Participation in European agencies: Keeping promises in institutional practice
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This chapter critically analyses the rules and practices of one final form of internal participation: the involvement of interested parties in quasi-regulatory matters. As such, the role and the added value of participation in the EBA Banking Stakeholder Group and the EASA Safety Standards Consultative Committee will be investigated and evaluated. It is assumed that this form of participation might be relevant for the effectiveness and credibility of agencies’ rulemaking, not least because it might help overcome problems of implementation and help avoid enforcement problems.

6.1 ACCESS: FORMAL DESIGN AND DE FACTO INVOLVEMENT

The EBA and the EASA are two agencies with far-reaching quasi-regulatory powers, which comprise regulation by soft law and the preparation of potentially binding measures adopted by the Commission. The EBA, in particular, engages in the drafting of regulatory and implementing technical standards, and the issuing of guidelines and recommendations, whereas the EASA issues opinions (i.e. draft technical standards) addressed to the Commission, acceptable means of compliance and guidance material. Following legal requirements or voluntarily, both agencies have established, in their internal administrative structure, consultative stakeholder groups, exclusively composed of representatives of interests affected, which provide input/assistance with regard to quasi-regulatory tasks. To establish the promises of this form of participation, it is first necessary to consider the formal responsibilities of the EBA’s and the EASA’s participatory groups. In other words, it is important to investigate the mandates and tasks that interested parties are entrusted when granted an opportunity of access. Second, to confirm whether – in terms of access - the envisaged purpose of quasi-regulatory participation is actually advanced, it indispensable to investigate the composition of consultative stakeholder groups, the selection procedure to become a member, and the eventual representativeness of the groups.1

6.1.1 Mandates, Tasks and Promises: Making Agencies’ Rulemaking More Effective and Credible?

In the case of the EBA, the founding regulation explicitly foresees the creation of the Banking Stakeholder Group with a view to facilitating consultations with stakeholders in areas relevant to the tasks of the agency.2 This group, in particular, needs to be consulted and given a “reasonable opportunity” to comment on proposed measures with regard to the EBA quasi-regulatory acts (draft regulatory technical standards or implementing technical standards, guidelines and recommendations) insofar as these do not concern individual financial institutions.3 Moreover, the Banking Stakeholder Group may provide opinions and advice to the EBA on any matter

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1 See Chapter 2, Sections 2.3.1 and 2.4.
3 Ibid. Art. 37(1); Ibid. Para. 48 of the Preamble.
pertaining to other tasks of the agency, with a particular focus on the common supervisory culture, peer reviews of competent authorities, and assessments of market developments. 4 Additionally, this participatory group can propose that the EBA investigates a competent authority’s alleged breach or non-application of Union law. 5

By contrast, the EASA has established the Safety Standards Consultative Committee upon its own motion, as part of its rulemaking procedure adopted by the agency’s management board. 6 Through this forum, representatives of persons and organisations from the sectors affected by the EASA’s operation assist the agency with regard to its “rulemaking activities” (i.e. development and issuing of opinions, acceptable means of compliance, certification specifications, and guidance material). 7 The Safety Standards Consultative Committee may be consulted, inter alia, (i) on the content, priorities and execution of the EASA rulemaking programme (a plan that lists the regulatory tasks of the agency for the next four years, adopted by the executive director), including preliminary regulatory impact assessments and terms of reference, (ii) with respect to the establishment and composition of drafting groups, the development of “regulatory tools and concepts”, including recommendation on risk assessment analyses, regulatory impact assessments, and other “tools” employed in the rulemaking, and (iii) in the context of improving the effectiveness and efficiency of the EASA’s rulemaking process and structures. 8 In this regard, a member of the Safety Standards Consultative Committee reflected,

I consider [the Safety Standards Consultative Committee’s] advising on the rulemaking programme our main task; that is obviously a key issue for all stakeholders. [...] Here, we look at the programme as a whole, and we can discuss which of the rulemaking tasks [i.e. planned rule development] we think has a priority, what should be deleted, and so on. We do not do content discussion of every single rulemaking task, but we do a general discussion, so that as a Safety Standards Consultative Committee we can file our position on its importance. This also gives [individual members] a general view, as it offers an opportunity to really track the developments of those issues that we are interested in. (Respondent #28)

Primafacie, the above rules suggest that both the EBA Banking Stakeholder Group and the EASA Safety Standards Consultative Committee are formalised and that their mandates and tasks are precisely delineated. We can observe that these consultative groups differ in one salient aspect: they are consulted at different stages of the respective agencies’ rulemaking procedures. This is due to the design of such participatory groups and cannot be seen as a malfunction of this form of participation. However, it will be demonstrated that consultation at different stages of

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4 Ibid. Art. 37(5).
5 Ibid. Art. 17(2).
6 European Aviation Safety Agency (2012a), ‘Decision of the Management Board Amending and Replacing Decision 08-2007 Concerning the Procedure to be Applied by the Agency for the Issuing of Opinions, Certification Specifications and Guidance Material (‘Rulemaking Procedure’), EASA Management Board Decision 01-2012, 13.3.2012, Art. 9; The Safety Standards Consultative Committee is one of the consultative bodies of the EASA, the other being the Rulemaking Advisory Group (RAG) and the Thematic Advisory Groups (TAGs). The latter are entirely made up of representatives of national authorities. See, Ibid. Art. 10.
7 Ibid. Art. 9; The quasi-regulatory tasks of the EASA include issuing of opinions (which are actually draft legislation) and recommendations addressed to the Commission. Besides, the agency may publish certification specifications and acceptable means of compliance, as well as guidance material. See Arts. 18 and 19(1) of Regulation (EC) No 216/2008, as subsequently amended.
8 European Aviation Safety Agency (2012a), Art. 9.
the rulemaking process may indicate distinctive promises of participation or different shades of the same promise. One of the more obvious differences is the nature of input that the respective participatory groups provide to the agencies. In general, the EASA consultative group is consulted at the earliest stage, before a rule (i.e. an opinion, acceptable means of compliance, certification specifications, or guidance material) is drafted, whereas, in the main, the EBA group can provide comments at a much later stage, when rules (i.e. draft regulatory or implementing technical standards, guidelines and recommendations) are already drafted. In fact, the Banking Stakeholder Group is consulted on draft EBA rules at exactly the same point as public consultations regarding the drafts are launched. This “duplication of participatory effort” is a much cited “inconvenient” aspect concerning the establishment of the EBA consultative group, which was also recorded in the group’s end of term report. In this report, the Banking Stakeholder Group proposed that “it would be useful if the EBA could consult [the group] earlier in the process of formulating regulatory policy, and in some cases before [draft regulatory, or implementing technical standards] and discussion papers have been issued [for consultation]. This would allow the views of this diverse and experienced group to be taken into account prior to the production of consultation papers.” As one member of the Banking Stakeholder Group reflected,

I would have liked if the Banking Stakeholder Group gave its opinion first, then the draft would be amended with respect to our comments, so that we could see and monitor our impact on the proposed draft. Now we cannot see it, because all commenting happens at the same time; there are a lot of views and we only see the final version. I think that the Group would be in a better position, if we could monitor the end result of our work. (Respondent #15)

However, not all members of the EBA stakeholder group share this view. In the words of another member of the Banking Stakeholder Group,

I do not think that it would be appropriate if the Banking Stakeholder Group was involved at an earlier stage. There should not be any privileged treatment for [the members of the Banking Stakeholder Group] compared to the general public [which can participate in public consultations]. (Respondent #16)

Arguably, the latter interpretation is more in line with the rationale for the establishment of the Banking Stakeholder Group as envisaged by the legislator: the employment of a dedicated group of interested parties serves the purpose of effectiveness of consultations. In other words, the Banking Stakeholder Group may be viewed as an interface for fostering consultations (ensuring inclusiveness and responsiveness to those affected) in the areas relevant to the remit of the agency. It guarantees, in particular, that the EBA communicates with and receives input from interested

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10 Arts. 10(1), 15(1) and 16 (2) of Regulation (EU) No 1093/2010, as subsequently amended.


12 Ibid.

13 Para. 48 of the Preamble to Regulation (EU) No 1093/2010, as subsequently amended.
parties before adopting draft regulatory technical standards and implementing technical standards. However, given the underlying rationale (i.e. an “enhanced” form of consultation), the Banking Stakeholder Group should not be perceived as a privileged group of stakeholders compared to the public (the interested parties not immediately involved in the group) who may provide their input through a separate channel, namely the open (external) consultations. Given that participation in the group would be limited to a representative variety of interested parties, a “preferential treatment” of the particular interests included could result in their “message” being privileged at the expense of the general public. Thus, the EBA stakeholder group should be understood as a means of ensuring that the agency actually receives input from a representative selection of interests that will be affected once the rules are finalised, whereas the rest of interested parties (the “public”) assumedly have an equal opportunity to do so in the open consultations.

What is the potential of this form of participation? What promises of participation can we identify in the case of the EBA Banking Stakeholder Group and the EASA Safety Standards Consultative Committee? Generally, in both cases consultation of stakeholder groups may be understood to further the effectiveness of the respective agencies’ rulemaking. More specifically, considering the mandates and tasks of the EBA and the EASA participatory groups, the following promises of participation can be identified. First of all, interested parties from the various sectors affected by agencies’ operation may provide relevant knowledge and insights that, in turn, may contribute to more informed outcomes in terms of the rulemaking output of agencies. We have observed before that the two groups are consulted at different stages of the rulemaking process. The timing of the involvement of the EBA and the EASA participatory groups is significant in terms of the nature of the input of interested parties (i.e. the information that they provide to the agencies). The EBA Banking Stakeholder Group increases the pool of information available to the agency which may help improve the finalisation of the EBA draft rules. The EASA Safety Standards Consultative Committee furnishes its views at the earliest stage of the agency’s rulemaking (i.e. with regard to planning and prioritisation of rulemaking, and regulatory impact assessment), before an EASA rule is drafted. It may be assumed that this form of participation contributes to the EASA’s assessment of the potential effects of its regulatory proposals from the outset, allowing the agency to weigh different regulatory choices. Second, given that both participatory groups involve a representative variety of interested parties with different backgrounds and experiences, this form of participation is designed to ensure inclusiveness of different, possibly conflicting interests and promote the responsiveness of agency rulemaking (either at the planning or the final stage) to various claims and needs. The opportunity to participate in, and possibly influence, agencies’ rulemaking procedures appears to promote regulatory outcomes more in line with sector-specific concerns. This is desirable to ensure the effectiveness of rulemaking. Thirdly, in both cases the involvement of consultative stakeholder groups may be seen as a means of advancing the likelihood of compliance and promoting implementation. It is unlikely that the difference regarding the timing of such consultations impacts the fulfilment of this promise of participation. Both agencies intend to involve various interested parties who will eventually need to apply the highly technical rules once they are adopted. Thus, the opportunity to be part of agency rulemaking processes may increase interested parties’ understanding of the relevance

14 Admittedly only to the extent that such participation does not affect the independence of agencies’ rulemaking and present a risk of capture.
of the rules (at the planning stage or once drafted) and, thus, promote rule adherence. Finally, as both participatory groups have access to agencies’ (draft) documents, this form of participation may promote transparency and monitoring of agencies’ rulemaking activities by those most concerned and, as a consequence, increase the credibility of agencies’ operation. However, given that the tasks of these groups are first and foremost oriented towards increasing the effectiveness of EBA and EASA rulemaking, it is assumed that transparency, monitoring and trust are not the primary promises of participation in this case, but rather a “side effect” or a “spill-over effect” of other promises of participation identified above. In other words, it may be argued that the provision of documents to these groups primarily serves the fulfilment of the promises of better and more informed agency rulemaking, responsiveness, implementation and compliance, rather than ensuring transparency, monitoring and enhancing confidence in the rulemaking process.

6.1.2 Composition, Selection Procedure and Representativeness: Agencies in Charge

In this section we will examine whether the composition of the participatory groups, the selection of participants and their representativeness actually promote the fulfilment of the promises of participation established above. On the one hand, the issue of composition is important for establishing the de jure inclusiveness of participation. On the other hand, other factors such as possible deficits in the appointment procedure (which results in a composition different from the one formally envisaged) or the level of affiliation of the members of the consultative stakeholder groups with their background organisations (i.e. the capacity in which such members participate), are relevant for determining the extent to which the promises envisaged are de facto carried forward.

According to the EBA founding regulation, the Banking Stakeholder Group should comprise 30 members, “representing in balanced proportions” credit and investment institutions operating in the EU (at least ten members, three of whom need to represent cooperative and savings banks), their employees’ representatives, consumers, users of banking services, and representatives of SMEs. At least five of the Banking Stakeholder Group members need to be top-ranking academics. De jure, the members of the EBA Banking Stakeholder Group are appointed by the agency’s Board of Supervisors, on the basis of proposals from the relevant stakeholders. The selection procedure should ensure, to the extent possible, “an appropriate geographical and gender balance”, as well as representation of stakeholders across the EU. The term of service of the Banking Stakeholder Group members is two and a half years and may be renewed once.

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15 See Chapter 2, Sections 2.3.1 and 2.4.
16 Art. 37(2) of Regulation (EU) No 1093/2010, as subsequently amended.
17 Ibid. Art. 37(3).
18 Ibid.
19 Ibid. Art. 37(4).
The selection procedure is further determined in an agency policy document, namely the Selection Procedure for the Banking Stakeholder Group, which was adopted in 2013 in the aftermath of the complaints to the European Ombudsman regarding the method of appointment of the Banking Stakeholder Group members. Given that the formal rules for the selection of the EBA consultative group members are rather sparse, and that the selection procedure was not adequately formalised at the time, the final composition of the Banking Stakeholder Group has caused disputes when the Group was first established.

In 2011, based on four separate complaints, the European Ombudsman opened a maladministration investigation of the EBA regarding the selection of the Banking Stakeholder Group members. The instance of maladministration invoked, in particular, concerned an alleged breach of lawfulness (i.e. incorrect application of rules). The complainants argued that the EBA failed to ensure a proper gender and geographical balance among stakeholders, as well as an adequate balance between different interests. It was further maintained that the agency adopted an incorrect definition of the stakeholder categories, which was not in line with the EBA founding regulation. Specifically, it was claimed that the Banking Stakeholder Group is “heavily overweight towards the persons paid by the banking industry” and that this presents a serious risk that “the membership vote will always lean on the same site.” Additionally, the complainants stated that all except one representative of the banking industry came from the “old” Member States, whereas the majority of the consumers’ representatives came from small consumer associations located in the “new” Member States. This resulted in “over-representativeness” of certain leading banks from the “old” Member States. Therefore, the EBA was asked to reconsider the composition of the Banking Stakeholder Group and publish detailed information on the selection criteria and the selection process on its website. In her decision, the European Ombudsman critically remarked that the EBA indeed committed an instance of maladministration (i.e. breach of lawfulness) with regard to the “geographical and gender balance and representation of stakeholders across the Union” requirement, as well as with regard to its interpretation of the stakeholder categories. On the whole, the EBA did not ensure a sufficiently representative variety of interested parties in the Banking Stakeholder Group, which de facto affected the promise of inclusiveness and responsiveness to different, possibly conflicting, interests and also diminished the diversity of relevant information that would be available to the agency in the course of rulemaking. Moreover, given that certain interests were not properly represented in the group, this situation also affected

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22 Ibid.
24 See, European Ombudsman (2013a); European Ombudsman (2013b); European Ombudsman (2013c); European Ombudsman (2013d).
the accomplishment of the promises of transparency and monitoring and had, as the complaints attest, negative consequences on credibility of the EBA operation. In other words, the EBA failed to provide an equal opportunity of access and to include in “balanced proportions” those who matter for the fulfilment of the identified promises of this form participation.

Following these complaints, the EBA adopted a more detailed internal Selection Procedure for the appointment of the Banking Stakeholder Group members. These rules are intended to ensure a composition that facilitates the fulfilment of the primary promises (i.e. more informed outcomes, inclusiveness and responsiveness). According to this EBA policy, the selection procedure starts with a call for the expression of interest, following which the EBA prepares a gross list of applications and checks their completeness. After an analysis of the applications, the agency prepares a shortlist, which needs to contain 30 proposed candidates and 15 to 20 reserve candidates. The shortlist is then reviewed by the EBA management board and submitted to the Board of Supervisors for approval. The agency needs to inform the candidates of their appointment and make the results available to the public.

The Selection Procedure for the Banking Stakeholder Group also prescribes detailed instructions to ensure representativeness of the EBA consultative group. According to these rules, each member of the group can only represent one of the above-listed stakeholder categories and should not be in conflict of interest with another category represented. Furthermore, the EBA needs to ensure geographical balance not only across the Banking Stakeholder Group, but also within each stakeholder category. Nonetheless, regarding different entities (e.g. banking groups), general preference is given to European entities versus national ones. Additionally, the EBA document entails comprehensive eligibility criteria for all members of the Banking Stakeholder Group, such as professional experience in the financial service sector (a minimum of 4 years), commitment to the Group, and an English proficiency requirement, as well as for each of the stakeholder categories.

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25 European Banking Authority (2013b).
27 Ibid, pp. 2-3.
28 Ibid, p. 3.
29 The Selection Procedure for the Banking Stakeholder Group provides the following criteria for each of the stakeholder categories.
   (i) Credit and investment institutions: Includes individual representatives and representatives of associations currently employed by or acting on behalf of Union credit and investment institutions, representing the diverse modes and sites of financial institutions and businesses, including financial market practitioners, institutional investors and other financial institutions which themselves use financial services; (ii) Consumers: This category includes representatives of consumer organisations or any natural person acting for purposes outside their trade, business, craft or profession, and with a proven record of dealing with consumer issues; (iii) Users of banking services: Includes individuals and associations delivering services and advice to consumers including other retail users of banking services and end users of banking products, but not providers of banking services; (iv) Employees: This category includes associations, bodies, individuals, or others which represent the interest of employers and trade unions, which may be paid by their employer; (v) Representatives of SMEs: Includes individuals employed by a SME relevant to credit and investment institutions, or representatives of their organisations; (vi) Independent top-ranking academics: Individuals falling into this category are assessed based on their academic qualifications. They should preferably hold a Ph.D. in finance, economics, law or other field relevant to financial services, or equivalent qualifications and a solid academic experience in a university or institute of higher education (e.g. professorship), have a strong publication record in the field of finance, economics, law and participation in international conferences and workshops. They must be independent from interests of credit and investment institutions or similar.

Sec, European Banking Authority (2013b), pp. 4-5.
Overall, the new selection procedure described in the EBA policy document comprises several elements to secure adequate composition on the EBA Banking Stakeholder Group: there is an open call for the expression of interest, a clear method of appointment, and detailed eligibility criteria. If all these steps are indeed followed, then the identified promises of this form of participation can be fulfilled. It ensures, in particular, that all the prescribed categories of stakeholders are sufficiently represented and more geographically balanced. The EBA website reveals that since 2014, representation of different interests in the Banking Stakeholder Group is in fact more balanced compared to its previous mandate. Specifically, it appears that representativeness of different interests in the group is now actually in line with the criteria contained in the EBA founding regulation, as well as with the agency policy.

One more aspect regarding representation of different interests in the EBA Banking Stakeholder Group is worth stressing. According to the EBA founding regulation, the members of the group representing non-profit organisations or academics are entitled to receive “adequate compensation”. This should ensure that persons who are “neither well-funded nor industry representatives” take part fully in the debate on financial regulation. Arguably, this furthers the promise of inclusiveness.

Under the EBA rules, the members of the Banking Stakeholder Group are appointed ad personam and serve in their personal capacity. Whereas the EBA rules do not state any concrete reasons for such arrangements, it is argued that participation in an individual capacity is (at least partially) grounded in the need to ensure confidentiality and professional secrecy. This constitutes a specific situation in terms of representation of different interests: while such members are expected to represent - to their best knowledge - the interests affected by the EBA operation (e.g. the general interests of the banks or consumers), they are not supposed to represent their immediate background organisations (e.g. the interests of a specific bank or a specific consumer organisation) (Respondent #15, #16, #19, #21). Given that the members of the EBA consultative group, on the one hand, need to represent (on a broader scale) different interests concerned with the agency’s operation and, on the other hand, fulfil detailed criteria, including relevant knowledge and professional experience, participation in this group may be understood as a mix of interest representation and expertise. This situation is understandable, taking into consideration the highly technical nature of the EBA remit. However, considering the selectiveness of the membership in

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30 The latter will always depend on who applies for membership in the first place.
31 As of 2015, the EBA Banking Stakeholder Group comprises 4 representatives of the users of banking services (2 from the UK, and one from each Romania and Norway), 2 representatives of employees (from France and Denmark), 6 top-ranking academics (from Italy, the UK, Greece, Denmark, the Czech Republic and Spain), 6 representatives of consumers (from Slovenia, France, Ireland, Spain, the UK and Denmark), 2 representatives of SMEs (from Germany and Greece), and 10 representatives of credit and investment institutions (2 from Germany and the Netherlands, and one from each France, Spain, Belgium, Austria, the UK and Sweden). See EBA website, <http://www.eba.europa.eu/about-us/organisation/banking-stakeholder-group/members>.
32 Art. 37(4) of Regulation (EU) No 1093/2010, as subsequently amended.
33 Ibid. Para. 48 of the Preamble.
35 Namely, members of the Banking Stakeholder Group are not allowed to make public or share with the general public any unpublished documents provided by the EBA and should comply with the obligations of professional secrecy and protection of classified information laid down in EU law, in particular the EBA founding regulation. See, European Banking Authority (2015), Art.17. See also, Chapter 1, Section 1.4.
the Banking Stakeholder Group and the fact the appointed interested parties generally should not affiliate with their background organisations (which have to respect and apply the rules once they are adopted), the immediate link to the promise of enhanced compliance and implementation becomes less evident.

The respondents from the EBA Banking Stakeholder Group reported that such a strict separation of interests (i.e. representation of broader interests in individual capacity vs. representing the interests of background organisations) is, in reality, difficult to achieve. In the words of one EBA Banking Stakeholder Group member,

You are selected [as a member] because you represent a certain interest and originate from a certain organisation, and yet you have to be your own man there. So this means that you are not supposed to receive any support from your organisation, you cannot check the positions you are taking [in the Banking Stakeholder Group] with them. So you are supposed to be an independent stakeholder, but it is a weird concept because in fact you are not really independent, of course you are there because of the organisation that nominated you. And I also think it is sometimes a little artificial to ask people to go against their own interest just because they work [for an organisation]. So that is a very difficult balance to strike. [...] And that is a problem of the Banking Stakeholder Group. You know that the members are not really openly, transparently representing [the general stakeholder interests] as such. (Respondent #19)

All in all, this indicates that there is a risk of discrepancy between the EBA provisions and how representation of interests occurs in practice. What is at stake here is the representation of broader interests (e.g. the banking industry or consumers) in favour of representing the interests of the Banking Stakeholder Group members’ background organisations (e.g. a particular bank or consumer organisation), which in turn affects the fulfilment of the identified promises of participation (more informed outcomes, inclusiveness and responsiveness, transparency and monitoring). This could actually result in the provision of very particular, organisation-specific information, with the EBA’s responsiveness directed to the concerns of distinct stakeholder organisations. Additionally, this situation may diminish the credibility of EBA rulemaking from the perspective of those interested parties situated outside this participatory group (i.e. those not immediately involved). They might trust that the EBA deals with the broader interests of different sectors concerned, whereas in fact, the agency might deal with the interests of a member’s background organisation. Therefore, the EBA should further address this issue and clarify whose interests (on whose behalf) are actually represented in the Banking Stakeholder Group and in what manner. At the very least, the EBA should establish more precise rules regarding the extent to which the members of the Banking Stakeholder Group can liaise and seek support from their background organisations, as well as define the instances in which this is prohibited. On the whole, this would increase the transparency of the EBA group and enhance its credibility towards those interested parties not immediately included in the group.
By comparison, the composition of the EASA Safety Standards Consultative Committee is specified in the EASA Rulemaking Procedure. According to the agency rules, the EASA consultative group should be made up of “representatives of persons and organisations directly subject to the [EASA founding regulation], to implementing rules, to certification specifications or to guidance material.”36 The exact composition of the group is determined by the agency’s executive director “taking account of the requirement to balance representation with efficiency.”37 The list of the Safety Standards Consultative Committee members, published on the EASA website, provides an additional insight into the composition of the group.38 Similarly as in the case of the EASA Advisory Board (managerial participation),39 the membership of the EASA consultative group should include a diverse spectrum of sectors affected by the agency operation, ranging from the manufacturer industry (European and non-European), the maintenance industry, aviation operators (commercial and general/non-commercial), aviation personnel (aerodrome personnel, air traffic controllers and aviation personnel), aero-medical personnel, the training industry, the air navigation services, and aerodromes.40 Apart from the general provisions on the composition of the Safety Standards Consultative Committee, the EASA has not established any specific rules guiding the selection of the group’s members. In fact, any civil aviation organisation or association, affected by the EASA operation, may apply for membership and nominate candidates for the group. This suggests a certain degree of openness of access to the EASA consultative group and may be interpreted as a potential means of ensuring the fulfilment of the promise of inclusiveness. As explained by a member of the EASA Safety Standards Consultative Committee,

In order to [be included], you have to write a letter to the executive director of the EASA, presenting your case as to why you want have to be a member of the Safety Standards Consultative Committee, and name your representative. Then it is a personal decision of the executive director. He decides if he accepts an association and their representative. (Respondent #28)

In fact, there is a growing interest in becoming a member of the EASA Safety Standards Consultative Committee. According to another member of the EASA consultative group,

More and more people see what effect the EASA has on their work, and more and more parties are interested in getting a seat in the [Safety Standards Consultative Committee]. If you want to influence something, you have to be at the site. If you have a mammoth tanker sailing from France to New York and you give it a push when it leaves the harbour, you

37 Ibid.
38 In 2013, the EASA Safety Standards Consultative Committee underwent a restructure. The main improvements include: bringing in representatives from the missing aviation sectors and limiting the size of the plenary group to a maximum of 35 members, while expending the membership of the groups’ sub-committees. Since in 2015, the end year of this research, the reorganised Safety Standards Consultative Committee has not yet gained momentum, the present study considers the arrangement that was in place until the end of 2013.
39 See Chapter 4.
will have a long lasting side effect. If you give it a push once it is already entering the New York harbour, forget it. You have to be there from the start, which is why people want to be members of this group. (Respondent #38)

Until 2013 year-end, the membership of the Safety Standards Consultative Committee was not limited to a maximum number of members. In this respect an EASA official explained,

It is not the intention of the agency to bring any limitations. If an organisation is subject to the EASA founding regulation, then it has a specific interest, so potentially it could be part of the Safety Standards Consultative Committee. (Respondent #7)

Arguably, this can be attributed to the fact that the EASA Safety Standard Consultative Committee has been established on a voluntarily basis as a form of collaboration with stakeholders regarding the agency’s rulemaking. The consequence was that the size of the group reached 43 members, which, as the respondents observed, started to affect the overall effectiveness of the group (Respondent #11, #13, #26). The result was also that despite the diverse backgrounds of the members, the manufacturers industry represented the biggest block within the Safety Standards Consultative Committee. As already explained with respect to the EASA Advisory Board (managerial participation), the competences of the EASA have grown over the years. The EASA tasks initially included certification of airworthiness and of aeronautical products - that is why the EASA primarily interacted with the manufacturers industry – and it was only later that other sectors were included in the Safety Standards Consultative Committee. Due to the fact that “there have been mainly just new additions to the list and hardly any deletions” (Respondent #26), this might have tilted the balance in the favour of the manufacturers industry. Nevertheless, it is argued that the inclusion of various manufacturers does not compromise the fulfilment of the primary promises, since their involvement is deemed crucial for ensuring the acceptance of EASA rulemaking and because each manufacturer is expected to provide particular insights (which are likely to be different from those of another manufacturer). Moreover, given that the access to the Safety Standards Consultative Committee remains relatively open and that any interested party from the sectors affected by the EASA operation may become a member, it can be argued that the promises of more informed outcomes (the diversity of information provided), inclusiveness and responsiveness to various, possibly conflicting interests is not hampered. The overall effectiveness of the group is due to improve following the 2013 review of the Safety Standards Consultative Committee. The new composition of the group will be limited to 35 members, covering all domains regulated by the EASA, and establishing more effective representation of all stakeholder categories listed above. Essentially, by making participation in the EASA stakeholder group more effective, this revision is expected to additionally further the fulfilment of the identified promises.

41 European Aviation Safety Agency (2012a), Art. 9.
42 See Chapter 4.
The remaining question is: What qualities does the EASA require with respect to membership of the Safety Standards Consultative Committee? According to the Safety Standards Consultative Committee’s Rules of Procedure, the group is composed of a representative variety of participants from “organisations and trade associations representing industries, professions and end user groups concerned.”44 Given the actual composition of the EASA Safety Standards Consultative Committee, it can be argued that the members are sufficiently representative of different interests affected by EASA rulemaking. However, it was reported that in order to deal with the highly complex and technical matters pertaining to civil aviation, members need to possess a certain level of expertise and experience in the relevant fields (Respondent #11, #13, #26). Therefore, similarly to participation in the EBA Banking Stakeholder Group, participation in the EASA consultative group could be considered a mix of interest representation and expertise.45

In sum, in terms of access and representativeness, the above considerations reveal possible shortcomings in terms of the EBA and the EASA consultative stakeholder groups. In the case of the EBA, we observe that the agency experienced initial problems regarding the creation and the composition of the Banking Stakeholder Group. It appears, however, that the overall representativeness of the EBA stakeholder group has been enhanced and different interests are indeed represented in “balanced proportions”. Moreover, there were no further complaints to the European Ombudsman with respect to the new mandate of the group. Additionally, the empirical evidence signals that the initial problems have been corrected; therefore it is argued that the EBA is in fact committed to respecting the formal rules on the establishment of the Banking Stakeholder Group. There are, nevertheless, tensions pertaining to the capacity (i.e. individual capacity vs. representation of background organisation) in which the members participate in the EBA stakeholder group. As observed, the current situation may be problematic for the fulfilment of the primary promises of participation, especially the range of information provided (i.e. the spectrum of interests), inclusiveness and responsiveness to broader stakeholder interests, and transparency. The EBA should further address and clarify this issue. For example, the agency could adapt its policy and allow the members of the Banking Stakeholder Group to consult with their background organisations (when necessary) subject to clear and transparent criteria which would ensure representativeness of all interests affected. In the case of the EASA, it was shown that the Safety Standards Consultative Committee is much more open to different civil aviation interests affected by the work of the agency. Whereas it can be argued that the agency does not intend to impose any limitations to the fulfilment of the identified promises of participation, there are potential deficits regarding the effectiveness of this group due to is growing membership. Therefore, it will be interesting to observe whether with the new agency policy (i.e. the restructure of the group), the Safety Standards Consultative Committee will provide for a more effective and efficient involvement of the stakeholder groups affected by the EASA operation and whether this would additionally promote the primary promises of this form of participation.

45 See also, Chapter 1, Section 1.4.
6.2. QUALITY OF DELIBERATION: THE DIFFERENCE BEYOND ACCESS

This section will critically examine the influence of quasi-regulatory participation with regard to the EBA Banking Stakeholder Group and the EASA Safety Standards Consultative Committee, i.e. the significance of the involvement of interested parties with respect to the relevant promises. Consistent with the previous chapters, the analysis will consider three central facets of the quality of deliberation: the provision of information, debate, and the recognition of input.46

6.2.1 Provision of Information and Preparation: The Rules and Testimonies

Both the EBA Banking Stakeholder Group and the EASA Safety Standards Consultative Committee are included in agencies’ quasi-regulatory tasks. However, as observed above, the respective stakeholder groups are consulted at different stages of agencies’ rulemaking procedure: the EASA consults the Safety Standards Consultative Committee at the earliest stage, before a rule is drafted (i.e. with regard to planning and the prioritisation of rulemaking, and regulatory impact assessment), whereas the EBA primarily consults the Banking Stakeholder Group with respect to drafted rules (i.e. at the final stage of rulemaking). The different timing of participation is expected to make a difference regarding the type of information that will be provided to the consultative groups in order to promote the advancement of the primary promises. We will first inspect the rules guiding the nature and timing of the provision of information. Second, by juxtaposing rules and practices, the manner and the extent to which the provision of information actually furthers the overall quality of deliberation will be examined.

The EBA founding regulation establishes that the agency needs to equip the Banking Stakeholder Group with the information necessary for its work.47 According to the tasks of the EBA consultative group, such information should include, for example, draft technical standards, guidelines and recommendations.48 The information provided may be subject to a professional secrecy rule,49 which means that the members of the group are not allowed to make public or share any unpublished drafts which have been made available to them by the EBA.50 The deadlines for the submission of information to the Banking Stakeholder Group are specified in the rules of procedure of the group. In order to give the members of the group sufficient time to prepare for the meetings, the agency must provide drafts, of which the group is consulted, as well

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46 See Chapter 2, Section 2.3.2 and 2.4.
47 Art. 37(4) of Regulation (EU) No 1093/2010, as subsequently amended.
48 The EBA Banking Stakeholder Group may provide its opinion at the request of the agency or at its own initiative. Arguably, when the group acts at the request of the agency, the latter needs to provide relevant information by default, whereas when acting on its own initiative, access to documents is guided by the EBA management board’s decision on access to documents. In practice, this means that the group needs to apply for such information with the agency, unless a document is already directly accessible. See, European Banking Authority (2015), Art. 6; See also, European Banking Authority (2011), ‘Decision of the Management Board on Access to Documents’, Decision EBA DC 036, 27.5.2011.
49 Art. 37(4) of Regulation (EU) No 1093/2010, as subsequently amended.
50 European Banking Authority (2015), Art. 17.
as all other working documents, no later than seven calendar days in advance of the meeting.\(^{51}\) However, this deadline may be reduced to three days in urgent and exceptional cases.\(^ {52}\) Moreover, additional information is provided to Banking Stakeholder Group members in the meetings, and such informal practices may include verbal updates on general developments given by the EBA executive director or the EBA chairperson, as well as updates on the agency’s regulatory work under development presented by the EBA staff.\(^ {53}\) Additionally, the agency’s Board of Supervisors, which is in charge of adopting agency opinions, recommendations and decisions, convenes a meeting biannually with the Banking Stakeholder Group,\(^ {54}\) during which further overviews of EBA rulemaking are presented to the group.\(^ {55}\)

With respect to the EASA Safety Standards Consultative Committee, the agency’s responsibility to provide information is established in the consultative group’s rules of procedure.\(^ {56}\) The agency is required to support the work of the group by distributing the preparatory documents and working papers.\(^ {57}\) Given the EASA consultative group’s tasks, such documents include, \textit{inter alia}, the agency’s draft 4-year rulemaking programme, draft regulatory impact assessments, and draft terms of reference of specific rules under development. Moreover, the EASA is required to inform the group of any changes to the rulemaking programme,\(^ {58}\) as well as any amendments to the terms of reference if these occur later in the rulemaking process.\(^ {59}\) As a rule, all necessary documents have to be submitted to the Safety Standards Consultative Committee fifteen working days prior to the meeting.\(^ {60}\) In exceptional circumstances, information may be provided at a later date, although no later than one week before the meeting.\(^ {61}\) Similarly to other participatory forums, additional information is submitted to the Safety Standards Consultative Committee during the meetings. The minutes of the EASA consultative group meetings show that, as a matter of established practice, agency personnel regularly gives verbal presentations on rulemaking developments.\(^ {62}\)

The table below provides an overview of the envisaged promises of quasi-regulatory participation and the nature of the information submitted.

\(^{51}\) Ibid. Art. 5. \\
\(^{52}\) Ibid. \\

\(^{54}\) Art. 40(2) of Regulation (EU) No 1093/2010, as subsequently amended.


\(^{56}\) In 2013, the EASA Safety Standards Consultative Committee underwent a restructure and the group also adopted new rules of procedure. Since in 2015, the end year of this research the reorganised Safety Standards Consultative Committee has not yet gained momentum, the present study considers the previous arrangement which was in place until the end of 2013.


\(^{58}\) European Aviation Safety Agency (2012a), Art. 3(7).

\(^{59}\) Ibid. Art. 5(1).

\(^{60}\) European Aviation Safety Agency (2010), p. 5.

\(^{61}\) Ibid.


Table 6.1 Overview of the Promises of Quasi-Regulatory Participation/Type of Information/Deadline

<table>
<thead>
<tr>
<th>Identified Promises of Participation</th>
<th>Information/Documents (Examples)</th>
<th>Deadlines</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Increase the range of information available to the agencies.</td>
<td>- Draft 4-year rulemaking programme, draft regulatory impact assessments, and draft terms of reference of specific rules under development.</td>
<td>- 15 working days prior to each meeting.</td>
</tr>
<tr>
<td>- Inclusiveness and responsiveness.</td>
<td>- Draft regulatory or implementing technical standards, guidelines and recommendations.</td>
<td>- May be more exacting in exceptional cases; however, no later than one week prior to a meeting.</td>
</tr>
<tr>
<td>- Transparency, monitoring and trust (secondary).</td>
<td></td>
<td>- 7 calendar days prior to each meeting.</td>
</tr>
<tr>
<td>- Advance the likelihood of compliance and promote implementation (EASA).</td>
<td></td>
<td>- May be reduced to 3 days in urgent cases.</td>
</tr>
</tbody>
</table>

In sum, the rules and established practices concerning the provision of information appear to correspond with the tasks of the EASA Safety Standards Consultative Committee and the EBA Banking Stakeholder Group. The nature of the information provided depends on what stage of the agencies’ rulemaking process the consultative groups are invited to participate. The information that the EBA consultative group is expected to receive primarily concerns draft rules (i.e. draft technical standards, guidelines and recommendations), whereas the information provided to the EASA consultative group consists of preparatory documents and working papers (e.g. rulemaking programmes, draft regulatory impact assessments, as well as draft terms of reference) regarding the EASA rulemaking.

The question is thus: are the arrangements regarding the provision of information de facto respected in a manner that furthers the fulfilment of the relevant promises? Is information provided in a timely and sufficient manner? And can the participants adequately prepare their submissions on the basis of the information received?

The case of the EBA Banking Stakeholder Group is singular in the sense that the agency is legally obliged to interact with interested parties and to equip them with the information necessary for the discharge of the group’s tasks. Given that in this case the participation of interested parties is a formal part of a broader structure and process pertaining to the effective functioning of the EBA (i.e. with regard to rulemaking), it is conceivable that the members of the EBA consultative group should receive all relevant information within the agreed deadlines. In fact, the respondents from the Banking Stakeholder Group generally confirmed that in substance they are adequately informed and that the formal deadlines for the submission of information are in fact respected (Respondent #15, #16, #19, #21). As explained by one respondent from the EBA consultative group,

We receive the first bunch of documents a week in advance and then a second one three days before [the meetings]. And usually, these documents include the minutes of the Board of Supervisors [which is in charge of the agency’s rulemaking] and Power Point presentations
which were prepared by the EBA staff. These documents are very useful as they give you the state of play of the [agency’s] activities. And all this is complemented by the consultation documents [i.e. draft technical standards, guidelines and recommendations]. (Respondent #21)

However, as another EBA Banking Stakeholder Group member observed,

This is still not enough time to prepare, if you imagine that you receive quite a big pile of documents to go through. It would be quite welcome [for the Banking Stakeholder Group’s members], if we would receive documentation earlier than [within the prescribed deadline]. Of course in the field of our work some things are moving very rapidly, so it is not possible to send documents months in advance, but for certain issues it is. So we feel that sometimes it would be good to receive documents as early as possible and not on the day when it is really required. (Respondent #16)

This latter observation shows that even though the agency fulfils its obligation regarding the timely provision of information, the members of a participatory forum may still find the time frames too narrow to prepare their input. Indeed, the EBA deals with complex technical issues which might take time to entirely comprehend. Thus, if the agency were to equip participants with the relevant information at the earliest possible convenience, this potentially furthers the promise of more informed outcomes, i.e. EBA (draft) rules.

Having confirmed that the EBA observes the formal deadlines for the submission of information, we will proceed to investigate how the participants deal with the information received and how they prepare their submissions in general. As observed above, the interested parties in the EBA Banking Stakeholder Group are supposed to participate in their individual capacity, which means that, in theory at least, they need to rely on their own knowledge and experience in the field in order to represent broader stakeholders’ concerns. According to the empirical evidence (i.e. interview data), the respondents from the EBA Banking Stakeholder Group found it difficult to deal with the information received due to its highly technical nature. The complexity of issues is further aggravated by the fact that some 30 percent of the documents provided to the group are subject to professional secrecy and that the members are expected to deal with them as such. Due to professional secrecy, the members of the group will often not be able to seek any support (from their background organisations or any other party not immediately involved in the group) when preparing for the meetings of the EBA consultative group. This was confirmed by one of the Banking Stakeholder Group members, according to whom,

The system works to the extent that I would not dream of circulating something that is supposed to be confidential. Because then I would have no control over [the document] anymore and I would not know in whose hands it might end. That limits my ability to deal with such issues because they are very technical and you do not always have the knowledge yourself. But there are other issues that are not confidential and then I could seek views from other stakeholders. (Respondent #19)
Indeed, the EBA and the Banking Stakeholder Group came to an agreement that, if information is not confidential, “it should be to a certain degree possible to collect views from people who can support you in your mission, however, not necessarily representing such positions” (Respondent #15). This was reported to be indispensable for the performance of the group. In the words of another Banking Stakeholder Group member,

If you look at the agenda [of the consultative group’s meetings], it is very difficult to be knowledgeable about all those topics and, honestly, for the members it is extremely difficult to pretend [they are] giving an input that is strictly personal. It is possible on two, three or four topics, but not on everything. Because the range of topics which are addressed is so wide, that for one individual it is simply impossible [to be knowledgeable about everything]. (Respondent #21)

These findings reveal that due to the complexity of issues, the members of the EBA Banking Stakeholder Group might not always be capable of effectively fulfilling their role in an entirely personal capacity, according to their own knowledge and experience. This means that where they cannot rely on the possible support of their background organisations, the level of preparation for the group’s meetings may be inadequate. This is problematic in terms of the promises of participation, in particular because it is argued that members of the Banking Stakeholder Group can provide input (i.e. relevant knowledge and experience) that can enhance the effectiveness of the EBA rulemaking. However, it appears that the obligation of professional secrecy is necessary in the highly sensitive environment in which the EBA operates and, in these circumstances, prevails over concerns regarding the fulfilment of the promises of participation. Thus, this shortcoming of participation (preparation) cannot be ameliorated by a change in the agency’s rules or practices.

In the case of the EASA Safety Standards Consultative Committee, the respondents have generally confirmed that, in terms of substance, they receive adequate information. With regard to the additional provision of information one member of the EASA consultative group reflected,

The agency reports on every mixed subject and the latest status [of rulemaking plans], and those presentations we do not receive up front, which is fine. The agency does that in the meetings, and then we get the documents a couple of days later, that is not a problem. That information is actually one of the key reasons why the attendance in the Safety Standards Consultative Committee is so important. If you are not there or you are not a member, there is no way to know what the latest statements or the next plans are. (Respondent #28)

This shows that additional presentations in the meetings may de facto increase the transparency of the EASA rulemaking activities. Nevertheless, the respondents complained that the prescribed deadlines for the provision of information (documents that should be received before the meetings) are not always respected. In this connection, a member of the EASA consultative group explained,
Now, we receive the documents one week in advance [instead of the prescribed 15 working days]. We have complained before that we received documents the day we were travelling, so you could only throw them away because you could not read them before the meeting. [...] Some papers you need in advance because you really need to discuss them with other people. But this has slightly improved now. (Respondent #13)

This was confirmed by another EASA Safety Standards Consultative Committee member, who added that “if the EASA wants to work with the Safety Standards Consultative Committee, they need to make sure that we have the documents in advance; they know that if people do not receive the documents, the group will not work, [...] and they need us” (Respondent #26).

Indeed, if the EASA aspires to maintain the promises of participation of the Safety Standards Consultative Committee, it should provide timely information. Untimely submissions of information can have a negative impact on the level of preparation by participants and, consequently, on the discharge of the tasks of this participatory forum. In fact, it is argued that a delay in providing information provides no information at all. If the participants do not have sufficient time to read through the documents provided, they might overlook some important aspects of proposals and may not be able to make any meaningful contribution to discussions. As a consequence, this state of affairs proves frustrating for the members of the EASA consultative group.

Moreover, delays in the submission of information are also problematic in terms of interest representation. Given that the members of the EASA Safety Standards Consultative Committee are expected to represent the interests of their background organisations, they may need to consolidate their positions with such organisations before attending the meetings. In fact, the respondents from the EASA consultative group generally noted that regarding preparation, untimely submission of information hinders their ability to obtain input from their background organisations. According to one member of the EASA Safety Standards Consultative Committee,

There is not enough time to prepare and certainly not enough time to consult with others. I should be representing [the interests of the background organisation], but if I receive the documents only one or two days before the meetings, that is impossible. [...] Fortunately, I have regular contacts with [the background organisation], so I know in which direction I should be going and what the basics of what I am representing are, but for 25 percent of the issues I would still need to have a higher level of discussion. (Respondent #11)

And again, in the words of another EASA consultative group respondent,

Not receiving information in time negatively impacts the work of the group because you discuss something you do not really know about or, even as an expert you have to discuss with your colleagues because you are a representative of the field. There are some subjects that I do not know about. [The EASA] supposes that I know something about it, but I do not. (Respondent #13)
In sum, with regard to the EASA Safety Standards Consultative Committee, the advancement of the relevant promises of quasi-regulatory participation, especially more informed regulatory outcomes and responsiveness of EASA rulemaking to the concerns of the regulated sectors, are compromised. The empirical data has confirmed that the relevant information is provided in an untimely manner such that participatory forum members are unable to adequately prepare ahead of the meetings. Not only does this mean that the participants have too little time for preparation, but it means that they must rely on their own knowledge and experience in the field they are supposed to represent, rather than obtain support from their background organisations. This situation is rather troubling in terms of the envisaged promises of participation; even more so since it is the EASA, rather than the participants, which is responsible for this deficiency.

6.2.2 Debating and Commenting: Asymmetries of Involvement?

The focus of this section is on the second facet of interaction between the agencies and interested parties in quasi-regulatory matters, namely debating and commenting. Similar to the provision of information, this aspect of participation is equally important for the determination of the overall quality of deliberation and the extent and the manner in which the primary promises are fulfilled. When examining the level and the quality of the debate in the EBA Banking Stakeholder Group and the EASA Safety Standards Consultative Committee, several elements require attention. First, we need to examine the organisational aspect of debate. Given the complexity of the tasks of the consultative groups, the course of participation should allow sufficient time to adequately address specific items on the agenda. Second, it is important to inquire into the engagement of participants in discussions, and emphasise good, as well as bad, practices of debate. Finally, considering the EBA and the EASA consultative groups often need to present a common position to the respective agencies, we will explore their decision-making arrangements. This latter aspect is indispensable for establishing the degree to which particular interests may come forward in the output of the consultative groups. Relying on the empirical evidence provided by the participants, we will assess each of these elements and the degree to which they further the fulfilment of the intended promises.

63 See Chapter 2, Sections 2.3.2 and 2.4.
A) Organisational Aspects of Debate

Both the EASA Safety Standards Consultative Committee and the EBA Banking Stakeholder Group are unique in the sense that the work of the groups is divided into smaller sub-committees, which concentrate on particular issues and interests, and report their findings to the plenary group. Arguably, this enables the respective members to dedicate more time to particular topics in accordance with their individual interests. One member of the EASA Safety Standards Consultative Committee clarified, “the main work is done in the sub-groups, where we really have enough time to discuss all the details, and then the plenary is used for the sub-groups to report. This means that every member is given an equal opportunity and sufficient time to be heard in the group” (Respondent #28). This was also confirmed by other EASA consultative group respondents (Respondent #11, #13, #26).

Furthermore, the organisational aspect of the debate in the EASA Safety Standards Consultative Committee and the sub-committees was described as follows:

During the calendar year, the meetings are build up in such a way that we have an opportunity amongst ourselves in the sub-committees to discuss regulatory impact assessments, the pre-regulatory impact assessment of various topics where we can comment in detail on every single issue, and we can give our advice to the agency on how the priority setting should be made. Then the whole group [Safety Standards Consultative Committee as a whole] looks at the draft rulemaking programme as a whole, so you have all the rulemaking tasks that are lined up for the next four years and we discuss then between the particular rulemaking tasks [across the sub-committees] what we think is a priority and what not and should be changed. And in December we do one final review after the adoption of the rulemaking plan to start preparing for the next year. (Respondent #28)

In the case of the EBA Banking Stakeholder Group, however, the respondents generally felt that the time devoted to the discussion of specific issues on the agenda is rather limited. It was reported that the members of the sub-committees interact mainly via electronic communication, and that a majority of issues will be addressed and discussed once again in the plenary meetings (Respondent #15, #16, #19, #21). As recalled by one member of the EBA consultative group,

[When establishing the agenda], a certain balance is created among the issues that are important and need to be discussed in the meetings, but looking at the number of members of the group, you can already see that it will be difficult to cover [all issues] in a single meeting. You would have situations where you can discuss [a specific topic on the agenda] for only half an hour. And this could not be enough time for an in-depth discussion. (Respondent #16)

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64 For example, the EBA established three technical working groups on: (i) capital and risk analysis, (ii) recovery, resolution and systemic issues, and (iii) consumer issues and financial innovation. See, European Banking Authority (2014b), ‘BSG Standing Technical Working Groups – Established 10 December 2013’, EBA BSG 2014 26, 20.3.2014; In comparison, the EASA Safety Standards Consultative Committee is supported by five groups, covering the following sectors of civil aviation: (i) flight standards, (ii) design and manufacturing, (iii) engineering and maintenance, (iv) aerodromes, and (v) air traffic management. See, European Aviation Safety Agency (2010), p. 6.
Another respondent from the EBA Banking Stakeholder Group added further clarity to the matter,

> There is a tight time-frame, but usually we can deal with that. That has to do with the fact that we have to prioritise the items that we deal with and not be seduced to say a word on every single document that we are dealing with. So you have to limit the number of documents that you want to comment on. And usually we do; in the Banking Stakeholder Group meetings there might be four or five documents and that is what we can handle. (Respondent #15)

In summary, it appears that in the case of the EASA Safety Standards Consultative Committee the organisational aspect of debate is adequate and sufficient time is dedicated to discussion of different items on the agenda throughout the year. This is an important observation, given that any unfavourable organisational deficits could affect the fulfilment of the primary promises of quasi-regulatory participation, in particular more informed regulatory outcomes and the balancing of different interests (i.e. inclusiveness). The empirical evidence pertaining to participation in the EBA Banking Stakeholder Group has also shown the importance of prioritising different issues on the group’s agenda. Without prioritisation, the EBA participatory group will fail to discuss the relevant topics adequately and, thus, diminish the possibility of quality participant input.

**B) Engagement in Debate: Problematic Aspects**

From the above, it is clear that the members of the EASA Safety Standards Consultative Committee receive information from the agency in an untimely manner. Given that different facets of the overall quality of deliberation are interrelated and mutually dependent, this deficiency may negatively affect the level and the quality of debate. The respondents from the EASA consultative group generally perceived that the quality discussions in the group could be enhanced if they had more time to prepare ahead of meetings (Respondent #11, #13, #26, #28). A member of the Safety Standards Consultative Committee referred to the following inconveniences caused by delays in the submission of documents:

> Honestly speaking, there have been occasions when the chairman [of the Safety Standards Consultative Committee] should have said that the debate should not go on. Because the documents came too late and they are asking for a position from the members... but do not expect that to happen in one day. [The members of the group] also have the responsibility of internal consultation and coordination [with the background organisation which they represent], which did not happen. But until now, a meeting has not been postponed. If you postpone, you have to find another date, and that is one of those difficult things. (Respondent #11)

This shows that untimely provision of information can have serious repercussions for the quality of debate and the consequent delivery of the primary promises of participation as it affects the ability of participants to engage in debate. If participation in the EASA Safety Standards Consultative Committee aims to increase the range of (quality) information available to the
agency in the course of rulemaking and aims to ensure inclusiveness and responsiveness, then the fulfilment of such promises may be frustrated in this instance. What is at stake here is the quality of the eventual input of the consultative group. In other words, the EASA might not receive the best available and properly deliberated input from the participants and the participation effort as a whole will be impaired.

A different, but related deficiency in terms of debating was pointed out in the case of the EBA Banking Stakeholder Group. There the respondents indicated that the complexity of issues and inadequate knowledge about particular items on the agenda negatively affect the level of debate in the group. It can, in particular, sideline certain participants leading to the dominance of a smaller group of interests in debates. As explained by one member of the EBA Banking Stakeholder Group,

Not everybody is able to contribute to the same extent to some of the issues that are actually being discussed in the group. This is something that is very clear. There are just a few people who have thorough knowledge [of the issues] and even they have difficulties sometimes [because they are supposed to act in their personal capacity without the support of their background organisations]. So there are some topics on the agenda that I do not really deal with. Not because I do not care, it is because I do not understand them. And if you only have two or three people that are aware of some issues and the others are not, then you cannot expect a really good debate. [...] And then it is very easy for such people to dominate the whole group and their own views get a lot of credibility; because they seem to be shared by everybody, but the rest have absolutely no clue. (Respondent #19)

This is a relevant observation, given that inadequate engagement due to insufficient knowledge or inexperience may in fact jeopardise the quality of debate and undermine the credibility of the group’s eventual output. As observed with regard to access, taking into account the very technical remit of the EBA Banking Stakeholder Group, and the strict selection and appointment criteria, the membership in the group can be understood as a mix of interest representation and expertise. Therefore, in terms of the formal design, there should be no reason for a suboptimal level of debate on account of inadequate knowledge or expertise. Since the matter seems to be sufficiently regulated at the agency level (i.e. by means of detailed eligibility criteria and selection procedures), the responsibility rests with those who apply for a position at the Banking Stakeholder Group. This means that the individual candidates (and their background organisations who nominate them) should be aware of the nature of the EBA consultative group’s operation and ensure the most qualified representation of the interests concerned. An alternative solution, possibly a more suitable one, would be a change of the design of the Banking Stakeholder Group, allowing equal and transparent representation of the participants’ background organisations (instead of participation in individual capacity). This would mean that the members of the EBA consultative group could obtain the support of their background organisations. It is only in this manner that participation in the Banking Stakeholder Group can fully succeed in fulfilling the relevant promises of participation, especially in terms of increasing the range of quality information available to the EBA, and the inclusiveness (i.e. balancing of different interests) and responsiveness of the EBA rulemaking activities.
Another problematic aspect with regard to discussions in the EBA Banking Stakeholder Group is the fact that the agency primarily deals with capital and risk analysis, bank recovery, resolution and systemic issues, and much less with consumer related issues. In the words of a consumer representative in the EBA Banking Stakeholder Group,

In general [the level of involvement] very much depends on the point of focus of the EBA work. And I need to say that, in general – the EBA being a relatively young organisation and with the financial crisis taking place – the very emphasis of the EBA activities is on systemic issues and on credential legislation, and definitely not on consumer protection issues. So it is understandable that these issues are also more often on the schedule of the Banking Stakeholder Group. And because of the EBA inactivity in my field of interest [consumer protection], my capacity to engage is restricted.

What is problematic is not the fact that the EBA primarily deals with issues pertaining to the financial crisis, but rather that by including consumer representatives in the Banking Stakeholder Group, the agency signals to the outside world that it actually responds to such interests or concerns. This potentially builds a false trust or confidence of those situated outside the agency who might believe that the EBA is dealing with certain issues that affect them, whereas this, in fact, is not the agency’s primary concern. Arguably, this can negatively affect transparency and trust in the EBA rulemaking activities (on a broader scale), as well as the agency’s credibility as a whole.

In sum, it appears that the problems that were identified with regard to the provision of information, affect also the EBA and the EASA consultative groups’ debates. It is clear, in particular, that untimely submission of information and the complexity of issues discussed can negatively affect the engagement of interested parties in debate. The members of the consultative groups may find it difficult to cope with the issues on the agenda, which can result in a serious detriment to the overall quality of deliberation and the subsequent fulfilment of the primary promises (especially more informed outcomes, inclusiveness and responsiveness). This is particularly problematic because the benefits of being involved in such participatory forums can be diminished. However, it is highly doubtful that the shortcoming of the debate could be mended by a further regulation of this matter (i.e. regarding timely submission of information and addressing the complexity of issues). As observed, in the case of the EBA Banking Stakeholder Group, the design of the group as a whole needs to be reconsidered.

C) Reaching Decisions: The Rule of Consensus

Whenever the EASA Safety Standards Consultative Committee and the EBA Banking Stakeholder Group need to present a common position towards the respective agencies, decisions are generally reached by consensus.65 In this context, this means that the EASA and the EBA consultative groups will search for an agreement which is supported by all group members. We will show how

the members of the two participatory forums perceive such decision-making arrangements and identify possible deficits which could affect the fulfilment of the primary promises of participation, in particular, inclusiveness (i.e. balancing of different interests).

Generally, the respondents form the EASA Safety Standards Consultative Committee felt that they can adequately contribute to the common positions of the group. The respondents reported, in particular, that positions are reached by a sufficient level of common understanding, which each of the members can accept as a common view (Respondent #8, #11, #13, #26, #28). One of the members observed that,

In general, we manage to reach a common position. We had a couple of occasions where this was not completely possible, and in those cases, the differing positions were explicitly expressed in the final document. (Respondent #11)

However, another respondent from the EASA consultative group stated that, “there are very little items that may in fact cause a split between the stakeholders in the group” (Respondent #28). On the whole, nothing in the empirical evidence suggests that the fulfilment of the envisaged promises of this form of participation, in particular, the inclusiveness of different interests, is affected in any way by the consensus rule.

By contrast, in the case of the EBA Banking Stakeholder Group, certain respondents were displeased with the manner in which the common views are adopted. While a certain level of dissatisfaction with the decision-making is inevitable in any participatory forum, the reasons for discontent are problematic in terms of fulfilling the promise of inclusiveness (i.e. balancing of different, possibly conflicting interests). Even though the views of the EBA consultative group should generally be adopted by consensus, according to the respondents, the actual decision-making process is far from clear. In the words of one member of the EBA Banking Stakeholder Group,

What is the work of the group? The work of the group is to issue recommendations on the EBA papers. This should be the concrete output of the group. But that is not done in the meetings; that is done outside the meetings and in a very untransparent approval procedure for that. A lot of work is done in the sub-committees and the positions are drafted by somebody [a member] who volunteers. In practice there will be two people who drive the process. [...] At some point the final product is presented and then maybe two or three people are reacting to this and nothing is really decided. Maybe somebody says “do you agree, do you disagree?”, but I do not think that everybody is aware of what we are actually agreeing or disagreeing with. It is almost like it is done by implicit consensus and that is a problem, as these things get weight because they are assumed to be thoroughly debated by all these different interests and they are not. It is the opinion of one or two people and sometimes these things do not really get the legitimacy from the whole group. (Respondent #19)

Another member also referred to the rather ambiguous way in which the positions of the EBA Banking Stakeholder Group are adopted. In his own words,
The [sub-committees of the Banking Stakeholder Group] cover particular areas of the EBA work. This means that some members are preparing views on very specific issues, capital for instance. They come to an agreement in this working group and then propose it to the rest of the Banking Stakeholder Group members, and then usually there is a kind of consensus “this is it”. (Respondent #15)

On the whole, this shows that the problem is not with the consensus rule, as such, but rather with its practical implementation. In theory, the consensus decision-making process promotes deliberation of different, possibly conflicting views, and furthers an outcome which is in the best interest of the participatory group as whole. In practice, the actual approach to decision-making in the EBA consultative group may have significant repercussions regarding the degree to which particular interests are represented in the outcomes of the EBA Banking Stakeholder Group. In fact, this situation can seriously impinge upon the promise of inclusiveness. Additionally, it is problematic because it creates a false feeling of credibility and trust to those interested parties situated outside the group. These tensions are ever greater if combined with a suboptimal level of discussion. At the very least, all participants should fully understand what they are agreeing to and should be acquainted with the consequences of the group’s decisions.

6.2.3 Input and Recognition: Marginal Uptake

The EASA Safety Standards Consultative Committee provides for the inclusion of the insights of interested parties at the earliest stage of the agency’s rulemaking process (regarding content, priorities and execution of the EASA rulemaking programme, on preliminary regulatory impact assessment and on terms of reference of the rules under development), whereas the EBA Banking Stakeholder Group responds to the agency’s consultations on draft regulatory or implementing technical standards, guidelines and recommendations. But what are the actual outcomes of this form of participation? How does quasi-regulatory participation, in the manner that is envisaged in the EASA and the EBA, *de facto* influence the rulemaking process of agencies? These questions will be addressed in turn.

In the case of the EASA Safety Standards Consultative Committee, members generally present their views on the topics specified in meetings. In the words of one respondent from the EASA consultative group,

During the sub-committee meetings the members present their views and opinions. And in the full meeting, the reporters from the sub-committees give presentations of the discussions. In the meetings, the agency representatives always respond directly to the issues that were brought up and, whenever they can, always respond immediately. Sometimes they cannot immediately provide feedback, but that is fine. They say, “We will take this back and we will let you know.” And that is done. (Respondent #28)
The input of the members of the EASA consultative group and the agency’s responses are then recorded in the meeting minutes, which are published on the agency’s website. In addition, the EASA Safety Standards Consultative Committee may submit its contributions in the form of written opinions; however, according to one of the respondents from the EASA consultative group, “very often the discussions and our presentations during the meetings are clear enough and a follow-up is not needed” (Respondent #26).

By contrast, the EBA Banking Stakeholder Group generally produces its input in the form of written opinions, which are published on the EBA website. Moreover, the exchange of views with the agency (the executive director and the EBA staff) takes place immediately in the meetings, and is subsequently documented in the minutes of the consultative group. However, as observed by one respondent from the Banking Stakeholder Group,

> If you put your positions [i.e. concrete responses to draft rules] forward in writing and you make them public for the whole world to see, you have more impact than if you only have a verbal discussion. Sometimes, the meeting minutes do not fully recollect the views of stakeholders; they may be whatever the secretary [who drafts the minutes] understood were the issues. (Respondent #15)

This indicates that, in general, the nature and the form of the contribution of the EASA Safety Standards Consultative Committee and the EBA Banking Stakeholder Group correspond to the previously identified promises of participation, especially the promise of more informed agencies’ rulemaking. For a better visualisation, the table below provides an overview of the results of quasi-regulatory participation.

<table>
<thead>
<tr>
<th>Quasi-Regulatory Participation</th>
<th>EBA Banking Stakeholder Group</th>
<th>EASA Safety Standards Consultative Committee</th>
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<td>- Publication of responses, comments and reports on the EBA website.</td>
<td>- Publication of the meeting minutes on the EASA website.</td>
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<tr>
<td></td>
<td>- Publication of meeting minutes on the EBA website.</td>
<td>- Exchange of views with the EASA representatives in the meetings.</td>
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<td>- Exchange of views with the executive director and the EBA representatives in the meetings.</td>
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Nevertheless, concerning the actual uptake of the positions that the two consultative groups provide to their respective agencies, the respondents generally reported that this is rather restricted and difficult to monitor. As explained by one member of the EASA consultative group,

> Regarding the EASA rulemaking plan, our influence is limited and that is specifically due to the limited financial resources that the agency has. [...] So I understand why the EASA cannot always follow our advice, but on the other hand, there is a certain level of disappointment that this is not happening. The influence on the actual terms of reference for specific rulemaking tasks is somewhat higher, but also there we absolutely do not have a final say, that is clear. It is the agency that makes the final decision. (Respondent #11)

66 According to EBA founding regulation, the agency is legally obliged to make the opinions and advice of the Banking Stakeholder Group public. See, Art. 37(7) of Regulation (EU) No 1093/2010, as subsequently amended.
However, the EASA is not obliged to provide any explicit feedback as to whether and how the views of the Safety Standards Consultative Committee were taken into consideration. In fact, if the contributions of the EASA consultative group lead to changes in the agency’s rulemaking programme or to changes in the specific terms of reference, this can only be observed indirectly. In the words of one of the EASA consultative group’s respondents,

Sometimes you can see changes if you look at the final drafts of the agency. But there is no explanation from the EASA that a certain change was initiated by the Safety Standards Consultative Committee. They [the EASA] certainly never indicate that “because of this and this, we did that and that”. (Respondent #28)

In the case of the EBA, the agency’s consultations with the Banking Stakeholder Group on draft rules coincide with public consultations. At the end of the consultation process, the EBA is under a legal obligation to make the results of its consultations public. However, the agency only provides general feedback to consultations (to both “internal” and “external” input) and is not obliged to provide a specific (i.e. separate) reasoning as to whether and how the views of the Banking Stakeholder Group were taken into account. In this regard, the respondents from the EBA consultative group reported that they have difficulties monitoring the extent to which the agency has actually taken their views into consideration (Respondent #15, #16, #19, #21).

Whereas neither the EASA nor the EBA have a legal obligation to provide individual written feedback to the input of the consultative groups, this would nevertheless be required for reasons of transparency. For example, the respective agencies could provide an annual overview of the issues discussed and demonstrate how they responded to the concerns of interested parties. This would also increase the visibility of agencies’ rulemaking towards all those interested parties who are not part of the consultative groups and reveal what the consultative groups achieve on behalf of the interests they represent. In the case of the EASA Safety Standards Consultative Committee, it is argued that if the members would receive specific feedback about why and how their views were or were not taken on board, this could also foster implementation and enhance compliance.

Concerning other matters, the empirical evidence indicates that the contributions of the EASA Safety Standards Consultative Committee and of the EBA Banking Stakeholder Group first and foremost positively contribute to the range of information available to the agencies when drafting rules. However, on the basis of the inquiry into the timeliness of the provision of documents and the complexity of issues dealt with, it can be argued that the input of consultative groups could be further improved. In particular, if the EASA would provide the relevant information to the Safety Standards Consultative Committee in a more timely manner (i.e. at least within the prescribed deadline) and if the members of the EBA Banking Stakeholder Group were sufficiently knowledgeable and experienced to deal with complex and highly technical matters, then the contributions of the two consultative groups could reach an even higher level of quality and adequateness. Besides, this could additionally help the consolidation (balancing) of the participants’ views when needed.

67 Art. 37(7) of Regulation (EU) No 1093/2010, as subsequently amended.
68 This promise of participation was identified in the case of the EASA Safety Standards Consultative, but not with regard to the EBA Banking Stakeholder Group.
Moreover, in terms of the promises of participation it is argued that the contribution of the EASA and the EBA consultative groups enhances the responsiveness of agencies’ rulemaking to the needs of the regulated sector; however, the degree to which the EASA and the EBA actually internalise such insights is not entirely clear. Finally, to the extent that the variety and complexity of issues dealt with in the consultative groups does not preclude some members from providing quality input, this form of participation promotes inclusiveness and balancing of various competing interests.

6.3 Conclusions

From the foregoing analysis, it is argued that the involvement of interested parties in regulatory matters, if properly executed, is valuable because it furthers the effectiveness and credibility of agencies’ rulemaking. Specifically, it was shown that, *prima facie*, quasi-regulatory participation by means of consultative stakeholder groups (i.e. the EBA Banking Stakeholder Group and the EASA Safety Standards Consultative Committee), intends to advance the effectiveness and credibility of agencies’ rulemaking for the following reasons. Formally, such participatory groups involve a wide variety of interested parties with different backgrounds (e.g. consumers, the banking sector, or various sectors of civil aviation) who are expected to possess relevant factual knowledge and experience. Their contributions may thus lead to more informed regulatory outcomes of the agencies (i.e. with regard to banking or aviation safety). Moreover, given the rather broad audiences (i.e. members with different backgrounds), this form of participation may be understood to ensure inclusiveness and the balancing of the possibly conflicting interests and to further the responsiveness of the agencies’ rulemaking process, which allows agencies’ (draft) rules to be more in harmony with the needs of the regulated sectors. Besides, assuming that the various interested parties, who are involved in such consultative groups, will eventually need to apply the rules once they are adopted, it is argued that quasi-regulatory participation is intended to promote implementation and advance the likelihood of spontaneous compliance. Finally, this form of participation may increase transparency and monitoring of agencies’ rulemaking activities. However, this purpose of participation is only implicit; in other words, rather than being the primary promises, these are a “spill-over” effect of other promises of participation that were explicitly identified above.

This rather descriptive assessment of the relevance of quasi-regulatory participation was oriented towards demonstrating how the mandates of the EBA and the EASA consultative stakeholder groups cohere with the evaluative framework based on the central promises of participation. The inquiry into *de facto* practices of access and the overall quality of deliberation, however, revealed several structural and practical deficiencies of this form of participation, especially with regard to the EBA, which are problematic in terms of the accomplishment of the intended promises.
To be precise, inadequate interpretation of the formal rules of access (e.g. regarding the selection procedure), leads to situations where different interests are not properly balanced and sufficiently represented in a participatory group. With respect to the EBA, we observed that the agency experienced some initial problems regarding the creation and the composition of the Banking Stakeholder Group. The result was that not all interested parties that matter for the fulfilment of the intended promises of this form of participation, especially the promise of inclusiveness and responsiveness, were de facto provided with an equal opportunity of access. Whereas this deficiency has presumably been addressed, we could observe further failures in the case of the EBA. The lack of clarity of what exactly the participatory arrangement entails is a realistic concern. As the empirical data attests, the members of the EBA Banking Stakeholder Group struggle with the formal role assigned to them (i.e. participation in individual capacity and representation of the affected interests to their best knowledge). It was shown that due to highly technical remit of the group, the members need to rely on the support of their background organisations, which can lead to situations where they are not transparently representing the stakeholder interests as such. Thus, there is a realistic risk of discrepancy between the EBA provisions and how the representation of different interests occurs in practice. What is at stake here is the representation of “broader” stakeholder concerns (e.g. of the banking industry or consumers) to the benefit of partial and unclear representation of the interests of the participants’ background organisations (e.g. of a particular bank or consumer organisation). On the whole, this situation is particularly problematic for the primary promises of inclusiveness, responsiveness, and more informed regulatory outcomes. Therefore, the EBA should take steps to explain in a clear and transparent manner on whose behalf the members of the Banking Stakeholder Group should act and whether and how they can obtain support from their background organisations, and outline the situations where this would (not) be permissible.

Second, with regard to the overall quality of deliberation the empirical evidence exposed further potential failures of quasi-regulatory participation. Issues, such as the untimely provision of information and the complexity of the documents provided, may result in an inadequate preparation of the consultative stakeholder groups. As the participants struggle to make any relevant contribution, this can possibly affect the fulfilment of the promise of more informed regulatory outcomes. In the case of the EASA Safety Standards Consultative Committee, the deficiency regarding untimely information (and subsequent inadequate debate) is insubstantial and could be easily addressed by the agency’s respect of its own rules on the timing of information. In the case of the EBA Banking Stakeholder Group, the problem of information is more thorough-going. The empirical evidence revealed that due to the complexity of information, the participants are not always sufficiently knowledgeable and experienced to prepare for the tasks they are entrusted with. It was observed, in particular, that some of the respondents did not feel fully capable of acting in their personal capacity (to their best personal knowledge), as formally envisaged, and expressed the need to consult with their background organisations. This relates to the tension in the execution of this participatory arrangement (i.e. impartial representation of broader stakeholder concerns vs. partial representation of the interests of particular background organisations). This situation might again have negative consequences for the fulfilment of the
promises of more informed regulatory outcomes, inclusiveness and responsiveness. The problems of quasi-regulatory participation in the EBA do not end here. In terms of the debate, it was observed that the knowledge and expertise of some members of the Banking Stakeholder Group fall short of what is expected for a proper operation of this group. This might result in situations where discussions and commenting are monopolised by a smaller group of more knowledgeable and experienced members, while the rest of the participants submit to the insights provided by the dominant group. This is particularly unsettling because the benefits of being a member of this consultative group are arguably considerably diminished. What also stands out is that, according to the empirical data, the opinions of the Banking Stakeholder Group are adopted by, in the words of one respondent, an “implied consensus”. This raises concerns regarding the extent to which different interests can actually participate in forming the outcomes of the group. In fact, this situation undermines the credibility of the EBA consultative group's input and, consequently, affects the fulfilment of the intended promises. Specifically, it can seriously impair the inclusiveness of participants and the diversity of information available to the EBA as a result of this form of participation. To conclude, it is argued that the problem lies with the formal design of the group. To be precise, the Banking Stakeholder Group members are caught between what is formally expected from them (i.e. participation in personal capacity) and what is actually needed for an effective accomplishment of their role (i.e. an accurate and informed representation of interests concerned).