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REPORT

from : Presidency

to : COREPER / 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;
- Orientation debate

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 12682/12.

2. The ECB Proposal aims to introduce a new Single Supervisory Mechanism (SSM), where the ECB will 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 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

In line with this conclusion, the Presidency intends to present a compromise text to the ECOFIN Council on 4 December with a view to agreement in Council.

5. 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). The Presidency therefore intends to intensify the contacts with the Parliament and to undertake negotiations with the Parliament at an accelerated pace as soon as possible, with a view to reaching an agreement between the institutions in line with the European Council conclusions.

II. STATE OF PLAY

6. In view of the high importance of these Proposals, the complexity of the subject matters and the tight timeline, the Coreper decided on 12 September to establish a temporary Ad-Hoc Working Party on the Banking Supervision Mechanism (BSM). The Ad Hoc Working Party has now met 4 times⁴ and has made considerable progress⁵.

³ Document EUCO 156/12

⁴ The AHWP met so far on 27-28 September, 11-12 October, 25-26 October and 5-6 November.

⁵ The most recent Presidency compromise texts are set out in documents 15718/12 and 15719/12

7. On a number of issues such as the separation within the ECB of monetary policy and supervisory functions (Article 18 of the ECB Regulation), an agreement is emerging, subject to finalisation of the drafting. Other (key) issues remain open and the Presidency finds that guidance from Ministers, in particular on the issues set out below, would be needed to permit the Ad Hoc Working Party to progress along the aforementioned timelines. The overarching issues are briefly outlined below.

A. The equitable treatment of euro-area and non-euro area Member States

8. 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. ..."
9. Two key issues are of particular importance in this respect:
- i. The status and role of non-euro area Member States who choose to participate in the SSM (under Articles 6 and 19 of the ECB Proposal)*

The Commission Proposal set the principle that the national competent authority (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 status of that NCA within the ECB Supervisory Board (the body entrusted in this Regulation with preparing decisions to be ratified by the Governing Council) was left unclear in the Regulation. Moreover, the ECB could unilaterally take the initiative of terminating the cooperation.

The Presidency has amended the Commission Proposal on all these aspects:

- In the Supervisory Board, all participating Member States will be treated equally (and therefore, non-euro area participating Member States will be voting members), in accordance with public rules of procedure to be adopted by the ECB's Governing Council (Article 19 of the ECB Proposal);
- Any concerned non-euro area Member State may take the initiative to force the termination of the close cooperation after the lapse of three years (Article 6).

Many Member States would have preferred going further by entrusting the Supervisory Board (instead of the Governing Council) with the institutional responsibility of taking the final supervisory decisions. Here, a clear legal constraint has been identified: the Treaty (TFEU) has only established, as the decision-making bodies of the ECB, the Governing Council and the Executive Board. Non-euro area Member States may not take part in the formal (final) decision on possible supervisory measures.

Against this backdrop, the Presidency has already introduced a number of safeguards for participating non-euro area Member States:

- a draft decision prepared by the Supervisory Board will be deemed to be adopted unless the Governing Council objects to it within a limited timeframe (3 weeks);
- the Governing Council may only object to (and not amend) that draft decision;
- it should then state its reasons in writing.

Discussions at the last working party on 5-6 November, showed that more work is needed to meet the concerns of delegations. Nonetheless the Presidency finds that these safeguards should lay the foundations for a satisfactory compromise, subject to further guidance from the Council, especially on the voting rights in the supervisory board.

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

The Commission Proposal amended EBA Regulation 1093/2010 in several respects, as regards voting mechanisms in the EBA's Board of Supervisors. In particular, it provided that, with regard to votes to be taken on draft binding mediation decisions (on matters related to alleged breaches of Union law or disagreements in cross-border situations), the simple majority rule would be complemented by the requirements for a minimum number of (3) votes from, respectively, euro-area Member States and, non euro area Member States.

Votes on matters covered by qualified majority requirements (typically, on draft regulatory standards to be proposed to the Commission) would however remain governed by the present rules.

In that respect, a number of Member States consider that the voting rules should still be further (thoroughly) reviewed, and allow for additional safeguards, e.g. in terms of double majority requirements, in all cases (including QMV).

Against this backdrop, the Presidency considers that further political guidance from the Council is needed to find the adequate balance between anti-discrimination safeguards for non-participating Member States and effective decision-making, in line with the above-quoted European Council conclusions.

Following the discussion in the Working Party on 5-6 November, the Presidency has decided in its forthcoming compromise to make it clear that when the EBA engages in binding mediation according to Article 19(3) of the EBA Regulation, all competent authorities, including the ECB acting in its supervisory capacity, will be treated equally.

B. The distribution of tasks between the ECB and the NCAs (Articles 4 and 5 of the ECB Proposal)

10. 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."

11. 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. Most of them have proved uncontroversial, except in particular those referring to so-called "macroprudential tools" (especially, the setting of buffers under Article 4(1)(e) of the ECB Proposal) and to the coordination of a single position of NCAs from Member States participating in the SSM.
12. The Commission Proposal was also short on the respective roles of the ECB and the NCAs in their foreseen cooperation within the SSM.
13. Without touching the basic principle of the ECB's exclusive responsibility, the Presidency has introduced a number of significant changes, which aim to establish the following supervisory architecture, without prejudice to further specifications:
 - The ECB will play a central role in that System and will make use of the powers provided under Article 4 in a differentiated way as specified in Article 5 (in line with the European Council conclusions);
 - The ECB will instruct, and be assisted by the NCAs, under the conditions set out in a framework to be elaborated in consultation with the NCAs of participating Member States, and formally adopted by the ECB;
 - The practical/operational arrangements thus put in place from the start of the system should be able to evolve in a dynamic way, taking also account of the evolution in the individual situation of any given (group of) credit institutions and its environment;
 - The ECB will in particular make use of direct investigatory powers, without prejudice to the sharing of information collected by NCAs;
 - The ECB will consult NCAs on draft decisions, and will duly state its reasons when it does not follow their proposals or advice;
 - In the EBA, the ECB will act as a (mere) competent authority alongside national competent authorities.

At the meeting of the Working Party on 5-6 November a number of proposals for improvements were made, especially on the exact competences to be granted to the ECB and on the modalities for cooperation between the ECB and the NCAs (see fifth indent above), and the Presidency will reflect on these when drawing up a revised compromise. The Presidency would also need political guidance on the right balance and distribution of work between the ECB and national authorities regarding the so-called "macroprudential tools", especially, the setting of buffers under Article 4(1)(e) of the ECB Proposal.

The question of granting and withdrawal of authorisation, Article 13 of the ECB Proposal, has given rise to concerns by some delegations which find that the key issue of access to and removal from the market should remain within the remit of national authorities. Some of these delegations have highlighted the link between withdrawal of an authorisation and resolution powers and find that until a resolution mechanism has been set up at EU level, the right to withdraw an authorisation should remain with national authorities. Compromise suggestions to amend the text in this respect were made at the last meeting of the Working Party and will be further considered by the Presidency with a view to preparing a revised compromise.

C. Phasing in of the SSM (Article 27 of the ECB Proposal)

14. The European Council concluded i.a.: " Work on the operational implementation (*of the SSM*) will take place in the course of 2013."
15. The Commission Proposal sets out a phasing-in period where from the first day, the ECB will 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 will be phased in automatically: on 1 July 2013 for the most significant European systemically important banks, and on 1 January 2014 for all other banks.
16. Some delegations have questioned the phasing-in arrangements proposed by the Commission and suggestions have been made to seek a more flexible phasing-in arrangement, thus leaving the ECB more time to prepare for the taking over of its new supervisory tasks.

17. Against this background, the Presidency finds that further political guidance is needed to finalise the necessary timelines.

III. CONCLUSION

18. The Presidency invites the Council to take note of the progress made on the two Proposals and of the intention of the Presidency to submit the Proposals to the ECOFIN on 4 December with a view to agreement in Council. The Presidency accordingly invites the Council to provide additional guidance, particularly as regards the overarching issues outlined above.
