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

REGULATION (EU) No 1092/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board

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) Financial stability is a precondition for the real economy to provide jobs, credit and growth. The financial crisis has revealed important shortcomings in financial supervision, which has failed to anticipate adverse macro-prudential developments and to prevent the accumulation of excessive risks within the financial system.

(2) The European Parliament called repeatedly for the reinforcement of a true level playing field for all actors at the level of the Union while pointing out significant failures in the Union's supervision of ever more integrated financial markets (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 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.

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(4) In its final report presented on 25 February 2009 (the 'de Larosière Report'), the High-Level Group recommended, inter alia, the establishment of a Union level body charged with overseeing risk in the financial system as a whole.

(5) In its Communication of 4 March 2009 entitled 'Driving European Recovery', the Commission welcomed and broadly supported the recommendations of the de Larosière Report. At its meeting of 19 and 20 March 2009, the European Council agreed on the need to improve the regulation and supervision of financial institutions within the Union and to use the de Larosière Report as a basis for action.

(6) In its Communication of 27 May 2009 entitled 'European Financial Supervision', the Commission suggested a series of reforms to the current arrangements for safeguarding financial stability at the Union level, in particular including the creation of a European Systemic Risk Board (ESRB) responsible for macro-prudential oversight. The Council on 9 June 2009 and the European Council at its meeting of 18 and 19 June 2009 supported the Commission's suggestions and welcomed its intention to put forward legislative proposals for the new framework to be in place in the course of 2010. In line with the views of the Commission, the Council concluded, inter alia, that the European Central Bank (ECB) 'should provide analytical, statistical, administrative and logistical support to the ESRB, also drawing on technical advice from national central banks and supervisors'. The support provided by the ECB to the ESRB, as well as the tasks assigned to the ESRB, should be without prejudice to the principle of the independence of the ECB in the performance of its tasks pursuant to the Treaty on the Functioning of the European Union (TFEU).

(7) Given the integration of international financial markets and the contagion risk of financial crises, there is a need for a strong commitment on the part of the Union at the global level. The ESRB should draw expertise from a high-level scientific committee and take on all the global responsibilities required in order to ensure that the voice of the Union is heard on issues relating to financial stability, in particular by cooperating closely with the International Monetary Fund (IMF) and the Financial Stability Board (FSB), which are expected to provide early warnings of macro-prudential risks at the global level, and the partners of the Group of Twenty (G-20).

(8) The ESRB should contribute, inter alia, towards implementing the recommendations of the IMF, the FSB and the Bank for International Settlements (BIS) to the G-20.

(9) The report of the IMF, the BIS and the FSB, of 28 October 2009, presented to the G-20 Finance Ministers and Central Bank Governors, entitled 'Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations' also states that the assessment of systemic risk is likely to vary depending on the economic environment. It will also be conditioned by the financial infrastructure and crisis management arrangements and the capacity to deal with failures when they occur. Financial institutions may be systemically important for local, national or international financial systems and economies. The key criteria helping to identify the systemic importance of markets and institutions are size (the volume of financial services provided by the individual component of the financial system), substitutability (the extent to which other components of the system can provide the same services in

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the event of failure) and interconnectedness (linkages with other components of the system). An assessment based on those three criteria should be supplemented by a reference to financial vulnerabilities and the capacity of the institutional framework to deal with financial failures and should consider a wide range of additional factors such as, inter alia, the complexity of specific structures and business models, the degree of financial autonomy, intensity and scope of supervision, transparency of financial arrangements and linkages that may affect the overall risk of institutions.

(10) The ESRB's task should be to monitor and assess systemic risk in normal times for the purpose of mitigating the exposure of the system to the risk of failure of systemic components and enhancing the financial system's resilience to shocks. In that respect, the ESRB should contribute to ensuring financial stability and mitigating the negative impacts on the internal market and the real economy. In order to accomplish its objectives, the ESRB should analyse all the relevant information.

(11) The present arrangements of the Union place too little emphasis on macro-prudential oversight and on inter-linkages between developments in the broader macroeconomic environment and the financial system. Responsibility for macro-prudential analysis remains fragmented, and is conducted by various authorities at different levels with no mechanism to ensure that macro-prudential risks are adequately identified and that warnings and recommendations are issued clearly, followed up and translated into action. A proper functioning of Union and global financial systems and the mitigation of threats thereto require enhanced consistency between macro- and micro-prudential supervision.

(12) A newly designed system of macro-prudential oversight requires credible and high-profile leadership. Therefore, given its key role and its international and internal credibility, and in the spirit of the recommendations of the de Larosière Report, the President of the ECB should be the Chair of the ESRB for a first term of 5 years following the entry into force of this Regulation. In addition, the accountability requirements should be increased and the ESRB bodies should be able to draw on a wide range of experience, backgrounds and opinions.

(13) The de Larosière Report also states that macro-prudential oversight is not meaningful unless it can somehow impact on supervision at the micro level whilst micro-prudential supervision cannot effectively safeguard financial stability without adequately taking account of macro-level developments.

(14) A European System of Financial Supervision (ESFS) should be established, bringing together the actors of financial supervision at national level and at the level of the Union, to act as a network. Pursuant to the principle of sincere cooperation in accordance with Article 4(3) of the Treaty on European Union, the parties to the ESFS should cooperate with trust and full mutual respect, in particular to ensure that appropriate and reliable information flows between them. At the level of the Union, the network should comprise the ESRB and three micro-supervisory authorities: the European Supervisory Authority (European Banking Authority), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council[11], the European Supervisory Authority (European Insurance and Occupational Pensions Authority), established by Regulation

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(EU) No 1094/2010 of the European Parliament and of the Council[(12)], and the European Supervisory Authority (European Securities and Markets Authority), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(13)] (hereinafter collectively referred to as the 'ESAs').

(15) The Union needs a specific body responsible for macro-prudential oversight across its financial system, which would identify risks to financial stability and, where necessary, issue risk warnings and recommendations for action to address such risks. Consequently, the ESRB should be established as a new independent body, covering all financial sectors as well as guarantee schemes. The ESRB should be responsible for conducting macro-prudential oversight at the level of the Union and should have no legal personality.

(16) The ESRB should comprise a General Board, a Steering Committee, a Secretariat, an Advisory Scientific Committee and an Advisory Technical Committee. The composition of the Advisory Scientific Committee should take into account adequate rules of conflict of interests adopted by the General Board. The establishment of the Advisory Technical Committee should take into account existing structures with a view to avoiding any duplication.

(17) The ESRB should issue warnings and, where it deems necessary, recommendations either of a general or a specific nature, which should be addressed in particular to the Union as a whole or to one or more Member States, or to one or more of the ESAs, or to one or more of the national supervisory authorities with a specified timeline for the relevant policy response.

(18) The ESRB should elaborate a colour code in order to allow interested parties better to assess the nature of the risk.

(19) In order to increase their influence and legitimacy, such warnings and recommendations should also be transmitted, subject to strict rules of confidentiality, to the Council and the Commission and, where addressed to one or more national supervisory authorities, to the ESAs. The deliberations of the Council should be prepared by the Economic and Financial Committee (EFC) in accordance with its role as defined in the TFEU. In order to prepare the Council's discussions and provide it with timely policy advice, the ESRB should inform the EFC regularly and should send the texts of any warnings and recommendations as soon as they have been adopted.

(20) The ESRB should also monitor compliance with its warnings and recommendations, based on reports from addressees, in order to ensure that its warnings and recommendations are effectively followed. Addressees of recommendations should act on them and provide an adequate justification in case of inaction ('act or explain' mechanism). If the ESRB considers that the reaction is inadequate, it should inform, subject to strict confidentiality rules, the addressees, the Council and, where appropriate, the European Supervisory Authority concerned.

(21) The ESRB should decide, on a case-by-case basis and after having informed the Council sufficiently in advance so that it is able to react, whether a recommendation should be

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kept confidential or made public, bearing in mind that public disclosure can help to foster compliance with the recommendations in certain circumstances.

(22) If the ESRB detects a risk which could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the Union's financial system, it should promptly inform the Council of the situation. If the ESRB determines that an emergency situation may arise, it should contact the Council and provide an assessment of the situation. The Council should then assess the need to adopt a decision addressed to the ESAs determining the existence of an emergency situation. During that process, due protection of confidentiality is of the outmost importance.

(23) The ESRB should report to the European Parliament and the Council at least annually, and more frequently in the event of widespread financial distress. Where appropriate, the European Parliament and the Council should be able to invite the ESRB to examine specific issues related to financial stability.

(24) The ECB and the national central banks should have a leading role in macro-prudential oversight because of their expertise and their existing responsibilities in the area of financial stability. National supervisors should be involved in providing their specific expertise. The participation of micro-prudential supervisors in the work of the ESRB is essential to ensure that the assessment of macro-prudential risk is based on complete and accurate information about developments in the financial system. Accordingly, the chairpersons of the ESAs should be members with voting rights. One representative of the competent national supervisory authorities of each Member State should attend meetings of the General Board, without voting rights. In a spirit of openness, 15 independent persons should provide the ESRB with external expertise through the Advisory Scientific Committee.

(25) The participation of a Member of the Commission in the ESRB will help to establish a link with the macroeconomic and financial surveillance of the Union, while the presence of the President of the EFC will reflect the role of Member States' ministries responsible for finance and the Council in safeguarding financial stability and performing economic and financial oversight.

(26) It is essential that the members of the ESRB perform their duties impartially and consider only the financial stability of the Union as a whole. Where consensus cannot be reached, voting on warnings and recommendations within the ESRB should not be weighted and decisions should, as a rule, be taken by simple majority.

(27) The interconnectedness of financial institutions and markets implies that the monitoring and assessment of potential systemic risks should be based on a broad set of relevant macroeconomic and micro-financial data and indicators. Those systemic risks include risks of disruption to financial services caused by a significant impairment of all or parts of the Union's financial system that have the potential to have serious negative consequences for the internal market and the real economy. Any type of financial institution and intermediary, market, infrastructure and instrument has the potential to be systemically significant. The ESRB should therefore have access to all the information necessary to perform its duties while preserving the confidentiality of that information as required.