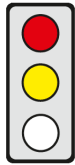


KEY ISSUES

Objective of the Regulation: The Commission wants to give the EBA more responsibility for financial supervision.

Affected parties: Banks, EBA, national supervisory authorities (NSAs) and European Central Bank.



Pro: The proposed independent Executive Board can mediate in conflicts between supervisory authorities and rule on breaches of the law by supervisory authorities.

Contra: (1) The EBA's new tasks, to take account of ecological and social factors and to promote consumer protection, may lead to a conflict of interest with its actual task - safeguarding financial stability.

(2) The European Parliament and Council should be able to block EBA guidelines.

(3) The Executive Board, NSAs and ECB should decide collectively on the strategic supervisory plan, stress testing and monitoring the outsourcing of banking activities, in an EBA Governing Council.

The most important passages in the text are indicated by a line in the margin.

CONTENT

Title

Proposal COM(2017) 536 of 20 September 2017 for a **Regulation** amending Regulations (EU) No. 1093/2010 establishing a **European Banking Authority (EBA)**; (EU) No. 1094/2010 establishing a European Insurance and Occupational Pensions Authority (EIOPA) and (EU) No. 1095/2010 establishing a European Securities and Markets Authority (ESMA)

Brief Summary

► Background

- This Regulation aims to amend the rules applicable to the three European Supervisory Authorities (ESAs). These are:
 - the European Banking Authority (EBA, currently based in London, soon moving to Paris; this cepPolicyBrief),
 - the European Securities and Markets Authority (ESMA, in Paris; cepPolicyBrief to follow) and
 - the European Insurance and Occupational Pensions Authority (EIOPA, in Frankfurt; cepPolicyBrief to follow).
- As EU agencies, these authorities are part of the EU system of financial supervision which also includes the European Central Bank (ECB) and the national supervisory authorities (NSAs). The ESAs have been operating since 2011.
- Their regulatory work aims to contribute to the stability and effectiveness of the financial system.

► New Tasks

- In addition to the existing handbook on banking supervision, the EBA will develop a handbook with best practices for bank resolutions (Art. 8 (1)).
- In carrying out its tasks, the EBA will in future also take account of (Art. 8 (1a) (c)):
 - environmental, social and governance related factors and
 - technological innovation.
- In addition to depositor and investor protection, the EBA shall also foster consumer protection (Art. 8 (1)).

► Relationship between the EBA and the “competent supervisory authorities”

The competent supervisory authorities are the European Central Bank (ECB) – responsible for the supervision of major banks in the eurozone – and the national supervisory authorities (NSAs) – responsible for all supervision in the non-eurozone countries and for smaller banks in the eurozone.

“Strategic Supervisory Plan” of the EBA and annual work programmes of the competent supervisory authorities

- The EBA issues a Strategic Supervisory Plan every three years. By setting “priorities”, it aims to promote efficient and uniform supervision that is in line with EU-law, and address the risks and vulnerabilities identified by the EBA. The plan is addressed to the competent supervisory authorities as a recommendation. (Art. 29a (1))
- Every year, each competent authority submits a draft annual work programme to the EBA containing the objectives and priorities for their supervisory activities in the following year. Where the EBA takes the view that a work programme does not meet the priorities of the strategic supervisory plan, it will “recommend” changes. The affected supervisory authority must take these into account. (Art. 29a (2) and (3))
- Every year, each supervisory authority submits a report to the EBA on the implementation of its annual work programme. The EBA makes a recommendation on how it can remedy “shortcomings in its activities”. (Art. 29a (4) and (5))

Reviews of the competent supervisory authorities by the EBA

- The EBA will establish a review committee, exclusively composed of staff from the EBA - i.e. not from the NSAs or the ECB - to review “some or all” of the activities of the NSAs and the ECB. Until now, only a “comparative analysis” was required. New is the fact that the degree of independence of the authorities will be explicitly included in the review. (Art. 30 (1) and (2) (a))
- The EBA publishes all review results. The agreement of the competent supervisory authorities is no longer necessary for this. As before, the EBA can use non-binding guidelines and recommendations, and now also reports, to suggest follow-up measures to the authorities. (Art. 30 (3) and (4))
- Where the competent supervisory authorities fail to take any follow-up measures, the EBA issues a follow-up report (Art. 30 (3), sub-para. 2).
- In an opinion, the EBA can call on the Commission to further harmonise the rules applicable to financial institutions or supervisory authorities if it considers it necessary (Art. 30 (3a)).

EBA’s powers to mediate between the competent supervisory authorities

- In future, the EBA will be able, on its own initiative, to mediate (Art. 19 (1)),
 - as soon as competent supervisory authorities are unable to agree on a joint decision within the time limits specified under EU law,
 - as soon as a competent supervisory authority concludes “on the basis of objective factors” that a “disagreement” with another authority exists, even prior to the expiry of the specified time limit,
 - two months after a competent supervisory authority has requested another authority to take certain action in order to comply with EU law, without result.

► **Stress testing**

- In future, the EBA will decide whether to carry out EU-wide stress testing and will inform the European Parliament, the Council and the Commission of this (Art. 32 (2a)).
- The EBA will disclose the results of the stress testing for each participating bank if it considers it “appropriate” (Art. 32 (2a)).

► **EBA tasks with regard to third countries (soon to include the UK)**

Examining the equivalence of supervisory rules in third countries

- In future, the EBA will assist the Commission, at its request, in preparing equivalence decisions pertaining to regulatory and supervisory regimes in third countries (Art. 33 (2)).
- The EBA continually monitors whether regulatory and supervisory practice in third countries continues to fulfil the criteria of equivalence decisions that have been adopted. In this regard, it will work with the authorities in the third countries and conclude administrative arrangements with them. (Art. 33 (2a))
- The EBA informs the Commission without delay about “developments” in third countries which are relevant to financial stability, “market integrity”, investor protection or the functioning of the internal market (Art. 33 (2b)).
- The competent supervisory authorities must inform the EBA about planned cooperation with supervisory authorities in third countries. The EBA develops models for such cooperation. (Art. 33 (2c))

Supervision of the outsourcing or delegation of banking activities to third countries

- The EBA harmonises the supervision of competent supervisory authorities regarding outsourcing and delegation of banking activities to third countries, by way of “coordination” (Art. 31a (1)).
- Each competent authority notifies the EBA of their intention to authorise a bank that wants to delegate or leave material activities, risks or key functions to third countries but at the same time benefit from the European Pass, i.e. wants to operate in several EU countries (Art. 31a (2)).
- The EBA “informs” the competent supervisory authority where the intended authorisation does not comply with EU law or with guidelines, recommendations and opinions of the EBA. The EBA may issue a recommendation to the competent supervisory authority; if it fails to comply with the recommendation, the EBA can publish the recommendation. (Art. 31a (2) and (4))

► **Guidelines and recommendations (Level 3 regulatory activity)**

- In future, the EBA may also address guidelines to national authorities that are not financial supervisory authorities but which are responsible for the application of EU law within the EBA’s area of responsibility (Art. 16 (1)).
- In future, the EBA must conduct consultations on its guidelines and recommendations and analyse the “potential costs and benefits” (Art. 16 (2)).
- By way of implementing powers, the Commission can request the EBA to withdraw a guideline if it considers that the EBA has exceeded its competence with this guideline (Art. 16 (5)).
- This must have been called for by at least two thirds of the members of the “Insurance and Reinsurance Stakeholder Group or Occupational Pensions Stakeholder Group”. The aforesaid interest groups have 30 members including representatives of banking and consumer interest groups and academics. (Art. 16 (5) and Art. 37 (1))

► Governance and decision-making

- As before, the representatives of the NSAs on the Board of Supervisors adopt decisions, on regulatory and implementing standards, by way of a qualified majority. The ECB remains represented without a voting right. The simple majority which is also required both among the eurozone countries and the non-eurozone countries, continues to apply but in future only to the countries that are present. (Art. 44 (1))
- The EBA will have an Executive Board (previously: Administrative Board), composed of the Chairperson and three full time members. The Executive Board members act independently of instructions and in the interest of the Union as a whole. In selecting the members of the Executive Board, non-eurozone countries are given balanced consideration. (Art. 45 (1) and (2) and Art. 46)
- The Council of the EU selects the Executive Board members from a list of qualified candidates drawn up by the Commission and approved by the European Parliament. The term of office is five years and may be renewed once by the Council on a proposal from the Commission. (Art. 45 (2) and (4) and Art. 48 (2) and (4))
- The Executive Board (previously: Board of Supervisors) decides by way of simple majority on mediation, stress testing, breaches of EU law by the competent supervisory authorities, outsourcing of banking activities to third countries, reviews of the competent supervisory authorities, the EBA's Strategic Supervisory Plan and the review of the annual work programmes of the competent supervisory authorities. In the event of a tie, the Chairperson has the casting vote. (Art. 45a (1) and Art. 47 (3))

► Financing of the EBA

- In future, the EBA will receive (Art. 62 (1))
 - “up to” 40% (previously: exactly 40%) of its revenues from the EU budget,
 - around 60% of its revenues from the financial institutions based in the EU (previously: from the NSAs).
- National authorities will collect compulsory contributions from the financial institutions. The Commission will specify the method of calculation for the contributions in delegated acts. For this it will use “appropriate and objective criteria”, such as the “category” or size of the financial institution. In addition, the EBA may impose pecuniary fines and penalties if a financial institution fails to provide the EBA with sufficient information. (Art. 62 (5), Art. 62a, Art. 35c and Art. 35d)

Statement on subsidiarity by the Commission

The amendment of the EBA Regulation serves a “coherent internal market”. This requires EU action.

Policy Context

In Spring 2017, the Commission conducted consultations on the European supervisory authorities.

Legislative Procedure

20 September 2017	Adoption by the Commission
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

Directorates General:	DG Financial Stability, Financial Services and Capital Markets Union
Committees of the European Parliament:	Economic/Monetary Affairs (leading), Rapporteur: Burkhard Balz (EVP Group, D) and Pervenche Berès (S&D Group, FR)
Federal Ministries:	Federal Ministry of Finance
Committees of the German Bundestag:	Finance
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The EBA's new tasks, to allow for “ecological and social factors” and to promote consumer protection, may lead to a conflict of interest with its actual task - safeguarding financial stability. The tasks need to be clearly prioritised.

As a result of the vague terminology - “ecological”, “social” and “consumer protection” - the boundaries of the EBA's mandate become blurred which may lead to excessive regulatory activity. This risk is increased by the fact that regulatory and implementation standards can be decided - in the absence of a large number of NSAs - more easily. The amendment is nevertheless justifiable: Inactive NSAs should not be able to hinder sensible standards.

The EBA's power to adopt – de jure non-binding but de facto binding – guidelines is still subject to too few political

constraints. It is unlikely that the planned monitoring by the Commission - as the executive authority with an interest in integration - will be sufficient. **The EBA should only be allowed to draw up guidelines provided there is no objection from the Council and the Parliament** (Barrier to exercising the mandate, cf. [cepStudy](#)).

Establishing an independent Executive Board means that national interests, represented by the NSAs, have less influence on the work of the EBA. This is **necessary for the effective mediation of conflicts between the supervisory authorities and for effective penalties to deter these authorities from breaching EU law.** The powers of the Executive Board thereby enable a minimum harmonisation of supervisory practice which until now has been almost impossible due to the mutual consideration exercised by the NSAs in the Board of Supervisors.

Overall however the powers of the Executive Board go too far. That applies firstly to the adoption of a Strategic Supervisory Plan and the subsequent reviewing of the competent authorities. In this regard, the EBA fails to accommodate to a sufficient degree the varying regulatory situations in the Member States. It applies, **secondly, to the right to decide unilaterally on the implementation and publication of stress testing.** Not only is the involvement of the competent supervisory authority crucial for the practical implementation of stress testing, but the (non-) publication of results can also have consequences for the stability of financial markets for which the competent supervisory authorities are ultimately responsible. It applies, **thirdly, to monitoring in the case of the outsourcing of banking activities.** During the course of Brexit, questions will increasingly arise about the permitted extent of powers in this regard.

Although, in this case, there is a risk of supervision being allowed to become too lax, in the competition between Member States to attract British banks, a unilateral power of the Executive Board to object to allegedly questionable practices by the supervisory authorities, may unduly restrict the latter's powers: since these authorities ultimately bear supervisory responsibility, they must have sufficient scope for deciding on how to arrange cooperation with authorities in third countries. This is all the more true since future relations between the EU and the UK with regard to financial market issues are still entirely unclear.

For these three powers, an EBA Governing Council should be set up in which both the Executive Board and the NSAs and ECB are represented. A similar approach has proven to be effective in relation to monetary policy which is decided collectively in the ECB Governing Council by the Executive Board of the ECB and the Presidents of the eurozone central banks.

Legal Assessment

Legislative Competency

The measures facilitate the functioning of the internal financial services market. The relevant basis for legislative power is therefore Art. 114 TFEU, as confirmed by the CJEU (Case C-270/12, para. 102 et seq.).

Subsidiarity

Unproblematic.

Proportionality with respect to Member States

The fact that the EBA – rather than the competent supervisory authorities – examines the equivalence of regulatory conditions and supervision in third countries and thus carries out important preparatory work for the Commission, is **appropriate.** If the NSAs or the ECB were to undertake this work, they would soon be suspected of wanting to protect the interests of local financial markets or the eurozone. **The competent authorities should, however, continue to be able to work together with supervisory authorities in third countries – bilaterally –** because this may be relevant to their supervisory responsibilities. The activities of the EBA should not therefore be so detailed that the competent supervisory authorities are no longer able to exercise reasonable supervision of banking groups with activities in third countries.

Compatibility with EU Law in other respects

Unproblematic.

Impact on German Law

The Regulation applies directly (Art. 288 TFEU) so that there is no need for a national transposing act.

Conclusion

The EBA's new tasks, to allow for "ecological and social factors" and to promote consumer protection, may lead to a conflict of interest with its actual task - safeguarding financial stability. The European Parliament and the Council should be able to block EBA guidelines. Establishing an Executive Board that is independent of instructions is necessary for the effective mediation of conflicts between the supervisory authorities and for effective penalties to deter these authorities from breaching EU law. The Executive Board, NSAs and ECB should decide on the strategic supervisory plan, stress testing and monitoring of the outsourcing of banking activities, collectively in an EBA Governing Council. An examination of the equivalence of regulatory conditions and supervision in third countries by the EBA is appropriate. The NSAs and the ECB must however be able to work together - bilaterally - with supervisory authorities in third countries.