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REPORT

from :	Presidency
to :	Council
No. Cion prop.:	13917/10 EF 117 ECOFIN 543 CODEC 879
Subject :	Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions; Regulation of the European Parliament and of the Council amending Regulation (EC) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No…/… conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions; - General approach

I. INTRODUCTION

1. On 12 September 2012 the Commission in line with a mandate received from the Euro area summit of 29 June 2012 presented a package composed of two elements:

   - A proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions[1] (the ECB Proposal) based on Article 127(6) TFEU;

   - A proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) [2] (the EBA proposal) based on Article 114 TFEU.

1 Document 13683/12.
2 Document 13682/12.

2. The ECB Proposal aims to introduce a new Single Supervisory Mechanism (SSM), within which the ECB and national competent authorities (NCAs) will cooperate. The ECB will in particular carry out a wide range of key supervisory tasks over credit institutions in the Euro area Member States. With a view to maintaining and deepening the internal market, Member States whose currency is not the Euro will have the right to participate in the SSM.

3. The EBA Proposal aims to introduce the necessary changes to the EBA Regulation in order to avoid fragmentation of the internal market following the establishment of the SSM.

4. The European Economic and Social Committee adopted its opinion on the EBA Regulation on 15 November 2012. The European Central Bank adopted its opinion on the ECB Regulation and the EBA Regulation on 27 November 2012. The ECON Committee of the European Parliament adopted its reports on the proposals on 29 November 2012.

5. The European Council on 18-19 October 2012 concluded i.a.: "..the European Council invites the legislators to proceed with work on the legislative proposals on the Single Supervisory Mechanism (SSM) as a matter of priority, with the objective of agreeing on the legislative framework by 1 January 2013."[3]

   In line with this conclusion, the Presidency is presenting a compromise text on both the ECB Proposal (doc. 17141/12 EF 287 ECOFIN 1011) and the EBA Proposal (doc. 17142/12 EF 288 ECOFIN 1012 CODEC 2893) with a view to agreement in Council (ECOFIN) on 4 December.

6. The EBA Proposal is subject to the ordinary legislative procedure and the Presidency has held informal contacts with the European Parliament which has indicated its willingness to seek an agreement in first reading. The ECB Proposal will be decided according to the procedure set out in Article 127(6) of the Treaty (Unanimity in Council and consultation of the Parliament). Following an agreement in the ECFOFIN, the Presidency therefore intends to undertake negotiations with the Parliament at an accelerated pace with a view to reaching an agreement between the institutions in line with the European Council conclusions.

[3] Document EUCO 156/12

II. STATE OF PLAY

7. In view of the high importance of these Proposals, the complexity of the subject matters and the tight timeline, the Coreper decided on 12 September to establish a temporary Ad-Hoc Working Party on the Banking Supervision Mechanism (BSM). The Ad Hoc Working Party has now met 6 times[4] and has made considerable progress with a view to Ministers' conclusive deliberation on the texts at the 4 December ECOFIN.

8. Following discussion on 28 and 30 November in COREPER, the Presidency considers that a very large measure of agreement has now been found on most of the text of the ECB Regulation, notwithstanding some key outstanding issues (see below). On the EBA Regulation, the discussion now hinges on one single political issue, i.e. EBA voting arrangements (see immediately below). The most recent Presidency compromise texts, as set out in documents 17141/12 and 17143/12, take stock of discussions at the 30 November COREPER meeting.

9. The key outstanding issues are briefly outlined below.

A. The changes to voting modalities in the EBA (Article 1(5)&(7) of the EBA Proposal):

10. The European Council on 18-19 October concluded i.a.: "There is a need to ensure ….. the equitable treatment and representation of both euro and non-euro area Member States participating in the SSM. …. It is important to ensure a level playing field between those Member States which take part in the SSM and those which do not, in full respect of the integrity of the single market in financial services. An acceptable and balanced solution is needed regarding changes to voting modalities and decisions under the European Banking Authority (EBA) Regulation, taking account of possible evolutions in the participation in the SSM, that ensures non-discriminatory and effective decision-making within the Single Market. …"

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4 The AHWP met on 27-28 September; 11-12 and 25-26 October; 5-6, 20-21 and 26 November.

11. The **Commission Proposal** aimed at amending EBA Regulation 1093/2010 in several respects, as regards voting mechanisms in the EBA's Board of Supervisors. In particular, it provided that, with regard to votes to be taken on draft **binding mediation** decisions (on matters related to alleged breaches of Union law or disagreements in cross-border situations), the simple majority rule would be complemented by the requirements for a minimum number of (3) votes from, respectively, euro-area Member States and, non euro area Member States.

    It also updated provisions related to the **independent panel** preparing binding mediation decisions, and extended its role to preparing binding decisions in respect of breaches of Union law (Article 17 of EBA Regulation).

    Votes on matters covered by **qualified majority** requirements (typically, on draft regulatory standards to be proposed to the Commission) would however remain governed by the present rules.

12. Discussions in the **Working Party** and in **COREPER** have shown that Member States are still broadly divided: one group backing the Commission proposal, the other group calling for further significant adaptations to voting rules aiming at ensuring a new balance between participating and non-participating Member States - both as regards qualified majority voting and single majority voting arrangements. The suggestion has also been made in that second group to include in the amendments to current EBA voting rules the case of decisions on action in emergency situations (Article 18 of EBA Regulation).

13. Against this background, the **Presidency** finds that the options presented in the Presidency compromise (doc. 17142/12) form an adequate basis on which to find a compromise.

B. The distribution of competences and tasks and powers between the ECB and the NCAs (Article 5 of the ECB Proposal)

14. The **European Council** concluded i.a.: "The SSM will be based on the highest standards for bank supervision and the ECB will be able, in a differentiated way, to carry out direct supervision."

15. The **Commission Proposal** assigned a wide range of tasks to the ECB with regard to <u>all</u> credit institutions established in the Member States participating in the SSM, but was short on the respective roles of the ECB and the NCAs in their foreseen cooperation within the SSM.

16. Whilst stressing explicitly the basic principle of the ECB's responsibility for the effective and consistent functioning of the SSM, the **Presidency** has introduced a number of significant changes, which aim to establish the following supervisory mechanism:

    - The **ECB** will play the central role in that System. It will be responsible for the effective and consistent functioning of the Single Supervisory Mechanism, and for that purpose it will make use of the powers provided under this Regulation, to carry out the tasks specified in Article 4, in a differentiated way as specified in Article 5 (in line with the European Council conclusions);

    - The ECB will supervise directly the more significant credit institutions and all those for which public financial assistance has been requested or received directly or indirectly from the EFSF or the ESM, without prejudice to adding further ones at any time. It will also provide guidance and instructions to the NCAs of the participating Member States supervising the "less significant credit institutions";

    - In this work, the ECB will be assisted by these NCAs, under the conditions set out in a framework to be elaborated in consultation with them, and formally adopted by the ECB;

    - The **NCAs** will, subject to the ECB's instructions and guidance, supervise directly the credit institutions that are considered as "less significant", which will be defined in accordance with objective criteria specified in the Regulation;

    - The practical/operational arrangements thus put in place from the start of the system should be differentiated enough, and able to evolve in a dynamic way, taking also account of the evolution in the individual situation of any given credit institutions and their environment.

17. While the discussion in **COREPER showed broad support for the Presidency approach, it** further evidenced the need to reconcile two opposite concerns: on the one hand, the need to lay down with sufficient clarity and precision in the Regulation the parameters according to which the ECB and the NCAs will distribute their work and competences across banks; and, on the other hand, the need to provide for a sufficient degree of flexibility for the ECB and NCAs to further develop and agree a methodology in the implementation stage.

18. Against this background, the **Presidency** finds that the text set out in the Presidency compromise (doc. 17141/12) adequately addresses these concerns that need to be reconciled, and thus forms the proper basis on which to elaborate the solution that will underpin the general approach.

C. The governance of the Supervisory Board (Article 19 of the ECB Proposal):

19. The **Commission Proposal** left several aspects of the functioning of the Supervisory Board (the body entrusted in this Regulation with preparing decisions to be ratified by the Governing Council) subject to further determination. In particular, the status of NCAs of non-euro area participating Member States was to be determined by future ECB rules of procedure. The rules reflecting adequate separation of the supervisory and monetary policy functions were missing in respect of the ECB representatives and the reference to a steering committee was not accompanied by clarifications, in particular, on its composition.

20. The **Presidency** has amended the Commission Proposal in several respects. First, the rules for the appointment of the Chair and the ECB representatives now underpin adequate separation of the supervisory and monetary policy functions: the Chair is to be appointed by the participating Member States in the Council (ECOFIN) and cannot be a member of the ECB's Governing Council (whilst the Vice-Chair is to be appointed from the members of the ECB Executive Board to provide the necessary direct link to the ECB's decision-making bodies).

21. Second, it is now clarified that **NCAs** from euro-area and non-euro area participating Member States will be **treated equally**[5]. The question had then arisen as to whether that should lead to the decisions in the Supervisory Board being taken by **simple-majority voting**, based on the principle that every single member holds one vote.

22. The latest discussions in **COREPER evidenced a divide** between a majority of delegations backing this voting arrangement, and a minority of delegations strongly preferring a system where institution-specific decisions are taken with simple majority voting and decisions on horizontal issues with a **qualified majority voting** (an approach inspired by EBA voting rules).

23. With a view to balancing out the views of the two camps, the Presidency has aimed to specify the principles underpinning the composition, and the role of a possible **steering committee** in supporting the activities of the Supervisory Board on a daily basis. Whilst delegations remain divided on the need to introduce such a committee, the Presidency finds that such a body could still be one component of a final balanced compromise, depending on the final voting arrangements decided for the Supervisory Board.

24. Against this background, the Presidency finds that the related options in the Presidency compromise (doc. 17141/12) form a proper basis for deliberations and the final compromise underpinning the general approach.

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5 In addition, the suggestion has been made that, when the Supervisory Board is preparing draft decisions on an EU parent institution, which has subsidiaries or branches in non-participating Member States, the representative of the NCA of each of these Member State should attend as observer and be allowed to present the NCA's views to be taken into account for the final elaboration of the draft decision.

D. Phasing in, and entry into force, of the SSM (Article 27-28 of the ECB Proposal)

25. The European Council concluded i.a.: "…the European Council invites the legislators to proceed with work … with the objective of agreeing on the legislative framework by 1 January 2013… Work on the operational implementation *(of the SSM)* will take place in the course of 2013."

26. The **Commission Proposal** set out a phasing-in period where from the first day, the ECB would be empowered to take over the supervision of any bank in participating Member States if it so decides, in particular if the bank is receiving public financial assistance. For all other banks, ECB supervision would be phased in on 1 July 2013 for the most significant European banks, and on 1 January 2014 for all other banks.

27. Some delegations have questioned the phasing-in arrangements proposed by the Commission, including pending agreement on the CRD4/CRR package for the entry into force of the ECB Regulation, and suggestions have been made by some delegations to seek a more flexible phasing-in arrangement, thus leaving the ECB more time to prepare for the taking over of its new supervisory tasks.

28. Discussions in **COREPER** confirmed that a large majority of delegations could agree with a phasing-in process based on strict dates, thus providing legal certainty, but were also open to the idea of the ECB reporting on progress in its operational implementation to Parliament and Council. The suggestion was also made that credit institutions, for which public financial assistance has been requested or received directly or indirectly from the EFSF or the ESM,, should be covered by ECB's supervision from the start of the SSM. The suggestion has further been made by some delegations that the ECB should, from the start of the SSM, carry out, upon request from the NCA of a Member State under financial assistance, direct supervision of credit institutions considered of significant importance by that NCA. The Presidency has aimed at incorporating that suggestion with the appropriate safeguards. All these combined elements are now reflected in the Presidency compromise (doc. 17141/12).

29. In addition, the streamlined distribution of responsibilities between the ECB and the NCAs proposed under Article 5 (see above under B) has now clarified the arrangements to be put in place between the ECB and the NCAs of participating Member States, and is thus paving the way for the work on the operational implementation of the SSM to take place in the course of 2013, in line with the above-quoted conclusions of the European Council.[6]

30. Against this background, the **Presidency** finds that its latest compromise forms a proper basis for reaching an agreement on a general approach, subject to possible limited fine-tuning of the provision.

E. Other provisions of the ECB Proposal:

31. In addition to the key outstanding issues outlined above, a number of limited issues, stressed by some delegations, remain outstanding.

32. These provisions and issues, as indicated by delegations at this late stage of negotiations, are:

- Article 3 (as regards expanding the cooperation requirement towards relevant national authorities responsible for granting or monitoring financial assistance at national level, and incorporating the text of recital 11a on cooperation MoUs into the text);
- Article 4(1) (in particular as regards the mention of the ECB's being "exclusive competent"; and, the ECB's task to authorise credit institutions);
- Articles 4a and 26 (as regards the need for mentioning the European Systemic Risk Board);
- Article 6(6ab) (as regards the case where a non-euro area participating Member State does not agree with a Governing Council's decision having regard to its fiscal impact for that Member State, irrespective of whether the Governing Council has in fact endorsed, or not, the draft decision proposed by the Supervisory Board);

6 On the basis of the intended political agreement, both in Council and with the European Parliament, being achieved by end-2012, the adoption and publication of the Regulations, following the necessary finalisation steps, can be expected to take place in the first quarter of 2013. Attention is also drawn to the fact that, in parallel, one Member State has indicated the need to complete a parliamentary procedure taking approximately ten weeks as a prerequisite to that adoption.

- The mention of the second and third pillars of the Banking Union, at least in recital 9;
- The mention in the review clause in Article 26 or in a Recital of a future possible right for NCAs in 'host' Member States to restrict the conditions for a credit institution (mother company) to transform its local subsidiary into a branch, especially where the local entity is systemic.

33. The Presidency has aimed in its latest compromise on the ECB Proposal (doc. 17141/12) to address Member States' outstanding concerns to the extent possible, bearing in mind the need to maintain the proper balance between the differing views of delegations. The Presidency hopes that Member States, in a spirit of compromise, will be willing to support the compromise text as proposed, save for possible editorial drafting improvements.

III. CONCLUSION

34. The Presidency invites the Council to agree on both Proposals, based on the related Presidency compromises (doc. 17141/12 and 17142/12), and to mandate the Presidency to undertake negotiations with the European Parliament with a view to reaching an agreement before the end of the year.