

European Securities and Markets Authority (ESMA)

2009/0144(COD) - 22/09/2010 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted a resolution under the ordinary legislative procedure (formerly the co decision procedure).amending the proposal for a regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority (ESMA). The amendments are the result of a compromise agreement between Parliament and Council. The main points are as follows:

Establishment and scope of action: Members stipulate that the Regulation establishes a European Supervisory Authority (European Securities and Markets Authority). 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: (a) improving the functioning of the internal market, including in particular a sound , effective and consistent level of regulation and supervision, (ii) ensuring the integrity, transparency , efficiency and orderly functioning of financial markets, (iii) strengthening international supervisory coordination, (iv) preventing regulatory arbitrage and promoting equal conditions of competition, (v) ensuring the taking of investment and other risks are appropriately regulated and supervised, and (vi) enhancing customer protection.

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

Seat: the Authority shall have its seat in Paris.

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 compromise text states that the ESFS shall comprise: (a) the [ESRB](#); (b) the European Supervisory Authority (Securities and Markets) ([ESMA](#)); (c) the European Supervisory Authority (Insurance and Occupational Pensions) ([EIOPA](#)); (d) the EBA (e) the Joint Committee of the European Supervisory Authorities (f) the competent or supervisory authorities in the Member States specified in the Regulations on EBA and ESMA and EIOPA.

The ESRB, ESMA, EBA and EIOPA shall be accountable to the European Parliament and the Council.

Tasks: the text extends the Authority's tasks and these now include:

- undertaking economic analyses of markets to inform the discharge of the Authority's functions;
- fostering investor protection;
- contributing to the consistent and coherent functioning of supervisory colleges, the monitoring, assessment and measurement of systemic risk, the development and coordination of recovery and resolution plans, providing a high level of protection for investors throughout the Union and developing methods for the resolution of failing financial market participants and an assessment of the need for appropriate financing instruments;
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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 information is easily accessible by the public;

- taking over, as appropriate, all existing and ongoing tasks from the Committee of European Securities Regulators (CESR).

Tasks related to consumer protection and financial activities: the Authority shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer 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 by the competent authorities; (iii) developing training standards for the industry; (iv) contributing to the development of common disclosure rules.

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: where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards by means of delegated acts under Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts, the Authority may develop draft regulatory technical standards and submit its draft standards to the Commission for endorsement. Regulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the acts on which they are based.

Where the Authority submits a draft regulatory technical standard, the Commission shall immediately forward it to the European Parliament and the Council. The Commission shall decide within three months of receipt whether to adopt a draft regulatory technical standard.

The Authority may develop **implementing technical standards**, by means of implementing acts under Article 291 TFEU, in the areas specifically set out in the legislative acts. These standards shall be technical, not imply strategic decisions or policy choices and their content shall be to determine the conditions of application of that legislation. The Authority shall submit its draft standards to the Commission for endorsement.

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 whether it complies or intends to comply with that guideline or recommendation.** In the event that a competent authority does not comply or intend to comply, it shall inform the Authority, stating its reasons. The Authority shall publish the fact that a competent authority does not comply or intend to comply with that guideline or

recommendation. It may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation. The competent authority shall receive advanced notice about such a publication

Action in emergency situations: 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 an emergency situation may arise, they shall issue a confidential recommendation addressed to the Council and provide it with an assessment of the situation. The Council shall then assess the convenience of convening a meeting. In that 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.

Where the Council has adopted a decision, and in exceptional circumstances where co-ordinated action by national authorities is necessary to respond to 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 may adopt individual decisions requiring competent authorities to take the necessary action.**

Settlement of disagreements between competent authorities in cross-border situations: the compromise text states that where on the basis of objective criteria, disagreement between competent authorities from different Member States can be determined, the Authority may, **on its own initiative**, assist the authorities in reaching an agreement. If, at the end of the conciliation phase, the competent authorities concerned have failed to reach an agreement, the Authority may, in accordance with the procedure set out in the text take a decision requiring them to take specific action or to refrain from action in order to settle the matter, **with binding effects for the competent authorities concerned**, in order to ensure compliance with Union law. Decisions adopted by the Authority shall **prevail over any previous decision adopted by the competent authorities on the same matter.**

The Joint Committee will settle cross sectoral disagreements that may arise between one or more competent authorities.

Colleges of supervisors: Parliament expanded on the tasks of the colleges, entrusting them with, inter alia, initiating and coordinating Union-wide stress tests to assess the resilience of financial institutions to adverse market developments, and overseeing the tasks carried out by the competent authorities.

A legally binding mediation role should allow the Authority to solve disputes between competent authorities in accordance with the procedure set out in the text.

Systemic risk: the Authority shall duly consider systemic risk as defined by the ESRB Regulation 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: is caused by an impairment of all or parts of the financial system; and has the potential to have serious negative consequences for the internal market and the real economy. The Authority, in collaboration with the ESRB, shall develop a common approach to the identification and measurement of systemic importance, including quantitative and qualitative indicators as appropriate. It will 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 the text.

The compromise text contains provisions on the identification and measurement of systemic risk, and on recovery and resolution procedures.

European System of national Investor Compensation Schemes: the Authority shall contribute to strengthening the European system of national Investor Compensation Schemes (ICS) to ensure the correct application of Directive 97/9/EC with the aim of ensuring that national Investor Compensation Schemes are adequately funded by contributions from the concerned market participants, including where appropriate financial market participants headquartered in third-countries, and provide a high level of protection to all investors in a harmonised framework throughout the Union.

European System of resolution and funding arrangements: the Authority shall contribute to developing methods for the resolution of failing key market participants in ways which avoid contagion, allow them to be wound down in an orderly and timely manner, and, where applicable, including coherent and credible funding mechanisms as appropriate.

The review of the Regulation shall in particular examine the possible enhancement of the role of the ESMA in a framework of crisis prevention, management and resolution.

Safeguards: the provisions in the text are now closer to the Commission's original proposal. The Authority shall ensure that no decision adopted under Articles 10 (Action in emergency situations) or 11 (settlement of disagreements) impinges in any way on the fiscal responsibilities of Member States. **Where a Member State considers that a decision taken under the latter article 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.

The compromise text sets out the **powers of the Council** in the alternatives that the Authority maintains or evokes its decision.

It states that 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.

Board of supervisors: Members introduced amendments on provisions regarding the organisation and composition of the board of supervisors, and the management board. They also expand the issues in which the Joint Committee will be concerned and make some changes to provisions on the composition and operation of the board of appeal. Parliament will be able to veto the appointment of ESA chairpersons.

Review clause: 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: the convergence in supervisory practices reached by competent authorities; the convergence in functional independence of the competent authorities and in standards equivalent to corporate governance; the impartiality, objectivity and autonomy of the Authority; the functioning of the colleges of supervisors; progress achieved towards convergence in the fields of crisis prevention, management and resolution,

including European funding mechanisms, the role of the Authority as regards systemic risk; the application of the safeguard clause; and the application of the binding mediation role.

The report shall also examine whether:

- 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 European Supervisory Authorities;
- 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 resources of the Authority are adequate to carry out its responsibilities;
- the appropriateness of the seat of the Authority and whether it is appropriate to move the Authorities to a single seat to enhance better coordination between them.

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