



# Stop, I'm getting off, I want to get off

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<sup>1</sup> The European Commission support for the production of this publication does not constitute endorsement of the contents which reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein

The number of regulations, soft law, court decisions and, in general, official documentation referring to the supervision and resolution of credit institutions in the European Union is so high that the author of this text is increasingly reminded of the song "que paren, que me apeo, que me quiero bajar" ("stop, I'm getting off, I want to get off")<sup>2</sup> A review of the OJEU during the months of July, August and September only confirms that banking law issues continue to consume a lot of official paper. Access to and exchange of information, transparency and democratic accountability, fintech or questions of the ECB's internal workings have appeared in the pages of the European Gazette this summer.

## 1. Access to and exchange of information

Indeed, in recent months, rules on access to and exchange of information have been published. Bank supervisory and resolution agencies have not escaped the moves in the EU on the limitations of data subjects' rights of access to information<sup>3</sup>

The exchange of information between state authorities and the different EU bodies with competences over financial and insurance markets has always been a key and sensitive issue that also has a number of recent examples. Delegated Regulation 2021/1722, among other curious things, states that the "single contact point shall be a dedicated functional mailbox" for the exchange of information, and does not forget to mention on-site inspections<sup>4</sup>.

It is well known that the position of the European Banking Authority or the national authorities in terms of access to information is not comparable to that of the European Central Bank. The European Court of Auditors' lament about the scant information provided by the Single Resolution Board and the European Central Bank itself, although corrected in recent years as we have been reminded this summer, is still echoing around the corridors<sup>5</sup>.

## 2. Transparency and democratic accountability

Transparency and democratic accountability, which, as we have already said in various forums, must continue to be improved in the rules and in the supervisory and resolution bodies of the European Union, have had some examples in recent months. Various European Parliament Resolutions on the Banking Union, the activity of the European Central Bank and that of the European Investment Bank have been published, with the usual incomprehensible delay.

<sup>2</sup>Oil, "Xenofobia", A matar hormigas con la espalda, 1992.

<sup>3</sup>Decision (EU) 2021/1486 of the European Central Bank of 7 September 2021 adopting internal rules concerning restrictions of rights of data subjects in connection with the European Central Bank's tasks relating to the prudential supervision of credit institutions (OJEU 16/9/2021).

<sup>4</sup>See Decision 2021/1396 ECB of 13 August 2021 amending Decision ECB/2014/29 on the provision to the European Central Bank of supervisory data reported to the national competent authorities by the supervised entities pursuant to various implementing regulations. See also Delegated Regulation 2021/1415 of 5 May 2021 supplementing Regulation (EU) 2017/2402 with regard to regulatory technical standards on the cooperation, exchange of information and notification obligations between competent authorities and ESMA, the EBA and EIOPA (OJEU 30/8/2021).

See also Commission Delegated Regulation 2021/1722 of 18 June 2021 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards specifying the framework for cooperation and the exchange of information between competent authorities of the home and the host Member States in the context of supervision of payment institutions and electronic money institutions exercising cross-border provision of payment services.

<sup>5</sup>See Special Report No 23, 2017, Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go; or Special Report No 2, 2018, The operational efficiency of the ECB's crisis management for banks.

The European Parliament, on the occasion of the **2019 Annual Report on the Banking Union**, has continued to point out classic issues such as the level of bad loans, the need to implement the Single Resolution Fund and the European Deposit Guarantee Scheme, or money laundering and its necessary connection with supervision.

Parliament welcomed the flexibility granted to banks regarding the prudential treatment of loans or the application of accounting rules and the release of capital buffers, in order to mitigate the effects of COVID-19. It has expressed concern, inter alia, about the necessary reduction of the administrative burden on small banks. The European Parliament pays particular attention to green finance, sustainable investments, and does not forget to mention the protection of the rights of users of banking services. It expresses concern about the EBA's failure to meet deadlines for submitting its proposals to reduce the administrative burden on small institutions. He devotes some space to non-bank financing<sup>6</sup>.

The European Parliament has also expressed its views on the **European Central Bank's Annual Report 2018**<sup>7</sup>. Parliament considers that there has been more and better accountability of the ECB to the European Parliament but "stresses the need for enhanced and more effective accountability of the ECB in a context in which its missions have expanded since the beginning of the global financial crisis".

Recognising that "the euro is a political project in addition to a purely economic one", it stresses "the irreversible nature of the single currency". After some considerations on monetary policy and some others on measures against climate change, the European Parliament, like the ECB, insists that the Banking Union must be completed with the establishment of the European Deposit Guarantee Scheme, and calls on the ECB to strengthen the monitoring of crypto-assets.

On transparency and accountability, it is very positive that since 2017 the ECB has published the full list of all bonds purchased under the CSPP, although the same cannot be said for the asset-backed securities purchase programme (ABSPP) and the third covered bond purchase programme (CBPP3).

The **European Investment Bank**, the European Union's public bank, has also received attention, in this case from both the European Parliament and the Commission.

The **European Parliament resolution of 10 July 2020 on the financial activities of the European Investment Bank – annual report 2019** has been published in the OJEU of 15 September 2021, with the delay we have been denouncing<sup>8</sup>. It contains, as always, interesting information and statements that cannot go unnoticed. Parliament "Welcomes the coordinated EU response to the COVID-19 pandemic" and "particularly welcomes the role that the EIB is called upon to play in supporting the EU's economy" through various funds. It calls for better financial advice and capacity building "to local and regional authorities before project approval".

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<sup>6</sup> European Parliament resolution of 19 June 2020 on Banking Union – annual report 2019 (OJEU 8/9/2021).

<sup>7</sup> European Parliament resolution of 12 February 2020 on the European Central Bank Annual Report for 2018 (OJEU 23/7/2021).

<sup>8</sup> In the same OJEU of 15 September 2021, curiously, you can see the European Parliament resolution of 10 July 2020 on control of the financial activities of the European Investment Bank - annual report 2018, also with very relevant information referring to 2018.

The EIB is highlighted as the world's largest issuer of green bonds and is urged to stimulate sustainable finance. Parliament devotes considerable space to the EIB's role in the European Green Pact and the Just Transition Facility.

Finally, the calls for governance and transparency deserve a special mention. The "heightened economic role of the EIB Group and the increase in its investment capacity and use of the EU budget to guarantee its operations must go hand in hand with transparency, responsibility and accountability regarding its economic operations". The Parliament welcomes the fact that "public summaries are now to be produced of Management Committee meetings". Finally, it "asks the EIB to publish, in line with EU legislation, information relating to direct loans subject to the approval of the Management Committee".

As mentioned above, the Commission has also expressed its views on the EIB's external activity. See the **Report from the Commission to the European Parliament and the Council on 2019 EIB external activity with EU budgetary guarantee, 26 July 2021 COM (2021) 416 final**, with interesting data on these EIB investments, with details of the geographical areas, and where information can also be obtained on the constitution of small equity funds, or on cooperation with the Commission (which also includes "EU blending facilities, for example the Neighbourhood Investment Platform (NIP), the Western Balkans Investment Framework (WBIF) and the ERI Technical Assistance (ERI TA)"). Also very interesting is the explicit reference to the EIB's cooperation with the French Development Agency and the German KfW Group, or the European Bank for Reconstruction and Development, which have been discussed in some detail by colleagues in *La banca pública de inversión, promoción o fomento en Europa*, Iustel, 2021.

### 3. Other issues: fintech, money laundering, decision-making processes at the ECB and important court rulings

Digital finance, among other issues with crypto-assets, is a truism that they are here to stay. A number of scientific publications addressing these issues have recently come out, but a European Parliament Resolution 2020 has also been published in the OJEU, with a delay<sup>9</sup>.

The internal workings of the European Central Bank, so magnificently explained in her day by Carmen Hernández Saseta, have once again deserved our attention with the publication in the OJEU of several ECB Decisions on the delegation of decision-making on a wide range of issues .

<sup>9</sup> European Parliament resolution of 8 October 2020 with recommendations to the Commission on Digital Finance: emerging risks in crypto-assets - regulatory and supervisory challenges in the area of financial services, institutions and markets (OJEU 29/9/2021).

<sup>10</sup> HERNÁNDEZ SASETA, C., "La toma de decisiones de supervisión por el BCE: contexto, proceso de adopción y revisión", Unión Bancaria Europea. Lecciones de Derecho Público, Iustel, Madrid, 2019, p.35 y siguientes.

See now, inter alia, ECB Decision 2021/1439 of the European Central Bank of 3 August 2021 amending Decision (EU) 2018/546 on delegation of the power to adopt own funds decisions (OJEU 6/9/2021); ECB Decision 2021/1438 of the European Central Bank of 3 August 2021 amending Decision (EU) 2017/935 on delegation of the power to adopt fit and proper decisions and the assessment of fit and proper requirements (OJEU 6/9/2021), ECB Decision 2021/1437 of the European Central Bank of 3 August 2021 amending Decision (EU) 2017/934 on the delegation of decisions on the significance of supervised entities (OJEU 6/9/2021).

There have been constant references to money laundering in recent times. We have already mentioned some of the references made by the European Parliament, and the Commission has announced the package of measures that the EU intends to adopt in the coming months. Suffice it to recall now the ***European Court of Auditors' Special Report No. 13/2021, EU efforts to fight money laundering in the banking sector are fragmented and implementation is insufficient***. A strong and striking title, as is often the case with this Court of Auditors.

Other issues, such as combined buffer requirement, have also been the subject of technical implementing regulations<sup>11</sup>. We end, however, with the citation of three judicial decisions of the European Court of Justice on issues as varied as:

- The value and judicial appeal of the European Banking Authority's guidelines<sup>12</sup>.
- The reorganisation of credit institutions, bridge institutions and the effects of measures in other Member States<sup>13</sup>.
- The legal status of the declaration by the ECB that an institution is failing or likely to fail. That is, whether or not it is a preparatory or a procedural act and, in the latter case, whether or not it is an act that cannot be contested<sup>14</sup>.

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<sup>11</sup> Commission Delegated Regulation (EU) 2021/1118 of 26 March 2021 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the methodology to be used by resolution authorities to estimate the requirement referred to in Article 104a of Directive 2013/36/EU of the European Parliament and of the Council and the combined buffer requirement for resolution entities at the resolution group consolidated level where the resolution group is not subject to those requirements under that Directive (DOUE 8/7/2021).

<sup>12</sup> Judgment of the Court (Grand Chamber) of 15 July 2021, Case C-911/19, on the value of and possibilities for challenging guidelines issued by the European Banking Authority group consolidated level where the resolution group is not subject to those requirements under that Directive (DOUE 8/7/2021).

<sup>13</sup> Judgment of the Court of Justice of 29 April 2021 on the reorganisation of credit institutions, bridge institutions and the effect of measures in other Member States, Case C-504/19.

<sup>14</sup> Judgment of the Court of Justice of 6 May 2021, joined cases C-551/19P and C-552/19 P. We have already cited the Order of the General Court (Eighth Chamber) of 6 May 2019, Case T-281/18.



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