The EU’s massive crisis-era reform programme has radically reconfigured EU financial services regulation, substantively and institutionally. The scale of the achievement is immense. The 40 or so legislative measures adopted, and their accompanying technical administrative rules and soft law, which together form the vast Single Rulebook, are a testament to the ability of the EU rule-making process to adopt often sophisticated and complex rules, and to deliver the G20 reform agenda as well as specific EU reforms, in time-pressed and difficult conditions. The ECON committee has been a key player in this process, particularly with respect to the finessing and calibration of legislation. The EU has also built a new supporting architecture for the regulatory and supervisory governance of financial markets in the EU – the European System of Financial Supervision (ESFS), initially, and Banking Union subsequently – which has left a lasting imprint on the governance of the EU financial market, reconfiguring in particular how supervision is organized.

It is still somewhat too early to judge the impact of the regulatory and institutional reforms (MiFID II/MiFIR, for example, are not yet in force), although initiatives are already underway (including by this Committee). But it is the case that the EU financial system, and the regulatory and institutional reforms, are now, to some extent at least, beginning to operate in ‘business as usual’ rather than in crisis conditions. It is also the case that evidence is emerging on the new system, including on the institutional dynamics of the ESFS and Banking Union, and that a series of reviews of key legislative measures are shortly to take place. And there are some signs that market integration (rather than market protection) - although always of concern over the crisis-era - is returning to its pre-crisis prominence. This is most apparent, perhaps, in the elements of a de-regulatory agenda that can now be seen in the EU policy space, most notably under the Capital Markets Union agenda. On the other hand, the scale of the repair required to the financial system, including with respect to institutional culture, remains clear, as is evidenced by the ongoing evidence of serious conduct failures.

It is a key time, accordingly, to assess the new regulatory and institutional architecture and, in particular, to consider how it should be reviewed and monitored; how appropriate benchmarks for success should be designed; and how legislative priorities are to be identified. The ECON committee has a central and critically important role to play in this review and assessment.

This brief note offers some outline contributions on the major themes which can be associated with the current period.
• (1) The Central Importance of Supervision and Enforcement

If regulatory reform and institutional design were the dominant themes of the crisis-era Parliament (and Commission terms), ensuring the effectiveness of the supervision and application of the Single Rulebook, and the effective operation of the ESFS and Banking Union, merit being major concerns of the current terms. The focus needs to move from ‘design’ to ‘delivery’, as it were – or from ex ante regulation to ex post application and supervision. Monitoring, review, and legislative action in this context may be usefully directed to three areas in particular:

(i) The oversight of a new and fragile institutional ecosystem. Banking Union and the ESFS were constructed under conditions of intense crisis. It is now imperative that the performance of both systems under ‘business as usual’ conditions is monitored, that any strains which emerge are assessed, and the need for any legislative reforms considered. In particular:

The ability of the European Banking Authority to support the Single Rulebook and pan-EU supervisory convergence is critical to the ability of the ESFS to support the single market in financial services. Any prejudicial centrifugal forces generated by Banking Union must be monitored and addressed by legislative intervention where appropriate.

Similarly, ESMA’s ability to support pan-EU convergence in matters relating to financial market conduct (as the EU’s markets authority) must be supported.

Finally, the dangers of consumer protection matters being ‘crowded out’ by a focus on financial stability matters within the ESFS and Banking Union, and by related institutional dynamics, could usefully be monitored and the ESAs’ powers strengthened as appropriate.

(ii) The monitoring of, and the finessing of the foundational legislative regime for, the European Supervisory Authorities (ESAs). As the pressure of regulatory reform recedes, the ESAs have a critical role to play in ensuring effective ‘delivery,’ including by supporting supervisory convergence, best practice, and peer review, and guiding the market through soft measures such as Guidelines. They also are uniquely well placed to offer advice on technical reforms and enhancements to the Single Rulebook, particularly where strains within the Single Rulebook emerge in practice. In particular:

The effectiveness of ESA independence, governance (and in particular whether the inter-governmental nature of Board of Supervisor operation should be finessed), funding, and powers could usefully be considered.
The extent to which (subject to appropriate oversight) enhancements could be made to the current ‘level 2’ rule-making process to afford the ESAs more flexibility where speedy changes are required could also usefully be considered.

(iii) Supporting strong enforcement. Much of the success of the current ‘delivery’ phase of the EU reforms depends on the incentives, including supervisory and enforcement incentives, for compliance and for cultural change. Enforcement of financial services regulation remains largely a Member State competence. The effectiveness of the new conduct Rulebook in particular is heavily dependent on effective enforcement. While effective enforcement demands proximity to local markets, areas worth investigating include:

While significant progress has been made with respect to sanctions (notably under the Market Abuse regime), the consistency of the EU’s approach to enforcement (including sanctions), and National Competent Authority powers, across the major legislative measures could usefully be considered.

So too could be the implications of the evidence which will emerge from the ESAs’ monitoring of enforcement practices across the Member States (as required under key crisis-era measures). Much remains to be done with respect to the ‘acquis’ here in terms of databases and the pooling of experiences.

* (2) Accepting a Degree of ‘Regulatory Revolution’ - with a small ‘r’

Effective regulatory design implies something of a continual state of review, refreshment, and renewal, albeit in a proportionate, organized, and planned manner. The Single Rulebook is a towering achievement. But it is often highly complex and of a vast scale. Much of it deals with novel (and untested) regulatory techniques (including with respect to product intervention and market transparency). It was adopted in conditions of often incomplete empirical data and severe time pressure, which meant that consultation and impact assessment were often rushed. Its cumulative impact is not yet clear. The Single Rulebook is also in acute need of careful and proportionate application, given the range of new actors, including non-financial counterparties, now within the regulatory net. A new approach has been adopted to third country access and to ‘equivalence’. The ESAs provide a new channel, however, through which data on market impact can be gathered and technical reforms initiated.

Accordingly the new set of ‘review clauses’ are of acute importance to the ‘delivery’ phase of EU financial regulation and to the credibility of the new Rulebook. The review process at the legislative level could usefully consider in particular:

(i) Risks to consistency and of overlap and of duplicating (and potentially conflicting) requirements) within the regime, particularly for multi-function groups.

(ii) The application of the proportionality principle, which is deployed frequently in major crisis-era measures, and whether it is causing arbitrage or other difficulties
(iii) The incidence of exemptions and ambiguities in the application of the regime in practice and whether they call for legislative reform (for example, the definition of capital under the CRD IV/CRR regime).

(iv) The clarity of (or risks to) the perimeter which surrounds EU financial regulation. In particular, the consistency with which the EU legislative regime relies on the ‘regulated market’ concept, for example.

(v) The quality of and channels for data collection in the EU, and the use to which data is put. The EU’s capacity to collect financial system data is now significantly enhanced, whether through new legislative requirements (the new FINREP and COREP requirements under CRD IV/CRR, for example) or by means of the ability of the ESAs to collect data. Consideration could usefully be given to how this data is assessed, monitored, and deployed to achieve legislative change. Gaps in data collection, notably with respect to the consumer financial markets, should also be addressed. This is particularly the case given the prominence being given to the consumer as a supplier of capital under the Capital Markets Union reforms and the relatively poor data still available on financial consumer behaviour pan-EU.

(vi) The relative priority afforded to speedy and evidenced review of pre-existing, as compared to new, measures.

• (3) A Modest Approach to Additional Reforms

EU financial regulation is a dynamic system composed of many moving parts. The need for new regulation could usefully be considered within a context in which other forms of regulation may provide an appropriate substitute. Safety valves are also needed, to allow Member States to experiment and specialize, and to generate regulatory learning opportunities. Again the ESAs provide an important channel for monitoring whether destructive divergences emerge. Areas which appear in need of closer attention, however, include the consistency of the fast-developing financial consumer protection system, notably the short form disclosure regime (summary prospectuses and Key Investor Information documents).