures spelling out technical details, and Level 3 of guidelines, recommendations, and peer reviews in the interest of supervisory convergence. In practice, however, Level 1 regulation and Level 2 measures have adopted an approach that is too granular to reflect the heterogeneity of banks' size, complexity and risk profiles.

→ *The focus of Level 1 and Level 2 regulation should be on uniformly applicable principles, not on criteria for assessing the individual case.*

Moreover, the distinction between Level 3 standards and rule enforcement has remained unclear. Regulators set and enforce Level 3 standards uniformly, failing to distinguish the enforcement of binding rules and the case-specific exercise of regulatory or supervisory discretion. This is not in line with the requirement established in EU case law that

[3] ECJ, Judgment of 14 October 1999, Atlanta / European Community (C-104/97 P, ECR 1999 p. I-6983) ECLI:EU:C:1999:498, § 76; Judgment of 6 July 2000, Molkereigenossenschaft Wiedergeltingen (C-356/97, ECR 2000 p. I-5461) ECLI:EU:C:2000:364, § 21.

[4] ECJ, Judgment of 6 May 2008, Parliament / Council (C-133/06, ECR 2008 p. I-3189) ECLI:EU:C:2008:257, § 47; Judgment of 13 July 1995, Parliament / Commission (C-156/93, ECR 1995 p. I-2019) ECLI:EU:C:1995:238, § 18.

discretionary decisions must be reasoned and take into account the relevant circumstances.[5] Further, to be proportionate, regulatory discretion should be exercised in the manner that European Supervisory Authorities (ESAs) should impose or enforce complex requirements only if they can demonstrate a clear added prudential value. Otherwise, abstaining from regulatory intervention may be the better choice.

→ *A more calibrated and case-specific application and enforcement of financial regulation is needed!*

To improve financial regulation across all three levels of that regulation, the following guiding principles should be observed:

1. Level 1 regulation should be unambiguous and clearly define the core requirements ("essential rules") without interference from regulators and supervisors.
2. Level 2 measures should be used sparingly and only for technical aspects (i.e. regulators and supervisors should not decide on essential requirements).
3. Level 3 guidelines should be treated effectively as "soft law" and should not be equated de facto with binding requirements in supervisory expectations.

III. Examples where revising financial regulation could effectively contribute to growth

The above findings and recommendations have been voiced also elsewhere – but in the abstract and to no avail. Without any intention of completeness, we would therefore like to give a few examples to further clarify our position.

Example A: Capital requirements

While the principle of proportionality is reflected in the Capital Requirements Regulation and the Capital Requirements Directive, its specification at Level 2 and Level 3 remains limited and is not consistent:

- For example, while the Level 1 regulation introduces the category of Small and Non-Complex Institutions (SNCIs) for which certain simplified requirements are provided, the implementation and further specification of those requirements across the Level 2 and Level 3 legislation often fails to fully consider the heterogeneity of banks' size, complexity and risk profiles.

[5] ECJ, Judgment of 8 May 2019, Landeskreditbank Baden-Württemberg / ECB (C-450/17 P, Publié au Recueil numérique) ECLI:EU:C:2019:372, § 77; GC, udgment of 11 September 2002, Pfizer Animal Health / Council (T-13/99, ECR 2002 p. II-3305) ECLI:EU:T:2002:209, § 171.

- Level 2 standards often impose extensive and granular obligations on all institutions, with limited differentiation (e.g. the EBA Implementing Technical Standards on Supervisory Reporting and on Pillar 3 disclosures).
- Level 3 instruments and ECB Guidelines exacerbate these issues by outlining standardised expectations (e.g. the EBA Guidelines on the Supervisory Review and Evaluation Process (SREP), the ECB Guideline on climate-related and environmental risks). This results in undue burden on smaller institutions without a clear prudential rationale.
- The supervisory approach often is also adding further burden. Supervisors treat the Guidelines from the ESAs and the ECB as introducing *de facto* binding requirements rather than indications on best practises and recommendations. In addition, there is a tendency to apply a “tick the box” approach.

Differentiating prudential requirements across banks at Level 1 (i.e. lower capital requirements for smaller banks) or establishing a separated regulatory framework would constitute a substantial change of the regulatory approach which would be very difficult to achieve and conflict with international harmonization efforts in the field of prudential requirements. That being said, a more consistent application of proportionality should be considered, if not in the legislative framework, then at least in the implementation and supervisory practice:

- When Level 1 clearly envisages the case for proportionality, the burden of proof for imposing complex requirements on smaller banks should lie with the ESAs, i.e., requirements should only be imposed if a clear added prudential value is demonstrated.
- In addition, increasing the use of principle-based regulation could improve supervisory flexibility and enable a more risk-sensitive/outcome-focused application of the requirements, while still maintaining the core prudential goals.

Example B: The Retail Investment Strategy (RIS)

The strategy for retail investors is not a single piece of legislation, but an overall concept that revises several existing EU directives and regulations. In particular:

- MiFID II (market rules for investment services),
- IDD (insurance distribution),
- UCITS Directive (investment funds),
- AIFMD (Alternative Investment Funds),
- and the PRIIPs Regulation (key information documents for investment products).

The RIS is geared towards ensuring that investment products bring “real value for money to retail investors”. The objective is laudable, but the proposed measures go much too far.

Trying to regulate the price of companies for investors (value for money (VFM)) leads to VFM benchmarks that are redundant. Cost is not the only relevant consideration, as there are several legitimate reasons why an investor may want a comparatively more expensive strategy (expected return, sustainability characteristics, etc.). The proposed VFM benchmarks may hinder innovation as such products usually have higher initial costs, e.g. transitional financing. This is a classic market problem.

Customer processes, especially customer acceptance, become an incalculable risk due to the many regulatory details. Simplifying the customer process is of crucial importance. The checks must not become even more complex, but the information must be limited to meaningful details.

The currently foreseen mandatory Best Interest Test for costumers aims to identify the most suitable and cost-efficient financial product for their needs. The test is emblematic of how well-intentioned regulation can inadvertently lead to over-standardisation of customer processes.

The blanket ban on inducements in distribution is aimed in the same direction of overprovision. It undermines and contradicts the political intention to increase retail investor participation and to ensure that retail investors are treated fairly and are adequately protected. A general or even partial ban on incentives would force banks to remunerate financial advice exclusively through fee-based models. This approach would primarily cater to high net worth clients, while creating a barrier for individuals with more modest means to access financial advice. As a result, wealth advisory services could become less attractive, particularly for retail investors, potentially discouraging them from participating in financial markets. In this way, the regulation would risk being counterproductive, ultimately achieving the opposite of its intended objective - namely, limiting rather than facilitating retail investors’ access to financial markets. The European Commission has already acknowledged that a full ban would have a significant and sudden impact on existing distribution systems. Even a partial ban poses significant operational challenges for banks. For example, customers may initially be advised and then buy more of a fund via the execution only process, or vice versa. It is good that both the Parliament and the Polish Presidency agreed in April 2025 to remove the proposed ban on partial incentives and postpone it to a later review. But it should be removed from the agenda altogether. Consumer interests can be protected sufficiently by making incentives in distribution transparent.

This area of obligatory client protection also includes the restrictions on retail clients imposed by MiFID II. The very undifferentiated classification as a retail client restricts the services and products that can be made available to sophisticated clients. This is not only detrimental to clients' long-term investment objectives, but also to the EU Capital Markets Union's objectives of encouraging more investment in the capital markets. If such rules are considered important, the opt-up criteria must in any case be easy to apply. The required individual test must focus on expertise (and not on the number of transactions) and allow opt-up at portfolio level (and not by asset class) to ensure appropriate investment diversification and reflect the way the asset management industry works.

There are possible long-term benefits of the proposed RIS Directive, but in the short to medium term the proposed rules are too complex, unclear and inhibit investment. Many financial market participants are calling for more clarity, de minimis limits and a more pragmatic application practice by the EU Commission.

Example C: Sustainability framework

Important adjustments are currently being made here as part of the omnibus legislation. As an immediate measure, it would be necessary to suspend the application of the CSRD, the CSDDD and the taxonomy until agreement is reached on changes through the omnibus package. The removal of the dual disclosure requirements at company level for financial sector companies from the taxonomy and SFDR is of particular importance and at the same time a particularly glaring example of uncoordinated regulation. The SFDR reporting obligations at company level on the most material principal adverse impacts (PAI) in relation to the sustainability strategy should be reconsidered with regard to the CSRD/ESRS reporting obligations in order to eliminate the existing overlaps between the CSRD reporting obligations and the SFDR PAI reporting obligations at company level.

The reporting obligation for the Green Asset Ratio (GAR) under the Taxonomy Regulation should be completely removed as the usefulness and usability of the reported GAR information is very limited. A core issue lies in the methodology: certain sectors might display significantly higher Green Asset Ratios than others, not because they are inherently more sustainable, but simply because relevant data in those sectors is more readily available and verifiable.

The “Do No Significant Harm” (DNSH) principle under the Taxonomy Regulation should be removed or substantially simplified. In practice, the assessment of economic activities often fails not because of the nature of the activity itself, but due to the difficulty of providing robust evidence for compliance with the DNSH principle and the Minimum Safeguards (MSS).

The overly narrow interpretation of the DNSH principle leads in practice to paradoxical situations whereby investments that are widely considered sustainable can no longer be classified as such under the Taxonomy Regulation. A common example is the exclusion of large-scale photovoltaic installations, which are not deemed sustainable because adequate end-of-life recycling processes do not yet exist for certain materials.

Similarly, the GAR and BTAR reporting requirements should be removed from the Pillar 3 ESG reporting requirements as they are not useful for risk management.

The SFDR is used as a labeling and marketing tool. Given its loose definitions, this leads to problems. There are data gaps in all areas of SFDR (PAI including for DNSH valuation, %TR adjustment, E/S contribution for SI valuation, good governance). Disclosure requirements should be radically simplified to increase the usefulness of disclosures for investors and avoid an excess of complex, non-comparable disclosures.

Example D: Financial data access (FiDA)

FiDA seeks to mandate the sharing of virtually all types of financial data across the financial sector that would go much further than Open Banking, which only mandates the sharing of payment data. The formal approach of this regulation is to require greater market transparency, but the proposal has not been supported by a clear impact assessment or well-articulated use cases. The cost-benefit analysis is not correct.

The EU Financial Data Access Regulation (FIDA) aims to support Europe’s digital future by fostering innovation, empowering consumers, and enhancing the EU's global digital economy position. Successfully creating pan-European data spaces requires consistent data standardisation across sectors, financial services being one of them.

These objectives and FIDA are an essential measure in advancing a data-driven EU economy. Nevertheless, the current proposal introduces complexities that will significantly limit its advantages. The proposal should be revised/amended taking the following guidelines into account.

The risk of market segmentation through regulatory fragmentation is a major concern and only insufficiently addressed in the discussed amendments. What is needed is robust governance and standard-setting procedures. A centralised governance framework should oversee the development of common technical standards, access rules, and interoperability protocols.

Implementation should also be phased and impact-led, starting with data categories that are already standardised, digitised, and commonly used, such as current accounts and payment data. Subsequent phases should depend on assessments of technical readiness, customer demand, and operational feasibility.

To effectively scale an open finance ecosystem, it is essential to clearly define the scope of data and customer segments. Initial focus should be on consumer and SME data as well as core financial products. Expansion into more complex datasets, such as intricate investment and structured loan information, should be preceded by thorough demand and readiness assessments. A key takeaway from the Payment Services Directive (PSD2) is that a regulation that targets retail-focused use cases is not pertinent to large corporates who benefit from bespoke data-driven financial services beyond the retail domain.

For FIDA to provide an efficient framework, a public sector led experimental platform that allows the private sector to trail their innovations at different stages of the innovation process in tech sprints, digital sandboxes and finally regulatory sandboxes would be highly beneficial. This would accelerate time-to-market of open finance use cases and help the European Commission understand the feasibility of existing regulation.

Example E: Digital operational resiliency (DORA)

The protection of critical infrastructures is extremely important and requires regulation. However, different levels have once again created a situation that is difficult to handle and manage due to uncoordinated regulations. Banks in Germany are subject to KRITIS supervision by the BSI and national organizational supervision by BaFin and the Bundesbank. Similar supervision may also exist in other EU member states. DORA adds a double layer of regulation with complex documentation requirements.

IV. General recommendations: Strategies against overregulation

We now outline **seven fundamental changes** to the current EU approach to financial regulation which, in addition to the issues raised in the previous sections, could contribute to a short-term simplification and thus improvement of the EU's financial regulatory framework.

1. Regulate in line with Better Regulation Guidelines!

The EU Better Regulation (BR) Guidelines should be properly followed both in the preparation of new legislative proposals and in the evaluation of existing legislation. Compliance with **the Better Regulation Guidelines should become the main test for new legislation** to ensure that legislation is only adopted if it is reasonably necessary and aimed at achieving the desired policy objectives.

In this respect, the development of **robust impact assessments** with adequate consideration of policy options and associated costs and benefits is crucial to the development of effective and well-coordinated legislation. These assessments are included in the BR requirements but are not always carried out in a robust evidence-based way to adequately inform policy choices.

2. Each regulator should limit itself strictly to its competences and tasks!

The division of responsibilities in European rulemaking should be re-aligned with the *Lamfalussy* process, i.e. the EU co-legislators exercise essential legislative functions at EU level; the ESAs are responsible for the formulation of Level 2 and 3 legislation implementing rules and guidance, while the SSM and the NCAs are to ensure that the legislation is effectively applied by and enforced towards supervised entities.

In addition to the concerns raised in Sections II and III, the current high number of second-order financial market regulations shows that the **ESAs are overwhelmed** with their regulatory mandates; they have effectively stopped coordinating with the other horizontal regulators (e.g. other authorities).

Even more concerning, **unplanned self-empowerments** can be noticed. For example, the ECB introduces guidelines without a formal legal mandate, which cumulate with all other levels of law and create additional (de facto hard) requirements in the form of supervisory expectations. As a result, an already complex framework becomes even more complex and sometimes even creates expectations that are not in line with existing requirements in other sources of law.

Another issue related to the demarcation between Level 1 and Level 2 regulations that needs to be addressed is a new development that requires firms to **implement Level 1 regulations when the required Level 2 implementation rules are not yet ready** (e.g. EMIR 3, SFDR, etc.). This new expectation from regulators leads to an unnecessary duplication of implementation work and costs for firms. To avoid such situations, the Level 1 text should specify that new obligations requiring the development of implementing legislation (Level 2) should only take effect after a reasonable implementation period (depending on the nature of the new obligation and the expected implementation work) following the publication of the corresponding Level 2 legislation in the EU Official Journal.

The competitiveness of the European financial industry would benefit from a single eurozone legal system for the financial sector in terms of capital and liquidity and preventing the **"gold plating**" of EU standards by national regulators (first in the Eurozone and then immediately in the rest of the EU/EEA, as national "gold plating" is an important prerequisite).

This does not mean that all national peculiarities are abandoned. In the case of capital requirements, for example, the legislator could take into account the fact that some of these requirements are only relevant for banks operating in national or cross-border markets, while others are also relevant for regionally active banks. The European Commission's market definitions in merger cases (see here), for instance, may provide guidance in this regard. Accordingly, the capital requirements for local operations could be simplified compared to those for national/cross-border operations.

3. Introduce regulatory flexibility to adapt to priority and market changes

The current financial regulatory framework is too rigid to account for changing political priorities and market changes. One solution would be to ensure that the Level 1 legal texts are based to a larger extent on **general principles** instead of directly enforceable rules. However, if general legal clauses were to be used, it would be the more necessary that Level 1 regulation sets **clear boundaries for Level 2 mandates.**[6]

This would require a fundamental shift in EU financial regulation. As underlined by John Berrigan, European Commission Director General Financial Stability, Financial Services, and Capital Markets Union:

"Simplification is not only about changing rules and procedures. It is fundamentally about ***changing the mindset*** *of all those involved in building the regulatory framework."*

There needs to be a understanding among rule makers that rules should be designed so that they are the least burdensome in their application.

4. Global regulatory issues should be zoned up to the global level!

Issues with **global implications such as climate/ESG should be addressed by the EU at a global level in** order to achieve global alignment and reduce fragmentation. One example is the GFC: regulatory reforms (Basel/CRD/R) and derivatives (EMIR, Dodd Frank) have by and large been developed. Although the regulatory approaches of the various jurisdictions differ, the general policy direction is consistent. The EU is a global leader in sustainable finance, which is commendable, but the reality is that we have fragmented and often duplicative frameworks that we must comply with to access the market, often at significant cost and operational complexity.

5. Develop (further) enabling regulation to facilitate innovation!

The EU should take the opportunity through its Digital Simplification Package to **refine** its **approach to regulating new technologies (AI, etc.)** and encourage innovation. Currently, AI law regulates certain use cases based on the perceived risk rather than the actual risk posed by the outcomes of those use cases. While a risk-based approach makes sense, it can impose disproportionate obligations on use cases that in practice do not entail significant risks. The EU should instead promote innovation and growth by adopting a more flexible, technology-neutral and principles-based approach to AI regulation, ensuring that its approach is consistent with its competitiveness agenda.

[6] See in that regard: EFR paper on the basic principles https://www.efr.be/news/efr-paper-on-core-principles-for-policymaking-in-the-next-european-legislative-cycle/.

6. Recognize competitiveness as additional objective of regulation!

In line with the *Lamfalussy* process, financial regulation has to date focused on overcoming market fragmentation and developing the EU internal market. However, we now consider the introduction of a **secondary objective for growth and international competitiveness** of the financial sector in the mandate of the ESAs to be worth considering. Subject to alignment with relevant international standards, this should promote the EU's international competitiveness and growth.

In the UK, the secondary objective of promoting growth and international competitiveness is proving to be a useful tool for the industry in pushing for changes to complex and disproportionate regulation (e.g. the MiFID II rules for electoral experts from an international perspective) and has already led to changes in the FCA's regulatory approach.

7. Take market changes into account also in supervision!

To ease the pressure on both supervisory authorities and financial sector entities, legal certainty must be ensured, particularly when timelines for decisions are too tight for thorough evaluation or during transitional phases. **When detailed rules** for coping with these types of challenges **are lacking**, supervisory authorities should consider to **suspend rules** and to expressly declare "no enforcement action" against certain behaviors given the circumstances. This approach would provide clarity for market participants amid regulatory uncertainty or with new products or business models.

No-action letters are an **established instrument in the USA** – particularly at the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). Companies or market participants can apply for a no-action letter, in which case the authority declares that it will not take any action in the specific case. In EU financial market regulation (e.g. by ESMA, EBA, EIOPA or national supervisors such as BaFin, AMF, FCA), we are not yet aware of any formalized equivalent to the US no-action letters. Nevertheless, comparable measures have already been taken out of necessity, and these need to be integrated into a general framework and should be codified. This applies particularly to "Supervisory Statements" or "Statements of no enforcement priority." These statements are currently not legally binding, but already provide important practical guidance. (Example: ESMA or national supervisory authorities indicate that they will temporarily refrain from enforcing certain regulations or will apply them with a sense of proportion - for example when introducing new regimes (e.g. MiFID II, SFDR, EMIR). This is not sufficient, but it is an indication of suitable options.

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Conflict of interest statement

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The undersigned.

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