As part of the 2019 reform of the European System of Financial Supervision, the three European Supervisory Authorities were granted a completely new convergence tool in Article 29a to promote a common supervisory culture. This tool allows them to identify up to two Union Strategic Supervisory Priorities that the National Competent Authorities shall take into account when drawing up their work programme. The article provides a doctrinal legal analysis of each procedural step in Article 29a; from information gathering to assessment of national work programmes and follow-up measures. On this basis, it is argued that Article 29a has expanded the scope of the ESAs’ existing toolkit; from the operational to the strategic level. Hereby the USSPs have essentially brought a new strategic orientation to the former level 3 of the Lamfalussy process. However, this institutional development also raises several key challenges related to the ESA/NCA relationship that call for attention in the further development of this convergence tool.

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Note: However, the opinions expressed in this publication are those of the authors only.
1. Introduction

A 3rd birthday of a new supervisory convergence tool is usually not a milestone worth mentioning. This is, however, the case for the power to adopt Union Strategic Supervisory Priorities (USSP) in Article 29a of the founding Regulations. It represents a policy-coordination process where the European Supervisory Authorities (ESAs) identify up to two priorities of Union-wide relevance which shall reflect future developments and trends. The National Competent Authorities (NCAs) are then expected to take those priorities into account when drawing up their work programmes and to notify the ESAs accordingly. As part of a wider reform of the ESAs, the USSPs were introduced by Regulation (EU) 2019/2175 that entered into force on 1 January 2020. On 12 March 2021, the Commission launched a targeted consultation on the supervisory convergence and the Single Rulebook. Here a significant number of respondents, both from the public authorities and from the industry groups, agreed that the USSPs can be an important driver for supervisory convergence, but it was too early to assess their effect. Given that the first round of USSPs have now been completed in March 2023, it seems appropriate to take stock of these institutional developments within the European System of Financial Supervision (ESFS). Especially, it is worth considering how the USSPs could

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shape the national supervisory agendas and also strengthen mutual trust between the NCAs.4

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So far, the USSPs have only received comparatively little attention in legal scholarship.5 Other convergence tools, such as Guidelines and Recommendations and Q&As, have been covered to a far greater extent. A possible explanation is that these tools more closely resemble traditional EU soft law, defined as “rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects.”6 Today, the USSPs appear to have a significant impact on the supervisory convergence agenda in the EU. It is therefore important to explore this gap in the literature by answering the following research questions:

1. How has the legal nature, scope and rationale of the supervisory convergence tools developed over time, and
2. How does the USSPs fit into (or complement) the ESAs’ current kit of supervisory convergence tools in the founding Regulations?

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The questions will be answered on the basis of a doctrinal legal analysis and an evaluation of EU financial law. Even though this research tradition is well-established in Europe, it does give rise to some methodological reflections. Given that Article 29a, together with the preamble, has been drafted in a concise manner, it is necessary to interpret the provision in light of the Commission’s proposal. So far, neither the CJEU nor the Joint Board of Appeal have ruled on the USSPs in Article 29a. The analysis therefore draws on case law concerning one of the other convergence tools, namely Guidelines and Recommendations in Article 16. It is based on the underlying assumption that these convergence tools share certain legal characteristics which makes them suitable for comparison. Finally, to provide some practical insights, the evaluation is based on contributions from the respondents to the Commission’s targeted consultation on the supervisory convergence and the Single Rulebook, as well as an opinion from the European Central Bank (ECB). The main focus will be on the ESA/NCA relationship, even though the ECB is also included in the definition of a Competent Authority in EBA’s founding Regulation.

The remainder of this article is divided into four main parts: The first part describes the legal nature, scope and rationale of the supervisory convergence tools under the former level 3 Committees as well as the ESAs. This historic

7 Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, COM(2017) 536 final.


9 Targeted consultation on taking stock of the framework for supervising European capital markets, banks, insurers and pension funds: supervisory convergence and the single rulebook 12 March 2021–21 May 2021.


perspective is important because the supervisory convergence tools have been said to develop in an incremental or evolutionary manner. The second part analyses how the USSPs fit into (or complement) the ESAs’ current kit of supervisory convergence tools. Here it is worth highlighting that the ESAs have mainly focused on substantive issues in their public reporting, but they have not sought to clarify the legal characteristics of the USSPs unlike other convergence tools. The analysis therefore systematically covers each procedural step in Article 29a; from information gathering to assessment of national work programmes and follow-up measures. The third section evaluates whether the USSPs fulfil the stated policy objective of promoting a Union supervisory culture. Here the contribution identifies three key challenges related to the ESA/NCA relationship that call for attention in the further development of this supervisory convergence tool. The fourth and final section concludes by providing a legal definition of the USSPs highlighting a number of key characteristics.

2. A brief historical account of the EU convergence tools

The USSPs are generally referred to as a supervisory convergence tool in the proposal from the Commission as well as various policy documents from the ESAs. However, as mentioned above, it raises the question: What is the legal nature, scope and rationale of this category of tools, and how do they differ from regulatory convergence tools? Here it has been argued that supervisory arbitrage creates an environment of mutual distrust and non-reliance between the NCAs which raises the barriers to cross-border business in the Internal Market. To shed further light on this matter, the following sections provide a brief historical account of the convergence tools under the 3L3 Committees and the ESAs.

14 Recital 17 in the preamble of COM(2017) 536 final (fn. 7).
15 Ibid.
17 Buttigieg (fn. 4), 46.
2.1 Under the 3L3 Committees (2001–2010)

Regulatory and supervisory convergence were not defined in the Lamfalussy report from February 2001 nor in the founding Decision adopted by the Commission later the same year. These terms became even harder to separate in the Charter of the 3L3 Committees that generally use the same tools to promote both regulatory and supervisory convergence. However, these considerable definitional difficulties could obstruct the smooth operation of the 3L3 Committees and weaken their legitimacy. This may explain why CESR decided to clarify the terms, regulatory and supervisory convergence, in an important consultation paper published in April 2004.

2.1.1 Regulatory convergence

Regulatory convergence is for NCAs to establish common approaches and rules in order to facilitate harmonised implementation of EU law (i.e. laws on the book). This is done by adding an additional layer of detailed rules to the framework principles (at level 1) and implementing principles (at level 2) of the Lamfalussy process. The problems associated with a consistent transposition of EU law were at the time directly linked to the use of Directives as one of the EU’s legal acts. To promote regulatory convergence, CESR relied on a number of regulatory convergence tools addressed to the NCAs and market participants: “... The members of CESR may decide to enter these common approaches simply into minutes of meetings or, if felt necessary, to transform into indicative guidance, or into regulatory recommendations providing a benchmark or, more strongly, into standards that carry commitment of the CESR members.” According to the original Charter of CESR, the members would introduce Guidance, Recommendations and Standards in their regulatory practices on a voluntary basis. However, to create peer pressure, these convergence tools were later supported by a robust comply or explain-principle.
and a peer review procedure. CESR has also indicated various legal effects of the regulatory convergence tools; such as providing a safe harbour for the market participants, and that NCAs would integrate Standards into their respective assessment frameworks and in this way assess whether the market participants comply with them. Even though the CJEU never ruled on the legal effects of the regulatory convergence tools, it has been argued by N. Moloney that Guidance carries considerable interpretative weight and therefore is unlikely to be ignored in judicial and enforcement proceedings.

2.1.2 Supervisory convergence

Supervisory convergence relates to how NCAs approach the practical operation of rules and legislation in EU law (i.e. laws in action). It covers the convergence of both supervisory objectives and techniques. The supervisory convergence tools are intended to avoid “supervisory arbitrage” as well as foster cooperation and efficient exchange of information. This category of tools therefore includes a broader and more diverse range of activities – such as supervisory colleges, Q&As, peer reviews and mediation for dealing with cross-border disputes – where the 3L3 Committees either act as facilitators or supranational supervisors. According to N. Moloney, the ultimate goal of these activities is that “the NCAs would, in effect, become ‘mini EC supervisors’, exercising similar powers, sharing information freely, and making supervisory decisions based on a common approach to resource allocation, risk management, and supervisory objectives.” Hereby the supervisory convergence agenda addresses a fundamental weakness in the network-based supervisory model as opposed to single European regulatory authority. The supervisory convergence tools do not flesh out the substantive requirements in the level 1 and 2 measures. However, the Directives set out in the Financial Services Action Plan do impose a number of obligations on the NCAs to cooperate and

26 See Charter of the Committee of European Securities Regulators, September 2008, CESR/08-375d, para. 6.4–6.5.
27 CESR, publication and consolidation of MiFID Market Transparency Data (2007), CESR/07-043.
29 Niamh Moloney (fn. 12), p. 1081.
30 The Role of CESR at “Level 3” under the Lamfalussy process, CESR/04-104b, p. 5.
31 Ibid., p. 8.
32 Niamh Moloney (fn. 12), p. 1118.
exchange information. It is therefore not surprising that the supervisory convergence tools, such as Q&As, were also assumed to produce certain legal effects by the 3L3 Committees.

2.2 Under the ESAs (2011–2019)

Following the recommendation of the de Larosière report, the former 3L3 Committees were upgraded to EU agencies with binding intervention powers. It led General Advocate Jääskinen to conclude that the ESAs were granted a clear hierarchical authority over their national counterparts. In addition, the main governing body of the ESAs, referred to as the Board of Supervisors, would adopt decisions either by a simple or qualified majority. The representative of the NCAs would therefore no longer be able to veto decisions in case of disagreements. Finally, the parties to the ESFS are expected to cooperate with trust and full mutual respect in accordance with the principle of loyalty in Article 4(3). Hereby the duty to cooperate acquired a new legal status; from a self-imposed Charter commitment to a binding obligation under EU law.

In legal scholarship, these institutional developments have been described as a federalisation process that also impacted the convergence tools found in Article 16 and 29 of the founding Regulations. These tools are not only imbued with stronger legal effects but are also covered by more extensive procedural requirements. By way of contrast, the former 3L3 measures have been said to exist in a procedural vacuum, and they were not always implemented properly by the NCAs.

36 AG Jääskinen, 12 September 2013, United Kingdom v Parliament and Council, C-270/12, ECLI:EU:C:2013:562, para. 24.
37 Article 2(4) of the founding Regulations.
2.2.1 Guidelines and Recommendations

In accordance with Article 8(1)a, the ESAs shall contribute to the establishment of high-quality common regulatory and supervisory standards and practices, in particular by developing Guidelines and Recommendations. Whereas the former are addressed generally to all NCAs or market actors, the latter have an individual addressee.41 Given that Article 16 constitutes a legal basis provision (and not an enabling clause as in the case of Article 9(5)) to issue Guidelines and Recommendations,42 the European Parliament and Council do not need to empower the ESAs in the sectoral acts in Article 1(2).43 However, the condition set out in Article 16(1) of course needs to be fulfilled. Here the Commission has argued that the two objectives for issuing Guidelines and Recommendations, namely to establish “consistent, efficient and effective supervisory practices” and to ensure the “common, uniform and consistent application of Union law” have to be read cumulatively.44

Even though Guidelines and Recommendations do not have a legally binding force, the NCAs as well as the market actors shall make every effort to comply with them and are subject to a naming and shaming mechanism. If the NCAs decide to comply, the Guidelines and Recommendations are applied directly in their supervisory practices or incorporated in their legal framework;45 either as binding or non-binding provisions. For instance, in Danish law, EBA’s Guidelines on loan origination and monitoring have been implemented by an Executive Order.46 Hereby the market actors may effectively become bound by the Guidelines and Recommendations at the national level in the same way as Directives.47 It is therefore not surprising that the Joint Board of Appeal has referred to Guidelines as “an important source of law that address matters from a

45 Rijsbergen (fn. 43), 127–128.
46 EBA, Guidelines on loan origination and monitoring, 29 May 2020, EBA/GL/2020/06.
47 AG Bobek, 15 April 2021, Fédération bancaire française, C-911/19, ECLI:EU:C:2021:294, para. 48.
practical perspective."

Given the existence of these strong legal effects, M. Busuioc has criticised that the ESAs would not necessarily have to conduct an open public consultation or impact assessment. However, the ESAs now have to provide a reason if these procedural steps are not followed on a case-by-case basis. Hereby the procedural framework of Guidelines and Recommendations more closely resembles the binding Technical Standards in Article 10 and 15.

2.2.2 Article 29 tools

In Article 8(1)b, it is provided that the ESAs shall contribute to the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture. To promote supervisory convergence, Article 29 lists a number of activities that the ESAs must carry out to build “a common Union supervisory culture.” The latter term is not defined in the founding Regulations, but the EIOPA has explained that “a common supervisory culture entails a common understanding of the way supervisors think, behave and work within their community. The culture manifests itself in processes, procedures and behaviours.” It naturally requires a large degree of trust and loyalty between the home and host supervisor, but a common supervisory culture could also represent a new and more advanced stage of cooperation within the ESFS. A common supervisory practice not only allows NCAs to delegate tasks and responsibilities to one another, but it also underpins a European approach towards risk-based supervision. While most of the activities are well-defined in Article 29 (such as opinions, peer reviews, training programs and coordination groups), the provision also covers new practical instruments and convergence tools to promote common supervisory approaches and practices. Hereby the ESAs are able to preserve some of the flexibility that previously characterised the level 3 of the Lamfalussy process.

One prominent example is the Q&A mechanism where stakeholders can submit questions on the practical application or implementation of EU law. According to EBA, it will contribute to and supplement the Single Rulebook and

48 BoA 2013-008, para. 46.
50 EIOPA, A common supervisory culture – Key characteristics of high-quality and effective supervision, 2017, p. 3
52 EIOPA (fn. 50), p. 1.
moreover ensure that the latter embodies a ‘living’ and evolving regulatory framework. However, EBA also made the important reservation that “for questions that go beyond matters of consistent and effective application of the regulatory framework a Directorate-General of the Commission (Directorate General for Internal Market and Services) will prepare answers, albeit that only the Court of Justice of the European Union can provide definitive interpretations of EU legislation.”

Today, Article 16b provides that the ESAs shall forward questions that require the interpretation of Union law to the Commission. However, it may indeed be difficult to draw a clear line between interpretation, on the one hand, and practical application or implementation, on the other.

Unlike Guidelines and Recommendations, the NCAs and market participants are not under an obligation to make every effort to comply with the Article 29 instruments. The latter is therefore considered to have a more informal nature. However, the 2019 reform did introduce a requirement for open public consultations and cost-benefit analyses where appropriate; yet without the need to provide an explanation.

2.2.3 Towards a strategic dimension of supervisory convergence?

In 2019, EIOPA published a paper titled “A Common Supervisory Culture: Key characteristics of high-quality and effective supervision” which listed a number of basic tools needed for the NCAs. This list included a clearly defined strategy and an annual work plan that allows for proper planning and setting of priorities and timelines. The paper also highlighted an important distinction “such planning might essentially be ‘operational’ planning, taking into account impact/probability of risks stemming from supervised entities (following a bottom-up approach), but could also be complemented by ‘strategic’ planning that defines the strategic priorities set considering the specificities of local markets, the risk and vulnerabilities at the macro level or the positions of other competent authorities.” This strategic dimension did, however, not form part of the EU supervisory convergence agenda under the 3L3 Committees:

According to the Lamfalussy report, the essence of Level 3 was to greatly improve the consistency of the day-to-day transposition and implementation of Levels 1 and 2 legislation. This wording

55 EIOPA, A Common Supervisory Culture: Key characteristics of high-quality and effective supervision, p. 15.
56 Lamfalussy report (fn. 33), p. 37.
suggests that the 3L3 committees would not pursue regulatory and supervisory convergence on a more strategic level; for instance, by defining strategic priorities for the NCAs to implement in their national work programmes. Instead, CESR’s approach to convergence was generally characterised by “a practical, market-facing and operational orientation which points to CESR’s ability to build consensus and develop pragmatic solutions to problems generated by the regulatory regime.”

In the first years after the establishment of the ESAs, it appears that this operational approach to supervisory convergence was largely maintained. A possible reason is that the strategic planning was considered to form an integral part of day-to-day supervision and therefore should be left to the national level. However, as part of the 2019-reform of the ESAs, the Commission found that they were not equipped with all the tools required to achieve the objective of promoting a Union supervisory culture.

3. The Union Strategic Supervisory Priorities (2020-)

Following the amendment of the founding Regulations, the USSPs now appear on the list of activities that the ESAs must carry out to build a common Union supervisory culture in Article 29. However, the USSPs also have a dedicated legal basis provision in Article 29a that lays down more specific rules on their adoption, implementation and enforcement. Here it becomes quite clear that the USSPs are based on a policy coordination process that features four sequential stages:

![The four-stage process to adopt USSPs](image)

Policy coordination is usually found in areas where the EU is lacking a strong legal competence. For instance, in Article 2(3) and 5(1) TFEU it is provided that the Member States shall coordinate their economic policies within arrangements as determined by this Treaty, which the Union shall have competence to provide. It implies that the role of the Union is restricted to the adop-

57 Moloney (fn. 12), p. 1124.
58 See recital 9 in the preamble to the founding Regulations.
59 Recital 17 in 2017/0230(COD).
tion of coordinating measures with said policy field. This wider scope of EU intervention is also reflected in the founding Regulations where Regulatory Technical Standards are intended to ensure consistent harmonisation in the areas specifically set out in the legislative acts referred to in Article 1(2). Furthermore, the founding Regulations are all based on Article 114 TFEU on the approximation of laws. According to P. Cleynenbreugel, this legal basis provision offers an “open-ended mandate for the design and development of extensive harmonised legislation and accompanying supranational authorities in the service of the internal market.” For the USSPs, it is therefore more likely that policy coordination was considered the most suitable instrument to achieve the policy goal in question.

3.1 Step 1 – Information gathering

According to Article 29a, the identification of supervisory priorities must follow a discussion in the Board of Supervisors. In the original proposal, the USSP would instead be adopted by an independent Executive Board with full-time members that were externally appointed. These members would not be responsible for the day-to-day supervision of the market actors. However, as noted by Pan, supervision is the only regulatory strategy where authorities are developing in-depth knowledge of the financial institutions, their business models and their operations. It therefore seems like a fair political compromise to entrust the USSP to the heads of the NCAs acting as voting members (together with the chairman) in the Board of Supervisors. This decision is adopted with a simple majority where each voting member has one vote. However, the decision is not a reviewable act given that it is not intended to produce legal effects vis-à-vis third parties. Another issue is that the Board of Supervisors has been said to “focus too much on technical regulatory matters and too little on strategic and supervisory matters” in an earlier review of the ESFS. One could

60 Article 2(2) TFEU.
61 Article 10(1) of the founding Regulations.
63 See Article 45 in COM(2017) 536 final (fn. 7).
65 Decision of the European Banking Authority of 22 of January 2020 concerning the Rules of Procedure of the Board of Supervisors, para. 4.
66 Article 44(1) of the founding Regulations.
67 In this direction, see Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS), COM(2014) 509 final, p. 6
argue that Article 29a strengthens the mandate of the Board of Supervisors in
those areas. However, the question is whether this missing focus on strategic and
supervisory matters is only due to a lack of a dedicated convergence tool.\textsuperscript{68} For
instance, it could also be due to a mismatch between the size of the workload and
the available resources to carry out those tasks?\textsuperscript{69}

In their discussion, the members of the Board of Supervisors must take into
account contributions received from an exhaustive list of external stakeholders,
namely competent authorities, existing work by the Union Institutions and
analyses, warnings and recommendations published by the ESRB. These ex-
ternal stakeholders represent different interests, and they are not granted the
same power to influence in the legal framework. For instance, the ESAs are
under a general obligation to request advice from the Stakeholder Groups
where appropriate in relation to tools and instruments referred to in Article 29,
including USSP.\textsuperscript{70} There are also indications that the stakeholder groups are
involved in this work stream.\textsuperscript{71} In addition, the ESAs have to cooperate closely
and on a regular basis with the ESRB.\textsuperscript{72} If an ESA does not act on a warning or
recommendation from the ESRB, it shall explain its reasons for not doing so.\textsuperscript{73}
It is not clarified whether this general obligation applies to “analysis, warnings
and recommendations published by the ESRB” in Article 29a. Even though
the ESRB is responsible for macroprudential oversight,\textsuperscript{74} it is also important to
keep in mind that the USSPs constitute a microprudential tool.\textsuperscript{75} In this way,
Article 29a might be able to bridge the gap between the micro- and macropru-
dential level that are closely intertwined.

3.2 Step 2 – Setting strategic priorities of Union-wide relevance

As part of the 2019 reform, the three ESAs’ stakeholder groups made a joint
response arguing that the legal basis of the supervisory convergence tools are

\textsuperscript{68} Recital 17 in COM(2017) 536 final (fn. 7).
\textsuperscript{69} In addition, opinions expressed in the 2017 public consultation confirm that due to lim-
ited resources, the ESAs could not make full use of the abundant financial market data
\textsuperscript{70} Article 29(2) of the founding Regulations.
\textsuperscript{71} The 67th Board of Supervisors Meeting in EIOPA, EIOPA-BoS-20-638, para. 40.
\textsuperscript{72} Article 36(1) of the founding Regulations.
\textsuperscript{73} Article 8(1)(d) and 36(4) of the founding Regulations.
\textsuperscript{74} Article 3 of Regulation (EU) No. 1092/2010 of the European Parliament and of the
Council of 24 November 2010 on European Union macro-prudential oversight of the
financial system and establishing a European Systemic Risk Board.
\textsuperscript{75} Recital 17 in COM(2017) 536 final (fn. 7).
unclear and need clarification. It therefore seems appropriate to look into the ESAs’ scope of action and the boundaries of Article 29a.

3.2.1 The ESAs’ scope of action

According to Article 1(5), the ESAs only have competence to issue supervisory priorities within the ESAs’ scope of action. This scope of action is not specified in each legal basis provisions as it is often the case for EU primary law. Instead, the founding Regulations define a narrow and a broad scope in Article 1(2) and 1(3) that overlap as concentric circles ...

According to Article 1(2), the ESAs shall act within the powers conferred by this Regulation and within the scope of the legislative acts listed here, including all Directives, Regulations and Decisions based on those acts, and of any further legally binding Union act which confers tasks on the ESAs. Only within this area, the ESAs are allowed to adopt Binding Technical Standards and make use of their intervention powers. These powers have, as a common feature, that the ESAs adopt a binding act within the meaning of Article 288 TFEU. However, it is a requirement that the issues are directly covered by the legislative acts referred to in 1(2). Finally, it is possible for the co-legislators in a legislative act to confer new tasks on the ESAs not foreseen in their founding Regulations.

In Article 1(3), it is provided that the ESAs shall act in the field of activities of market participants in relation to issues not directly covered by the legislative acts referred to in paragraph 2. However, it is a requirement that “such actions are necessary to ensure the effective and consistent application of those acts.” As demonstrated by the FBF case, this requirement is subject to “a stringent judicial review.” However, given the nature of the legal framework, it may be difficult to carry out this stringent judicial review in practice. For instance, in the SV capital case, the joint Board of Appeal had to decide whether EBA’s former “Guidelines on the assessment of the suitability of members of the management body and key function holders” extended the scope of Union

77 BoA 2013-008, para. 38.
79 ECJ, 15 July 2021, FBF, C-911/19, ECLI:EU:C:2021:599, para. 67.
80 In this direction, see BoA 2013-008, para. 55.
law. Even though these guidelines were formally based on Article 11(1) of Directive 2006/48/EC, they were deliberately broader in scope. However, the Board of Appeal found that:

“First, in assessing the scope of Union law as to suitability requirements, account must be taken of Article 22 of Directive 2006/48/EC, which is wider in scope than Article 11. Under it, competent authorities must require credit institutions to have robust governance arrangements, effective processes to manage risk, and adequate internal control mechanisms. This is wide enough to cover the suitability of key function holders.”

Within this more loosely-defined area, the ESAs are allowed to adopt Guidelines and Recommendations having non-binding legal effects, as in the case of ordinary Recommendations pursuant to Article 288 TFEU. Hereby Article 1 (3) may serve a gap-filling provision insofar that the Guidelines and Recommendations go beyond the legislative acts mentioned in Article 1(2) in matters related to corporate governance, auditing and financial reporting.

The question is now whether the USSPs belong to the narrow or broad scope defined in Article 1(2) and 1(3). Here it could be argued that Article 29a represents “a power to exhort and to persuade”, in the same way as Guidelines and Recommendations, and therefore belongs to Article 1(3). However, an open question is whether the USSPs are in fact “necessary to ensure the effective and consistent application” of the legislative acts referred to in Article 1(2). Article 29a defines common strategic priorities but leaves to the NCAs the choice of form and methods. In other words, the USSPs are not intended to flesh out the sectoral acts in the same way as the other convergence tools. Regardless of the wording of Article 8(1)b, it is therefore not guaranteed that the requirement in Article 1(3) would be fulfilled. If not, the USSPs would need to be directly covered by the legislative acts referred to in Article 1(2). One practical example is EIOPA’s strategic priority “[a]dequate product design, including via a close monitoring of product oversight and governance (POG)” that are closely linked to the implementation of the Insurance Distribution Directive (IDD).

81 Guidelines on the assessment of the suitability of members of the management body and key function holders, EBA/GL/2012/06, para. 5.
82 BoA 2013-008, para. 55.
3.2.2 Article 29a as a legal basis provision

As a legal basis provision, Article 29a has three different requirements that need to be fulfilled before the Board of Supervisors can adopt the USSP by simple majority. Firstly, the priorities need to be of Union-wide relevance. Strategic priorities that only concern the financial markets of individual Member States should therefore be left to the national level. It is therefore natural that the USSPs also to a large extent reflect macro-prudential risks and vulnerabilities which threaten the financial system as a whole. Article 29a does not lay down rules on the substantive aspects of the USSPs; for instance, whether they are prudential or conduct-related. Looking at the first round of USSPs, it appears that they are used to address both types of risks in practice. Secondly, the ESAs shall, at least every three years, by 31 March, identify up to two priorities. In the original proposal, the number of priorities were not limited in this way, and they would form part of a more comprehensive Strategic Supervisory Plan. However, the ESAs are allowed to define a number of sub-priorities within the broader framework of USSPs. One issue is the relatively short time frame of the USSPs:

In the 2021 EBA Report on Convergence of Supervision Practices from May 2022, it is mentioned that one of the lessons learnt from the first USSP cycle is the need for continuity between the USSP cycles, i.e. from one to the next USSP cycle. It is also mentioned that there is consensus regarding both of the USSPs – business model sustainability and adequate governance – that they “will remain of heightened supervisory attention beyond the first 3-year cycle.” And it is concluded that “when launching the second USSP cycle, this request for continuity is to be considered.”

Thirdly, the priorities shall reflect future developments and trends. In this way, Article 29a represents a forward-looking tool where the identified micro-prudential trends, potential risks and vulnerabilities have not necessarily materialised yet. This characteristic is also highlighted by EBA in May 2022 where it is stated that “the USSPs have proved to be a valuable entry point for discussions regarding supervisory convergence developments and long term trends.”

88 The Strategic Supervisory Plan shall identify specific priorities for supervisory activities in order to promote consistent, efficient and effective supervisory practices and the common, uniform and consistent application of Union law and to address relevant micro-prudential trends, potential risks and vulnerabilities identified in accordance with Article 32, see COM(2017) 536 final (fn. 7).
89 EBA, Report on convergence of supervisory practices in 2021, EBA/REP/2022/10, p. 70.
90 See the proposal for Article 29a(1) in COM(2017) 536 final (fn. 7).
91 EBA, Report on convergence of supervisory practice in 2021, EBA/REP/2022/10, p. 70.
Here it also may be argued that the ESAs are, at least in principle, better equipped (than the NCAs) to carry out these scenario-related activities for the Single Market as a whole given their central position in the ESFS as a hub-and-spoke network.92 This includes the power to monitor and assess market developments in Article 32, as well as to collect all necessary information from the NCAs in Article 35. Together these powers have been said to “strengthen the ability of the ESAs to engage in forward-looking rule development.”93

### 3.3 Step 3 – Implementing the strategic priorities in the national work programmes

#### 3.3.1 The duty of the NCAs to take the USSPs into account

According to Article 29a, the NCAs shall take the strategic priorities into account when drawing up their work programmes. For this reason, the USSPs do not have legally binding force nor pre-emptive effects pursuant to Article 2 (2) TFEU. The commitment reflects the legal effect of Recommendations in Article 288 TFEU that “cannot create rights upon which individuals may rely before a national court... but national courts are bound to take recommendations into consideration in order to decide disputes submitted to them.”94 However, as explained by General Advocate Bobok, this commitment is subject to a wide range of possible interpretations:

“A potential extreme of the spectrum is whether it would amount to a Von Colson type of obligation of conform interpretation? In view of the formulation adopted in the judgment, it appears that the Court did not perhaps have the intention of going as far as imposing a duty on domestic courts to interpret national law in conformity with recommendations. On another imaginary extreme, to ‘take into consideration’ could also mean ‘have a look at’ and then choose to completely disregard.”95

This spectrum can also be observed in the ESAs’ own interpretation of their convergence tools.96 For the USSPs, there are several indications of a stronger

93 Moloney (fn. 12), p. 916.
96 See e.g. the two guidance notes EBA (fn. 13); as well as EBA, “Information on EIOPA’s Question and Answer (Q&A) process and guidance for submitting questions”, at https://www.eiopa.europa.eu/browse/supervisory-convergence/qa-regulation_en#HowisEIOPAhandlingQAs?, (accessed 3 February 2023).
commitment akin to Guidelines and Recommendations. This includes the duty of loyal and sincere cooperation in Article 2(4) which apply to the NCAs when they draw up their national work programmes. In addition, the NCAs must notify the ESAs of their progress, and the USSPs procedure features an informal follow-mechanism. In the same way, the ESAs may review the application of Guidelines and Recommendations in accordance with Article 29(1)d. However, Article 29a also differs from Guidelines and Recommendations in two important aspects:

Firstly, the NCAs shall confirm whether they comply or intend to comply with Guideline or Recommendation and otherwise state their reasons to the ESAs. Article 29a specifies a number of situations where the NCAs are not bound by the priorities; including a right of the NCAs to act on their additional priorities and developments. It is likely to include extraordinary events (not foreseen in the national work programmes) which pose significant prudential or conduct risks. An illustrative example is the vast problems with debt collection in Danske Bank that surfaced in the Danish media in August 2020. These problems meant that a total of approximately 245,000 debt collection customers were informed that their debt was set to zero and that their debt collection accounts would be closed.97 The bank later received four orders from the Danish NCA in relation to the data quality issues in the debt collection system.98 However, to preserve the useful effect (effet utile) of Article 29a,99 it is necessary to interpret this provision in a more restrictive manner.

Secondly, Guidelines and Recommendations have been said to “assist in the interpretation” of the legislative acts referred to in Article 1(2).100 It is therefore possible that the ESA would make use of Guidelines and Recommendations within the breach of Union law procedure in Article 17. However, the same line of arguments do not appear to apply to the USSPs. On this basis, the USSPs offer greater flexibility and carry less weight as a source of law than Guidelines and Recommendations. However, it also means that the USSPs themselves are not a reviewable act under Article 263 TFEU.101

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100 In this direction, see BoA 2013-008, para. 56.
101 ECJ, 15 July 2021, FBF, C-911/19, ECLI:EU:C:2021:599, para. 54.
Finally, it should be noted that the ESAs have communicated the USSPs informally through press releases and reports on their website. However, the fact that the USSPs are not adopted as one of the familiar acts in the founding Regulations (such as Guidelines, Recommendations or Opinions) is unlikely to change their legal status.

As a result, the NCAs do enjoy some discretion when implementing the USSPs in their supervisory practice. To illustrate this point, the Malta Financial Services Authority (MFSA) publishes an annual supervisory priorities document that highlights the different policy drivers in a particular order. This includes the market environment, regulatory developments, the European Union Strategic Priorities, the work programs of the ESFS, recommendations of international standard setters, as well as regulatory and supervisory experience.

3.3.2 The reporting obligation of the NCAs

The reporting obligation is crucial for the ESAs to carry out their new important task of monitoring the implementation of the USSP. In the original proposal, the NCAs were subject to two different reporting obligations: Firstly, a draft annual work programme which stipulates how it is aligned with the USSPs (ex ante control). The draft annual work programme not only covers specific objectives and priorities for supervisory activities but also quantitative and qualitative criteria for the selection of financial institutions, market practices and behaviours and financial markets to be examined by the NCA. The ESAs would assess the draft annual work programme before it was implemented. Secondly, a report on the implementation of the annual work programme (ex post control). The report would contain three categories of information, namely:

- A description of the supervisory activities and examinations of financial institutions, market practices and behaviours and of financial markets, and on the administrative measures and sanctions imposed against financial institutions responsible for breaches of Union and national law,

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105 EIOPA, Annual report 2021, p. 28.
106 See the proposal for Article 29a(2) in COM(2017) 536 final (fn. 7).
A description of activities that were carried out and which were not foreseen in the annual work programme, and

An account of the activities provided for in the annual work programme that were not carried out and of the objectives of that programme that were not met, as well as the reasons for the failure to carry out those activities and to reach those objectives.

Hereby the ESAs were not only made aware of if the NCAs have exercised their right to act on their additional priorities and developments, but it could also inform the discussion on possible follow-up measures in the Board of Supervisors. However, the Commission’s proposal also brought into question how closely the ESAs can observe and control the daily operation of the NCAs by means of a convergence tool.

The final version of Article 29a does not specify the content nor the frequency of this reporting obligation. The provision merely provides that “the NCAs shall take those priorities into account when drawing up their work programmes and shall notify the Authority accordingly.” One way to fill the lacuna would be to interpret the provision in light of the legislative intent. Here it appears that the co-legislator wanted to loosen the control structures and streamline the policy coordination process. The NCAs are therefore not necessarily subject to the same reporting obligations in the area of banking and securities as in insurance and occupational pensions. This diverse approach also characterises the ESAs own reporting on the supervisory convergence, including the USSPs.

3.4 Step 4 – Assessment of national work programmes and follow-up measures

As part of the last step, the ESAs shall discuss the relevant activities by the NCAs in the following year and draw conclusions. The nature of these activities is not specified in the final version of Article 29a, but it is likely to include “supervisory activities and examinations” as well as “administrative measures and sanctions against financial institutions responsible for breaches of Union


108 EBA publishes a Report on Convergence of Supervision Practices while EIOPA publishes a Supervisory Convergence Plan, and ESMA includes the theme Supervisory Convergence in its Annual Work Programme. The format of the reporting does not seem to reflect the level of impact of the USSPs.
and national law. If so, the USSPs would mainly be implemented in the NCAs’ supervisory practices and not incorporated in their legal framework.

On this basis, the ESAs assess whether the activities attain the strategic priorities and discuss possible follow-up measures which may include guidelines, recommendations to competent authorities and peer reviews, in the respective area. As the list is non-exhaustive, the ESAs could use other follow-up measures in the founding Regulations, such as Q&As. It should also be noted that these follow-up measures are not necessarily adopted with the same majority as USSPs themselves. This includes Guidelines and Recommendations that are adopted with a qualified majority in the Board of Supervisors. In light of the Commission’s proposal, it appears that the follow-up measures mentioned in Article 29a would be used in three quite different situations.

3.4.1 Peer review

The peer review process is set out in Article 30 of the founding Regulations. According to the proposal of the Commission, the ESAs could consider this follow-up measure for national activities that are critical to fulfilling the USSPs. The peer review process may be used to assess the application of best practices developed by NCAs whose adoption might be for the benefit of other competent authorities. In this way, the USSPs offer a unique learning opportunity compared to the other convergence tools. The reason is that Article 29a encourages the NCAs to explore their own approach to the common problems. The ESAs would therefore be able to identify so-called “ideal solutions” based on comparative law. The peer review process may also be used to assess whether the NCAs have achieved the objectives of the USSPs. If this is not deemed the case, the ESAs may resort to either Guidelines or Recommendations in Article 16 or Opinions in Article 29(1)a, as stated in the peer review report.

109 See the proposal for Article 29a (4) in COM(2017) 536 final (fn. 7).
110 Press release: ESMA to work on ESG disclosures as a new Union Strategic Supervisory Priority, 27 October 2022.
111 For Guidelines and Recommendations, see Article 44(1) of the founding Regulations.
112 See the proposal for Article 29a (5) in COM(2017) 536 final (fn. 7).
113 Article 30(3)c in the founding Regulations.
115 Article 30(3)b in the founding Regulations.
116 Article 30(4) in the founding Regulations.
3.4.2 Guidelines

Guidelines are addressed to all NCAs, and the ESA may therefore favour this follow-up measure if the supervisory and enforcement activities of the NCAs have not ensured a consistent application of legally binding Union acts.117 It also means the NCAs would become subject to the comply or explain principle in Article 16(3). Hereby the ESAs may gradually escalate the situation to ensure a higher degree of compliance among the NCAs. Indeed, Member States comply with the ESA guidelines with a few exceptions. Based on ESMA’s compliance table, national authorities have notified non-compliance in only thirty-one individual cases, which suggests a compliance rate of approximately ninety-eight percent. Of these non-compliances, few have been motivated by material dissent but rather are explained by specific circumstances, which have made compliance impossible or difficult. The European Banking Authority (EBA) guidelines are almost equally effective.118 However, the ESAs could also seize this opportunity to expand the personal scope of the Guidelines to all the market actors and not only the NCAs. If so, the market actors (but not the NCAs) may use the new procedural right in Article 60a to send reasoned advice to the Commission if the ESAs have exceeded their competence. This right resembles the subsidiarity control mechanism for the national parliament; except the latter only covers the principle of subsidiarity and proportionality in Article 5(3) and (4) TEU.119 However, the broad wording of Article 60a suggests that this provision also covers the principle of conferral in Article 5(2) TEU. One potential issue here is whether Guidelines issued as follow-up measures to USSPs belong to the narrow or broad scope of action in Article 1(2) and 1(3) of the founding Regulations.

3.4.3 Recommendations

In the Commission’s proposal, it was provided that “where there are material risks of not attaining the priorities set out in the Strategic Supervisory Plan, the Authority shall issue a Recommendation to each competent authority concerned on how the relevant shortcomings in its activities can be remedied.”120 This enforcement model resembles the way in which Recommendations are used as a soft enforcement mechanism within the Breach of Union Law proce-
dure. One key difference is, however, that the Recommendation in Article 29a does not require a breach of Union law pursuant to Article 17(1), but merely that the USSPs have not been sufficiently met. This means that there is no direct link between the USSPs and the formal intervention powers in Article 17–19 of the founding Regulations.

Another question is whether the addressee is allowed to take part in the discussion and voting on the Recommendation in the Board of Supervisors. The EBA’s Conflict of Interest Policy for non-staff from January 2020 only covers private interests and not institutional affiliations within the EFSF. However, in May 2021, a new section was added to EBA’s Rules of Procedure of the Board of Supervisors, titled “Independence of the Board of Supervisors”. Here it is provided in article 6(4) that “in case of existence of any interest in relation to any item of the agenda, the individual concerned (‘conflicted individual’) shall abstain from participating in the discussion of and voting upon that item.” Based on a literal interpretation, it appears that Article 6(4) covers private interests as well as institutional affiliations within the EFSF. It is therefore not possible to interpret the provisions in a way which eliminates the conflict. Instead, it is necessary to determine which of them takes priority over the other. Here it may be argued that Article 6(4) only covers the members of the Board of supervisors (lex specialis), and the provision was enacted more recently (lex posterior). As a result, the head of the NCA (the conflicted individual) would not be allowed to take part in the discussion of and voting upon the Recommendations under Article 29a.

### 3.4.4 A more flexible approach to enforcement?

By including several follow-up measures in Article 29a, the USSPs acquire a more flexible and less intrusive nature. Hereby the provision takes into account that the ESAs may have preference for certain convergence tools over others. In addition, it allows the ESAs not only to shame the NCAs for not

121 Article 1(3)b in Decision of the European Banking Authority on the EBA’s Policy on Independence and Decision-Making Processes for avoiding Conflicts of Interest for Non-Staff, EBA/DC/2020/308.

122 Article 6(4) in Decision of the European Banking Authority of 22 January 2020 concerning the Rules of Procedure of the Board of Supervisors as amended by EBA/DC/2021/392.


attaining the priorities but also to encourage mutual learning between them. For instance, EIOPA explains how it will monitor the implementation of the USSPs by engaging with national supervisors and providing feedback and assistance.125 This is in sharp contrast to the Breach of Union law procedure where “many decisions that have been taken to date appear to concern decisions not to open an investigation following a request by a complainant who alleges that a competent authority is failing to discharge its Union law obligations.”126 It is therefore also more likely that the ESAs will take action under Article 29a. In fact, EIOPA has already announced that it “will provide structured follow-up on recommendations to NCAs (potentially including guidelines, recommendations to NCAs) in relation to the identified Strategic Supervisory Priorities and recommendations stemming from peer reviews and EIOPA’s other oversight activities.”127 It therefore seems that Article 29a is already having a noticeable impact on the supervisory convergence agenda in the EU.

4. Evaluation

The previous sections presented the ESAs’ first round of USSPs (from 2021 to 2023) and analysed each procedural step in Article 29a. On this ground, the next step will be to determine the impact of Article 29a in the ESFS and the wider consequences for the NCAs in the Member States. According to EBA, the first USSP cycle was carried out as a so-called “additional strategic layer to the supervisory convergence discussions.”128 It could therefore be argued that Article 29a has expanded the scope of the ESAs’ convergence tools; from the operational to the strategic level. Hereby the USSPs have essentially brought a new strategic orientation to the former level 3 of the Lamfalussy process.129 Hereby, the USSPs align the national supervisory priorities and also contribute to the strengthening of mutual trust between the NCAs. EBA also adds to the statement that “[t]he future USSP toolkit will be further incorporated and institutionalised into the existing supervisory convergence processes and work-

To avoid fragmentation, it is therefore expected that the ESAs will seek to connect the convergence tools at the strategic and operational level, respectively. However, this institutional reform raises two questions, namely: What fundamental challenges does the reform give rise to, and to what extent have they been addressed in the final version of Article 29a?

4.1 The first challenge

The first of these challenges relates to the role of the ESAs and to whether it is possible to separate the strategic and operational planning of the NCAs. In an opinion delivered by the ECB, it was noted that “[d]efining respective strategic supervisory priorities on the basis of identified microprudential trends, potential risks and vulnerabilities for financial institutions was mentioned as core supervisory tasks that should be carried out by the competent microprudential supervisory authority. Hence, it should not be carried out by EBA in their function as a standard-setting regulator.”

Here it is important to recognise that the supervisory convergence tools of the ESAs have expanded over time and become more sophisticated (or intrusive). Today, it therefore appears somewhat acronymic to reduce the ESAs to “standard-setting regulators” in the same way as their institutional predecessors, i.e. the 3L3 Committees. In addition, the USSPs do not seek to replace the NCAs’ strategic planning. Instead, the USSPs add a European strategic approach towards a risk-based supervisory convergence framework across the Member States. In this way, Article 29a serves the same overriding goal as a common EU mandate for the NCAs. Yet, as more concrete strategic priorities, the USSPs do not run the same risk of becoming vacuous where “it would be easy for country authorities to declare their commitment to a noble goal, but carry on as before, and be ready to defend interests at every turn, while providing a spurious explanation of how selflessly they are acting.” However, this also means that the USSPs are not necessarily aligned with the mandate of the individual NCAs; a risk that was also highlighted by a respondent in the targeted consultation.

130 See fn. 129, p. 70.
135 Contribution to the targeted consultation on the supervisory convergence and the single rulebook between 12 March 2021 and 21 May 2021.
Another challenge is whether common strategic priorities are relevant for all 27 Member States, or whether it leads to a scenario of “one size fits all”. In the targeted consultation, one of the business organisations argued that “it should be noted that the Union strategic priorities, although set at the EU-level, can prove to be problematic for an individual Member State. It is difficult to define risks that are important for every Member State. There is a risk that an NCA is forced to allocate resources into supervisory areas that are not the most relevant in that particular country.”

The key challenge here is that the European financial markets as well as the real economy differ vastly in terms of their size, structure, risks and vulnerabilities. One example could be tackling non-performing loans in the aftermath of the COVID-19 pandemic. Here the overall risk picture is quite diverse, and it would therefore not require or justify the same supervisory focus across the Member States.

**Non-performing loans ratio by home country for the third quarter of 2022**


It is therefore important that the ESAs define the strategic priorities at a reasonably high level and that the NCAs are allowed to use sound judgment and decide their own set of supervisory activities and actions to implement the USSPs. Otherwise, there is an inherent risk that the USSPs would become counterproductive. However, it seems that this concern has been addressed in the final version of Article 29a where the USSPs shall not prevent NCAs from applying their best practices, acting on their additional priorities and developments, and national specificities shall be considered. In EBA’s 2021 convergence plan, it was highlighted that “CAs’ feedback on this implementation was positive as it offers room for strategic discussion on supervisory convergence as well as enough flexibility to accommodate for specificities in the national implementation.”

4.3 The third challenge

A final challenge is the budgets of NCAs and their funding contributions to the ESAs. This issue was already brought up in the impact assessment on Regulation (EU) 2019/2175. Here the Commission explained how “the Member State contributions are proportionate to their share of votes under the Council QMV rule and not necessarily to the size of their respective financial sectors. As a result, national CAs from Member States with a large financial market contribute less relative to their size, while national CAs from Member States with small financial markets may be due to pay more in relation to their size.”

The introduction of USSPs could worsen this problem, as indicated in the public consultation “the setting of priorities is rather clear and appropriate, but the actual set of priorities has been relatively detailed. As a result, completing them is a largely necessary but time and resource-demanding task, especially for smaller NCAs.”

The cost allocation between the ESAs and the NCAs seems to vary between the convergence tools in Article 16 and 29. For instance, Guidelines to a large extent represent finished regulatory products that the NCAs apply directly in their supervisory practices or incorporate in their legal framework. By way of contrast, the USSPs require that the NCAs themselves define the concrete supervisory activities and actions while taking into account national specificities. In this way, Article 29a may inadvertently “delegate the burden of regula-

139 Contribution to the targeted consultation on the supervisory convergence and the single rulebook between 12 March 2021 and 21 May 2021.
140 Ibid.
tion” from the ESAs to the NCAs. According to the founding Regulations, the ESAs shall where appropriate analyse the related potential costs and benefits of the Article 29 tools. However, it is not clear how the Impact Assessment process should be applied to the USSPs where the supervisory activities and actions are not predefined. It will therefore likely be up to each NCA to ensure that the cost implications for local consumers, investors and market participants are fully justified. Yet, it would not necessarily account for the aggregated costs of the USSPs at the EU level.

5. Conclusion

As a new supervisory convergence tool, the USSPs raise a number of familiar questions regarding their legal nature, scope and rationale. To shed light on these questions, the present contribution provides a brief historical account of the EU convergence tools followed by a legal analysis of each procedural step in Article 29a. On this basis, it is possible to define the USSPs as a proactive, micro-prudential and strategic-oriented supervisory convergence tool, adopted through a policy coordination process and addressed to the NCAs, which must be directly covered by the legislative acts referred to in paragraph 1(2), and which is only subject to informal enforcement through a non-exhaustive list of other convergence tools. These legal characteristics are unique to the USSPs, as it allows the ESAs to exert a direct influence over the national supervisory practice without formally taking over this responsibility, as in the case of the intervention powers in Article 17–19 of the founding Regulations. In this way, the USSPs are more closely aligned with the fundamental principle of the ESFS, namely that day-to-day supervision should be left to the national level. However, this also means that the ESAs should consider carefully when and how to follow-up. Otherwise, there is a risk that overzealous enforcement would undermine the rationale of the USSPs which results in an unclear division of responsibilities between the ESAs and the NCAs.

142 See Article 29(2) in the founding Regulation.
144 In this direction, see EBA Banking Stakeholder Group, Proportionality in Banking Regulation, 10 December 2015, p. 22.