Multi-level Regulatory Governance: Establishing bank-regulator relationships at the European Banking Authority

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Following the financial crisis the EU strengthened its institutional apparatus for bank regulation, creating a trio of sectoral bodies including the European Banking Authority (EBA). Various aspects of this new system have been studied, but to date little is known about how banks engage with their new supranational regulator. We argue that such engagement fosters an interdependence between banks and regulators, thus contributing to the efficiency and robustness of the overall regulatory regime; but also that it is contingent on the regulator exhibiting the qualities of credibility, legitimacy and transparency. These qualities are grounded in the domestic regulatory governance literature, but we suggest that they are rendered problematic by the complexities of the EU's multilevel system, and in particular the overlap in competences between the EBA and the European Central Bank. We examine the EBA in the light of these criteria, and find that banks' engagement remains pitched towards established national regulators and the EU's legislative arena. This poses concerns for the efficacy of agency governance in the EU's regulatory regime for banking.

1. Introduction

Following the financial crisis and the Eurozone's ensuing sovereign debt problems, the EU moved to consolidate the regulatory framework overseeing the banking system. The regime previously based on a network of cooperation among national regulators was significantly strengthened, and a standalone agency – the European Banking Authority (EBA) – was formed in 2011. In line with developments in other regulatory domains, where we have seen the 'mushrooming' of agency governance (M. Busuioc, Groenleer, and Trondal 2012), this new body was given a legal standing, a set of powers and resources, and a mandate. The EBA is responsible for writing the technical standards governing banking in the single market. It sits at the centre of a complex system of multi-level regulatory governance (MLRG) spanning from the EU's legislative arena down to the regulatory regimes of the Member States – an arrangement which can be seen as a manifestation of the broader phenomenon of complex governance structures in the EU (Marks and Hooghe 2001; Sabel and Zeitlin 2010). This institutional landscape became more complex in 2014, when, as part of the development of the Single Supervisory Mechanism (SSM), the European Central Bank (ECB) became the lead supervisor of around 130 of the eurozone's largest banks (Gren, Howarth, and Quaglia 2015).

Various facets of this regulatory system have been studied. The circumstances of the latest crisis-driven phase of its development have been examined in detail (Buckley, Howarth, and Quaglia 2012; Quaglia 2013); we also have a good understanding of the preferences of the Member States, and of their regulators, during this period (Lombardi and Moschella 2016; Spendzharova 2014). At a more detailed level, Maggetti and Gilardi have examined the dynamics shaping the domestic adoption of the standards produced by this new apparatus (2014). However, with a few exceptions, there has been less research into the interactions between market actors and the supranational regulator at the centre of this system to date; that is to say, we know relatively little about regulatory engagement by banks in the multi-level system, and how they move between domestic and European arenas. As banks represent an important constituency for the EBA – alongside its political principals and other public bodies – it could be said that by overlooking their engagement we are missing an important part of the functioning of this agency.

The aim of this paper is to examine how the features of the EBA shape banks' engagement with it, and in so doing we contribute to the themes of the special issue by studying how banks interact with policy makers across the multiple levels of their landscape. This engagement goes beyond participation in formal consultations, and encompasses banks' efforts to forge stable connections with their regulator, contribute to dialogue on the design or implementation of rules, and so on. Like many other types of stakeholder, banks are adept at moving around the opportunity structure afforded by the EU's system of governance, engaging with regulatory bodies at various level (Coen et al. 2019; Mazey and

Richardson 2015). However, we argue that engagement by banks rests on the agency in question having certain characteristics. For firms to have an incentive to set about forging strong links with their regulator, it must exercise some form of authority over them (writing rules or standards, supervising, or enforcing); but in addition the firms must view it as a viable and worthwhile partner. This viability, we argue, is a function of the regulator's credibility, its legitimacy, and its transparency.

We rest our analysis on two theoretical claims. First, dialogue between firms and regulators is a vital component of a well-functioning regulatory regime: when of a sufficient stability, it facilitates a rich exchange of information, and constructive cooperation over rule-making and implementation. In these situations, both parties learn to work together in a mutually beneficial arrangement, and what then emerges can be thought of as a 'regulatory order' – more than just a set of institutions and a body of rules but also a dense web of practices linking members of the regulatory community together. In this sense, dialogue is normatively desirable, contributing to the development of a robust and efficient regulatory regime. Second, the trio of credibility, legitimacy and transparency are grounded in the extensive literature on the operation of such agencies at the national level. However, they are cast in a different light when viewed in the EU context: the multi-level nature of this system, and the dispersion of roles and lines of authority across multiple venues, push us to consider carefully how credibility, legitimacy and transparency are manifested.

The findings presented are based on two data sets. We analysed consultation documents submitted by public and private sector stakeholders; official reports from various bodies, including the European Commission (European Commission 2014) and the Parliament (Demarigny, McMahon, and Robert 2013); and notes from public hearings. We also conducted 32 elite interviews between 2013 and 2016, with staff from the major British banks (11), their German counterparts (three) the British and German trade associations (seven each), and the EBA (four). Many of the interview subjects had cross-cutting expertise, having worked for the national authorities of their countries, or for several different firms or organisations, and were medium- to high-ranking staff selected for their involvement in regulatory engagement. The combined data were analysed to extract the key themes pertaining to the theoretical framework, and this allowed us to build a coherent, theoretically-grounded narrative explaining regulatory relationships at the European level. The presentation of the findings uses quotes from interviews, and extracts from documents, to illustrate the main points.

This paper proceeds as follows. In section two, we develop a theoretical framework to guide our analysis. Next, we set out the structure and functions of the EBA in more detail, as well as the broader institutional system in which it operates. In section four, we deploy the theoretical framework to study banks'

engagement with their European regulator. Finally, we discuss the findings and conclude.

2. ***Theoretical framework***

2.1 Regulation, engagement and interdependence

Regulatory relationships are marked by information asymmetries, whereby firms are better informed about the operation of their markets than regulators. To overcome such problems, and to achieve effective control of firms' behaviour and to fulfil their own mandates, regulators seek to foster strong links with their charges (Epstein and O'Halloran 1999; McCubbins, Noll, and Weingast 1987). Firms reciprocate, devoting time and effort to building stable relationships with their regulators (Coen and Héritier 2005), and from these links we see the development of a resource dependency between the two (Pfeffer and Salancik 1978, Getz 2001, Hillman et al 2004). Both parties obtain access to valuable information: firms provide expertise to aid in the development of regulatory policy and the writing of specific standards (Coen and Vannoni 2018), which is invaluable for the regulator, since to develop a proprietary capacity to generate it would be enormously costly (and, indeed, almost impossible, since the most up-to-date knowledge can only be held by market actors themselves). In return, firms gain insight into the future trajectory of regulatory policy: of change in supervisory practices, of the tone or scope of forthcoming standards, and on principles to be followed in enforcement decisions. Perhaps most valuable in a day-to-day sense, they can gain clarification on questions of implementation of *current* policies – particularly important in complex regulatory scenarios where ambiguity abounds. Importantly, the exchange also facilitates a learning mechanism, through which both parties become embraced in a close working partnership (Coen 2005; Willman et al. 2003). They learn not only details about each other's procedures and outputs, but also *how to sustain the relationship*; in other words, norms of behaviour emerge which guide the conduct of firms and of the agency (Coen et al 2019), and thus a regulatory order develops.

Importantly, we take this interaction to be vital to the efficient working of the regulatory regime, and so normatively desirable: information provided by firms contributes to the writing of practicable and effective rules, while the insights firms gain from the regulator into the development of policy facilitate rational decision-making in a context of relative certainty about the regulatory environment. The cooperation which emerges as part of this regulatory order enables the regime to achieve the twin aims of controlling firms' behaviour, while fostering a stable regulatory environment.

However, efforts on the part of firms to forge close relationships with their regulator do not emerge automatically; rather, we suggest that they are a function of certain qualities of the agency in question. Straightforwardly, the starting point is the authority it wields over firms, and this is usually thought of

in terms of the three roles ascribed to regulators: standard-setting, monitoring, and behaviour modification (Black 2002; Hood, Rothstein, and Baldwin 2001). Thus, to be worth engaging with, the regulator should be responsible for some, or all, of these (writing rules, supervising behaviour against those rules, and enforcing compliance), and should have adequate capacity to do so. Above these concerns, though, firms' willingness to engage with their regulator is shaped by the qualities it exhibits *in the way it carries out those roles*: firms are concerned not only with what the regulator does, but also with how it does it.

2.2 What makes for a good relationship between firms and their regulator?

We now draw on the extensive literature on regulatory governance at the national level to identify three such qualities in detail. However, it is important to note that these qualities – or our understanding of how these qualities are manifested – must be flexed when considering their application to the EU's multi-level system.

Beyond a simple functional assessment of the authority the regulator wields, firms' willingness to engage is shaped by considerations of its *credibility*, *legitimacy* and *transparency*. The first of these is often associated with the regulator's independence, and using a principal-agent framework, a large body of work has studied the intricacies of functional and formal independence, and the implications for the regulator's efficacy of it being restricted (Guidi 2015; Hanretty and Koop 2012; Koop and Hanretty 2017; Thatcher 2002). For our purposes, credibility and independence are considered with reference to the clarity of the regulator's role and its relationship with those above it in the chain of delegation: issues can arise when the agency serves several masters – resulting in a shifting zone of discretion and thus an unclear, unstable role (Thatcher and Stone Sweet 2002). Likewise, the regulator's position *vis-à-vis* other public bodies operating in its regulatory domain is important, as tensions can emerge where several agencies compete for authority over the same market, or police different aspects of it (a specialist product regulator versus an overarching competition regulator, for example). The position is a function of both a clear separation of remits between the regulator and other bodies, and of the resources – financial and human – it holds. In our multilevel context, it is likely that these inter-institutional aspects of credibility will be key, since European regulatory agencies exist in a complex and de-centred institutional environment in which lines of delegation are often blurred (Blauberger and Rittberger 2014; Dehousse 2008; Kelemen and Tarrant 2011; Tarrant and Kelemen 2017).

Next, firms' perceptions of the regulator's *legitimacy* are important. Like others in the study of public administration, this concept is protean and elusive, but a differentiation is often made between 'input' and 'output' variations (Scharpf 2009). The former relates to the participation by citizens and civil society (alongside business) in the processes of governance, so that a regulator can be

seen as legitimate if grounded in a chain of delegation stretching back to voters. In contrast, the latter speaks to the effectiveness of regulatory agencies in a 'problem-solving' sense; such a consideration is closely related to what has been termed 'new' (Bovens 2007) or 'extended' (Scott 2000) accountability, under which a regulator is primarily answerable to market actors for its performance. This output legitimacy is essentially reputational, resting on the efficiency with which the agency carries out its tasks, and on its ability to make good, predictable decisions and correct errors (E. M. Busuioc and Lodge 2015; Koop 2014). While steps have been taken to bolster the input legitimacy of supranational regulators (Arras and Braun 2018; Buess 2014), we argue that in our empirical context the concern for output legitimacy is more important in shaping banks' willingness to engage, given the highly technical nature of this policy area. Meanwhile, it is also likely that this legitimacy is put under stress by the division of labour present in the EU's multi-level system, since regulatory tasks are dispersed among various institutions.

The final consideration is of the regulator's *transparency*. This is closely related to the notion of accountability (Bovens 2010; Hood 2010), and in the broader public administration literature has been a feature of debates on trust and responsiveness (Grimmelikhuijsen and Meijer 2013); in the EU context, it has been discussed as a key *desideratum* of agency governance (Dudley and Wegrich 2016). For our purposes, we relate this specifically to the policies in place to render regulatory activities open to review by stakeholders (Lodge 2004), with two dimensions. The first concerns the transparency of the processes through which regulatory standards are written, or enforcement decisions made: either by allowing stakeholders to participate in, or at least observe, these procedures as they occur; or by publicly disclosing information (minutes of discussions, evidence used, *et cetera*) about them afterwards (Lodge 2004; Stern 2010; Thatcher 2002). The second dimension is organisational transparency: an openness about the agency's internal hierarchy and chain of command. We argue that for firms this remains a key factor in shaping their efforts to engage: a lack of transparency can hamper the development of relationships between firms and their regulators, since – at a basic level – an opaque organisational structure or set of procedures leaves them unsure of how to initiate contact. Again, though, we suggest that the complex form of European regulators, as 'agencified networks' (Levi-Faur 2011), may cause their transparency in both dimensions to suffer.

2.3 Summary: Good bank-regulator relationships in a multi-level context

Where banks are able to build good relationships with their regulator, the resulting interdependence contributes to a robust and efficient regulatory regime. Firms' engagement with their regulator, in turn, rests on the latter exhibiting three interconnected qualities – it should be credible, legitimate, and transparent – and each of these can be identified, in practical terms, with reference to a set of arrangements within and around the regulator. Thus, inter-

institutional credibility arises from clear reporting lines to political principals, and a clearly-defined and stable remit (which also demarcates the regulator's tasks from those performed by others in its environment). Similarly, strong resource endowments and working practices contribute to the regulator's output legitimacy, and policies aimed at making its rule-making processes and internal hierarchies visible to stakeholders increase transparency. However, while each of these *desiderata* has a firm foundation in the study of domestic regulatory governance, we should be aware that the complexities of the EU's institutional system may challenge the way in which they actually operate.

3. ***The institutional landscape***

The domain of financial regulation is an example of the broader processes of evolution (Thatcher and Coen 2008) and agencification (M. Busuioc, Groenleer, and Trondal 2012; Levi-Faur 2011) present in the EU. Although the legislative framework stretches back to the 1970s, the development of the associated institutions did not get under way for many decades; instead, regulatory capacity remained in the hands of the Member States, who seemed wary of ceding control over their financial systems to the supranational level. During the 1990s the impetus to develop financial regulation at the supranational level waned, as attention focussed instead on establishing the euro, until the process was re-energised by the Financial Services Action Plan in 2001. This contained both a package of legislation to be passed and recommendations for the development of a set of institutions at the EU level, and thus the Committee of European Banking Supervisors (CEBS) was formed in 2004: a standing group of the heads of Member States' bank regulators charged with providing input into legislative processes and acting as a venue in which best practice could be shared.

In the early stages, then, institutional capacity at the EU level was weak, with solutions based on informal networks being preferred. With time, and following a delicate interplay between supranational actors and Member State governments after the financial crisis of 2007-9, this arrangement of soft law diffusion was hardened. The legislative framework for financial regulation was considerably expanded and strengthened – with a notable switch towards regulations rather than directives – and the associated institutional structure underwent a similar formalisation. As a result the CEBS was crystallised into the European Banking Authority in 2011 (Buckley, Howarth, and Quaglia 2012; Quaglia 2013).

Three aspects of this agency are pertinent to the current discussion. First, most obviously, the EBA's institutional form makes it stand in clear contrast to its predecessor. Where CEBS had a weak institutional basis and limited resources (Coen and Thatcher 2008), the EBA is a fully-fledged agency, with powers, a remit, and a distinct legal personality. Second, the EBA has delegated to it a

wide set of tasks: it drafts technical standards[1], drives convergence in the supervisory practices of national authorities, issues binding decisions in the case of disagreements between them, makes recommendations and expresses opinions[2], and can – in crisis situations – issue individual supervisory decision[3]. Third, it is embedded in a system comprising several interlocking components (see Figure 1). In the EU's legislative arena high-level policy is enshrined in EU law. Below this sit the EBA, two other similar bodies overseeing the insurance and securities markets (the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority), and the ECB, as the focal point of the SSM – a key pillar of the efforts towards more integrated financial regulation and supervision which followed the sovereign debt crisis. The lowest level contains the national regulatory bodies of the Member States (referred to as 'National Competent Authorities', or NCAs). In fulfilling its tasks, the EBA must work closely with the other standard-setting bodies, as well as institutions engaged in supervision at either the supranational (ECB) or the domestic (NCA) level. While there is a division of labour between them, the EBA's roles combine to make it the locus of regulatory, and particularly rule-making, authority in the overall system of EU bank regulation.

Figure 1 here

What we see here is a system of multilevel regulatory governance which has arisen from a double delegation (Coen and Thatcher 2008) – from national governments to their independent agencies, and from the EU to its own supranational regulators. The system is characterised by complex chains of principal-agent relationships (Héritier and Lehmkuhl 2008), creating multiple lines of accountability manifesting a combination of both political and legal accountability, and less tangible, more 'social' forms (Bovens 2007; Scott 2000). Finally, the division of labour between institutions – the EBA, its fellow sectoral rule-making bodies, the ECB, and the NCAs – creates the potential for overlapping competences (and so tension); and the complexity increases further if we consider the role of international coordinating, or standard-setting, bodies, such as the Basel Committee.

These three aspects have a bearing on the present discussion as they inform us both that the EBA is a more viable venue for banks' engagement than CEBS was before it, and that it is embedded in a complex opportunity structure which banks must navigate. The standing of the EBA as an agency in its own right creates a 'pull' from the centre of the MLRG system, drawing banks' attention towards the it. Thus, the basic requirement set out in our theoretical discussion

[1] 1093/2010/EC, Article 10
[2] See, for example, the recent opinion on issues related to Brexit: https://www.eba.europa.eu/documents/10180/1756362/EBA+Opinion+on+Brexit+Issues+%28EBA-Op-2017-12%29.pdf (accessed 13/12/2017)
[3] 1093/2010/EC, Articles 18-19

– for a regulator to wield authority over firms – is present, and so we now turn to the more complicated matter of the EBA's qualities.

4. Regulatory relationships at the EBA

The earlier theoretical discussion set out our position on the importance and desirability of dialogue between firms and regulators, framed in terms of the interdependence which underpins a robust and efficient regulatory regime. We also argued that for firms to engage with their regulator, the latter needed to display certain qualities. In this empirical section, we analyse the EBA in the light of this framework, drawing on themes present in the data pertaining to its three components.

4.1 Credibility

The first of the three focusses on the regulator's credibility and independence, where a stable and well-defined remit and a clear relationship with its political principals are needed. Further, the regulator's resources – whether financial or human – are important in enabling it to 'hold its own' vis-à-vis other public bodies in its domain. Where these various arrangements are in place, and calibrated in such a way as to forge and maintain the regulator's credibility, firms will view it as a viable target for engagement.

For the EBA, though, interview respondents reported that its role in the overall regulatory process has long been problematic. Although by design this is clear – drafting technical standards in support of legislative frameworks – in reality there was ambiguity surrounding the timing and scope of its activities. For example, difficulties arose during the work on the Fourth Capital Requirements Directive (the largest legislative package the EBA has worked on to date): the initial draft was issued by the Commission in 2011, and the resulting legislation was eventually approved and printed in the Official Journal in the summer of 2013, but the EBA's work programmes of 2012 and 2013 had already committed it to delivering technical standards in support of an as-yet-unfinished text. During this period, extensive and often bitter debates took place in the legislative arena, over issues such as bonus caps or the application of the leverage ratio[4], and this resulted in an unstable legislative foundation on which the EBA was to work. A response to the 2013 Commission consultation on the EU's regulatory framework by a British trade body stated that the EBA was constrained by a 'lack of clarity (including that created by unresolved political disagreements)' (British Bankers' Association 2013: 2), and as a result of such tensions, the EBA hearings that ran at this time often began with a *caveat* that the 'level one text was still to be finalised'.[5]

[4] *Financial Times*, 25 September 2013. 'George Osborne takes EU to court over bank bonus cap.'

[5] Public hearings during 2013 and 2014.

Meanwhile, the relationship with the EBA's political masters was inconsistent, leading to uncertainty about the size and stability of its zone of discretion. The European Parliament's committee responsible for financial regulation became increasingly forthright in questioning draft standards submitted by the EBA. This pressure rose in the period following the European Parliament elections in 2014, and a similar trend could be seen in the Commission's handling of draft rules (Interview, EBA, 2016). Meanwhile, as the legislation progressed from the Fourth Capital Requirements Directive (in 2013) to the Bank Resolution and Recovery Directive (in 2014), the framework texts included more and more detail, as the drafters in the legislative arena began to encroach on the EBA's technical remit.

This lack of clarity undermined the EBA as a venue for regulatory engagement. Mindful of the discussions continuing at the legislative level, the banks focussed their efforts on the relevant parts of the Commission and the Parliament: the working groups, expert committees, and key officials. A lobbyist explained that "we could see which way the wind was blowing, and were clear that ultimately what would determine the maximum of what was possible was the CRDIV text … so obviously we talked to the people in the DG" (Interview, UK trade association, 2015). There was also an extent to which banks' use of these political channels represented a gaming of the system, as they actively sought to re-open regulatory issues, by appealing to the higher level drafters of the framework document to have the scope of the issue redefined. This was a particularly useful approach when banks were seeking to defend some national specificity in their regulatory model – which the EBA was unable to account for in its rule-making (Interview, German trade association, 2014).

Meanwhile, problems were caused for the EBA by the presence on European regulatory circuit of two powerful national institutions: the regulatory authorities of the UK and of Germany. The situation can most easily be grasped with reference to the varying levels of resources among the three. The EBA has weak holdings of financial and human resources, with a budget of only €36.5m and a staff of only 169 (European Banking Authority 2017: 118). In comparison, the British regulator has a budget of £236m and around 1,000 staff (Prudential Regulatory Authority 2015: 60); and the German has a budget of €242m and around 2,500 staff (BaFin 2016: 259). More importantly, though, these national regulators are far longer established: in the UK, the statutory regulatory structure dates back to the creation of the Financial Services Authority in 1997 (Davies and Green 2008; Westrup 2007), and the new body established following the financial crisis – the Prudential Regulatory Authority – inherited many of the key staff, ensuring a continuity of expertise. In Germany, the formal institutionalisation of bank regulation is older still, as the federal banking regulator – the *Bundesaufsichtsamt für das Kreditwesen* (BAKred) – was formed in 1961. In 2002 it was merged with other bodies responsible for insurance markets and securities firms into a single, unified agency –

Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) – which survived the financial crisis: a protracted debate about the reform of the dual-institutional arrangement came to nothing, as the complex nature of German policy-making, with its many veto points and interlocking institutions, frustrated attempts to bring about change (Zimmermann 2012).

But it is not just age which matters. As well as being the largest in Europe, the British and German banking sectors are also perhaps the most advanced and complex; and as a result, their respective national regulators have extensive holdings of expertise and knowledge concerning many areas of complex banking products and financial instruments. The PRA and BaFin are seen as centres of regulatory know-how by the banks of their own sectors, but also by foreign banks and by other regulators. In contrast, the EBA's expertise base is not only thinner, but also drawn from the many member states in Europe with comparatively less developed banking markets. Interview subjects reported that the national regulators are held in much higher regard – on the basis of policy knowledge – than the EBA (Interviews, UK bank, 2015; UK trade association, 2014; German trade association, 2014). Overall, the national regulators are stronger in capacity, continuity and credibility than the EBA.

Indeed, it is likely that the EBA's recent relocation from London to Paris[6] – as a result of the UK's vote to leave the EU – will unleash two sets of changes to the relationships between banks, the national authorities, and the EBA. First, at a basic level, Brexit may potentially strengthen the attractiveness of the PRA for UK banks seeking to engage on matters of EU regulation, while the physical relocation of the EBA to Paris may raise staffing challenges which weaken the EBA in the short run. More fundamentally, since the rise of the SSM, the EBA has functioned as something of a bridge between the Eurozone members and the 'outs', ensuring that the regulatory preferences of the UK, and of its banks, are represented on the European stage. With the departure of the EU's largest financial centre the need for such a bridge is diminished, and so the standing of the SSM may well rise, undermining the institutional credibility of the EBA yet further.

4.2 Legitimacy

The second element of the framework focusses on output legitimacy, and we proposed that arrangements are needed which promote resource holdings and working practices which enable the regulator efficiently to draft practicable standards, and to make reliable and predicable regulatory decisions. Where such arrangements are in place, the reputation for efficiency which emerges makes the regulator a worthwhile interlocutor for firms.

[6] Financial Times, 20 November 2017. 'Paris wins battle to host European banking regulator'

The EBA's financial and human resources, as we have seen, are weak, but further issues were caused in this regard by its internal working practices. With so few staff dedicated to writing rules, it instead draws in secondees from the national authorities, and this approach to staffing led to several specific difficulties. A report commissioned in 2013 by the European Parliament noted that the EBA struggles to attract staff of sufficient calibre and experience, commenting that a secondment is 'not seen as a significant step in their career' (Demarigny, McMahon, and Robert 2013: 50). This observation was echoed by interview participants, who stated that secondees are often relatively junior regulators with little experience in drafting standards, or with little knowledge of the complexities of certain banking markets, and that to overcome this, more senior staff often have to be brought in on an *ad hoc* basis (Interviews, German banks, 2016). In response to a European Commission consultation exercise in 2013, a British trade body called for staffing levels to be increased, and suggested that this could perhaps be achieved by increasing the direct funding of the EBA from the EU's community budget (AFME 2013; Deutsche Bank 2013).

These staffing patterns had consequences for banks' perceptions of the EBA's outputs. For example, it established a 'question-and-answer' procedure, whereby banks could submit a written question through its website, and receive a detailed response from EBA staff. Over 1,300 such questions have been raised to date[7], and a review of the timespans involved shows responses took an average of 252 days (see Table 1). This slow turnaround caused obvious problems for the banks, with one respondent explaining that "two successive quarters of reported numbers were wrong – and we knew it – by the time we got an answer" (Interview, UK bank, 2014). Similar sentiments were expressed during the 2017 European Commission consultation (Deutsche Bank 2017)

Table 1: Average response times to questions

Year	Average response time, in days
2013	228
2014	361
2015	244
2016	175

Source: Calculations based on records of questions from EBA website

Elsewhere, an interviewee remarked: "… we see quite shoddy work [and] then there's a public hearing and they're left in this almost indefensible position

[7] See http://www.eba.europa.eu/single-rule-book-qa?p_p_id=questions_and_answers_WAR_questions_and_answersportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_pos=1&p_p_col_count=2&_questions_and_answers_WAR_questions_and_answersportlet_jspPage=%2Fhtml%2Fview.jsp&_questions_and_answers_WAR_questions_and_answersportlet_viewTab=1

where what they've written is complete nonsense, and so … we say 'x or y won't work because of a, b, c, d, e ...' and they'll nod and take notes" (Interview, UK trade association, 2014). It has also resulted in an ever-growing body of reporting templates on which information is submitted to the EBA: it requests large amounts of raw data on banks' positions, inventories, and so on, and interview subjects remarked that they were sending huge volumes – 'gigabytes worth' – of data to the EBA, far more than they suspected it was actually able to usefully analyse (Interview, German trade association, 2015). For the banks, the issue is that finding, verifying and sending that data is itself a hugely costly and complex task, as the German bank NordLB noted in a consultation response:

> *'a third of the required data can already be generated today from the existing items and information in the consolidated financial statements; another third of the data is not available in the requested form and, from a current perspective, can only be produced manually at great expense; and a further third of the data requirements is not currently available and can only be produced at very great expense or cannot be produced with the current accounting systems.'* (Norddeutsche Landesbank 2012)

Finally, the problems with the EBA's stress testing exercises have harmed perceptions of its effectiveness. Following one such exercise in 2011 several banks that had passed the examination went on to collapse (such as the Franco-Belgian firm Dexia), or to need state bailouts very soon afterwards. The episode was derided by analysts, investors and European leaders[8]; and the German regulatory authority was moved to warn that the EBA risked 'falling into disrepute at the very start of its activities' (BaFin 2011: 5). The European Parliament report also highlighted the tension between the EBA as the coordinating body and the actual efforts committed by the national authorities (Demarigny, McMahon, and Robert 2013); later, similar issues arose in the round of testing conducted in 2016, when critics pointed to the omission of Greek and Portuguese banks, and to the lack of an analysis of the impact of negative interest rates, as major weaknesses in the methodology applied[9]. Meanwhile, as the SSM developed the ECB began to contribute to the EBA's stress testing exercises, and indeed to conduct its own; with this, the need to for consistency of stress test recommendations increased, in order to avoid the risk of double jeopardy. Nonetheless, the two institutions' stress tests have been conducted on different pools of banks, using different calculation methodologies and including different 'stresses'. This, in turn, has undermined perceptions of the EBA's effectiveness.

[8] *Financial Times*, 11 December 2013. 'European Central Bank: Credibility test.'

[9] *The Guardian*, 1 August 2016. 'The EBA's stress tests reveal their own lack of credibility.'

4.3 Transparency

Finally, the third element focusses on transparency. Here, good arrangements push the regulator to be open about its internal hierarchy and about its rule-making processes; to put it colloquially, firms need to be able to know who they should be contacting, and to understand how rules are being made.

However, interviewees often described the EBA as "opaque" or "unapproachable", with several linking this opacity to the its approach to staffing. Secondees are recruited into small working groups to draft a specific standard, and when the task is complete the group is disbanded. A result of this is a very high level of staff turnover, and interviewees frequently spoke of difficulty in identifying staff responsible for certain areas of policy; as one put it, "it's like building a puzzle, but at the time you are close to the completion of the puzzle, you know, the responsibilities have changed again, and there's someone else" (Interview, German trade association, 2014). Indeed, with the EBA's relocation will bring about a transition period during which its personnel will change, compounding this issue further.

Likewise, issues arose around both the transparency and the robustness of the procedures governing the EBA's consultation practices. The European Parliament report remarked that 'in certain cases, the three month timeline outlined in the General Principles of Consultation has not been adhered to' (Demarigny, McMahon, and Robert 2013: 57); while the Commission's report called on the EBA to 'enhance the transparency of the regulatory process' (European Commission 2014: 6). Similar concerns were raised several years later, when stakeholders were invited by the Commission to participate in a review of the European regulatory architecture in 2017 (German Banking Industry Committee 2017: 6). Among interviewees this concern was expressed as a common perception that in between the drafting stages and the final output the national authorities would leave their imprint on the standard by exerting quiet leverage in the board of supervisors (Interviews, UK bank, 2013; German trade association, 2014). The lack of transparency surrounding this channel of influence left the banks feeling undermined and circumvented by discussions taking place behind closed doors. These difficulties were even worse for many of the smaller banks, and the associations, without large offices in London. For them, the problems of structural or procedural opacity were compounded by the simple fact of distance: working with a known, local authority was by far preferable to travelling to London and trying to get to grips with an impenetrable, constantly shifting regulator.

4.4 Out-manoeuvred, above and below

The EBA resides in a shifting zone of discretion, with its role in the policy-making process and its relationship with its political principals lacking in clarity. Meanwhile, its weak resources – and in particular its lack of institutional memory – put it at a disadvantage relative to the national authorities, which

remain centres of regulatory expertise. Its working practices – mainly its reliance on small working groups and the *ad hoc* use of senior staff brought in on secondment – frustrated banks, and, in their eyes, contributed to the various failings, such as the slow response times in the Q&A process and the flawed stress tests. Third, problems of non-transparency were present, both with respect to the EBA's institutional structure (with its use of small working groups leading to high staff turnover) and to its processes (with suspicions that national authorities were out-manoeuvring the results of public consultations in the final board meetings). Collectively, these issues meant that devoting effort to building strong links with the EBA was trumped by continued activity in the legislative arena, particularly as victories could be achieved there which would materially shape the regulatory (rule-making) debates further downstream; and by continued engagement with national authorities. Overall, this suggests that the EBA's position in the multi-level system of regulatory governance leaves it at a structural disadvantage compared to the other venues available to banks – both above and below it.

These findings are also significant in the light of the normative desirability of engagement. The empirical analysis of the EBA has shown several areas of weakness in the EBA's resources, working practices, and inter-institutional relationships, meaning that the qualities needed to foster dialogue are lacking. The resulting fragmented nature of banks' engagement with the EBA risks undermining the EU's regulatory regime for banking.

5. ***Conclusion***

The centralisation of regulatory authority at the European level following the creation of the EBA in 2011 had a consequence for the institutional landscape in which banks communicate their preferences to policy makers. Previously, banks had engaged with EU institutions over legislation and with domestic regulators over detailed standards, whereas now there was a distinct pull for banks to combine their efforts on the European stage. This paper set out to examine how the features of the EBA shape banks' engagement with it.

Our theoretical approach began with the premise that such engagement of a regulator by firms is a precursor to the development of stable dialogue, in which both parties gain valuable access to informational goods held by the other; the resulting interdependence then contributes to the robustness and efficiency of the overall regime. However, engagement does not arise automatically, and instead relies on the regulator demonstrating certain qualities. Moving beyond a basic consideration of the authority it might wield over firms (arising from it performing some combination of standard-setting, supervision, and enforcement), we argued that the regulator must also exhibit certain qualities in the conduct of its work in order to encourage the emergence of stable engagement by firms. These, we proposed, were *credibility*, *legitimacy*, and *transparency*. Importantly, though, we also suggested that these qualities are

likely to be stressed by the complexities present in the EU's system of multilevel regulatory governance.

Our empirical analysis found banks' limited engagement with the EBA arose from a confluence of factors concerning the regulator and its environment. Its working practices, and the problems connected to its high staff turnover – particularly its poor institutional memory – arose from its resource weakness, and these issues served to undermine the credibility of the EBA in the eyes of the banks. The problems with the agency's transparency left banks not knowing how, or where, to attempt to build links. The inefficiency of its rule-making procedures (involving a great deal of duplication of work) and of its Q&A processes relating to public consultations harmed its legitimacy. Meanwhile, the features of the multi-level regulatory governance system weakened firms' incentives to engage. At the lower level, the relative strength of the national authorities – particularly their holdings of expertise – meant that banks continued to prefer working with their home agencies. At the upper, the blurring of the EBA's independence by its political masters, and the lack of clarity around its role (with the rise of the SSM in 2014, and now with Brexit), encouraged banks to prioritise engagement with the legislative arena. Banks have been unwilling, and unable, to build close and stable links with the EBA, and their engagement is actually tipped towards tried-and-trusted venues – namely, the domestic scene and the European legislative bodies. This means that the key mechanism which should facilitate the development of a strategic working relationship, and support a process of learning among both parties, is absent

These findings have three sets of implications. First, from a theoretical perspective, they fill a gap in our knowledge of the operation of European agency governance by shedding light on the conditions under which firms engage with their supranational regulator. Such engagement is heavily dependent on firms' perceptions of the European regulator, in particular concerning its resources, efficiency and openness; and more broadly, the stability and clarity of its overall position in the multi-level system of regulatory governance. Where the qualities are weak or problematic, the incentive on the part of firms to engage is undermined.

Secondly, the issues found here suggest that European agency governance remains hamstrung by poor resource endowments and by difficulties caused by the distribution of regulatory tasks among actors across various levels. Given the timespan involved, from the EBA's formation in 2011 to the present date, it seems these issues are actually structural, rather than transitory, and thus it seems that a particular assessment of 2011 still stands: the EU has adopted the 'agency form, but not yet the reality of agency governance' (Thatcher 2011: 806). This has an implication for the development of a European regulatory

order – while the institutions and the rules are present, the strong relationships and rich dialogue between firms and regulators are not.

The final implication flows from this, and refers more specifically to European financial sector governance. Here, early studies of the regulatory networks (as they were at the time) in the financial sector concluded that although they nominally had a 'technical' role, they were often pulled into 'para-political' activities, either by private actors (chiefly banks) or by powerful national regulators (Quaglia 2008). The step towards agencification – demonstrated by the creation of the EBA – was intended to formalise this mechanism (de Larosière 2009); yet as we have seen, the ability of banks to circumvent the EBA, and the targeting of the Commission and the Parliament to re-open regulatory discussions by challenging the framing of the legislative texts, show the continuing fluidity of the mechanisms of financial sector governance – a fluidity which will persist as the relationships between the ECB, the EBA and the national authorities are shaken up by Brexit. This multilevel regulatory complexity, we argue, will continue to hinder the efficient development of genuinely European standards, and so cause problems in the regulatory apparatus of banking union.

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Figure 1