Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC

REGULATION (EU) No 1095/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 24 November 2010

establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC

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,

Having regard to the opinion of the European Central Bank[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) The financial crisis in 2007 and 2008 exposed important shortcomings in financial supervision, both in particular cases and in relation to the financial system as a whole. Nationally based supervisory models have lagged behind financial globalisation and the integrated and interconnected reality of European financial markets, in which many financial institutions operate across borders. The crisis exposed shortcomings in the areas of cooperation, coordination, consistent application of Union law and trust between national supervisors.

(2) Before and during the financial crisis, the European Parliament has called for a move towards more integrated European supervision in order to ensure a true level playing field for all actors at the level of the Union and to reflect the increasing integration of financial markets in the Union (in its resolutions of 13 April 2000 on the Commission communication on implementing the framework for financial markets: Action Plan[(4)], of 21 November 2002 on prudential supervision rules in the European Union[(5)], of 11 July 2007 on financial services policy (2005 to 2010) – White Paper[(6)], of 23 September 2008 with recommendations to the Commission on hedge funds and private equity[(7)] and of 9 October 2008 with recommendations to the Commission on Lamfalussy follow-up: future structure of supervision[(8)], and in its positions of 22 April 2009 on the amended proposal for a directive of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)[(9)] and of 23 April

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2009 on the proposal for a regulation of the European Parliament and of the Council on Credit Rating Agencies[10]).

(3) In November 2008, the Commission mandated a High-Level Group chaired by Jacques de Larosière to make recommendations on how to strengthen European supervisory arrangements with a view to better protecting the citizen and rebuilding trust in the financial system. In its final report presented on 25 February 2009 (the 'de Larosière Report'), the High-Level Group recommended that the supervisory framework be strengthened to reduce the risk and severity of future financial crises. It recommended reforms to the structure of supervision of the financial sector in the Union. The group also concluded that a European System of Financial Supervisors should be created, comprising three European Supervisory Authorities, one for the banking sector, one for the securities sector and one for the insurance and occupational pensions sector and recommended the creation of a European Systemic Risk Council. The report represented the reforms the experts considered were needed and on which work had to begin immediately.

(4) In its Communication of 4 March 2009 entitled 'Driving European Recovery', the Commission proposed to put forward draft legislation creating a European system of financial supervision and a European systemic risk board. In its Communication of 27 May 2009 entitled 'European Financial Supervision', it provided more detail about the possible architecture of such a new supervisory framework reflecting the main thrust of the de Larosière Report.

(5) The European Council, in its conclusions of 19 June 2009, confirmed that a European System of Financial Supervisors, comprising three new European Supervisory Authorities, should be established. The system should be aimed at upgrading the quality and consistency of national supervision, strengthening oversight of cross-border groups and establishing a European single rule book applicable to all financial market participants in the internal market. It emphasised that the European Supervisory Authorities should also have supervisory powers in relation to credit rating agencies and invited the Commission to prepare concrete proposals on how the European System of Financial Supervisors could play a strong role in crisis situations, while stressing that decisions taken by the European Supervisory Authorities should not impinge on the fiscal responsibilities of Member States. The Commission has presented a Proposal for a Regulation amending Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies[11]. The European Parliament and the Council should consider that proposal in order to ensure that European Supervisory Authority (European Securities and Markets Authority) (hereinafter the Authority') will have adequate supervisory powers over credit rating agencies, bearing in mind that the Authority should execute exclusive supervisory powers over Credit Rating Agencies entrusted to it in Regulation (EC) No 1060/2009. For that purpose, the Authority should have appropriate powers of investigation and enforcement as specified in the relevant legislation, as well as the possibility of charging fees.

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(6) On 17 June 2010, the European Council agreed that 'Member States should introduce systems of levies and taxes on financial institutions to ensure fair burden-sharing and to set incentives to contain systemic risk. Such levies or taxes should be part of a credible resolution framework. Further work is urgently required on their main features and issues of level playing field and cumulative impacts of various regulatory measures should be carefully assessed'.

(7) The financial and economic crisis has created real and serious risks to the stability of the financial system and the functioning of the internal market. Restoring and maintaining a stable and reliable financial system is an absolute prerequisite to preserving trust and coherence in the internal market, and thereby to preserve and improve the conditions for the establishment of a fully integrated and functioning internal market in the field of financial services. Moreover, deeper and more integrated financial markets offer better opportunities for financing and risk diversification, and thus help to improve the capacity of the economies to absorb shocks.

(8) The Union has reached the limits of what can be done with the present status of the Committees of European Supervisors. The Union cannot remain in a situation where there is no mechanism to ensure that national supervisors arrive at the best possible supervisory decisions for cross-border financial market participants; where there is insufficient cooperation and information exchange between national supervisors; where joint action by national authorities requires complicated arrangements to take account of the patchwork of regulatory and supervisory requirements; where national solutions are most often the only feasible option in responding to problems at the level of the Union; and where different interpretations of the same legal text exist. The European System of Financial Supervision (hereinafter the ESFS') should be designed to overcome those deficiencies and provide a system that is in line with the objective of a stable and single Union financial market for financial services, linking national supervisors within a strong Union network.

(9) The ESFS should be an integrated network of national and Union supervisory authorities, leaving day-to-day supervision to the national level. Greater harmonisation and the coherent application of rules for financial market participants across the Union should also be achieved. In addition to the Authority, a European Supervisory Authority (European Banking Authority) and a European Supervisory Authority (European Insurance and Occupational Pensions Authority) as well as a Joint Committee of the European Supervisory Authorities (hereinafter the Joint Committee') should be established. A European Systemic Risk Board (hereinafter the ESRB') should form part of the ESFS for the purposes of the tasks as specified in this Regulation and in Regulation (EU) No 1092/2010 of the European Parliament and of the Council[(12)].

(10) The European Supervisory Authorities (hereinafter collectively referred to as the 'ESAs') should replace the Committee of European Banking Supervisors established by Commission Decision 2009/78/EC[(13)], the Committee of European Insurance and Occupational Pensions Supervisors established by Commission Decision 2009/79/EC[(14)] and the Committee of European Securities Regulators established by Commission Decision 2009/77/EC[(15)], and should assume all of the tasks and competences of

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those committees including the continuation of ongoing work and projects, where appropriate. The scope of each European Supervisory Authority's action should be clearly defined. The ESAs should be accountable to the European Parliament and the Council. When that accountability relates to cross-sectoral issues that have been coordinated through the Joint Committee, the ESAs should be accountable, through the Joint Committee, for such coordination.

(11) The Authority should act with a view to improving the functioning of the internal market, in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States and the different nature of financial market participants. The Authority should protect public values such as the integrity and stability of the financial system, the transparency of markets and financial products and the protection of investors. The Authority should also prevent regulatory arbitrage and guarantee a level playing field, and strengthen international supervisory coordination, for the benefit of the economy at large, including financial institutions and other stakeholders, consumers and employees. Its tasks should also include promoting supervisory convergence and providing advice to the Union institutions in the areas of its responsibility. The Authority should also be entrusted with certain responsibilities for existing and new financial activities.

(12) The Authority should also be able to temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in this Regulation. If required to make such temporary prohibition in the case of an emergency situation, the Authority should do so in accordance with and under the conditions laid down in this Regulation. In cases where a temporary prohibition or restriction of certain financial activities has a cross-sectoral impact, sectoral legislation should provide that the Authority should consult and coordinate its action with, where relevant, the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Insurance and Occupational Pensions Authority), through the Joint Committee.

(13) The Authority should take due account of the impact of its activities on competition and innovation within the internal market, on the Union's global competitiveness, on financial inclusion, and on the Union's new strategy for jobs and growth.

(14) In order to fulfil its objectives, the Authority should have legal personality as well as administrative and financial autonomy.

(15) Based on the work of international bodies, systemic risk should be defined as a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy. All types of financial intermediaries, markets and infrastructures may be potentially systemically important to some degree.

(16) Cross-border risk includes all risks caused by economic imbalances or financial failures in all or parts of the Union that have the potential to have significant negative consequences for the transactions between economic operators of two or more Member

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States, for the functioning of the internal market or for the public finances of the Union or any of its Member States.

(17) The Court of Justice of the European Union in its judgment of 2 May 2006 in Case C-217/04 (United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union) held that: 'nothing in the wording of Article 95 EC [now Article 114 of the Treaty on the Functioning of the European Union (TFEU)] implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States. The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate'[(16)]. The purpose and tasks of the Authority – assisting competent national supervisory authorities in the consistent interpretation and application of Union rules and contributing to financial stability necessary for financial integration – are closely linked to the objectives of the Union *acquis* concerning the internal market for financial services. The Authority should therefore be established on the basis of Article 114 TFEU.

(18) The following legislative acts lay down the tasks for competent authorities of Member States, including cooperating with each other and with the Commission: Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes[(17)], Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[(18)], Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities[(19)], Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements[(20)], Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)[(21)], Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC[(22)], Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments[(23)], Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market[(24)], Directive 2006/49/EC of the European Parliament and the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions[(25)], without prejudice to the competence of the European Supervisory Authority (European Banking Authority), as far as prudential supervision is concerned, Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[(26)], any future legislation in the area of Alternative Investment Fund Managers (AIFM) and Regulation (EC) No 1060/2009.