

**Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on Community macro-prudential oversight of the financial system and establishing a European Systemic Risk Board'**

COM(2009) 499 final — 2009/0140 (COD)

**Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Banking Authority'**

COM(2009) 501 final — 2009/0142 (COD)

**Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Insurance and Occupational Pensions Authority'**

COM(2009) 502 final — 2009/0143 (COD)

**Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority'**

COM(2009) 503 final — 2009/0144 (COD)

(2010/C 339/08)

Rapporteur: **Mr NYBERG**

On 6 October 2009 the Council of the European Union decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the

*Regulation of the European Parliament and of the Council on Community macro prudential oversight of the financial system and establishing a European Systemic Risk Board*

COM(2009) 499 final - 2009/0140 (COD)

*Regulation of the European Parliament and of the Council establishing a European Banking Authority*

COM(2009) 501 final - 2009/0142 (COD)

*Regulation of the European Parliament and of the Council establishing a European Insurance and Occupational Pensions Authority*

COM(2009) 502 final - 2009/0143 (COD)

*Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority*

COM(2009) 503 final - 2009/0144 (COD).

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 8 January 2010.

At its 459th plenary session, held on 20 and 21 January 2010 (meeting of 21 January 2010), the European Economic and Social Committee adopted the following opinion by 169 votes to 2 with 15 abstentions.

## **1. Conclusions and recommendations**

1.1 On 23 September, the European Commission presented proposals for a Regulation on a European Systemic Risk Board

(ESRB) and three Regulations establishing a European Banking Authority, a European Insurance and Occupational Pensions Authority and a European Securities and Markets Authority. All these are very much in line with the report prepared by the de Larosière group early in 2009.

1.2 In an opinion on the de Larosière report, the EESC discusses the reasons for the financial and economic crisis, regulation of the financial market and supervisory arrangements. Besides a general reference to that opinion we want to repeat one of its statements: 'The EESC also thinks that supervision is key to preventing the occurrence of another financial crisis. But supervision requires rules. Therefore the proposals for amending and strengthening rules... are considered equally important.' <sup>(1)</sup>

#### *Stakeholder groups*

1.3 The Committee argued for wider representation on the Boards of the three new Authorities. Instead the Commission proposes special stakeholder groups.

1.3.1 The **ESRB** should 'seek, where appropriate, the advice of relevant private sector stakeholders.' The examples given are financial sector representatives, consumer associations and certain groups established by the Commission. It ought to be mentioned that the financial sector representatives should come from both the employers and trade unions. Moreover, as the systemic risks concern not only the financial market but all of the economy employers and trade unions at European level also ought to be consulted.

1.3.1.1 Nothing is said on the form of these consultations and how often they should take place. This is needed as the article states that these consultations 'shall' take place. To use 'where appropriate' seems too vague.

1.3.2 The stakeholder groups for the three **Authorities** should, according to the Commission, be employers and employees in the respective part of the financial market as well as consumers and users of the services of the sector. The 30 representatives proposed should be evenly distributed between all the types of representatives.

1.3.2.1 These groups will meet at least twice a year, may submit opinions and advice and have secretarial support. Opinions and advice should be made public. There is a risk that their work will be concentrated only to the two meetings. They ought to have the option of following the work of the Authority in question permanently.

#### *Macro-prudential supervision*

1.4 The proposal for an ESRB lacks a definition of systemic risks. This concept needs to be discussed in public, not just behind closed doors in the new ESRB.

1.4.1 The EESC's opinion is that the ESRB must have a clear mandate to act when financial stability is at risk and that, in order to guarantee this in the regulation, the wording of some passages should be reconsidered.

- The different versions should be streamlined using the concept of 'supervision'.

<sup>(1)</sup> See point 1.4 of the EESC opinion on the *Report of the de Larosière Group*, OJ C 318 of 23 December 2009 p. 57.

- The warnings and recommendations from the ESRB should only be transmitted to the Council as in Article 16(3) and not go through the Council as in recital 9, which could reduce its independence.
- The use of the word 'should' for these recommendations means that they are more or less compulsory. Whether or not action is compulsory must be dependent on where the competence for the rules lies: with the Member States or with the EU.
- The ESRB (Article 3) is said to 'contribute to a smooth functioning of the internal market'. The ESRB's remit is the risks involved in the financial market but here it seems to have been given a wider role.

1.4.2 The General Board of the ESRB will include the 29 members of the ECB General Council. This connection between the ESCB and the new ESRB is advocated by the EESC.

1.4.2.1 Article 11 on the Steering Committee has no rules on voting rights. The EESC recommends that there should be five members from the ECB General Council in the Steering Committee, which could make it easier to have a better geographical distribution, a distribution between small and big countries and between countries inside and outside the eurozone. In addition, given that all members in the Steering Committee seemingly should have voting rights there has to be a significant number of central bank representatives.

1.4.3 The Parliament is mentioned only as the ESRB has to give reports to the Parliament and the Council at least once a year. Under article 20 the Council shall examine the Regulation on the ESRB after three years. The Parliament should of course also be involved in this.

#### *Micro-prudential supervision*

1.5 The objectives for the Authorities (Article 1(4)) are almost identical in the three Regulations – the functioning of the internal market, the stability of the financial system and strengthened international supervisory coordination. The differences concern who they should protect – investors for the Securities and Markets Authority, policyholders and other beneficiaries for the Insurance and Occupational Pensions Authority and depositors and investors for the Banking Authority.

1.5.1 The main activities of the three Authorities will concern existing rules, streamlining the practices of the national authorities, mainly through guidelines and recommendations. The authorities will also be given a mandate to develop new technical standards.

1.5.1.1 Their proposals for new technical standards could, according to Article 7(2), not have the form of Directives, but only of Regulations and Decisions. If technical standards are defined as being non-political, Regulations are also excluded. Technical standards should be directed only at the national supervisory bodies and the financial institutions, not at the Member States, and they should therefore take the form of Decisions and not Regulations or Directives. Those are reserved for political rules proposed by the Commission.

1.5.2 The supervision carried out by the European Authorities is directed at the national supervisory authorities, not directly at the financial market participants. The exception to this is when a national authority does not follow the recommendations (articles 9 and 11). A decision directed at the financial market participants will then finally be taken by the European Authority.

1.5.2.1 There is also a description of emergency situations (article 10) where the European Authority may take such decisions without involving the Commission. The task of deciding whether there is an emergency situation should nevertheless rest with the Council. The EESC finds that the reasons for declaring emergency situations must arise from the markets in general. An individual financial institution in an emergency situation must be a task for the national supervisory body.

1.5.2.2 Article 23 concerns safeguards for a government if it considers that the new technical standards have fiscal effects. These safeguards seem adequate although technical standards hardly ever have fiscal effects. As the safeguards only concern articles 10 and 11 this article ought to be placed directly after article 11.

1.5.3 The EESC proposes that a national authority should give its consent before new financial instruments can be introduced, as is the case in Spain. As this is not in place in other Member States an initial step would be to scrutinise instruments used in countries other than Spain. The Commission should therefore also amend the Regulation on the European Securities and Markets Authority with a Regulation for such a task.

1.5.4 The field of action for the Banking Authority should, in the EESC's view, be as wide as possible. A level playing field for all financial institutions should be a general objective. The definition in this Regulation refers back to older Directives. The EESC would like to see a new discussion on the definitions in these Directives in order to include experiences from the financial crisis to make these definitions as wide as possible.

1.5.5 According to article 20(3) the Authorities may use confidential information received from the financial institutions only for the duties directly assigned to them by the Regulations. This statement ought to be complemented by a rule on how confidentiality must be protected.

1.5.6 It is proposed that the Management Board for these European Authorities should have four members from the national supervisory authorities. It instead seems natural to follow the proposal for the ESRB and have five members.

1.5.6.1 Only the heads of the national authorities will have voting rights on the Board of Supervisors. There is a risk with a Board of Supervisors supervising themselves. The importance of other aspects then increases. The independence of the Chairperson is crucial and he/she should have voting rights. Just as crucial is

openness to and the influence of the stakeholder group. It is also necessary to operate transparently by making the decisions of the Authorities public.

1.5.7 If the activities of the Authorities start in 2011 it will take more than two years before they are fully active. It is necessary to speed up this expansion in order to quickly handle all the problems revealed during the crisis.

## 2. Background

2.1 On 23 September, the European Commission presented a whole package of financial market legislation, consisting of a proposal for a Regulation on a European Systemic Risk Board (ESRB), together with a special Decision giving the ECB specific tasks concerning this ESRB and three proposals for Regulations establishing a European Banking Authority, a European Insurance and Occupational Pensions Authority and a European Securities and Markets Authority. Subsequently, on 28 October, a Directive was presented concerning amendments to existing directives connected with the creation of the new authorities. This will be dealt with in a separate opinion.

2.2 All these proposals are very much in line with the report prepared by the de Larosière group early in 2009. This report was studied by the EESC in an own-initiative opinion adopted at its plenary session in September 2009. That opinion discusses the reasons for the financial and economic crises, necessary new or improved regulation of the financial market and new and improved supervisory arrangements. We, therefore, refer to that opinion for all other subjects involved, apart from the actual concrete proposals for legislation.

2.3 Notwithstanding this general reference we want to repeat one of its statements: 'The EESC also thinks that supervision is key to preventing the occurrence of another financial crisis. But supervision requires rules. Therefore the proposals for amending and strengthening rules set out in the first part of the de Larosière report are considered equally important.' After seeing the limitations in the proposals on the micro supervision of existing rules our emphasis on amending and strengthening these seems even more important.

2.4 Some legislation concerning the rules in the financial markets has also been proposed by the Commission. So far the EESC has discussed opinions on Credit Rating Agencies <sup>(2)</sup>, Alternative Investment Fund Managers and Capital Requirements. Another subject for new legislation, not so far proposed by the Commission, but proposed by the EESC, is to have a national authority scrutinise all new instruments in the financial market before authorising them, a system that is already in use in Spain.

<sup>(2)</sup> See EESC opinion on *Credit Rating Agencies*, OJ C 277, 17.11.2009, p. 117

### 3. General remarks

3.1 It is necessary to separate the macro and micro levels of the supervision of the financial market. At the same time it is just as necessary to guarantee close cooperation between all the bodies proposed. General problems discovered during micro level supervision are relevant to the financial market as a whole, and where risks are revealed in macro supervision the remedies can often be found at micro level. This interdependence is also referred to in several places in the regulations.

3.2 The main activities of the three Authorities will concern existing rules, and the practices of the national authorities should be streamlined, mainly through guidelines and recommendations, but these authorities will also be given a mandate to develop new technical standards for the formal proposals coming from the Commission.

3.3 In its opinion on the de Larosière report the Committee argued for wider representation on the Boards of the three new Authorities. This has not been taken up by the Commission either in the Regulations on these Authorities or in the regulation on the ESRB. Instead the Commission in both cases proposes special stakeholder groups.

3.3.1 The ESRB should 'seek, where appropriate, the advice of relevant private sector stakeholders.' In the introductory part of this proposal examples are given for these – financial sector representatives, consumer associations and certain groups established by the Commission. This description is not sufficiently informative: it ought to be mentioned that the financial sector representatives should come from both the employers and trade unions in this sector.

3.3.1.1 Moreover, as the systemic risks concern not only the financial market but all of the economy a wider representation is necessary. For this reason representatives of employers and trade unions at EU level also ought to be consulted.

3.3.1.2 Finally, nothing is said on the form of these consultations and how often they should take place. This is needed as the article states that these consultations 'shall' take place. To use 'where appropriate' also seems too vague. A more exact description of when these consultations are obligatory should be introduced.

3.3.2 For the composition of the stakeholder groups for the three Authorities the Commission seems to have about the same opinion as the EESC: the employers and the employees in the respective part of the financial market should be represented as well as consumers and users of the services of the sector.

3.3.2.1 Problems are most likely to arise when selecting the countries from which these representatives should come. We assume that the thought behind having 30 representatives does not mean that there will be representatives from the financial institutions from all countries. The 30 representatives should be

evenly distributed between all these types of representatives as is indicated in the introductory parts of the Regulations.

3.3.2.2 The groups will meet at least twice a year. They may submit opinions and advice and will have secretarial support. Opinions and advice should be made public. All this seems appropriate but there is a risk that their work will be concentrated only in the two meetings. They ought to have the option of following the work of the respective Authority permanently. This is necessary as a guarantee for Authorities with supervisors supervising themselves to function effectively.

### 4. Specific remarks

#### *European Systemic Risk Board*

4.1 Concerning macro-prudential supervision, there is a fundamental lack of discussion of what a systemic risk can be. The introduction of some new instruments could be regarded as systemic risks for the current crisis. The methods used by the Credit Rating Agencies to calculate risks and values could also be called systemic risks. Can rules for the managers of financial institutions which lead to too much risk-taking be considered systemic risks? These are some possible examples. The concept of systemic risk needs to be discussed in public, not just behind closed doors in the new ESRB.

4.2 The EESC opinion is that the ESRB must have a clear mandate to act when financial stability is at risk and that, in order to guarantee this in the regulation, the wording of some passages should be reconsidered.

4.2.1 According to the preamble to the proposal for a regulation, the task for the ESRB concerns financial 'supervision' (recital 1), and supervision has been the term used in the discussions on finding remedies for the financial crisis. Later on it is said that the Community needs a body for macro-prudential 'oversight' (recital 7). The usage of such a concept reduces the real power of this body: oversight is a first step, which should be followed by supervision involving real power to act. These are not synonyms and in some other languages only one word corresponding to 'supervision' is used. The different versions should be streamlined using the concept of supervision.

4.2.2 It is clearly stated that the ESRB must be an independent body. According to the regulation, however, its warnings and recommendations should go through the Council or the three Authorities, in order to give them more weight (recital 9), which somewhat brings into question its independence. In the EESC's view, the correct description is found in article 16(3), under which the warnings and recommendations should be transmitted to the Council.



4.2.3 The recommendations 'should' lead to action by the addressees if they cannot explain why they cannot act. The use of 'should' means that these recommendations are more or less compulsory, but whether or not action is compulsory must be dependent on where the competence for the rules lies: with the Member States or with the EU. Therefore, the wording in this paragraph needs to be more specific.

4.2.4 The regulation also might have gone a step too far in article 3. The ESRB is said to 'contribute to a smooth functioning of the internal market'. The ESRB's remit is the risks involved in the financial market but here it seems to have been given a wider role. Ordinary legislation for the financial market is the objective for the Commission. To reduce the risk for future competence disputes, this should be reworded to restrict the objective of the ESRB to the systemic risks.

4.3 The ESRB will be made up of a General Board, a Steering Committee and a Secretariat. The connection to the European System of Central Banks (ESCB) is very clear as the General Board of the ESRB will include the 29 members of the ECB General Council. This connection between the ESCB and the new ESRB was advocated by the EESC in the opinion on the de Larosière report. Among these 29 a chair and a vice-chair will be elected for a 5-year-period. In addition to those 29 members, a member of the European Commission and the three chairpersons of the new Authorities will also be members with voting rights. 27 representatives of the national supervisory authorities may be present but without voting rights, and the same goes for the president of the Economic and Financial Committee.

4.3.1 Article 11 on the Steering Committee has no rules on voting rights. According to the Commission proposal the Steering Committee consists of the chair and vice-chair of the General Board plus 5 other members of the ECB General Council, the three chairpersons of the new Authorities, the Commission representative and the president of the Economic and Financial Committee.

4.3.1.1 The first reports from the Council discussions on these proposals were about the number of members from the ECB General Council in this Steering Committee. Should it be three or five? The EESC recommends five, as does the ECB in its opinion, which could make it easier to have a better geographical distribution, a distribution between small and big countries and between countries inside and outside the eurozone. In addition, given that all members in the Steering Committee seemingly should have voting rights there has to be a significant number of central bank representatives. The composition of the Steering Committee should adequately reflect the composition of the General Board of the ESRB where 29 members are central bankers.

4.3.2 The Advisory Technical Committee should be included in paragraph 1 of Article 4, which enumerates all bodies of the ESRB.

4.4 There is a separate article on the question of whether the warnings and recommendations should be made public. The EESC is aware of all the considerations which have to be made before such a publication but cannot understand why this is the only decision for which the Board requires a two-thirds majority. If the members of the General Board are competent enough to make decisions on systemic risks and to formulate warnings and recommendations they ought to be competent enough also to decide whether or not decisions should be public.

4.5 The involvement of the European Parliament could be described as meagre. The decisions on all these proposals from the Commission have to be taken by both the Council and the European Parliament. Apart from this fact the Parliament is mentioned only as the ESRB has to give reports to the Parliament and the Council at least once a year. Under article 20 the Council shall examine the regulation on the ESRB after three years. The Parliament is not mentioned although it has a power in this legislation equivalent to that of the Council. The EESC considers that the regulation should give a bigger role to the European Parliament in these questions.

## 5. Specific remarks

### *Micro-Prudential supervision*

5.1 According to Point 6.6 of the Explanatory Memorandum accompanying the various proposals, the only differences in the regulations can be found in the objectives, scope of actions and definitions.

5.1.1 The objectives (Article 1(4)) have an almost identical description in the three Regulations – the functioning of the internal market, the stability of the financial system and strengthened international supervisory cooperation. The only apparent differences can be found in the description of who they should protect – investors for the Securities and Markets Authority, policyholders and other beneficiaries for the Insurance and Occupational Pensions Authority and depositors and investors for the Banking Authority.

5.1.2 The EESC finds the wording of this article clear with regard to the division between these supervisory bodies and the law-making competences of the EU institutions. The real powers of the Authorities are restricted, as far as we understand the Regulations, to supervision of existing rules. Regarding changes to regulatory rules their role is only to give opinions to the Commission, Council and European Parliament.

5.1.2.1 Concerning proposals from the Authorities for new technical standards these, according to Article 7(2), could not have the form of Directives, but only Regulations and Decisions. If technical standards are defined as being non-political in character it seems appropriate also to exclude the form of Regulations. Technical standards should be directed only at the national supervisory bodies and the financial institutions and not at the Member States, and they should therefore take the form of Decisions and not Regulations or Directives. Those are reserved for political rules proposed by the Commission. This article also says that the Commission adopts the draft technical standards: this cannot apply to Regulations or Directives as they have to be adopted by the Council and European Parliament.

5.1.3 The articles describing the details of the tasks of the Authorities all seem adequate. The supervision of the European Authorities is directed at the national supervisory authorities, not directly at the financial market participants. The exception to this is when a national authority does not follow the recommendations (articles 9 and 11). A decision directed at the financial market participants will then finally be taken by the European Authority.

5.1.3.1 The EESC welcomes the understanding that the power to determine the existence of an emergency situation should be conferred on the Council, following consultations with the Commission, the ESRB and where appropriate, the European Supervisory Authorities.

5.1.3.2 The proposal for a European Banking Authority lacks a clear definition of an emergency situation, as well as the criteria for declaring it. The text should be made more distinct regarding reasons for declaring emergency situations. The EESC finds that they must arise from the markets in general. An individual financial institution in an emergency situation must be a task for the national supervisory body.

5.1.3.3 Article 23 concerns safeguards about how a government can act if it considers that the new technical standards have fiscal effects. These safeguards seem adequate although technical standards hardly ever have fiscal effects. Furthermore, as the safeguards only concern articles 10 and 11 this article ought to be placed directly after article 11.

5.1.4 Financial institutions and market participants should, in the event of disagreement with the national supervisory authority, be able to appeal to the EBA.

5.1.5 Concerning the scope of actions the European Securities and Markets Authority will have a special task as the supervisory body for the credit rating agencies. This power will include withdrawal of the registration for such agencies, investigations and on-site inspections. These actions are not specified in this Regulation but will be in a coming amending Regulation. It seems appropriate to give this supervisory power to the Securities and Markets Authority and it will be one of its most important tasks.

5.1.5.1 One of the conclusions in the EESC opinion on the de Larosière report was that there should be a national authority, as in Spain, with the task of giving its consent before new financial instruments could be introduced. With these three Authorities in place this proposal could now be implemented. As this does not currently exist in other Member States a first step would be to scrutinise instruments used in countries other than Spain. The Commission should therefore also amend the Regulation for the European Securities and Markets Authority with a Regulation for such a task.

5.1.6 The main concern for the Banking Authority definitions is the definition of how large a part of the financial sector it should supervise. Referring to the experiences from the financial crisis this definition must be as wide as possible. The existence of financial institutions outside the supervision of this Authority may lead to such institutions having an advantage in the search for profits, as rules on and supervision of their behaviour will be outside of the scope of actions for the Authority. A level playing field for all financial institutions should be a general objective. The definition in this Regulation refers back to Directives on credit institutions, investment firms and financial conglomerates. The EESC would like to see a new discussion on the definitions in these Directives in order to include experiences from the financial crisis to make these definitions as wide as possible.

5.1.7 For the European Insurance and Occupational Pensions Authority there is also a reference to existing Directives. Here the EESC would point out that especially within the area of occupational retirement provisions there are different models used in the Member States. Therefore it is especially important in this case to clarify that the scope of action is only a question of supervision. The possibility of proposing new rules rests entirely with the Commission.

5.1.8 For the European Securities and Markets Authority it is stated that a financial market participant is a 'person'. We assume that this means both a legal person and an individual, but this should be made clear in Article 2(1) of the Regulation.

5.1.9 In article 20(3) it is stated that the Authorities may use confidential information received from the financial institutions only for the duties directly assigned to them by the Regulations. This statement ought to be complemented by a rule on how confidentiality must be protected.

5.2 All three Authorities have the same organisation – a Board of Supervisors, a Management Board, a Chairperson, an Executive Director and a Board of Appeal. In the Authorities the Chairperson is not taken from the national supervisory authorities. It should, according to the Regulations, be an independent person working full time.

5.2.1 The proposal for the Management Board for these European Authorities is four members from the national supervisory authorities. With no reason given for the number of four it instead seems natural to follow the proposal for the ESRB and have five members.

5.2.2 Only the heads of the national authorities will have voting rights on the Board of Supervisors, not the Commission representative or the representative of the ESRB. This means giving all the power in a supervisory body to the national bodies being supervised. With such an arrangement there is a risk of non-action even with all the prescriptions in the Regulation on how the supervision shall take place, how national authorities shall be criticised, and even the situations when decisions will be taken over by the European Authority and with the final possibility of a decision by the Commission. Of course the national authorities must work in a collegial manner in the European Authority, but can it be too collegial?

5.2.3 This risk with a Board of Supervisors supervising themselves leads us to point out the importance of some other aspects for these Authorities. The independence of the Chairperson is crucial and he/she should have voting rights. Just as crucial is openness to and the influence of the stakeholder group. On top of this it is necessary to operate transparently by making the decisions of the Authorities public. Apart from advocating such a general rule the EESC is of course aware of the fact that there are decisions which cannot be immediately made public because of the risks of disorder in the financial market.

5.3 When these Authorities are planned to start their activities the proposal involves a doubling of the staff compared to the present three committees. When their activities have reached full capacity they are expected to have about four times as many employees as the present committees. As the activities have a quite different extent and character the EESC considers this to be an appropriate level of staff.

5.3.1 Our doubts relate to the length of time proposed until the Authorities are fully active: if the activities start in 2011 this will take more than two years after that. It would be possible to speed up this expansion and it is really necessary in order to quickly handle all the problems revealed during the crisis.

5.4 The EESC finds the Joint Committee of the European Supervisory Authorities, which will be established together with the three Authorities, a necessary complement. With this Committee for cooperation between the Authorities in place it does not, at least for the moment, seem necessary to create one common Authority for the three areas of supervision.

5.5 Some minor errors can be found in Article 33. In 33(2) 'in his absence' should be changed into 'in his/her absence'. In the same article (33(5)) the word Chairperson is suddenly changed to Chairman, which should also be changed.

Brussels, 21 January 2010.

*The President*  
*of the European Economic and Social Committee*  
Mario SEPI

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