



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 7 December 2009**

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from: Presidency  
to: Delegations

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Subject: Proposal for a regulation of the European parliament and the Council  
establishing a European Securities and Markets Authority (ESMA)  
- Presidency compromise

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Delegations will find attached the text agreed by Council (ECOFIN) at its 2 December meeting on the above Commission proposal.

2009/0144 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**establishing a European Securities and Markets Authority**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union

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

Having regard to the proposal from the Commission<sup>1</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Having regard to the opinion of the Committee of the Regions<sup>3</sup>,

Having regard to the opinion of the European Central Bank,

Acting in accordance with the procedure laid down in Article 294 of the Treaty on the Functioning of the European Union<sup>4</sup>,

Whereas:

- (1) The financial crisis in 2007/2008 exposed important shortcomings in financial supervision, both in particular cases and in relation to the financial system as a whole. Nationally-based supervisory models have lagged behind the integrated and interconnected reality of European financial markets, in which many financial firms operate across borders. The crisis exposed shortcomings in the area of cooperation, coordination, consistent application of European Union law and trust between national supervisors.

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

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

<sup>3</sup> OJ C , , p. .

<sup>4</sup> OJ C , , p. .

- (2) A report published on 25 February 2009 by a high-level group of experts chaired by J. de Larosière, requested by the Commission, concluded that the supervisory framework needed to be strengthened to reduce the risk and severity of future financial crises and recommended far-reaching reforms to the structure of supervision of the financial sector in the European Union. That group of experts also concluded that a European System of Financial Supervisors should be created, comprising three European Supervisory Authorities, one for the securities sector one for the insurance and occupational pensions sector and one for the banking sector, and the creation of a European Systemic Risk Council.
- (3) The Commission in its Communication of 4 March 2009 entitled "Driving European Recovery"<sup>1</sup> proposed to bring forward draft legislation creating a European System of Financial Supervisors and a European Systemic Risk Board, and in its Communication of 27 May 2009 entitled "European Financial Supervision"<sup>2</sup> provided more detail about the possible architecture of such a new supervisory framework.
- (4) The European Council, in its conclusions of 19 June 2009, recommended that a European System of Financial Supervisors, comprising three new European Supervisory Authorities, be established. The system should be aimed at upgrading the quality and consistency of national supervision, strengthening oversight of cross border groups and establishing a European single rule book applicable to all financial market participants in the Single Market. It emphasised that the European Supervisory Authorities should also have supervisory powers for credit rating agencies and invited the Commission to prepare concrete proposals on how the European System of Financial Supervisors could play a strong role in crisis situations, while stressing that decisions taken by the European Supervisory Authorities should not impinge on the fiscal responsibilities of Member States.

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<sup>1</sup> COM(2009) 114.

<sup>2</sup> COM(2009) 252.

- (5) The financial and economic crisis has created real and serious risks to the stability of the internal market. Restoring and maintaining a stable and reliable financial system is an absolute prerequisite to preserving trust and coherence in the internal market, hence to preserve and improve the conditions for the establishment of a fully integrated and functioning internal market in the field of financial services. Moreover, deeper and more integrated financial markets offer better opportunities for financing and risk diversification, and thus help to improve the capacity of the economies to absorb shocks.
- (6) The European Union has reached the limits of what can be done with the present status of the Committees of European Supervisors, which remain advisory bodies to the Commission. The European Union cannot remain in a situation where there is no mechanism to ensure that national supervisors arrive at the best possible supervisory decisions for cross-border institutions; where there is insufficient cooperation and information exchange between national supervisory authorities; where joint action by national authorities requires complicated arrangements to take account of the patchwork of regulatory and supervisory requirements; where national solutions are most often the only feasible option in responding to European problems, where different interpretations of the same legal text exist. The European System of Supervisors should be designed to overcome these deficiencies and provide a system that is in line with the objective of a stable and single European Union financial market for financial services, linking national supervisors into a strong European Union network.
- (7) The European System of Financial Supervisors should be a network of national and European Union supervisory authorities, leaving day-to-day supervision of financial market participants at the national level, and according a central role in the supervision of cross-border groups to colleges of supervisors., Greater harmonisation and the coherent application of rules for financial market participants and markets across the European Union should also be achieved. A European Securities and Markets Authority should be established, along with a European Insurance and Occupational Pensions Authority and a European Banking Authority (the European Supervisory Authorities).

- (8) The European Supervisory Authorities should replace the Committee of European Banking Supervisors established by Commission Decision 2009/78/EC<sup>1</sup>, the Committee of European Insurance and Occupational Pensions Supervisors established by Commission Decision 2009/79/EC<sup>2</sup> and the Committee of European Securities Regulators established by Commission Decision 2009/77/EC<sup>3</sup>, and assume all of the tasks and competences of those committees including the continuation of on-going work and projects, where appropriate. The scope of each Authority's action should be clearly defined.
- (9) The European Securities and Markets Authority ("the Authority") should act with a view to improving the functioning of the internal market, including in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States, to protect investors, to ensure the integrity, efficiency and orderly functioning of financial markets, to safeguard the stability of the financial system, and to strengthen international supervisory coordination, for the benefit of the economy at large, including financial market participants and other stakeholders, consumers and employees. Its tasks also include promoting supervisory convergence and providing advice to the EU institutions in the area of financial market regulation and supervision, as well as being active in the area of corporate governance, auditing, financial reporting, clearing and settlement and derivatives. The Authority should also be active in the area of take-over bids as appropriate. In order to be able to fulfil its objectives, it is necessary and appropriate that the Authority should be a European Union body having legal personality and it should have legal, administrative and financial autonomy.

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<sup>1</sup> OJ L 24, 29.1.2009, p.23.

<sup>2</sup> OJ L 25, 29.1.2009, p.28.

<sup>3</sup> OJ L 25, 29.1.2009, p.18.

- (10) The Court of Justice of the European Union in its judgement of 2 May 2006 in Case C-217/04 (United Kingdom/European Parliament and Council)<sup>1</sup> has acknowledged that Article 95 of the Treaty establishing the European Community (now Article 114 of the Treaty on the Functioning of the European Union) 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 purpose and tasks of the Authority - assisting competent national supervisory authorities in the consistent interpretation and application of European Union rules and contributing to financial stability necessary for financial integration - are closely linked to the objectives of the European Union acquis concerning the internal market for financial services. The Authority should therefore be established on the basis of Article 114 of the Treaty on the Functioning of the European Union.

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<sup>1</sup> pt. 44 –not yet published.

- (11) The legal acts which lay down the tasks for competent authorities of Member States, including cooperating with each other and with the Commission, are the following: Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes<sup>1</sup>, Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems,<sup>2</sup> Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities<sup>3</sup>, Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements<sup>4</sup>, Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate<sup>5</sup>, Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>6</sup>, Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC<sup>7</sup>, Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments<sup>8</sup>, Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive<sup>9</sup>, Directive 2006/49/EC of the European Parliament and the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast), without prejudice to the competence of the European Banking Authority, as far as prudential supervision is concerned, Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 concerning Undertakings for Collective

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<sup>1</sup> OJ L 84, 26.3.1997, p. 22.

<sup>2</sup> OJ L 166, 11.6.1998, p. 45.

<sup>3</sup> OJ L 184, 6.7.2001, p. 1.

<sup>4</sup> OJ L 168, 27.6.2002, p. 43.

<sup>5</sup> OJ L 35, 11.2.2003, p. 1.

<sup>6</sup> OJ L 96, 12.4.2003, p. 16.

<sup>7</sup> OJ L 345, 31.12.2003, p. 64.

<sup>8</sup> OJ L 145, 30.4.2004, p. 1.

<sup>9</sup> OJ L 390, 31.12.2004, p. 38.

Investment in Transferable Securities<sup>1</sup>, [AIFM] Directive and [CRA] Regulation, and, in relevant parts, Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing<sup>2</sup>, Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services<sup>3</sup>, including all Commission directives, regulations and decisions based on these acts, and of any further European Union act which confers tasks on the Authority.

- (12) The term financial market participant should cover a diverse range of participants who are subject to European Union legislation in this area. It may include both legal persons and individuals. It can include for example investment firms, UCITS and their management companies, alternative investment fund managers, market operators, clearing houses, settlement systems, credit rating agencies, issuers, offerors, investors, persons who control or have an interest in participants, persons involved in the management of participants as well as other persons in relation to whom a requirement in the legislation applies. It should also include financial market participants such as credit institutions and insurance companies when engaging in activities covered by European Union legislation in this area. Competent authorities in the EU and of third countries as well as the Commission do not fall within this definition.
- (12a) Given the horizontal nature of Directive 2005/60/EC, this Regulation should not prejudice the existing institutional framework of Member States with regard to anti-money laundering and combating of financing of terrorism. When taking action in the context of Directive 2005/60/EC, the Authority should take into account the existing framework and co-operate, as appropriate, with other relevant bodies.

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<sup>1</sup> [Reference not yet available.]

<sup>2</sup> OJ L 309, 25.11.2005, p. 15

<sup>3</sup> OJ L L 271, 9.10.2002, p. 16

- (13) It is desirable that the Authority promotes a consistent approach in the area of investor compensation schemes to ensure a level playing field regarding the transposition of Directive 97/7/EC and the equitable treatment of investors across the European Union.
- (14) There is a need to introduce an effective instrument to establish harmonised technical standards in financial services to ensure, also through a single rulebook, a level playing field and an adequate protection investors and consumers across Europe. As a body with highly specialised expertise, it is efficient and appropriate to entrust the Authority, in areas defined by European Union law, with the elaboration of draft technical standards, which do not involve policy choices. The Commission should endorse those draft technical standards in accordance with European Union law in order to give them binding legal effect. The draft technical standards have to be adopted by the Commission. They would be subject to amendment if, for example, the draft technical standards were incompatible with European Union Law, would not respect the principle of proportionality or would run counter to the fundamental principles of the internal market for financial services as reflected in the acquis of European Union financial services legislation. The Commission should not change the content of the technical standards prepared by the Authority without prior coordination with the Authority. To ensure a smooth and expedited adoption process for those standards, the Commission should be subject to a time limit for its decision on the endorsement.
- (15) The process for the development of technical standards in this regulation is without prejudice to the Commission's powers to adopt on its own initiative implementing measures under comitology procedures at level 2 of the Lamfalussy structure as laid out in the relevant European Union legislation. The matters concerned by the technical standards should ~~do~~ not involve policy decisions, and their content should be ~~is~~ precisely framed by the European Union acts adopted at Level 1. Technical standards should be proportionate and take into account the existence of well-functioning business models and the differences in size and complexity of financial market participants. Where Level 2 measures are foreseen or already exist, such technical standards should respect these Level 2 measures and only determine the conditions of application of those measures. Development of the draft standards by the Authority ensures that they fully benefit from the specialised expertise of national supervisory authorities. Essential elements of legislative acts may only be amended by the co-legislators.

- (16) In areas not covered by technical standards, the Authority should have the power to issue non-binding guidelines and recommendations on the application of European Union legislation. In order to ensure transparency and strengthen compliance by national supervisory authorities with those guidelines and recommendations, national authorities should be obliged to state their reasons where they do not comply with those guidelines and recommendations.
- (17) Ensuring the correct and full application of European Union law is a core prerequisite for the integrity, efficiency and orderly functioning of financial markets, the stability of the financial system, and for neutral conditions of competition for financial market participants in the European Union. A mechanism should therefore be established whereby the Authority addresses instances of non-application or incorrect application, which constitute a breach of European Union law. This mechanism should apply in areas where European Union legislation defines clear and unconditional obligations. It should in general not be used for cases concerning only the incorrect transposition of European Union law.
- (18) To allow for a proportionate response to instances of incorrect or insufficient application of European Union law, a three-step mechanism should apply. At a first level, the Authority should be empowered to investigate alleged incorrect or insufficient application of European Union law obligations by national authorities in their supervisory practice, concluded by a recommendation. Where the competent national authority does not follow the recommendation, the Commission should be empowered to issue a formal opinion taking into account the Authority's recommendation, requiring the competent authority to take the actions necessary to ensure compliance with European Union law.
- (19) *Deleted*
- (20) To overcome exceptional situations of persistent inaction by the competent authority concerned, the Authority should be empowered, as a last resort, to adopt decisions addressed to individual financial market participants. This power should be limited to exceptional circumstances in which a competent authority does not comply with the formal opinion addressed to it and in which European Union law is directly applicable to financial market participants by virtue of existing or future EU Regulations.

- (21) Serious threats to the orderly functioning and integrity of financial markets or the stability of the financial system in the European Union require a swift and concerted response at European Union level. The Authority should therefore be able to require national supervisory authorities to take specific actions to remedy an emergency situation. Bearing in mind the sensitivity of the issue, the power to determine the existence of an emergency situation should be conferred on the Council, following consultation with the Commission, the ESRB and, where appropriate, the European Supervisory Authorities.
- (22) In order to ensure efficient and effective supervision and a balanced consideration of the positions of the competent authorities in different Member States, the Authority should be able to settle disagreements in cross-border situations between those competent authorities with binding effect, including within colleges of supervisors. A conciliation phase should be provided for, during which the competent authorities may reach an agreement. The Authority's competence should cover disagreements on the procedure or content of an action or inaction by a competent authority of a Member State in cases specified in the legislation referred to in Article 1(2) of this Regulation, which require joint decision making, cooperation or, coordination by competent authorities from more than one Member State. The sectoral legislation should be amended in a timely manner in order to ensure that, *inter alia*, for joint decision making currently laid down in that legislation, settling of disagreements will be covered by the procedure in Article 11.
- (23) Colleges of supervisors play an important role in the efficient, effective and consistent supervision of financial markets participant operating across borders. The Authority should have full participation rights in colleges of supervisors with a view to streamlining the functioning of and the information exchange process in colleges and to foster convergence and consistency across colleges in the application of European Union law.

- (24) The delegation of tasks and responsibilities can be a useful instrument in the functioning of the network of supervisors in order to reduce the duplication of supervisory tasks, foster cooperation and thereby streamline the supervisory process as well as reduce the burden imposed on financial market participants. The Regulation should therefore provide a clear legal basis for such delegation. Whilst respecting the general rule that delegation should be allowed, Member States should be able to introduce specific conditions for the delegation of responsibilities, e.g. regarding information and notification of delegation arrangements. Delegation of tasks means that tasks are carried out by another competent authority instead of the responsible authority, while the responsibility for supervisory decisions remains with the delegating authority. By delegation of responsibilities one national supervisory authority, the delegate shall be able to decide upon a certain supervisory matter in its own name in lieu of another national supervisory authority. Delegations should be governed by the principle of allocating supervisory competence to a supervisor which is well placed to take action in the subject matter. A reallocation of responsibilities can be appropriate for example for reasons of economies of scale or scope, of coherence in group supervision, and of optimal use of technical expertise among national competent authorities. Decisions by the delegatee authority should be recognised by the delegating authority and by other competent authorities as determinative within the scope of the delegation. Relevant European Union legislation may further specify the principles for reallocation of responsibilities upon agreement. The Authority should facilitate delegation agreements between national supervisory authorities by all appropriate means. It should be informed in advance of intended delegation agreements to be able to express an opinion where appropriate. It should centralise the publication of such agreements to ensure timely, transparent and easily accessible information about agreements for all parties concerned.
- (25) The Authority should actively foster supervisory convergence across the European Union with the aim of establishing a common supervisory culture.

- (26) Peer reviews can be an efficient and effective tool for fostering consistency within the network of financial supervisors. The Authority should therefore develop the methodological framework for such reviews and conduct them on a regular basis. Reviews should focus not only on convergence of supervisory practices but also on the capacity of supervisors to achieve high quality supervisory outcomes as well as the independence of competent authorities.
- (27) The Authority should actively promote a coordinated European Union supervisory response, in particular where adverse developments could potentially jeopardise the orderly functioning and integrity of financial markets or the stability of the financial system in the European Union. In addition to its powers for action in emergency situations, it should therefore be entrusted with a general coordination function within the European System of Financial Supervisors. The smooth flow of all relevant information between competent authorities should be a particular focus of the Authority's actions.
- (28) In order to safeguard financial stability it is necessary to identify, at an early stage, trends, potential risks and vulnerabilities stemming from the micro-prudential level, across borders and across sectors. The Authority should monitor and assess such developments in the area of its competence and, where necessary, inform the European Parliament, the Council, the Commission, the other European Supervisory Authorities and the European Systemic Risk Board on a regular and, as necessary, ad hoc basis. The Authority should also coordinate European Union-wide stress tests to assess the resilience of financial market participants to adverse market developments, ensuring an as consistent as possible methodology is applied at the national level to such tests.
- (29) Given the globalisation of financial services and the increased importance of international standards, the Authority should foster the dialogue and cooperation with supervisors outside the European Union. It shall fully respect the existing roles and competences of the European Institutions and Member States in relations with authorities outside the European Union and in international forums.

- (30) The Authority should serve as an independent advisory body to the European Parliament, the Council, and the Commission in the area of its competence. Without prejudice to the competencies of the competent authorities concerned, the Authority should be able to provide its opinion on the prudential assessment of mergers and acquisitions under Directive 2004/39/EC in those cases in which that Directive requires consultation between competent authorities from two or more Member States.
- (31) In order to effectively carry out its duties, the Authority should have the right to request all necessary information relating to supervision of financial markets. To avoid duplication of reporting obligations for financial market participants, that information should normally be provided by the national competent authorities who are closest to financial markets and market participants and the Authority should take into account already existing statistics. However, as a last resort, the Authority should be able to address a duly justified and reasoned request for information directly to a financial market participant where a national competent authority does not or cannot provide such information in a timely fashion. Member States' authorities should be obliged to assist the Authority in enforcing such direct requests. In this context, the work on common reporting formats is essential
- (31a) The measures for the collection of information 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

- (32) Close cooperation between the Authority and the European Systemic Risk Board is essential to give full effectiveness to the functioning of the European Systemic Risk Board and the follow-up to its warnings and recommendations. The Authority should share any relevant information with the European Systemic Risk Board. Data related to individual undertakings should be provided only upon reasoned request. Upon receipt of warnings or recommendations addressed by the European Systemic Risk Board to the Authority or a national competent authority, the Authority should ensure follow-up, as appropriate.
- (33) As a general rule, the Authority should conduct cost-benefit analyses and consult interested parties on technical standards, guidelines and recommendations and provide these parties with an opportunity to comment on proposed measures. To this end, the Authority should put transparent procedures in place. For reasons of efficiency, a Securities and Markets Stakeholder Group should be established for that purpose, representing in balanced proportions European Union financial market participants (including as appropriate institutional investors and other financial market participants which themselves use financial services), their employees, and consumers and other retail users of financial services, including SMEs. The Securities and Markets Stakeholder Group should actively work as an interface with other user groups in the financial services area established by the Commission or European Union legislation.
- (34) Member States have a core responsibility in preserving financial stability in crisis management, in particular with regard to stabilising and resolving individual ailing financial institutions. Measures by the Authority in emergency or settlement situations affecting the stability of a financial institution should not impinge on the fiscal responsibilities of Member States. A mechanism should be established whereby Member States may invoke this safeguard and ultimately bring the matter before the Council for a decision. When taking decision under this safeguard article, the Council should vote according to the principle where each member has one vote. It is appropriate to confer on the Council a role in this matter given the particular responsibilities of the Member States in this respect. Given the sensitivity of the issue, strict confidentiality arrangements should be ensured.

- (35) In its decision-making procedures, the Authority should be bound by European Union rules and general principles on due process and transparency. The right to be heard of the addressees of the Authority's decisions should be fully respected. The Authority's acts form an integral part of European Union law.
- (36) A Board of Supervisors composed of the heads of the relevant competent authority in each Member State, and chaired by the Chairperson of the Authority, should be the principal decision-making organ of the Authority. Representatives of the Commission, the European Systemic Risk Board and the other two European Supervisory Authorities should participate as observers. Members of the Board of Supervisors should act independently and only in the European Union's interest. Given the range of activities falling within the remit of the Authority's powers, the Authority's activities may have implications also for national authorities which are not represented on the Board of Supervisors. Consequently, where the Board of Supervisors discusses an item which does not fall within the competence of the national authority being a member of that Board, the member concerned may bring a non-voting representative of the relevant national authority.
- (36a) As a general rule, the Board of Supervisor should take its decisions with simple majority according to the principle of one man-one vote. However for acts relating to the adoption of technical standards, guidelines and recommendations as well as budgetary matters, it is appropriate to apply the rules on qualified majority as laid down in the Treaty on European Union and in the Treaty on the Functioning of the European Union and in the Protocol (No. 36) on transitional provisions attached to them. Cases concerning the settlement of disagreements between national supervisory authorities should be examined by a restricted, objective panel, composed of members who are not representatives of the competent authorities which are parties to the disagreement, nor have any interest in the conflict or direct links to the competent authorities concerned. The composition of the panel should be appropriately balanced. The decision taken by the panel should be approved by the Board of Supervisors by simple majority according to the principle where each member has one vote.

- (37) A Management Board composed of the Chairperson of the Authority and, representatives of national supervisory authorities-should ensure that the Authority carries out its mission and performs the tasks assigned to it. The Management Board should be entrusted with the necessary powers to, inter alia, propose the annual and multi-annual work programme, exercise certain budgetary powers, adopt the Authorities staff policy plan, adopt special provisions on the right to access to documents and adopt the annual report.
- (38) A full time Chairperson, selected by the Board of Supervisors through an open competition, should represent the Authority. The management of the Authority should be entrusted to an Executive Director, who should have the right to participate in meetings of the Board of Supervisors and the Management Board without the right to vote.
- (39) In order to ensure cross-sectoral consistency in the activities of the European Supervisory Authorities, those authorities should coordinate closely in a Joint Committee of European Supervisory Authorities and reach common positions where appropriate. A Subcommittee on Financial Conglomerates to the Joint Committee of European Supervisory Authorities should assume all of the functions of the Joint Committee on Financial Conglomerates. Where relevant, acts also falling within the area of competence of the European Insurance and Occupational Pensions Authority or the European Banking Authority should be adopted in parallel by the European Supervisory Authorities concerned.
- (40) It is necessary to ensure that the parties affected by decisions adopted by the Authority may exercise the necessary remedies. To effectively protect the rights of parties and for reasons of procedural economy, where the Authority has decision-making powers, parties should be granted a right of appeal to a Board of Appeal. For reasons of efficiency and consistency, the Board of Appeal should be a joint body of the three European Supervisory Authorities with a balanced composition, independent from their administrative and regulatory structures. The decision of the Board of Appeal should be subject to appeal before the Court of Justice of the European Union.

- (41) In order to guarantee its full autonomy and independence, the Authority should be granted an autonomous budget with revenues mainly from obligatory contributions from national supervisory authorities and from the General Budget of the European Union. The European Union budgetary procedure should be applicable as far as the European Union contribution is concerned. The auditing of accounts should be undertaken by the Court of Auditors.
- (42) Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)<sup>1</sup> should apply to the Authority. The Authority should also accede to the Inter-institutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF)<sup>2</sup>.
- (43) In order to ensure open and transparent employment conditions and equal treatment of staff, the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities<sup>3</sup> should apply to all members of staff of the Authority. The Authority should endeavour to ensure an appropriate balance between employed staff and seconded national experts.
- (44) It is essential that business secrets and other confidential information are protected. The confidentiality of information made available to the Authority and exchanged in the network should be subject to stringent and effective confidentiality rules.

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<sup>1</sup> OJ L 136, 31.5.1999, p. 1.

<sup>2</sup> OJ L 136, 31.5.1999, p. 15.

<sup>3</sup> O.J. L 56, 04.03.1968, p.1

- (45) The protection of individuals with regard to the processing of personal data is governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>1</sup> and by Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the European Union institutions and bodies and on the free movement of such data<sup>2</sup>, which are fully applicable to the processing of personal data for the purposes of this Regulation.
- (46) In order to ensure the transparent operation of the Authority, Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents<sup>3</sup> should apply to the Authority.
- (47) Countries which are not members of the European Union should be allowed to participate in the work of the Authority in accordance with appropriate agreements to be concluded by the European Union.
- (48) Since the objectives of this Regulation, namely improving the functioning of the internal market by means of ensuring a high, effective and consistent level of regulation and supervision, protecting investors, protecting the integrity, efficiency and orderly functioning of financial markets, maintaining the stability of the financial system, and strengthening international supervisory coordination, cannot be sufficiently achieved by the Member States and can, therefore, by reason of scale of the action, be better achieved at European Union level, the European Union 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 in order to achieve those objectives.

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<sup>1</sup> OJ L 281, 23.11.1995, p. 31.

<sup>2</sup> OJ L 8, 12.1.2001, p. 1.

<sup>3</sup> OJ L 145, 31/5/2001, p. 43.

- (49) The Authority assumes all current tasks and powers of the Committee of European Securities Regulators. Commission Decision 2009/77/EC of 23 January 2009 establishing the Committee of European Securities Regulators should therefore be repealed, as of the date of the establishment of the Authority, and Decision .../.../EC of the European Parliament and of the Council establishing a Community programme to support specific activities in the field of financial services, financial reporting and auditing, should be amended accordingly. Given the already existing structures and operations of the Committee of European Securities Regulators, it is important to ensure a very close co-operation between the Committee of European Securities Regulators and the Commission when establishing appropriate transitory arrangements, making sure that the period during which the Commission is responsible for the administrative establishment and initial administrative operation of the Authority should be as limited as possible.
- (50) It is appropriate to set a time limit for the application of this Regulation in order to ensure that the Authority is adequately prepared to begin operations and to ensure a smooth transition from the Committee of European Securities Regulators. The Authority should be appropriately financed and should, at least initially, be financed through 40% European Union funds and 60% through contributions from Member States, made in accordance with the weighting of votes set out in Article 3(3) of the Protocol (No 36) on transitional provisions annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

HAVE ADOPTED THIS REGULATION:

**CHAPTER I**  
**ESTABLISHMENT AND LEGAL STATUS**

*Article 1*

*Establishment and Scope of action*

1. This Regulation establishes a European Securities and Markets Authority ("the Authority").
2. The Authority shall act within the scope of Directive 97/9/EC, Directive 98/26/EC, Directive 2001/34/EC, Directive 2002/47/EC, Directive 2002/87/EC, Directive 2003/6/EC, Directive 2003/71/EC, Directive 2004/39/EC, Directive 2004/109/EC, Directive 2009/65/EC, Directive 2002/65/EC, and to Directive 2006/49/EC, without prejudice to the competence of the European Banking Authority as far as prudential supervision is concerned, Directive [AIFM], and Regulation (EC) No 1060/2009 [CRA] and within the relevant parts of Directive 2005/60/EC and 2002/65/EC, to the extent that these apply to firms providing investment services or to collective investment undertakings marketing their units or shares, including all directives, regulations, and decisions based on these acts, and of any further European Union act which confers tasks on the Authority.
  - 2a. The Authority shall also act within the field of the activities covered by the legislation referred to in paragraph 2, including matters relating to shareholder rights, corporate governance, auditing, financial reporting, provided that such actions by the Authority are necessary to ensure the effective and consistent application of the legislation referred to in paragraph 2. The Authority shall also take appropriate action in the context of take-over bids, clearing and settlement and derivative issues.
3. The provisions of this Regulation are without prejudice to the powers of the Commission in particular under Article 258 of the Treaty on the Functioning of the European Union to ensure compliance with European Union law.

4. The objective of the Authority shall be to contribute to: (i) improving the functioning of the internal market, including in particular a high, effective and consistent level of regulation and supervision, (ii) protecting investors and ensuring adequate investor information, (iii) ensuring the integrity, efficiency and orderly functioning of financial markets, (iv) safeguarding the stability of the financial system, and (v) strengthening international supervisory coordination. For this purpose, the Authority shall contribute to ensuring the consistent, efficient and effective application of the European Union law referred to in Article 1(2) above, fostering supervisory convergence and providing opinions to the European Parliament, the Council, and the Commission.
5. The Authority shall form part of a European System of Financial Supervisors, hereinafter referred to as 'ESFS', which shall function as a network of supervisors, as further specified in Article 39.
6. The European Securities and Markets Authority shall co-operate with the European Systemic Risk Board, hereinafter referred to as 'ESRB' as laid down in Article 21 of this Regulation.

## *Article 2*

### *Definitions*

For the purposes of this Regulation the following definitions apply:

- (1) 'financial market participant' means any person in relation to whom a requirement in the legislation referred to in Article 1(2) or a national law implementing such legislation applies.
- (2) 'key financial market participant' means a financial market participant, whose regular activity or financial viability has or is likely to have a significant effect on the stability, integrity, or efficiency of the financial markets in the European Union.
- (3) 'competent authorities' means competent authorities and/or supervisory authorities as defined in the legislation referred to in Article 1(2). With regard to Directives 2002/65/EC and 2005/60/EC, 'competent authorities' means the authorities competent for ensuring compliance with the requirements of those Directives by firms providing investment services and by collective investment undertakings marketing their units or shares. Where investor compensation schemes are concerned, competent authorities means bodies which administer national compensation schemes pursuant to Directive 97/9/EC, or in the case where the operation of the investor compensation scheme is administered by a private company, the public authority supervising these schemes, pursuant to that Directive.

## *Article 3*

### *Legal status*

1. The Authority shall be a European Union body with legal personality.
2. In each Member State, the Authority shall enjoy the most extensive legal capacity accorded to legal persons under national law. It may, in particular, acquire or dispose of movable and immovable property and be a party to legal proceedings.
3. The Authority shall be represented by its Chairperson.

*Article 4*  
*Composition*

The Authority shall comprise the following:

- (1) a Board of Supervisors, which shall exercise the tasks set out in Article 28;
- (2) a Management Board, which shall exercise the tasks set out in Article 32;
- (3) a Chairperson, who shall exercise the tasks set out in Article 33;
- (4) an Executive Director, who shall exercise the tasks set out in Article 38;
- (5) a Board of Appeal, as referred to in Article 44, which shall exercise the tasks set out in Article 46.

*Article 5*  
*Seat*

The Authority shall have its seat in Paris.

**CHAPTER II**  
**TASKS AND POWERS OF THE AUTHORITY**

*Article 6*

*Tasks and Powers of the Authority*

1. The Authority shall have the following tasks:
  - (a) contribute to the establishment of high quality common regulatory and supervisory standards and practices, in particular by providing opinions to the European Union institutions and by developing guidelines, recommendations, and draft technical standards which shall be based on the legislation referred to in Article 1(2);
  - (b) contribute to a consistent application of European Union legislation, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the legislation referred to in Article 1(2), preventing regulatory arbitrage, mediating and settling disagreements between competent authorities, promoting a coherent functioning of colleges of supervisors and taking actions in emergency situations;
  - (c) facilitate the delegation of tasks and responsibilities between competent authorities;
  - (d) cooperate closely with the ESRB, in particular by providing the ESRB with the necessary information for the achievement of its tasks and by ensuring a proper follow up to the warnings and recommendations of the ESRB;
  - (e) conduct peer review analysis of competent authorities, including the issuing of advice, in order to strengthen consistency in supervisory outcomes;
  - (f) monitor and assess market developments in the area of its competence;
  - (g) fulfil any other specific tasks set out in this Regulation or in the European Union legislation referred to in Article 1(2);

- (h) take over, as appropriate, all existing and ongoing tasks from the Committee of European Securities Regulators;
  - (i) publish and regularly update information relating to its field of activities on its website, in order to ensure easily accessible information to the public.
2. To achieve the tasks set out in paragraph 1, the Authority shall have the powers set out in this Regulation, in particular the power to:
- (a) develop draft technical standards in the specific cases referred to in Article 7;
  - (b) issue guidelines and recommendations, as laid down in Article 8;
  - (c) issue recommendations in specific cases, as referred to in Article 9(3);
  - (d) take individual decisions addressed to competent authorities in the specific cases referred to in Articles 10 and 11;
  - (e) in cases concerning directly applicable European Union law, take individual decisions addressed to financial markets participants, in the specific cases referred to in Article 9(6);
  - (f) issue opinions to the European Parliament, the Council, or the Commission as provided in Article 19.
3. The Authority shall execute exclusive supervisory powers over Credit Rating Agencies entrusted to it in Regulation (EC) no 1060/2009.

For that purpose, the Authority shall have appropriate powers of investigation and enforcement as specified in the relevant legislation, as well as the possibility of charging fees.

*Article 7*  
*Technical standards*

1. The Authority may develop technical standards in the areas specifically set out in the legislation referred to in Article 1(2). Technical standards shall not include policy choices and shall be limited to determining the conditions of application of that legislation. The Authority shall submit its draft standards to the Commission for endorsement.

Before submitting them to the Commission, the Authority shall, conduct open public consultations on 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 technical standards concerned or in relation to the particular urgency of the matter.

Within three months of receipt of the draft standards, the Commission shall decide whether to endorse the draft standards. The Commission may extend that period by one month. The Commission may endorse the draft standards only in part or with amendments where the European Union interest so requires.

Where the Commission intends not to endorse the standards or to endorse them in part or with amendments, it shall send the draft standards back to the Authority, proposing reasoned amendments. Within a period of 6 weeks, the Authority may amend the draft standards on the basis of the Commission's proposed amendments and resubmit them in the form of a formal opinion to the Commission.

If on the expiry of this time limit, the Authority has not submitted amended standards, or has submitted standards that are not amended in a way consistent with the Commission's proposed amendments, the Commission may adopt the standards with the amendments it considers relevant or reject the standards.

The Commission may not change the content of the technical standards prepared by the Authority without prior coordination with the Authority, as set out in this Article.

2. The standards shall be adopted by the Commission by means of Regulations or Decisions and published in the *Official Journal of the European Union*.

### *Article 8*

#### *Guidelines and recommendations*

The Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of European Union legislation, issue guidelines and recommendations addressed to competent authorities or financial market participants.

The Authority shall, where appropriate, conduct open public consultations on guidelines and recommendations and analyse the potential related costs and benefits.

The guidelines and recommendations shall be published on the website of the Authority.

The competent authorities shall make every effort to comply with those guidelines and recommendations.

Where the competent authority does not apply those guidelines or recommendations it shall inform the Authority of its reasons. The Authority may decide, on a case by case basis, to publish such reasons provided by a competent authority. The competent authority shall receive advanced notice about such a publication.

*Article 9*  
*Breach of European Union law*

1. Where a competent authority has not applied or has applied the legislation referred to in Article 1(2) in a way which appears to be a breach of European Union law, in particular by failing to ensure that a financial markets participant satisfies the requirements laid down in that legislation, the Authority shall have the powers set out in paragraphs 2, 3 and 6 of this Article.
2. Upon request from one or more competent authorities, from the Commission or on its own initiative and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of European Union law.  
Without prejudice to the powers laid down in Article 20, the competent authority shall provide the Authority with all information which the Authority considers necessary for its investigation without delay.
3. The Authority may, at the latest within two months from initiating its investigation, address to the competent authority concerned a recommendation setting out the action necessary to comply with European Union law.  
The competent authority shall, within ten working days of the receipt of the recommendation, inform the Authority of the steps it has taken or intends to take to ensure compliance with European Union law.
4. Where the competent authority has not complied with European Union law within one month from receipt of the Authority's recommendation, the Commission may, after having been informed by the Authority or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with European Union law. The Commission's formal opinion shall take into account the Authority's recommendation. The Commission shall issue such a formal opinion no later than three months from the adoption of the recommendation. The Commission may extend this period by one month. The Authority and the competent authorities shall provide the Commission with all necessary information.

5. The competent authority shall, within ten working days of receipt of the formal opinion referred to in paragraph 4, inform the Commission and the Authority of the steps it has taken or intends to take to comply with the Commission's formal opinion.
6. Without prejudice to the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union, where a competent authority does not comply with the formal opinion referred to in paragraph 4 within the period of time specified therein, and where it is necessary to remedy in a timely manner the non compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the Authority may, where the relevant requirements of the legislation referred to in Article 1(2) are directly applicable to financial market participants, adopt an individual decision addressed to a financial markets participant requiring the necessary action to comply with its obligations under European Union law including the cessation of any practice.

The decision of the Authority shall be in conformity with the formal opinion issued by the Commission pursuant to paragraph 4-

7. Decisions adopted under paragraph 6 shall prevail over any previous decision adopted by the competent authorities on the same matter

When taking action in relation to issues which are subject to a formal opinion pursuant to paragraph 4, or a decision pursuant to paragraph 6, competent authorities shall comply with the formal opinion or the decision, as the case may be.

## Article 10

### *Action in emergency situations*

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

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

- 1a. 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 and declare the discontinuation of the emergency situation, as soon as appropriate.
2. Where the Council has adopted a decision pursuant to paragraph 1a, 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 European Union, the Authority may adopt individual decisions requiring competent authorities to take the necessary action in accordance with the legislation referred to in Article 1(2) to address any such developments by ensuring financial market participants and competent authorities satisfy the requirements laid down in that legislation.
3. *Deleted*
4. Any action by the competent authorities in relation to issues which are subject to a decision pursuant to paragraph 2 shall be compatible with those decisions.

## *Article 11*

### *Settlement of disagreements between competent authorities in cross-border situations*

1. Without prejudice to the powers laid down in Article 9, where a competent authority disagrees on the procedure or content of an action or inaction by a competent authority of another Member State in cases specified in the legislation referred to in Article 1(2), the Authority, at the request of one or more of the competent authorities concerned, may assist the authorities in reaching an agreement in accordance with the procedure set out in paragraph 2.
2. The Authority shall set a time limit for conciliation between the competent authorities taking into account any relevant time periods specified in the legislation referred to in Article 1(2) and the complexity and urgency of the matter.
3. 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 third subparagraph of Article 29(1) 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 European Union law.
4. *Deleted*
- 4a. Decisions taken under paragraph 3 shall prevail over any previous decision adopted by the competent authority on the same matter.
- 4b. When taking action in relation to issues which are subject to a decision pursuant to paragraph 3, competent authorities shall comply with this decision.

*Article 12*

*Colleges of supervisors*

1. The Authority shall contribute to, promote and monitor the efficient, effective and consistent functioning of colleges of supervisors and foster the coherence of the application of European Union legislation across colleges.
  
2. The Authority shall participate as an observer in colleges of supervisors as it deems appropriate. For the purpose of that participation, it shall be considered a 'competent authority' within the meaning of the relevant legislation and, at its request, shall receive all relevant information shared with any member of the college.
  
3. The Authority shall, in cooperation with the supervisors operating in colleges of supervisors, determine and collect as appropriate all relevant information from competent authorities, in order to facilitate the work of those colleges.

It shall establish and manage a central system to make such information accessible to the competent authorities in colleges of supervisors.

## *Article 13*

### *Delegation of tasks and responsibilities*

1. Competent authorities may delegate tasks and responsibilities to other competent authorities, subject to the conditions set out in this Article. Member States may set out specific arrangements regarding the delegation of responsibilities that have to be complied with before their competent authorities enter into such agreements and may limit the scope of delegation to what is necessary for effective supervision of cross-border financial markets participants or groups.
2. The Authority shall facilitate the delegation of tasks and responsibilities between competent authorities by identifying those tasks and responsibilities that can be delegated or jointly exercised and by promoting best practices.
  - 2a. The delegation of responsibilities shall result in a reallocation of the competencies laid down in the legislation referred to in Article 1(2). The law of the delegatee authority shall govern the procedure, enforcement and administrative and judicial review relating to the delegated responsibilities.
3. Competent authorities shall inform the Authority of delegation agreements they intend to enter into. They shall put the agreements into effect at the earliest one month after informing the Authority.

The Authority may give an opinion on the intended agreement within one month of being informed.

The Authority shall publish any delegation agreement as concluded by the competent authorities by appropriate means, in order to ensure that all parties concerned are informed appropriately.

*Article 14*

*Common supervisory culture*

1. The Authority shall play an active role in building a common European supervisory culture and consistent supervisory practices, and ensuring uniform procedures and consistent approaches throughout the European Union and shall carry out, at a minimum, the following activities:
  - (a) provide opinions to competent authorities;
  - (b) promote an effective bilateral and multilateral exchange of information between competent authorities, with full respect of the applicable confidentiality and data protection provisions provided for in the relevant European Union legislation;
  - (c) contribute to developing high quality and uniform supervisory standards, including reporting standards;
  - (d) review the application of the relevant technical standards adopted by the Commission, guidelines and recommendations issued by the Authority and propose amendments where appropriate;
  - (e) establish sectoral and cross-sectoral training programmes, facilitate personnel exchanges and encourage competent authorities to intensify the use of secondment schemes and other tools.
2. The Authority may, as appropriate, develop new practical instruments and convergence tools to promote common supervisory approaches and practices.

## *Article 15*

### *Peer review of competent authorities*

1. The Authority shall periodically conduct peer review analyses of some or all of the activities of competent authorities, to further enhance consistency in supervisory outcomes. To this end, the Authority shall develop methods to allow for objective assessment and comparison between the authorities reviewed. When conducting peer reviews, existing information and evaluations already made with regard to the competent authority concerned shall be taken into account.
2. The peer review shall include an assessment of, but not be limited to:
  - (a) the adequacy of resources and governance arrangements of the competent authority, with particular regard to the effective application of the legislation referred to in Article 1(2) and to the capacity to respond to market developments;
  - (b) the degree of convergence reached in the application of European Union law and in supervisory practice, including technical standards, guidelines and recommendations adopted under Articles 7 and 8, and the extent to which the supervisory practice achieves the objectives set out in European Union law;
  - (c) good practices developed by some competent authorities which might be of benefit for other competent authorities to adopt.
3. On the basis of the peer review, the Authority may issue advice to the competent authorities concerned. Competent authorities shall endeavour to follow this advice. Where a competent authority does not follow this advice, it shall inform the Authority of its reasons.
- 3a. Results of peer reviews may be disclosed publicly, subject to the agreement of the competent authority being the subject of the peer review.

*Article 16*  
*Coordination function*

The Authority shall fulfil a general coordination role between competent authorities, including where adverse developments could potentially jeopardise the orderly functioning and integrity of financial markets or the stability of the financial system in the European Union.

The Authority shall promote a coordinated European Union response, inter alia by:

- (1) facilitating the exchange of information between the competent authorities;
- (2) determining the scope and, where possible and appropriate, verifying the reliability of information that should be made available to all competent authorities concerned;
- (3) without prejudice to Article 11, carry out non-binding mediation on the request of competent authorities or on its own initiative;
- (3a) taking all appropriate measures in situations of financial instability and crisis with a view to facilitating the coordination of actions undertaken by relevant national competent supervisory authorities;
- (4) notifying the ESRB of any potential emergency situations without delay.

*Article 17*  
*Assessment of market developments*

1. The Authority shall monitor and assess market developments in the area of its competence and, where necessary, inform the European Insurance and Occupational Pensions Authority, the European Banking Authority, the ESRB and the European Parliament, the Council and the Commission about the relevant micro-prudential trends, potential risks and vulnerabilities.

In particular, the Authority shall, in cooperation with the ESRB, initiate and coordinate European Union-wide assessments of the resilience of key financial market participants to adverse market developments. To that end, it shall develop the following, for application by the competent authorities:

- (a) common methodologies for assessing the effect of economic scenarios on a key financial market participant's financial positions;
- (b) common approaches to communication on the outcomes of these assessments of the resilience of key financial market participants.

2. Without prejudice to the tasks of the ESRB set out in Regulation (EC) No .../... [ESRB], the Authority shall, at least once a year, and more frequently as necessary, provide assessments to the European Parliament, the Council, the Commission and the ESRB of trends, potential risks and vulnerabilities in the area of its competence.

The Authority shall include a classification of the main risks and vulnerabilities in these assessments and, where necessary, recommend preventative or remedial actions.

3. The Authority shall ensure an adequate coverage of cross-sectoral developments, risks and vulnerabilities by closely cooperating with the European Insurance and Occupational Pensions Authority and the European Banking Authority.

## *Article 18*

### *International relations*

Without prejudice to the competences of the European Union Institutions and Member States, the Authority may develop contacts and enter into administrative arrangements with supervisory authorities, international organisations and administrative bodies of third countries. These arrangements shall not create legal obligations in respect of the European Union and its Member States.

The Authority shall assist in preparing equivalence decisions pertaining to supervisory regimes in third countries in accordance with the legislation referred to in Article 1(2).

## *Article 19*

### *Other tasks*

1. The Authority may, upon a request from the European Parliament, the Council, the Commission or on its own initiative provide opinions to the European Parliament, the Council and the Commission on all issues related to its area of competence.
2. With regard to prudential assessments of mergers and acquisitions falling within the scope of Directive 2007/44/EC and which according to that Directive require consultation between competent authorities from two or more Member States, the Authority may, on application of one of the competent authorities concerned, issue and publish an opinion on a prudential assessment, except in relation to the criteria in Art. 10b (1)(e) of Directive 2004/39/EC. The opinion shall be issued promptly and in any event before the end of the assessment period according to Directive 2007/44/EC. Article 20 shall apply to the areas about which the Authority may issue an opinion.

*Article 20*  
*Collection of information*

1. At the request of the Authority, competent authorities of the Member States shall provide the Authority with all the necessary information to carry out the duties assigned to it by this Regulation, provided that the addressee has legal access to the relevant data.

The Authority may also request information to be provided at recurring intervals. These requests shall, where possible, use common reporting formats.

- 1a. Before requesting information in accordance with this Article, the Authority shall first take account of the existing statistics produced, disseminated and developed by the European Statistical System and the European System of Central Banks.

2. Where information is not available or is not made available in a timely fashion by the competent authorities, the Authority may address a duly justified and reasoned request to other supervisory authorities, the Ministry of finance where the latter has at its disposal supervisory information, the central bank or statistical office of the Member State concerned.

- 2a. Where information is not available or is not made available under paragraphs 1 or 1a in a timely fashion, the Authority may address a duly justified and reasoned request directly to the relevant financial markets participants. The reasoned request shall explain why the data concerning the respective individual financial markets participants is necessary.

The Authority shall inform the relevant competent authorities of requests in accordance with paragraphs 2 and 2a.

At the request of the Authority, the competent authorities shall assist the Authority in collecting such information.

3. The Authority may use confidential information received under this Article only for the purposes of carrying out the duties assigned to it by this Regulation.

*Article 21*  
*Relationship with the ESRB*

1. The European Banking Authority shall co-operate closely with the ESRB.
2. The Authority shall provide the ESRB with regular and up-to-date information necessary for the achievement of its tasks, as specified in Article 15 of Regulation (EC) No .../... [ESRB].
3. The Authority shall, in accordance with paragraphs 4 and 5, ensure a proper follow-up to ESRB warnings and recommendations referred to in Article 16 of Regulation (EC) No .../... [ESRB].
4. On receipt of a warning or recommendation from the ESRB addressed to the Authority, it shall convene a meeting of the Board of Supervisors without delay and assess the implications of such a warning or recommendation for the fulfilment of its tasks.

It shall decide, by the relevant decision-making procedure, whether to take action with regard to a warning or recommendation and what actions to be taken in accordance with the powers conferred upon it by this Regulation for addressing the issues identified in the warnings and recommendations.

If the Authority does not act further on a recommendation, it shall explain to the Council and the ESRB its reasons for not doing so.

5. On receipt of a warning or recommendation from the ESRB addressed to a competent national supervisory authority, the Authority shall, where relevant, use the powers conferred upon it by this Regulation to ensure a timely follow-up.

Where the addressee intends not to follow the recommendation of the ESRB, it shall inform and discuss with the Board of Supervisors its reasons for not acting.

The competent authority shall take due account of the views of the Board of Supervisors when informing the Council and the ESRB in accordance with Article 17 of Regulation (EC) no .../...[ESRB].

6. In discharging its tasks set out in this regulation, the Authority shall take the utmost account of the warnings and recommendations of the ESRB.

## *Article 22*

### *Securities and Markets Stakeholder Group*

1. The Authority shall establish a Securities and Markets Stakeholder Group for the purpose of consultation with stakeholders in areas relevant to the tasks of the Authority.
2. The Securities and Markets Stakeholder Group shall be composed of 30 members, representing in balanced proportions European Union financial market participants, their employees as well as consumers, investors and users of financial services.

The Securities and Markets Stakeholder Group shall meet at least twice a year.

3. The members of the Securities and Markets Stakeholder Group shall be appointed by the Board of Supervisors of the Authority, following proposals from the relevant stakeholders.

In making its decision, the Board of Supervisors shall, to the extent possible, ensure an appropriate geographical balance and representation of stakeholders across the European Union.

The Authority shall ensure adequate secretarial support for the Securities and Markets Stakeholder Group.

4. Members of the Securities and Markets Stakeholder Group shall serve for a period of two and a half years, following which a new selection procedure shall take place.

The members may serve two successive terms.

5. The Securities and Markets Stakeholder Group may submit opinions and advice to the Authority on any issue related to the tasks of the Authority specified in Articles 7 and 8.
6. The Securities and Markets Stakeholder Group shall adopt its rules of procedure.
7. The Authority shall make public the opinions and advice of the Securities and Markets Stakeholder Group and the results of its consultations.

### *Article 23*

#### *Safeguards*

1. The Authority shall ensure that no decision adopted under Articles 10 or 11 impinges in any way on the fiscal responsibilities of Member States.
2. Where a Member State considers that a decision taken under Article 11(3) 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 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.

Where the Authority maintains its decision, the Council, shall take a decision, by a majority of the votes cast, at one of its meetings at the latest two months after the Authority has informed the Member State as set out in the previous subparagraph, as to whether the Authority's decision is maintained.

Where the Council, after having considered the matter, does not take a decision to maintain the Authority's decision, in accordance with the previous subparagraph, the Authority's decision shall be terminated.

3. Where a Member State considers that a decision taken under Article 10(2) impinges on its fiscal responsibilities, it may notify the Authority, the Commission and the Council within three working days, 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 explain why and how the decision impinges on its fiscal responsibilities.

In that case, the decision of the Authority shall be suspended.

The Council shall, within ten working days convene a meeting and take a decision, with a simple majority of its members, as to whether the Authority's decision is revoked.

Where the Council, after having considered the matter, does not take a decision to revoke the Authority's decision, in accordance with the previous subparagraph, the suspension of the Authority's decision shall be terminated.

- 3a. Where the Council has taken, in accordance with paragraph 3, a decision not to revoke a decision of the Authority relating to Article 10(2), and the Member State concerned still considers that that decision impinges upon its fiscal responsibilities, it may notify the Commission and the Authority and request the Council to re-examine the matter. The Member State concerned shall clearly set out the reasons for its disagreement with the decision of the Council.

Within a period of four weeks after the notification referred to in the previous subparagraph, the Council shall confirm its original decision or take a new decision in accordance with paragraph 3. The period of four weeks may be extended by four additional weeks by the Council, if the particular circumstances of the case so require.

## *Article 24*

### *Decision-making procedures*

1. Before taking the decisions provided for in Article 9(6), Article 10(2) and Article 11(3) and (4), the Authority shall inform the addressee of its intention to adopt the decision, setting a time limit within which the addressee may express its views on the matter, taking full account of the urgency of the matter.
2. The decisions of the Authority shall state the reasons on which they are based.
3. The addressees of decisions of the Authority shall be informed of the legal remedies available under this Regulation.
4. Where the Authority has taken a decision pursuant to Article 10(2) or (3), it shall review that decision at appropriate intervals.
5. The decisions which the Authority takes pursuant to Articles 9, 10 and 11 shall be made public and shall state the identity of the competent authority or financial markets participant concerned and the main content of the decision, unless such publication is in conflict with the legitimate interest of financial markets participants in the protection of their business secrets or could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the European Union.

## CHAPTER III

### ORGANISATION

#### SECTION 1

#### BOARD OF SUPERVISORS

##### *Article 25*

##### *Composition*

1. The Board of Supervisors shall be composed of:
  - (a) the Chairperson, who shall be non-voting;
  - (b) the Head of the competent authority in each Member State, who shall meet in person at least twice a year;
  - (c) one representative of the Commission who shall be non-voting;
  - (d) one representative of the ESRB who shall be non-voting;
  - (e) one representative of each of the other two European Supervisory Authorities who shall be non-voting.
  
2. Each competent authority shall be responsible for nominating a high-level alternate from the competent authority, who may represent the member of the Board of Supervisors referred to in paragraph 1(b), when this person is prevented from attending.

3. For the purpose of acting within the scope of Directive 97/9/EC the member of the Board of Supervisors referred to in paragraph 1(b) may, where appropriate, be accompanied by a representative from the relevant bodies which administers investor compensation schemes in each Member State, who shall be non-voting.
- 3a. In Member States where there is more than one authority competent for the supervision according to this Regulation, those authorities shall agree on a common representative. Nevertheless, when an item to be discussed by the Board of Supervisors does not fall within the competence of the national authority being represented by the member referred to in paragraph 1(b), that member may bring a representative from the relevant national authority, who shall be non-voting.
4. The Board of Supervisors may decide to admit observers.

The Executive Director may participate in meetings of the Board of Supervisors without the right to vote.

## *Article 26*

### *Internal committees and Panels*

1. The Board of Supervisors may establish internal committees or panels for specific tasks attributed to the Board of Supervisors, and may provide for the delegation of certain clearly defined tasks and decisions to internal committees or panels, to the Management Board or to the Chairperson.
2. For the purposes of Article 11, the Board of Supervisors shall convoke, on an ad-hoc basis, a panel which has a balanced composition of members and is independent with regard to the disagreement concerned, in order to facilitate the settlement of the disagreement, consisting of the Chairperson and two of its members, who are neither representatives of the competent authorities which are parties to the disagreement, nor have any interest in the conflict or direct links to the competent authorities concerned.
  - 2a. Subject to Article 11(2), the panel shall propose a decision for final adoption by the Board of Supervisors, in accordance with the procedure set out in the third subparagraph of Article 29(1).
  - 2b. The Board of Supervisor shall adopt rules of procedure for the panel referred to in paragraph 2.

## *Article 27*

### *Independence*

1. 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 European Union and shall neither seek nor take instructions from European Union institutions or bodies, from a Government of a Member State or from any other public or private body.
2. Neither Member States, European Union institutions or bodies, nor any other public or private body shall seek to influence staff members of the Authority, the Chairperson and the voting members of the Board of Supervisors.

## *Article 28*

### *Tasks*

1. The Board of Supervisors shall give guidance to the work of the Authority and shall be in charge of taking the decisions referred to in Chapter II.
2. The Board of Supervisors shall adopt the opinions, recommendations, and decisions, and issue the advice referred to in Chapter II.
3. The Board of Supervisors shall appoint the Chairperson.
4. The Board of Supervisors shall adopt, before 30 September each year, on the basis of a proposal by the Management Board, the work programme of the Authority for the coming year, and shall transmit it for information to the European Parliament, the Council and the Commission.

The work programme shall be adopted without prejudice to the annual budgetary procedure and shall be made public.

5. The Board of Supervisors shall adopt the multi-annual work programme of the Authority, and shall transmit it for information to the European Parliament, the Council and the Commission.

The multi-annual work programme shall be adopted without prejudice to the annual budgetary procedure and shall be made public.

6. The Board of Supervisors shall adopt the budget in accordance with Article 49.
7. The Board of Supervisors shall exercise disciplinary authority over the Chairperson and the Executive Director and may remove them from office in accordance with Article 33(5) or Article 36(5) respectively.

*Article 29*  
*Decision making*

1. Decisions of the Board of Supervisors shall be taken by simple majority of its members, according to the principle where each member has one vote.

With regard to acts specified in Articles 7 and 8 and measures and decisions adopted under Chapter VI and by way of derogation from the first subparagraph, the Board of Supervisors shall take decisions on the basis of a qualified majority of its members, as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol No 36 on transitional provisions annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

With regard to decisions in accordance with Article 11(3), the decision proposed by the panel shall be considered as adopted, if approved by a simple majority of the members of the Board of Supervisors according to the principle where each member has one vote.

2. Meetings of the Board of Supervisors shall be convened by the Chairperson at his or her own initiative or at the request of one third of its members, and shall be chaired by the Chairperson.
3. The Board of Supervisors shall adopt and make public its rules of procedure.
4. The rules of procedure shall set out in detail the arrangements governing voting, including, where appropriate, the rules governing quorums. The non-voting members and the observers, with the exception of the Chairperson and the Executive Director, shall not attend any discussions within the Board of Supervisors relating to individual financial market participants, unless otherwise provided for in Article 61 or in the legislation referred to in Article 1(2).

**SECTION 2**  
**MANAGEMENT BOARD**

*Article 30*  
*Composition*

1. The Management Board shall be composed of the Chairperson, and six other members of the Board of Supervisors, elected by the voting members of the Board of Supervisors.

Each member other than the Chairperson shall have an alternate, who may replace the member of the Management Board if that person is prevented from attending.

The term of office of the members elected by the Board of Supervisors shall be two and a half years. It may be extended once. The composition of the Management Board shall be balanced and proportionate and reflect the European Union as a whole. Mandates shall be overlapping and an appropriate rotating arrangement shall apply.

2. Decisions by the Management Board shall be adopted on the basis of a majority of the members present. Each member shall have one vote.

The Executive Director and a representative from the Commission shall participate in meetings of the Management Board without the right to vote.

The representative of the Commission shall have the right to vote on matters referred to in Article 49.

The Management Board shall adopt and make public its rules of procedure.

3. Meetings of the Management Board shall be convened by the Chairperson on its own initiative or at the request of at least a third of its members, and chaired by the Chairperson.

It shall meet at least five times a year in ordinary session.

4. The members of the Management Board may, subject to the rules of procedure, be assisted by advisers or experts. The non-voting members with the exception of the Executive Director, shall not attend any discussions within the Management Board relating to individual financial markets participants.

*Article 31*  
*Independence*

The members of the Management Board shall act independently and objectively in the sole interest of the European Union, , without seeking or taking any instructions from European Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, European Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Management Board.

## *Article 32*

### *Tasks*

1. The Management Board shall ensure that the Authority carries out its mission and performs the tasks assigned to it in accordance with this Regulation.
2. The Management Board shall propose, for adoption by the Board of Supervisors, an annual and multi-annual work programme.
3. The Management Board shall exercise its budgetary powers in accordance with Articles 49 and 50.
4. The Management Board shall adopt the Authority's staff policy plan and, pursuant to Article 54(2), the necessary implementing measures of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations').
5. The Management Board shall adopt the special provisions on right of access to the documents of the Authority, in accordance with Article 58.
6. The Management Board shall, after consulting the Board of Supervisors, adopt the annual report on the activities of the Authority on the basis of the draft report referred to in Article 38(7) and shall transmit that report to the European Parliament, the Council, the Commission, the Court of Auditors, the European Economic and Social Committee by 15 June. The report shall be made public.
7. The Management Board shall adopt and make public its rules of procedure.
8. The Management Board shall appoint and remove the members of the Board of Appeal in accordance with Article 44(3) and 44(5).

## SECTION 3 CHAIRPERSON

### *Article 33 Appointment and tasks*

1. The Authority shall be represented by a Chairperson, who shall be a full-time independent professional.

The Chairperson shall be responsible for preparing the work of the Board of Supervisors and shall chair the meetings of the Board of Supervisors and the Management Board.

2. The Chairperson shall be appointed by the Board of Supervisors on the basis of merit, skills, knowledge of financial market participants and markets, and experience relevant to financial supervision and regulation, following an open selection procedure.

Before appointment, the candidate selected by the Board of Supervisors shall be subject to confirmation by the European Parliament.

The Board of Supervisors shall also elect from among its members an alternate who shall carry out the functions of the Chairperson in his absence.

3. The Chairperson's term of office shall be five years and may be extended once.

4. In the course of the nine months preceding the end of the five-year term of office of the Chairperson, the Board of Supervisors shall evaluate:
- (a) the results achieved in the first term of Office and the way they were achieved;
  - (b) the Authority's duties and requirement in the coming years.

The Board of Supervisors taking into account the evaluation may extend the term of office of the Chairperson once subject to confirmation by the European Parliament.

5. The Chairperson may be removed from office only upon Decision of the Board of Supervisors subject to confirmation by the European Parliament.

The Chairperson may not prevent the Board of Supervisors from discussing matters relating to the Chairman, in particular the need for his or her removal and shall not be involved in deliberations concerning such a matter.

*Article 34*  
*Independence*

Without prejudice to the role of the Board of Supervisors in relation to the tasks of the Chairperson, the Chairperson shall neither seek nor take instructions from European Union institutions or bodies, from any government of a Member State or from any other public or private body.

In accordance with the Staff Regulations referred to in Article 54, the Chairperson shall, after leaving the service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

*Article 35*

*Report*

1. The European Parliament and the Council may invite the Chairperson or his or her alternate, while fully respecting his or her independence, to make a statement regularly before its competent committee and answer questions put by members of that committee.
2. The European Parliament may also call upon the Chairperson to submit a report on the performance of his duties.

**SECTION 4**

**EXECUTIVE DIRECTOR**

*Article 36*

*Appointment*

1. The Authority shall be managed by the Executive Director, who shall be a full-time independent professional.
2. The Executive Director shall be appointed by the Board of Supervisors on the basis of merit, skills, knowledge of financial market participants and markets, and experience relevant to financial supervision and regulation and managerial experience, following an open selection procedure.
3. The Executive Director's term of office shall be five years and may be extended once.

4. In the course of the nine months preceding the end of the five-year term of office of the Executive Director, the Board of Supervisors shall undertake an evaluation.

In that evaluation, the Board of Supervisors shall assess in particular:

- (a) the results achieved in the first term of Office and the way they were achieved;
- (b) the Authority's duties and requirement in the coming years.

The Board of Supervisors taking into account the evaluation may extend the term of office of the Executive Director once.

5. The Executive Director may be removed from office only upon Decision of the Board of Supervisors.

#### *Article 37*

#### *Independence*

Without prejudice to the respective roles of the Management Board and the Board of Supervisors in relation to the tasks of the Executive Director, the Executive Director shall neither seek nor take instructions from any government, authority, organisation or person outside the Authority.

In accordance with the Staff Regulations referred to in Article 54, the Executive Director shall, after leaving the service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

*Article 38*

*Tasks*

1. The Executive Director shall be in charge of the management of the Authority and shall prepare the work of the Management Board.
2. The Executive Director shall be responsible for implementing the annual work programme of the Authority under the guidance of the Board of Supervisors and under the control of the Management Board.
3. The Executive Director shall take the necessary measures, notably the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Authority, in accordance with this Regulation.
4. The Executive Director shall prepare a multi-annual work programme, as referred to in Article 32(2).
5. Each year by 30 June, the Executive Director shall prepare a work programme for the following year, as referred to in Article 32(2).
6. The Executive Director shall draw up a preliminary draft budget of the Authority pursuant to Article 49 and shall implement the budget of the Authority pursuant to Article 50.
7. Each year the Executive Director shall prepare a draft annual report with a section on the regulatory and supervisory activities of the Authority and a section on financial and administrative matters.
8. The Executive Director shall exercise in respect to the Authority's staff the powers laid down in Article 54 and manage staff matters.

**CHAPTER IV**  
**EUROPEAN SYSTEM OF FINANCIAL SUPERVISORS**

**SECTION 1**  
**GENERAL PROVISIONS**

*Article 39*

*Composition*

1. The Authority shall form part of the ESFS, which shall function as a network of supervisors.
2. The ESFS shall comprise the following:
  - (a) the authorities in the Member States as specified in Article 1(2) of this Regulation, Article 1(2) of Regulation (EC) No .../2009 [EIOPA] and Article 1(2) of Regulation (EC) No .../... [EBA],
  - (b) the Authority,
  - (c) the European Insurance and Occupational Pensions Authority set up under Article 1 of Regulation (EC) No .../...[EIOPA],
  - (d) the European Banking Authority set up under Article 1 of Regulation (EC) No .../... [EBA],
  - (e) the Joint Committee of European Supervisory Authorities provided for in Article 40;
3. The Authority shall cooperate regularly and closely, ensure cross-sectoral consistency of work and arrive at joint positions in the area of supervision of financial conglomerates and on other cross-sectoral issues with the European Insurance and Occupational Pensions Authority and the European Banking Authority through the Joint Committee of European Supervisory Authorities set up in Article 40.

## SECTION 2

### JOINT COMMITTEE OF EUROPEAN SUPERVISORY AUTHORITIES

#### *Article 40*

##### *Establishment*

1. A Joint Committee of the European Supervisory Authorities is hereby established.
2. The Joint Committee shall serve as a forum in which the Authority shall cooperate regularly and closely and ensure cross-sectoral consistency with the European Insurance and Occupational Pensions Authority and the European Banking Authority.
3. The Authority shall contribute adequate resources to the administrative support of the Joint Committee of European Supervisory Authorities. This includes staff, administrative, infrastructure, and operational expenses.

#### *Article 41*

##### *Composition*

1. The Joint Committee shall be composed of the Chairperson and the Chairpersons of the European Insurance and Occupational Pensions Authority and the European Banking Authority, and, where applicable, the Chairperson of a Sub-Committee established under Article 43.
2. The Executive Director, the Commission and the ESRB shall be invited to the meetings of the Joint Committee of European Supervisory Authorities as well as the Sub-Committees mentioned in Article 43 as observers.
3. The chair of the Joint Committee of European Supervisory Authorities shall be appointed on an annual rotational basis from among the Chairpersons of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority.

4. The Joint Committee of European Supervisory Authorities shall adopt and publish its own rules of procedure. The rules may specify further participants of the meetings of the Joint Committee.

The Joint Committee of European Supervisory Authorities shall meet at least once every two months.

#### *Article 42*

##### *Joint positions and common acts*

Within the scope of its tasks in Chapter II, and notably with respect to the implementation of Directive 2002/87/EC, where relevant, the Authority shall reach joint positions with the European Insurance and Occupational Pensions Authority and with the European Banking Authority as appropriate.

Acts under Articles 7, 9, 10, or 11 of this Regulation in relation to the application of Directive 2002/87/EC and of any other legislation referred to in Article 1(2) that also falls within the area of competence of the European Insurance and Occupational Pensions Authority or the European Banking Authority shall be adopted by the Authority, the European Insurance and Occupational Pensions Authority, and the European Banking Authority, as appropriate, in parallel.

#### *Article 43*

##### *Sub-committees*

For the purposes of Article 42, a Sub-Committee on Financial Conglomerates to the Joint Committee of European Supervisory Authorities shall be established.

That Sub-Committee shall be composed of the individuals mentioned in Article 41(1), and one high-level representative from the current staff of the relevant competent authority from each Member State.

The Sub-Committee shall elect a Chairperson from amongst its members, who shall also be a member of the Joint Committee of European Supervisory Authorities.

The Joint Committee may establish further Sub Committees.

### SECTION 3

#### BOARD OF APPEAL

##### *Article 44*

##### *Composition*

1. The Board of Appeal shall be a joint body of the European Banking Authority, the European Insurance and Occupational Pensions Authority, and the European Securities and Markets Authority.
  
2. The Board of Appeal shall be composed of six members and six alternates, who shall be individuals of a high repute with a proven record of relevant knowledge and professional, including supervisory, experience on a sufficiently high level in the field of banking, insurance, securities markets or other financial services, excluding current staff of the competent authorities or other national or European Union institutions involved in the activities of the Authority.

The Board of Appeal designates its President.

The decisions of the Board of Appeal shall be adopted on the basis of a majority of at least four of its six members. Where the appealed decision falls within the scope of this Regulation, this majority of four members shall include at least one of the two members of the Board of Appeal appointed by the Authority.

The Board of Appeal shall be convened by its President when necessary.

3. Two members of the Board of Appeal and two alternates shall be appointed by the Management Board of the Authority from a short-list proposed by the Commission, following a public call for expression of interest published in the *Official Journal of the European Union*, and after consultation of the Board of Supervisors.

The other Members shall be appointed in accordance with Regulation (EC) No .../... [EIOPA] and Regulation (EC) No .../... [EBA].

4. The term of office of the members of the Board of Appeal shall be five years. This term may be extended once.
5. A member of the Board of Appeal, who was appointed by the Management Board of the Authority, may not be removed during his term of office, unless he has been found guilty of serious misconduct, and the Management Board takes a decision to that effect after consulting the Board of Supervisors.
6. The Authority, the European Banking Authority, and the European Insurance and Occupational Pensions Authority shall ensure adequate operational and secretarial support for the Board of Appeal.

#### *Article 45*

##### *Independence and impartiality*

1. The members of the Board of Appeal shall be independent in making their decisions. They shall not be bound by any instructions. They may not perform any other duties in the Authority, in its Management Board or in its Board of Supervisors.
2. Members of the Board of Appeal may not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to the proceedings, or if they have participated in the decision under appeal.
3. If, for one of the reasons referred to in paragraph 1 and 2 or for any other reason, a member of a Board of Appeal considers that a fellow member should not take part in any appeal proceedings, the member shall inform the Board of Appeal accordingly.

4. Any party to the appeal proceedings may object to the participation of a member of the Board of Appeal on any of the grounds referred to in paragraph 1 and 2, or if suspected of bias.

An objection may not be based on the nationality of members nor shall it be admissible if, while being aware of a reason for objecting, the party to the appeal proceedings has nonetheless taken a procedural step other than objecting to the composition of the Board of Appeal.

5. The Board of Appeal shall decide on the action to be taken in the cases specified in paragraphs 1 and 2 without the participation of the member concerned.

For the purpose of taking that decision, the member concerned shall be replaced on the Board of Appeal by his alternate, unless the alternate finds himself in a similar situation. Should this be the case, the Chairperson shall designate a replacement from among the available alternates.

6. The members of the Board of Appeal shall undertake to act independently and in the public interest.

For that purpose, they shall make a declaration of commitments and a declaration of interests indicating either the absence of any interest which may be considered prejudicial to their independence or any direct or indirect interest which might be considered prejudicial to their independence.

Those declarations shall be made public, annually and in writing.

**CHAPTER V**  
**REMEDIES**

*Article 46*  
*Appeals*

1. Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 9, 10 and 11 and any other decision taken by the Authority according to legislation as referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.
  
2. The appeal, together with the statement of grounds thereof, shall be filed in writing at the Authority within two months of the day of notification of the decision to the person concerned, or, in the absence thereof, of the day on which the Authority has published its decision.  
  
The Board of Appeal shall decide upon the appeal within two months after the appeal has been lodged.
  
3. An appeal lodged pursuant to paragraph 1 shall not have suspensive effect.  
  
The Board of Appeal may, however, if it considers that circumstances so require, suspend the application of the contested decision.
  
4. If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded. It shall as often as necessary invite the parties to the appeal proceedings to file observations on notifications issued by itself or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make an oral presentation.

5. The Board of Appeal may either confirm the decision taken by the competent body of the Authority or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and shall adopt an amended decision regarding the case concerned.
6. The Board of Appeal shall adopt and make public its rules of procedure.
7. The decisions taken by the Board of Appeal shall be reasoned and made public by the Authority.

*Article 47*

*Actions before the Court of Justice*

1. An action may be brought before the Court of Justice, in accordance with Article 263 of the Treaty on the Functioning of the European Union, contesting a decision taken by the Board of Appeal.

Member States and the European Union institutions, as well as any natural or legal person, may lodge a direct appeal before the Court of Justice against decisions of the Authority, in accordance with Article 263 of the Treaty on the Functioning of the European Union.

2. In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice in accordance with Article 265 of the Treaty on the Functioning of the European Union.
3. The Authority shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

**CHAPTER VI**  
**FINANCIAL PROVISIONS**

*Article 48*

*Budget of the Authority*

1. The revenues of the Authority shall consist, in particular, of:
  - (a) obligatory contributions from the national public authorities competent for the supervision of financial institutions; which shall be made in accordance with the weighting of votes set out in Article 3(3) of the Protocol (No 36) on transitional provisions annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union. For the purposes of this Article, Article 3(3) of the Protocol (No 36) on transitional provisions shall continue to apply beyond the deadline of 31 October 2014 therein established.
  - (b) a subsidy from the European Union, entered in the General Budget of the European Union (Commission Section);
  - (c) any fees paid to the Authority in the cases specified in the relevant instruments of European Union law.
2. The expenditure of the Authority shall include, at least, staff, remuneration, administrative, infrastructure, and operational expenses.
3. Revenue and expenditure shall be in balance.
4. Estimates of all Authority revenue and expenditure shall be prepared for each financial year, corresponding to the calendar year, and shall be presented in the budget of the Authority.

*Article 49*

*Establishment of the budget*

1. By 15 February each year, the Executive Director shall draw up a draft statement of estimates of revenue and expenditure for the following financial year, and shall forward this preliminary draft budget to the Management Board and the Board of Supervisors, together with the establishment plan. Each year, the Board of Supervisor shall, on the basis of the preliminary draft drawn up by the Executive Director and approved of the Management Board, produce a statement of estimates of revenue and expenditure of the Authority for the following financial year. That statement of estimates, including a draft establishment plan, shall be transmitted by the Board of Supervisors to the Commission by 31 March. Prior to adoption of the statement of estimates, the draft prepared by the Executive Director shall be approved by the Management Board.
2. The statement of estimates shall be transmitted by the Commission to the European Parliament and to the Council (hereinafter referred to as the 'budgetary authority'), together with the preliminary draft General Budget of the European Union.
3. On the basis of the statement of estimates, the Commission shall enter in the preliminary draft General Budget of the European Union the estimates it deems necessary in respect of the establishment plan and the amount of the subsidy to be charged to the general budget of the European Union in accordance with Article 313 of the Treaty on the Functioning of the European Union.
4. The budgetary authority shall adopt the establishment plan for the Authority. The budgetary authority shall authorise the appropriations for the subsidy to the Authority.
5. The budget of the Authority shall be adopted by the Board of Supervisors. It shall become final after the final adoption of the general budget of the European Union. Where necessary, it shall be adjusted accordingly.

6. The Management Board shall, without delay, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of its budget, in particular any project relating to property such as the rental or purchase of buildings. It shall inform the Commission thereof. If either branch of the budget authority intends to issue an opinion, it shall, within two weeks of receipt of the information on the project, notify the Authority of its intention to issue such an opinion. In the absence of a reply, the Authority may proceed with the planned operation.

*Article 50*

*Implementation and control of the budget*

1. The Executive Director shall act as authorising officer and shall implement the Authority's budget.
2. By 1 March following the completion of each financial year, the Authority accounting officer shall forward to the Commission's accounting officer and to the Court of Auditors the provisional accounts, accompanied by the report on budgetary and financial management during the financial year. The Authority accounting officer shall also send the report on budgetary and financial management to the members of the Board of Supervisors, the European Parliament and the Council by 31 March of the following year.

The Commission's accounting officer shall then consolidate the provisional accounts of the institutions and decentralised bodies in accordance with Article 128 of Council Regulation (EC, Euratom) No 1605/2002<sup>1</sup>, (hereinafter referred to as the 'Financial Regulation').

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<sup>1</sup> OJ L 248, 16.9.2002, p. 1.

3. After receiving the observations of the Court of Auditors on the provisional accounts of the Authority in accordance with the provisions of Article 129 of the Financial Regulation, the Executive Director, acting on his own responsibility, shall draw up the final accounts of the Authority and transmit them, for opinion, to the Management Board.
4. The Management Board shall deliver an opinion on the final accounts of the Authority.
5. The Executive Director shall transmit those final accounts, accompanied by the opinion of the Management Board, by 1 July following the completion of the financial year, to the Members of the Board of Supervisors, the European Parliament, the Council, the Commission and the Court of Auditors.
6. The final accounts shall be published.
7. The Executive Director shall send the Court of Auditors a reply to the latter's observations by 30 September. He or she shall also send a copy of this reply to the Management Board and the Commission.
8. The Executive Director shall submit to the European Parliament, at the latter's request and as provided for in Article 146(3) of the Financial Regulation, any information necessary for the smooth application of the discharge procedure for the financial year in question.
9. The European Parliament, following a recommendation from the Council acting by qualified majority, shall, before 15 May of the year N + 2, grant a discharge to the Authority for the implementation of the budget for the financial year N.

*Article 51*  
*Financial rules*

The financial rules applicable to the Authority shall be adopted by the Management Board after the Commission has been consulted. Those rules may not depart from Commission Regulation (EC, Euratom) No 2343/2002<sup>1</sup> unless the specific operational needs for the functioning of the Authority so require and only with the prior agreement of the Commission.

*Article 52*  
*Anti-fraud measures*

1. For the purposes of combating fraud, corruption and any other illegal activity, the provisions of Regulation (EC) No 1073/1999 shall apply to the Authority without any restriction.
2. The Authority shall accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF)<sup>2</sup> and shall immediately adopt appropriate provisions for all staff of the Authority.
3. The funding decisions and the agreements and the implementing instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may, if need be, carry out on-the-spot checks on the beneficiaries of monies disbursed by the Authority as well as on the staff responsible for allocating these monies.

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<sup>1</sup> OJ L 357, 31.12.2002, p.72.

<sup>2</sup> OJ L 136, 31.5.1999, p. 15.

**CHAPTER VII**  
**GENERAL PROVISIONS**

*Article 53*

*Privileges and immunities*

The Protocol on Privileges and Immunities of the European Communities shall apply to the Authority and its staff.

*Article 54*

*Staff*

1. The Staff Regulations, the Conditions of employment of other servants and the rules adopted jointly by the European Union institutions for the purpose of applying these shall apply to the staff of the Authority, including its Executive Director and its Chairperson.
2. The Management Board, in agreement with the Commission, shall adopt the necessary implementing measures, in accordance with the arrangements provided for in Article 110 of the Staff Regulations.
3. In respect of its staff, the Authority shall exercise the powers conferred on the appointing authority by the Staff Regulations and on the authority entitled to conclude contracts by the Conditions of employment of other servants.
4. The Management Board shall adopt provisions to allow national experts from Member States to be seconded to the Authority.

## *Article 55*

### *Liability of the Authority*

1. In the case of non-contractual liability, the Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its staff in the performance of their duties. The Court of Justice shall have jurisdiction in any dispute over the remedying of such damage.
2. The personal financial liability and disciplinary liability of Authority staff towards the Authority shall be governed by the relevant provisions applying to the staff of the Authority.

## *Article 56*

### *Obligation of Professional Secrecy*

1. Members of the Board of Supervisors and the Management Board, the Executive Director, and members of the staff of the Authority including officials seconded by Member States on a temporary basis and all other persons carrying out tasks for the Authority on a contractual basis shall be subject to the requirements of professional secrecy pursuant to Article 339 of the Treaty on the Functioning of the European Union and the relevant provisions in the relevant European Union legislation, even after their duties have ceased.
2. Without prejudice to cases covered by criminal law, any confidential information received by 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 market participants cannot be identified.

Moreover, the obligation under paragraphs 1 and the first subparagraph of this paragraph shall not prevent the Authority and the national supervisory authorities from using the information for the enforcement of the legislation referred to in Article 1(2), and in particular for legal proceedings for the adoption of decisions.

3. Paragraphs 1 and 2 shall not prevent the Authority from exchanging information with national supervisory authorities in accordance with this Regulation and other European Union legislation applicable to financial market participants.

That information shall be subject to the conditions of professional secrecy indicated in paragraphs 1 and 2. The Authority shall lay down in its internal rules of procedure the practical arrangements for implementing the confidentiality rules referred to in paragraphs 1 and 2.

4. The Authority shall apply Commission Decision 2001/844/EC, ECSC, Euratom<sup>1</sup>.

#### *Article 57*

##### *Data protection*

This regulation shall be without prejudice to the obligations of Member States relating to their processing of personal data under Directive 95/46/EC or the obligations of the Authority relating to its processing of personal data under Regulation (EC) No 45/2001 when fulfilling its responsibilities.

#### *Article 58*

##### *Access to documents*

1. Regulation (EC) No 1049/2001 shall apply to documents held by the Authority.
2. The Management Board shall adopt practical measures for applying Regulation (EC) No 1049/2001 by 31 May 2011.
3. Decisions taken by the Authority pursuant to Article 8 of Regulation (EC) No 1049/2001 may be the subject of a complaint to the Ombudsman or of proceedings before the Court of Justice, following appeal to the Board of Appeal, as appropriate, in accordance with the conditions laid down in Articles 228 and 263 of the Treaty on the Functioning of the European Union respectively.

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<sup>1</sup> OJ L 317, 3.12.2001, p.1.

## *Article 59*

### *Language arrangements*

1. The provisions of Council Regulation No 1<sup>1</sup> shall apply to the Authority.
2. The Management Board shall decide on the internal language arrangements for the Authority.
3. The translation services required for the functioning of the Authority shall be provided by the Translation Centre for the Bodies of the European Union.

## *Article 60*

### *Headquarters Agreement*

The necessary arrangements concerning the accommodation to be provided for the Authority in the Member State where its seat is located and the facilities to be made available by that Member State, as well as the specific rules applicable in that Member State to the Executive Director, the members of the Management Board, staff of the Authority and members of their families shall be laid down in a Headquarters Agreement between the Authority and that Member State concluded after obtaining the approval of the Management Board.

That Member State shall provide the best possible conditions to ensure proper functioning of the Authority, including multilingual, European-oriented schooling and appropriate transport connections

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<sup>1</sup> OJ 17, 6.10.1958, p. 385/58.

*Article 61*

*Participation of third countries*

Participation in the work of the Authority shall be open to countries which are not members of the European Union and which have concluded agreements with the European Union whereby they have adopted and are applying European Union law in the area of competence of the Authority as referred to in Article 1(2).

Under the relevant provisions of these agreements, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of these countries in the work of the Authority, including provisions relating to financial contributions and to staff. They may provide for representation, as an observer, on the Board of Supervisors, but shall ensure that these countries do not attend any discussions relating to individual financial market participants, except where there is a direct interest.

**CHAPTER VIII**  
**TRANSITIONAL AND FINAL PROVISIONS**

*Article 62*

*Preparatory actions*

1. During the period after the entry into force of this Regulation, and before the establishment of the Authority, the Committee of European Securities Regulators shall act in close co-operation with the Commission to prepare for the replacement of the Committee of European Securities Regulators by the Authority.
2. Once the Authority has been established, the Commission shall be responsible for the administrative establishment and initial administrative operation of the Authority until the Authority has appointed an Executive Director. For that purpose, until such time as the Executive Director takes up his/her duties following his appointment by the Board of Supervisors in accordance with Article 36, the Commission may assign one official on an interim basis in order to fulfil the functions of the Executive Director. This period shall be limited to the time necessary for the appointment of an Executive Director of the Authority. The interim Executive Director may authorise all payments covered by credits provided in the budget of the Authority, once approved by the Management Board and may conclude contracts, including staff contracts, following the adoption of the Authority's establishment plan.
3. Paragraphs 1 and 2 are without prejudice to the powers of the Board of Supervisors and the Management Board.

- 3a. The Authority shall be considered the legal successor of the Committee of European Securities Regulators. At the latest on the date of establishment of the Authority, all assets and liabilities and all pending operations of the Committee of European Securities Regulators will be automatically transferred to the Authority. The Committee of European Securities Regulators shall establish a statement showing its closing asset and liability situation as of the date of that transfer, This statement shall be audited and approved by its members and by the Commission.

*Article 63*  
*Transitional Staff provisions*

1. By way of derogation from Article 54, all employment contracts concluded by the Committee of European Securities Regulators or its Secretariat and in force on the date of application of this Regulation shall be honoured until their expiry date. They may not be extended.
2. All members of staff under contracts referred to in paragraph 1 shall be offered the possibility of concluding temporary agent contracts under Article 2(a) of the Conditions of Employment of Other Servants at the various grades as set out in the Authority's establishment plan.

An internal selection limited to staff who have contracts with the Committee of European Securities Regulators or its Secretariat shall be carried out after the entry into force of this Regulation by the authority authorised to conclude contracts in order to check the ability, efficiency and integrity of those to be engaged.

3. Depending on the type and level of functions to be performed, successful applicants shall be offered temporary agents' contracts of a duration corresponding at least to the time remaining under the prior contract.

4. The relevant national law relating to labour contracts and other relevant instruments shall continue to apply to staff members with prior contracts who choose not to apply for temporary agent's contracts or who are not offered temporary agents contracts in accordance with paragraph 2

*. Article 63a*

*National provisions*

The Member States shall make such provision as is appropriate to ensure the effective application of this Regulation.

*Article 64*

*Amendments*

Council and Parliament Decision n° ... of ... establishing a Community programme to support specific activities in the field of financial services, financial reporting and auditing, is hereby amended insofar as the Committee of European Securities Regulators is removed from the list of beneficiaries set out in Section B of the Annex to that Decision

*Article 65*

*Repeal*

Commission Decision 2009/77/EC, establishing the Committee of European Securities Regulators, is hereby repealed with effect from the date of application referred to in Article 67.

*Article 66*  
*Review clause*

1. Within three years from the date set out in the second paragraph of Article 67 and every three years thereafter, the Commission shall examine this Regulation, and in particular the functioning of Article 23, and 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 also evaluate progress achieved towards regulatory and supervisory convergence in the fields of crisis management and resolution in the European Union. The evaluation shall be based on extensive consultation, including with the Securities and Markets Stakeholder Group.

2. The report and any accompanying proposals, as appropriate, shall be forwarded to the European Parliament and to the Council. The report referred to in paragraph 1 and any accompanying proposals, as appropriate, shall be forwarded to the European Parliament and to the Council
- 2a. The European Parliament and the Council shall examine this Regulation on the basis of the report referred to in paragraph 1 and shall determine whether the missions and organisation of the Authority need to be reviewed.

*Article 67*  
*Entry into force*

This Regulation shall enter into force on the 20<sup>th</sup> day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2011, with the exception of Article 62 and 63(1) and (2), which shall apply as of the date of entry into force. The Authority shall be established on 1 January 2011.

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*

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