



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

from: Council Secretariat
to: Delegations
dated: 15 October 2009

Subject: Proposal for a regulation of the European Parliament and the Council on
Community macro prudential oversight of the financial system and establishing
a European Systemic Risk Board
- Compromise proposal by the Presidency

Please find attached the compromise proposal following the ECOFIN on 20 October 2009.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on Community macro prudential oversight of the financial system and establishing a
European Systemic Risk Board

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Central Bank²,

Having regard to the opinion of the European Economic and Social Committee³,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,

Whereas:

¹ OJ C , , p. .
² Decision XXXX
³ OJ C , , p. .
⁴ OJ C , , p. .

- (1) The financial crisis has revealed important shortcomings in financial supervision, which has failed to anticipate adverse macro-prudential developments and to prevent the accumulation of excessive risks within the financial system and has in particular highlighted the weaknesses of the existing macro-prudential oversight.
- (2) In November 2008, the Commission mandated a High Level Group chaired by Mr Jacques de Larosière (the "de Larosière Group") to make recommendations on how to strengthen European supervisory arrangements with a view to better protecting its citizens and rebuilding trust in the financial system.
- (3) In its final report presented on 25 February 2009, the de Larosière Group recommended, among other things, the establishment of a Community level body charged with overseeing risk in the financial system as a whole.
- (4) In its Communication entitled "Driving European Recovery" of 4 March 2009¹, the Commission welcomed and broadly supported the recommendations of the de Larosière Group. At its meeting of 19 and 20 March 2009, the European Council agreed on the need to improve the regulation and supervision of financial institutions within the EU and to use the report from the de Larosière Group as a basis for action.
- (5) In its Communication entitled "European Financial Supervision" of 27 May 2009², the Commission set out a series of reforms to the current arrangements for safeguarding financial stability at the EU level, notably including the creation of a European Systemic Risk Board (ESRB) responsible for macro-prudential oversight. The Council on 9 June 2009

¹ COM(2009) 114.

² COM(2009) 252.

and the European Council at its meeting of 18 and 19 June supported the view of the Commission and welcomed the Commission's intention to bring forward legislative proposals so that the new framework is in place in the course of 2010. In line with the views of the Commission, it concluded inter alia that the ECB “should provide analytical, statistical, administrative and logistical support to the ESRB, also drawing on technical advice from national Central Banks and supervisors”.

- (6) The present Community arrangements place too little emphasis on macro-prudential oversight and on inter-linkages between developments in the broader macro-economic environment and the financial system. Responsibility for macro-prudential analysis remains fragmented, and is conducted by various authorities at different levels with no mechanism to ensure that macro-prudential risks are adequately identified and that warnings and recommendations are issued clearly, followed up and translated into action.
- (7) The Community needs a specific body responsible for macro-prudential oversight across the EU financial system, which would identify risks to financial stability and, where necessary, issue risk warnings and recommendations for action to address such risks. Consequently, a European Systemic Risk Board should be established as a new independent body, covering all financial sectors as well as guarantee schemes. It should be responsible for conducting macro-prudential oversight at the European level and should have no legal personality.
- (7a) The ESRB should comprise a General Board, a Steering Committee, a Secretariat and a Advisory Technical Committee. The establishment of the Advisory Technical Committee should take into account existing structures with a view to avoiding any duplication.

- (8) The ESRB should issue warnings and, where it deems necessary, recommendations of a general nature concerning the Community as a whole, individual Member States or groups of Member States, with a specified timeline for the relevant policy response.
- (9) In order to increase their weight and legitimacy, such warnings and recommendations should also be transmitted to the Council and, where appropriate, the European Banking Authority established by Regulation (EC) No .../... the European Parliament and of the Council¹, the European Securities and Markets Authority established by Regulation (EC) No .../... of the European Parliament and of the Council², and the European Insurance or the Occupational Pension Authority established by Regulation (EC) No .../... of the European Parliament and of the Council³. The deliberations of the Council should be prepared by the Economic and Financial Committee (EFC) in accordance with its role as defined in the Treaty. In order to prepare the Council discussions and provide timely policy advice to the Council, the EFC should be informed regularly and at an early stage and should receive the texts of the warnings and recommendations as soon as they have been adopted.
- (10) The ESRB should also monitor compliance with its recommendations, based on reports from addressees, in order to ensure that its warnings and recommendations are effectively followed. Addressees of recommendations should act on them and provide adequate justification in case of inaction ("act or explain" mechanism). If the ESRB judges that the reaction is inadequate, it shall inform the addressees, the Council and, where relevant, the European Supervisory Authorities concerned. In implementing all these processes, the role of the EFC should be fully taken into account.

¹ OJ L , , p. .

² OJ L , , p. .

³ OJ L , , p. .

- (11) The ESRB should decide, on a case by case basis and after having consulted the Council, whether a recommendation should be kept confidential or made public, bearing in mind that public disclosure can help to foster compliance with the recommendations in certain circumstances.
- (12) The ESRB should report to the European Parliament and the Council at least bi-annually, and more frequently in the event of widespread financial distress. Where appropriate, the Council could invite the ESRB to examine specific issues related to financial stability.
- (13) The ECB and National Central banks should have a leading role in macro-prudential oversight because of their expertise and existing responsibilities in the area of financial stability. National supervisors should be involved in providing their specific expertise. The participation of micro-prudential supervisors in the work of the ESRB is essential to ensure that assessment of macro-prudential risk is based on complete and accurate information about developments in the financial system. Accordingly, the chairpersons of the European Supervisory Authorities should be members with voting rights, while one national supervisor per Member State should attend as Member without voting rights.
- (14) The participation of a Member of the Commission will help to establish a link with the macro-economic and financial surveillance of the Community, while the presence of the Chairman of the EFC will reflect the role of finance ministries and the Council in safeguarding financial stability and performing economic and financial oversight.
- (15) It is essential that the members of the ESRB perform their duties impartially and only consider the financial stability of the European Union as a whole. Voting on warnings and recommendations within the ESRB should not be weighted and decisions should as a rule be taken by a simple majority.

- (16) The interconnectedness of financial institutions and markets implies that the monitoring and assessment of potential systemic risks should be based on a broad set of relevant macro-economic and micro-financial data and indicators. The ESRB should therefore have access to all the information necessary to perform its duties while preserving the confidentiality of these data as required.
- (16a) The measures for the collection of information set out in this Regulation are necessary for the performance of the tasks of the ESRB and should be without prejudice to the legal framework of the European Statistical System (ESS) and the European System of Central Banks (ESCB) in the field of statistics. This Regulation should therefore be without prejudice to Regulation EC no 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics and to Council Regulation EC No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank
- (17) Market participants can provide valuable input to the understanding of the developments in the financial system. Where appropriate, the ESRB should therefore consult private sector stakeholders, such as financial sector representatives, consumer associations and user groups in the financial services area established by the Commission or Community legislation, and give them a fair opportunity to provide their comments.
- (18) Given the integration of international financial markets at international level and the contagion risk of financial crises, the ESRB should coordinate with the International Monetary Fund and the newly established Financial Stability Board, which are expected to provide early warnings of macro-prudential risks at the global level.

- (19) The establishment of the ESRB should contribute directly to achieving the objectives of the internal market. The Community macro prudential oversight of the financial system should be an integral part of the overall new supervisory arrangements in the Community as the macro-prudential aspect is closely linked to the micro-prudential supervisory tasks attributed to the European Supervisory Authorities. Only with arrangements in place that properly acknowledge the interdependence between micro- and macro-prudential risks can all stakeholders have sufficient confidence to engage in cross-border financial activities. The ESRB should monitor and assess risks to financial stability arising from developments that can impact on a sectoral level or at the level of the financial system as a whole. By addressing such risks, the ESRB should directly contribute to an integrated Community supervisory structure necessary to promote timely and consistent policy responses among the Member States, thus preventing diverging approaches and improving the functioning of the Internal Market.
- 19a) The Court of Justice of the European communities in its judgment of 2 May 2006 in Case C-217/04 (United Kingdom/European Parliament and Council)¹ has acknowledged that Article 95 of the Treaty relating to the adoption of measures for the approximation of legislation for the establishment and functioning of the internal market provides an appropriate legal basis for setting up a Community body responsible for contributing to the implementation of a process of harmonisation", when the tasks conferred on such a body are closely related to the subject-matter of the acts approximating the national legislations. The ESRB contributes to the financial stability necessary for further financial integration in the internal market by monitoring systemic risks and issuing warnings and recommendations where appropriate. These tasks are closely linked to the objectives of the Community legislation concerning the internal market for financial services. The ESRB should therefore be established on the basis of Article 95 of the Treaty.

¹ pt. 44 –not yet published

- (20) Since an effective macro-prudential oversight of the Community financial system cannot be sufficiently achieved by the Member States because of the integration of the European financial markets, the Community may adopt measures in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve those objectives,

HAVE ADOPTED THIS REGULATION:

CHAPTER I
GENERAL PROVISIONS

Article 1
Establishment

A European Systemic Risk Board, hereinafter referred to as 'ESRB', is established. The ESRB shall be an independent body without legal personality.

Article 2
Definitions

For the purpose of this Regulation, the following definitions shall apply:

- (a) 'financial institution' means any undertaking covered by the legislation referred to in Article 1(2) of Regulation [EC no xx/2009 (EBA)], Regulation [EC no xx/2009 (ESMA)] and Regulation [EC no xx/2009 (EIOPA)], as well as any other undertaking or entity in the Community whose main business is of a similar nature.
- (b) 'financial system' means all financial institutions, financial markets and financial market infrastructures.

Article 3

Mission, Objectives and Tasks

1. The ESRB shall be responsible for the macro-prudential oversight of the financial system within the Community in order to contribute to the prevention or mitigation of systemic risks to financial stability in the EU that arise from developments within the financial system and taking into account macro-economic developments, so as to avoid episodes of widespread financial distress and contribute to a smooth functioning of the internal market.
2. For the purposes of paragraph 1, the ESRB shall, without prejudice to the role and responsibilities of existing bodies, carry out the following tasks:
 - (a) Determine and/or collect and analyse all the information relevant and necessary for the mission described in paragraph 1;
 - (b) identify and prioritise systemic risks described in paragraph 1;
 - (c) issue warnings where such systemic risks are deemed to be significant;
 - (d) issue recommendations for remedial action in response to the risks identified;
 - (e) monitor the follow-up to warnings and recommendations;

- (f) cooperate closely with the European System of Financial Supervisors and provide the European Supervisory Authorities with the information on risks required for the achievement of their tasks;
- (g) coordinate with international institutions, particularly the International Monetary Fund and the Financial Stability Board as well as the relevant bodies in third countries on matters related to macro-prudential oversight;
- (h) carry out other related tasks as specified in Community legislation.

CHAPTER II ORGANISATION

Article 4 Structure

1. The ESRB shall have a General Board, a Steering Committee, a Secretariat and an Advisory Technical Committee.
2. The General Board shall take the decisions necessary to ensure the performance of the tasks entrusted to the ESRB.
3. The Steering Committee shall assist in the decision-making process of the ESRB by preparing the meetings of the General Board and reviewing the documents to be discussed and monitoring the progress of the ESRB's ongoing work.

4. The Secretariat shall provide analytical, statistical, administrative and logistical support to the ESRB under the direction of the Chair of the General Board and the Steering Committee in accordance with Council Decision XXXX/EC/2009¹. For its analyses, the Secretariat shall draw on technical advice from the national central banks and national supervisory authorities.
5. The ESRB shall be supported by the Advisory Technical Committee referred to in Article 12, which shall provide advice and assistance on technical issues relevant to the work of the ESRB.

Article 5 Chairmanship

1. The Chair of the ESRB shall be elected for a term of 5 years by and from the Members of the General Board who are also members of the General Council of the ECB. The Vice-Chair shall be elected for a term of 5 years by and from the ESRB members with voting rights. The Chair and the Vice-Chair may only be re-elected once.
2. The Chair shall preside at the meetings of the General Board and the Steering Committee.
3. The Vice-Chair shall preside at the General Board and/or the Steering Committee when the Chair cannot participate in a meeting.
4. If the term of office of the Members of the General Council of the ECB elected as Chair or Vice-Chair ends before the completion of the 5 year term or if for any reason the Chair or Vice Chair are unable to discharge their duties, a new Chair or Vice-Chair shall be elected in accordance with paragraph 1.

¹ OJ L , , p. .

5. The Chair shall represent the ESRB externally.

Article 6
General Board

1. The following persons shall be Members of the General Board with voting rights
 - (a) the President of the ECB and, if he or she is elected Chair of the ESRB, the Vice-President of the ECB;
 - (b) the Governors of the national central banks; if a Governor of a national central bank is elected Chair of the ESRB, a Vice-Governor of that national central bank; if a Governor of a national central bank is elected Vice-Chair of the ESRB and has to replace the Chair of the ESRB, a Vice-Governor of that national central bank;
 - (c) a Member of the European Commission;
 - (d) the Chairperson of the European Banking Authority;
 - (e) the Chairperson of the European Insurance and Occupational Pensions Authority;
 - (f) the Chairperson of the European Securities and Markets Authority.
2. The following persons shall be Members of the General Board without voting rights:
 - (a) one high level representative per Member State of the competent national supervisory authorities, in accordance with paragraph 3 of this Article;
 - (b) the President of the Economic and Financial Committee.

3. With regard to the representation of national supervisory authorities, the respective high level representatives shall rotate depending on the item discussed, unless national supervisory authorities have agreed on a common representative.
4. The General Board shall establish the Rules of Procedure for the ESRB.

Article 7
Impartiality

1. When participating in the activities of the General Board and of the Steering Committee or when conducting any other activity relating to the ESRB, the Members of the ESRB shall perform their duties impartially and solely in the interest of the Community as a whole. They shall neither seek nor take instructions from Member States, Community institutions or any other public or private body.
2. Neither Member States, Community institutions nor any other public or private body shall seek to influence the members of the ESRB in the performance of their ESRB tasks.

Article 8
Professional secrecy

1. Members of the General Board of the ESRB and any other persons who work or who have worked for or in connection with the ESRB (including the relevant staff of central banks, Advisory Technical Committee, ESAs and competent national supervisory authorities of the Member States), shall be required not to disclose information covered by professional secrecy, even after their duties have ceased.

2. Information received by Members of the ESRB may only be used in the course of their duties and in performing the tasks set out in Article 3(2).
3. Without prejudice to Article 16 and the application of criminal law, any confidential information received by the persons referred to in paragraph 1 whilst performing their duties, may not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial institutions cannot be identified.
4. The ESRB shall, together with the European Supervisory Authorities, agree on and put in place specific confidentiality procedures in order to safeguard information regarding individual financial institutions, or information where individual financial institutions can be identified.

Article 9

Meetings of the General Board

1. Ordinary plenary meetings of the General Board shall be convened by the Chair of the General Board and shall occur at least four times a year. Extraordinary meetings may be convened at the initiative of the Chair of the General Board or at the request of at least one third of the Members with voting rights.
2. Each Member shall be present in person at the meetings of the General Board and may not be represented.
3. By way of derogation from paragraph 2, a Member who is prevented from attending the meetings for a period of at least three months may appoint an alternate. That Member may also be replaced by a person who has been formally appointed under the rules governing the institution concerned for the substitution of representatives on a temporary basis.

4. The proceedings of the meetings shall be confidential.

Article 10

Voting modalities of the General Board

1. Each Member of the General Board with a voting right shall have one vote.
2. Without prejudice to the voting procedures set out in Articles 16.5 and 18.1, the General Board shall act by a simple majority of Members present with voting rights. In the event of a tie, the Chair shall have the casting vote.
3. A quorum of two-thirds of the Members with voting rights is needed for any vote to be taken by the General Board. If the quorum is not met, the Chair may convene an extraordinary meeting at which decisions may be taken with a quorum of one third. The rules of procedure shall set an adequate notice applicable for convening an extraordinary meeting.

Article 11

Steering Committee

1. The Steering Committee shall be composed of the following:
 - (a) the Chair of the ESRB;
 - (b) the Vice-Chair of the ESRB;
 - (c) Five other members of the General Board who are also members of the General Council of the ECB. Three of those members shall be from a euro area Member State and two from a non-euro area Member State. They shall be elected by and from the Members of the General Board who are also members of the General Council of the ECB for a period of two years.

- (d) a Member of the European Commission;
- (e) the Chairperson of the European Banking Authority;
- (f) the Chairperson of the European Insurance and Occupational Pensions Authority;
- (g) the Chairperson of the European Securities and Markets Authority;
- (h) the President of the Economic and Financial Committee.

Any vacancy for an elected Member of the Steering Committee shall be filled by the election of a new Member by the General Board.

2. Meetings of the Steering Committee shall be convened by the Chair at least quarterly, before each meeting of the General Board. The Chair may also convene ad-hoc meetings.

Article 12

Advisory Technical Committee

1. The Advisory Technical Committee shall be composed of the following:
 - (a) a representative of each national central bank and a representative of the ECB;
 - (b) one representative per Member State of the competent national supervisory authority;
 - (c) one representative of the European Banking Authority;
 - (d) one representative of the European Insurance and Occupational Pensions Authority;
 - (e) one representative of the European Securities and Markets Authority;
 - (f) two representatives of the Commission;
 - (g) one representative of the Economic and Financial Committee.

The supervisory authorities of each Member State shall choose one representative in the Committee. With regard to the representation of national supervisory authorities, the respective high level representatives shall rotate depending on the item discussed, unless national supervisory authorities have agreed on a common representative.

2. The Chair of the Advisory Technical Committee shall be appointed by the General Board following a proposal from the Chair of the General Board.
3. The Committee shall perform the tasks referred to in Article 4(5) at the request of the Chair of the General Board.
4. The ESRB Secretariat shall support the work of the Advisory Technical Committee and the Head of the Secretariat shall participate in the meetings.

Article 12a

1. Subject to the conditions laid down in paragraph 2, participation in the work of the ESRB shall be open to authorities from the EEA States.
2. Under the relevant provisions of the EEA agreement, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of these countries in the work of the ESRB. These arrangements may provide for representation, on an ad-hoc basis, as an observer, on the General Board and the Advisory Technical Committee, but shall ensure that these countries do not attend any discussions relating to individual financial market participants, except where there is a direct interest.

Article 13

Other sources of advice

In performing its tasks, the ESRB shall seek, where appropriate, the views of relevant private sector stakeholders, including consumer groups.

Article 14

Deleted

CHAPTER III

TASKS

Article 15

Collection and exchange of information

1. The ESRB shall provide the European Supervisory Authorities with the information on risks necessary for the achievement of their tasks.
2. The European Supervisory Authorities, the ESCB, the Commission, the national supervisory authorities and national statistics authorities shall cooperate closely with the ESRB and provide all the information necessary for the fulfilment of its tasks in accordance with Community legislation.
3. Subject to Article 21.2 of the Regulations establishing the EBA, ESMA and EIOPA the ESRB may request information from the European Supervisory Authorities, as a rule in summary or collective form such that individual financial institutions cannot be identified. Where this information is not sufficient for the ESRB to achieve its tasks, the ESRB may address a reasoned request to the European Supervisory Authorities to provide data that are not in summary or collective form.

- 3a. Before requesting information in accordance with this Article, the ESRB shall first take account of the existing statistics produced, disseminated and developed by the European Statistical System and the ESCB.
- 3b. If the requested data are not available to those Authorities or are not made available in a timely manner, the ESRB may request the data from the ESCB, national supervisory authorities or national statistics authorities. When the data is not available at the aforementioned authorities, the ESRB may request the data from the Member State concerned.
- 3c. Where the ESRB requests data that is not in summary or collective form, the reasoned request shall explain why data on the respective individual financial institution is deemed to be systemically relevant, and necessary, considering the prevailing market situation.
4. *Paragraph 4 deleted*
5. Before each request for information which is not in summary or collective form, the ESRB shall duly consult the relevant European Supervisory Authority in order to ensure that the request is justified and proportionate. If the relevant European Supervisory Authority does not consider the request to be justified and proportionate, it shall, without delay, send the request back to the ESRB and ask for additional justification. After the ESRB has provided the relevant European Supervisory Authority with such additional justification, the requested data shall be transmitted to the ESRB from the addressee of the request, provided that the addressee has legal access to the relevant data.

Article 16

Warnings and recommendations

1. When significant risks to the achievement of the objective in article 3(1) are identified, the ESRB shall provide warnings and, where appropriate, issue recommendations for remedial action, including, where appropriate, for legislative initiatives.

2. Warnings or recommendations issued by the ESRB in accordance with points (c) and (d) of Article 3(2) may be either of a general or specific nature and shall be addressed to the Community as a whole or to one or more Member States, or to one or more of the European Supervisory Authorities, or to one or more national supervisory authorities. In case a warning or a recommendation is addressed to one or more supervisory authorities, the Member State concerned shall be informed thereof. Recommendations shall include a specified timeline for the policy response. Recommendations may also be addressed to the Commission in respect of the relevant Community legislation.
3. The warnings or recommendations shall, at the same time as they are transmitted to the addressees according to paragraph 2, also be transmitted to the Council and, where addressed to one or more national supervisory authority, to the European Supervisory Authorities.
4. Any Member of the Board may request a vote on a draft warning or a draft recommendation at any time.
5. By derogation from Article 10(2), a majority of two-thirds of the votes is needed to adopt a recommendation.

Article 17

Follow-up of the ESRB recommendations

1. Where a recommendation referred to in letter (d) of Article 3(2) is addressed to the Commission, one or more Member States, one or more European Supervisory Authorities, or one or more national supervisory authorities, the addressees shall communicate the actions undertaken in response to the recommendations to the Council and the ESRB and provide adequate justification in case of inaction (“act or explain”). Where relevant, the European Supervisory Authorities shall be informed.

2. If the ESRB decides that its recommendation has not been followed and that the addressees have failed to explain their inaction appropriately, it shall inform the addressees, the Council and, where relevant, the European Supervisory Authorities concerned.

Article 18

Public warnings and recommendations

1. The General Board of the ESRB shall decide, after having consulted the Council, whether a warning or a recommendation should be made public on a case- by-case basis. By derogation from Article 10(2), a majority of two-thirds of the votes is needed to make a warning or recommendation public. Notwithstanding Article 10(3), a quorum of two-third shall always apply in respect of decisions taken under this paragraph.
2. Where the General Board of the ESRB decides to make a warning or recommendation public, it shall inform the addressee(s) in advance.
3. Where the general Board of the ESRB decides not to make a warning or a recommendation public, the addressee and where appropriate, the Council and the European Supervisory Authorities, shall take all the measures necessary for the protection of their confidential nature.

CHAPTER IV

FINAL PROVISIONS

Article 19

Reporting obligations

1. The ESRB shall report at least bi-annually to the European Parliament and to the Council.

2. The ESRB shall also examine specific issues at the invitation of the Council or the Commission.

Article 20

Review clause

The European Parliament and the Council shall examine this Regulation on the basis of a report from the Commission three years after its entry into force and shall determine whether the missions and organisation of the ESRB need to be reviewed after having received an opinion from the ECB and the European Supervisory Authorities.

Article 21

Entry into force

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
