


# POSITION PAPER



**ESBG position on  
Commission legislative package concerning  
the reform of financial supervision in the EU**

February 2010





The European Savings Banks Group (ESBG) would hereby like to convey its main messages on the Commission's legislative package on the reform of the EU framework for financial supervision, as well as its views on specific aspects of the proposals.

## **General remarks**

### *General support for combining macro- and micro-prudential approaches*

In light of the events that occurred in the financial markets during the past two years the state of play in EU financial supervision appears unsatisfactory. There is now general agreement that measures need to be taken in view of creating a solid foundation underpinning financial stability in the EU. This needs to be done by repairing the shortcomings in the current supervisory system, but also by capitalising on the merits of those features that worked well (such as the crucial role of national supervisors in day-to-day supervision because of their proximity to and their better knowledge of the markets). ESBG is welcoming the Commission's efforts and the Member States' political willingness to act in this direction.

ESBG agrees that the safety and soundness of EU financial markets can be ensured only by properly considering at the same time the financial health of individual institutions and of the system as a whole. Consequently, ESBG generally welcomes the proposed creation of an enhanced European financial supervisory framework based on the mutually reinforcing macro-prudential and micro-prudential pillars. Hence, ESBG supports the general principles underlying the Commission's proposals. At the same time, ESBG would like to draw attention to the fact that the concrete details fleshing out these principles are of utmost importance.

### *Common rulebook*

ESBG wishes to reiterate its long-standing support for the creation of a common supervisory culture in the EU. ESBG is of the opinion that, if properly designed, a single European rulebook containing one harmonised core set of standards can contribute to achieving the objective of a common supervisory culture. An adequate rulebook should result in more consistency in supervisory practices, whilst observing national specificities. Thus, it is important that the common rulebook does not amount to a rigid framework and pays due attention to the fact that day-to-day supervision remains at national level. The European rulebook should not result in overburdening the industry with regulatory requirements. This is particularly important for the smaller banks. Therefore we suggest that proportionality is set as an overarching principle to guide further work on the rulebook. A common rulebook should envisage a "same risk – same rules" approach rather than "one size fits all".

Furthermore, because of the attached legal consequences, it is of utmost importance to clearly define what constitutes a binding technical standard. Technical standards should be firmly circumscribed to defining the conditions of application of the legislation falling within the scope of action of the three new Authorities. In addition, it should be made explicit that such standards cannot entail any policy choices, as this should be exclusively subject to the legislative process.



Last but not least, there should be sufficient guarantees that the adoption of the common rulebook observes better regulation principles, including consultation procedures, impact assessments and cost-benefit analyses.

#### *The structure of the supervisory system*

ESBG would like to highlight that it is extremely important that the reforms contribute to strengthening the resilience of the EU financial system as a whole. Therefore, the EU's supervisory architecture should focus on the supervisory concerns characterising an integrated financial market, and thus especially on common developments, interactions and the hereto linked vulnerabilities (macro-prudential aspects), as well as on the coordination and resolution of disputes related to micro-prudential decision-making. It should be seriously scrutinised whether it is appropriate that such reforms take the form of a two-tier system, where cross-border or systemically relevant banks are supervised at EU level whereas national or local banks remain under the control of domestic supervisors.

ESBG notes that the legislative proposals do not differentiate between financial institutions either as regards their supervision or the applicable law. However, in our view, some generic clauses enshrined in the Commission's proposals may open the door for such developments. At this stage of the debates, ESBG argues in favour of deleting those provisions that would enable the transfer to the new European Authorities of direct supervisory powers over certain institutions.

#### *Concerns related to preserving the institutional balance*

One of the cornerstone principles of the EU framework is the mutual checks and balances between the EU institutions partaking in the decision-making process. Maintaining the institutional balance was one of the main concerns during the adoption of the Lamfalussy framework for financial services regulation. An appropriate balance was reached then after long discussions and a series of political declarations, with the Council and the European Parliament being endowed with balanced control powers over the Commission. The Comitology Decision was amended so as to include the new regulatory procedure with scrutiny, to reflect the concerns related to the maintenance of the institutional balance.

ESBG fears that the wide-reaching powers of the Commission proposed under the legislative package for supervision are likely to distort the institutional equilibrium achieved through the Lamfalussy procedure. More specifically, the proposed Commission's powers to adopt binding technical standards, outside the comitology framework, its powers to determine the existence of an emergency situation, as well as its overall influence over the activities of the ESAs (through participation in their decision-making bodies) are likely to undermine the powers of the two legislative branches in the EU. This is in ESBG's view not desirable.

#### *Legal certainty in relation to the powers of the ESAs*

The debates surrounding the proposals on a new architecture for financial supervision in the EU often highlight concerns as regards the lawfulness of some of the powers envisaged to be granted to the ESAs. In particular, such concerns appear in relation to ESAs powers to impose binding decisions on individual institutions. It is of utmost importance that the situations and legal relationships established



by the new EU supervisory framework remain foreseeable and are firmly grounded in an unchallengeable legal base.

#### *Industry representation*

Given that developments in the financial markets are determined by regulatory and supervisory requirements, as well as by the market players, it is indispensable that experts bringing practical insight and representing the industry's views participate in both the macro and the micro-prudential discussions taking place in the framework of the new bodies. Therefore, ESBG considers that it is particularly important to explicitly foresee the participation of the industry in the new supervisory framework. Such participation should – at least – consist of a formal dialogue with the ESRB, the continuation of industry representation in the framework of the successors to the Consultative Panels currently used by the Level 3 Committees, and binding consultation of all stakeholders for all measures to be adopted by the new Authorities (including guidelines and recommendations).

#### *Timing*

ESBG agrees that the most needs to be made out of the current momentum. At the same time, ESBG would like to highlight that – given the crucial importance of the supervisory framework and its substantial impact on all players – it is essential to avoid any rushed decisions and the adoption of hasty measures in this field. Therefore, we perceive the proposed timeframe envisaging that the new architecture be in place by the end of 2010 as unfeasible and as triggering undue pressure that risks negatively affecting the final outcome. Thus, whilst we agree that a decisive impetus should be given now to the creation of the new financial supervisory framework, we would also suggest that a more flexible time schedule is envisaged in view of avoiding undesired and counterproductive pressures. Also, ESBG considers it to be important to have more certainty about the arrangements during the transitional period.

### **Specific comments on the proposals underpinning the creation of the European System of Financial Supervisors (ESFS)**

ESBG welcomes the reinforcement of cooperation between Member States' supervisory authorities, as well as the objective of fostering the convergence of supervisory approaches. In this respect ESBG supports the establishment of the ESFS as an operational European network relying on the mutually reinforcing responsibilities of the upgraded Level 3 Committees (the European Supervisory Authorities – ESAs) and the competences of national supervisory authorities in day-to-day supervision. ESBG particularly supports the fact that daily supervision will remain at the national level and the fact that a central role in the supervision of cross-border groups is given to colleges of supervisors.

However, ESBG considers there are several problematic aspects in the proposals put forward by the Commission. The most important ones will be addressed below, whereby the references are made to the draft regulation establishing EBA, unless specified otherwise:

#### *Legal base*

As already mentioned ESBG considers that article 114 TFEU (ex article 95 EC Treaty) does not represent an appropriate legal basis for many of the powers to be attributed to the new ESAs, especially



as regards powers to adopt binding individual decisions addressed to institutions. The granting of such powers, if at all possible under the current EU legal framework, could only be based on Article 352 TFEU (ex-article 308 EC Treaty), which would require unanimity in the Council and the consent of the European Parliament.

#### *Recital 13 – Deposit guarantee schemes*

The Commission's proposal mentions that it would be "appropriate" that EBA "be able to exercise its powers under this regulation in relation to the deposit guarantee scheme itself and its operator". Such rather vague formulation tentatively anticipates future developments in the field of deposit guarantee schemes, thereby risking creating confusion or preempting forthcoming debates. This would be completely counter-productive, for which reason, ESBG suggests deleting the phrase, in line with the Council's proposal.

#### *Recital 28 – Stress tests*

According to the draft legislative proposal recital 28 requires the Authority to coordinate Community-wide stress tests. There is no corresponding competence in the text of the draft regulation. To avoid any confusions or misinterpretation we would suggest that the phrase be removed from the recital.

#### *Article 6(3) – Direct supervisory powers of EBA*

It is proposed in article 6(3) that EBA "shall execute any exclusive supervisory powers over entities with Community-wide reach or economic activities with Community-wide reach entrusted to it in sectoral legislation. For this purpose it shall have appropriate powers of investigation, enforcement and the possibility to charge fees." ESBG understands that this clause is intended to enable ESMA to exercise supervisory powers over credit rating agencies. However, in the context of EBA, the paragraph amounts to a far reaching enabling clause that opens the door to eventually entrusting EBA with direct supervisory tasks over certain institutions. It would also be contrary to the intentions expressed already by the Commission and by the de Larosière High Level group. Therefore, ESBG very much supports the Council's proposal to delete paragraph 3 of article 6 in the EBA draft regulation.

#### *Article 7 – Technical standards*

Article 7 prescribes the procedure for the adoption of binding technical standards. As already mentioned in the general comments there are three major problems related to the text proposed by the Commission.

Firstly, a definition of technical standards is missing. The very broad principles referred to in the Omnibus Directive for the identification of technical standards (technical issues, practical issues, cooperation procedures, flexibility, necessity) are virtually all-encompassing. ESBG takes the view that, at least, it should be made clear that technical standards cannot include policy choices and that their objective is limited to facilitating the application of the legislation falling within the scope of action of EBA.



Secondly, the Commission's powers to endorse these technical standards, which includes amending them or refusing their adoption, should be limited and clearly circumscribed. Otherwise it risks impinging on the institutional balance and would amount to a new rule-making procedure, in addition to the current regulatory levels within the Lamfalussy framework. Such a new rule-making procedure would in our view turn the Commission into an overly powerful protagonist, without providing for appropriate checks and balances.

Thirdly, the drafting of the technical standards should be based on open public consultations. Such consultations should be undertaken as a general rule and not merely "where appropriate" at the discretion of ESAs. Better regulation principles should be warranted.

Last but not least, the merits of the current regulatory regime, particularly of Level 3 measures, should not be denied. Especially as far as capital markets law is concerned, the current non-binding guidelines (adopted by CESR) have overall proven to be well functioning. Consequently, in these areas, from a practical point of view there is no need for extensive technical standards.

#### *Article 8 – Guidelines and recommendations*

Equally, as in the case of technical standards, the elaboration of guidelines and recommendations by EBA should be based on open public consultations of all stakeholders.

#### *Article 9 – Breach of European Union law*

Enforcement of prudential standards should remain the competence of national supervisory authorities, in line with the overall principle that day-to-day supervision remains at national level.

Any measure taken by EBA in response to alleged breaches cannot amount to more than a recommendation or an opinion. It should not be possible for EBA to directly enforce prudential rules against individual institutions. Such enforcement supposes the exercise of discretion and the knowledge of individual institutions. Yet, EBA cannot exercise discretionary powers, nor can it have an appropriate knowledge of individual institutions. Any legal uncertainty should be avoided. This can be done in our view only by guaranteeing that whatever individual measures EBA may be allowed to directly address to financial institutions they do not constitute binding decisions.

#### *Article 10 – Action in emergency situations*

Draft article 10 envisages a central role for the Commission in determining whether there is an emergency situation. This would require the exercise by the Commission of a discretionary power that is not supported by appropriate checks and balances in the draft proposal. As explained in our general comments, it is imperative to avoid that the institutional balance is disrupted and the Commission's position overly strengthened at the expense of the role of the other EU institutions.

Given the important implications attached to a decision declaring an emergency situation, ESBG considers that such decision could only be based on objective criteria to be determined beforehand and after the appropriate consultation of the Member States concerned, as well as of the national supervisory authorities and the European Systemic Risk Board. Under these conditions, it seems more appropriate for the Council to have the final say on the existence of an emergency situation (as proposed by the Council in its general approach on the legislative proposals).



In line with the plea for maintaining day-to-day supervision at national level (see also the general comments), ESBG considers that any action by EBA in emergency situations should be directed towards national authorities, but not towards individual institutions. Therefore, we urge removing the proposals in paragraph 3 of article 10 that envisage endowing EBA with the power to adopt individual decisions addressed to financial institutions in emergency situations.

#### *Article 11 – Settlement of disagreements between competent authorities*

ESBG welcomes the establishment of a procedure capable of dealing with disagreements between national competent authorities. To ensure legal certainty, there is in our view a need for certain further specifications.

Firstly, it would be necessary to make clear that EBA’s power of settling disagreements applies to cross-border situations and does not concern possible disagreements between different competent authorities within a Member State.

Secondly, it is important to clarify the status of existing arrangements to settle disagreements as already enshrined in sectoral legislation and the role of colleges of supervisors. Recital 22 of the Commission proposal explicitly provides that “existing conciliation mechanisms provided in sectoral legislation have to be respected”. This means that there would be no change in the distribution of competences between home-host-consolidated supervisors where legislation already establishes a mechanism for taking a joint decision. However, many of these arrangements are at the same time subject to the amendments proposed in the Omnibus Directive (for instance article 129(2) CRD on IRB and AMA validation), which basically repeal existing arrangements and subject them to the procedure in article 11. The proposal needs to clarify the situation. In ESBG’s view current arrangements for adopting joint decisions, which have worked well, should be further maintained. The settlement mechanism in article 11 should apply only to those situations where there is not yet a procedure for settling disagreements through joint decision-making.

Thirdly, in line with our previous comments, it should not be possible for EBA to adopt individual decisions addressed to financial institutions, in the case that national authorities do not comply with the settlement reached by EBA. The regular infringement procedure for breach of EU law by a Member State should apply. Consequently, we suggest to deleting the proposed paragraph 4 of article 11 (as also proposed by the Council).

#### *Article 12 – Colleges of supervisors*

Draft article 12(2) provides that EBA should participate as an observer in colleges of supervisors “as it deems appropriate”. ESBG considers that this discretionary participation is not helpful for ensuring the level-playing field between colleges. It should be certain when an ESA has to participate in colleges. Furthermore, the role to be played by EBA within colleges of supervisors needs to be specified.

#### *Article 22 – Banking Stakeholder Group*

ESBG welcomes the institutionalization of the dialogue with the industry via the Banking Stakeholder Group and hopes that this will build on the positive experience of the Consultative Panel. Yet, there are some concerns that an enlarged composition of 30 members might impinge on the effectiveness of the



dialogue. Therefore, ESBG would suggest that, according to the topics to be discussed, the composition of the Banking Stakeholder Group should warrant a fair representation of the banking industry, reflecting its pluralistic structure. Furthermore, ESBG would welcome a specification that consultations should not be limited to the consultation with the Banking Stakeholder Group.

### **Specific comments on the proposals underpinning the creation of the European Systemic Risk Board (ESRB)**

ESBG particularly welcomes the establishment of a body explicitly entrusted with conducting macro-prudential supervision at European level and its close links with the European Central Bank. It is essential that an entity be clearly entrusted with the task of monitoring the macro-economic developments and the developments in the financial system and with identifying the hereto related potential risks for Europe's financial markets. It is also of utmost importance that concrete measures be taken for addressing identified macro-prudential risks.

A general concern of ESBG is that national specificities should be given due consideration when analysing EU-wide macro-prudential developments. EU Member States and EEA countries have different market structures, as well as different economies. There should be guarantees that the ESRB duly relies on the substantial macro-prudential analysis conducted at national level when undertaking its own analysis and risk assessment. Furthermore, this should be also considered when issuing warnings and recommendations, given that national authorities will be best placed to address national specificities.

#### *Article 2 – Definitions*

The precise delimitation of the responsibilities of the ESRB is particularly important for ensuring legal certainty. To clearly define the scope of action of the ESRB, ESBG would welcome the insertion of a definition of “systemic risks” to which the tasks of the ESRB are intimately linked.

#### *Article 10 – Voting modalities of the General Board*

ESBG considers that the same voting rules should apply for the adoption of recommendations as for their publication. Consequently, the rules on qualified majority voting (as required in article 18 of the draft regulation) should apply in both cases.

#### *Article 13 – Other sources of advice*

ESBG very much welcomes the insertion of a provision that allows for the presentation of the industry's views on macro-prudential issues. Given that developments in the financial markets are determined by regulatory and supervisory requirements, as well as by the market players, it is indispensable that experts from the industry bring their practical insights and represent the industry's views. ESBG would very much support the establishment of an institutionalised platform underpinning the dialogue between the industry and the ESRB.

#### *Article 15 – Collection and exchange of information*



When pursuing its functions, the ESRB will have to rely on substantial and reliable information and data. All aspects related to the transmission and receipt of such data are of utmost concern to all stakeholders. The banking industry is already subject to heavy burden as regards the transmission of data, information and notifications to their supervisory authorities. Consequently, national central banks and supervisory authorities by now dispose of a large information base on individual institutions and national financial systems. In order to avoid submitting the industry to double reporting requirements, it should be ascertained that the ESRB relies in the first place on the data already available to the central banks and the micro-prudential supervisory authorities. If the ESRB were to need supplementary data it should request them from the relevant micro-prudential authorities. The necessary confidentiality should be guaranteed.

ESBG believes that the ESRB should not be able to request data and information directly from market operators. In principle, the focus of the ESRB should be on aggregate, not on individual data. However, in exceptional cases, there may be reasons for the ESRB to acquire information that is not in summary or collective form. In such cases the relevant data may be asked from the national authorities, provided that pertinent explanations are given, the request is justified and proportionate, the national authority has already access to the respective data and the individual institutions are duly informed.

#### *Article 16 - Risk warnings and recommendations*

ESBG takes the view that the ESRB's role is that of identifying macro-prudential problems and raising the awareness of policy-makers about possible risks. It is however not for the ESRB to indicate the precise action to be taken, but to call for the competent policy-makers to address the specific problems identified. Therefore, warnings and recommendations should remain high-level, and especially should not refer to individual institutions.

#### **Specific comments on the proposal for the Omnibus Directive**

ESBG highlights the importance of the Directive intended to amend sectoral legislation with a view to setting the powers of the new Authorities (the so-called Omnibus Directive). This piece of legislation is crucial in determining the scope of the effective powers of the new Authorities and therefore it needs to be scrutinised carefully.

As already indicated, ESBG favours the insertion of a definition of technical standards in the text of the regulation establishing the new Authorities. ESBG considers that it is of utmost importance that such definition catches two important features of technical standards: 1) they should not include policy choices and 2) their objective is limited to facilitating the application of the legislation that falls within the scope of action of EBA. In light of these observations, ESBG considers that the high-level principles for the identification of technical standards in the explanatory memorandum are not appropriate, as they are particularly broad and virtually all-encompassing.

As regards the concrete proposals, in ESBG's view, the following proposed amendments cannot be considered technical standards:

Proposals for amendments to Directive 2006/ 48/ EC (CRD) – article 9 paragraphs 1, 13, 14, 16, 18, 22 of the Proposal for an Omnibus Directive:



- Article 6 in conjunction with article 11: the determination of the details of the “fit and proper test” for bank directors will necessarily have to consider national specificities especially in the case of small or local banks. Therefore it involves a certain degree of discretion and implicitly some policy choices, and cannot be considered a technical standard.
- Article 63a in conjunction with article 57(ca): the quality of instruments constituting own funds is a very delicate topic that draws on different national specificities and involves lots of policy choices (as apparent from ongoing discussions on the definition of capital). Hence, this cannot be simply labeled as technical standards, and any harmonization needs to be made subject to the regular legislative decision-making.
- Articles 74(2), 110(2): the reference to a uniform language of reporting needs to be clarified. Reducing language diversity and promoting one language over another is definitely not a technical aspect, but an important policy choice. The use of the word “language” should be avoided as long as it commonly refers to the linguistic process and not to terminology/nomenclature.
- Article 84(2): the application of the IRB approach supposes the exercise of national discretions and options that do not amount to “gold plating” but reflect genuine national specificities. Therefore, this should not count as a technical standard.
- Article 105(1): the application of the AMA approach supposes the exercise of national discretions and options that do not amount to “gold plating” but reflect genuine national specificities. Therefore, this should not count as a technical standard.
- Article 124(6): because of the diversity of national financial markets ESBG sees some problems with a common risk assessment procedure in SREP to be devised merely as a technical standard.

Proposals for amendments to Directive 2003/ 71/ EC (Prospectus Directive) – article 5 paragraphs 1, 4 of the Proposal for an Omnibus Directive:

- Article 8(5): “conditions of application of the implementing measures adopted by the Commission according to paragraph 4” – these concern substantial information required in the prospectus and should therefore not be regarded as a technical standard.
- Article 16(3): “conditions of application of the obligation to provide a supplement to the prospectus in case of significant new factor, material mistake of inaccuracy relation to the information included in the prospectus” – this involves policy choices and does not amount to a technical standard.

Proposals for amendments to Directive 2004/ 39/ EC (MiFID) - article 6 paragraphs 2, 3 of the Proposal for an Omnibus Directive:

- Article 7(4): “conditions of application of the requirements and procedures for such [investment firms] authorisation...” - would need to take account of national specificities and cannot be merely qualified as a technical standard.
- Article 10a(8): “conditions of application relating to the list of information required for the assessment of an acquisition as referred to in paragraph 1 and the modalities of the



consultation process between the relevant competent authorities as referred in article 10(4)” – only the modalities of the consultation process can be regarded as technical standards, however not the application itself, which concerns substantial aspects.

Proposals for amendments to Directive 2009/ 65/ EC (UCITS): the following proposals do not represent technical standards in our view – article 11 paragraphs 1-4, 6-15 of the Proposal for an Omnibus Directive:

- Article 5(8): “conditions of application relating to the information to be provided to the competent authorities in the application for authorization of a UCITS”
- Article 7(6): “conditions of application of the requirements for the authorisation of the management company...”
- Article 12(4): “conditions of application of the implementing measures... regarding the procedures, arrangements, structures and organisational requirements [to minimize conflicts of interest]referred to in paragraph 3 of this article”.
- Article 14(3): “conditions of application of the implementing measures... regarding the criteria, principles and steps referred to in points (a), (b) and (c) of the first subparagraph of this article [rules of conduct for the management company]”.
- Article 29(5): “conditions of application of the conditions for the authorisation [refusal of authorisation and withdrawal of authorisation] of the self-managed investment company...”.
- Article 43(6): “conditions of application of the implementing measures... regarding the content, format and method by which the information ... should be provided [by the merging and receiving UCITS]”.
- Article 50(4): “conditions of application of the provisions concerning the categories of assets in which UCITS can invest...”
- Article 51(5): “conditions of application of the implementing measures... regarding the criteria and rules referred to in points (a), (b) and (c) of paragraph 4 [risk management, assessment of value and treatment of derivative instruments]”.
- Article 60(7): “conditions of application of the implementing measures... regarding the agreement, measures and procedures referred to in points (a), (b) and (c) of paragraph 6 [with respect to feeder and master UCITS].”
- Article 61(4): “conditions of application of the implementing measures... regarding the agreement and types of irregularities referred to in points (a) and (b) of paragraph 3[with respect to feeder and master UCITS and their depositaries]”.
- Article 64(5): “conditions of application of the implementing measures... regarding the information and procedure referred to in points (a) and (b) of paragraph 4 [with respect to changes in relation to feeder and master UCITS]”.
- Article 69(5): “conditions of application of the provisions concerning the content of the prospectus, the annual report and the half-yearly report...”.



- Article 78(8): “conditions of application of the implementing measures... regarding the information referred to in paragraph 3 [with respect to Key Investor Information]”.
- Article 84(4): “conditions of application of the conditions applying to the temporary suspension of the repurchase or redemption of the units of the UCITS as referred to in point (a) of paragraph 2, once the suspension has been decided”.



## **About ESBG (European Savings Banks Group)**

ESBG (European Savings Banks Group) is an international banking association that represents one of the largest European retail banking networks, comprising about one third of the retail banking market in Europe, with total assets of €5967 billion (1 January 2008). It represents the interest of its Members vis-à-vis the EU Institutions and generates, facilitates and manages high quality cross-border banking projects.

ESBG Members are typically savings and retail banks or associations thereof. They are often organized in decentralized networks and offer their services throughout their region. ESBG Member banks have reinvested responsibly in their region for many decades and are one distinct benchmark for corporate social responsibility activities throughout Europe and the world.



European Savings Banks Group - aisbl  
Rue Marie-Thérèse, 11 . B-1000 Brussels . Tel: +32 2 211 11 11 . Fax : +32 2 211 11 99  
Info@savings-banks.eu . www.esbg.eu

Published by ESBG. February 2010

