



EUROPEAN COMMISSION

Brussels, 12.9.2012  
COM(2012) 512 final

2012/0244 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Regulation (EU) 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**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

Today, the solidity of the banking sector is in many instances still closely linked to the Member State in which they are established. Doubts about the sustainability of public debt, economic growth prospects, and the viability of credit institutions have been creating negative, mutually reinforcing market trends. This may lead to risks for the viability of some credit institutions as well as for the stability of the financial system, and may impose a heavy burden for already strained public finances of the Member States concerned.

The situation poses specific risks within the euro area, where the single currency increases the likelihood that developments in one Member State can create risks for economic development and the stability of the Euro area as a whole. Furthermore, the current risk of financial disintegration along national borders significantly undermines the Single Market for financial services and prevents it from contributing to economic recovery.

The establishment of the European Banking Authority (EBA) by Regulation (EU) No. 1093/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), and of the European System of Financial Supervision (ESFS) already contributed to improved cooperation between national supervisors and to the development of a single rulebook for financial services in the EU. However, supervision of banks remains to a large extent within national boundaries and thereby fails to keep up with integrated banking markets. Supervisory failings have, since the onset of the banking crisis, significantly eroded confidence in the EU banking sector and contributed to an aggravation of tensions in euro area sovereign debt markets.

The Commission has therefore called in May 2012, as part of a longer term vision for economic and fiscal integration, for a banking union to restore confidence in banks and in the euro. One of the key elements of the banking union should be a Single Supervisory Mechanism (SSM) with direct oversight of banks, to enforce prudential rules in a strict and impartial manner and perform effective oversight of cross border banking markets. Ensuring that banking supervision across the Euro area abides by high common standards will contribute to build the necessary trust between Member States, which is a pre-condition for the introduction of any common backstops.

At the Euro area summit on 29 June, 2012, the Heads of State or Government have called on the Commission "to present proposals for the setting up of a single supervisory mechanism shortly. When such a mechanism will be in place for banks in the euro area the ESM could, following a regular decision, have the possibility to recapitalize banks directly". The European Council conclusions of the meeting held on the 28/29 June 2012 state that this Euro Area statement and the proposals that the Commission will present accordingly should take into account the development of "a specific and time-bound road map for the achievement of a genuine Economic and Monetary Union".

Under this new mechanism, 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, other Member States will be allowed to enter into close collaboration with the ECB.

To avoid fragmentation of the internal market following the establishment of the single supervisory mechanism, the proper functioning of the EBA needs to be ensured. The role of the EBA should therefore be preserved in order to further develop the single rulebook and ensure convergence of supervisory practices over all EU.

Along with the proposal for a Council Regulation conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions in accordance with Article 127(6) TFEU, this proposal introduces targeted amendments to the Regulation establishing the European Banking Authority.

## **2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS**

The Commission has taken into account the analysis done in the context of the adoption of the "supervisory package" creating the European Supervisory Authorities, which assessed operational, governance, financial and legal aspects relevant to the establishment of a SSM. The preparation of a formal impact assessment was not possible within the timetable set by the Euro area Summit of 29 June.

## **3. LEGAL ELEMENTS OF THE PROPOSAL**

The proposal is based on Article 114 TFEU since it amends Regulation (EU) No. 1093/2010 adopted under the same legal basis.

The proposal is limited to an adjustment of the procedural modalities under which the EBA operates to take account of the conferral of supervisory tasks on the ECB and to ensure that the EBA can continue to pursue its functions to protect the integrity, efficiency and orderly functioning of the internal market for financial services and maintaining the stability of the financial system within the internal market. It does not alter the balance of respective competences between the EBA and national authorities. The provisions in the proposal do not go beyond what is strictly necessary to achieve the objectives pursued. The proposal is therefore in line with the principles of subsidiarity and proportionality set out in Article 5 of the Treaty on the European Union.

## **4. DETAILED EXPLANATION OF THE PROPOSAL**

### *EBA powers, in particular binding mediation/emergency situations*

The wording of Articles 4, 18(1) and 35(1) to (3) is amended to ensure that EBA can carry out its tasks also in relation to the ECB by clarifying that the notion of "competent authorities" includes also the ECB, as it does in the other articles which make reference to "competent authorities".

In order to ensure that the EBA can carry out its tasks to settle disagreements and act in emergency situations also in relation to the ECB, in Articles 18 and 19, paragraphs 18(3a) and 19(3a) are introduced to provide for a specific procedure in relation to the decision taken by the EBA under Article 18(3) or 19(3). The procedure provides that if the ECB does not comply with an action by EBA to settle a disagreement or to address an emergency situation, it should be required to explain its reasons. In that unlikely case, where the relevant

requirements are set out in directly applicable Union law, the EBA can adopt an individual decision addressed to the financial institution concerned to enforce its action, and it is normally expected to do so. This will ensure full enforceability of EBA's settlement of a disagreement and its action in an emergency situation.

### *Voting modalities*

The fact that the ECB will coordinate the position of the Euro area Member States requires a review of the voting modalities currently provided for in the EBA regulation, in order to ensure that EBA decisions are taken in the interest of maintaining and strengthening the internal market for financial services.

Under the EBA Regulation, decisions concerning regulatory matters (binding technical standards, guidelines and recommendations provided for in Articles 10, 15 and 16, and decisions to reconsider restrictions on financial activities provided for in Article 9.5) as well as budgetary matters (Chapter VI) are taken by the Board of Supervisors on the basis of a qualified majority of its members, as defined in Article 16(4) TEU and Article 3 of the Protocol No 36 on transitional provisions.

Decisions on other issues (e.g. on breach of law according to Article 17, on settlement of disagreement under Article 19, on the election of Management Board) are adopted by the Board of Supervisors by simple majority of the voting members according to the rule "one man one vote".

If voting rights remain unchanged, it cannot be ensured that decisions taken by simple majority will always represent the interests of the Union as a whole. Voting arrangements need therefore to be adjusted in some specific cases of simple majority to ensure that the integrity of the internal market remains preserved while avoiding at the same time the risk of paralysing the EBA decision making.

The best option identified to achieve this objective is to confer decision making powers on an independent panel and provide for a strong reverse voting mechanism which will ensure that the proposal prepared by the independent panel is supported by Euro area and non-Euro area Member States. This will also ensure that Euro area Member States cannot have a blocking minority in case of actions taken against one of them.

Article 41 of the EBA Regulation is therefore amended in order to confer stronger decision making powers to the independent panel on breaches of EU law and settlement of disagreements, and adapt rules on its composition accordingly.

Article 44 of the EBA Regulation is amended to provide that the decisions proposed by the independent panel are adopted unless they are rejected by a simple majority, including at least three votes of participating Member States and non-participating Member States. A specific provision is added on the appointment of the independent panel.

### *Composition of the Management Board*

In view of the decisive influence of members from Member States participating in or closely cooperating with the single supervisory mechanism when electing the Management Board (simple majority of members present), members from Member States not participating in the SSM could not be appropriately represented adequately in the Management Board. To ensure a balanced composition of the Management Board, reflecting the EU as a whole and including

Member States not participating in the single supervisory mechanism, the proposal amends the composition of the Management Board of the EBA to ensure that at least two members from Member States not participating in the single supervisory mechanism are represented in the Management Board.

Article 45 of the EBA Regulation is therefore amended to ensure that the Management Board includes at least two Member States which are not participating in the SSM.

*Review of voting modalities in light of future developments*

Finally, in order to take into account any developments in the number of Member States whose currency is the Euro or whose competent authorities have entered into a close cooperation in accordance with Article 6 of Regulation .../..., the Commission is required to review the proposed provisions to examine whether in light of such developments any further adjustments are necessary to ensure that EBA decisions are taken in the interest of maintaining and strengthening the internal market for financial services.

## **5. BUDGETARY IMPLICATION**

The proposal has no implications for the EU budget.

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Having regard to the opinion of the European Central Bank<sup>2</sup>

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) On 29 June 2012, the Euro area Heads of State or Government have called on the Commission to present proposals to provide for a single supervisory mechanism involving the European Central Bank (ECB). The European Council in its conclusions of 29 June 2012 invited the President of the European Council to develop, in close collaboration with the President of the Commission, the President of the Eurogroup and the President of the ECB, a specific and time-bound road map for the achievement of a genuine Economic and Monetary Union, which includes concrete proposals on preserving the unity and integrity of the Single Market in financial services and which takes account of the Euro Area statement and the intention of the Commission to bring forward proposals based on Article 127 of the Treaty on the Functioning of the European Union (TFEU).
- (2) The provision for a single supervisory mechanism is the first step towards the creation of a European banking union, underpinned by a true single rulebook for financial services and composed also of a common deposit insurance and resolution framework..

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

- (3) In order to provide for the single supervisory mechanism, Council Regulation (EU) No .../...<sup>3</sup>[127(6) Regulation] confers specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions in the Member States whose currency is the euro. Other Member States may enter in a close cooperation with the ECB. Under that Regulation, the ECB is to coordinate and express the position of those Member States on the decisions to be taken by the Board of Supervisors of the European Banking Authority (EBA) falling within the scope of the ECB tasks.
- (4) The conferral of supervisory tasks to the ECB in the banking sector for part of the Member States of the Union should not in any way hamper the functioning of the internal market in the field of financial services. It is therefore necessary to ensure the proper functioning of the EBA following that conferral.
- (5) In view of the supervisory tasks conferred on the ECB by Council Regulation (EU) No .../... [127(6) Regulation], EBA should be able to carry out its tasks also in relation to the ECB. In order to ensure that existing mechanisms for settlement of disagreements and actions in emergency situations remain effective, a specific procedure should be provided for. In particular, if the ECB does not comply with an action by EBA to settle a disagreement or to address an emergency situation, it should be required to explain its reasons. In that case, whenever based on requirements set out in directly applicable Union law EBA can adopt an individual decision addressed to the financial institution concerned, it should do so.
- (6) In order to ensure that interests of all Member States are adequately taken into account and to allow for the proper functioning of the EBA with a view to maintain and deepen the internal market in the field of financial services, the voting modalities within the Board of Supervisors should be adapted, in particular with regard to decisions taken by the EBA at simple majority.
- (7) Decisions concerning breaches of Union law and settlement of disagreements should be examined by an independent panel composed of voting members of the Board of Supervisors which do not have any conflicts of interest, appointed by the Board of Supervisors. The decisions proposed by the panel to the Board of Supervisors should be considered as adopted unless rejected by a simple majority, which should include an adequate number of votes from members from Member States participating in the SSM and from Member States that do not participate in the SSM.
- (8) The members of the independent panel set up according to Article 41(2) of Regulation (EU) No 1093/2010 should not be considered to be in a situation of conflict of interest on the sole ground that they are representatives of competent authorities which are part of the SSM and a given case to be decided upon by the Panel concerns the SSM. The EBA should develop rules of procedure for the panel that ensure its independence and objectivity.
- (9) The composition of the Management Board should be balanced and proper representation of Member States not participating in the SSM should be ensured.
- (10) In order to ensure the proper functioning of the EBA and adequate representation of all Member States, the voting modalities, the composition of the Management Board, and

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the composition of the independent panel should be reviewed after an appropriate period of time taking into account any experience gained and further developments.

- (11) Since the objectives of this Regulation, namely ensuring a high, effective and consistent level of prudential regulation and supervision across the European Union, protecting the integrity, efficiency and orderly functioning of financial markets and maintaining the stability of the financial system, cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS REGULATION:

### *Article 1*

Regulation (EU) No 1093/2010 is amended as follows:

1. Article 4(2)(i) is replaced by the following:

"(i) Competent authorities as defined in Directives 2006/48/EC and 2006/49/EC, including the ECB for matters related to the tasks conferred upon it by Council Regulation (EU) No .../...\*[127(6) TFEU Council Regulation], in Directive 2007/64/EC, and as referred to in Directive 2009/110/EC.

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\* OJ L ..., ....., p.... "

2. Article 18 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. In the case of adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the Authority shall actively facilitate and, where deemed necessary, coordinate any actions undertaken by the relevant competent supervisory authorities.

In order to be able to perform that facilitating and coordinating role, the Authority shall be fully informed of any relevant developments, and shall be invited to participate as an observer in any relevant gathering by the relevant competent supervisory authorities."

(b) the following paragraph is inserted after paragraph 3:

"3a Where the Authority requests the ECB as competent authority to take the necessary action in accordance with paragraph 3,, the ECB shall comply with it or shall provide within 48 hours at the latest adequate justification to the Authority for its non-compliance."

3. In Article 19 the following paragraph is inserted after paragraph 3:



"3a. Where the Authority requests the ECB as competent authority to take specific action or to refrain from action in accordance with paragraph 3,, the ECB shall comply with it or shall within ten working days of the receipt of the request provide adequate justification to the Authority for its non-compliance."

4. In Article 35, paragraphs 1, 2 and 3 are replaced by the following:

"1. At the request of the Authority, the competent authorities shall provide the Authority with all the necessary information to carry out the duties assigned to it by this Regulation, provided that they have legal access to the relevant information and that the request for information is necessary in relation to the nature of the duty in question.

2. The Authority may also request information to be provided at recurring intervals and in specified formats. Such requests shall, where possible, be made using common reporting formats.

3. Upon a duly justified request from a competent authority, the Authority may provide any information that is necessary to enable the competent authority to carry out its duties, in accordance with the professional secrecy obligations laid down in sectoral legislation and in Article 70."

5. Article 41, paragraphs 2, 3 and 4 are replaced by the following:

"2. For the purposes of Article 17 and 19, the Board of Supervisors shall establish an independent panel consisting of the Chairperson and two members appointed by the Board of Supervisors among its voting members. At least one member of the independent panel shall be from a Member State which is not a participating Member State in accordance with Regulation (EU) No .../... [127(6) TFEU Council Regulation].

The members of the panel shall act independently and objectively in accordance with Article 42, shall not be representatives of the competent authority concerned or of the competent authorities which are party to the disagreement.

3. The panel shall propose a decision for final adoption by the Board of Supervisors, in accordance with the procedure set out in the third subparagraph of Article 44(1).

4. The Board of Supervisors shall adopt rules of procedure for the panel referred to in paragraph 2, including rules implementing the requirement set out in the second subparagraph of that paragraph."

6. In Article 42 the following paragraph is added:

"The first and second paragraphs are without prejudice to the tasks conferred upon the ECB by Regulation (EU) No .../... [127(6) TFEU Council Regulation]."

7. Article 44(1) is replaced by the following:

"1. Decisions of the Board of Supervisors shall be taken by a simple majority of its members. Each member shall have one vote.

With regard to the acts specified in Articles 10 to 16 and measures and decisions adopted under the third subparagraph of Article 9(5) and Chapter VI and by way of derogation from

the first subparagraph of this paragraph, 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.

With regard to decisions in accordance with Articles 17 and 19, the decision proposed by the panel shall be considered as adopted unless it is rejected by a simple majority which shall include at least three votes from members of participating Member States and three votes from members of Member States which are neither participating Member States in accordance with Regulation (EU) No .../... [127(6) TFEU Council Regulation] nor have entered into close cooperation with the ECB in accordance with that Regulation

By derogation from the third subparagraph, from the date when four or less Member States are neither participating Member States in accordance with Regulation (EU) No .../... [127(6) TFEU Council Regulation] nor have entered into close cooperation with the ECB in accordance with that Regulation, the decision proposed by the panel shall be considered as adopted unless it is rejected by a simple majority which shall include at least one vote from members of those Member States.

Each member shall have one vote.

With regard to the composition of the panel in accordance with Article 41(2), the Board of Supervisors shall strive for consensus. In the absence of consensus, decisions of the Board of Supervisors shall be taken by a majority of three quarters of its members. Each member shall have one vote."

8. In Article 45(1), the third subparagraph is replaced by the following:

"The term of office of the members elected by the Board of Supervisors shall be 2 1/2 years. That term may be extended once. The composition of the Management Board shall be balanced and proportionate and shall reflect the Union as a whole. The Management Board shall include at least two representatives from Member States which are not participating Member States in accordance with Regulation [127(6) TFEU Council Regulation] nor have entered into close cooperation with the ECB in accordance with that Regulation. Mandates shall be overlapping and an appropriate rotating arrangement shall apply."

## *Article 2*

Without prejudice to Article 81 of Regulation (EU) No 1093/2010, by 1 January 2016, the Commission shall publish a report on the application of the provisions of this Regulation in relation to:

- (a) the suitability of the voting modalities;
- (b) the composition of the Management Board; and
- (c) the composition of the independent panel preparing decisions for the purposes of Articles 17 and 19.

The report shall take into account in particular any developments in the number of Member States whose currency is the Euro or whose competent authorities have entered into a close cooperation in accordance with Article 6 of Regulation .../... and shall examine whether in

light of such developments any further adjustments of those provisions are necessary to ensure that EBA decisions are taken in the interest of maintaining and strengthening the internal market for financial services.

*Article 3*

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*