

EBA/Op/2017/03

07 March 2017

Opinion of the European Banking Authority on improving the decision-making framework for supervisory reporting requirements under Regulation (EU) No 575/2013

Introduction and legal basis

Following five years' experience with the development of the Union's supervisory reporting requirements based on Regulation (EU) No 575/2013¹ (the CRR), the EBA now proposes ways to improve the decision-making framework for adopting those requirements, with a view to making it more efficient and fit for purpose.

The EBA's competence to deliver an opinion is based on Article 30(3)(a) and Article 34(1) of Regulation (EU) No 1093/2010² (the EBA Regulation), as it results from the EBA's peer review on implementing technical standards (ITS) establishing supervisory reporting requirements in the EU in accordance with the CRR, which relates to the EBA's area of competence. That peer review concluded that a legislative initiative is necessary to improve the decision-making framework for supervisory reporting requirements.

In accordance with Article 14(5) of the Rules of Procedure of the Board of Supervisors,³ the Board of Supervisors has adopted this opinion.

¹ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

² Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

³ Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 12 January 2011 (EBA/DC/2011/01 Rev5).

General comments

Problems in relation to reporting requirements arising from the endorsement process

The endorsement process for ITS related to reporting poses challenges for financial institutions and supervisors alike. Reporting ITS are drafted by the EBA and adopted by the Commission. The Commission has to decide whether to endorse the draft ITS, in part only or with amendments, within three months (extendable by one month) of receipt to ensure a smooth and expeditious adoption process.⁴ Nevertheless, there are systemic and significant delays in the adoption of ITS by the Commission (see Annex I).

These delays and changes made to the ITS create difficulties for the EBA, competent authorities and financial institutions in three principal ways that are explained further in the 'Specific comments' section of this opinion:

- They disrupt or prevent effective planning and preparing for the implementation of ITS, given the resulting uncertainty about the contents and likely implementation date of the final requirements, for example by delaying the EBA's publication of updated technical specifications, which in turn delays the updating of reporting systems, and by making the time available for implementation periods inconsistent and unpredictable.
- They lead to mismatches between the reporting requirements and the underlying obligations to which they relate, and sometimes to dual and inconsistent reporting obligations. Financial institutions incur costs to report on substantive requirements that no longer apply, while supervisors lack adequate data to monitor compliance with regulatory ratios.
- The highly technical nature of supervisory reporting results in the need for regular updates, corrections and clarifications, which are important for data quality but cannot be effected with speed, according to a predictable schedule or in a clear, legally binding manner. This results in non-harmonised solutions, again creating unnecessary burdens and poor-quality data.

The EBA's proposal

Since these issues arise principally due to the gap between the adoption of draft ITS and their final endorsement, the EBA considers that these problems can be avoided if the EBA adopts supervisory reporting requirements directly through its own implementing technical decisions, rather than through ITS.

The Court of Justice has established that Union agencies can be given powers for the implementation of harmonisation, in particular where the measures to be adopted are dependent on specific professional and technical expertise and the ability of the body in question to respond swiftly and appropriately. The EBA considers that supervisory reporting falls squarely within this

⁴ See Article 15(1), fourth subparagraph, of the EBA Regulation.

description, since it concerns the detailed specification of the data needed by supervisors to carry out the tasks accorded to them in Union legislation, together with the detailed IT requirements that establish the mechanisms for providing that data. A fuller analysis of the legal feasibility of the proposal for direct adoption of the supervisory reporting requirements by the EBA is provided in Annex II. The allocation of decision-making to an agency in this field would also accord with previous practice at national level, where prior to the implementation of the CRR, supervisory reporting was treated as a highly technical matter, the requirements for which were to be established by the competent authority. As regards the swiftness of decision-making, the EBA has described above the role of speed and predictability in contributing to the goal of harmonised reporting: experience has shown that the current ITS framework cannot lead to reporting requirements being adopted with the necessary speed or predictability, and so, rather than improving the operation of the current process, we consider that it is now necessary to move to a more direct decision-making process.

The urgency of this issue has become apparent following the experience with the development, revision and application of the ITS on reporting. As this issue was a key finding of the recent peer review on reporting that the EBA carried out,⁵ it will feature in a planned EBA discussion paper on the complexity built into the CRR, which creates a significant burden for financial institutions.

In terms of how an alternative framework would work in practice, consideration has been given to several aspects that could further strengthen the EBA's position as regards decision-making on reporting requirements within an appropriate framework for accountability. These could include:

- a reiterated commitment on the part of the EBA to public consultation and cost-benefit analysis, and clarification of the obligation to translate decisions on supervisory reporting into all official languages of the Union;
- some form of right of scrutiny that could be attributed to the Commission in such a manner as to avoid the current problems arising from delays in adoption (e.g. in the form of a short *ex post* objection period);
- further specification of the policy areas in relation to which harmonised reporting requirements can be established by the EBA;
- a requirement for the EBA to periodically (possibly every three years) submit to the European Commission, the Council and the European Parliament a report on the appropriateness of the compliance burden on institutions generated by reporting requirements;
- clarification that EBA decisions on supervisory reporting would have to be adopted based on qualified majority voting, to reflect the increased importance of those decisions; and

⁵ As well as being a key finding of the feedback to the European Commission's *Call for evidence: EU regulatory framework for financial services*, which can be found at http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/index_en.htm.

- an extension of the scope of the Board of Appeal review to cover such decisions of general application.

Annex III provides a specific drafting proposal for amendments introducing the power for the EBA to adopt these decisions directly, incorporating some of the accountability arrangements described above. It is based on Article 99(6) of the CRR, taking as its starting point the proposal adopted by the Commission on 23 November 2016. The drafting proposal provides for the transition from the current ITS on reporting to the new proposed regime: the text aims to ensure that the ITS are repealed only once fully replaced by EBA decisions, with certainty provided pending that repeal through the use of a correlation table.

While the draft amendments focus on Article 99(6) of the CRR, the EBA believes that the approach described here should apply in *all* cases of regular supervisory reporting that are currently covered by the ITS on reporting and should also be extended to:

- reporting under Article 78(8) of Directive 2013/36/EU⁶ (the CRD) with regard to the benchmarking ITS, which also require regular, time-sensitive updating of reporting obligations;
- ITS providing for disclosure by institutions, given that they usually mirror or are based on the relevant ITS on reporting;
- remuneration data under Article 75 of the CRD; and
- reporting requirements under Directive 2014/59/EU⁷ (the BRRD).

Finally, this proposal focuses on implementing technical decisions for reporting, but it is proposed that a more general framework for adopting such decisions be inserted into the EBA's founding regulation. This would ensure that it is clear that the EBA is empowered to adopt such decisions as an integral part of its overall governance framework, and it would also constitute a way to flesh out a strengthened framework for accountability. It would enable greater consistency where the legislators choose to allocate other decision-making powers to the EBA in other areas with similar technical needs and characteristics.⁸

⁶ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L OJ L 176, 27.6.2013, p. 338).

⁷ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

⁸ For example, where requirements currently provided for in technical standards, such as those on the methodology for identifying G-SIIs, need regular, time-sensitive updating.

Specific comments

The current decision-making framework for supervisory reporting

Article 99 of the CRR mandates the EBA to develop ‘draft implementing technical standards to specify the uniform formats, frequencies, dates of reporting, definitions and the IT solutions to be applied in the Union for’ prudential and certain aspects of financial reporting (further specified in the CRR). Similarly worded mandates exist in the CRR in relation to reporting on other particular aspects of the regulatory framework (e.g. liquidity, large exposures, etc.).

The rationale behind this mandate is the need to ensure the uniform application of reporting requirements across the Union – hence the use, currently, of the legal basis of Article 291 of the Treaty on the Functioning of the European Union (TFEU) relating to implementing acts (‘Where uniform conditions for implementing legally binding Union acts are needed ...’). Such harmonised (indeed, under Article 99 of the CRR, ‘uniform’) reporting is required both to support the objective of the freedom of establishment and freedom to provide services across the Union by seeking to remove obstacles to those freedoms in the form of reporting requirements and to facilitate uniformly high-quality supervision at national and supranational levels. Uniform reporting also supports the carrying out of the EBA’s other tasks, such as risk analyses, peer reviews, impact assessments, reports, responses to calls for advice, and input to the European Systemic Risk Board and other parts of the European System of Financial Supervision.

However, several issues arise out of the functioning of that framework, which can be summarised as follows.

Delays

Since the CRD IV package entered into force in July 2013, the EBA has developed and submitted to the Commission 10 ITS on supervisory reporting and benchmarking portfolios. For seven of those new standards or standards with significant changes – mainly reflecting the changes in substantive rules – the endorsement process took between 10 and 23 months. It should be emphasised that, where reporting requirements relate to changes in the underlying legislative obligations, the process *overall* (i.e. from initiation by the EBA on the basis of a stable draft of the new sectoral act until first application by institutions) takes approximately 20 months.

In addition to the draft ITS containing the reporting templates and instructions, the EBA develops and publishes on its website,⁹ for each draft ITS on reporting, the technical solutions accompanying it: the data point model (DPM), XBRL taxonomies and validation rules (VRs). These facilitate the conclusion of remittances of data against which supervision can take place, and are

⁹ See Commission Implementing Regulation (EU) 2015/79 of 18 December 2014 amending Implementing Regulation (EU) No 680/2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) No 575/2013 of the European Parliament and of the Council as regards asset encumbrance, single data point model and validation rules (OJ L 14, 21.1.2015, p. 1), which replaced Annexes XV and XVI on DPM and validation rules with two annexes describing those types of rules and essentially delegating to the EBA the responsibility for providing them (see recital 9 and Annexes XIV and XV of that Regulation).

publicly consulted upon in accordance with the EBA's usual consultation practices. When the draft ITS are submitted to the Commission for endorsement, the EBA publishes concurrently the corresponding 'technical package' containing the DPM, XBRL taxonomies and VRs.

By comparing timeframes for the final adoption of draft ITS and of the technical packages for those draft ITS, it can be seen that the timeframes are a lot shorter for the technical packages, which are generally endorsed within 4-6 months.

Further, where delays in the adoption of draft ITS on reporting are also the result of amendments to the draft ITS, such delays result in the technical package accompanying each set of draft ITS also needing to be updated, resulting in further delays in the final *de facto* application of the reporting requirements. This requires financial institutions to choose whether to implement changes to their reporting systems early, with the risk that they will need to make further updates following Commission changes, or whether to rely only on the final text, with the risk that implementation timescales are unknown and may be short.

Mismatches

It is understood that the development of new reporting requirements, following the introduction of new prudential regulations, takes time, and institutions need to be afforded adequate time to implement new reporting requirements. Nevertheless, it is not possible to discontinue outdated reporting until the new reporting requirements are in place. In practice the current decision-making process has resulted in delays in the official publication of ITS, causing a lag between the date of entry into force of regulatory requirements and the reporting on them.

Examples: liquidity coverage requirement and leverage ratio

Commission Delegated Regulation (EU) 2015/61 specifying the liquidity coverage requirement (LCR) was published in the *Official Journal of the European Union* (OJEU) on **17 January 2015** with an application date of **1 October 2015**.

The final draft ITS establishing the new reporting requirements for the LCR were submitted in **June 2015**.

Owing to a delay in endorsement, the final regulation was published in **March 2016**, with first reporting being applicable from **September 2016**.

Institutions had to comply with the LCR requirements from October 2015. However, they were also legally bound to report the outdated monitoring data based on the earlier version of the ITS on LCR reporting, which had not been replaced by the new requirements. Supervisors did not have data to monitor compliance until almost a year after the LCR applied. This may have led to supervisory pressure to demonstrate the calculation of the LCR, thus leading to a duplication of efforts and an increased reporting burden for institutions, as well as incomparable data at Union level.

A similar situation occurred with the ITS on leverage ratio reporting and those on leverage ratio disclosure, which resulted in mismatches between substantive requirements and reporting on them for more than one and a half years.

There are a number of areas where mismatches have been exacerbated not only from delays but also from amendments, in particular on the liquidity aspects of reporting.

Example: additional liquidity monitoring metrics

The ITS on additional liquidity monitoring metrics (adopted 23 months after its submission by the EBA) raised several issues. In addition to delays, there were significant amendments, whereby the maturity ladder templates and instructions were removed.

In an opinion,¹⁰ the EBA expressed concerns regarding the removal of the maturity ladder, highlighting that many institutions had already implemented the maturity ladder in their IT systems. In addition, it pointed out that competent authorities would continue to collect data on it, which might lead to further costs, duplication of efforts and continuation of disharmonised practices in this area.

Another example is the revised ITS on LCR reporting (Regulation (EU) 2016/322); it took 10 months for the EC to officially endorse these ITS (submitted in June 2015, adopted in February 2016 and published in the OJEU in March 2016), and the version published in the OJEU contained some minor changes to the template proposed by EBA, which, by way of a corrigendum to Regulation (EU) 2016/322 of 9 April 2016, were fully reversed by the Commission.

A similar situation arose with the adoption of the ITS on supervisory reporting (Regulation (EU) No 680/2014) of 16 April 2014; following the adoption of these ITS, some additional technical issues emerged relating to the mapping of the liquidity templates (Annex XII) onto the underlying DPM (Annex XIV).

The EBA believes that such repeated discrepancies between the requirements and the corresponding reporting should be avoided by all means, in particular to avoid competent authorities having to bridge gaps via *ad hoc* reporting requests – adding to the regulatory burden for institutions, which becomes disproportionate – and a return to national, unharmonised, rather than Union-wide, solutions, which, again, can lead to costs for cross-border institutions.

Q&As

¹⁰ Opinion of the European Banking Authority on the Commission intention to amend draft Implementing Technical Standards on additional liquidity monitoring metrics under Article 415(3)(b) of Regulation (EU) No 575/2013 (EBA/Op/2015/16 of 23 September 2015).

With regard to the specification of the ITS reporting templates themselves, experience has shown that the daily practice and application of supervisory reporting reveals further technical aspects that require additional specification, clarification, updating or correction.

This needs to be done speedily to ensure the quality of the latest data to be fed into all the analyses of the EEA banking sector; the time it takes to adopt ITS leads to the EBA using its 'Q&A process' for this purpose.¹¹ Given the lack of a legally binding character for the answers provided through that tool, this approach is less than optimal, leading to difficulties both for the EBA and for the competent authorities in receiving timely submissions from institutions that are of high quality, harmonised and comparable, and it also creates issues, delays and costs for the institutions.

All of the above aspects point to a situation where institutions are faced with:

- a lack of certainty regarding the expected timelines for applying a new reporting framework;
- a lack of legal certainty about the reporting requirements expected to be applicable (given mismatches with the substantive regulatory framework); and, therefore,
- often the extra burden of a 'parallel running' of two regimes.

This results in EU law being disproportionate with regard to the aims it purports to achieve (the tools employed by EU law need to be both appropriate to the objective and necessary, that is, there are no other, less burdensome, solutions). This is reflected in feedback from the industry about the overall reporting burden resulting, *inter alia*, from the decision-making framework for adopting supervisory reporting in the Union, and points to the need to decrease the reporting burden as part of the development of a more proportionate, but still prudentially robust, reporting framework.

Another, related aspect of the Union's supervisory reporting framework is the overlap of supervisory reporting with the information requested under other, unharmonised types of reporting, such as statistical reporting, which can also contribute to the overall reporting burden for the industry, calling for closer coordination between supervisory and non-supervisory reporting.

Both of the above objectives require putting an end to the possibility of resorting to national, diversified, duplicative solutions that create unnecessary and disproportionate burdens for institutions and also weaken data quality and comparability across the Union.

An alternative framework to improve decision-making for supervisory reporting

An approach whereby the EBA would be able to develop implementing technical decisions and adopt them directly could overcome the limitations described above. Here are some ways in

¹¹ See <http://www.eba.europa.eu/single-rule-book-qa> for more details.

which the proposed solution could alleviate some of the issues raised above with regard to the decision-making process for supervisory reporting, in particular, in the Union:

- (a) The misalignments between the substantive requirements and reporting on them referred to above arise in the period between the draft update of the ITS proposed by the EBA and its formal endorsement and publication in the OJEU. Reducing that period would enable greater speed in finalising requirements, providing greater certainty for the EBA, competent authorities and financial institutions as well as facilitating greater flexibility in the development of the Union's supervisory reporting requirements.
- (b) With the EBA adopting the regulatory framework via own decisions, the timelines for adoption would not only be shorter, they would also be more predictable: they would provide much needed clarity on the expected date of entry into force of reporting requirements, and more legal certainty on the content of the envisaged new framework and its consistency with substantive requirements, thereby reducing unnecessary costs, duplications and other burdens on institutions' resources in preparation for the new supervisory reporting.
- (c) Were substantive regulatory requirements to change, the swifter procedure for adopting EBA decisions would ensure the quicker adaptation of reporting to the changing regulatory framework, thereby avoiding misalignments. Furthermore, were reporting requirements to change, shorter timelines and therefore fewer discrepancies could be expected between those new requirements and the accompanying technical solutions on DPM, XBRL taxonomies and VRs.
- (d) Finally, while the Q&A process would still be needed to specify remaining technical details in the interim period between the various updates of the EBA decisions on supervisory reporting, that interim period would be shorter, leading to shorter timelines for the incorporation of the Q&A results into the next EBA decision; further, that interim period would also be more predictable (as the EBA has already announced that it will update the technical solutions twice annually, and it could do the same with its decisions updating the supervisory reporting templates); and during that interim period the Q&As could provide stronger indications to institutions regarding expected upcoming changes in the reporting framework, thereby allowing them to better prepare for them.

Such arrangements as those proposed here are not entirely new; some of the issues with regard to the long and burdensome character of the process were reflected in the first amendment to the original Regulation containing the ITS endorsed by the Commission. This related to the development of the DPM, XBRL taxonomies and VRs accompanying the supervisory reporting requirements. Where previously the full DPM and VRs were included in the original version of the ITS, the EBA was essentially delegated the task of defining the DPM and VRs on its website, with a view to having the flexibility to adopt a revised DPM and VRs as often as was technically necessary, without any Commission approval. The proposals made here are made in the same spirit that inspired that original amendment to the ITS and constitute the logical conclusion of

that approach, while potentially providing a more robust framework in terms of both legal enforceability and accountability.

Further, the institutional framework surrounding the functioning and organisation of the EBA as an EU agency provides safeguards for proceeding to the proposed changes in the process. Nevertheless, consideration has been given to several *other* aspects that could further strengthen the EBA's position as regards carrying out that task within an appropriate framework for accountability:

- In addition to the current legal framework for the functioning of the EBA as an EU agency, an explicit reiteration of the EBA's commitment to public consultation and cost-benefit analysis could be made, accompanied by clarification of the obligation to translate EBA decisions into all official languages of the Union.
- Further, to provide accountability within the Union institutional framework, some form of right of scrutiny could still be attributed to the Commission, but in a manner that avoided the current problems arising from delays in adoption. This could be in the form of a short *ex post* objection period for the Commission, allowing it to raise any 'red flags' with regard to the legality of the decisions (including the EBA's analysis on the benefits of the proposed decision vis-à-vis its costs and the resulting compliance burden for the varying population of the Union banking sector).
- With regard to ensuring the quality of the substantive content of EBA decisions, a more precise framing of the EBA's mandate could be conceived; this could entail a more detailed specification of policy areas where the EBA would be able to adopt decisions on supervisory reporting. This specification could be made directly in the sectoral act that provides for the adoption of EBA decisions, or by providing for regulatory technical standards to specify the policy areas.
- In the same context of ensuring the quality of the content of EBA decisions, a further requirement could be for the EBA to periodically (possibly every three years) submit to the European Commission, the Council and the European Parliament a report on the appropriateness of the compliance burden on institutions generated by reporting requirements.
- Additional assurances could be ensured by clarifying that EBA decisions on supervisory reporting would have to be adopted based on qualified majority voting, to reflect the increased importance of those decisions.
- Finally, an extension of the scope of the Board of Appeal review to cover such decisions of general application could be considered.

In conclusion, as the EBA represents the supervisory community of the whole of the Union, and constitutes the *locus* of supervisory expertise in the Union, it is also the natural *forum* for discussing issues pertaining to the development and application of a harmonised supervisory

reporting framework for the Union. Given its internal governance and decision-making processes, providing for the democratic representation of the whole supervisory community in the Union, as well as its nature as a Union body, bound by all relevant procedural safeguards in the course of its activity, it is also capable of establishing that framework without the full extent of the Commission's current involvement, but further safeguards can be introduced to strengthen that framework where needed. Alternative, quicker, more flexible processes are needed to limit the disproportionality of EU law resulting from the current processes on supervisory reporting for both institutions and supervisors at both national and Union levels. Such processes are also *possible*, thanks to an EU legal framework that is evolving to accommodate the needs of a modern EU polity.

This opinion will be published on the EBA's website.

Done at London, 07 March 2017

[signed]

Andrea Enria

Chairperson

For the Board of Supervisors

Annex I

Examples of delays in the adoption of ITS and mismatches with substantive requirements

ITS	Endorsement period	Total period from submission to publication	Dates
ITS on supervisory reporting Regulation (EU) No 680/2014	9 months	11 months	Submitted 07/2013 Adopted 04/2014 OJEU publication 06/2014
Asset encumbrance reporting Regulation (EU) 2015/79	14 months	15 months	Submitted 10/2013 Adopted 12/2014 OJEU publication 01/2015
Non-performing and forborne exposures reporting Regulation (EU) 2015/227	11 months	12 months	Submitted 02/2014 Adopted 01/2015 OJEU publication 02/2015
Technical amendments Regulation (EU) 2015/227	6 months	6 months	Submitted 07/2014 Adopted 01/2015 OJEU publication 02/2015
Additional liquidity monitoring metrics reporting Regulation (EU) 2016/313	23 months	23 months	Submitted 04/2014 Adopted 03/2016 OJEU publication 03/2016
Technical amendments Regulation (EU) 2015/1278	4 months	4 months	Submitted 03/2015 Adopted 07/2015 OJEU publication 07/2015
Supervisory benchmarking reporting Regulation (EU) 2016/2070	18 months	21 months	Submitted 03/2015 Commission amendments proposed 05/2016 EBA opinion on amendments 05/16 Adopted 09/16 OJEU publication 12/2016
Revised LCR reporting Regulation (EU) 2016/322	8 months	10 months	Submitted 06/2015 Adopted 02/2016 OJEU publication 03/2016
Revised leverage ratio reporting Regulation (EU) 2016/428	9 months	10 months	Submitted 06/2015 Adopted 03/2016

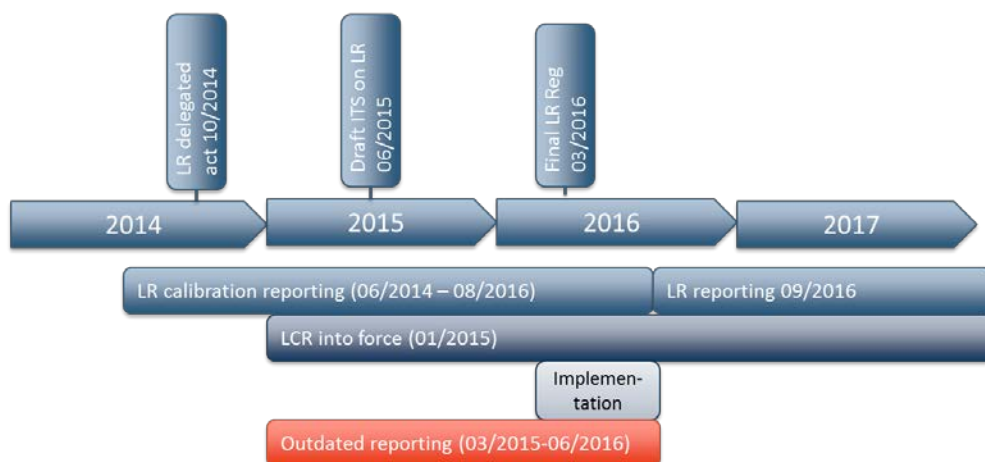
ITS	Endorsement period	Total period from submission to publication	Dates
			OJEU publication 03/2016
Technical amendments Regulation (EU) 2016/1702	5 months	6 months	Submitted 03/2016 Adopted 08/2016 OJEU publication 09/2016

Mismatches between reporting obligations and underlying regulatory requirements

Liquidity coverage ratio (LCR)



Leverage ratio (LR)



Net stable funding ratio (NSFR)



ANNEX II

Legal feasibility

1. The EBA first notes the precedents that already exist in EU banking sectoral legislation for delegation directly to the EBA of technical implementing decisions. That is, for example, the case with the power of the EBA to establish a benchmark rate specified in Annex II to Directive 2014/17/EU (the Mortgage Credit Directive – MCD);¹² similarly, under Article 138 of the CRR, the EBA has the power to adopt decisions that confirm that an ECAI's unsolicited ratings are of the same quality as that ECAI's solicited ratings before these unsolicited ratings can be used for regulatory purposes.¹³
2. In both of these cases (which can arguably be seen as administrative acts of specific and general application, respectively) technical issues are delegated to the EBA to be defined, given the highly technical/scientific nature of the task at hand, which does not require any further scrutiny by other actors. Further, as mentioned above, a similar approach was taken by the Commission with regard to the ITS on reporting, which, through Commission Implementing Regulation (EU) 2015/79 of 18 December 2014 replaced Annexes XV and XVI on DPM and VRs, respectively, with two annexes describing those types of rules and essentially delegating to the EBA the power to develop them (see recital 9 and Annexes XIV and XV of that Regulation¹⁴). Given that such instances are already present in the sectoral legislation, it would be preferable to provide a clearer and more consistent framework for their application.
3. Further, it is submitted that an approach such as that proposed would be compatible with the EU rules on the delegation of power to agencies (established by an earlier judgment of the Court of Justice of the European Union on case C-9/56, generally known as and hereinafter referred to as '*Meroni*'), recently read again in the context of another Court case, C-270/12 (known as and hereinafter referred to as '*Short selling*'). Essentially, in '*Short selling*' the Court confirmed a reading of *Meroni* that considers that, under particular conditions, it is actually possible for agencies to adopt acts of general application that can have legal effects also on individual legal or natural persons.¹⁵
4. *Meroni* had already established that for this type of delegation to be acceptable, it has to relate to 'clearly defined executive powers the exercise of which is subject to strict review based on objective criteria determined by the delegation' and which, as a result 'do not appreciably alter the consequences involved in the exercise of powers concerned'. The Court

¹² See the EBA decision published at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Y0604\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Y0604(01)).

¹³ See the EBA decision published at [http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1470652117332&uri=CELEX:32016Y0722\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1470652117332&uri=CELEX:32016Y0722(01)).

¹⁴ The Regulation can be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L.2015.014.01.0001.01.ENG>

¹⁵ See paragraph 65 (and paragraph 98) of the *Short selling* judgment.

of course addressed the four pleas in law as these were raised in this particular case; therefore, it can be debated whether, for this type of delegation to be possible, all of the conditions that the Court analysed in *Short selling* are necessary and sufficient or whether only some of them would suffice. There are, nonetheless, some very clear pointers as to when the *Meroni* conditions are met. What follows briefly examines the basic points the Court made in relation to each of the pleas made and provides a first attempt at reading how those would apply in the way forward proposed in this opinion.

5. One case where it appears that the Court appears to accept compatibility with *Meroni* is where the powers of the agency to adopt such acts is delimited/framed/circumscribed by specific conditions and criteria.¹⁶ With regard to the proposal for EBA decisions setting out the requirements for supervisory reporting, the following considerations arise. First, such a requirement of delimiting the power of the EBA is already met by way of the conditions described in the CRR with regard to the requirement of proportionality and other technical specifications in the reporting requirements that could, if necessary, be further strengthened. Furthermore, all the other general conditions already present for the EBA's decision-making should of course be taken into account in that respect (for example, cost-benefit analysis and consultation obligations, the possibility for judicial review of its actions, other means of accountability to the various EU institutions, as well as the EBA's internal decision-making structures, which, like those of the other ESAs but unlike those of some EU agencies, involve also a Board of Supervisors, in the form of a plenary of banking supervisors from all member states of the Union).
6. The proposed framing of the EBA's powers could also involve 'light' powers of scrutiny for the Commission in the form of a short non-objection period following the adoption of EBA decisions, without power of amendment. Indeed, if these powers were to be clarified in the EBA's founding regulation, this would also have the advantage of circumscribing more generally this power (which could then be 'activated' by specific references in sectoral regulation), and thus meeting what appears to be another criterion that the Court found helpful in *Short selling*, namely that these powers would not be 'autonomous' or 'going beyond the bounds of the regulatory framework established by the' EBA's founding regulation.¹⁷
7. Further, as the Court confirmed in *Short selling*, the delegation of the adoption of the abovementioned decisions to an agency is not incompatible with Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU), as these Articles relate to delegation to the Commission and not to agencies.¹⁸ Although the Treaties do not contain an explicit provision regarding conferral of powers on a Union body, nevertheless a number of provisions in the TFEU presuppose that such a possibility exists.¹⁹ The Court goes on to suggest that, in

¹⁶ See paragraph 45 *et seq* of the *Short selling* judgment.

¹⁷ See paragraph 44 of the *Short selling* judgment.

¹⁸ See paragraph 77 of the *Short selling* judgment.

¹⁹ See paragraph 79 *et seq* of the *Short selling* judgment.

the absence of explicit conditions in the Treaties, what is relevant in terms of discussing or analysing the legitimacy of this type of delegation of powers is the regulatory context of the power examined.²⁰ It explicitly states that the provision examined in that case ‘cannot be considered in isolation’ and ‘must be perceived as forming part of a series of rules designed to’ meet the specific sectoral, technical objectives of Regulation (EU) No 236/2012²¹ (the ‘short-selling regulation’) analysed in that case. An article conferring on the EBA the power to develop decisions that set out the technical details of supervisory reporting should also be considered not in isolation but, rather, as part of a series of rules designed to achieve the co-legislators’ objective of ‘uniform’ (Article 99 of the CRR) supervisory reporting in the Union, further helping to ensure the quality of micro- and macroprudential supervision, at national and supranational levels, as well as the carrying out of other EBA tasks such as risk analyses, peer reviews, impact assessments, and supporting the work of the European Systemic Risk Board, other parts of the European System of Financial Supervision and other parts of the regulatory framework across the Union.

8. Further, such powers could indeed be the subject of a basic act adopted on the basis of Article 114 TFEU (such as the EBA’s founding regulation or the CRR itself). In *Short selling*, the Court states that the co-legislators have ‘discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields of complex technical features’.²² The Court goes on to confirm that ‘the EU legislature ... may delegate to a Union body, office or agency powers for the implementation of the harmonisation sought’. That is the case in particular ‘where the measures to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately’.²³ The previous section of this note has largely elaborated on why the current process (involving the adoption of ITS by the Commission) is still, despite some improvements, an inappropriate method for achieving the harmonisation of supervisory reporting in the Union, and it is clear that supervisory reporting is a measure that depends on specific professional and technical expertise and entails the need to respond swiftly and appropriately, being a task that at national level was previously, and continues to be, carried out by competent authorities (see the explanations above about the need for speed and the highly technical expertise involved). It is also self-evident that the purpose of the delegation of the power in question would be to improve the ‘conditions for the establishment and functioning of the internal market in the financial field’, as was suggested by the Court in *Short selling*;²⁴ the aim of harmonised supervisory reporting cannot be achieved by actions at national level only. In addition to those powers being ‘precisely delineated’, it should be noted that they would also be ‘amenable to judicial review in the light of the objectives

²⁰ See paragraph 85 of the *Short selling* judgment.

²¹ Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ L 86, 24.3.2012, p. 1).

²² See paragraph 100 *et seq* of the *Short selling* judgment, referring to and reiterating earlier jurisprudence of the Court.

²³ See paragraph 105 of the *Short selling* judgment.

²⁴ See paragraph 116 of the *Short selling* judgment.

established by the delegating authority',²⁵ given that EBA decisions are subject to judicial review by the Court of Justice of the EU and certain decisions are reviewable by the Board of Appeal.

9. Finally, the proposed approach would also be compatible with the principle, established in case C-427/12 (known as '*Biocides*'), that an act implementing another basic act can provide 'further detail in relation to the normative content' of that basic act.

²⁵ See paragraph 53 of the 'Short selling' judgment.

ANNEX III

Proposed drafting

Text proposed by the Commission²⁶

Amendments proposed by the EBA

Amendment 1

Article 99 of Regulation (EU) No 575/2013

(6) EBA shall develop draft implementing technical standards to specify the uniform formats, frequency, dates of reporting, definitions and IT solutions for the reporting referred to in paragraphs 1 to 3 and in Article 100.

The reporting requirements laid down in this Article shall be applied to institutions in a proportionate manner, having regard to their size, complexity and the nature and level of risk of their activities.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

(6) EBA shall ~~develop draft implementing technical standards~~ **adopt decisions** to specify the uniform formats, frequency, dates of reporting, definitions and IT solutions for the reporting referred to in paragraphs 1 to 3 and in Article 100.

The reporting requirements laid down in this Article shall be applied to institutions in a proportionate manner, having regard to their size, complexity and the nature and level of risk of their activities.

~~Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.~~

The EBA shall adopt the decisions referred to in paragraph 1 in accordance with Article 15(a) of Regulation (EU) No 1093/2010.

The EBA shall publish on its website a correlation table showing the correspondence between the provisions of Commission Implementing Regulation (EU) No 680/2014 and the provisions of decisions adopted in accordance with this paragraph. References to Regulation (EU) No 680/2014 shall be construed as references to those decisions and shall be read in accordance with the correlation table. The Commission shall repeal Regulation (EU) No 680/2014 upon receiving notification from the EBA that the provisions of that Regulation have been replaced and that the correlation table is complete.

²⁶ Commission proposal COM(2016) 850 final adopted on 23 November 2016.

Amendment 2

Article 15(a) of Regulation (EU) No 1093/2011

Implementing technical decisions

No text	1. The Authority may adopt implementing technical decisions in the areas specifically set out in the legislative acts referred to in Article 1(2). Implementing technical decisions shall be technical and shall not imply strategic decisions or policy choices. 2. Before adopting an implementing technical decision that does not specify to whom it is addressed, the Authority shall conduct open public consultations and shall analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate to the scope and impact of the technical decision concerned or in relation to the particular urgency of the matter. The Authority shall also request the opinion of the Banking Stakeholder Group referred to in Article 37 on such an implementing technical decision. 3. The Authority shall immediately forward an implementing technical decision to the European Parliament, the Council and the Commission. 4. Within one month from the transmission of an implementing technical decision by the Authority, the Commission may object to the implementing technical decision where it is incompatible with Union law, does not respect the principle of proportionality or runs counter to the fundamental principles of the internal market for financial services as reflected in Union law. The Commission shall provide reasons for the exercise of their power of objection. 5. Implementing technical decisions shall be published on the Authority's website and shall enter into force on the date stated on the decision unless an objection has been expressed by the Commission in accordance with paragraph 4.
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Explanation

The proposed amendment ensures that there is an overarching framework for the adoption of EBA decisions of general application in the EBA's founding regulation while leaving the identification of situations where it might be used to be decided on a case-by-case basis in sectoral legislation. Appropriate accountability mechanisms are provided for, similar to those that apply to implementing technical standards but with a streamlined scrutiny process for the Commission under which a reasoned objection would prevent a decision from entering into force. No amendment procedure is provided for; if the EBA wished to continue to pursue its proposals, it would need to issue a new decision, which would in turn be subject to the Commission's scrutiny.
