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REPORT

from : Presidency
to : Council

No. Cion prop.: 13917/10 EF 117 ECOFIN 543 CODEC 879

Subject : Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions;
Regulation of the European Parliament and of the Council amending Regulation (EC) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No.../... conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions;
- General approach

I. INTRODUCTION

1. On 12 September 2012 the Commission in line with a mandate received from the Euro area summit of 29 June 2012 presented a package composed of two elements:
- A proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions¹ (the ECB Proposal) based on Article 127(6) TFEU;
 - A proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority)² (the EBA proposal) based on Article 114 TFEU.

¹ Document 13683/12.

² Document 13682/12.

2. The ECB Proposal aims to introduce a new Single Supervisory Mechanism (SSM), within which the ECB and national competent authorities (NCAs) will cooperate. The ECB will in particular carry out a wide range of key supervisory tasks over credit institutions in the Euro area Member States. With a view to maintaining and deepening the internal market, Member States whose currency is not the Euro will have the right to participate in the SSM.
3. The EBA Proposal aims to introduce the necessary changes to the EBA Regulation in order to avoid fragmentation of the internal market following the establishment of the SSM.
4. The European Economic and Social Committee adopted its opinion on the EBA Regulation on 15 November 2012. The European Central Bank adopted its opinion on the ECB Regulation and the EBA Regulation on 27 November 2012. The ECON Committee of the European Parliament adopted its reports on the proposals on 29 November 2012.
5. The European Council on 18-19 October 2012 concluded i.a.: "...the European Council invites the legislators to proceed with work on the legislative proposals on the Single Supervisory Mechanism (SSM) as a matter of priority, with the objective of agreeing on the legislative framework by 1 January 2013."³
6. The EBA Proposal is subject to the ordinary legislative procedure and the Presidency has held informal contacts with the European Parliament which has indicated its willingness to seek an agreement in first reading. The ECB Proposal will be decided according to the procedure set out in Article 127(6) of the Treaty (Unanimity in Council and consultation of the Parliament). Following an agreement in the ECOFIN, the Presidency therefore intends to undertake negotiations with the Parliament at an accelerated pace with a view to reaching an agreement between the institutions as soon as possible.
7. The ECOFIN Council examined the compromise proposals presented by the Presidency at its session on 4 December. Following this examination, the Coreper was mandated to re-examine the text with a view to submitting a compromise text for agreement to the ECOFIN Council on 12 December.

³ Document EUCO 156/12

8. In line with this conclusion, the Presidency is presenting a compromise text on both the ECB Proposal (doc. 17538/12 EF 301 ECOFIN 1050) and the EBA Proposal (doc. 17539/12 EF 302 ECOFIN 1051 CODEC 2993) with a view to agreement.

II. STATE OF PLAY

9. Following discussion on 10 December in COREPER, the Presidency considers that a very large measure of agreement has now been found on most of the text of the ECB Regulation, notwithstanding some key outstanding issues outlined below. On the EBA Regulation, the discussion now hinges on one single political issue, i.e. EBA voting arrangements as regards qualified majority voting (see immediately below). The most recent Presidency compromise texts, as set out in documents 17538/12 and 17539/12, take stock of discussions at the 10 December COREPER meeting.

A. The changes to voting modalities in the EBA (Article 1 (7) of the EBA Proposal):

10. The European Council on 18-19 October concluded i.a.: "There is a need to ensure the equitable treatment and representation of both euro and non-euro area Member States participating in the SSM. It is important to ensure a level playing field between those Member States which take part in the SSM and those which do not, in full respect of the integrity of the single market in financial services. An acceptable and balanced solution is needed regarding changes to voting modalities and decisions under the European Banking Authority (EBA) Regulation, taking account of possible evolutions in the participation in the SSM, that ensures non-discriminatory and effective decision-making within the Single Market. ..."
11. Following the discussion in Coreper on 10 December, the Presidency is now presenting a significantly amended text. It deviates from the Commission proposal in several key aspects, most particularly as regards the voting modalities within the EBA, in order to ensure a level playing field between those Member States which take part in the SSM and those which do not, in line with the European Council Conclusions.

12. In particular, where the Commission Proposal called for simple majority voting with at least three votes from participating and three votes from non-participating Member States respectively, the text now calls for double simple majority: a simple majority among both groups.
13. Where the EBA Regulation calls for voting by Qualified Majority, the Presidency invites the Council to choose between two options: the Commission Proposal, which proposes to leave the rules on Qualified Majority unchanged, Option A, and a Presidency proposal containing an additional safeguard for the non-participating Member States, Option B. This latter option stipulates that any qualified majority must contain at least a simple majority of members from participating and non-participating Member States respectively.

B. The distribution of competences and tasks and powers between the ECB and the NCAs (Article 5 of the ECB Proposal)

14. The **European Council** concluded i.a.: "The SSM will be based on the highest standards for bank supervision and the ECB will be able, in a differentiated way, to carry out direct supervision."
15. The **Commission Proposal** assigned a wide range of tasks to the ECB with regard to all credit institutions established in the Member States participating in the SSM, but was short on the respective roles of the ECB and the NCAs in their foreseen cooperation within the SSM.
16. Whilst stressing explicitly the basic principle of the ECB's responsibility for the effective and consistent functioning of the SSM, the **Presidency** has introduced a number of significant changes⁴, which aim to ensure a practical balance between the tasks of the ECB, which will be tasked with the direct supervision of all significant banks, and the national competent authorities which will be tasked with a number of supervisory tasks, under the overall responsibility of the ECB, for less significant banks.

⁴ See report to Council of 4 December, document 17143/12.

17. While the discussion in COREPER showed broad support for the Presidency approach, it further evidenced in particular the need to define with a sufficient degree of precision what constitutes a "less significant" bank. Following this debate, the Presidency has further fine-tuned the compromise text, but there is not yet full agreement among all delegations. The Presidency finds that the compromise text strikes the best achievable balance between the diverging views expressed and a good basis for an agreement in Council.

C. The Position of non-Euro Area Member States regarding certain decisions by the Governing Council (Article 6 (6abb) of the ECB Proposal)

18. The **Commission Proposal** set the principle that the NCA of any non-euro area Member State may enter into a close cooperation with the ECB, subject to a decision by the ECB, specifying the terms and conditions of that cooperation. The Presidency compromise has amended this provision significantly in particular with a view to ensuring the position of participating Member States whose currency is not the Euro. The Presidency now finds that the current text ensures a level playing field between all the participants in the SSM.
19. In particular, the Presidency has in Article 6 (6abb) suggested a provision to cater for the specific case where a non-euro area participating Member State does not agree with a draft decision of the Supervisory Board which is being submitted to the Governing Council.

D. The governance of the Supervisory Board (Article 19 of the ECB Proposal):

20. The **Commission Proposal** left several aspects of the functioning of the Supervisory Board (the body entrusted in this Regulation with preparing decisions to be ratified by the Governing Council) subject to further determination. In particular, the status of NCAs of non-euro area participating Member States was to be determined by future ECB rules of procedure. The rules reflecting adequate separation of the supervisory and monetary policy functions were missing in respect of the ECB representatives and the reference to a steering committee was not accompanied by clarifications, in particular, on its composition.

21. The **Presidency** has amended the Commission Proposal in several respects⁵. The latest discussions in COREPER evidenced, however, some degree of divergence on two key aspects:
- the balance between Member States in the voting rules, Article 19 (2b) and the steering Committee, Article 19 (4a)
 - the separation between the monetary policy functions and the supervisory powers of the ECB, Article 18 and Article 19 (2) and (2a).

The Presidency finds that the compromise text strikes the best achievable balance between the diverging views expressed and a good basis for an agreement in Council.

E. Phasing in, and entry into force, of the SSM (Article 27-28 of the ECB Proposal)

22. The European Council concluded i.a.: "...the European Council invites the legislators to proceed with work ... with the objective of agreeing on the legislative framework by 1 January 2013... Work on the operational implementation (*of the SSM*) will take place in the course of 2013."
23. The **Commission Proposal** set out a phasing-in period where from the first day, the ECB would be empowered to take over the supervision of any bank in participating Member States if it so decides, in particular if the bank is receiving public financial assistance. For all other banks, ECB supervision would be phased in on 1 July 2013 for the most significant European banks, and on 1 January 2014 for all other banks.
24. Some delegations have questioned the phasing-in arrangements proposed by the Commission, and suggestions have been made by some delegations to seek a more flexible phasing-in arrangement with a possibility of a later completion of the implementation, thus leaving the ECB more time to prepare for the taking over of its new supervisory tasks.

⁵ See report to Council on 4 December, document 17143/12.

25. Discussions following the Council meeting on 4 December has shown support for differentiated phasing-in arrangements as set out in the Presidency compromise, pending agreement on the CRD4/CRR package for the entry into force of the ECB Regulation⁶.

F. Other provisions of the ECB Proposal:

26. In addition to the key outstanding issues outlined above, a number of limited issues, stressed by some delegations, remain outstanding.
27. This concerns, in particular, the following provisions:
- Article 2 - market infrastructures
 - Article 9 e.a. - ECB's right of access to information
 - Article 17b - nomination of the members of the review panel
 - Article 26 and recital 29a - structural changes in banking groups
 - Recital 10 - reference to the pillars of the Banking Union

The Presidency has aimed in its latest compromise on the ECB Proposal (doc. 17538/12) to address Member States' outstanding concerns to the extent possible, bearing in mind the need to maintain the proper balance between the differing views of delegations. The Presidency hopes that Member States, in a spirit of compromise, will be willing to support the compromise text as proposed, save for possible editorial drafting improvements.

III. CONCLUSION

28. The Presidency invites the Council to agree on both Proposals, based on the related Presidency compromises (doc. 17538/12 and 17539/12), and to mandate the Presidency to undertake negotiations with the European Parliament with a view to reaching an agreement as soon as possible.

⁶ On the basis of the intended political agreement, both in Council and with the European Parliament, being achieved early in 2013, the adoption and publication of the Regulations, following the necessary finalisation steps, can be expected to take place mid-Spring 2013. Attention is also drawn to the fact that, in parallel, one Member State has indicated the need to complete a parliamentary procedure taking approximately ten weeks as a prerequisite to that adoption.