

The “New Regulatory Tools”

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Purpose

- Does the EBA establishing Regulation provide operational solutions to the regulatory issues met by the various competent rule-makers?
- If this is not the case, which ways forward might be elaborated?
- Two main groups of regulatory issues:
 - the interplay between level 1 and level 2 measures
 - the legal value of soft law regulatory measures adopted under Article 16

- The overall perspective
 - inherently institutional issues
 - a case study on the current transformation of the EU administrative system?

A. The Interplay Between Level 1 and Level 2 Measures

- Examples of regulatory issues: how technical and how detailed should level 1 measures be? How should mandates be drafted? Is there a substantial difference between the available types of binding technical measures?
- Can we derive a number of operational solutions from the the EBA establishing Regulation?

- A fundamental tension between two different visions of the relations between the rule-makers in the field: one recognizing the potentialities of the EBA as a specialized regulator, the other minimizing its regulatory role
- How to solve this tension?
- The exploitation of the EBA's potentialities as a specialized regulator

- A legally justified way forward:
 - a non-restrictive interpretation of the Commission's responsibility in delegated and implementing measures under Articles 290 and 291;
 - a realistic reading of the *Meroni* ruling;
 - the internal dynamics of the single market of financial services as a project of further integration based upon a single rulebook

- The institutionalization of some form of involvement of the EBA in the discussions on level 1 regulation
- A favour for level 1 measures limiting the elements of discretion for the national competent authorities and relying on the regulatory capacity of the EBA to draft technical standards in the form of directly applicable regulations
- A restrictive interpretation of the powers of the Commission within the endorsement procedure

B. The Legal Value of Soft Law Regulatory Measures

- The regulatory issues raised by Article 16
- Can we derive a number of operational solutions from the the EBA establishing Regulation?

- The «meta-regulatory» role of the EBA: orientating the interpretation and application of EU law by means of soft law measures
- Two functionally different hypotheses in Article 16(1): guidelines and recommendations as supervisory or regulatory tools
- Preconditions for the use of guidelines and recommendations as regulatory tools

- Legal value
- Taking seriously the non-binding nature of soft law regulatory measures
- The obligation to «make every effort to comply with those guidelines and recommendations»
- Two different and potentially conflicting dimensions co-exist in the procedure laid down by Article 16: one is oriented towards compliance, the other is dialogical and argumentative
- The way forward: strengthening the dialogical dimension