



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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from:	Presidency
to:	Delegations
Subject:	Proposal for a regulation of the European Parliament and the Council establishing a European Banking Authority - Presidency compromise

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Delegations will find below a Presidency compromise on the above proposal, following the ECOFIN Council.

## Extracts of

### Proposal for a **REGULATION of the European Parliament and the Council establishing a European Banking Authority**

#### Article 5

The Authority shall have its seat in London.

#### Article 6(3)

Deleted

#### Article 6a (5)

The Authority may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in Article 1(2) or if so required in the case of an emergency situation in accordance with and under the conditions laid down in article 10.

**The authority shall review its decision at appropriate intervals and at least every three months. If the decision is not renewed after those three months, it shall automatically expire.**

**A Member State can appeal against the decision of the Authority. In that case, the Authority shall decide in accordance with Article 29(1) subparagraph 2, whether it maintains its decision.**

## Recital for Article 6a

Introduce a recital stating that "in cases where a temporary prohibition or restriction of certain financial activities has a cross-sectoral impact, sectoral legislation should provide that the Authority should coordinate its action with, where relevant, the ESMA and the EIOPA".

## Article 10 (1a)

The Council, in consultation with the Commission and the ESRB and, where appropriate, the European Supervisory Authorities, may adopt a decision addressed to the Authority, determining the existence of an emergency situation for the purposes of this Regulation, following a request by the Authority, the Commission or the ESRB. The Council shall review this decision at appropriate intervals and at least once a month. If the decision is not renewed after one month, it shall automatically expire. The Council may declare the discontinuation of the emergency situation at any time.

Where the ESRB or the ESAs deem that the existence of an emergency situation could be in the offing, they shall issue a confidential recommendation addressed to the Council and provide with an assessment of the situation. The Council will then assess the convenience of convening a meeting. In this process, due care of confidentiality shall be guaranteed.

If the Council determines the existence of an emergency situation, it shall duly inform the European Parliament and the Commission without delay.

### Article 10 (3)

Without prejudice to the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union, where a competent authority does not comply with the decision of the Authority referred to in paragraph 2 within the period laid down therein, the Authority may, where the relevant requirements laid down in the legislative acts referred to in Article 1(2) including in regulatory technical standards and implementing technical standards adopted in accordance with the legislative acts referred to in Article 1(2) are directly applicable to financial institutions, adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under that legislation, including the cessation of any practice. This shall only apply in situations in which a competent authority does not apply the legislative acts referred to in Article 1(2), including regulatory technical standards and implementing technical standards adopted in accordance with the legislative acts referred to in Article 1(2), or does apply them in a way which appears to be a manifest breach of those legislative acts, and where urgently remedying is necessary to restore the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the European Union.

Article 11 (1)

Without prejudice to the powers laid down in Article 9, where a competent authority disagrees on the procedure or content of an action or inaction by a competent authority of another Member State in cases specified in the legislation referred to in Article 1(2), the Authority, at the request of one or more of the competent authorities concerned may assist the authorities in reaching an agreement in accordance with the procedure set out in paragraphs 2 to 4.

**In cases specified in the legislation referred to in Article 1(2), and where on the basis of objective criteria, disagreement between competent authorities from different Member States can be determined, the Authority may, at its own initiative, assist the authorities in reaching an agreement in accordance with the procedure set out in paragraphs 2 to 4.**

Recital:

- (22) In order to ensure efficient and effective supervision and a balanced consideration of the positions of the competent authorities in different Member States, the Authority should be able to settle disagreements in cross-border situations between those competent authorities with binding effect, including within colleges of supervisors. A conciliation phase should be provided for, during which the competent authorities may reach an agreement. The Authority's competence should cover disagreements on the procedure or content of an action or inaction by a competent authority of a Member State in cases specified in the legislation referred to in Article 1(2) of this Regulation. In such a situation, one of the supervisors involved may raise the issue to the competent European Supervisory Authority, which should act in accordance with this Regulation. It may require the competent authorities concerned to take specific action or to refrain from action in order to settle the matter in order to ensure compliance with EU legislation, with binding effects for the competent authorities concerned. Where a competent authority does not comply with the settlement decision addressed to it, the Authority should be empowered to adopt decisions directly addressed to financial institutions in areas of Union law directly applicable to them. The power to adopt such a decision should apply only as a last resort and only to ensure the correct and consistent application of EU law. In cases where the relevant EU legislation confers discretion on Member States' competent authorities, decisions taken by the ESA cannot replace the exercise in compliance with European Union law of that discretion.

#### Article 11 (4)

Without prejudice to the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union, where a competent authority does not comply with the decision of the Authority, and thereby fails to ensure that a financial institution complies with requirements directly applicable to it by virtue of the legislation referred to in Article 1(2), the Authority may adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Community law, including the cessation of any practice.

#### Article 12

1. The Authority shall contribute to promote and monitor the efficient, effective and consistent functioning of the colleges of supervisors referred to in Directive 2006/48/EC and foster the coherence of the application of Union law across the colleges. With the objective to converge supervisory best practices, staff from the Authority shall be able to participate in the activities of the colleges of supervisors, including on-site examinations, carried out jointly by two or more competent authorities.
2. The Authority shall lead in ensuring a consistent and coherent functioning of supervisory colleges for cross-border institutions across the European Union, taking account of the systemic risk posed by financial institutions referred to in Article 12b.

For the purpose of this Article the Authority shall be considered a 'competent authority' within the meaning of the relevant legislation.

It may:

- (a) collect and share all relevant information in cooperation with the competent authorities in order to facilitate the work of the colleges of supervisors and establish and manage a central system to make such information accessible to the competent authorities in the colleges of supervisors;
- (b) initiate and coordinate Union-wide stress tests in accordance with Article 17 of Regulation .../... EBA to assess the resilience of financial institutions, in particular the systemic risk posed by financial institutions as referred to in Article 12b, to adverse market developments, and an evaluation of the potential for systemic risk to increase in situations of stress, ensuring that a consistent methodology is applied at the national level to such tests and, where appropriate, address a recommendation to the competent authority to correct issues identified in the stress test;
- (c) promote effective and efficient supervisory activities, including evaluating the risks to which financial institutions are or might be exposed as determined under the supervisory review process or in stress situations;
- (d) oversee, in accordance with the tasks and powers specified in this regulation, the tasks carried out by the competent authorities, and
- (e) request further deliberations of a college in any cases where it considers that the decision would result in an incorrect application of Union Law or would not contribute to the objective of convergence of supervisory practices. It may also require from the consolidating supervisor to schedule a meeting of the college or add a point to the agenda of a meeting.



3. The Authority may develop regulatory and implementing technical standards to ensure uniform conditions of application with respect to the provisions regarding the operational functioning of colleges and issue guidelines and recommendations adopted under Article 8 to promote convergence in supervisory functioning and best practices adopted by the colleges of supervisors.
  
- 3b. A legally binding mediation role should allow the Authority to resolve disputes between competent authorities in accordance with the procedure set out in Article 11. The Authority may take supervisory decisions directly applicable to the institution concerned in accordance with Article 11.

The Joint Committee may settle cross-sectoral disagreements between competent authorities in accordance with the procedures laid down in Articles 11 and 42.

#### Article 12 a

1. The Authority shall duly consider systemic risk as defined by Regulation (EU) No .../2010 [ESRB] meaning a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy and address risks of disruption in financial services that (i) is caused by an impairment of all or parts of the financial system and (ii) has the potential to have serious negative consequences for internal market and the real economy [Note: adjust this definition to final ESRB text]

The Authority shall consider, where appropriate, the monitoring and assessment of systemic risk as developed by the ESRB and the Authority and respond to warnings and recommendations by the latter in accordance with Article [17] of the ESRB Regulation.

2. **The Authority, in collaboration with the European Systemic Risk Board, shall develop a common set of quantitative and qualitative indicators (risk dashboard) to identify and measure systemic risk.**

**The authority shall also develop an adequate stress testing regime to help identifying those institutions that may pose systemic risk. These institutions shall be subject to strengthened supervision, and where necessary, to the recovery and resolution procedures referred to in Article 12 ca.**

3. Without prejudice to legislative acts referred to in Article 1(2), the Authority shall draw up, as necessary, additional guidelines and recommendations for financial institutions, to take account of the systemic risk posed by them.

The Authority shall ensure that the systemic risk posed by financial institutions is taken into account when developing draft regulatory and implementing technical standards in the areas laid down in the legislation referred to in Article 1(2).

4. On request of one or more competent authorities, the Council, the European Parliament, or the Commission, or on its own initiative, the Authority may conduct an inquiry into a particular type of financial institution or type of product or type of conduct in order to assess potential threats to the stability of the financial system and make appropriate recommendations for action to the competent authorities concerned.

For these purposes, the Authority may use the powers conferred on it under this regulation, including Article 20.

5. The Joint Committee shall ensure overall and cross-sectoral coordination of the activities carried out in accordance with this Article.

## Article 12 b

### Identification and measurement of systemic importance

1. The Authority shall, in consultation with the ESRB, develop criteria for the identification and measurement of systemic importance and an adequate stress testing regime which includes an evaluation of the potential for systemic risk posed by financial institutions to increase in situations of stress. **These institutions that may pose a systemic risk shall be subject to strengthened supervision, and where necessary, the recovery and resolution procedures provided in article 12 ca.**
2. The Authority shall fully take into account the relevant international approaches when developing the criteria for the identification and measurement of systemic risk posed by financial institutions, including those established by the FSB, the IMF and the BIS.

## Article 12 c

### Permanent capacity to respond to systemic risks

1. The Authority shall ensure it has specialised and ongoing capacity to respond effectively to the materialisation of systemic risks as referred to in article 12 a and b **and, in particular, with respect to institutions that pose a systemic risk.**
2. The Authority shall fulfil the tasks conferred to it under this Regulation, the legislation referred to in Article 1(2), and contribute to ensuring a coherent and coordinated crisis management and resolution regime in the EU.

## Article 12 ca

### Recovery and resolution procedures

1. The Authority shall contribute to and participate actively in the development and coordination of effective and consistent recovery and resolution plans, procedures in emergency situations and preventive measures to minimise the systemic impact of any failure.
2. The Authority may identify best practices aimed at facilitating the resolution of failing institutions and, in particular, cross border groups, in ways which avoid contagion, ensuring that appropriate tools, including sufficient resources, are available and allow the institution or the group to be resolved in an orderly, cost-efficient and timely manner.
3. The Authority may develop regulatory and implementing technical standards as specified in the legislative acts referred to in Article 1(2) in accordance with the procedure laid down in Articles 7 - 7d of this regulation.

## Article 12 d

### European System of Deposit Guarantee Schemes

1. The Authority shall contribute to strengthening the European system of national Deposit Guarantee Schemes (DGS) by acting under the powers conferred to it in this Regulation to ensure the correct application of directive 94/19/EC with the aim of ensuring that national deposit guarantee schemes are adequately funded by contributions from financial institutions including from those financial institutions established and taking deposits within the Union but headquartered outside the Union as provided for in directive 94/19/EC and provide a high level of protection to all depositors in a harmonised framework throughout the Union, which leaves the stabilising safeguard role of mutual guarantee schemes intact, provided they comply with the European Union legislation.

2. Article 8 concerning the Authority's powers to adopt guidelines and recommendations shall apply to deposit guarantee schemes.
3. The Authority may develop regulatory and implementing technical standards as specified in the legislative acts referred to in Article 1(2) in accordance with the procedure laid down in Articles 7 - 7d of this regulation.

#### Article 12 e

##### European System of Bank resolution and funding arrangements

1. The Authority shall contribute to developing methods for the resolution of failing financial institutions, **in particular those that may pose a systemic risk**, in ways which avoid contagion and allow them to be wound down in an orderly and timely manner, including , where applicable, coherent and robust funding mechanisms as appropriate.
2. The Authority shall contribute to the assessment of the need for a system of coherent, robust and credible funding mechanisms, with appropriate financing instruments linked to a set of coordinated national crisis management arrangements.

The Authority shall contribute to the work on the level playing field issues and cumulative impacts of any systems of levies and **contributions** on financial institutions that may be introduced to ensure fair burden sharing and incentives to contain systemic risk as a part of a coherent and credible resolution framework.

The review of this Regulation as provided for in Article x shall in particular examine the possible enhancement of the role of the EBA in a framework of crisis prevention, management and resolution, **the convergence of the European system of national Deposit Guarantee Schemes and, if necessary, the creation of a European Resolution Fund.**

Recitals linked to Articles 12 - 12e:

Convergence in the fields of crisis prevention, management and resolution, including funding mechanisms, is necessary in order to ensure that public authorities are able to resolve failing financial institutions whilst minimising the impact of failures on the financial system, reliance on taxpayer funds to bail out banks and the use of public sector resources, limiting damage to the economy, and coordinating the application of national resolution measures. In this regard it is imperative to develop a common set of rules on a complete set of tools for prevention and resolution of failing banks to deal in particular with the crisis of large, cross-border and/or interconnected institutions, and should assess the need to confer additional relevant powers to the Authority.

In the current review of the Deposit Guarantee Schemes Directive and the Investor Compensation Schemes Directive, the Commission 's intention to pay special attention to the need to ensure further harmonisation throughout the EU is noted. In the insurance sector, the Commission's intention to examine the possibility of introducing European rules protecting insurance policy holders in case of a failing insurance company is also noted.

The ESAs should play an important role in these areas and appropriate powers concerning the European Guarantee Scheme Systems should be conferred upon it.

Declarations **of the Commission** linked to Articles 12 - 12e:

In its Communication of 26 May 2010 on Bank Resolution Funds, the Commission emphasised that 'an appropriate first step could be a system based around the establishment of a harmonized network of national funds linked to a set of coordinated national crisis management arrangements.

The Commission confirms that it will make legislative proposals for a complete set of tools for prevention and resolution of failing banks in Spring 2011. This will ensure that public authorities are able to resolve failing financial institutions whilst minimising the impact of failures on the financial system, limiting damage to the economy and the use of public sector resources.

The Commission confirms that the ESAs should play an important role in these areas and that it will examine which powers concerning the tools for prevention and resolution of failing banks should be conferred upon it.

These arrangements are a first step and would be reviewed by 2014 with the aim of creating EU integrated crisis management and supervisory arrangements, as well as an EU Resolution Fund in the longer term.

The Commission confirms that it will make proposals for the revision of the Deposit Guarantee Schemes Directive to ensure further harmonisation of the rules to ensure effective protection for depositors throughout the EU in July 2010. In parallel, the Investor Compensation Schemes Directive will be revised to increase protection of investors, and in the insurance sector, a White Paper on Insurance Compensation Schemes will examine the possibility of introducing European rules protecting insurance policy holders in case of a failing insurance company.

#### Article 23

1. The Authority shall ensure that no decision adopted under Articles 10 or 11 impinges in any way on the fiscal responsibilities of Member States.
2. Where a Member State considers that a decision taken under Article 11 (3) impinges on its fiscal responsibilities, it may notify the Authority and the Commission within two weeks after notification of the Authority's decision to the competent authority that the decision will not be implemented by the competent authority.

In its notification, the Member State shall clearly and specifically explain why and how the decision impinges on its fiscal responsibilities.

In that case, the decision of the Authority shall be suspended.

Within a period of one month from the notification by the Member State, the Authority shall inform the Member State as to whether it maintains its decision or whether it amends or revokes it. If the decision is maintained or amended, the Authority shall state that fiscal responsibilities are not affected.

Where the Authority maintains its decision, the Council, shall take a decision by a majority of the votes cast, at one of its meetings at the latest two months after the Authority has informed the Member State as set out in the previous subparagraph, as to whether the Authority's decision is maintained.

Where the Council after having considered the matter, does not take a decision to maintain the Authority's decision, in accordance with the previous subparagraph, the Authority's decision shall be terminated.

3. Where a Member State considers that a decision taken under Article 10(2) impinges on its fiscal responsibilities, it may notify the Authority, the Commission and the Council within three working days after notification of the Authority's decision to the competent authority that the decision will not be implemented by the competent authority.

In its notification, the Member State shall clearly and specifically explain why and how the decision impinges on its fiscal responsibilities.

In that case, the decision of the Authority shall be suspended.

The Council shall, within ten working days, convene a meeting and take a decision, with a simple majority of its members, as to ,whether the Authority's decision is revoked.

Where the Council, after having considered the matter, does not take a decision to revoke the Authority's decision, in accordance with the previous subparagraph, the suspension of the Authority's decision shall be terminated.



- 3a. Where the Council has taken, in accordance with paragraph 3, a decision not to revoke a decision of the Authority relating to Article 10(2), and the Member State concerned still considers that that decision impinges upon its fiscal responsibilities, it may notify the Commission and the Authority and request the Council to re-examine the matter. The Member State concerned shall clearly set out the reasons for its disagreement with the decision of the Council.

Within a period of four weeks after the notification referred to in the previous subparagraph, the Council shall confirm its original decision or take a new decision in accordance with paragraph 3.

The period of four weeks may be extended by four additional weeks by the Council, if the particular circumstances of the case so require.

4. Any abuse of this Article, in particular in relation to a decision by the Authority which does not have a significant or material fiscal impact, shall be prohibited as incompatible with the internal market.

## Article 29

### *Decision making*

1. Decision of the Board of Supervisors shall be taken by simple majority of its members, according to the principle where each member has one vote.

With regard to acts specified in Articles 7 and 8 and measures and decisions adopted under Chapter VI and by way of derogation from the first subparagraph, the Board of Supervisors shall take decisions on the basis of a qualified majority of its members, as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol No 36 on transitional provisions annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

With regard to decisions in accordance with Article 11(3), for decisions taken by the consolidating supervisor, the decision proposed by the panel shall be considered as adopted, if approved by a simple majority, unless it is rejected by members representing a blocking minority of the votes as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol No 36 on transitional provisions annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

For all other decisions in accordance with Article 11(3), the decision proposed by the panel shall be adopted by a simple majority of the members of the Board of Supervisors according to the principle where each member has one vote.

2. Meetings of the Board of Supervisors shall be convened by the Chairperson at his or her own initiative or at the request of one third of its members, and shall be chaired by the Chairperson.
3. The Board of Supervisors shall adopt and make public its rules of procedure.
4. The rules of procedure shall set out in detail the arrangements governing voting, including, where appropriate, the rules governing quorums. The non-voting members and the observers, with the exception of the Chairperson and the Executive Director, shall not attend any discussions within the Board of Supervisors relating to individual financial institutions, unless otherwise provided for in Article 61 or in the legislation referred to in Article 1(2).

Article 66 (1) and (1a)

1. By ...\* and every three years thereafter, the Commission shall publish a general report on the experience acquired as a result of the operation of the Authority and the procedures laid down in this Regulation. That report shall evaluate, inter alia:

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\*OJ please insert date: three years after the date of application of this Regulation.

- a) the convergence in supervisory practices reached by competent authorities,
  - aa) the convergence in functional independence of the competent authorities and in standards equivalent to corporate governance;**
  - aaa) the impartiality, objectivity and autonomy of the Authority;**
- b) the functioning of the colleges of supervisors;
- c) progress achieved towards convergence in the fields of crisis prevention, management and resolution, including European funding mechanisms;
- d) the role of the Authority as regards systemic risk
- e) the application of the Safeguard clause established in Article 23

1a. The report referred to in paragraph 1 shall also examine whether:

- (a) it is appropriate to continue separate supervision of banking, insurance, occupational pensions, securities and financial markets;
- (b) it is appropriate to supervise prudential supervision and the conduct of business separately or by the same supervisor;
- (c) it is appropriate to simplify and reinforce the architecture of the ESFS in order to increase the coherence between the macro and the micro levels and between the ESAs;
- (d) the evolution of the ESFS is consistent with that of the global evolution;
- (e) there is sufficient diversity and excellence within the ESFS;
- (f) accountability and transparency in relation to publication requirements are adequate;
- (g) the resources of the Authority are adequate to carry out its responsibilities;**
- (h) the appropriateness of the seat of the Authority.**

**1b. Concerning the issue of direct supervision of institutions or infrastructures of pan-European reach and taking account of market developments, the Commission will draw up an annual report on the appropriateness of entrusting the Authority with further supervisory responsibilities in this area.**

**Commission Declaration on its intention to be provided by Commission**

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