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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board

(Text with EEA relevance)

{SWD(2017) 313 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Following the financial crisis¹, the EU set up the European System of Financial Supervision (ESFS), built on a two-pillar system of macro-prudential and micro-prudential supervision.

The European Systemic Risk Board (ESRB), established in December 2010, is the macro-prudential pillar of the ESFS. The ESRB is responsible for macro-prudential oversight of the financial system in the EU. Its tasks include: (i) contributing to the prevention or mitigation of systemic risks to financial stability in the EU that arise within the financial system, while taking into account macroeconomic developments, so as to avoid periods of widespread financial distress; (ii) contributing to the smooth functioning of the internal market, ensuring that the financial sector has a sustainable contribution to economic growth.

The ESRB has broad membership including national central banks, supervisors and European institutions. It has specific tools, such as recommendations and warnings to shape macro-prudential policy in the EU. The ESRB's system-wide mandate is particularly relevant in monitoring and assessing cross-sectorial and cross-border risks and spillovers and its coordination role limits contagion risk. Also, by facilitating the recognition of national macro-prudential measures, the ESRB ensures that cross-border leaks and regulatory arbitrage are minimised. As a result, the ESRB has a direct effect on the effectiveness of EU countries' macro-prudential measures and in turn on the degree of financial stability in the EU. In this context, improving the ESRB's functioning is expected to make macro-prudential policy more effective.

Since its creation, the ESRB has:

- issued recommendations and warnings to a wide range of addressees;
- contributed to the ongoing development of a macro-prudential framework in the EU;
- successfully used the resources and expertise provided by its broad institutional membership and the independent academic input from the Advisory Scientific Committee;
- played an important role in coordinating and assessing notifications of macro-prudential measures in the EU.

The ESRB's importance is borne out by its work as a coordination platform and information hub, on monitoring risk from an EU-wide perspective and on setting guidance on the use of macro-prudential instruments.

However, the recent institutional changes related to Banking Union and efforts to build a Capital Markets Union, make the context in which the ESRB was set up different from the one it now operates in. This has implications primarily for the ESRB's composition and how it is organised. Improvements to the ESRB's composition and how it cooperates with

¹ The de Larosière Report (final report presented on 25 February 2009) recommended establishing a Union to oversee risk in the financial system as a whole.

European institutions are needed to take account of incremental changes to the macro-prudential framework and the waves of regulatory developments that have taken place.

In addition, changes are needed to ensure that the ESRB is able to perform macro-prudential oversight of the entire financial system as the importance of market-based financing increases, particularly with the establishment of the Capital Markets Union.

Strengthening the ESRB's efficiency and effectiveness will improve coordination of macro-prudential policies within the EU and enable the ESRB to better fulfil its mandate. The proposal is further explained in the effect analysis.

- **Consistency with existing policy provisions in the policy area**

This proposal should be seen in the context of the ongoing review of the European Supervisory Agencies (ESAs). The ESRB and the ESAs are the macro- and micro-prudential pillars of the ESFS.

- **Consistency with other Union policies**

The ESRB Review also takes place in the context of building a Banking Union and Capital Markets Union. The expected deepening and further integration of EU capital markets requires commensurate adjustment of the oversight framework for systemic risks.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis for the proposed amendments is the same as that for the legislative act being amended, i.e. Article 114 TFEU. The Regulation establishing the ESRB is complemented by a Council Regulation giving the European Central Bank (ECB) the task of running the ESRB Secretariat.

- **Subsidiarity (for non-exclusive competence)**

The ESRB is a body without legal personality. It has responsibility for macro-prudential supervision of the financial system in the EU. The proposal's aims to make the ESRB more efficient and strengthen macro-prudential coordination in the EU can be met by supplementing already existing EU legislation, meaning that they can be best achieved at EU level rather than by different national initiatives. Furthermore, as the ESRB has a substantial contribution to the reciprocation of national macro-prudential measures, it helps national authorities to address systemic risks emerging at national level.

- **Proportionality**

The proposal amends an existing regulation. The changes are targeted and aim to clarify or strengthen existing provisions and are hence proportionate to the problems identified. The underlying structure of the ESRB will remain broadly unchanged.

- **Choice of the instrument**

Amendment of existing regulation

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

As per the requirement in the ESRB Regulation, the Commission carried out a review to determine whether the ESRB's mission and organisation need updating. The first review of the ESRB Regulation was performed in 2014.

- **Stakeholder consultations**

Public consultation on the macro-prudential framework and a public hearing were organised in the second half of 2016. Stakeholders generally considered the ESRB's mandate and tasks appropriate to ensure the efficiency and effectiveness of macro-prudential policies, and expressed some support for adjusting the ESRB's working practices to make it more efficient. Most respondents supported keeping the ECB President as Chair of the ESRB. Some respondents advocated having the Single Supervisory Mechanism and of the Single Resolution Board represented on the ESRB's General Board to acknowledge the establishment of the Banking Union, but most did not see a need for extensive changes to the Board's composition. Some respondents supported strengthening the ESRB Secretariat and boosting the ESRB's role in streamlining notification procedures at EU level.

- **Collection and use of expertise**

n.a. – via stakeholder consultation & public hearing, see above

- **Impact assessment**

The Commission has carried out an effect analysis of the proposed changes to the ESRB Regulation. A formal impact assessment has not been carried out, given the targeted nature of the changes introduced by the legislative proposal.

- **Regulatory fitness and simplification**

[n.a.]

- **Fundamental rights**

[n.a.]

4. BUDGETARY IMPLICATIONS

The budgetary cost for the ESRB Secretariat is borne by the ECB and has no direct implication for the EU budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Regulation will be reviewed after 5 years.

- **Explanatory documents (for directives)**

[n.a.]

- **Detailed explanation of the specific provisions of the proposal**

Chair

In the current set-up, the ESRB is chaired by the ECB President. As Chair, the ECB President confers authority and credibility on the ESRB and ensures that it can effectively build and rely on the ECB's expertise in the area of financial stability. It is therefore proposed that the ECB President serve as ESRB Chair on a permanent basis.

ESRB Secretariat

As the ESRB General Board has no full-time members, including no full-time Chair or Vice-Chairs, there is no member who can devote all his/her time to ESRB-related matters and duties. In addition, the official tasks of the Head of the ESRB Secretariat are limited. This may limit the visibility of the ESRB's work, despite the ESRB Chair's regular participation in Parliament hearings. A larger role for the Head of the ESRB Secretariat would increase the impact and effectiveness of warnings and recommendations.

The proposal here is to introduce a consultation procedure in which the General Board assesses the candidates proposed by the ECB for the post of Head of the ESRB Secretariat, in particular their qualities and experience necessary to manage the Secretariat. Parliament and Council would be informed of the procedure. This would keep the link with the ECB and maintain the Secretariat Head's accountability to the General Board. It would also make the process more transparent, while raising the profile of the Head of the Secretariat. It is proposed to further specify the tasks conferred to the Secretariat Head, including the possibility for the Chair to delegate to it the task of representing the Chair externally.

ESRB composition

The proposal updates the ESRB Regulation to take account of the creation of the Banking Union and to add the Single Supervisory Mechanism and the Single Resolution Board as voting members of the ESRB General Board. Corresponding adjustments should also be made to the Advisory Technical Committee and the Steering Committee.

Addressees of ESRB warnings and recommendations

It is also proposed to include the ECB as a possible addressee of ESRB warnings and recommendations for ECB tasks conferred to it by the Single Supervisory Mechanism Regulation (Regulation (EC) No 1024/2013), i.e. for supervisory tasks not pertaining to the conduct of monetary policy. This would address the current asymmetry whereby national authorities can receive such warnings and recommendations as members of the General Board, but these are not sent to the ECB as the competent or designated authority at Banking Union level.

Better Regulation

In line with Better Regulation principles and where appropriate, the ESRB's advisory committees are expected to consult stakeholders such as market participants, consumer bodies and experts on its opinions, recommendations and decisions.

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,
Having regard to the proposal from the European Commission,
After transmission of the draft legislative act to the national parliaments,
Having regard to the opinion of the European Economic and Social Committee²,
Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) In accordance with Article 20 of Regulation (EU) No 1092/2010³ (ESRB Regulation), the European Parliament and the Council, on the basis of a report⁴ from the Commission, have examined the ESRB Regulation to determine whether the mission and organisation of the ESRB needed to be reviewed. The modalities for the designation of the Chair of the ESRB have also been reviewed.
- (2) The 2017 Commission report on the mission and organisation of the ESRB⁵ concludes that, while the ESRB is generally well-functioning, improvements on certain specific points are necessary.
- (3) The broad membership of the General Board of the ESRB is a major asset. Recent developments in the financial supervisory architecture of the Union, and in particular the set-up of a Banking Union, are however not reflected in the composition of that General Board. For that reason, the Chair of the Supervisory Board of the ECB and the Chair of the Single Resolution Board should become members with voting rights of the General Board of the ESRB. Corresponding adjustments should also be made to the Steering Committee and to the Advisory Technical Committee, respectively.

² OJ C , , p. .

³ Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).

⁴ Report from the Commission to the European Parliament and to the Council on the mission and organisation of the European Systemic Risk Board, COM(2014) 508 final.

⁵ Commission Staff Working Document, Effect Analysis, Amendments to ESRB Regulation, COM(2017).

- (4) The ECB President has chaired the ESRB for the first 5 years of its existence, after which the ECB President has continued to chair the ESRB on an interim basis. During that period, the ECB President has conferred authority and credibility to the ESRB and ensured that the ESRB can effectively build and rely on the expertise of the ECB in the area of financial stability. It is therefore appropriate that the ECB President chairs the ESRB on a permanent basis.
- (5) To strengthen the visibility of the ESRB as a body that is separate from its individual members, the Chair of the ESRB should be able to delegate tasks related to the external representation of the ESRB to the head of the ESRB Secretariat.
- (6) Article 3(2) of Council Regulation (EU) No 1096/2010⁶ provides that the head of the Secretariat of the ESRB is to be appointed by the ECB, in consultation with the General Board of the ESRB. To raise the profile of the head of Secretariat of the ESRB, the General Board of the ESRB should assess, in an open and transparent procedure, whether the shortlisted candidates for the position of head of Secretariat of the ESRB possess the qualities and experience necessary to manage the ESRB Secretariat. The General Board should inform the European Parliament and the Council about the assessment procedure. Furthermore, the tasks of the head of the ESRB Secretariat should be clarified.
- (7) In accordance with Article 5(2) of Regulation (EU) No 1092/2010, the first Vice-Chair of the ESRB has up until now been elected by and from the members of the General Council of the ECB, with regard to the need for a balanced representation of Member States overall and between those whose currency is the euro and those whose currency is not the euro. Following the creation of the Banking Union, it is appropriate to replace the reference to Member State whose currency is the euro and those whose currency is not the euro with a reference to Member States that do participate in the Banking Union and those who do not.
- (8) Given the amendments to the Agreement on the European Economic Area (EEA)⁷, and in particular the adoption of Regulation (EU) No 1092/2010 by the EEA member states, Article 9(5) of that Regulation is no longer relevant and should therefore be deleted.
- (9) To decrease costs and to enhance procedural efficiency, the number of representatives of the Commission in the Advisory Technical Committee of the ESRB should be reduced from the current two representatives to one representative.
- (10) Article 16(3) of Regulation (EU) No 1092/2010 requires that the ESRB warnings and recommendations are transmitted to the Council and the Commission and, where addressed to one or more national supervisory authorities, to the ESAs. To strengthen democratic control and transparency, those warnings and recommendations should also be transmitted to the European Parliament and to the ESAs.
- (11) To ensure the quality and relevance of the ESRB opinions, recommendations and decisions, the Advisory Technical Committee and Advisory Scientific Committee are

⁶ Council Regulation (EU) NO 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board (OJ L 331, 15.12.2010, p. 162).

⁷ Decision of the EEA Joint Committee No 198/2016 of 30 September 2016 amending Annex IX (Financial services) to the EEA Agreement [2017/275] (OJ L 46, 23.2.2017, p. 1).

expected to consult stakeholders, where appropriate, at an early stage and in an open and transparent manner.

(12) Regulation (EU) No 1092/2010 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 1092/2010 is amended as follows:

(1) Article 4 is amended as follows:

(a) the following paragraph 2a is inserted:

“2a. When consulted on the appointment of the head of Secretariat of the ESRB in accordance with Article 3(2) of Council Regulation (EU) No 1096/2010*, the General Board, following an open and transparent procedure, shall assess whether the shortlisted candidates for the position of head of Secretariat of the ESRB possess the qualities and experience necessary to manage the ESRB Secretariat. The General Board shall inform the European Parliament and the Council about the consultation procedure.

* Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board (OJ L 331, 15.12.2010, p. 162).”;

(b) the following paragraph 3a is inserted:

“3a. When giving directions to the head of Secretariat of the ESRB in accordance with Article 4(1) of Council Regulation (EU) No 1096/2010, the ESRB Chair and the Steering Committee may in particular address the following:

- (a) the day-to-day management of the ESRB Secretariat;
- (b) any administrative and budgetary issues related to the ESRB Secretariat;
- (c) the coordination and preparation of the work and the decision making of the General Board;
- (d) the preparation of the annual ESRB programme proposal and its implementation;
- (e) the preparation of the annual report on the ESRB activities and the reporting to the General Board on its implementation”;

(2) Article 5 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

“1. The ESRB shall be chaired by the President of the ECB.

2. The first Vice-Chair shall be elected by and from the members of the General Council of the ECB for a term of 5 years, with regard to the need for a balanced representation of Member States overall, and between those which are participating Member States as defined in Article 2(1) of Council Regulation (EU) No 1024/2013**, and those which are not. The first Vice-Chair may be re-elected once.

** Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).”;

- (b) paragraph 8 is replaced by the following:
- “8. The Chair shall represent the ESRB externally. The Chair may delegate tasks related to the external representation of the ESRB to the head of the Secretariat.”;
- (3) Article 6 is amended as follows:
- (a) paragraph 1 is amended as follows:
- (i) the following points (fa) and (fb) are inserted:
- “(fa) the Chair of the Supervisory Board of the ECB;
- (fb) the Chair of the Single Resolution Board;”;
- (ii) point (g) is replaced by the following:
- “(g) the Chair of the Advisory Scientific Committee;”;
- (b) paragraph 2 is amended as follows:
- (i) point (a) is replaced by the following:
- “(a) one high-level representative per Member State either of the national competent authorities or of the national authorities designated for the application of measures aimed at addressing systemic or macro-prudential risk, in accordance with paragraph 3;”;
- (c) paragraph 3 is replaced by the following:
- “3. With regard to the representation of the national authorities referred to under paragraph 2(a), the respective high-level representatives shall rotate depending on the item discussed, unless the national authorities of a particular Member State have agreed on a common representative.”;
- (4) in Article 9, paragraph 5 is deleted;
- (5) Article 11 is amended as follows:
- (a) paragraph 1 is amended as follows:
- (i) point (c) is replaced by the following:
- “(c) four other members of the General Board who are also members of the General Council of the ECB, with regard to the need for a balanced representation of Member States overall, and between those which are participating Member States as defined in Article 2(1) Regulation (EU) No 1024/2013 and those which are not. They shall be elected by and from among the members of the General Board who are also members of the General Council of the ECB, for a period of 3 years;”;
- (ii) the following points (ga) and (gb) are inserted:
- “(ga) the Chair of the Supervisory Board of the ECB;
- (gb) the Chair of the Single Resolution Board;”;
- (6) Article 12 is amended as follows:

- (a) paragraph 5 is replaced by the following:
- “5. Where appropriate, the Advisory Scientific Committee shall organise consultations with stakeholders at an early stage and in an open and transparent manner, while taking into account the requirement of confidentiality.”;
- (7) Article 13 is amended as follows:
- (a) paragraph 1 is amended as follows:
- (i) point (f) is replaced by the following:
- “(f) a representative of the Commission;”;
- (ii) the following points (fa) and (fb) are inserted:
- “(fa) a representative of the Supervisory Board of the ECB;
- (fb) a representative of the Single Resolution Board;”;
- (b) the following paragraph 4a is inserted:
- “4a. Where appropriate, the Advisory Technical Committee shall organise consultations with stakeholders at an early stage and in an open and transparent manner, while taking into account the requirement of confidentiality.”;
- (8) Article 16 is amended as follows:
- (a) in paragraph 2, the first sentence is replaced by the following:
- “Warnings or recommendations issued by the ESRB in accordance with points (c) and (d) of Article 3(2) may be of either a general or a specific nature and shall be addressed in particular to the Union, to one or more Member States, to one or more of the ESAs or to one or more of the national competent authorities, or to the ECB for the tasks conferred to the ECB in accordance with Articles 4(1), 4(2) and 5(2) of Regulation (EU) No 1024/2013.”;
- (b) paragraph 3 is replaced by the following:
- “3. At the same time as they are transmitted to the addressees in accordance with paragraph 2, the warnings or recommendations shall be transmitted, in accordance with strict rules of confidentiality, to the Council, the European Parliament, the Commission and to the ESAs.”;
- (9) in Article 17, paragraphs 1 and 2 are replaced by the following:
- “1. If a recommendation referred to in Article 3(2)(d) is addressed to the Commission, to one or more Member States, to one or more ESAs, or to one or more national competent authorities, the addressees shall communicate to the European Parliament, the Council and to the ESRB the actions undertaken in response to the recommendation and shall substantiate any inaction. Where relevant, the ESRB shall, subject to strict rules of confidentiality, inform the ESAs of the answers received without delay.”;
2. If the ESRB decides that its recommendation has not been followed or that the addressees have failed to provide adequate justification for their inaction, the ESRB shall, subject to strict rules of confidentiality, inform the addressees, the European Parliament, the Council and the relevant ESAs thereof.”;
- (10) Article 20 is replaced by the following:

“No sooner than five years after [OJ, please insert the date of entering into force], the Commission shall carry out an evaluation of this Regulation and present a Report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.”

Article 2

This Regulation shall enter into force on the [...] day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President