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NOTE

from : Presidency
to : Delegations

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Subject : Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/48/EC and 2006/49/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management
= Presidency compromise on securitisation and supervisory arrangements

Delegations will find below a compromise from the Presidency containing the provisions of the proposal related to securitisation and supervisory arrangements.

With respect to the Commission proposal changes are underlined and deletions denoted by (...).

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directives 2006/48/EC and 2006/49/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

Having regard to the proposal from the Commission,

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

Having regard to the opinion of the European Central Bank,

Having regard to the opinion of the Committee of the Regions,

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

Whereas:

(1) to (4) : as in doc. 14611/1/08 REV 1.

- (5) For the purpose of strengthening the crisis management framework of the Community, it is essential that competent authorities coordinate their actions with other competent authorities and where appropriate with central banks in an efficient way. In order to strengthen the efficiency of prudential supervision of parent credit institutions authorised in the Community and to allow competent authorities to better carry out the supervision of a banking group on a consolidated basis, supervisory activities should be coordinated in a more effective manner. Therefore, Colleges of Supervisors should be established. The establishment of colleges should not affect the rights and responsibilities of the competent authorities under Directive 2006/48/EC. Their establishment should be an instrument for stronger cooperation whereby competent authorities reach agreement on key supervisory tasks. The colleges should facilitate the handling of ongoing supervision and emergency situations. The consolidating supervisor may, in association with the other members of the college, decide to organise meetings or activities that are not of general interest and therefore streamline the attendance as appropriate.
- (6) The mandates of competent authorities should (...) duly consider a Community dimension. Competent authorities should therefore take into account the effect of their decisions on the stability of the financial system in all other Member States. This objective does not constitute a basis for liability claims towards competent authorities.
- (7) Competent authorities should be able to participate in colleges established for the supervision of credit institutions the parent institution of which is situated in a third country. The Committee of European Banking Supervisors should provide, where necessary, for non-binding guidelines and recommendations in order to enhance the convergence of supervisory practices pursuant to Directive 2006/48/EC.
- (8) Information deficits between the home and the host competent authorities may prove detrimental to the financial stability in host Member states. The information rights of host supervisors, in particular in a crisis of systemically relevant branches, should therefore be reinforced. For that purpose, systemically relevant branches should be defined. Competent authorities should transmit information which is essential for the pursuance of tasks of central banks and of Ministries of Finance with respect to financial crises.

(9) to (14) : as in doc. 14611/1/08 REV 1.

(15) It is important to remove misalignment between the interest of firms that 're-package' loans into tradable securities and other financial instruments (originators or sponsors) and firms that invest in these securities or instruments (investors). It is therefore important for the originators or the sponsors to retain exposure to the risk of the loans in question; the exposure of the originators or the sponsors shall be to this end a net exposure after the effects of credit risk mitigation techniques so that an alignment of interest with investors is achieved by the retention. Such retention should be applicable in all situations where the economic substance of a securitisation according to the definition of the directive is applicable, whatever legal structures or instruments are used to obtain this economic substance. In particular where credit risk is transferred by securitisation, investors should make their decisions only after conducting thorough due diligence, for which they need adequate information about the securitisations. The measures to address the misalignment of these structures need to be consistent and coherent in all relevant financial sector regulation; the Commission intends to bring forward the appropriate legislative proposals to ensure this will be the case.

(16) to (21) : as in doc. 14611/1/08 REV 1.

(21) Directives 2006/48/EC and 2006/49/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2006/48/EC

Directive 2006/48/EC is amended as follows:

1. as in doc. 14611/1/08 REV 1.

2. Article 4 is amended as follows:

(a) and (b) : as in doc. 14611/1/08 REV 1.

(c) Point (48) is added:

"(48) 'consolidating supervisor' means the competent authority responsible for the exercise of supervision on a consolidated basis of EU parent credit institutions and credit institutions controlled by EU parent financial holding companies."

3. In Article 40 the following paragraph 3 is added:

"3. The competent authorities in one Member State shall (...) duly consider to the potential impact of their decisions on the stability of the financial system in all other Member States concerned and, in particular, in emergency situations."

4. The following Article 42a is inserted:

"Article 42a

1. The competent authorities of a host Member State may make a request to the consolidating supervisor where Article 129 (1) applies or to the competent authorities of the home Member State, for a branch of a credit institution to be considered as systemically relevant.

The request shall provide reasons for considering the branch to be systemically relevant with particular regard to the following:

- (a) whether the market share of the branch of a credit institution in terms of deposit exceeds 2% in the host Member State;
- (b) the likely impact of a suspension or closure of the operations of the credit institution on the payment and clearing and settlement systems in the host Member State;
- (c) the size and the importance of the branch in terms of number of clients within the context of banking or financial system of the host Member State.

The competent authorities of the home and the host Member State, and the consolidating supervisor where Article 129(1) applies, shall do everything within their power to reach a joint decision on the designation of branches as being systemically relevant.

If no joint decision is reached within two months of receipt of a request under the first subparagraph, the competent authorities of the host Member State shall take their own decision within a further period of two months on whether the branch is systemically relevant. In taking its decision, the competent authorities of the host Member State shall take into account any views and reservations of the consolidating supervisor or the competent authorities of the home Member State.

The decisions referred to in the third and fourth subparagraph shall be set out in a document containing the fully reasoned decision, transmitted to the competent authorities concerned, recognised as determinative and applied by the competent authorities in the Member States concerned.

The designation of a branch as being systemically relevant shall not affect the rights and responsibilities of the competent authorities under this Directive.

2. The competent authorities of the home Member State shall communicate to the competent authorities of a host Member State where a systemically relevant branch is established the information referred to in Article 132(1)(c) and (d) and carry out the tasks referred to in Article 129(1)(c) in cooperation with the competent authorities of the host Member State.

If a competent authority of a home Member State becomes aware of an emergency situation within a credit institution as referred to in Article 130(1), it shall alert as soon as practicable the authorities referred to in the fourth paragraph of Article 49 and in Article 50.

3. Where Article 131a does not apply, the competent authorities supervising a credit institution with systemically relevant branches in other Member States shall establish and chair a college of supervisors to facilitate the cooperation under Article 42 and paragraph 2 of this Article. The establishment and functioning of the college shall be based on written arrangements determined, after consultation with competent authorities concerned, by the competent authorities of the home Member State. The competent authority of the home Member State shall decide which competent authorities participate in a meeting or in an activity of the college."

5. The following Article 42b is inserted:

"Article 42b

1. In the exercise of their duties, competent authorities shall (...) have regard to the convergence in respect of supervisory tools and supervisory practices in the application of the laws, regulations and administrative requirements adopted pursuant to this Directive. For that purpose, Member States shall ensure that the competent authorities participate in the activities of the Committee of European Banking Supervisors and take into account its non-binding guidelines and recommendations.

2. The Committee of European Banking Supervisors shall report to the Council, the European Parliament and the European Commission on the progress made towards supervisory convergence every three years starting from 31 December 2010."

6. Article 49 is amended as follows:

- (a) In the first paragraph, point (a) is replaced by the following:

"(a) central banks in the Community and other bodies with a similar function in their capacity as monetary authorities when this information is relevant for the exercise of their (...) tasks, in (...) the conduct of monetary policy, the oversight of payments and securities settlement systems, and the safeguarding of financial stability ; and"

- (b) The following paragraph is added at the end of the Article:

"In an emergency situation as referred to in Article 130(1), Member States shall allow competent authorities to communicate information to central banks in the Community when this information is relevant for the exercise of their (...) tasks, in (...) the conduct of monetary policy, the oversight of payments and securities settlement systems, and the safeguarding of financial stability."

7. In Article 50, the following paragraph is added:

"In an emergency situation as referred to in Article 130(1), Member States shall allow competent authorities to disclose information to the departments referred to in the first paragraph in all Member States concerned."

8 to 26 : as in doc. 14611/1/08 REV 1.

27. The following Section 7 is added to Chapter 2:

"Section 7

Exposures to transferred credit risk

Article 122a

1. A credit institution, as an investor, shall only be exposed to the (...) risk of a securitisation in its trading book or non-trading book (...) if the originator or sponsor:

(...)

(...)

has (...) explicitly disclosed (...) to the credit institution that it will maintain, on an ongoing basis, a material net economic interest (...) which, in any event shall not be less than 5 per cent (...).

Economic interest shall mean either positions in securitisation tranches sold to the investors, or where the number of securitised exposures is not less than 100 at origination, randomly selected exposures that would have been otherwise securitised. Economic interest shall be calculated net of any credit risk mitigation or short positions. This economic interest shall be measured in terms of nominal amount for asset items and in terms of notional amount for off-balance sheet items.

2. Paragraph 1 shall not apply when the securitised exposures are (...) claims or contingent claims on or guaranteed by:

(a) central governments or central banks;

(b) regional governments, local authorities and public sector entities of Member States where those exposures would be assigned a 0 % risk weight under Articles 78 to 83;

(c) institutions where those exposures would be assigned a 50% risk weight or better under Articles 78 to 83; (...) and

(d) multilateral development banks.

(...)

3. deleted

3. (...) Credit institutions shall be able to demonstrate (...) to the competent authorities for each of their individual securitisation positions that they have a comprehensive and thorough understanding of and have implemented formal policies and procedures for analysing and recording (...):

- (a) (...) information disclosed under paragraph 1, (...) by originators (...) or sponsors to specify the (...) net economic interest that they maintain, on an on-going basis, in the securitisation (...);
- (b) the risk characteristics of the individual securitisation position;
- (c) the risk characteristics of the exposures underlying the securitisation position;
- (d) the reputation and loss experience in earlier securitisations of the originators or sponsors in the relevant exposure classes underlying the securitization position;
- (e) the statements made by the originator or sponsor, or its agent or advisor, about (...) its due diligence to ensure the quality of the securitised exposures (...) and, where applicable, on the collateral quality of the securitised exposures (...);
- (f) where applicable, the methodologies and concepts on which the valuation of collateral supporting the securitised exposures (...) is based and the policies adopted by the originator or sponsor to ensure the independence of the valuer; and
- (g) all the structural features of the securitisation that can materially impact the performance of the credit institution's securitisation position. (...) Credit institutions shall (...) regularly (...) perform (...) stress tests appropriate to their securitisation positions. To this end, credit institutions shall not only rely on stress tests performed by an ECAI (...).

4. Credit institutions shall establish formal procedures to monitor on an ongoing basis and in a timely manner performance information on the exposures underlying their securitisation positions. Where appropriate (...), this shall include (...): the exposure type, (...) the percentage of loans more than 30, 60 and 90 days past due, default rates, prepayment rates, loans in foreclosure, collateral type and occupancy, frequency distribution of credit scores or other measures of credit worthiness across underlying exposures, industry and geographical diversification, frequency distribution of loan to value ratios with band widths that facilitate adequate sensitivity analysis. Where the underlying exposures are themselves securitisation positions, credit institutions shall have the above listed information not only on the underlying securitisation tranches, such as the issuer name and credit quality, but also on the characteristics and performance of the pools underlying securitisation tranches (...). Credit institutions shall have a thorough understanding of all structural features of a securitisation transaction that would materially impact the performance of their exposures to the transaction such as the contractual waterfall and waterfall related triggers, credit enhancements, liquidity enhancements, market value triggers, and deal-specific definition of default.

Where the requirements in paragraph 3 and in this paragraph are not met, credit institutions shall apply, within 3 months, a risk weight of 1250% to these securitisation positions under Annex IX, part 4, except where competent authorities have decided to temporarily suspend the requirements referred to in paragraphs 1 and 2 during periods of general market liquidity stress.

5. (...) Originator credit institutions shall apply the same sound and well-defined criteria for credit-granting in accordance with the requirements of Annex V, point 3 to exposures to be securitised as they apply to exposures to be held on their own non-trading book. To this end the same processes for approving and, where relevant, amending, renewing and re-financing credits shall be applied by the originator (...) credit institutions. Credit institutions shall also apply the same standards (...) to securitisation issues purchased from third parties whether (...) they are to be held on their trading or non-trading book. The same standards of analysis should be applied to the underwriting of securitisation issues as applied to other underwritings undertaken by the firm.

6. Sponsor and originator credit institutions shall disclose to investors the (...) net economic interest that they maintain in the securitisation. Sponsor and originator credit institutions shall ensure that investors and prospective investors have readily available access to all materially relevant data on the (...) securitisation exposure, such as the credit quality and performance of the individual underlying exposures and (...) information that is necessary to conduct (...) appropriate stress tests (...). Where these requirements and those in paragraph 5 are not met, Article 95(1) shall not be applied by an originator credit institution which will not be allowed to exclude the securitised exposures from the calculation of its capital requirements under this Directive.

7. Paragraphs 1 and 2 shall apply from 31 December 2010. Competent authorities may decide to temporarily suspend the requirements referred to in these paragraphs during periods of general market liquidity stress.

Paragraphs 3 to 6 shall apply to securitisations issued from (...) 31 December 2010 and to existing securitisations where new underlying exposures are added or substituted after that date and where this addition or substitution significantly alters the risk profile of the securitisation.

8. Competent authorities shall disclose the following information (...):

(a) the general criteria and methodologies adopted to review the compliance with paragraphs 1 to 7 at 31 December 2010;

(...)

(b) (...) a summary description of the outcome of the supervisory review and description of the measures imposed in cases of non-compliance with paragraphs 1 to 6 identified on an annual basis starting from December 2011 (...).

This requirement is subject to the second subparagraph of Article 144.

9. The Committee of European Banking Supervisors (...) shall report bi-annually to the Commission about the application of (...) this Article and potential evidence of other risk transfer mechanisms with adverse incentives. The Commission shall, no later than December 2014, report to the European Parliament and the Council on the application and effectiveness of this Article in the light of market developments."

28. Article 129 is amended as follows:

(a) Paragraph 1 is amended as follows:

(i) Point (b) is replaced by the following:

"(b) planning and coordination of supervisory activities in going concern situations, including in relation to the activities referred to in Articles 123, 124, 136, in Chapter 5 and in Annex V, in cooperation with the competent authorities involved;

(ii) The following point (c) is added:

- (c) planning and coordination of supervisory activities in cooperation with the competent authorities involved, and if necessary with central banks, in preparation of and during emergency situations, including adverse developments in credit institutions or in financial markets.

The planning and coordination of supervisory activities referred to in point (c) includes exceptional measures referred to in Article 132(3)(b), the preparation of joint assessments, the implementation of contingency plans and communication to the public."

(b) The following paragraph 3 is added:

"3. The consolidating supervisor and the competent authorities responsible for the supervision of subsidiaries of an EU parent credit institution or an EU parent financial holding company in a Member State shall (...):

- (a) do everything within their power to reach a joint decision on the application of Articles 123 and 124 to determine the adequacy of the consolidated level of own funds held by the group with respect to its financial situation and risk profile and (...) the required level of own funds for the application of Articles 136(2) to each entity within the banking group and on a consolidated basis;
- (b) commonly apply, by 30 June 2012, (...) uniform formats, frequencies and dates of reporting for the application of Article 74(2) to all entities within the banking group. To this end, the Committee of European Banking Supervisors shall elaborate guidelines to set up, within the Community, a uniform reporting format by 1 January 2012.

For the purposes of point (a), the joint decision shall be reached six months after submission by the consolidating supervisor of a report containing the risk assessment of the group in accordance with Articles 124 and 123 to the other relevant competent authorities. The joint decision shall also duly consider the risk assessments of subsidiaries performed by other relevant competent authorities under Articles 123 and 124 in accordance with the level application of this directive.

(...)

The joint decision referred to in the first subparagraph shall be set out in a document containing the fully reasoned decision which shall be provided to the EU parent credit institution by the consolidating supervisor. In case of disagreement, the consolidating supervisor shall at the request of any of the other competent authorities concerned consult the Committee of European Banking Supervisors. The consolidating supervisor may consult the Committee of European Banking Supervisors on its own initiative.

[In the absence of such a joint decision between the competent authorities within six months, the consolidating supervisor shall make its own decision on the application of Articles (...) 123, 124 and 136(2). The decision shall be set out in a document containing the fully reasoned decision and shall take into account the views and reservations of the other competent authorities expressed during the six months period. The decision shall be provided to the other competent authorities by the consolidating supervisor.

Where the Committee of European Banking Supervisors has been consulted, the consolidating supervisor shall consider such advice, and explain any significant deviation there from.]

The joint decision referred to in the first subparagraph and the decision referred to in the fifth subparagraph shall be recognised as determinative and applied by the competent authorities in the Member State concerned."

29. Article 130 paragraph 1 is replaced by the following:

"1. Where an emergency situation, including adverse developments in financial markets, arises, which potentially jeopardises the stability of the financial system in any of the Member States where entities of a group have been authorised or where systemically relevant branches as referred to in Article 42a are established, the consolidating supervisor shall, subject to Chapter 1, Section 2, alert as soon as is practicable, the authorities referred to in the fourth paragraph of Article 49 and in Article 50, and shall communicate all information that is essential for the pursuance of their tasks. These obligations shall apply to all competent authorities under Articles 125 and 126 and to the competent authority identified under Article 129(1).

If the authority referred to in the fourth paragraph of Article 49 becomes aware of a situation described in the first subparagraph of this paragraph, it shall alert as soon as is practicable the competent authorities referred to in Articles 125 and 126.

Where possible, the competent authority and the authority referred to in the fourth paragraph of Article 49 shall use existing defined channels of communication."

30. The following Article 131a is inserted:

"Article 131a

1. The consolidating supervisor shall establish colleges of supervisors to facilitate the exercise of the tasks referred to in Articles 129 and 130(1).

Colleges of supervisors shall provide a framework for the consolidating supervisor and the other competent authorities concerned to carry out the following tasks:

- (a) exchange information;
- (b) agree on voluntary entrustment of tasks and delegation of responsibilities where appropriate;

- (c) determine supervisory examination programmes based on a risk assessment of the group in accordance with Article 124;
- (d) increase the efficiency of supervision by removing unnecessary duplication of supervisory requirements, including in relation to the information requests referred to in Articles 130(2) and 132(2);
- (e) consistently apply the prudential requirements under this Directive across all entities within a banking group without prejudice to the options and discretions available in Community legislation;
- (f) apply 129(1)(c) taking into account the work of other forums that may be established in this area.

The competent authorities participating in the college of supervisors shall cooperate closely. The confidentiality requirements under Chapter 1, Section 2 shall not prevent competent authorities from exchanging confidential information within colleges of supervisors. The establishment and functioning of colleges of supervisors shall not affect the rights and responsibilities of the competent authorities under this Directive.

2. The establishment and functioning of the college shall be based on written arrangements referred to in Article 131, determined after consultation with competent authorities concerned by the consolidating supervisor.

The Committee of European Banking Supervisors shall elaborate guidelines for the operational functioning of colleges.

The competent authorities responsible for the supervision of subsidiaries of an EU parent credit institution or an EU parent financial holding company and the competent authorities of a host country where systemically relevant branches as referred to in Article 42a are established, and authorities of third countries where appropriate and subject to confidentiality requirements that are equivalent, in the opinion of all competent authorities, to the requirements under Chapter 1 Section 2, may participate in colleges of supervisors.

The consolidating supervisor shall chair the meetings of the college and shall decide which competent authorities participate in a meeting or in an activity of the college. The consolidating supervisor shall keep all members of the college fully informed, in advance, of the organisation of such meetings, the main issues to be discussed and the activities to be considered. The consolidating supervisor shall also keep all the members of the college fully informed, in a timely manner, of the decisions taken in those meetings or the measures carried out.

The decision of the consolidating supervisor shall take account of the relevance of the supervisory activity to be planned or coordinated for those authorities, (...) including in relation to Articles 40(3) and 42a(2).

The consolidating supervisor, subject to the confidentiality requirements under Chapter 1, Section 2, shall inform the Committee of European Banking Supervisors of the activities of the college of supervisors, including in emergency situations, and communicate to that Committee all information that is of particular relevance for the purposes of supervisory convergence."

31. Article 132 is amended as follows:

- (a) In point (d) of paragraph 1 the reference to Article 136 is replaced by the reference to Article 136(1).
- (b) In point (b) of paragraph 3 the reference to Article 136 is replaced by the reference to Article 136(1).

32 to 37 : as in doc. 14611/1/08 REV 1.

Article 2

Amendments to Directive 2006/49/EC

Directive 2006/49/EC is amended as follows:

(1) to (5) : as in doc. 14611/1/08 REV 1.

(6) In Article 38, the following paragraph is added:

"3. Article 42a, with the exception of point 1(a) of Directive 2006/48/EC shall apply *mutatis mutandis* to the supervision of investment firms unless the investment firms fulfil the criteria set out in Article 20(2), 20(3) or 46(1) of this Directive.

(7) and (8) : as in doc. 14611/1/08 REV 1.

Articles 3, 4, 5

As in doc. 14611/1/08 REV 1
