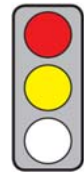


KEY ISSUES

Objectives of the Regulation: The tasks of the European Banking Authority (EBA) need to be modified in light of the supervisory responsibility for euro area banks being conferred to the European Central Bank (ECB).

Parties affected: EBA, ECB, national supervisory authorities and credit institutions.



Pros: The EBA's technical standards are also binding on the ECB.

Cons: (1) The EBA's authority contravenes the ECB's independence as guaranteed under primary law.

(2) There is a risk that the euro area will dominate and exploit the EBA during the settlement of disagreements and when taking action against breaches of the law by the ECB.

(3) The EBA does not have sufficient monitoring abilities to carry out supervision within the euro area. It is also weakened by the fact that the ECB is not required to follow the EBA's requests during the settlement of disagreements and crisis situations.

(4) The envisaged voting quorums mean that it will only be possible to coordinate crisis response measures unofficially and outside of the EBA.

CONTENT

Title

Proposal COM (2012) 512 of 12 September 2012 for a **Regulation** of the European Parliament and of the Council **amending Regulation** (EU) No. 1093/2010 **establishing a European Supervisory Authority (European Banking Authority)** as regards its **interaction with the Regulation conferring** specific tasks on the **European Central Bank** concerning policies relating to the **prudential supervision of credit institutions**

Brief Summary

Note: unless stated otherwise, all articles indicated refer to EBA Regulation (EU) No. 1093/2010.

► Background

- A European System of Financial Supervision (ESFS) was introduced in January 2011. The European Banking Authority (EBA) forms part of this system [Regulation (EU) No. 1093/2010, see [CEP Policy Brief](#)]. In essence this authority is responsible for (Art. 10, Art. 16 to 19)
 - the formulation of technical standards that form an EU-wide single rulebook for banks
 - the binding settlement of disagreements between national supervisory authorities
 - taking specific action in the event of crises that could threaten the stability or performance of financial markets
 - taking action in the event of EU law being breached by national supervisory authorities
- The Commission now intends to restructure the supervision of European banks. In the future, the European Central Bank (ECB) is to supervise banks within the euro states [COM (2012) 511, see [CEP Policy Brief](#)]. The EBA shall, however, continue to exist. In light of this, the relationship between the EBA and ECB is defined in the Regulation.
- Although non-euro states may voluntarily submit to ECB banking supervision, the Commission fears there will be an imbalance between euro states and non-euro states in the EBA's decisions. As a result, the voting rules and other "procedural modalities under which the EBA operates" are amended in the Regulation (Explanatory Memorandum, p. 3).

► Relationship between the EBA and ECB in terms of legally binding technical standards

In the future, the EBA's technical standards shall also apply to the ECB (new Art. 4 (2) in conjunction with Art. 15).

► Relationship between the EBA and ECB in terms of settlements and crisis management

- In addition to ordering the national supervisory authorities to take action, in future the EBA shall also have the authority to order the ECB to act, by means of a resolution (Art. 9 (3), Art. 18 (3))
 - on the basis of settlement decisions taken by the EBA in the event of conflicts between supervisory authorities; this is relevant when disagreements arise between the ECB in its role as a supervisory authority for euro states and the supervisory authority of a non-euro state or between two supervisory authorities of non-euro states
 - in response to a crisis having previously been declared by the Council of Ministers; crises are declared at the request of the EBA, the Commission or the European Systemic Risk Board (ESRB)
- Unlike the national supervisory authorities, the ECB is not required to follow the EBA's requests. It must, however, justify any non-compliance ("comply or explain", new Art. 18 (3a), new Art. 19 (3a))
 - within ten working days in the event of settlement decisions
 - within 48 hours in the event of a crisis
- If the national supervisory authorities or the ECB do not comply with the EBA's request, the EBA may directly oblige a financial institution to take action (Art. 18 (4), Art. 19 (4)).

- ▶ **Relationship between the EBA and ECB in the event of EU law being breached**
 - In addition to giving national supervisory authorities non-binding recommendations on how to stop breaching EU law, the EBA may in the future also advise the ECB in this way (Art. 17 (3)).
 - If recommendations are not followed, the Commission may issue a non-binding opinion (Art. 17 (4)).
 - If the national supervisory authorities or the ECB do not comply with the Commission’s opinion, the EBA may directly oblige a financial institution to take action (Art. 17 (6)).
- ▶ **Board of Supervisors**

The Board of Supervisors is the EBA’s principal decision-making body. The voting members of this board are the heads of the 27 national supervisory authorities. The ECB is a non-voting member. (Art. 40 (1))
- ▶ **The EBA’s decision-making procedures in terms of technical standards and crisis management**

The Board of Supervisors determines (Art. 44 (1) in conjunction with Art. 16 (4) TEU)

 - decisions on crisis management with a simple majority
 - technical standards with a qualified majority.
- ▶ **The EBA’s decision-making procedures in terms of settlements and breaches of EU law**
 - The Board of Supervisors shall appoint independent panels which propose (new Art. 41 (2) in conjunction with Art. 17 and 19)
 - as before: decisions necessary for agreeing settlements
 - in the future: recommendations for national supervisory authorities to prevent them from breaching EU law
 - in the future: binding action imposed directly on financial institutions to ensure they implement settlement decisions or rectify breaches of EU law
 - As before, the panel shall comprise the Chairperson of the EBA and two heads of national supervisory authorities not affected by the case in question. In the future, at least one of these three people must come from a non-euro state. (new Art. 41 (2))

If no consensus is reached on the composition of the panel, the Board of Supervisors shall decide with a three-quarter majority (new Art. 44 (1) sub-para. 6).
 - In the future, the Board of Supervisors – i.e. the national banking supervisors – may only reject a panel’s proposal if (new Art. 44 (1) sub-para. 3)
 - a simple majority declares itself to be against the proposal and
 - this majority is made up of supervisors from at least three euro states and at least three of the non-euro states that have not submitted themselves to ECB supervision.

To date, the Board of Supervisors may reject the proposal if

 - the proposal does not obtain a simple majority or
 - four supervisors use their veto.

Statement on Subsidiarity by the Commission

The Commission believes that subsidiarity is respected because the Regulation does not alter the distribution of competences between the national supervisory authorities and the EBA.

Policy Context

The Commission first called for the establishment of a “banking union” in May 2012. At the end of June 2012, the heads of state and government within the euro states requested that the Commission soon draw up a proposal for common supervision under the aegis of the ECB. This was published at the same time as the Regulation proposal being analysed here [COM (2012) 511, see [CEP Policy Brief](#)]. As soon as the new supervision regime is introduced, the European Stability Mechanism (ESM) should also have the power to recapitalise banks (see [CEP Policy Brief](#) on the ESM).

In addition to common supervision, the banking union shall also comprise a joint deposit guarantee scheme and an integrated banking crisis management system. The Commission had already proposed a harmonisation of the Member States’ deposit guarantee scheme in July 2010 [COM (2010) 368, see [CEP Policy Brief](#)]. In June 2012 it also presented a proposal for the resolution of failing banks [COM (2012) 280]. The Commission intends to reach an agreement on both proposals by the end of 2012. Subsequently, the Commission intends to publish a proposal for a “single bank resolution mechanism” which is to include the distribution of the costs of such resolutions. The European Parliament and the Council are also currently negotiating on the Commission’s proposals to implement capital requirements for banks [“Basel III”, COM (2011) 452/3, see [CEP Policy Brief](#)]. An agreement should also be reached on this by the end of 2012.

Legislative Procedure

12 September 2012	Adoption by the Commission
28 November 2012	Vote on the ECON Committee’s report
11 December 2012	First reading in the European Parliament
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:	DG Internal Market
Committees of the European Parliament:	Economic and Monetary Affairs (in charge), rapporteur: Sven Giegold (Greens Group, D); Budget, Legal Affairs, Constitutional Issues
Committees of the German Bundestag:	Finances (in charge); Legal Affairs; European Affairs; Economic Affairs and Technology; Budget
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)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The supervision of banks in the euro area is to become fully centralised under the ECB [COM (2012) 511, see [CEP Policy Brief](#)]. The Amending Regulation in question aims to adapt the EBA's tasks to the new structure without marginalising it completely. Since the ECB Regulation must be passed unanimously by the Council, and **non-euro states fear that euro states may use the ECB to dominate, and therefore exploit, the EBA**, the Commission wishes to strengthen the rights of non-euro states within the EBA. **This fear is based on the fact that many members of the ECB's supervisory board also sit on the EBA's Board of Supervisors.** The representatives of the 17 euro state supervisory authorities are members of both the ECB's supervisory board (alongside six ECB representatives) and the EBA's Board of Supervisors, where, compared with the ten representatives of the non-euro states, they form the majority.

The extent to which the euro states' supervisors coordinate their votes on the Board of Supervisors is crucial in determining whether their feared dominance within the EBA actually materialises, as well as the degree to which the EBA is actually able to perform its important monitoring tasks in the face of ECB supervision in the future. **The fact that the ECB's supervisory board is to be given the task of coordinating common positions within the euro states' national supervisory authorities for the making of EBA decisions makes such dominance likely** (Art. 4, COM (2012) 511, see [CEP Policy Brief](#)), as these decisions may be pushed through in the EBA's Board of Supervisors with the majority of representatives from the euro area. Once the new voting weights imposed by the Lisbon Treaty come into effect in 2017, the euro states will have a qualified majority, meaning that they will be able to pass technical standards on their own. **Another fact making dominance likely is that, in the event of settlements** being made between the ECB supervisory board and the supervisory authority of a non-euro state, **or breaches of the law by the ECB supervisory board, euro area representatives on the Board of Supervisors or on an independent panel would have to rule on decisions that they themselves had made in the ECB's supervisory board.**

Therefore, by introducing the EBA Regulation, the Commission is rightly strengthening the influence of independent panels during the settlement of disagreements and in dealing with breaches of EU law made by supervisory authorities: on the one hand, non-euro states must be represented on these panels and on the other, the Board of Supervisors, which is dominated by the euro states, is only able to reject a panel's proposed resolutions under strict conditions.

As the ECB alone will be responsible for the principal supervisory tasks in future, **the EBA shall, as a minimum, lose its function as a monitoring and coordinating authority during the settlement of agreements within the euro area.** Supervisory decisions made by the ECB that affect the euro area alone will therefore no longer be examined by the EBA in settlement procedures, as there will be no such matters left to settle. **This is problematic, as national interests are also able to impair the neutrality of ECB supervision.**

The fact that the ECB is not required to follow the EBA's requests during the settlement of disagreements and emergency situations, weakens the latter's authority and **significantly** reduces the acceptance of its decisions. Moreover, settlement decisions lose all meaning when only one party to the conflict is required to follow them. However, the EBA's ability to aim settlement and crisis instructions directly at individual banks – i.e. without acting via the ECB – may prompt the ECB to yield to the EBA's decisions as a precaution.

The single majority requirement for decisions relating to crisis management is problematic. As the euro states' supervisors hold this majority on the Board of Supervisors, they are able to pass binding crisis response measures for the entire EU with just a moderate level of coordination. **As a result, the non-euro states in the Council of Ministers will try to block the legally required declaration of a crisis**, for which a qualified majority is needed. **The EU-wide coordination of supervisory measures**, which is particularly necessary in such cases, **will therefore only be possible unofficially and outside of the EBA**, which is extremely problematic.

It is appropriate for the EBA to continue to be responsible for the development of technical standards in the future and that these standards are also binding for the ECB, as this means that the establishment of an EU-wide single rulebook will also be possible within the new supervisory structure. These standards are

particularly important for the coherence of ECB supervision within the euro area. The ECB will only be able to treat the same supervisory cases equally if a comprehensive single rulebook is introduced. The fact that the voting procedures for technical standards within the EBA are in line with those of the Council of Ministers makes sense given the almost legislative nature of this task.

Legal Assessment

Competency

The precondition of competency has been fulfilled. The Amending Regulation has the same legal basis as the EBA Regulation, and Art. 114 TFEU (Internal Market) is relevant for both. On this legal basis, the EU legislator is entitled not only to adopt measures targeted to Member States, but also to establish EU bodies. The tasks assigned to these bodies must, however, “be closely linked to the subject-matter of the acts approximating laws, regulations and administrative provisions of the Member States”. [ECJ, Case C-217/04 dated 2 May 2006, para. 44 f.] The following applies: The EBA coordinates the work of the banking supervisory authorities, especially work falling within the scope of Directives 2006/48/EC (taking up and pursuit of the business of credit institutions) and 2006/49/EC (capital adequacy of credit institutions) (see [CEP Policy Brief](#) for information on the current revision).

Subsidiarity

Unproblematic.

Proportionality

Unproblematic.

Compatibility with EU Law

This Amending Regulation contravenes the independence of the ECB as guaranteed under primary law. This independence applies to all of its tasks (Art. 282 (3) TFEU) including banking supervision, and is impeded as a result of the EBA being entitled to direct its decisions at specific financial institutions and to compel them to take measures for settlement purposes, in crisis situations and in the event of EU law being breached. This is tantamount to the EBA having authority over the ECB, as the ECB is no longer able to make its supervisory decisions independently: the ECB’s decisions must not contradict those of the EBA (Art. 17 (7), Art. 19 (5)).

Compatibility with German Law

Unproblematic.

Alternative Policy Options

The Commission’s attempt to restructure banking supervision is synonymous with trying to do the impossible on two levels. Firstly, the independence of the ECB, which is both required by primary law and is fundamentally necessary, leads to insurmountable conflicts. Secondly, the fact that ECB supervision is applicable to the euro area alone and that the EBA has authority for the entire EU results in irresolvable conflicts.

Centralising euro bank supervision within the EBA would at least avoid any damage to the ECB’s independence being caused by (1) the EBA’s monitoring functions, (2) conflicts of interest between bank supervision and monetary policies within the ECB and (3) political interference in the ECB’s supervisory decisions.

If the ECB is nevertheless to be made responsible for banking supervision in the euro area, all of the EBA’s powers in terms of its role as an arbitrator, its responsibility for crisis management and its procedures for dealing with breaches of the law must be taken away. This in turn will lead to enormous friction with supervision in the non-euro states.

Conclusion

The Amending Regulation contravenes the independence of the ECB as guaranteed under primary law. The fact that many members of the ECB’s supervisory board also sit on the EBA’s Board of Supervisors has created the fear that the euro states will dominate and exploit the EBA. This notion is supported by the fact that the ECB is intended to coordinate common positions among the euro area’s supervisors prior to EBA decisions being made. It is also problematic that in the event of settlements and breaches of the law, euro area representatives in the EBA would be required to rule on decisions that they themselves had made in the ECB. In the euro area, the EBA will lose its function as a monitoring authority during the settlement of disagreements. This is problematic, as national interests may also impair the neutrality of ECB supervision. The EBA’s authority is weakened by the fact that the ECB is not required to follow the EBA’s requests during the settlement of disagreements and in crises. Only a simple majority is required for crisis management measures, which will lead to non-euro states in the Council of Ministers blocking the legally required declaration of a crisis. As a result, it will only be possible to coordinate supervisory measures unofficially and outside of the EBA. It is appropriate that the development of technical standards remains with the EBA in the future and that these standards are also binding for the ECB.