ADVANCING OPEN, SAFE AND COMPETITIVE DERIVATIVES MARKETS

Proposals for better rulemaking in the EU

A pathway to smarter regulation in financial services

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Our work includes engaging with global regulators, driving industry-led best practices, promoting efficiency and innovation, and protecting the integrity of derivatives markets.

EXECUTIVE SUMMARY

This paper examines the European Union's (EU) financial services rulemaking framework and identifies practical and realistic reforms that would enhance its transparency, coherence and proportionality. A large number of our recommendations do not require wholesale revision of the EU's institutional architecture. Our paper aims to positively contribute to the ongoing European debate on regulatory simplification, competitiveness and sustainable growth by presenting concrete, actionable recommendations directed towards the European Commission, the European Parliament, the Council and the European Supervisory Authorities (ESAs). The recommendations call for more rigorous application of existing commitments under the 2016 Interinstitutional Agreement on Better Law-Making, together with targeted improvements in drafting methodology, procedural transparency and inter-institutional coordination.

KEY FINDINGS

The paper identifies four interconnected features of EU financial services rulemaking where reform is warranted and would have a significant positive impact:

Transparent Rulemaking: The opacity of Council negotiations, trilogue procedures and Level 2 adoption timelines impair stakeholder engagement and regulatory predictability. Negotiation documents are typically disclosed only upon final adoption of legislative acts, preventing meaningful stakeholder input during critical negotiation phases. The absence of contemporaneous disclosure deprives stakeholders of the opportunity to identify unintended consequences, highlight implementation challenges or propose technical refinements before positions become entrenched.

Effective and Efficient Rulemaking: Compliance burdens frequently arise from inconsistent definitions across legislative instruments, complex cross-referencing architectures, prescriptive drafting approaches and inadequate cost-benefit analyses. Key regulatory terms are defined differently across legal frameworks, complicating compliance and increasing legal risk. The territorial scope of regulatory requirements and their application to cross-border activities remains a persistent source of legal uncertainty.

Orderly Rulemaking and Sequencing: Level 1 legislation frequently becomes applicable prior to the adoption or application of corresponding Level 2 measures, compelling in-scope entities to implement requirements on a "best efforts" basis without adequate visibility of the rules they will ultimately be expected to follow. This disjointed application increases compliance costs, introduces operational risk and forces duplicative implementation exercises when Level 2 measures are subsequently finalised.

Regulator Powers: Constitutional constraints under the *Meroni* doctrine prevent the ESAs from issuing legally binding no-action relief capable of suspending or disapplying regulatory requirements. While the European Securities and Markets Authority (ESMA) may issue communications to national competent authorities (NCAs) requesting that they deprioritise enforcement in relation to specific issues, such communications do not affect the legal applicability of the underlying obligations and do not provide regulated entities with legal certainty that compliance action will not be taken against them. These limitations impair the EU's capacity to respond flexibly to market developments and provide timely relief where strict compliance would be disproportionate or impractical.

PRINCIPAL RECOMMENDATIONS

The paper presents 21 recommendations, listed in full in the Appendix, across its four thematic sections. Key reforms include:

- ***Council, Parliament and trilogue transparency:*** Proactive and timely publication of Council negotiation documents, Parliament deliberations leading up to its final position and trilogue compromise texts, subject only to narrowly justified confidentiality exceptions.

- ***Territorial scope and drafting clarity:*** Clear articulation of connecting factors, third-country treatment and extraterritorial application in all financial services legislation, supported by a mandatory drafting checklist verified by the Commission's Legal Service.

- ***Level 1/Level 2 sequencing:*** Level 1 requirements dependent upon Level 2 specification should apply only from the date of application of the relevant Level 2 measures, together with adequate implementation periods.

- ***Outcome-based regulation:*** Level 1 and Level 2 measures should focus on regulatory outcomes rather than prescriptive operational processes, with explicit proportionality mechanisms reflecting firm size and complexity.

- ***ESMA/ESAs powers (longer-term):*** Future treaty or institutional reforms should consider granting ESMA/ESAs the power to issue legally binding no-action relief that suspends or disapplies regulatory obligations in defined circumstances, subject to appropriate procedural safeguards.

The implementation of these recommendations would yield significant material benefits for all participants across the EU financial services ecosystem: greater regulatory predictability for impacted entities, reduced duplicative implementation costs, enhanced stakeholder engagement and strengthened public confidence in EU decision-making processes. Most recommendations do not require treaty revision and can be achieved through targeted changes in institutional practice, procedural arrangements and decision-making culture.

1. INTRODUCTION

The EU's financial services regulatory framework has undergone a period of unprecedented expansion and intensification since the global financial crisis. While the objectives of this regulatory expansion remain sound, the mechanisms by which rules are developed, adopted and implemented increasingly warrant critical examination. FIA would like to contribute to the ongoing debate on regulatory simplification, competitiveness and sustainable growth by identifying practical reforms to the EU's rulemaking processes that would enhance transparency, coherence and proportionality without compromising regulatory integrity.

The paper, drafted in partnership with a renowned global law firm, Norton Rose Fulbright LLP, addresses four interconnected features of EU financial services rulemaking. *First*, it examines the transparency of legislative and regulatory processes, with particular attention to the opacity of Council negotiations, trilogue procedures and Level 2 adoption timelines - deficiencies that impair stakeholder engagement and regulatory predictability. *Second*, it analyses recurring sources of legal uncertainty and compliance burdens arising from inconsistent definitions, complex cross-referencing and prescriptive drafting approaches that constrain firms' ability to implement requirements efficiently. *Third*, it considers the sequencing of the EU's multi-level regulatory architecture, identifying systemic misalignments between Level 1 application dates and the adoption of corresponding Level 2 measures that compel regulated entities to implement requirements without adequate visibility of the rules they are expected to follow. *Fourth*, it outlines longer-term considerations relating to the institutional powers of the ESAs, recognising that meaningful reform in certain areas may require change to the EU's founding treaties.

Each section of this paper sets out concrete, actionable recommendations. Taken together, FIA believes that the recommendations presented in this paper would strengthen stakeholder engagement, improve regulatory predictability for market participants, reduce unnecessary compliance burdens and enhance public confidence in the integrity and openness of EU decision-making processes. FIA presents this paper as a constructive contribution to the ongoing policy dialogue on the future of EU financial services regulation, recognising that the challenges identified represent a fundamental aspect of a complex regulatory reform agenda.

2. TRANSPARENT RULEMAKING

Aim: Transparency is an important foundation of the modern legislative and rulemaking process. It ensures democratic accountability and allows stakeholders to scrutinise the development of laws and regulations. This provides the public with insights on how decisions and compromises were developed and what factors decision-makers considered in reaching their conclusions. More importantly, for firms and other entities subject to those rules, transparency provides insights into the policy objectives, considerations and compromises that helped to shape the final outcome.

Although the EU legislative process has become more open, several hurdles remain which prevent a fully transparent legislative process. Below we list a number of these practices and their implications on transparent decision-making. We share recommendations which would improve transparency in EU legislative and regulatory processes without requiring legislative changes. The EU's three main legislative institutions (the European Commission (Commission), the European Parliament (Parliament) and the Council of the European Union (Council)) can implement these through changes in institutional practice, internal procedures and decision-making culture. Their adoption would strengthen stakeholder engagement and improve regulatory readiness among entities subject to the relevant rules.

Observations: The current EU legislative process presents recurring and systemic transparency challenges that materially undermine stakeholder engagement, regulatory predictability and the capacity of market participants to prepare adequately for new compliance obligations. These deficiencies play an outsized role in the context of financial services regulation, where legislative and regulatory developments amend the existing acquis on a regular basis, which leads to implementation challenges for regulated entities, their counterparties and end-users of financial products and services. While the 2016 Interinstitutional Agreement on Better Law-Making [1] established foundational principles of openness, cooperation and inter-institutional coordination, substantial gaps persist between these commitments and their practical implementation. The challenges identified below reflect the most important practices in EU decision-making that tend to limit the ability of stakeholders to contribute meaningfully to the legislative process and to anticipate regulatory change with reasonable certainty.

1 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, *OJ L 123, 12.5.2016, pp. 1–14* (link).

The key issues observed include:

i. Transparency in Council and Parliament decision-making processes

The proactive disclosure of documents produced within the Council remains limited and the possibility for labelling documents as classified remains broad[2]. Negotiation documents produced within the Council, including non-papers, overviews of Member State positions, draft general approach documents, compromise proposals and progress reports from working party discussions, are typically published only upon final adoption of the legislative act. This can delay disclosure by months or even years after the implementation of key political decisions that shaped the final text.

This delay systematically prevents meaningful stakeholder input during the critical negotiation phase when positions are being formulated and compromises are being reached. For financial services legislation in particular, where technical provisions may have far-reaching implications for business models, reporting obligations and cross-border operations, the absence of timely disclosure deprives affected entities of the opportunity to identify unintended consequences, highlight implementation challenges or propose technical refinements before positions become entrenched.

The opacity of decision-making at Council level stands in contrast to the substantially more transparent procedures followed by the Parliament, which generally makes committee documents, amendments and voting records available contemporaneously with deliberations. Nevertheless, even on the Parliament side, more thought could be given to how transparency of process can be increased from the point of publication of tabled amendments by individual Members of the European Parliament (MEPs) to the point when the Committee on Economic and Monetary Affairs (ECON) agrees on the final draft Parliament position that then still needs to be voted on by the Parliament in a plenary session.

By way of example, under the Market Integration and Supervision Package (MISP), the Cyprus and Irish presidencies have not created Member States 4-column tables, which although were often obtained by the industry as leaks before, they could be used by the Council and stakeholders accessing those documents to understand the evolution of member states' positions. As per Recommendation 1 below, the Council should publish these negotiation table updates, so the public understands progress in the debates and has an opportunity to form a view on possible impact.

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2 See Annex II of Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (Council Decision 2009/937/EU), *OJ L 325, 11.12.2009, p. 35–35* (link).

ii. Access to trilogue documentation

Informal inter-institutional meetings between representatives of the Council, the Parliament and the Commission, also referred to as trilogue negotiations, have become the predominant mechanism for reaching agreement on contested legislative files. While aimed at speeding up decision-making under the ordinary legislative process, trilogue negotiations are conducted with a high degree of confidentiality. There is no systematic public access to the compromise texts developed during these negotiations, nor to records documenting the rationale for key scope changes, policy trade-offs or technical amendments agreed between the co-legislators. This opacity is particularly problematic in circumstances where trilogue negotiations introduce significant amendments to transitional provisions, territorial scope, exemption regimes or supervisory arrangements - changes that can materially affect compliance obligations, implementation timelines and the commercial viability of existing or new business structures. Such changes are typically only disclosed to the public upon publication of the provisionally agreed text or the final legislative act. The absence of contemporaneous disclosure impairs the ability of regulated entities to engage in advance planning, assess the implications of pending changes for their operations or provide timely technical input to decision-makers that might improve the quality and workability of the final legislation, or prevent unintended regulatory consequences.

iii. Justification and explanation of amendments

In many instances, the Parliament and the Council consider or adopt amendments to legislative proposals without publishing the motivation and reasoning for these amendments. In the Parliament, some MEPs already provide justifications for the amendments they propose to Commission proposals, but this is not an established practice for all lawmakers. In the Council, decision-making processes would benefit from publishing the motivation and reasoning for proposed amendments. Although this is common practice for a number of MEPs, extending the practice to all decision-makers would improve transparency. Written explanations of amendments to the legislative text are not only important to understand the considerations of decision-makers during the legislative process itself but also can provide guidance in the event there is ambiguity in the interpretation of provisions of a legislative act.

iv. Level 2 adoption timelines

The legal framework governing the ESAs provides for a three-month Commission endorsement period for draft regulatory technical standards (RTS) and implementing technical standards (ITS) submitted by the ESAs. In practice, although this is an instructive timeline, it is not always observed, and delays are not consistently accompanied by public explanations or updated indicative timelines. In addition, the process for an adopted RTS or ITS publication in the EU Official Journal (OJ) adds additional time and uncertainty on timing.

This uncertainty of the Level 2 adoption timelines can materially impair firms´ ability to prepare for regulatory change. In circumstances where Level 1 legislation establishes general principles and leaves key substantive requirements to Level 2 specification, regulated entities may be required to develop compliance programmes without sufficient visibility of the rules they will ultimately be expected to implement – leading in some cases to double implementation efforts where firms must first meet their obligations based on the Level 1 text and, then at a later stage, based on the detailed Level 2 rules (when the later are adopted and available). The absence of visibility on adoption timelines forces regulated entities to operate under conditions of significant regulatory uncertainty. This uncertainty is compounded where delayed adoption compresses the period available for systems development, process redesign, staff training and other implementation activities, thereby increasing operational risk and compliance costs for the financial services industry.

A recent example where a delayed timeline led to implementation issues for regulated entities is the European Market Infrastructure Regulation (EMIR) active account requirement: ESMA published its final report on the draft RTS on 19 June 2025, the Commission adopted the Delegated Regulation on 29 October 2025 and the RTS were published in the OJ on 6 February 2026.

Under EMIR 3.0 alone, there are more than 20 mandates for ESMA and the European Banking Authority (EBA) to develop RTS and/or ITS. As of 7 September 2026, only two Level 2 acts (including a Delegated Act drafted by the Commission) have been finalised and published in the Official Journal of the EU. We understand there are currently five Level 2 acts with the Commission for adoption. Four of them have been with the Commission for over three months with the final draft RTS on the conditions for extensions of authorisation and the list of documents for applications for initial authorisations and extensions of authorisation under EMIR (Articles 14(6), 15(3), 17a(5) and 15a(2) of EMIR) being with the Commission since 9 October 2025 with no indication as to when it is going to be adopted (or rejected). ESMA/EBA still have to publish four Final Reports with final draft RTS/ITS. With the second anniversary of EMIR 3 (Level 1) fast approaching, ESMA is yet to consult on a number of initial draft Level 2 measures adding to the uncertainty as to how and by when market participants should comply with the requirements that are yet to be consulted on.

v. Legal framework for transparency

Case law of the Court of Justice of the European Union (Court) and the General Court provides significant judicial support for enhanced transparency in EU legislative processes, establishing legal foundations which support the recommendations in this paper. In *Access Info Europe* (Case C-280/11 P) [3], the Court held the public has a legitimate interest in understanding the positions adopted by individual Member States in Council deliberations, and that such transparency is essential for enabling citizens to exercise democratic scrutiny over the exercise of public power at EU level.[4] The Court rejected arguments that disclosure would impair the Council's decision-making process. It emphasised that transparency strengthens - rather than undermines - the legitimacy of legislative outcomes. In *De Capitani* (Case T-540/15) [5], the General Court ordered the disclosure of trilogue documents, including the so-called "fourth column" texts containing the institutions' proposed common compromises, rejecting the institutions' blanket refusal to release such materials. This confirmed the presumption in favour of access under Regulation (EC) No 1049/2001 which applies to documents relating to ongoing legislative procedures. These judgments together establish a robust legal basis for the transparency suggested in this paper, demonstrating that greater openness in EU legislative processes is not merely a policy aspiration but a legal obligation capable of judicial enforcement.

The observations set out above identify a number of areas in which greater transparency could further strengthen the EU legislative and regulatory processes. Many of these issues could be addressed through targeted changes in institutional practice, procedural arrangements and decision-making culture, without necessitating formal legislative amendment or revision of the EU's founding treaties. Please note that the recommendations do not require wholesale reform of the EU's institutional architecture; rather, they call for the more rigorous application of existing commitments and the adoption of practical measures to give effect to principles already enshrined in inter-institutional agreements. The 2016 Interinstitutional Agreement on Better Law-Making expressly commits the European Parliament, Council and Commission to principles of transparency, cooperation and mutual information-sharing throughout the legislative cycle.[6] The recommendations that follow seek to operationalise those commitments more effectively by identifying concrete, actionable steps that would enhance stakeholder engagement, improve

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3 Case C-280/11 P *Council v Access Info Europe*, OJ C 367 14.12.2013, p.2 (link).

4 Also see Joined Cases C 39/05 P and C 52/05 P *Sweden and Turco v Council* [2008] ECR I 4723 (link).

5 Case T-540/15 *De Capitani v Parliament*, OJ C 398 30.11.2015, p.57 (link).

6 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, pp. 1–14 (link)

regulatory predictability for market participants and strengthen public confidence in the integrity and openness of EU decision-making processes.

RECOMMENDATIONS:

Recommendation 1 (Document disclosure): The Council should proactively publish key negotiation documents, including mandate texts, general approach documents, compromise proposals and working party progress reports, unless a narrowly justified confidentiality exception applies. The Parliament should be more transparent in its process of agreeing final positions across political groups in the ECON.

Recommendation 2 (Trilogue transparency): Compromise texts and records of material scope, transition and exemption changes should be published after each trilogue round, subject only to specific and limited confidentiality safeguards where disclosure would genuinely prejudice ongoing negotiations.

Recommendation 3 (Explanation of amendments): Throughout the legislative process, decision-makers should provide explanations and their reasoning for tabling amendments to specific provisions of a legislative proposal.

Recommendation 4 (Level 2 adoption timelines): The Commission should maintain publicly available indicative timelines for Level 2 endorsement, adoption and publication in the OJ, update them regularly and explain delays beyond the standard endorsement period, together with a revised expected timeline.

3. EFFECTIVE AND EFFICIENT RULEMAKING

Aim: Compliance burdens frequently arise from conflicting, ambiguous or inconsistent requirements in EU financial services regulatory framework. The aim of the recommendations set out in this section is to promote greater clarity, coherence and consistency across the EU financial services acquis. This would enable investment firms, credit institutions and other affected entities to implement regulatory requirements in an effective, proportionate, cost-efficient and legally robust manner. This section sets out recommendations aimed at enhancing the quality of the legislative and regulatory framework through improvements in the drafting methodology, structural coherence and inter-institutional coordination that governs the EU financial services legislation and rulemaking.

Observations: The scope of EU financial services regulation has expanded considerably in both volume and complexity over the past two decades, particularly following the global financial crisis. The legislative and regulatory response to that crisis gave rise to a substantial body of new legislation, including the key Markets in Financial Instruments Directive and Regulation (MiFID II/MiFIR) [7], EMIR [8], and the Securities Financing Transactions Regulation (SFTR)[9]. Despite the dramatic expansion of financial services-related regulation and high volume of legislative and regulatory processes to update rules and regulation running in parallel, the legal framework for adopting these rules remains largely unchanged.

Firms operating under the different regulatory regimes must navigate a regulatory landscape characterised by overlapping requirements, inconsistent terminology and definitions, and extensive cross-referencing across Level 1, Level 2 and Level 3 instruments. At the same time, many entities operate on a global scale, meaning that they have to abide by sometimes conflicting rules. The resulting complexity can give rise to compliance burdens that are not intrinsic to the underlying regulatory objectives. Such compliance burdens arise from the manner in which regulatory requirements have been developed and drafted, amended and layered over time, sometimes without sufficient regard to the overall coherence and consistency of the wider regulatory framework. These issues can create unnecessary implementation challenges and contribute to legal and operational uncertainty.

Key observations include:

i. Volume and layering of rules and regulation

As already mentioned, the quantity of EU financial services regulation has increased exponentially since the post-crisis regulatory reforms initiated from 2009 onwards. Multiple EU financial services directives and regulations now govern overlapping subject matters, with requirements frequently distributed across Level 1 frameworks, Level 2 delegated and implementing acts providing the detailed rules and Level 3 soft law instruments such as guidelines, opinions and Q&A documents. This multi-layered architecture requires firms to navigate complex hierarchies of legally binding and non-binding rules in order to ascertain the full scope of their regulatory obligations. This is a task that has become increasingly challenging as the volume of applicable legislation, including RTS, ITS, as well as supervisory guidance has continued to expand. During the 2019 – 2024 legislative term alone,

7 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), *OJ L 173, 12.6.2014, p. 349* (link); Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, *OJ L 173, 12.6.2014, p. 84* (link).

8 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, *OJ L 201, 27.7.2012, p. 1* (link).

9 Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012, *OJ L 337, 23.12.2015, p. 1* (link).

the Commission became empowered to adopt 430 different pieces of RTS and ITS, many of which resulted in rules that go above and beyond the desired outcome articulated in the Level 1 text. [10] The complexity is further compounded by the frequency with which these instruments are amended, supplemented and updated.

ii. Inconsistent definitions

Key regulatory terms are defined differently across legislative instruments, creating interpretive uncertainty that complicates compliance and increases legal risk. Examples of such definitional inconsistencies include:

- the definition of "trading venue" under EMIR, which is defined by reference to MiFID I [11] instead of the current definition under MiFID II [12];
- the misalignment of the definition of small and medium-sized enterprise (SME) between MiFID II and the Capital Requirements Regulation (CRR) [13];
- the divergent definitions of "group" across EMIR and CRR [14] as well as between CRR and the Capital Requirements Directive (CRD) [15];
- the concept of "investment service" under MiFID II does not align precisely with the categorisation of activities relevant for prudential purposes under the capital requirements framework for banks and large investment firms [16], notwithstanding that a single firm may be subject to all of these regimes simultaneously.

10 See New Financial, *Measuring the volume of EU financial regulation*, October 2025 (link).

11 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, *OJ L 145, 30.4.2004, pp. 1-44* (link).

12 See Article 2(4) EMIR and Article 4(1)(24) MiFID II.

13 See Article 4(1)(13) MiFID II and Article 5(9) CRR.

14 See Article 2(16) EMIR and Article 4(138) CRR.

15 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, *OJ L 182 29.6.2013, p. 19*, (link) Article 2(11) and Article 5(138) CRR.

16 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, *OJ L 176, 27.6.2013, p. 338* (link); Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms, *OJ L 176, 27.6.2013, p. 1* (link).

The absence of a harmonised definitional framework across EU financial services legislation requires firms to apply different interpretations of ostensibly similar concepts depending upon which regulatory framework governs a particular activity, increasing the risk of inadvertent non-compliance.

iii. Cross-referencing complexity

EU financial services legislation frequently incorporates requirements by reference to provisions contained in other instruments, including references that span sectoral frameworks. For example, EMIR incorporates definitions from MiFID II by reference [17], SFTR cross-refers to both EMIR and MiFID II concepts [18] and the Sustainable Finance Disclosure Regulation (SFDR) [19] incorporates definitions from MiFID II in respect of financial market participants. MiFID II and MiFIR are frequently cross-referencing each other, such as in the transparency framework for systematic internalisers. This cross-referencing architecture, while intended to promote consistency, gives rise to significant interpretive challenges when the referenced instrument is subsequently amended or repealed[20]. Where amendments to the referenced provision are not accompanied by consequential amendments to the referring legislation, firms typically must assess not only the direct effects of the legislative amendment but also their indirect implications across the entire suite of interconnected regulatory obligations.

iv. Outdated or duplicative requirements

Certain regulatory requirements have become redundant following subsequent legislative amendments or duplicate obligations that exist elsewhere in the EU financial services acquis. For instance, reporting obligations under SFTR overlap in certain respects with transaction reporting requirements under EMIR, while the application of both regimes to securities financing transactions creates potential fragmentation, overlap and duplicative infrastructure. [21] These redundant or

17 See Article 2(1) of EMIR, which incorporates by reference the definition of "financial instrument" in Section C of Annex I to MiFID II.

18 Article 3 SFTR defines key terms by reference to both EMIR and MiFID II definitions.

19 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, *OJ L 317, 9.12.2019, p. 1* (link). Article 2(1)(a) defines "financial market participant" by reference to MiFID II investment firm definitions.

20 See the example above whereby the EMIR definition of trading venue refers to MiFID I, which has been repealed.

21 See ESMA's Final Report on the Call for Evidence on a comprehensive approach for the simplification of financial transaction reporting (link).

duplicative requirements impose compliance costs without corresponding regulatory benefit and obscure the clarity of the regulatory framework. A systematic review and consolidation exercise, which ESMA has undertaken, would materially benefit both regulated entities and competent authorities by streamlining compliance obligations and eliminating unnecessary regulatory friction.

v. Territorial scope and cross-border application

A persistent source of legal uncertainty in EU financial services legislation concerns the territorial scope of regulatory requirements and their application to cross-border activities. Many EU legislative instruments do not clearly articulate which connecting factors trigger the application of EU rules, how activities conducted outside the EU are to be treated or the extent to which EU requirements apply to third-country firms serving EU clients. This ambiguity creates material compliance challenges for firms operating across jurisdictions and undermines the predictability of the regulatory framework.

MiFID II and MiFIR provide illustrative examples of these difficulties. The territorial application of MiFIR's share trading obligation remains uncertain in certain cross-border scenarios. Similarly, the application of MiFID II's organisational and conduct of business requirements to branches of third-country firms operating within the EU has given rise to divergent interpretations among NCAs, thereby contributing to market fragmentation and undermining the objective of a single European market for investment services. Similarly, for EU firms operating in third countries via branches, the extensive application of MiFID II organisational and reporting requirements in these third countries creates duplicative and burdensome requirements which impact EU firms' competitiveness.

EMIR presents similar challenges. The application of clearing, reporting and risk mitigation requirements to transactions involving third-country counterparties has generated considerable interpretative uncertainty. In particular, market participants have faced difficulties in determining when non-EU entities should be treated as financial counterparties or non-financial counterparties for the purposes of EMIR, as well as in applying the intragroup exemption in structures involving third-country affiliates. Questions have also arisen regarding the territorial scope of reporting obligations and the operation of EMIR's anti-evasion provisions. In many instances, firms have been required to rely on supervisory guidance, Q&As and other interpretative materials to address uncertainties not resolved expressly in the legislation itself. While helpful, such materials do not provide the same level of legal certainty as clear legislative provisions.

vi. Prescriptive rulemaking and proportionality

EU financial services legislation has increasingly adopted a prescriptive approach to regulatory requirements, specifying detailed operational processes rather than focusing on the intended regulatory outcomes. While prescriptive rules can provide certainty as to compliance expectations, they may also constrain firms' ability to develop innovative or efficient compliance solutions tailored to their particular business models, risk profiles and operational circumstances. This rigidity can be particularly burdensome for smaller firms, which may lack the resources to implement complex procedural requirements designed with larger institutions in mind.

The MiFID II organisational requirements illustrate this tendency. The legislation prescribes detailed governance structures, committee compositions and procedural arrangements that must be implemented regardless of a firm's size, complexity or the nature of its activities. While the legislative text of Level 1 acknowledges the principle of proportionality, the detailed Level 2 requirements often leave limited scope for genuinely proportionate implementation. An outcome-based and less prescriptive approach, which specifies the regulatory rules and objectives while affording firms sufficient flexibility as to the means of compliance, would better accommodate the diversity of business models within the EU financial services sector and reduce unnecessary compliance costs without compromising regulatory outcomes.

vii. Cost-benefit analysis in EU rulemaking

The quality and timing of cost-benefit analysis in EU financial services rulemaking remains inconsistent. While impact assessments often accompany major legislative proposals, the Commission conducts these assessments at an early stage of the legislative process. These impact assessments are not updated to reflect material amendments introduced during trilogue negotiations or Level 2 rulemaking. This often leads to final regulatory requirements that may differ substantially from those assessed, rendering the original cost-benefit analysis incomplete or outdated. International comparisons and consideration of competitiveness impact are often absent, notwithstanding that EU requirements may place EU firms at a competitive disadvantage relative to third-country counterparts subject to less burdensome regulatory frameworks.

RECOMMENDATIONS:

The recommendations below seek to reduce legal uncertainty and compliance burdens arising from recurring drafting deficiencies, particularly in relation to the territorial scope of EU legislation and its application to cross-border activities.

Recommendation 1 (Territorial scope and cross-border application): EU financial services legislation should state clearly which connecting factors trigger EU jurisdiction, how third-country activities are treated and why any extraterritorial application is necessary to address risks to EU markets, investors or financial stability.

Recommendation 2 (Clarity of scope): The Commission should apply a mandatory drafting checklist for all financial services proposals covering personal, product, territorial, temporal and legislative-interaction scope, with verification by the Commission's Legal Service before adoption.

Recommendation 3 (Omnibus legislation): Omnibus legislation should be avoided for substantive financial services reforms. Reserve this approach for technical corrections or genuine cross-cutting simplification, with individual impact assessment and adequate implementation periods where its use is unavoidable.

Recommendation 4 (Cross-referencing): The Commission should adopt formal drafting principles that minimise cross-referencing complexity in financial services legislation. These principles should include: (i) restating key definitions in full within each legislative instrument where practical, rather than incorporating definitions by reference to other instruments; (ii) specifying whether references to other provisions are static or dynamic, thereby eliminating the interpretive uncertainty that currently affects many cross-referenced provisions; and (iii) systematically updating referring instruments when referenced provisions are amended, through the use of consequential amendments included in the amending legislation.

Recommendation 5 (Proportionality and outcome-based rulemaking): Level 1 and Level 2 measures should focus on regulatory outcomes rather than prescriptive operational processes. They should include explicit proportionality mechanisms that reflect the nature, scale and complexity of firms' activities.

Recommendation 6 (Cost-benefit analysis): Cost-benefit analysis should begin before publishing formal proposals, be updated as proposals evolve and include quantified compliance costs where feasible, including indirect market effects, the effect on competitiveness of the EU's economy and financial markets, international comparisons and measurable regulatory benefits. Cost-benefit analysis should be updated following feedback provided by stakeholders that challenge the initial cost-benefit analysis with quantified evidence.

Recommendation 7 (Legislative consistency review): A mandatory technical consistency review process should be used and conducted prior to the final adoption of any Level 1 legislation in the financial services domain. It should identify and resolve conflicts, inconsistencies or overlaps with existing regulatory requirements . A dedicated, inter-institutional working group comprising representatives of the Commission, Parliament and Council, as well as the relevant ESAs should undertake this review and solicit input from technical experts. The review should address: (i) definitional consistency with existing legislation; (ii) coherent interaction of new requirements with pre-existing obligations; (iii) avoidance of duplicative or conflicting reporting, disclosure or record-keeping requirements; and (iv) consistency of supervisory powers and enforcement mechanisms across the EU financial services rulebook. The review's conclusions should be published prior to the final vote on the legislative proposal, affording stakeholders an opportunity to identify any residual inconsistencies that may require amendment during the implementation phase.

4. ORDERLY RULEMAKING AND SEQUENCING

Aim: To ensure the orderly and coherent implementation of new regulatory requirements within the EU financial services framework, this section proposes that Level 1 requirements should become applicable only after the corresponding Level 2 measures have been duly adopted and are applicable following appropriate implementation periods. This approach recognises that Level 2 rules furnish the practical detail necessary for effective compliance, and that requiring compliance with Level 1 requirements prior to the adoption and application of Level 2 measures creates unnecessary burden, legal uncertainty and possible duplication of implementation burden for regulated entities. A well-sequenced regulatory framework is essential to ensuring that market participants can prepare for, and comply once with, new obligations in a proportionate and operationally feasible manner.

Observations: The temporal sequencing of EU financial services legislation presents practical recurring challenges for compliance that merit careful consideration. As reiterated in the December 2025 conclusions of the Economic and Financial Affairs Council [22], the EU's current multi-level regulatory architecture requires close coordination to ensure that in-scope entities are afforded adequate time and clarity to implement new requirements. Where this coordination falls short, firms may face the prospect of implementing requirements on a provisional basis, only to later revise their systems, processes and documentation at significant cost upon the subsequent adoption of Level 2 measures. The key observations in this regard include the following:

Level 1/Level 2 timing mismatch: Level 1 legislation frequently enters into effect or becomes applicable prior to the adoption or application of the relevant Level 2 measures (RTS and ITS) and without any implementation period. This temporal disjunction creates material uncertainty for regulated entities that find themselves

22 Conclusions on simplifying the Union's financial services regulation - Council Conclusions (12 December 2025) (link).

nominally subject to Level 1 requirements while lacking the technical detail necessary to discharge their obligations in accordance with the legislature's intentions. In practice, firms may be compelled to implement Level 1 requirements on a "best efforts" basis, developing interim processes and systems, only to be required to undertake substantial re-implementation when the Level 2 measures are subsequently finalised. Again, this duplicative approach increases compliance costs and introduces operational risk. This risk is only exacerbated further in circumstances where the Level 1 text contemplates Level 2 specification for key definitional, procedural or reporting requirements, yet the delegated rulemaking process is delayed beyond the Level 1 application date. In a number of cases, entities were asked to comply with draft legislation or RTS before they were formally adopted, which breaches the legality principle. For example, the ESMA MiFID II/MiFIR transition statement from October 2025 [23] clearly signalled that firms should align with draft technical standards before they formally became law ('*ESMA therefore expects trading venues to take into account the position management controls in relation to derivatives of emission allowances included in the amending draft RTS until the current RTS is revised.*').

We repeat the example with regard to the EMIR active account requirement (AAR) mentioned above, whereby a timing mismatch led to material uncertainty for regulated entities subject to the new requirements. The AAR came into force at the end of 2024, and in-scope counterparties had to establish and operationalise an active account at an EU CCP by 25 June 2025. However, the RTS supplementing the AAR were not adopted until 29 October 2025 and only published in the OJ on 6 February 2026. This led to regulatory uncertainty and cost for firms that had to undertake implementation exercises multiple times. Guidance through the publication of Q&As were also delayed, meaning that entities had to reassess their implementation of the AAR.

Inadequate implementation periods: Implementation periods for complex regulatory requirements are frequently too short or non-existent to permit proper system development, process redesign, staff training and the establishment of appropriate governance and control frameworks. This deficiency is compounded where Level 2 measures are published in close proximity to, or indeed after, the Level 1 application date, thereby leaving firms with insufficient time to implement the complete regulatory framework in a considered and robust manner.

23 ESMA74-276584410-11123_Public_statement_on_the_Transition_for_the_application_of_the_MiFID_II-MiFIR_review_No.2.pdf

Article 7d of EMIR, as introduced by EMIR 3.0, requires in-scope counterparties to report information on their clearing activity at recognised third-country CCPs on an annual basis. Although the obligation has applied since 24 December 2024, no RTS and ITS specifying the content and details of the required reporting have been adopted to date. In its August 2026 consultation paper and taking into account the Level 1 requirements, ESMA proposed to require counterparties to conduct back-reporting for all missed reporting years back to 2025 as part of counterparties' first annual submission, once the RTS and ITS have been adopted and have entered into force.

Q&As with material impact: In a number of cases, Q&As have been submitted to the ESAs, the answers to which could have a material impact on firms' compliance obligations, their business models or their market practice (Material Q&As). The current regulatory set-up does not include a process for stakeholders to provide their views on draft Q&As, or at least draft Material Q&A, considered by the Commission or the ESAs.

Level 3 scope: In certain instances, supervisory guidance instruments - including guidelines issued by the ESAs, Q&A documents, opinions, supervisory briefings and other Level 3 tools - have been deployed to introduce requirements that extend beyond the scope of, or are not clearly anchored in, Level 1 or Level 2 legislation. While Level 3 instruments serve a valuable function in promoting supervisory convergence and providing interpretive clarity, they ought not be utilised as vehicles for creating something new. Additional compliance obligations, expansion of the material scope of existing requirements or accelerated application dates beyond those determined by the co-legislators should flow from the Level 1 process. By way of illustration, ESMA's supervisory briefing on algorithmic trading [24] demonstrates the potential for Level 3 instruments to introduce expectations that extend beyond, or are not clearly anchored in, the underlying Level 1 and Level 2 framework. It thereby creates uncertainty as to the legal basis and enforceability of such guidance.

24 ESMA issues a supervisory briefing on algorithmic trading

RECOMMENDATIONS:

The following recommendations are directed towards ensuring a logical and coherent sequence of application for EU financial services regulation, and towards affording in-scope entities adequate time and clarity to implement new requirements in a proportionate and operationally feasible manner:

Recommendation 1 (Level 1/Level 2 Sequencing): Level 1 legislation should include a standard provision stipulating that requirements dependent upon Level 2 specification shall apply only from the date of application of the relevant RTS or ITS, together with an adequate implementation period to be specified in Level 1 or Level 2 as appropriate. The co-legislators should adopt a consistent drafting approach to ensure that such provisions are included in all relevant legislation, thereby eliminating ambiguity as to the commencement of compliance obligations.

Recommendation 2 (Level 2 Publication Timeline): The Commission should adopt Level 2 measures with appropriate application dates to allow adequate time for industry implementation.

Recommendation 3 (Level 3 Instrument Scope): Level 3 instruments should be utilised solely to clarify existing requirements contained in Level 1 or Level 2 legislation. They should not be employed to introduce new compliance obligations, expand the material scope of existing requirements or accelerate compliance expectations beyond what is provided for in the primary and secondary legislation. Where an ESA identifies a gap in the regulatory framework, it should recommend amendments to Level 1 or Level 2 legislation through the established legislative procedure.

Recommendation 4 (Q&A Consultation): The ESAs or the Commission should consult on Material Q&A with the industry ahead of releasing the final response, similarly to the process that they follow for publication of Level 3 Guidelines.

Recommendation 5 (No expectation to comply with draft legislation): While draft legislative text can be helpful to market participants when planning their compliance programmes, they should not be required or expected to comply with draft legislation, but only with rules/requirements that have become law.

Recommendation 6 (No retroactive application of Level 2 requirements): Level 2 requirements should only apply prospectively (i.e., from the date of entry into effect of the requirements). Retrospective application of such requirements should be avoided.

5. LONG-TERM CONSIDERATIONS FOR TREATY CHANGES

Aim: To identify longer-term reforms that could provide ESMA and the other ESAs clearer tools to address exceptional implementation issues, while recognising that such reforms may require institutional or treaty-level change and should be developed with appropriate accountability safeguards.

Observations: The institutional framework of the EU imposes constitutional constraints on the powers that may be delegated to EU agencies such as ESMA. The *Meroni* doctrine, established by the Court of Justice in 1958, limits the delegation of discretionary powers to bodies not directly established by the Treaties, requiring that any delegated powers be precisely delineated and subject to strict review. [25] The Court followed Meroni in its 1981 judgment in *Romano v Institut national d'assurance maladie-invalidité*. In this judgment the court determined that it was also unlawful for the EU institutions to delegate to an agency any power to "adopt acts having the force of law."[26] Since the Meroni judgment, the EU constitutional set-up has greatly evolved in terms of powers and competences. The most significant changes to this framework followed the amendments to the Treaty on European Union and the Treaty Establishing the European Community set out in the Lisbon Treaty. The resulting Treaty on the Functioning of the European Union (TFEU) provided legal bases for the delegation of powers from the co-legislators to the Commission. TFEU provisions expressly extended CJEU jurisdiction to review the legality of the acts of EU agencies "intended to produce legal effects vis-à-vis third parties" and recognised acts of general application adopted by EU agencies. [27] Case law has also evolved, and it is worth mentioning that the 2014 Short-Selling judgment [28] provided that ESMA's intervention powers under the Short Selling Regulation were "precisely delineated and amenable to judicial review" and thus compatible with Meroni, even though they involved a degree of discretion. However, the boundaries of permissible delegation remain subject to ongoing judicial interpretation. These constitutional constraints materially affect ESMA's ability to respond flexibly to market developments and to provide timely relief to regulated entities in circumstances where strict compliance with regulatory requirements would be disproportionate or impractical. The principal limitations include the following:

25 Judgment of the Court of 13 June 1958 in *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, Case 9-56, EU:C:1958:7 (link).

26 Judgment of the Court of 14 May 1981 in *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, Case 98-80, EU:C:1981:104 (link).

27 See Articles 263 and 277 TFEU.

28 Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, EU:C:2014:18 (link)

No-action relief: ESMA has no power to issue legally binding no-action letters capable of suspending or disapplying regulatory requirements. While ESMA may issue communications to NCAs requesting that they deprioritise supervisory action on specific issues, such communications are directed to NCAs and are intended to guide supervisory enforcement priorities. They do not affect the legal applicability of the underlying regulatory obligations and do not provide firms with legal certainty that compliance action will not be taken against them for reliance on such guidance. This limitation undermines the EU's ability to provide timely and legally effective relief in circumstances where strict compliance would be disproportionate or impractical.

Suspend requirements: ESMA lacks general powers to suspend the application of regulatory requirements in exceptional circumstances, limiting its ability to provide timely relief where strict compliance would be disproportionate or impractical.

Binding interpretive guidance: The legal status of ESMA guidance, including Q&A documents, opinions and supervisory briefings, remains uncertain. This creates a gap between supervisory expectations and legal enforceability. Regulated entities may face practical pressure to comply with guidance that lacks a clear legal basis in Level 1 or Level 2 legislation while simultaneously not knowing the legal consequences of non-compliance.

Some other major jurisdictions, such as the United Kingdom and the United States, illustrate that financial supervisors can, in other constitutional settings, successfully operate with more direct rulemaking, waiver modification or no-action tools.

RECOMMENDATIONS:

The following recommendations are directed towards potential longer-term reforms that would require institutional or treaty-level changes. They are presented as matters for consideration in the context of future discussions regarding the EU's financial services supervisory architecture:

Recommendation 1 (No-Action Relief): Future treaty or institutional reforms should consider granting ESMA/ESAs the power to issue legally binding no-action letters that suspend or disapply regulatory obligations in defined circumstances. Such powers should be subject to appropriate procedural safeguards, including publication requirements, defined criteria for the exercise of discretion and mechanisms for periodic review and withdrawal of relief where circumstances change. ESMA should be empowered to direct NCAs to exercise forbearance for persons the NCAs supervise, binding NCAs and protecting them from third-party claims and infringement proceedings. This would be triggered where compliance creates conflicts of law, extraterritoriality issues, distorts competition or jeopardises equivalence decisions.

Recommendation 2 (Suspension Powers): ESMA/ESAs should be granted general suspension powers to provide temporary relief from regulatory requirements where strict compliance would disproportionately impact or lead to unforeseen circumstances, market disruptions or systemic implementation challenges. Such powers should be time-limited, together with a requirement for ESMA to publish reasons for the suspension and to propose appropriate legislative or regulatory amendments where the underlying issue is of a systemic or ongoing nature.

Recommendation 3 (Interpretive Guidance): Any expansion of ESMA's interpretive guidance powers should be accompanied by clear procedures for industry consultation prior to the issuance of material guidance, together with a defined legal status for such guidance to ensure accountability, predictability and consistency in supervisory outcomes across Member States. FIA recognises that meaningful reform in this area is likely to require Treaty-level change, given the constitutional constraints on the delegation of discretionary powers to EU agencies. However, further analysis is warranted to determine whether any flexibility exists within the current legal framework to enhance the effectiveness and legal certainty of ESMA's guidance powers without formal Treaty amendment. FIA intends to undertake further work on these issues and may submit additional recommendations in due course, following a more detailed assessment of the scope for reform within the existing institutional and constitutional framework.

Recommendation 4 (Urgency procedure): The Commission should, in limited circumstances, become empowered to propose minor amendments to primary legislation which should be agreed and adopted by the co-legislators without delay and within a targeted timeframe of six months.

6. CONCLUSION

This paper has examined the EU's financial services rulemaking framework through four interconnected lenses: transparency, effectiveness, logical sequencing and institutional powers. The analysis reveals that many of the compliance burdens and legal uncertainties confronting market participants do not arise from the policy objectives of EU financial services legislation, but rather from the manner in which rules are developed, drafted and implemented. Opacity in Council negotiations and trilogue procedures, delayed publication of Level 2 measures, inconsistent definitions across legislative instruments, prescriptive drafting approaches and inadequate cost-benefit analyses collectively contribute to an EU financial services regulatory environment that is more complex, less predictable and more costly to navigate than the underlying policy objectives require.

FIA has focused on realistic and practical reforms for the short term and a large share of the recommendations presented in this paper do not require wholesale revision of the EU's institutional architecture or founding treaties. Rather, they call for the more rigorous application of existing commitments under the 2016 Interinstitutional Agreement on Better Law-Making, together with targeted improvements in drafting methodology, procedural transparency and inter-institutional coordination. Key reforms include:

(i) **proactive disclosure of Council and Parliament negotiation documents and trilogue compromise texts;**

(ii) **mandatory explanations for legislative amendments;**

(iii) **clear articulation of territorial scope in financial services legislation;**

(iv) **adoption of outcome-based rather than prescriptive regulatory requirements;**

(v) **sequencing Level 1 application dates to follow the adoption of corresponding Level 2 measures; and**

(vi) **confining Level 3 instruments to their proper interpretive function.**

The longer-term recommendations regarding ESMA's institutional powers, including no-action relief and suspension powers, acknowledge that meaningful reform in certain areas may require treaty-level change, and warrant further analysis.

Implementing these recommendations would yield material benefits for all participants across the EU financial services ecosystem. Policymakers would benefit from enhanced stakeholder engagement and more robust feedback mechanisms that improve the quality and workability of legislation before it enters into force. Market participants would benefit from greater regulatory predictability, reduced duplicative implementation costs and clearer compliance pathways. Supervisory authorities would benefit from a more coherent and internally consistent regulatory framework that facilitates effective supervision and enforcement. More broadly, these reforms would strengthen public confidence in the integrity and openness of EU decision-making processes at a time when the EU is seeking to enhance its competitiveness and attract investment to European capital markets.

FIA presents this paper as a constructive contribution to the ongoing European debate on regulatory simplification, competitiveness and sustainable growth. The challenges identified are not unique to financial services, but the sector's particular characteristics make the case for reform especially compelling. While the recommendations set out in this paper may not be a panacea, they represent an important piece in a complex regulatory reform agenda. FIA stands ready to engage with EU institutions and other stakeholders to develop and refine these proposals further, with a view to achieving a regulatory framework that is transparent, coherent, proportionate and fit for purpose.

APPENDIX

List of FIA recommendations for better EU rulemaking process

1. **Document disclosure:** The Council should proactively publish key negotiation documents, including mandate texts, general approach documents, compromise proposals and working party progress reports, unless a narrowly justified confidentiality exception applies. The Parliament should be more transparent in its process of agreeing final positions across political groups in the ECON.

2. **Trilogue transparency:** Compromise texts and records of material scope, transition and exemption changes should be published after each trilogue round, subject only to specific and limited confidentiality safeguards where disclosure would genuinely prejudice ongoing negotiations.

3. **Explanation of amendments:** Throughout the legislative process, decision-makers should provide explanations and their reasoning for tabling amendments to specific provisions of a legislative proposal.

4. **Level 2 adoption timelines:** The Commission should maintain publicly available indicative timelines for Level 2 endorsement, adoption and publication in the OJ, update them regularly and explain delays beyond the standard endorsement period, together with a revised expected timeline.

5. **Territorial scope and cross-border application:** EU financial services legislation should state clearly which connecting factors trigger EU jurisdiction, how third-country activities are treated and why any extraterritorial application is necessary to address risks to EU markets, investors or financial stability.

6. **Clarity of scope:** The Commission should apply a mandatory drafting checklist for all financial services proposals covering personal, product, territorial, temporal and legislative-interaction scope, with verification by the Commission's Legal Service before adoption.

7. **Omnibus legislation:** Omnibus legislation should be avoided for substantive financial services reforms. Reserve this approach for technical corrections or genuine cross-cutting simplification, with individual impact assessment and adequate implementation periods where its use is unavoidable.

8. **Cross-referencing:** The Commission should adopt formal drafting principles that minimise cross-referencing complexity in financial services legislation. These principles should include: (i) restating key definitions in full within each legislative instrument where practical, rather than incorporating definitions by reference to other instruments; (ii) specifying whether references to other provisions are static or dynamic, thereby eliminating the interpretive uncertainty that currently

affects many cross-referenced provisions; and (iii) systematically updating referring instruments when referenced provisions are amended, through the use of consequential amendments included in the amending legislation.

9. **Proportionality and outcome-based rulemaking:** Level 1 and Level 2 measures should focus on regulatory outcomes rather than prescriptive operational processes. They should include explicit proportionality mechanisms that reflect the nature, scale and complexity of firms' activities.

10. **Cost-benefit analysis:** Cost-benefit analysis should begin before publishing formal proposals, be updated as proposals evolve and include quantified compliance costs where feasible, including indirect market effects, the effect on competitiveness of the EU's economy and financial markets, international comparisons and measurable regulatory benefits. Cost-benefit analysis should be updated following feedback provided by stakeholders that challenge the initial cost-benefit analysis with quantified evidence.

11. **Legislative consistency review:** A mandatory technical consistency review process should be used and conducted prior to the final adoption of any Level 1 legislation in the financial services domain. It should identify and resolve conflicts, inconsistencies or overlaps with existing regulatory requirements . A dedicated, inter-institutional working group comprising representatives of the Commission, Parliament and Council, as well as the relevant ESAs should undertake this review and solicit input from technical experts. The review should address: (i) definitional consistency with existing legislation; (ii) coherent interaction of new requirements with pre-existing obligations; (iii) avoidance of duplicative or conflicting reporting, disclosure or record-keeping requirements; and (iv) consistency of supervisory powers and enforcement mechanisms across the EU financial services rulebook. The review's conclusions should be published prior to the final vote on the legislative proposal, affording stakeholders an opportunity to identify any residual inconsistencies that may require amendment during the implementation phase.

12. **Level 1/Level 2 Sequencing:** Level 1 legislation should include a standard provision stipulating that requirements dependent upon Level 2 specification shall apply only from the date of application of the relevant RTS or ITS, together with an adequate implementation period to be specified in Level 1 or Level 2 as appropriate. The co-legislators should adopt a consistent drafting approach to ensure that such provisions are included in all relevant legislation, thereby eliminating ambiguity as to the commencement of compliance obligations.

13. **Level 2 Publication Timeline:** The Commission should adopt Level 2 measures with appropriate application dates to allow adequate time for industry implementation.

14. **Level 3 Instrument Scope:** Level 3 instruments should be utilised solely to clarify existing requirements contained in Level 1 or Level 2 legislation. They should not be employed to introduce new compliance obligations, expand the material scope of existing requirements or accelerate compliance expectations beyond what is provided for in the primary and secondary legislation. Where an ESA identifies a gap in the regulatory framework, it should recommend amendments to Level 1 or Level 2 legislation through the established legislative procedure.

15. **Q&A Consultation:** The ESAs or the EC should consult on Material Q&A with the industry ahead of releasing the final response, similarly to the process that they follow for publication of Level 3 Guidelines.

16. **No expectation to comply with draft legislation:** While draft legislative text can be helpful to market participants when planning their compliance programmes, they should not be required or expected to comply with draft legislation, but only with rules/requirements that have become law.

17. **No retroactive application of Level 2 requirements:** Level 2 requirements should only apply prospectively (i.e., from the date of entry into effect of the requirements). Retrospective application of such requirements should be avoided.

18. **No-Action Relief:** Future treaty or institutional reforms should consider granting ESMA/ESAs the power to issue legally binding no-action letters that suspend or disapply regulatory obligations in defined circumstances. Such powers should be subject to appropriate procedural safeguards, including publication requirements, defined criteria for the exercise of discretion and mechanisms for periodic review and withdrawal of relief where circumstances change. ESMA should be empowered to direct NCAs to exercise forbearance for persons the NCAs supervise, binding NCAs and protecting them from third-party claims and infringement proceedings. This would be triggered where compliance creates conflicts of law, extraterritoriality issues, distorts competition, or jeopardises equivalence decisions.

19. **Suspension Powers:** ESMA/ESAs should be granted general suspension powers to provide temporary relief from regulatory requirements where strict compliance would disproportionately impact or lead to unforeseen circumstances, market disruptions or systemic implementation challenges. Such powers should be time-limited, together with a requirement for ESMA to publish reasons for the suspension and to propose appropriate legislative or regulatory amendments where the underlying issue is of a systemic or ongoing nature.

20. **Interpretive Guidance:** Any expansion of ESMA's interpretive guidance powers should be accompanied by clear procedures for industry consultation prior to the issuance of material guidance, together with a defined legal status for such

guidance to ensure accountability, predictability and consistency in supervisory outcomes across Member States. FIA recognises that meaningful reform in this area is likely to require Treaty-level change, given the constitutional constraints on the delegation of discretionary powers to EU agencies. However, further analysis is warranted to determine whether any flexibility exists within the current legal framework to enhance the effectiveness and legal certainty of ESMA's guidance powers without formal Treaty amendment. FIA intends to undertake further work on these issues and may submit additional recommendations in due course, following a more detailed assessment of the scope for reform within the existing institutional and constitutional framework.

21. **Urgency procedure:** The Commission should, in limited circumstances, become empowered to propose minor amendments to primary legislation which should be agreed and adopted by the co-legislators without delay and within a targeted timeframe of six months.

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