EU BANKING AUTHORITY (EBA)

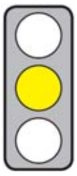
Status: 11.01.2010

Centrum für Europäische Politik

MAIN ISSUES

Objective of the Regulation: To establish a European Banking Authority (EBA).

Parties affected: National banking supervisors, financial institutions, all bank customers.



Pros: (1) A closer coordination of national banking supervision across Europe is reasonable.
(2) The technical standards to be developed by the EBA can prevent distortion of competition and improve the quality of supervision.
Cons: (1) The EBA should not be responsible for the enforcement of EU supervisory rules.
(2) The EBA's role as arbitrator is not compatible with its activities in the college of supervisors.
(3) The EBA does not have sufficient power to be effective in emergency situations.

CONTENT

Title

Proposal COM(2009) 501 of 23. September 2009 for a **Regulation** of the European Parliament and the Council **establishing a European Banking Authority**

Brief Summary

► **Objective and context of the Regulation**
– The Commission wishes to establish a European System of Financial Supervisors (ESFS). It is to comprise:
  - a European Banking Authority (EBA);
  - a European Insurance and Occupational Pensions Authority (EIOPA) [Proposal COM(2009) 502; cp. CEP Policy Brief];
  - a European Securities and Markets Authority (ESMA), [Proposal COM(2009) 503; cp. CEP Policy Brief]; and
  - a European Systemic Risk Board (ESRB) [COM(2009) 499; cp. CEP Policy Brief] for the "macro prudential oversight" of the entire EU financial system.
– The ESFS is to become "a network of national and Community supervisory authorities" leaving day-to-day supervision of financial institutions at national level. (Recital 6 and 7)
– EBA is to replace the existing Committee of European Banking Supervisors (CEBS); its registered office is seated in London. (Art. 1 and 5)

► **Composition of EBA**
– The EBA is to comprise a board of supervisors, a management board, a chairperson, an executive director and a board of appeal (Art. 4).
– The central body of the EBA is the board of supervisors, which decides on standards, guidelines and recommendations. It is composed of the following members:
  - as voting members: the heads of the relevant national banking supervisors;
  - as non-voting members: the head of the EBA, one representative each from the European Central Bank (ECB), the ESRB, EIOPA and ESMA, as well as a representative from the Commission (Art. 25 Abs. 1, Art. 28 and 29).

► **Scope of action and tasks of EBA**
– EBA is to act within the scope:
  - of the following directives: the Capital Requirements Directives (2006/48/EC and 2006/49/EC), the Money-Laundering Directive (2005/60/EC), the Financial Conglomerates Directive (2002/87/EC), the Directive on distance marketing of consumer financial services (2002/65/EC) and the Directive on Deposit-Guarantee Schemes (1994/19/EC);
  - all future legal acts entitling EBA to take action. (Art. 1 (2))
– In this respect EBA is to:
  - develop legally binding technical standards (Art. 7),
  - ensure a "consistent application" of European rules by national supervisory authorities (Art. 8 and 9),
  - settle disagreements between national supervisory authorities (Art. 11),
  - safeguard the stability of financial markets in emergency situations based on special powers for specific actions (Art. 10).

► **Developing binding technical standards**
– The EBA is to develop binding technical standards for the regulatory areas defined in the Directives mentioned above which must not, however, "involve policy decisions" (Art. 1 (2), Art. 7 and CEP Document annexed). As for the remaining areas of these Directives, the EBA may develop non-binding standards (Art. 8).
– The EBA may adopt technical standards with a qualified majority voting, in which the same weighting of votes applies as in the Council of Ministers. The technical standards are formally adopted by the Commission in the form of a regulation or decision. (Art. 7 and Art. 29 (1))

- **Three-step mechanism for a consistent application of EU supervisory rules**
  - The EBA is to ensure that national supervisory authorities fully apply EU supervisory rules, including the technical standards. For this purpose a three-step mechanism has been developed (Art. 9 (1)):
    - Step 1: If the EBA deems the conduct of a national supervisory authority incompatible with EU-law it may recommend to the authority concerned the action "necessary to comply with EU-law" (Art. 9 (3)).
    - Step 2: Where the supervisory authority concerned does not follow the EBA's recommendation, the Commission may take a decision requiring action and specify an implementation deadline (Art. 9 (4)).
    - Step 3: Where the supervisory authority further fails to comply with the Commission's decision, the EBA may adopt a decision addressed directly to a financial institution requiring it to take the necessary action. This may include the cessation of any practice (Art. 9 (6)).
  - The EBA's decision on these questions may be based on a simple majority vote (Art. 29 (1)).

- **Settlement of disagreements**
  - Where EU-law requires cooperation between national supervisory authorities, the EBA is to be responsible for settling irresolvable conflicts between these authorities (Art. 11 (1)).
  - Such a settlement consists in a decision taken by the EBA with a simple majority; this is binding to all parties involved (Art. 11 (3)).
  - Should a supervisory authority not comply with this decision, the EBA may adopt a decision addressed directly to a financial institution requiring it to take the necessary action (Art. 11 (4)).

- **Special powers in emergency situations**
  - In the case of "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", the Commission may declare the existence of an "emergency situation" (Art. 10 (1)).
  - In such a case the EBA may, within the scope of its powers, adopt a decision by simple majority obliging the national supervisory authorities to take certain measures. These measures must contribute to the stability and the orderly functioning of the financial markets. (Art. 10 (2))
  - Where a supervisory authority does not comply with this decision, the EBA may adopt an decision addressed directly to a financial institution requiring it to take the necessary action (Art. 10 (3)).

- **Safeguard Clause**
  - Decisions taken by the EBA for settlement purposes or in emergency situations may not burden the budgets of Member States.
  - Where a Member State considers that a decision by the EBA violates its budget autonomy, it may notify the EBA and the Commission thereof within one month (in the case of settlement issues), or within three working days (in case of an emergency situation). In that case, the EBA's decision is to be suspended. (Art. 23)
  - Finally, the Council is to decide by qualified majority on the decision taken by the EBA. Where the Council does not take a decision within ten working days (in emergency situations) or two months (in the case of settlement issues) the EBA's decision applies. (Art. 23 (2) and (3))

- **Cooperation with EIOPA, ESMA and the European Systemic Risk Board (ESRB)**
  - The EBA, EIOPA and ESMA are to establish a "Joint Committee of the European Supervisory Authorities" (ESA). In particular, it is to ensure that the three supervisory authorities' measures regarding financial conglomerates are, "as appropriate", adopted in parallel. (Art. 40 and 42)
  - Where a warning or recommendation by the ESRB is addressed to a national banking supervisory authority, the EBA is to use the powers conferred upon it to ensure a timely follow-up by the national supervisory authorities (Art. 21 (5)).

- **Board of Appeal**
  - Any natural or legal person may appeal against a decision taken by the EBA on the consistent application of EU supervisory rules within two months and against settlement measures or measures in emergency situations (Art. 44 and Art. 46 (1)).
  - Appeals lodged have no suspensive effect, unless otherwise decided by the Board of Appeal (Art. 46 (3)).
  - Decision taken by the Board of Appeal may be contested by an action brought before the European Court of Justice (Art. 47).

- **Entry into force**

  The Regulation is to enter into force on 1. January 2011.

Changes Compared to the Status Quo

- With the establishment of the European Banking Authority (EBA), the Committee of European Banking Supervisors (CEBS) is upgraded to a European authority.
- Currently, CEBS is only entitled to adopt non-binding guidelines and recommendations. In future, the EBA is to develop a consistent EU framework containing binding technical standards in the defined areas (see Annex).
- Until now, CEBS has not had the authority to establish the consistent application of EU supervisory rules, nor to act in settlements or in emergency situations. In future, the EBA will be able to take decisions in these matters.

- Unlike CEBS, the EBA will in future be conferred the power to address binding individual decisions to financial institutions.

Statement on Subsidiarity

The Commission emphasizes that despite the establishment of the EBA the focal point of the "day-to-day supervision" of banks will remain at national level. According to the Commission, this is in line with the principle of subsidiarity.

Policy Context

On 25. February 2009, the expert group headed by Jacques de Larosière submitted its report on the financial crisis, in which far-reaching measures were called for [see CEP Statement of Principles, *in German only*]. Thereupon, in March the Commission announced the establishment of a European System of Financial Supervision [Communication COM(2009) 114] and substantiated its plans in May [Communication COM(2009) 252; see CEP Policy Brief]. In June 2009, the ECOFIN Council and the European Council agreed to these plans, but stressed that decisions taken by European supervisory authorities "must not in any way affect the budgetary competence of Member States."

Legislative Procedure

23.09.09	Adoption by Commission
02.12.09	Debate in the Council
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	Internal Market and Services
Committees of the European Parliament:	Economic and Monetary Affairs (in charge), rapporteur José Manuel García-Margallo Y Marfil (E, EPP Group); Budgets; Employment and Social Affairs; Legal Affairs; Constitutional Affairs
Committees of the German Bundestag:	open
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 114 TFEU (Internal Market; ex-Art. 95 TEC)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure; ex-Art. 251 TEC)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The establishment of the EBA reflects the attempt to coordinate and harmonise national supervisory structures for banks across the EU. In view of the close international ties of financial markets this **is to be welcomed**. However, the EBA's activities are restricted to the scope of the aforementioned Directives. Furthermore, it is composed of national bank supervisors. A strong national feedback is therefore already preprogrammed**. In fact, there will be – and rightly so – no real centralisation of banking supervision at EU level.** Given enormous differences between national supervisory structures, this would not be at all feasible in the medium term. Nevertheless, the EBA will possess substantial powers which, when viewed overall, are convincing only in part:

The binding technical standards to be developed by the EBA contribute to the establishment of a consistent European set of rules ("common rulebook"). They help to **minimise distortions in the common internal market** for financial services **and prevent a "race to the bottom",** in that national authorities no longer deliberately relax supervisory standards to increase the competitiveness of their financial centres.

The EBA's power to enforce EU supervisory rules within the 3-step mechanism **and to give direct orders to financial institutions is**, however, **problematic**. Since where representatives of national supervisory authorities decide whether or not the conduct of "colleagues" is compatible with EU-law, national interests jeopardise decision-making processes. This is all the more serious when one considers that the EBA may give direct orders to financial institutions, and the appeal against these orders has no suspensive effect. As a result, financial institutions are in danger of falling victim to national interests. Since infringement proceedings initiated by the Commission would take far too long and therefore are impracticable, independent courts should deal with the infringement of EU supervisory rules by supervisory authorities (e.g. in expedited procedures).

With the **EBA's settlement right**, the national supervisory authority in the home country of a bank operating at cross-border levels – which currently has the last word in supervisory colleges – could be driven from power by the EBA. This **is inappropriate,** for on the one hand it does not contribute to the consistent common rulebook;

this is already given by the technical standards. And on the other hand, it is also not suitable as an instrument to enforce EU supervisory rules due to EBA's lack of neutrality.

T**he powers conferred upon** the **EBA for emergency situations are not efficient**. Though they should entitle the EBA to obligate national supervisory authorities to take certain measures, such measures will inevitably have a negative impact on the budgets of Member States – even more so in times of crisis. However, it is precisely this that the Regulation is to prohibit, granting the Member States the right of objection with the legal consequence that the EBA measure is suspended. In times of crisis such a waste of valuable time could have disastrous effects.

Impact on Efficiency and Individual Freedom of Choice

The new technical standards reduce the costs for supervision, particularly in the case of financial institutions operating at cross-border level.

Impact on Growth and Employment

Not evident.

Impact on Europe as a Business Location

The cooperation between supervisory authorities within the EBA strengthens the stability of financial markets and thereby the attractiveness of Europe as a business location. On the other hand, due to the close global interconnections between financial markets the stability of the European financial market depends equally on the quality of supervision in other parts of the world.

Legal Assessment

Legislative Competence

The legislative competence for the establishment of authorities is laid down in Art. 114 TFEU (ex-Art. 95 TEC) [see CEP Expertise, *in German only*].

Subsidiarity

Unproblematic.

Proportionality

Unproblematic.

Compatibility with EU Law

The EBA's right of final decision in emergency situations and settlement procedures is not compatible with EU-law, according to the Meroni Decision by the ECJ (Case 9/56). Pursuant to that decision, only institutions which are quoted in the TFEU (formerly: TEC) may have such powers conferred upon them. However, it is unclear as to whether or not the Meroni Decision, which affected the granting of subsidies, is applicable to EBA. Transferring the right of final decision to the Commission, however, would run counter to the declared intention of separating the supervisory authority from political bodies in order to ensure its independence.

Compatibility with German Law

If the *Deutsche Bundesbank* (German Central Bank) is, as planned, to exercise bank supervision in Germany, the Regulation will require amendments to the Bundesbank Act (BBankG). For the **Bundesbank is independent of directives** (§ 12 (1) BBankG) **and is not subject to any control or supervision** (German Federal Administrative Court - BVerwGE 41, 354). However, **the Regulation confers upon the EBA the power to issue decisions directed at** national supervisory authorities and to supervise them.

Moreover, the EBA may take decisions affecting the budget of a Member State; on its own, the Member State is not able to prevent this. With the Regulation, Member States would, in part, abandon their budget rights. This would have a direct impact on the powers of the German Bundestag and therefore is subject to the parliamentary reservation right stipulated in the German Federal Constitutional Court's Lisbon Verdict (cp. BVerfG, 2 BvE 2/08 of 30.06.2009, para.-no. 256). **The German approval of the Regulation should** therefore **not be given without a prior approval by the German Bundestag**.

Alternative Action

The Proposal can be substantially improved only if the Member States are ready to conclude clear preliminary agreements on the sharing of the financial burdens following from EBA decisions. However, it seems there is no real political will for that, although the already existing close international ties between financial markets urgently requires a European integration of banking supervision activities.

Possible Future EU Action

Not foreseeable.

Conclusion

The establishment of the EBA and the subsequent closer coordination of banking supervision is reasonable. The EBA's technical standards can minimise the distortion of competition and improve the quality of supervision. The EBA should, however, not be responsible for the application of EU supervisory rules. Besides, the EBA's role as arbitrator is not compatible with the activities of supervisory colleges. Finally, in emergency situations the EBA does not have sufficient power to be effective.