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La Commission européenne a présenté son Paquet Bancaire le 27 octobre dernier. Il contient des propositions de réformes des règles applicables au sein de l'Union en termes d'exigences de capitaux et de supervision bancaire, règles qui ont déjà été considérablement remaniées et renforcées au cours de la dernière décennie en réponse à la crise financière. Ce blog s'attache à analyser le contenu de ces propositions de réformes et à les resituer dans leur contexte qui est caractérisé par la nécessité de finir d'adapter le cadre réglementaire européen aux standards dits de Bâle III. Il souligne également que ce processus soulève des questions de légitimité démocratique.

When the consequences of the Great Financial Crisis that broke out in 2007-2008 started to be felt in Europe, it soon became clear that the supervisory and regulatory framework applicable to the financial sector within the European Union (EU) needed to be significantly reinforced. To remedy this unsatisfactory situation, the de Larosière report published in 2009 proposed that a Single Rulebook and a European System of Financial Supervision be introduced, and these recommendations were duly implemented by the EU legislator soon thereafter.

The Single Rulebook comprises numerous pieces of legislation that define for instance minimum requirements in terms of the capital that credit institutions must hold, rules for their orderly resolution, or measures to fight anti-money laundering. In particular, minimums in terms of capital requirements are contained in the Capital Requirements Directive (CRD) and the Capital Requirements Regulation (CRR). The first CRD was adopted in 2013, and has since been amended on three occasions, whereas the first CRR dates from 2013 and was amended in 2019.

With the Banking Package it issued on 27 October, the European Commission has proposed a new reform to the CRD and the CRR alongside a specific proposal of the CRR in the area of regulation ('daisy chain proposal'). This blogpost details the context in which the Banking Package is issued and its aims. It also highlights the issues of democratic accountability that arise in this context.

The Banking Package: Setting the Scene

As noted above, the EU rules in the field of banking supervision have been significantly reinforced over the past decade. These rules are, however, not only the outcome of the legislative process conducted within the EU but they are, in fact, strongly influenced by the standards developed by the Basel Committee on Banking Supervision. This forum, formally established at the Bank for International Settlements, brings together central bankers and banking supervisors from 28 States selected on the basis of the importance of their banking sector for international financial stability. They agree on standards with regard to capital, risk coverage, norms to contain leverage, risk management and supervision, market discipline, liquidity standards and monitoring, and large exposures. Although they are non-binding, these standards strongly influence practice within the 28 jurisdictions whose representatives sit on the Committee, and far beyond, as they are applied by over 100 jurisdictions worldwide.

The Banking Package: Aims

Following the adoption of the Basel III agreement in 2017, the existing EU rules had to be adapted (in fact, the pandemic led to a delay in this process as the BCBS postponed the deadline for ~~implementation by one year from the beginning of 2022 to the beginning of 2023~~). However, with its Banking Package, the European Commission not only seeks to pursue the finalization of the adaptation of the EU's legal framework, but it also aims to introduce sustainability as one of the criteria banks consider in their risk management, and to provide supervisors with stronger enforcement tools. As recently examined in another post, the European Commission proposes among other things to reinforce the independence of the national authorities (so called Competent Authorities) in charge of banking supervision.

EU and global levels of governance in the field of banking supervision and related issues of democratic accountability

Although the Package is deemed to finalize the implementation of the standards contained in the Basel III agreement, it remains the case that the European Commission's proposal has been adapted to the specific features of the EU's banking sector, as had already been anticipated by Mairead Mcguinness Commissioner for Financial services, financial stability and the Capital Markets Union on the occasion of her appointment hearing in October 2020. Regardless of this, there is no doubt that the margin of discretion which EU institutions have when implementing Basel standards (and international standards more generally) into EU law is necessarily limited. This is so among other reasons because peer pressure among States is high, and because all involved are aware of the fact that it is only through a (largely) uniform application of these standards that their positive effects can materialize. This notwithstanding, since the EU has chosen to go further than what the Basel standards would demand by applying them not only to its Global-Systematically Important Banks but by seeking to apply them to all credit institutions, some adaptations to the EU's reality were necessarily required. In any event, the strong influence the Basel standards have on EU legislation raises issues of democratic accountability. The European Parliament in fact noted in its Resolution of 12 April 2016 on the EU role in the framework of international financial, monetary and regulatory institutions and bodies that 'national parliaments and the European Parliament should not be reduced to a role of mere rubberstamping but must be incorporated, actively and comprehensively, into the whole decision-making process', and it suggested that an interinstitutional agreement 'with the aim of formalising a 'financial dialogue', […] be organised with the European Parliament for the purpose of establishing guidelines regarding the adoption and the coherence of European positions in the run-up to major international negotiations, making sure that these positions are discussed and known ex ante and ensuring a follow-up, with the Commission reporting back regularly on the application of these guidelines and scrutiny'.

Even if this proposal was made more than five years ago, and even if the impact of international financial standards and of the Basel standards in particular on the content of EU pieces of legislation is both evident and strong, the European Parliament's proposal has not been followed, and no interinstitutional agreement has been concluded. The adoption of its Banking Package by the European Commission should arguably prompt new reflections on and indeed concrete solutions to this issue.