

European Securities and Markets Authority (ESMA)

2009/0144(COD) - 07/07/2010 - Text adopted by Parliament, partial vote at 1st reading/single reading

The European Parliament adopted amendments, by 611 votes to 33 with 41 abstentions, at first reading under the ordinary legislative procedure (formerly known as the codecision procedure), to the proposal for a regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority.

The vote on the legislative resolution was postponed to a future plenary session. The main amendments to the Commission's proposal were as follows:

Establishment and scope of action: Members clarified that the Regulation establishes a European Supervisory Authority (European Securities and Markets Authority, or **ESMA**). The objective of the Authority shall be to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses. The Authority shall contribute to: (i) preventing regulatory arbitrage and contributing to equal conditions of competition, (ii) ensuring the taking of investment and other risks are appropriately regulated and supervised, and (iii) contribute to enhance customer protection. Its tasks should also include promoting supervisory convergence and providing advice to the EU institutions in the areas of securities and markets regulation and supervision, and related corporate governance and financial reporting issues. The Authority should also be entrusted with a general oversight responsibility for existing and new financial products /types of transactions.

In the exercise of its tasks, the Authority shall (i) pay particular attention to any systemic risk posed by market participants, failure of which may impair the operation of the financial system or the real economy, and act independently and objectively and in the interest of the Union alone.

Seat: the Authority will have its seat in **Frankfurt**. It may have representations in the most important financial centres of the European Union

The European System of Financial Supervision: a new clause states that the Authority shall form part of a European System of Financial Supervision (ESFS), whose main objective shall be to ensure that the rules applicable to the financial sector are adequately implemented, to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services.

The ESFS shall comprise: (a) the [ESRB](#); (b) the European Supervisory Authority (Securities and Markets); (c) the European Supervisory Authority (Insurance and Occupational Pensions) ([EIOPA](#)); (d) the European Supervisory Authority (Banking) ([EBA](#)); (e) the European Supervisory Authority (Joint Committee) established by Regulations on EBA, ESMA and EIOPA; (f) the authorities in the Member States as specified in the Regulations on EBA and ESMA and EIOPA; (g) the Commission, for the purposes of carrying out the tasks referred to in the Regulation on EBA, ESMA and EIOPA.

The Authorities shall be **accountable to the European Parliament**.

Tasks: Parliament has extended the Authority's tasks and these now include:

- undertaking economic analyses of markets;

- fostering depositor and investor protection;
- help to manage crisis of cross-border institutions that have the potential to pose a systemic risk, leading and executing all early interventions, resolution or insolvency procedures for such institutions through its Resolution Unit;
- supervising those financial institutions that are not subject to the supervision of competent authorities;
- publishing on its website and regularly updating information relating to its field of activities, in particular, within the area of its competence, on registered financial institutions, in order to ensure easily accessible information to the public;
- develop a regulatory standard setting out the minimum information that shall be made available to the Authority about transactions and market participants

Tasks related to consumer protection and financial activities: in order to foster policyholders and beneficiary protection the Authority shall take a leading role in promoting transparency, simplicity and fairness in the market for financial products or services across the single market, including by: (i) collecting, analysing and reporting on consumer trends; (ii) reviewing and coordinating financial literacy and education initiatives; (iii) developing training standards for the industry; (iv) contributing to the development of common disclosure rules, and (v) assess, in particular, the accessibility, availability and credit cost for households and enterprises, in particular SMEs.

The Authority shall monitor new and existing financial activities and may adopt guidelines and recommendations with a view to promote the safety and soundness of markets and convergence of regulatory practice. It may also issue warnings in case a financial activity poses a serious threat to its objectives.

It shall establish, as an integral part of the Authority, a Committee on financial innovation, which gathers all relevant competent national supervisory authorities with a view to achieving a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities and providing advice to the European Parliament, the Council and the Commission.

The Authority may also **temporarily prohibit or restrict certain types of 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 or if so required in the case of an emergency situation.

Regulatory technical standards: the European Parliament and the Council may delegate powers to the Commission to adopt regulatory technical standards under Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts referred to in the text. Those standards shall be technical, not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based. Draft regulatory technical standards shall be developed by the Authority and submitted to the Commission for endorsement.

The Authority shall conduct open public consultations on regulatory technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the regulatory technical standards concerned or in relation to the particular urgency of the matter before submitting them to the Commission. The Authority shall also request the opinion or advice of the Securities and Markets Stakeholder Group. The Commission shall upon receipt of a draft regulatory technical standard from the Authority forward it immediately to the European Parliament and the Council. The Commission shall decide within three months of receipt whether to adopt a draft regulatory technical standard. If the Commission does not intend to adopt the standard it shall inform the European Parliament and Council of this and of the reasons for this.

The Commission may be empowered to adopt **implementing technical standards** where uniform conditions for implementing legally binding Union acts are needed in the areas specifically set out in legislative acts. Where the Authority drafts implementing technical standards for submission to the Commission, those standards shall be technical, shall not include policy choices and shall be limited to determining the conditions of application of legally binding Union acts.

Guidelines and recommendations: the competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations. Within two months of the issuance of a guideline or recommendation, each competent authority shall confirm that it intends to comply with that guideline or recommendation. In the event that a competent authority does not intend to comply, it shall inform the Authority, stating reasons. The Authority shall publish those reasons.

Action in emergency situations: 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 EU, the Authority shall actively facilitate and, where deemed necessary, coordinate any actions undertaken by the relevant national competent supervisory authorities.

The Commission may, on its own initiative or at the request of the European Parliament, the Council, the ESRB or the Authority, adopt a decision addressed to the Authority, determining the existence of an emergency situation for the purposes of this Regulation. The Commission shall review that decision at monthly intervals and shall declare the discontinuation of the emergency situation as soon as appropriate. If the Commission determines the existence of an emergency situation, it shall duly inform the European Parliament and the Council without delay.

Colleges of supervisors: the Authority shall contribute to promote and monitor the efficient, effective and consistent functioning of the colleges of supervisors and foster the coherence of the application of Union law among them. It shall, at least: (a) collect and share all relevant information in going concern and emergency situations 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 to assess the resilience of financial institutions to adverse market developments, ensuring an as consistent as possible methodology is applied at the national level to such tests; (c) plan and lead supervisory activities in going concern as well as in emergency situations, including evaluating the risks to which financial institutions are or might be exposed; and (d) oversee the tasks carried out by the competent authorities.

A **legally binding mediation role** should allow the Authority to solve disputes between competent authorities. Where no agreement can be reached within the relevant college of supervisors, the Authority may take supervisory decisions directly applicable to the institution concerned.

Risk dashboard: the Authority shall pay special attention to 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 (systemic risk). In collaboration with the European Systemic Risk Board, it shall develop a common set of quantitative and qualitative indicators (risk dashboard), which will serve as the basis to assign a supervisory rating to cross-border institutions. That rating shall be reviewed on a regular basis, to take into account material changes of the risk profile of an institution. The supervisory rating shall be a critical element for the decision to directly supervise or intervene in an ailing institution.

Resolution Unit: the Resolution Unit shall preserve financial stability and minimise the contagion effect of distressed institutions to the rest of the system and the economy at large and limit the cost to taxpayers respecting the principle of proportionality, creditors' hierarchy and guaranteeing equal treatment across borders.

Among other actions it could require adjustments in capital or liquidity, adapt the business mix, improve processes, appoint or replace management, recommend guarantees, loans and liquidity assistance, total or partial sales, create a good bank / bad bank or a bridge bank, swap debt into equity (with appropriate haircuts) or take the institution into temporary public ownership.

European System of Investor Guarantee Schemes: the Authority shall contribute to strengthening national Investor Compensation Schemes (ICS) by ensuring that they are adequately funded by contributions from financial institutions including from market participant headquartered in third-countries, and provide a high level of protection to all investors in a harmonised framework throughout the Union, which leaves the stabilising safeguard role of mutual guarantee schemes intact, provided they comply with Union standards.

European System of resolution and funding arrangements: a European Stability Fund for Securities and Markets shall be established in order to strengthen the internalisation of the costs of the financial system and to assist in crisis resolution for failing cross border financial market participants. Financial market participants operating in only one Member State shall have the option to join the fund. The European Stability Fund for Securities and Markets shall adopt appropriate measures to avoid that the availability of aid generates a moral hazard.

Safeguards: the text now states that where a Member State considers that a decision taken under Article 10(2) (emergency measures) or Article 11 (disagreements between national authorities) impinges directly and in a significant manner on its fiscal responsibilities, it shall notify the Authority, the European Parliament and the Commission within ten working days after notification of the Authority's decision to the competent authority. In its notification, the Member State shall justify why and provide an impact assessment on how much the decision impinges on its fiscal responsibilities. Where the Authority maintains or amends its decision, the Council shall take a decision whether the Authority's decision is maintained or revoked. The decision to maintain the Authority's decision shall be taken by simple majority of members. The decision to revoke the Authority's decision shall be taken by a qualified majority of its members. In neither of these cases the vote of the Members concerned shall be taken into account.

Board of supervisors: Members introduced amendments on provisions regarding the organisation and composition of the board of supervisors. When carrying out the tasks conferred upon it by this Regulation, the Chairperson and the voting members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from a Government of a Member State or from any other public or private body.

Joint committee: Parliament introduces a joint committee, which shall serve as a forum in which the Authority cooperates regularly and closely and ensure cross-sectoral consistency with the other ESAs, in particular regarding (i) financial conglomerates; (ii) accounting and auditing; (iii) micro-prudential analyses of cross-sectoral developments, risks and vulnerabilities for financial stability; (iv) retail investment products; (v) anti-money laundering measures; and (vi) information exchange with the ESRB and developing the relationship between the ESRB and the European Supervisory Authorities .

Review clause: six months after entry into force of the Regulation, the Commission shall submit to the European Parliament and the Council the necessary proposals to strengthen supervision of institutions that may pose a systemic risk and the establishment of a new framework for financial crisis management including funding arrangements.

Three years after the date of application of the regulation, 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: (a) the convergence in supervisory practices reached by competent authorities; (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) whether, in particular in light of the progress achieved with regard to the issues referred to in point (c), the role of the Authority in the supervision of financial institutions posing a potential systemic risk should be strengthened and whether it should exercise enhanced supervisory powers over those institutions; (e) the application of the safeguard clause.

The report shall also examine whether:

- it is appropriate to move the Authorities to a single seat to enhance a better coordination between them;
- it is appropriate to continue separate supervision of banking, insurance, occupational pensions, securities and financial markets;
- it is appropriate to supervise prudential supervision and the conduct of business separately or by the same supervisor;
- 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;
- the evolution of the ESFS is consistent with that of the global evolution;
- there is sufficient diversity and excellence within the ESFS;
- accountability and transparency in relation to publication requirements are adequate;
- the appropriateness of the seat of the Authority;
- to establish a Stability Fund for Securities and Markets at EU level as the best defence against competitive distortion and most efficient way to deal with the failure of a cross-border institution.