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**WORKING PAPER SERIES**  
**No 2011/1**

**THE EUROPEAN BANKING AUTHORITY**  
**WITHIN THE EUROPEAN SYSTEM**  
**OF FINANCIAL SUPERVISION**

**by Professor Christos Vl. Gortsos**

**August 2011**





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*Christos Vl. Gortsos*

*Associate Professor of International Economic Law, Panteion  
University of Athens,*

*Visiting Professor, Europa-Institut, Universität des Saarlandes*

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**Address**

Panteion University of Social and Political Sciences  
Department of International and European Studies  
136 Sygrou Ave.  
GR-17671, Athens  
Greece

**Internet**

<http://www.ecefil.eu>

**Contact**

[info@ecefil.eu](mailto:info@ecefil.eu)

**Coordinator, Design**

ECEFIL, Dr. Ziakou Sophia

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# **The European Banking Authority within the European System of Financial Supervision**

Professor Christos Vl. Gortsos\*

August 2011

## **Abstract**

The European Banking Authority (“EBA”) is a part of the newly-established European System of Financial Supervision (“ESFS”), which started operating on January 1, 2011. The ESFS is the result of the legislative adoption of the proposals of the “de Larosière Report” of February 2009 and its legal basis are four Regulations of the European Parliament and of the Council and one Regulation of the Council.

The present paper, structured in three sections, explores the role of EBA within the ESFS. Section A provides an overall examination of the ESFS, while Section B deals with the legal status and organs, the scope of action, and the tasks and powers of EBA, as well as its integration within the European Union’s institutional framework. Section C contains some concluding remarks.

Christos Gortsos is Associate Professor of International Economic Law at Panteion University of Athens, and visiting Professor at the Law School of Athens and the European Institute of Saarland University. He is teaching and writing in international and European monetary and financial law, as well as economic analysis of law. Since 2005, he is a member of the Monetary Committee of the International Law Association (MoComILA) and member of the Management Committee of ECEFIL. Apart from his academic career, Professor Gortsos, member of the Athens Bar Association, is since July 2000 the Secretary General of the Hellenic Bank Association.

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## A. The European System of Financial Supervision (“ESFS”): an overall examination

### 1. The sources of the new institutional framework and their legal basis

#### 1.1 The sources

On 24 November 2010, the European Parliament and the Council adopted, within an admittedly extremely short period of time due to the urgency of the matter,<sup>1</sup> three (3) Regulations establishing the three so-called “European Supervisory Authorities” to strengthen the efficiency of micro-prudential supervision of financial service providers<sup>2</sup> in the European Union (hereinafter collectively referred to as the "Authorities" or the "three Authorities"):

- the European Banking Authority, hereinafter EBA pursuant to **Regulation (EC) 1093/2010**,<sup>3</sup>
- the European Insurance and Occupational Pensions Authority, hereinafter EIOPA, pursuant to **Regulation (EC) 1094/2010**,<sup>4</sup> and
- the European Securities and Markets Authority”, hereinafter ESMA, pursuant to **Regulation (EC) 1095/2010**.<sup>5</sup>

For the purpose of establishing as well, for the first time at European level, a specific legal framework regarding the macro-prudential oversight of the financial system, the following legal acts were also adopted:<sup>6</sup>

- on the same date, **Regulation (EC) 1092/2010** of the European Parliament and of the Council establishing a European Systemic Risk Board (hereinafter the “ESRB”),<sup>7</sup> and

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<sup>1</sup> Note that the Regulation proposals had been issued by the European Commission on 23 September 2009 and were accompanied by an impact assessment document (SEC(2009) 1234, 23.9.2009). Regarding the content of the above proposals (which underwent a number of changes while processed by the European Parliament and the Council), see **Louis (2010), Recine and Teixeira (2010)** and **Tridimas (2011)**, p. 801-803.

<sup>2</sup> On this, see indicatively **Barth, Caprio and Levine (2006)**.

<sup>3</sup> Regulation (EU) no. 1093/2010 of the European Parliament and of the Council of 24 November 2010 "establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC", OJ L 331, 15.12.2010, p. 12-47.

<sup>4</sup> Regulation (EU) no. 1094/2010 of the European Parliament and of the Council of 24 November 2010 "establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC", OJ L 331, 15.12.2010, p. 48-83.

<sup>5</sup> 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", OJ L 331, 15.12.2010, p. 84-119.

<sup>6</sup> On this, see indicatively **Financial Stability Board, International Monetary Fund and Bank for International Settlements (2011)**, section 3.

<sup>7</sup> 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. 1-11.

- on 17 November, **Regulation (EC) 1096/2010** of the Council conferring specific tasks upon the European Central Bank (hereinafter the “ECB”) concerning the functioning of the ESRB.<sup>8</sup>

These Regulations converted the proposals of the "de Larosière Report" of February 2009 (“The High-Level Group on Financial Supervision in the EU: Report”<sup>9</sup>) into rules. This Report was prepared at the request of the European Commission, with a view to investigating the causes of the recent (2007-2009) international financial crisis<sup>10</sup> and to making proposals in order to upgrade the regime governing the European financial system's supervision, both micro-prudential and macro-prudential.<sup>11</sup>

## 1.2 The legal basis of the sources

(a) The legal basis of the first four abovementioned Regulations is **article 114** of the Treaty on the Functioning of the European Union (hereinafter the "TFEU") (article 95 of the Treaty establishing the European Community, hereinafter the "TEC").<sup>12</sup> This choice, which was necessary mainly because of the scope of the tasks and powers conferred to the ESRB and to the Authorities,<sup>13</sup> demonstrates the specific significance that these have within the European Union's (hereinafter the “Union” or the “EU”) institutional system, notably in comparison to the clearly lower importance of, respectively, the "Lamfalussy Committees" in the Community's institutional system, in the context of which a legal framework for macro-prudential oversight of the financial system did not even exist.

*The "Lamfalussy Committees", namely CEBS (Committee of European Banking Supervisors), CESR (Committee of European Securities Regulators) and CEIOPS (Committee of European Insurance and Occupational Pensions Supervisors), established in early 2000 according to the proposals of the "Lamfalussy Report" of February 2001 (“Final Report of the Committee of Wise Men on the regulation of European Securities markets”),<sup>14</sup> now succeeded by the three newly established Authorities (on this, see A 3.2.1, below), had been established by virtue of Decisions of the European Commission and not by virtue of Regulations of the European Parliament and Council.<sup>15</sup>*

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<sup>8</sup> 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. 162-164.

<sup>9</sup> The Report is available at: [http://ec.europa.eu/commission\\_barroso/president/pdf/statement\\_20090225\\_en.pdf](http://ec.europa.eu/commission_barroso/president/pdf/statement_20090225_en.pdf).

<sup>10</sup> For an overview of the causes leading up to this crisis, see, indicatively, **Kiff and Mills (2007)**, **Borio (2008)**, **Calomiris (2008)**, **Eichengreen (2008)**, **Goodhart (2009)**, p. 2-29, **Posner (2010)**, p. 13-245, **Lastra and Wood (2010)**, p. 537-545, and **Tirole (2010)**.

<sup>11</sup> Regarding the content of the de Larosière Report, see, indicatively, **Ferrarini and Chiodini (2009)** and **Gortsos (2010)**.

<sup>12</sup> OJ C 83, 30.3.2010, p. 47-199 (consolidated version). Regarding this choice, see **Louis (2010)**, p. 149. In relation to the EBA Regulation, see also **point 17** of the recitals.

<sup>13</sup> On the tasks and powers of the EBA, similar for the other two Authorities as well, see section B, sub-section 3, in this article, below.

<sup>14</sup> The Report is available at: [http://ec.europa.eu/internal\\_market/securities/lamfalussy/index\\_en.htm](http://ec.europa.eu/internal_market/securities/lamfalussy/index_en.htm). On the content thereof and entry into effect of its proposals, see, indicatively, **Ferran (2004)**, p. 61-74 and 99-107, **Lastra (2006)**, p. 334-341.

<sup>15</sup> In particular:

(b) On the other hand, the legal basis for Regulation 1096/2010 is **para. 6 article 127 of the TFEU** (article 105, para. 6, of the TEC), which, indeed, was activated for the first time after it was laid down with the Maastricht Treaty.<sup>16</sup>

*According to the provisions of this paragraph of article 127 of the TFEU, specific tasks may be conferred by the Council to the ECB concerning policies in relation to the prudential supervision of credit institutions and other financial institutions", including micro-prudential supervision,<sup>17</sup> "with the exception of insurance undertakings". This is the reason why this article has been named the "sleeping beauty article" (the ECB being the "sleeping beauty").*

*The de Larosière Report did, however, eliminate the possibility of ECB becoming a body exercising micro-prudential supervision in the European financial system, noting that the tasks conferred to the ECB should concern the macro-prudential oversight of the financial system.<sup>18</sup> Consequently:*

- *the Regulations adopted almost fully reflect the Report's proposals;*
- *in the area of the micro-prudential supervision of financial services providers, the ECB still has the (limited) tasks conferred to it by way of article 127, para. 5, of the TFEU (article 105, para. 5, of TEC),<sup>19</sup>*
- *by Regulation 1096/2010, the Council conferred to the ECB specific tasks concerning the operation of the ESRB, with the reasoning that, given its experience on relevant issues, the ECB can make a significant contribution to the effective macro-prudential oversight of the Union's financial system,<sup>20</sup> and*
- *para. 6 of article 127 of the TFEU was correctly selected as its legal basis.<sup>21</sup>*

- 
- CESR was established first, in 2001, by virtue of **Decision 2001/527/EC** (OJ L 191, 13.7.2001), which was replaced in 2009 by **Decision 2009/77/EC** (OJ L 25, 29.1.2009, p. 18-22).
  - CEBS was established 2004 by virtue of **Decision 2004/5/EC** (OJ L 3, 7.1.2004, p. 28-29), which was replaced in 2009 by **Decision 2009/78/EC** (OJ L 25, 29.1.2009, p. 23-27, and
  - CEIOPS was also established in 2004 by virtue of **Decision 2004/6/EC** (OJ L 3, 7.1.2004, p. 30-31), which was replaced in 2009 by **Decision 2009/79/EC** (OJ L 25, 29.1.2009, p. 28-32).

As to the legal basis of these Decisions, note that reference was made to the TEC in general and not to any specific article thereof.

<sup>16</sup> For an analysis of the provisions of this article (as in force according to the TEC, because the Lisbon Treaty has brought changes in the relevant decision making process), see, indicatively, **Smits (1997)**, p. 355-360, and **Louis (2007)**, p. 162-164.

<sup>17</sup> It is clear that the authors of article 105 para. 6 of the TEC, had this dimension of prudential supervision clearly in mind, since at the time, there was no talk of the need for macro-prudential oversight (and in general of macro-prudential policies) of the financial system.

<sup>18</sup> **De Larosière Report (2009)**, para. 167-172.

<sup>19</sup> For an analysis of the provisions of this article (as was in force according to the TEC), see, indicatively, **Smits (1997)**, p. 338-355.

<sup>20</sup> **Regulation 1096/2010**, point 7 in the recitals.

<sup>21</sup> Consequently, albeit the ECB was activated, this was only in part and not with respect to the micro-prudential supervision of financial service providers.

## 2. Composition of the ESFS - obligation to cooperate

### 2.1 Composition of the ESFS

#### 2.1.1 The components of the ESFS

The three Authorities, which, as mentioned above, are mainly responsible in the area of the micro-prudential supervision of financial services providers operating in the Union's member states,<sup>22</sup> along with the ESRB,<sup>23</sup> which is responsible for the macro-prudential oversight of the European financial system, make up the so-called "European System of Financial Supervision", hereinafter the "ESFS".

*Neither the de Larosière Report nor the European Commission (in the proposals for Regulations) included the ESRB in the ESFS, although they recognised the existing correlation between the macro-prudential oversight of the financial system and the micro-prudential supervision of financial services providers.<sup>24</sup> The solution was provided by the Ecofin, which proposed that the ESRB be included in the ESFS, in order to establish formally this correlation.<sup>25</sup>*

Components of the ESFS are also:

- the Joint Committee of European Supervisory Authorities, hereinafter the "Joint Committee", on which details are provided in 2.1.2 below, and
- the competent or supervisory authorities of member states, as laid down in the legislative acts referred to in **article 1, para. 2**, of the Regulations establishing the Authorities (hereinafter the "Regulations establishing the Authorities" or the "establishing Regulations").<sup>26</sup>

Therefore, the ESFS is a new "constellation" of European law, with no legal personality. It is a term introduced so as to provide an overall description of its components, as is the case with the European System of Central Banks (hereinafter the "ESCB") in the field of the European monetary union.<sup>27</sup>

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<sup>22</sup> As will be explained in detail below (B 3), the scope of tasks and powers of the three Authorities does, however, extend beyond micro-prudential supervision.

<sup>23</sup> The "European Systemic Risk Committee" proposed by the de Larosière Report, was renamed to "European Systemic Risk Board", possibly following the renaming of the "Financial Stability Forum" to "Financial Stability Board" (on this see **Recine and Teixeira (2010)**, p. 16).

<sup>24</sup> According to para. 148 of the "de Larosière Report": "Macro-prudential supervision cannot be 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".

<sup>25</sup> On this see point 6c of the recitals of the Ecofin document of 2 September 2010 (Interinstitutional File: 2009/0140(COD)). The Council also opted to exclude the European Commission from participating in the ESFS.

<sup>26</sup> **Regulation 1092/2010**, article 1, para. 3, and **Regulations 1093/2010, 1094/2010 and 1095/2010**, article 2, para. 2. Note that most provisions are identical in the establishing Regulations of all three Authorities, indeed in the same article. To avoid repetitions, this section of the study only makes reference to Regulation 1093/2010 on the EBA.

<sup>27</sup> On this see **Smits (1997)**, p. 92-93, and **Häde (1999)**, p. 1164, who refers to a "Sammelbezeichnung".

### 2.1.2 Specifically: the Joint Committee

The Joint Committee is governed by the provisions of **articles 54-57** of the establishing Regulations. It is a joint body of the three Authorities, and is, primarily, composed of their Chairperson.<sup>28</sup>

*The term "joint body" does not appear in articles 54-57 of the establishing Regulations. It only appears on the title of Chapter VI "Joint Bodies ("Gremien" in German, "organs" in French) of the European Supervisory Authorities", which refers to the Joint Committee (section 1) and the Board of Appeal (section 2). Whether the Joint Committee and Board of Appeal can be considered "organs" is open to interpretation. According, however, to B 2, below, the author considers that it would be correct to claim that the EBA and the other Authorities indeed have organs, one of which being the Joint Committee which is common for all three.*

The Joint Committee serves as a forum to ensure cross-sectoral consistency between the three Authorities, notably concerning issue-areas where tasks and powers have been conferred to all three Authorities, over financial services providers falling within their scope, specifically:

- financial conglomerates,
- accounting and auditing,
- micro-prudential analyses of cross-sectoral developments, risks and vulnerabilities for financial stability,
- retail investment products,
- measures combating money laundering, and
- information exchange with the ESRB and developing the relationship between the ESRB and the Authorities.<sup>29</sup>

### 2.1.3 The pillars of the ESFS

Considering the above, the ESFS has two pillars:<sup>30</sup>

(a) The first pillar is the macro-prudential oversight of the European financial system, assigned to the ESRB.

(b) The second pillar is the micro-prudential supervision of financial services providers operating in the EU member states. With regard to this pillar, the ESFS is an integrated "network of national and European supervisory authorities",<sup>31</sup> on three levels, with the participation of:

- the national authorities of member states responsible for the micro-prudential supervision of financial services providers (including the "colleges of

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<sup>28</sup> **Regulation 1093/2010**, article 55, para. 1.

<sup>29</sup> **Regulation 1093/2010**, article 54, para. 2. The cooperation between CEBS, CESR and CEIOPS, which was informal in nature, was based on a Joint Protocol of Cooperation of 2005 (**CESR 05-405, CEBS 05-99, CEIOPS-3L3-01/05**: ("*Joint Protocol on Cooperation between CESR, CEBS and CEIOPS*"), November 2005).

<sup>30</sup> On this see **Recine and Teixeira (2010)**, p. 21, who refer to a "two-pillar structure".

<sup>31</sup> **Regulation 1093/2010**, point 9 of the recitals, sentence a.

supervisors", established for banking groups according to Directive 2006/48/EC and composed of national competent authorities),<sup>32</sup>

- the three European Authorities, with the above national authorities being represented in the primary organ thereof (the Board of Supervisors; on this see B 1.2, below), and
- the Joint Committee, composed of the Chairpersons of the three Authorities.

## 2.2 The purpose of the ESFS

The purpose of the ESFS is defined both in Regulation 1092/2010 establishing the ESRB (see para. a below), and in the Regulations establishing the Authorities (see para. b), with a different, in any case, wording. Specifically:

(a) **Regulation 1092/2010** stipulates, by way of a general wording, that the purpose of the ESFS is "*ensure the supervision of the Union's financial system*".<sup>33</sup> In this provision, the term "supervision" must be considered *lato sensu*, namely as covering both macro-prudential oversight of the financial system, which, as mentioned above, is the mission of the ESRB (the functioning of which is governed by the provisions of the above Regulation),<sup>34</sup> and micro-prudential supervision of financial services providers.

(b) On the contrary, the wording in the establishing Regulations is clearly more specific. However, it is also a partial wording, as it focuses on the objectives of the three Authorities (on this see A 3.1, below), without making any reference to the ESRB. Specifically, **article 2** of these Regulations stipulates that the "main objective" of the ESFS (without making any reference to any secondary one) is "*to ensure that the rules applicable to the financial sector are adequately implemented*".<sup>35</sup>

This objective of the ESFS is qualified in the establishing Regulations, since they stipulate that adequate implementation of the rules applicable to the financial sector (namely the European financial law, enacted, primarily, by the European Parliament and the Council by issuing legislative acts according to the ordinary legislative procedure),<sup>36</sup> aims at satisfying two requirements:<sup>37</sup>

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<sup>32</sup> Colleges of supervisors were established by article 1, point 33 (new article 131a), of **Directive 2009/111/EC** of the European Parliament and of the Council (OJ L 302, 17.11.2009, p. 97-119), amending Directive 2006/48/EC.

<sup>33</sup> **Regulation 1092/2010**, article 1, para. 2.

<sup>34</sup> **Regulation 1093/2010**, article 3, para. 1, sentence a.

<sup>35</sup> *Ibid*, article 2, para. 1, sentence b.

<sup>36</sup> The meaning of the term "legislative acts" (which corresponds to that of the basic legal acts according to the TEC) is defined in **article 289, para. 3, of the TFEU**, according to which legislative acts are legal acts adopted:

- either by the "ordinary legislative procedure" defined in article 294 of the TFEU (*ibid*, **article 289, para. 1**), which corresponds to the co-decision procedure of article 251 of the TEC,
- or by the "special legislative procedure" (*ibid*, **article 289, para. 2**).

On this, see **Craig (2010)**, p. 252-253 and 255-260, and **Hetmeier (2010)**, p. 2675-2679 (for article 289), and 2698-2707 (for article 294).

<sup>37</sup> **Regulation 1093/2010**, article 2, para. 1, sentence b, *in-finem*.

(i) The first is the preservation of financial stability in the European financial system, obviously with a view to avoiding the occurrence of financial crises, like the recent international one (2007-2009), which was the catalyst for the creation of the ESFS.

(ii) The second is to ensure:

- on the one hand, confidence of the public in the financial system, which was seriously shaken during the recent crisis,<sup>38</sup> and
- on the other, sufficient protection for the customers of financial services, which demonstrates the involvement of the ESFS in the field of protecting the financial interests of the consumers of financial services.

In the author's opinion, protection for the customers of financial services falls within the objective of the above three Authorities (on this see para. 3.1 below) and is one of their tasks, specifically regulated<sup>39</sup> (and this is the first time this happens, as no such tasks had been conferred to the Lamfalussy Committees), but not within the objective of the ESRB, as no such provisions exists in its establishing Regulation. In this sense, the relevant reference in **article 2** is not accurate as concerns the ESFS in its entirety, a fact that reinforces the initial remark that the wording, in this case, mostly focuses on the work of the Authorities.

### 2.3 Obligation of cooperation between the ESRB and the Authorities

The provisions of **para. 3 of article 2** of the Regulations establishing the Authorities lay down the obligation for regular and close cooperation both with the ESRB and among the Authorities, through the Joint Committee. The aim of this cooperation is twofold:

- to ensure cross-sectoral consistency of their operations, and
- to develop common positions on cross-sectoral issues, including the supervision of financial conglomerates.

Moreover, **para. 4** of the same article stipulates that this cooperation must take form according to the "principle of sincere cooperation" established by **article 4, para. 3 (subparagraph a), of the Treaty on European Union**,<sup>40</sup> "*with trust and full mutual respect, in particular in ensuring the flow of appropriate and reliable information between them*". The same provision is included verbatim in **Regulation 1092/2010** on the establishment of the ESRB (**article 1, para. 4**).

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<sup>38</sup> As Swoboda points out (2008, section I, *in finem*) in relation to the recent financial crisis: "The current turmoil is *not only a liquidity and a solvency crisis*, it is much more: a severe and rapidly spreading confidence crisis that reflects *a meltdown of trust in our financial system and institutions, private and public*" (emphasis made by the author).

<sup>39</sup> Regarding the related task of the EBA, see B 3.3, below.

<sup>40</sup> OJ C 83, 30.3.2010, p. 13-45 (consolidated version). On this provision of the TEU, see Lenz (2010).

### 3. The three Authorities: general provisions

#### 3.1 The objective of the Authorities

Apart from setting the key objective of the ESFS (according to paragraph 2.2 above), the establishing Regulations also set the specific, upgraded, purpose of the Authorities. The mark of reference is **point 8 of the recitals** which stresses the need to upgrade the role of the Lamfalussy Committees, since: "*The Union has reached the limits of what can be done within their context.*" This upgrade seeks to ensure that:

- there are mechanisms in place enabling national supervisory authorities to arrive at the best possible supervisory decisions for cross-border financial institutions;<sup>41</sup>
- there is sufficient cooperation and information exchange between national supervisory authorities;
- joint action by national authorities is not hindered by the complex patchwork of regulatory and supervisory requirements in member states;
- member states and national supervisory authorities do not seek national solutions as a response to problems at the level of the Union; and
- the Union's legal acts are interpreted in a uniform manner in all member states.

The objective of the Authorities is made more specific in **article 1 (para. 5)** of the establishing Regulations, whereby, the objective of the three Authorities is "*to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses*".<sup>42</sup> Indeed this is the first time (to the author's knowledge) that a legal act concerning the European financial system makes reference to the concept of "protecting the public interest".<sup>43</sup>

In this context, the Authorities are called to contribute to:

- improving the functioning of the internal market, including, in particular, a sound, effective and consistent level of regulatory intervention and supervision;
- ensuring the integrity, transparency, efficiency and orderly functioning of financial markets;
- strengthening international supervisory coordination;
- preventing regulatory arbitrage and promoting equal conditions of competition;
- ensuring that the taking of credit, investment, insurance and other risks are appropriately regulated and supervised; and
- enhancing customer protection.<sup>44</sup>

To achieve the above, the following implementation means were put into place:

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<sup>41</sup> For a definition of the term "financial institutions", see details in B 2.2.2, below.

<sup>42</sup> **Regulation 1093/2010**, article 1, para. 5, subparagraph a, sentence a.

<sup>43</sup> The concept of public interest (national or union) will be defined by the Authorities, and, should the need arise, it will be scrutinized by the Court of Justice of the European Union.

<sup>44</sup> **Regulation 1093/2010**, article 1, para. 5, subparagraph a, sentence b.

- contribution to ensuring the consistent, efficient and effective application of the legislative acts referred to in **article 1 (para. 2)** of the establishing Regulations, whose scope is the main scope of action thereof (with regard to EBA, see details in B.2 below);
- fostering convergence in micro-prudential supervision;
- providing opinions to the European Parliament, the Council and the Commission, and
- undertaking economic analyses of the markets,

according to the tasks and powers conferred to the Authorities (concerning the EBA, see details in B 3, below).<sup>45</sup>

### 3.2 The Authorities as successors of the Lamfalussy Committees and as "European Supervisory Authorities"

#### 3.2.1 The Authorities as successors of the Lamfalussy Committees

As of 1 January 2011, when the Regulations entered into effect and pursuant to the proposals of the de Larosière Report, the three Authorities succeeded and replaced the three Lamfalussy Committees, as follows:

- the EBA is the legal successor of the CEBS,<sup>46</sup>
- ESMA is the legal successor of the CESR, and
- EIOPA is the legal successor of the CEIOPS.

Consequently:

(a) Pursuant to the proposals of the de Larosière Report, and further to the architecture created in 2002 following implementation of the Lamfalussy Report's proposals, the "sectoral approach" was maintained with regard to the institutional arrangements at European level concerning the financial system's micro-prudential supervision.<sup>47</sup>

(b) The Authorities assume all the on-going work and all the powers of the Lamfalussy Committees. The legal acts issued by the Lamfalussy Committees are now legal acts of the Authorities.

#### 3.2.2 The Authorities as "European Supervisory Authorities"

The fact that exercising micro-prudential supervision of financial services providers in the Union is still a task of the competent national supervisors, according to

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<sup>45</sup> *Ibid*, article 1, para. 5, subparagraph b.

<sup>46</sup> *Ibid*, article 76, par. 4, sentence a. According to **article 80, Decision 2009/78/EC** of the Commission establishing the CEBS was repealed with effect from 1 January 2011 (the same applies to the Decisions establishing CESR and CEIOPS).

On this, note that national central banks-members of the ESCB (namely those of all EU member states) pursue (since 1998) their cooperation in the context of the ESCB's Banking Supervision Committee. On this see **European Commission** (2000), p. 11-12.

<sup>47</sup> Regarding the reasons that led to adoption of this approach (although there were proposals for the unification of Authorities), see **Louis (2010)**, p. 154 (para. 7.10). On the issue of creating one or more supervisory authorities for the financial system in the European Union, see, indicatively, **Lastra (2006)**, p. 324-328, with further references.

an explicit provision of **para. 5, article 2** of the Regulations, and pursuant to the proposals of the de Larosière Report, is a key and material element of the European financial system's architecture, even after the establishment of the three Authorities. According to **point 9 (sentence a) of the recitals** of Regulation 1093/2010: *"The ESFS should be an integrated network of national and Union supervisory authorities, leaving day-to-day supervision to the national level.*

Consequently, albeit the three Authorities, on the header of their establishing Regulations are called "European Supervisory Authorities", this term is most likely used excessively and in any case definitely not literally.<sup>48</sup> Specifically:

(a) The Authorities, established on the basis of EU law, are European and indeed called "Union bodies" (on this see B 1.1. below).

(b) Among others, their tasks include issues concerning the micro-prudential supervision of financial services providers operating in the EU member states.

(c) The Authorities have regulatory powers on those issues (i.e. they are regulatory authorities), since they have the power to issue guidelines and recommendations (European "soft" law acts), as well as decisions, apart from, of course, their decisive contribution to the shaping of regulatory and implementing technical standards issued by the European Commission by means of delegated acts, by preparing the relevant drafts (regarding the regulatory powers of the EBA, see B 3.2 below).

(d) However, the Authorities do not have, at least initially, any micro-prudential supervisory powers over financial services providers operating in the Union's member states, and consequently, are not "supervisory authorities" as such.<sup>49</sup> For this reason, in the author's opinion, it would be more correct if the Authorities were called "European quasi-supervisory authorities", or "European supervisory bodies".

Nevertheless, this remark becomes more relative in light of two elements which are innovative and suggest a tendency for gradual yet substantial further strengthening of the Authorities' powers against competent national supervisors:

(i) Firstly, the EBA is entitled to substitute itself to the work of competent national supervisors, provided these do not comply with a Commission opinion or EBA decision pursuant to the provisions of **articles 17-19** of the Regulation (on this see B 3.1.3.1 below).

(ii) Moreover, the supervision of credit rating agencies operating in the Union has been conferred to ESMA (and not to competent national supervisors), according to the provisions of **Regulation 513/2011** of the European Parliament and the Council,<sup>50</sup> whereby **Regulation (EC) 1060/2009 "on credit rating agencies"** was amended.<sup>51</sup> Point 5 of the recitals of **Regulation 1095/2010** governing the functioning of ESMA, states the following:

*"The European Council, in its conclusions of 19 June 2009, (...) 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 (...).*

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<sup>48</sup> Respectively, the CEBS was defined as an *"independent advisory group on banking supervision in the Community"* (**Decision 2009/78/EC**, article 1). This was also the case for CESR and CEIOPS.

<sup>49</sup> As regards the powers that the authorities called "supervisory" have in the context of banking micro-prudential supervision, see **Blumer (1996)**, p. 43-50, and **Barth, Caprio, and Levine (2006)**, p. 121-132.

<sup>50</sup> OJ L 145, 31.5.2011, p. 30-36.

<sup>51</sup> OJ L 302, 17.11. 2009, p. 1-31.

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. The European Parliament and the Council should consider that proposal in order to ensure that (...) European Securities and Markets Authority will have adequate supervisory powers over credit rating agencies (...).

<b>TABLE 1</b>			
<b>Arrangements at European level regarding the financial system's micro-prudential supervision: from informal <i>fora</i> to "European (quasi-)supervisory authorities"</b>			
	Banking	Securities and Markets	Insurance, Reinsurance and Pension Funds
before adoption of the Lamfalussy process:  informal (except BSC)	GdC (Group de Contact, 1972), and  BSC (Banking Supervision Committee, European Central Bank, 1998) (*)	HLSSC (High Level Securities Supervisors Committee", 1985)  FESCO (Forum of European Securities Commissions, 1997)	CIS (Conference of Insurance Supervisors, 1957)
after adoption of the Lamfalussy process:  institutionalised	CEBS (Committee of European Banking Supervisors, 2004), and  BSC (*)	CESR (Committee of European Securities Regulators, 2001)	CEIOPS (Committee of European Insurance and Occupational Pensions Supervisors, 2004)
after establishment of the ESFS:  institutionalised	EBA (European Banking Authority, 2011), and  BSC (*)	ESMA (European Securities and Markets Authority, 2011)	EIOPA (European Insurance and Occupational Pensions Authority, 2011)
(*) within the context of the ESCB, with the representation of all member states' national central banks (with the euro as the currency or member states with a derogation)			

### 3.3 Safeguard clause as to the fiscal responsibilities of member states

The functioning of the Authorities is demarcated by the established "safeguard clause as to the fiscal responsibilities of member states". In particular, **article 38** of the establishing Regulations states that Authorities must ensure that no decision taken pursuant to the provisions of para. 3 of articles 18 (regarding action in emergency situations) and 19 (regarding the settlement of disagreements between competent national authorities) (on this see B 3.1.3.1 below) impinges in any way on the fiscal responsibilities of member states.<sup>52</sup> Regulations' recitals clearly state the following:

*"Member states have a core responsibility for ensuring coordinated crisis management and preserving financial stability in crisis situations, in particular with regard to stabilising and resolving individual failing financial institutions. Decisions by the*

<sup>52</sup> Regulation 1093/2010, article 38, para. 1.

*Authority in emergency or settlement situations affecting the stability of a financial institution should not impinge on the fiscal responsibilities of member states".<sup>53</sup>*

Where a member state considers that a decision taken by the EBA or another Authority impinges on its fiscal responsibilities, it may activate a process, with the involvement of the Commission and the Ecofin which:

- is different depending whether the decision has been taken on the basis of article 18 or 19 of the Regulation, and
- will be completed with the Council taking a decision on whether or not to revoke the Authority's decision.<sup>54</sup>

However, any abusive use of the safeguard clause by a member state is prohibited as incompatible with the internal market. This applies especially if a decision by the Authority does not have a significant or material fiscal impact.<sup>55</sup>

### **3.4 Directive 2010/78/EU as the product of the need to amend certain legislative acts falling within the Authorities' scope of action<sup>56</sup>**

#### **3.4.1 Overall examination**

**Directive 2010/78/EU** of the European Parliament and of the Council (known as the "Omnibus Directive") was adopted along with the three establishing Regulations (i.e., on 24 November 2010).<sup>57</sup> The rationale behind the adoption of this Directive was the need to amend certain legislative acts of the European Parliament and of the Council which constitute sources of European financial law, and whose scope sets out the Authorities' scope of action, pursuant to **article 1 (para. 2 and 3) of their establishing Regulations** (regarding the EBA's scope of action, see B 2, below). This

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<sup>53</sup> *Ibid.*, point 50 of the recitals, sentences a and b.

<sup>54</sup> *Ibid.*, article 38, para. 2 and 3-4, respectively. On this note that the Council's decision on whether or not to revoke the EBA's decision has to be taken by a simple majority (*ibid.*, article 38, para. 3, subparagraph d).

<sup>55</sup> *Ibid.*, article 38, para. 5. As an example, point 50 of the Regulation's recitals (sentence d) refers to a reduction of income linked to the temporary prohibition of specific activities or products for consumer protection purposes.

<sup>56</sup> Further on, the phrases "legislative acts, whose scope sets out the Authorities' scope of action" (which is more accurate) and "legislative acts falling within the Authorities' scope of action" are used as equivalents.

<sup>57</sup> Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 "amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority)", OJ L 331, 15.12.2010, p. 120-161.

The legal basis of this Directive are the articles of the TFEU that constitute the legal basis of the Directives being amended (articles 50, 53, para 1, 62 and 114).

In 2011, a new Directive of the European Parliament and of the Council is expected (known as "Omnibus II Directive"), on the basis of a relevant Commission recommendation (COM(2011) 8 final, 19.1.2011), whereby more amendments will be introduced to Directive 2003/71/EC and for the first time amendments to Directive 2009/138/EC (known as "Solvency II" in insurance) concerning the powers of ESMA and of EIOPA, respectively.

amendment, which was (initially) limited to eleven (11) of the above legislative acts (Directives in particular),<sup>58</sup> had a dual purpose:

- on the one hand, to add provisions to these legislative acts so as to incorporate and qualify some of the tasks conferred to the Authorities by virtue of their establishing Regulations (see 3.4.2, below), and
- on the other hand, to meet the terms set by the TFEU regarding the Commission's ability to issue delegated and implementing acts on the basis of draft technical standards developed by the Authorities, according to the relevant powers conferred to them by the establishing Regulations (see 3.4.3)

### *3.4.2 Amendment of legislative acts and tasks of the Authorities*

In order for the ESFS to function efficiently and for the Authorities to be in a position to perform, equally efficiently, the tasks conferred to them pursuant to **article 8 of the Regulations** establishing the Authorities (regarding the tasks of the EBA, see B 3.1.2., below), **Directive 2010/78/EU** added new provisions to the abovementioned legislative acts, so that some of these tasks be explicitly incorporated therein. The relevant amendments were performed separately for each legislative act, pursuant to **articles 1-11** of the Directive.<sup>59</sup>

### *3.4.3 Amendment of legislative acts and power of the Authorities to develop draft technical standards*

#### *3.4.3.1 Introductory Remarks*

According to the provisions of **article 10-15** of the establishing Regulations (and on the basis of what follows in B.3.2.2 herein, regarding the relevant powers of the EBA), Authorities have the power to develop draft regulatory and implementing technical standards, to be submitted, respectively, to the European Commission for endorsement via (namely by the Commission issuing):

- delegated acts, according to **article 290 of the TFEU** (on this see 3.4.3.2, below),<sup>60</sup> and
- implementing acts, according to **article 291 of the TFEU** (see 3.4.3.3).<sup>61</sup>

*It is evident that this solution was adopted for both categories of technical standards, because the Authorities do not have the power to issue legally binding acts. Such a power could only be conferred to them by amendment of the TFEU, as was the case*

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<sup>58</sup> After adoption of the above mentioned "Omnibus II Directive", the number of amended legislative acts will increase to twelve (12). It is, however, reasonable to expect that in the near future all other legislative acts falling within the Authorities' scope of action will also be amended, accordingly.

<sup>59</sup> For instance, point 14 of article 9 of Directive 2010/78/EU added the following sentence to article 42 of **Directive 2006/48/EC** (which come under the scope of action of the EBA, according to what follows in B 2, below): "*The competent authorities may refer to the Authority situations where a request for collaboration, in particular to exchange information, has been rejected or has not been acted upon within a reasonable time. Without prejudice to Article 258 of the Treaty on the Functioning of the European Union (TFEU), the Authority may, in situations referred to in the first sentence, act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1093/2010*".

<sup>60</sup> See indicatively **Craig (2010)**, p. 253-254 and 260-270, and **Hetmeier (2010)**, p. 2679-2687.

<sup>61</sup> See indicatively **Craig (2010)**, p. 254-255 and 270-282, and **Hetmeier (2010)**, p. 2687-2691.

with the ECB, which has independent power to issue legal acts based on **article 132 of the TFEU** (article 110 of TEC).<sup>62</sup> According to the applicable institutional framework of the Union, the legally binding nature of technical standards, both regulatory and implementing, was, consequently, ensured by endorsement by the Commission of the drafts developed by the Authorities by means of delegated and implementing acts.<sup>63</sup>

According to articles 290 and 291 of the TFEU, a legislative act of the European Parliament and of the Council may delegate to the Commission the power to adopt such acts. Especially for delegated acts, the TFEU stipulates that such legislative acts should also include the *ex ante* and *ex post* restrictions of this delegation.

In view of the above and in order to enable activation, by the Authorities, of the power to develop draft regulatory and implementing technical standards, it became necessary to further amend the (abovementioned) legislative acts falling within the Authorities' scope of action. These amendments were also brought about by way of **Directive 2010/78/EU**.

### **3.4.3.2 Elaboration of draft regulatory technical standards by the Authorities and adoption of delegated acts by the Commission**

#### **(a) The provisions of the TFEU**

According to **article 290 of the TFEU**,<sup>64</sup> in order for the Commission to adopt delegated acts, the European Parliament and the Council must confer to it the relevant power by way of a legislative act (pursuant to **article 289 of the TFEU**). The article also stipulates that the legislative acts must also include the *ex ante* (see (i) below) and *ex post* (see (ii)) restrictions of this delegation. In particular:

(i) The objectives, content, scope and duration of the delegation of power must be explicitly defined in the legislative acts.<sup>65</sup> In this context, it is explicitly stipulated that:

- the "essential elements" of an area are reserved to the legislative act and may not be the subject of a delegation of power,<sup>66</sup> and
- consequently, delegated acts may supplement or amend certain "non-essential elements" of the legislative act.<sup>67</sup>

(ii) Legislative acts explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

- the European Parliament or the Council may decide to revoke the delegation, and/or
- the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.<sup>68</sup>

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<sup>62</sup> See indicatively **Smits (1997)**, p. 102-106.

<sup>63</sup> **Regulation 2010/1093**, point 23 of the recitals, sentence a.

<sup>64</sup> **TFEU**, article 290, p. 1, subparagraph a. The term "delegated acts" is used in para. 3 of the article, while in para. 1, the term "non-legislative acts of general application" is used. The two terms are synonymous.

<sup>65</sup> *Ibid*, article 290, para. 1, subparagraph b, sentence a.

<sup>66</sup> *Ibid*, article 290, par. 1, subparagraph b, sentence b.

<sup>67</sup> *Ibid*, article 290, par. 1, subparagraph a.

Consequently, adoption by the Commission of regulatory technical standards by way of delegated acts on the basis of relevant drafts developed by the Authorities, requires that the legislative acts falling within their scope of action provide for the relevant delegation of power, and also define all restrictions of such delegation.

*In the **Declaration (No 39)** "on Article 290 TFEU", annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, the Conference took note of the Commission's intention "to continue to consult experts appointed by the member states in the preparation of draft delegated acts in the financial services area, in accordance with its established practice".*

*It is obvious that at the time this Declaration was drafted (in 2007) the Commission expressed its intention to continue to consult with the Lamfalussy Committees. This consultation had been enacted by the Commission Decisions establishing the Lamfalussy Committees, in the context of the regulatory comitology procedure upon adoption of implementing measures, according to the provisions of **article 202 TEC** (point three, sentence a), which, according to the prevailing view (clearly supported by the above Declaration), does not apply to delegated acts of the Commission (as opposed to implementing acts, see 3.4.3.3(a), below).<sup>69</sup>*

*Consequently, in light of the conditions created with the establishment of the ESFS, the Commission's intention must be interpreted in the direction of continuation of deliberations with the Authorities in elaborating delegated acts on matters of micro-prudential supervision of financial service providers, albeit the comitology procedure does not apply to them in the context of (the Authorities) developing draft regulatory technical standards.<sup>70</sup>*

#### **(b) The provisions of Directive 2010/78/EU**

**Directive 2010/78/EU** lays down the issue-areas, per amended legislative act (articles 1-11, respectively), where:

- the power to elaborate draft regulatory technical standards has been conferred to the Authorities, and
- the power to endorse the above drafts by means of delegated acts has been conferred to the Commission.

The Directive also lays down the objectives, content and scope of the delegation of power. On the contrary, the duration of the delegation of power, as well as the conditions it is subject to (namely the *ex post* restrictions), have been laid down in a fragmented manner in Directive 2010/78/EE, and in a complete manner in the Regulations establishing the Authorities (on this see B 3.2.2.1, below).

*A clear example of the fragmented nature of the regulation is the fact that the duration of the delegation of power to the Commission and the *ex post* restrictions thereof in Directives 2006/48/EC and 2006/49/EC (which are amended by Directive 2010/78/EU and are falling within the EBA's scope of action, on this see B 2.2.2, below), was set in*

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<sup>68</sup> *Ibid*, article 290, par. 2, sentence a. It is noteworthy that in this case it is not necessary for both institutions to have a common position, since both revocation of the delegation and the expression of objection may come from either one of them.

<sup>69</sup> On this, see **Craig (2010)**, p. 260-263, with reference to arguments to the contrary.

<sup>70</sup> **Regulation 1093/2010**, point 21 of the recitals, sentence a. Another noteworthy thought is the one expressed in sentence b, according to which it is important to take EBA's expertise into account as regards "*standards or parts of standards that are not based on a draft technical standard that the Authority has elaborated*".

*Directive 2010/76/EU of the European Parliament and of the Council, which was adopted on the very same day as Directive 2010/78/EC (!).*<sup>71</sup>

Nevertheless, this Directive does not merely set the foundations for activation of the Authorities' power to elaborate draft regulatory standards, but also establishes the Authorities' obligation to exercise it in certain cases. In this context, the Commission is requested, by 1 January 2014, to submit to the European Parliament and the Council a report specifying whether the Authorities have submitted the draft regulatory and implementing technical standards provided for in this Directive, no matter "*whether the submission is mandatory or optional*".<sup>72</sup>

### **3.4.3.3 Elaboration of draft implementing technical standards by the Authorities and adoption of implementing acts by the Commission**

#### **(a) The provisions of the TFEU**

According to **para. 2 of article 291 of the TFEU**, where uniform conditions for implementing "legally binding Union acts" are needed, those acts should confer implementing powers to the Commission, in order to adopt implementing acts. According to this provision, the delegation of power for adoption of implementing acts<sup>73</sup> can be conferred to the Commission not only by means of legislative acts of the European Parliament and the Council (according to **article 289 of the TFEU**), but also by means of the Commission's delegated acts, since both these categories come under the concept of "legally binding Union acts".<sup>74</sup>

Consequently, adoption by the Commission of implementing technical standards by way of implementing acts on the basis of relevant drafts of the Authorities, requires that the legislative acts falling within their scope of action or the delegated acts issued thereby, provide for the relevant delegation of power.

Finally, it is noteworthy that contrary to delegated acts, the comitology procedure, even though modified, (still) applies to the Commission's implementing acts. This procedure ought to be laid down<sup>75</sup> and was indeed laid down:

- with the provisions of a Regulation adopted by the European Parliament and the Council according to the ordinary legislative procedure,<sup>76</sup>
- and not based on Decisions of the Council, following an opinion of the European Parliament, as was stipulated in TEC (yet another proof of the upgraded institutional role of the European Parliament after entry into effect of the Lisbon Treaty).<sup>77</sup>

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<sup>71</sup> OJ L 329, 14.12.2010, p. 3-35.

<sup>72</sup> **Directive 2010/78/EU**, article 12.

<sup>73</sup> The term "implementing acts" appears in para. 4, article 291.

<sup>74</sup> On this, see **Craig (2010)**, p. 272-275.

<sup>75</sup> **TFEU**, article 291, p. 3.

<sup>76</sup> **Regulation (EU) no. 182/2011** of the European Parliament and of the Council "*laying down the rules and general principles concerning mechanisms for control by member states of the Commission's exercise of implementing powers*" (OJ L 55, 28.2.2011, p. 13-18), repealing the above mentioned (see footnote no. 72) Decision 1999/468/EC of the Council, as in force (*ibid*, article 12).

<sup>77</sup> **TEC**, article 202, point 3, sentence d.

*(b) The provisions of Directive 2010/78/EU*

**Directive 2010/78/EU** also laid down the areas where the power to elaborate draft implementing technical standards has been conferred to the Authorities, and where the power to endorse them by means of implementing acts has been conferred to the Commission, for each amended legislative act, separately (articles 1-11, respectively). The provisions of the Directive's **article 12** (according to para. 3.4.3.2 (b), above) also apply to draft implementing technical standards.

## B. The European Banking Authority (“EBA”)

### 1. Legal status and organs

#### 1.1 The legal status

As already mentioned in the previous section, the European Banking Authority (“Europäische Bankenaufsichtsbehörde” in German, “Autorité bancaire européenne” in French) was established by **Regulation 1093/2010** of the European Parliament and of the Council (hereinafter the “Regulation”, except if there is reference to another one) and forms part of the ESFS.<sup>78</sup> It was established on 1 January 2011<sup>79</sup> and started operating on that day as the successor of the CEBS.

The EBA, which has its seat in London (same as the CEBS),<sup>80</sup> is a “Union body”,<sup>81</sup> like the other Authorities as well.<sup>82</sup> It has a legal personality<sup>83</sup> and, consequently, in each member state, it enjoys the most extensive legal capacity accorded to legal persons under national law. It may, in particular, acquire or dispose of movable and immovable property and be a party to legal proceedings.<sup>84</sup>

#### 1.2 The organs

Contrary to the CEBS, the EBA has no members. It does, however, have five (5) organs, specified in **article 6** of the Regulation.<sup>85</sup>

*This article of the Regulation makes no reference to organs (the title uses the term “composition”). However, it would be correct to assume that the EBA has organs, all the more so since point 52 of the recitals (sentence a) is mentioning: “A Board of Supervisors (...) should be the principal decision-making organ of the Authority”.*<sup>86</sup>

The organs of the EBA are:

(a) The first organ is the Board of Supervisors, governed by the provisions of articles 40-44, and is composed of:

- The EBA Chairperson;
- the heads of the national public authorities competent for the micro-prudential supervision of credit institutions, whether central banks or other independent administrative authorities, and

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<sup>78</sup> **Regulation 1093/2010**, article 2, para. 1, sentence a.

<sup>79</sup> *Ibid*, article 82, sentence c.

<sup>80</sup> *Ibid*, article 7.

<sup>81</sup> *Ibid*, article 5, para. 1. The wording used (“Union body” in English, “Einrichtung der Union” in German, “organisme de l’Union” in French) implies that the EBA is not an agency. Regarding the definition and powers of “Union agencies”, see, indicatively, **Shapiro (2011)**.

<sup>82</sup> On the contrary, this capacity is not attributed to the ESRB, as there is no similar provision in Regulation 2010/1092.

<sup>83</sup> **Regulation 1093/2010**, article 5, para. 1.

<sup>84</sup> *Ibid*, article 5, par. 2.

<sup>85</sup> The functioning of these organs is governed by the provisions of (internal) decisions. See at: <http://www.eba.europa.eu/Aboutus/Legal-texts/EBA-legal-documents.aspx>.

<sup>86</sup> On this see also **Louis (2010)**, p. 155.

- one representative of the European Commission, the ECB, the ESRB, the ESMA and the EIOPA.<sup>87</sup>

*The members of the CEBS also included the national central banks of all member states, even those not directly involved in the micro-prudential supervision of individual credit institutions.<sup>88</sup> Conversely, these central banks are not represented in the EBA Board of Supervisors. Accordingly, cooperation between all national central banks of EU member states takes place only within the Banking Supervision Committee of the ESCB.*

(b) The second organ is the Management Board, governed by the provisions of articles 45-47. It has seven members and is composed of:

- the EBA Chairperson, and
- six other members of the Board of Supervisors, elected by and from the voting members of the Board of Supervisors.<sup>89</sup>

(c) The third organ is the Chairperson (articles 48-50), who is a full-time independent professional,<sup>90</sup> appointed by the Board of Supervisors,<sup>91</sup> and representing the EBA.<sup>92</sup>

(d) The fourth organ is the Executive Director (articles 51-53), who is also appointed by the Board of Supervisors after confirmation by the European Parliament.<sup>93</sup> The Executive Director, who is a full-time independent professional, is in charge of managing the EBA.<sup>94</sup>

(e) Finally, the fifth organ is the Board of Appeals (articles 58-59), which:

- as discussed above (A 2.1.2), is a joint body of the three Authorities (just like the Joint Committee which, however is not mentioned in article 6),
- has six members, and
- provides expert legal advice on the legality of the EBA's exercise of its powers.<sup>95</sup>

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<sup>87</sup> **Regulation 1093/2010**, article 40, para. 1. Only the heads of the national public authorities competent for the micro-prudential supervision of credit institutions have voting rights. The Chairperson and all other members are non-voting.

<sup>88</sup> **Decision 2009/78/EK**, article 3, para. 1, items (b) and (c).

<sup>89</sup> **Regulation 1093/2010**, article 45, para. 1, subparagraph a. The first members elected were the Board of Supervisors members from the Czech Republic, Finland, France, Germany, Hungary, and Sweden.

<sup>90</sup> *Ibid*, article 48, par. 1, subparagraph a.

<sup>91</sup> *Ibid*, article 48, par. 2, subparagraph a. The first Chairperson appointed is the Italian national Andrea Enria (who in 2004-2007 had served as CEBS Secretary General), for a five-year term of office (according to **article 48, para. 3**).

<sup>92</sup> *Ibid*, article 5, par. 3.

<sup>93</sup> *Ibid*, article 51, par. 2. Conversely, appointment of the Chairperson does not require any action on the part of the European Parliament which, however, may express its objection (*ibid*, article 48, para. 2, subparagraph b). The first Executive Director appointed is the Hungarian national Adam Farkas for a five-year term of office (according to **article 51, para. 3**).

<sup>94</sup> *Ibid*, article 51, par. 1.

<sup>95</sup> *Ibid*, article 58, par. 2.

## 2. Scope of action

### 2.1 Introductory Remarks

The EBA's scope of action is explicitly laid down in **paras. 2 and 3 of article 1** of the Regulation. This is a *novum* compared to the CEBS, whose scope of action was not explicitly defined, a fact that caused doubts regarding the demarcation of its tasks.

### 2.2 The main basis of the EBA's scope of action

#### 2.2.1 General provisions

The main basis of the EBA's scope of action is described in article 1 (para. 2) of the Regulation. This provision lays down the following:<sup>96</sup>

(a) The EBA can act within the powers conferred to it pursuant to the provisions of **articles 8 and 9** of the Regulation (on this see B 3.1.3, and B 3.3 respectively, below).

(b) The EBA can act, initially, within the scope of specific, exhaustively indicated, legislative acts (on this see 2.2.2, below), including all legal acts (Directives, Regulations and Decisions) based on them. The latter reference obviously applies to:

- implementing measures which were adopted by the European Commission pursuant to **article 202 of the TEC**, and
- regulatory and implementing technical standards that the Commission will adopt by means of delegated and implementing acts, on the basis of **articles 290 and 291**, respectively, **of the TFEU**.

#### 2.2.2 The legislative acts referred to in para. 2 of article 1 of the Regulation

The legislative acts referred to in para. 2 of article 1 and within the scope of which the EBA must act, are divided into two categories:

(a) The first category includes five (5) legislative acts of the European Parliament and of the Council (as in force) which constitute the "core" of the EBA's scope of action. From a systematic point of view (and by branch of the European financial law where each belongs), these acts can be classified into two sub-categories:

(aa) The first one includes three (3) of the five (5) legislative acts constituting the main sources of European banking law:

- **Directive 2006/48/EC** "*relating to the taking up and pursuit of the business of credit institutions*",<sup>97</sup>
- **Directive 2006/49/EC** "*on the capital adequacy of investment firms and credit institutions*",<sup>98</sup> and
- **Directive 94/19/EC** "*on deposit-guarantee schemes*".<sup>99</sup>

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<sup>96</sup> **Regulation 1093/2010**, article 1, para. 2.

<sup>97</sup> OJ L 177, 30.6.2006, p. 1-200.

<sup>98</sup> OJ L 177, 30.6.2006, p. 201-255.

<sup>99</sup> OJ L 135, 31.5.1994, p. 5-14. Note that all these three Directives are being fully reviewed (on this, see section C (b), below).

The fourth Directive that constitutes a source of the European banking law (Directive 2009/110/EC) is included in the EBA's scope of action, pursuant to para. (b), below. What is striking, however, is the fact that its scope of action does not include the fifth legislative act that constitutes a source of European banking law, namely **Directive 2001/24/EC** "on the reorganisation and winding up of credit institutions",<sup>100</sup> all the more so, since addressing banking crises (an issue-area which, among others, does include the reorganisation and winding up of credit institutions) does fall within the tasks of the EBA (on this see 3.1.2, below).

(ab) The second sub-category includes:

- **Directive 2002/87/EC** "on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate",<sup>101</sup> and
- **Regulation (EC) no. 1781/2006** "on information on the payer accompanying transfers of funds",<sup>102</sup> which is a source of the European law on the protection of the economic interests of consumers of financial services.

(b) The second category includes four (4) legislative acts of the European Parliament and of the Council (as in force), in the context of which, the EBA has the power to act only to the extent that their provisions are applicable:

- to credit institutions and other categories of financial institutions, as well as
- the competent authorities exercising supervision on them.<sup>103</sup>

The definition of the term "financial institutions" for the application of the Regulation, is provided in **article 4, point 1**, and includes:

(i) "credit institutions" as defined in Article 4(1) of Directive 2006/48/EC, "investment firms" as defined in Article 3(1)(b) of Directive 2006/49/EC, and "financial conglomerates" as defined in Article 2(14) of Directive 2002/87/EC, and

(ii) especially with regard to Directive 2005/60/EC, "credit institutions" and "financial organisations", as defined in article 3, points 1 and 2, of that Directive.

This category of legislative acts also includes:

- **Directive 2009/110/EC** "on electronic money institutions",<sup>104</sup> which is a source of the European banking law,<sup>105</sup>

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<sup>100</sup> OJ L 125, 5.5.2001, p. 15-23.

<sup>101</sup> OJ L 35, 11.2.2003, p. 1-27.

<sup>102</sup> OJ L 345, 8.12.2006, p. 1-9.

<sup>103</sup> Competent authorities are defined as (**article 4, point 2**):

(i) competent (national) authorities as defined in Directives 2006/48/EC, 2006/49/EC and 2007/64/EC and as referred to in Directive 2009/110/EC;

(ii) with regard to Directives 2002/65/EC and 2005/60/EC, the (national) authorities competent for ensuring compliance with the requirements of those Directives by credit and financial institutions (to the author's knowledge, however, the term "competent authority" does not appear in Directive 2002/65/EC); and

(iii) with regard to deposit guarantee schemes, (national) bodies which administer deposit-guarantee schemes pursuant to Directive 94/19/EC, or, where the operation of the deposit-guarantee scheme is administered by a private company, the public authority supervising those schemes pursuant to that Directive.

<sup>104</sup> OJ L 267, 10.10.2009, p. 7 - 17.

- **Directive 2005/60/EC** "on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing,"<sup>106</sup> which is a source of the European law on combating the use of the financial system for the conduct of economic crime,
- **Directive 2002/65/EC** "concerning the distance marketing of consumer financial services (...)",<sup>107</sup> which is a source of the European law on the protection of the economic interests of consumers of financial services, and
- **Directive 2007/64/EC** "on payment services in the internal market",<sup>108</sup> which is a source of the same above branch of European financial law.<sup>109</sup>

### 2.3 The secondary bases of the EBA's scope of action

The EBA's scope of action has two secondary bases. Specifically:

(a) Firstly, its scope of action is expanded by way of **article 1, para. 3**, according to which, the EBA is entitled to act:

- in the field of activities of financial institutions, payment institutions and electronic money institutions,<sup>110</sup>
- in relation to issues not directly covered in the legislative acts referred to above (2.2.2), (including, indicatively, matters of corporate governance, auditing and financial reporting), provided that such actions by the Authority are necessary to ensure the effective and consistent application of those legislative acts.

(b) Finally, the EBA must act within the scope of any further legally binding EU act which confers tasks on it.<sup>111</sup>

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<sup>105</sup> Although the title of the Directive may lead to the conclusion that this Directive applies only to "electronic money institutions", credit institutions also come under the category of electronic money issuers, that are allowed to conduct the activity of issuing electronic money (*ibid*, article 1, para. 1 (a)).

<sup>106</sup> OJ L 309, 25.11.2005, p. 15-36.

<sup>107</sup> OJ L 271, 9.10.2002, p. 16-24.

<sup>108</sup> OJ L 319, 5.12.2007, p. 1-36.

<sup>109</sup> **Regulation 1093/2010**, article 1, para. 2.

<sup>110</sup> Both "payment institutions" and "electronic money institutions" are categories of regulated firms according to European financial law. For their definition, see article 4 (4) of Directive 2007/64/EC, and article 2 (1) of Directive 2009/110/EC, respectively.

<sup>111</sup> **Regulation 1093/2010**, article 1, para. 2, *in finem*.

### 3. Tasks and powers

#### 3.1 Overall examination

##### 3.1.1 *The structure of Chapter II of the Regulation*

To fulfil its objective as defined in **para. 5 article 1** of the Regulation, according to the above (A 3.1), specific tasks and powers have been conferred to the EBA, defined in Chapter II of the Regulation (**articles 8-39**). This Chapter has the following structure:

(a) **Article 8, para. 1**, contains an exhaustive (without prejudice to article 9) list of the tasks conferred to the EBA (see 3.1.2, below), while **para. 2 of the same article** an exhaustive list of all regulatory and other powers conferred to it in order to fulfil these tasks (see 3.1.3).

(b) **Article 9** specifically refers to the EBA's task in relation to "consumer protection and financial services", and its relevant powers.

*Paragraph 3.3, below, discusses the content and implementation means of this task.*

(c) Finally, **articles 10-39** offer a qualified description of the article 8 tasks (note that the order of these articles does not follow the listing of tasks in para. 1, article 8).

##### 3.1.2 *EBA's tasks according to article 8, para. 1 of the Regulation*

###### 3.1.2.1 *Introductory Remarks*

With the exception of the task in relation to consumer protection and financial services (article 9), all other tasks of the EBA are enumerated in article 8 (para. 1). The Regulation states that in the exercise of its tasks the EBA pays particular attention to any systemic risk<sup>112</sup> posed by financial institutions, the failure of which may impair the operation of the financial system or the real economy.<sup>113</sup> It is obvious that this provision was adopted particularly with a view to systemically important financial institutions.<sup>114</sup>

*On this note that the CEBS had a much more limited spectrum of tasks, since they (only) concerned:*

- *advising the European Commission, with regard to the adoption of implementing measures, in the context of the regulatory comitology procedure according to the Lamfalussy process;*
- *contributing to the consistent application of Community legislation and the convergence of national supervisory practices,*
- *promoting the cooperation between competent national supervisory authorities, and*
- *monitoring and assessing the development of banking systems and international supervisory trends.*

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<sup>112</sup> On this, see points 15 and 16 of the Regulation's recitals.

<sup>113</sup> *Ibid*, article 1, para. 5, subparagraph c.

<sup>114</sup> *Ibid*, point 15 of the recitals, sentence b. Regarding the demarcation of the definition of systemically important financial institutions (known as "SIFIs"), see **Huertas and Lastra (2011)**, p. 255-258.

### 3.1.2.2 An overview of the tasks

According to article 8, para. 1, of the Regulation, the EBA has the following twelve (12) tasks:

(1) Contribution to the "establishment of high-quality common regulatory and supervisory standards and practices".

*Paragraph 3.2, below, examines the content and implementation means of this task, specifically.*

(2) Contribution to the "consistent application of legally binding Union acts". By way of indication, the implementation means of this task are:

- ensuring consistent, efficient and effective application of the legislative acts referred to in article 1, para. 2 of the Regulation, according to the provisions of **article 17** of the Regulation and without prejudice to the powers of the European Commission pursuant to **article 258 of the TFEU** (former article 226 of the TEC) for ensuring compliance of member states with Union law;<sup>115</sup>
- taking action in emergency situations, namely in case of adverse developments, which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the financial system, according to the provisions of **article 18 of the Regulation**;
- assisting the settlement of disagreements between competent authorities, according to the provisions of **articles 19 and 20**;<sup>116</sup>
- ensuring a coherent functioning of colleges of supervisors, according to the provisions of **article 21**;
- contributing to the creation of a "common supervisory culture" among competent authorities, according to the provisions of **article 29**;
- preventing financial institutions from resorting to "supervisory arbitrage", choosing to be established in the member state with the relatively most favourable micro-prudential supervisory regime, and
- ensuring the most efficient and consistent micro-prudential supervision of financial institutions by the competent authorities.

(3) Stimulation and facilitation of the delegation of tasks and responsibilities among competent authorities, according to **article 28** of the Regulation.

(4) Close cooperation with the ESRB, according to the provisions of **article 36** of the Regulation (and para. A 2.3, above), in particular:

- by providing the ESRB with the necessary information for the achievement of its tasks, and
- by ensuring a proper follow up to the warnings and recommendations of the ESRB.

(5) Organisation and conduct of peer reviews ("vergleichende Analysen" in German) of competent authorities, according to the provisions of **article 30** of the

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<sup>115</sup> *Ibid*, article 1, para. 4. Regarding the provisions of the above article of the TFEU, see **Borchardt (2010a)**.

<sup>116</sup> The cases where the mechanism for settling disagreements between competent national authorities can be applied were defined, by means of **Directive 2010/78/EU**, in the legislative acts amended by that Directive, that come under the Authorities' scope of action.

Regulation. In order to strengthen the cohesion of supervisory results, in performing this task, the EBA:

- has the power to issue guidelines and recommendations (on this, see 3.2.3 below), and
- must create best practices.

(6) Monitoring and assessment of market developments in the area of its competence, including where appropriate trends in credit, in particular, to households and SMEs, according to the provisions of **article 32** of the Regulation.

*On this, note that the provisions of para. 2 of this article constitute the basis for the organisation and coordination of Europe-wide “stress tests”.*<sup>117</sup>

(7) Undertaking economic analyses of markets to inform the discharge of its functions.

(8) Fostering depositor and investor protection, by contributing to strengthening the European system of deposit guarantee schemes, according to the provisions of **article 26** of the Regulation.

(9) Contribution to the following:

(i) consistent and coherent functioning of colleges of supervisors, according to the provisions of **article 21**,

(ii) monitoring, assessment and measurement of systemic risk, according to the provisions of **articles 22 through 24**, and

(iii) development and coordination of "recovery and resolution plans",<sup>118</sup>

- providing a high level of protection to depositors and investors throughout the Union,
- developing methods for the resolution of failing financial institutions, and
- assessing the need for appropriate financing instruments, according to the provisions of **articles 25 and 26**.<sup>119</sup>

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<sup>117</sup> The EBA has already planned the first stress test which was completed in July 2011. The CEBS had also conducted stress tests in 2009 and 2010.

<sup>118</sup> The term “resolution” (“Abwicklung” in German, “résolution des défaillances” in French), which does not appear (yet) in any Union legislative act that constitutes a source of European financial law, is used to include all the measures for addressing the problems arising from the exposure of systemically important financial institutions to insolvency, without initiating bankruptcy proceedings (in order to avoid spillover effects), or resorting to bailout measures by the State budget. Regarding this issue-area, which is still ongoing, and is part of the measures of macro-prudential regulatory intervention for addressing the cross-sectoral dimension of the systemic risk in the financial system, see indicatively **Claessens, Herring and Schoenmaker (2010)**, **Avgouleas, Goodhart and Schoenmaker (2010)**, as well as individual contributions to the collective volume **Lastra (2011, editor)**. Especially on the concept and content of the term “resolution”, see **Huertas and Lastra (2011)**, p. 258-267.

The initiatives that the European Commission has undertaken to date in relation to this issue are described in its Communication of 20 October 2010: “*An EU Framework for Crisis Management in the Financial Sector*” (COM(2010) 579 final), based on which, the Commission is expected to issue, in 2011, a proposal for a legislative act of the European Parliament and of the Council (available at: [http://ec.europa.eu/internal\\_market/bank/docs/crisis-management/framework/com2010\\_579\\_en.pdf](http://ec.europa.eu/internal_market/bank/docs/crisis-management/framework/com2010_579_en.pdf)).

(10) Fulfilment of any other specific tasks set out in this Regulation or in other legislative acts, including, but not limited to:

- **article 31** regarding the EBA's general coordination role between competent authorities, and
- **article 33** regarding the EBA's international relations.

(11) Publication on its website ([www.eba.europa.eu](http://www.eba.europa.eu)) and regular updating of information relating to its field of activities, in particular, within the area of its competence, on registered financial institutions, in order to ensure information is easily accessible by the public.

(12) Taking over, as appropriate, all existing and on-going tasks from CEBS.

### *3.1.3 EBA's powers according to article 8, para. 2 of the Regulation*

Extensive powers have been conferred to the EBA in order to accomplish its objective and the tasks mentioned above. These powers are enumerated in article 8, para. 2, of the Regulation, and from a systematic viewpoint, can be divided into two categories:

- regulatory powers (see 3.1.3.1, below), and
- other powers (see 3.1.3.2, below).

#### *3.1.3.1 Regulatory powers*

The category of the EBA's regulatory powers, with a much wider spectrum than that of the CEBS, includes the following:

(1) Development of draft regulatory technical standards, according to the provisions of **articles 10-14** of the Regulation (see details in B 3.2.2.1, below).

(2) Development of draft implementing technical standards, according to the provisions of **article 15** (see B 3.2.2.2, below).

(3) Issuing of guidelines and recommendations, according to the provisions of **article 16** (see B 3.2.3, below).

(4) Issuing of recommendations to national competent authorities when there is breach of Union law (**article 17, para. 3**).

(5) Taking decisions addressed to national competent authorities in the following two (2) cases:

- when action is needed in emergency situations (**article 18, para. 3**), and
- to settle disagreements between national competent authorities in cross-border situations (**article 19, para. 3**).

(6) Taking decisions addressed to financial institutions in the following three cases:

- in case of breach of Union law (**article 17, para. 6**).
- when action is needed in emergency situations (**article 18, para. 4**), and

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<sup>119</sup> In the author's opinion, **point (i) of article 8** should not be making reference to article 26 (which concerns the European system of deposit guarantee schemes) but rather to article 27 (which concerns the relevant European system of bank resolution and funding arrangements).

- to settle disagreements between national competent authorities in cross-border situations (**article 19, para. 4**).<sup>120</sup>

The EBA exercises this power without prejudice to the relevant powers of the European Commission, in accordance with **article 258 of the TFEU** for ensuring compliance of member states to EU law, and provided that a competent authority has not complied with the Commission's official opinion (in the former case) or with a decision of the EBA (in the other two).

*It is evident that in this context the EBA obtains the very important power of substituting itself into the work of national competent authorities. This is possibly the singly most important innovation that the new regulatory framework is introducing.*

(7) Provision of opinions to the European Parliament, the Council or the European Commission, in accordance with the provisions of **article 34** (see details in B 3.2.4, below).

### 3.1.3.2 Other powers

The EBA's other three (3) powers are:

- the collection of the necessary information concerning financial institutions, according to **article 35** of the Regulation;
- the development of common methodologies for assessing the impact that the characteristics and the procedures for the supply of financial services have on the financial situation of financial institutions and on consumer protection; and
- the provision of a centrally accessible database of registered financial institutions in the area of its competence where specified in the legislative acts of its scope of action.<sup>121</sup>

## 3.2 In particular: contribution to the establishment of high-quality common regulatory and supervisory standards and practices.

### 3.2.1 Overall examination

Contribution to the establishment of high quality common regulatory and supervisory standards and practices, appears first on the list in **article 8** of the Regulation, and is, possibly, the most important task of EBA. By way of indication, article 8 stipulates the following implementation means:

- development of draft regulatory and implementing technical standards (see 3.2.2, below),
- issuing of guidelines and recommendations (see 3.2.3), and
- provision of opinions to the Union institutions (see 3.2.4).<sup>122</sup>

<sup>120</sup> The EBA decisions (instances (e) and (f)), which can be contested before the Court of Justice of the European Union (on this see B 4.4, below), are subject to the provisions of **article 39** ("decision-making procedures") of the Regulation.

<sup>121</sup> This power is the implementation means of the eleventh abovementioned task.

<sup>122</sup> Para. 1 of article 8 of the Regulation wrongly, in the author's opinion (and so translated in all languages) mentions that the EBA provides opinions to "the" Union institutions, given that according to article 34, opinions will be provided to only some of those.

### 3.2.2 *The power to develop draft regulatory and implementing technical standards*

#### 3.2.2.1 *Regulatory technical standards*

##### *(a) Introductory Remarks*

According to the above, one of the powers of the EBA is the development of draft regulatory technical standards, according to the provisions of **article 10-14** of the Regulation. The EBA has to define the content of the drafts on the basis of the restrictions set in **article 290 of the TFEU** (according to A 3.4.3.2 (a), above), as further qualified in **article 10** of the Regulation.

Regulatory standards are used as a means to creating a “single rulebook” (“*einheitliches Regelwerk*” in German, “*recueil réglementaire unique*” in French) for European financial law, whose sources come within the scope of action of EBA and the other Authorities.<sup>123</sup> **Point 22** of the Regulation’s **recitals** states the following in this respect: “*There is a need to introduce an effective instrument to establish harmonised regulatory technical standards in financial services to ensure, also through a single rulebook, a level playing field and adequate protection of depositors, investors and consumers across the EU. As a body with highly specialised expertise, it is efficient and appropriate to entrust the Authority, in areas defined by EU law, with the elaboration of draft regulatory technical standards, which do not involve policy choices*”.

##### *(b) The Regulation's provisions*

The Regulation's very thorough provisions on this issue-area can be summarised as follows:

**(ba)** Firstly, as mentioned above (in A 3.4.3.2(a)), the Commission issuing regulatory technical standards by means of an EBA draft, requires that the legislative acts falling within their scope of action provide for the relevant delegation of power (according to para. 2, article 1 of the Regulation).<sup>124</sup> Moreover, the content of these standards, and of the EBA drafts as well, is limited by these legislative acts.<sup>125</sup>

The areas where the Commission has the power to issue regulatory technical standards by means of delegated acts (and consequently where the EBA has the power to develop drafts of these standards, so as to ensure consistent harmonisation of these areas), and the objectives, content and scope of the delegation, were defined in the following articles of **Directive 2010/78/EU**:

- **article 2** in relation to **Directive 2002/87/EC**,
- **article 8** in relation to **Directive 2005/60/EC**,
- **article 9** in relation to **Directive 2006/48/EC**, and
- **article 10** in relation to **Directive 2006/49/EC**.

*Consequently, in relation to the other five (5) legislative acts falling within its scope of action (on this see B 2.2.2, above), the EBA does not have (at least yet) the power to develop draft regulatory (and/or implementing) technical standards.*

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<sup>123</sup> This term has been used in bibliography with a different content. However, the common point of all approaches is the maximum possible harmonisation of European financial law. On this, see **Moloney (2010)**, p. 1355-1361.

<sup>124</sup> **Regulation 2010/1093**, article 10, para. 1, subparagraph a, sentence a.

<sup>125</sup> *Ibid*, article 10, para. 1, subparagraph b (on this see article 290 of the TFEU, para. 1, subparagraph b, sentence a).

(b) The Regulation defines that the regulatory technical standards are technical and do not imply strategic decisions or policy choices.<sup>126</sup> This provision qualifies the abovementioned (in A 3.4.3.2(a)) provision of **article 290 of the TFEU**, according to which delegated acts supplement or amend certain "non-essential elements" of a legislative act.

(c) From a procedural viewpoint, draft regulatory technical standards are submitted by the EBA to the Commission for endorsement<sup>127</sup> (within a deadline set in the above mentioned legislative acts), which must immediately forward them to the European Parliament and the Council.<sup>128</sup> The detailed provisions regarding the endorsement of these standards, point out, primarily, that the Commission:

- will decide whether to endorse a draft regulatory technical standard of the EBA, within 3 months of receipt thereof,<sup>129</sup> and
- may not change the content of a draft without prior coordination with the EBA.<sup>130</sup>

(d) The regulatory technical standards will be adopted by means of Regulations or Decisions of the Commission (namely not Directives), they will be published in the Official Journal and enter into force on the date stated in the above legislative acts.<sup>131</sup> Therefore, as already mentioned, regulatory technical standards are not legal acts of the EBA, but of the Commission, in accordance with article 290 of the TFEU.

(e) If the EBA has not submitted a draft regulatory technical standard within the time limit set out in the abovementioned legislative acts, the Commission is entitled to set a new time limit.<sup>132</sup> If the EBA does not submit a draft within this as well, the Commission may, exceptionally, adopt a regulatory technical standard by means of a delegated act without a draft from the EBA.<sup>133</sup>

(f) As already mentioned, **article 290 of the TFEU** stipulates that the legislative acts according to which the Commission is delegated with the power to issue delegated acts, must clearly define, among others, the duration of the delegation and the conditions to which this delegation will be subject. In the Regulation, these issues were regulated collectively as follows:

- **article 11 (para. 1 sentence a)** stipulates that the power to adopt regulatory technical standards will be conferred on the Commission for a period of four (4) years;
- **article 12** lays down the terms according to which the European Parliament or the Council may revoke this power; and
- **article 13** regulates the power of the European Parliament or the Council to object to a specific regulatory technical standard.

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<sup>126</sup> **Regulation 1093/2010**, article 10, para. 1, subparagraph b.

<sup>127</sup> *Ibid*, article 9, para. 1, subparagraph a, sentence b.

<sup>128</sup> *Ibid*, article 10, para. 1, subparagraph d.

<sup>129</sup> *Ibid*, article 10, para. 1, subparagraph e.

<sup>130</sup> *Ibid*, article 10, para. 1, subparagraph h.

<sup>131</sup> *Ibid*, article 10, para. 4.

<sup>132</sup> *Ibid*, article 10, para. 2.

<sup>133</sup> *Ibid*, article 10, para. 3, subparagraph a. This provision was obviously established as a "safety net" and one could reasonably consider that it will not be activated.

### 3.2.2.2 *Implementing technical standards*

(a) As already mentioned (in A 3.4), apart from the draft regulatory technical standards, the EBA may develop draft implementing technical standards, also endorsed by the Commission by means of implementing acts pursuant to **article 291 of the TFEU**, in the areas specifically set out in the legislative acts falling into its scope of action (in accordance with article 1, para. 2, of the Regulation).<sup>134</sup> Implementing technical standards:

- just like regulatory ones, are technical in nature and do not imply strategic decisions or policy choices, while
- their content is to determine the conditions of application of both the legislative acts mentioned above, as well as of delegated acts.<sup>135</sup>

The areas where the Commission has the power to issue implementing technical standards by means of implementing acts and, consequently, where the EBA has the power to develop drafts of these standards, are defined in the above mentioned **articles 2 and 8-10 of Directive 2010/78/EU**.

(b) As in the case of regulatory technical standards, the EBA will submit for endorsement its draft implementing technical standards to the Commission,<sup>136</sup> which will then immediately forward them to the European Parliament and the Council.<sup>137</sup> Likewise, the implementing technical standards will be adopted by means of Regulations or Decisions of the Commission, they will be published in the Official Journal, and enter into force on the date stated in the above legislative acts.<sup>138</sup> The Regulation contains further detailed provisions with regard to the endorsement procedure of these standards.<sup>139</sup>

### 3.2.3 *The power to issue guidelines and recommendations*

According to article 16 of the Regulation, the EBA has the power to issue guidelines and recommendations in areas not governed by regulatory or implementing technical standards.<sup>140</sup> The objective of those legal acts are:

- to establish consistent, efficient and effective supervisory practices within the ESFS, and
- to ensure the common, uniform and consistent application of Union law.<sup>141</sup>

Their addressees are either competent authorities or financial institutions.<sup>142</sup>

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<sup>134</sup> *Ibid*, article 15, para. 1, subparagraph a, sentence a.

<sup>135</sup> *Ibid*, article 15, para. 1, subparagraph a, sentence b.

<sup>136</sup> *Ibid*, article 15, para. 1, subparagraph a, sentence c.

<sup>137</sup> *Ibid*, article 15, para. 1, subparagraph c.

<sup>138</sup> *Ibid*, article 15, para. 4.

<sup>139</sup> *Ibid*, article 15, para. 1, subparagraphs b and d-g, and para. 2-3.

<sup>140</sup> The CEBS also had the power to issue standards **CEBS Rules of Procedure (2008)**, para. 4.3); in practice, however, it only issued recommendations.

<sup>141</sup> **Regulation 1093/2010**, article 16, para. 1.

<sup>142</sup> *Ibid*. On the contrary, in the context of the functioning of CEBS, recommendations were only addressed to financial institutions, and not to competent authorities.

These acts, forming part of the European "soft" law,<sup>143</sup> do not, initially, have a legally binding character.<sup>144</sup> Competent authorities and financial institutions must, however, make every effort to comply with the provisions of those guidelines and recommendations.<sup>145</sup>

In this context, the following regulations were established, which are stricter than the ones applicable to the respective acts of the CEBS, which were also based, after the amendment of its Rules of Procedure in 2008, on the 'comply or explain' principle.<sup>146</sup> Specifically:

(a) Within two (2) months of the issuance of a guideline or recommendation, each competent authority must confirm whether it intends to comply with that guideline or recommendation.<sup>147</sup>

(b) In the event that a competent authority does not comply or does not intend to comply, it has to inform the EBA, stating its reasons.<sup>148</sup> In that case, the EBA:

- has to publish the fact (giving the competent authority early notice of this), and
- may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with a particular guideline or recommendation.<sup>149</sup>

(c) In the report submitted annually to the Board of Supervisors according to **para. 5 of article 43** of the Regulation, the EBA must inform the European Parliament, the Council and the Commission of the guidelines and recommendations that have been issued:

- stating which competent authority has not complied with them, and
- outlining how it intends to ensure that the competent authority concerned follow its recommendations and guidelines in the future.<sup>150</sup>

(d) Finally, if required by that guideline or recommendation, financial institutions must also report, in a clear and detailed way, whether they comply with that guideline or recommendation.<sup>151</sup>

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<sup>143</sup> On the definition of the European soft law, *see* **Chalmers, Hadjiemmanuil, Monti, and Tomkins (2006)**, p. 137-140, and **Craig and de Búrca (2008)**, p. 86-87. On the definition of soft law in international law in general, *see* indicatively **Boyle and Chinkin (2007)**, p. 211-229.

<sup>144</sup> On this matter, *see* the **Grimaldi case of the CJEC (C-322/88, ECR (1989), p. 4407 et seq.**, especially para. 18) regarding the degree to which recommendations of European institutions are binding for national courts, which can apply *pro rata* to all acts of European soft law, and the report of the European Parliament of 2007 "*on institutional and legal implications of the use of 'soft law' instruments*" (A6-0259/2007, final, 28.6.2007).

<sup>145</sup> **Regulation 1093/2010**, article 16, para. 3, subparagraph a.

<sup>146</sup> **CEBS Rules of Procedure (2008)**, para. 5.7.

<sup>147</sup> **Regulation 1093/2010**, article 16, para. 3, subparagraph b, sentence a.

<sup>148</sup> *Ibid*, article 16, para. 3, subparagraph b, sentence b.

<sup>149</sup> *Ibid*, article 16, para. 3, subparagraph c.

<sup>150</sup> *Ibid*, article 16, para. 4.

<sup>151</sup> *Ibid*, article 16, para. 3, subparagraph d.

### 3.2.4 The power to provide opinions to Union institutions

The EBA's power to issue opinions is defined in **article 34** of the Regulation, including one general and one specific provision:

(a) First of all, the EBA may provide opinions to the European Parliament, the Council and the Commission on all issues related to its area of competence. The EBA has to provide opinions upon a request from a Union institution, or on its own initiative.<sup>152</sup> In the context, the recitals of the Regulation refer to the EBA as an "*independent advisory body to the European Parliament, the Council, and the Commission*".<sup>153</sup>

(b) A special provision was established in the area of prudential assessments of mergers and acquisitions of credit institutions that:

- fall within the scope of Directive 2006/48/EC, as amended by Directive 2007/44/EC of the European Parliament and of the Council "*... as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector*",<sup>154</sup> and
- according to that Directive, require consultation between competent authorities from two or more member states.

In this case, the EBA may, on application of one of the competent authorities concerned, issue and publish an opinion,<sup>155</sup> having the power to collect all necessary information, according to **article 35** of the Regulation.<sup>156</sup>

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<sup>152</sup> *Ibid*, article 34, para. 1.

<sup>153</sup> *Ibid*, point 45 of the recitals.

<sup>154</sup> OJ L 247, 21.9.2007, p. 1-16.

<sup>155</sup> **Regulation 1093/2010**, article 34, para. 2, sentence a. The opinion does not cover cases relating to the criteria in Article 19a, para. 1, point e of Directive 2006/48/EC.

<sup>156</sup> *Ibid*, article 34, para. 2, sentence c.

<b>TABLE 2</b>				
<b>The procedure for issuing legal acts constituting sources of European financial law after the start of operation of the ESFS(*)</b>				
	<b>Level 1 (*): legally binding acts</b>	<b>Level 2 (*): legally binding acts</b>		<b>Level 3 (*): non-legally binding acts (soft law)</b>
<b>Type of legal act</b>	legislative acts falling within the Authorities' scope of action (TFEU, article 289)	regulatory technical standards by means of delegated acts (TFEU, article 290)	implementing technical standards by means of implementing acts (TFEU, article 291)	guidelines and recommendations (Regulations establishing the Authorities)
<b>Body issuing the legal act</b>	European Parliament and Council (with the ordinary legislative procedure)	European Commission	European Commission	<b>EBA/ESMA/EIOPA</b> (according to the scope of action)
<b>Assistance to the issuing of a legal act</b>	EBC/ESC/EIOPC (**) (as advisory committees)  <b>EBA/ESMA/EIOPA</b> (as opinion-giving bodies)	<b>EBA/ESMA/EIOPA</b> (elaborating draft technical standards)	<b>EBA/ESMA/EIOPA</b> (elaborating draft technical standards)  EBC/ESC/EIOPC (as regulatory committees) (***)	
<p>(*) Reference to these "three levels" depicts the wording that was established (without any explicit legal basis) in the Lamfalussy Report</p> <p>(**) European Banking Committee, European Securities Committee, European Insurance and Occupational Pensions Committee</p> <p>(***) According to the comitology procedure (Regulation 182/2011)</p>				

### 3.3 Specifically: contribution to the protection of financial services consumers

According to **article 9** of the Regulation, EBA's tasks also include "*promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market*". The implementation means of this task include, indicatively:

- collecting, analysing and reporting on consumer trends;
- reviewing and coordinating financial literacy and education initiatives by the competent authorities;
- developing training standards for the financial system, and
- contributing to the development of common disclosure rules.<sup>157</sup>

In this context, the EBA has the following obligations and powers:<sup>158</sup>

(a) It can monitor new and existing financial activities and may issue guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practice.

(b) It may also issue warnings in the event that a financial activity poses a serious threat to the objectives laid down in **article 1 (para. 5)** of the Regulation (see A 3.1, above).

(c) The EBA has to establish, as an integral part thereof, a "Committee on financial innovation", bringing together all relevant competent national supervisory authorities. The Committee's work will include:

- achieving a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities and products (e.g. consumer or mortgage credit banking products), and
- providing advice for the EBA to present to the European Parliament, the Council and the Commission.

(d) The EBA may temporarily prohibit or restrict (by means of "injunction" procedures) 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 article 1 (para. 2) of the Regulation, or
- if so required, in the case of an emergency situation in accordance with and under the conditions laid down in **article 18**.

It may also assess the need to prohibit or restrict certain types of financial activity and, where there is such a need, inform the European Commission in order to facilitate the adoption of any such prohibition or restriction.

*Consequently, the EBA does not only address the issue-area of protecting consumers' financial interests, but also that of promoting their right to training (namely two of the three axes of EU policy in the area of protecting consumers, according to article 169 of the TFEU (article 153 of the TEC)).*

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<sup>157</sup> **Regulation 1093/2010**, article 9, para. 1.

<sup>158</sup> *Ibid*, article 9, para. 2-5, respectively.

## 4. Integration in the European Union's institutional framework

### 4.1 Introductory Remarks

According to the above, the EBA has been endowed with a significant range of tasks and has a significant role to play, along with ESMA and EIOPA, notably in terms of creating an important subset of the European financial law and implementing its provisions in member states' internal law. In view of the above, it was necessary to lay down some provisions ensuring the fullest possible integration in the Union's institutional framework. Such provisions concern:

- the various aspects of independence of the EBA, its bodies and their members (*see* 4.2, below),
- the EBA's obligation to accountability *vis-a-vis* the European institutional and other bodies (*see* 4.3), and
- the judicial review of the EBA's decisions (*see* 4.4).

It should also be noted that the EBA is subject to the provisions of primary and secondary European regulatory framework governing:

- the combating of fraud, corruption and any other illegal activity, according to the provisions of **article 66** of the Regulation (application to the EBA of the provisions of **Regulation (EC) no. 1073/1999** of the European Parliament and of the Council "*concerning investigations conducted by the European Anti-Fraud Office (OLAF)*"<sup>159</sup>),
- privileges and immunities, according to the provisions of **article 67** (application to the EBA and its staff, of **Protocol (no. 7)** "*on the privileges and immunities of the European Union*" annexed to the TEU and the TFEU),
- the processing of personal data, according to the provisions of **article 71** (application of **Directive 95/46/EC** "*on the protection of individuals with regard to the processing of personal data (...)*"<sup>160</sup> and **Regulation (EC) 45/2001** "*on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies (...)*",<sup>161</sup> both being acts of the European Parliament and of the Council), and
- the access to documents, according to the provisions of **article 72** (application of **Regulation (EC) 1049/2001** of the European Parliament and of the Council "*regarding public access to European Parliament, Council and Commission documents*"<sup>162</sup>), with a view to ensuring transparency of operation.

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<sup>159</sup> OJ L 136, 31.5.1999, p. 1-7. According to **para. 2 article 66**, the EBA must also accede to the interinstitutional agreement "*concerning internal investigations by OLAF*" (OJ L 136, 31.5.1999, p. 15-19).

<sup>160</sup> OJ L 281, 23.11.1995, p. 31-50.

<sup>161</sup> OJ L 8, 12.1.2001, p. 1-22.

<sup>162</sup> OJ L 145, 31.5.2001, p. 43-48.

## 4.2 Independence of the EBA<sup>163</sup>

### 4.2.1 Institutional independence

(a) The institutional independence of the EBA is, principally, established in the general clause of **article 1, para. 5 (in finem)** of the Regulation, according to which: "*When carrying out its tasks, the Authority (EBA) shall act independently and objectively and in the interest of the Union alone*".

(b) Chapter III of the Regulation on the organs of the EBA, contains more specific provisions. Specifically, **article 42** of the Regulation lays down the institutional independence of the Chairperson and of the Board of Supervisors, as follows: "*When carrying out the tasks conferred upon it by this Regulation, the Chairperson and the voting members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body. Neither member states, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of Supervisors in the performance of their tasks*".<sup>164</sup>

The Regulation includes similar provisions on the institutional independence of:

- the members of the Management Board (**article 46**),
- the EBA Chairperson (**article 49**),
- the EBA Executive Director (**article 52**), and
- the members of the Board of Appeal (**article 59**, para. 1 and 6).

Among others, consolidating the institutional independence of the EBA is an important element of its overall independence, notably in the context of performing its task of organising and conducting "peer reviews" of competent authorities (**article 30**), and of its general coordination role between competent authorities (**article 31**) (on this see B 3.1.2.2, above).<sup>165</sup>

### 4.2.2 Financial independence

The financial independence of the EBA is ensured by the provisions of **article 62 (para. 1)** of the Regulation.<sup>166</sup> This article stipulates that the revenues of the autonomous budget of the EBA which, for this purpose, is considered (and so are the other two Authorities) as a "European body" in accordance with Article 185 of **Council Regulation (EC, Euratom) No 1605/2002 "on the Financial Regulation applicable to the general budget of the European Communities"**,<sup>167</sup> consist of the following:

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<sup>163</sup> The classification of the various aspects of independence is following closely that firstly adopted (and now widely accepted) by **Louis (1989)**, p. 25-28, in relation to the ECB.

<sup>164</sup> The content of this provision is particularly similar to that of **article 130 of the TFEU** on the institutional independence of the ECB, the national central banks-members of the ESCB, and the members of the decision-making organs in those bodies. Regarding the content of the provisions of this article (as in force according to article 108 of the TEC which has not been amended), see indicatively **Häde (1999)**, and **Lois (2007)**, p. 173-175.

<sup>165</sup> On this, see **Louis (2010)**, p. 155.

<sup>166</sup> On this, see also **point 59** of the Regulation's recitals.

<sup>167</sup> OJ L 248, 16.9.2002, p. 1-48.

- obligatory contributions from the national public authorities competent for the micro-supervision of financial institutions;
- a subsidy from the Union, entered in the General Budget (Commission Section),<sup>168</sup> and
- any fees paid to the Authority in the cases specified in the relevant instruments of Union law.

#### *4.2.3 Personal independence*

The Regulation contains special provisions regarding the personal independence of the EBA's Chairperson and Executive Director. Specifically:

(a) According to **article 48 (para. 5)**, the Chairperson may be removed from office only by the European Parliament, following a decision of the Board of Supervisors.

(b) Besides, according to **article 51 (para. 5)**, the Executive Director may be removed from office only upon a decision of the Board of Supervisors.

According to the author's opinion, however, in both cases this personal independence is limited, as no special criteria are defined for the European Parliament and Board of Supervisors, respectively, to take the relevant decisions. The opposite applies to members of the Board of Appeal, that may be removed from office upon decision of the Management Board, only if found guilty of serious misconduct.<sup>169</sup>

#### *4.2.4 Operational independence*

According to the above (in B 3), regarding the powers conferred to the EBA to perform its tasks, one can reasonably claim that its operational independence is granted.

### **4.3 Accountability of the EBA**

According to **article 3** of the Regulation, the EBA is accountable to the European Parliament and the Council (and so are the other two Authorities and the ESRB). There is no further qualification of this accountability obligation as to the implementation means, save for **article 43 (para. 5)** which states that the Board of Supervisors has to transmit the annual report of the EBA to the above institutions, as well as the Commission, the Court of Auditors and the European Economic and Social Committee by 15 June each year.

### **4.4 Judicial review of the decisions of the EBA**

The EBA's decisions (according to B 3.1.3.1, above) and its failure to take decisions, when obliged to do so, are subject to judicial review, according to **article 61** of the Regulation. In particular:

(a) Proceedings may be brought before the Court of Justice of the European Union, according to **article 263 of the TFEU**, contesting a decision taken by the Board

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<sup>168</sup> According to the provisions of **article 8.3** of its Rules of Procedure, the CEBS was entitled to accept contributions or financing from third parties, including Community institutions, however, only for specific purposes.

<sup>169</sup> **Regulation 1093/2010**, article 58, para. 5.

of Appeal or, in cases where there is no right of appeal before the Board of Appeal, a decision taken by the EBA (and the other Authorities as well).<sup>170</sup> Proceedings against decisions of the EBA may be instituted by member states, the Union institutions and any natural or legal person.<sup>171</sup>

*On this, it must be pointed out that according to **article 60, para. 1**, of the Regulation, and irrespective of instituting any court proceeding, any natural or legal person, including competent authorities, may appeal against a decision of the EBA, which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person. The Board of Appeal shall be competent to decide upon this appeal.*<sup>172</sup>

**(b)** In the event that the EBA has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with **article 265 of the TFEU**.<sup>173</sup>

In both cases, the EBA is required to take the necessary measures to comply with the judgement of the Court of Justice of the European Union.<sup>174</sup>

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<sup>170</sup> *Ibid*, article 61, para. 1.

<sup>171</sup> *Ibid*, article 61, para. 2. For an analysis of the provisions of article 263 TFEU, see, indicatively, **Borchardt (2010b)**.

<sup>172</sup> *Ibid*, article 60, para 2, subparagraph b.

<sup>173</sup> *Ibid*, article 61, para. 3. For an analysis of the provisions of article 265 TFEU, see indicatively **Borchardt (2010b)**.

<sup>174</sup> *Ibid*, article 61, para. 4.

## C. Concluding remarks

Further to the above, the following could offer a synopsis of the key changes brought about by the establishment of the ESFS in 2010 and its operation since January 2011, pursuant to the proposals of the de Larosière Report:

(a) The establishment of the Lamfalussy Committees, in early 2000's, constituted a *novum* in the context of the procedure for generating the rules of European financial law, that seek, by means of the regulatory framework, to achieve financial integration in the European Union. These Committees also significantly contributed to the convergence of supervisory standards and practices in the financial system, and to the promotion of cooperation among competent national supervisors. The outbreak, however, of the recent financial crisis revealed the limits of their capabilities.

(b) The EBA, being the successor of the CEBS and a component of the ESFS, has a clearly more important role in ensuring the stability of the European banking system than that of its "predecessor", the CEBS, extending beyond the area of micro-prudential supervision, especially during crisis situations. It has been conferred with extensive tasks and broader powers. Meanwhile, the EBA (contrary to the CEBS) has also been endowed with tasks and powers on the field of protecting financial services consumers. Similar provisions apply to the other two Authorities.

The critical requirement for the immediate future is the degree of effectiveness both in implementing the tasks and powers of the EBA (and the other Authorities), and in the cooperation between all the ESFS components (including national competent authorities). This remark is mostly made in view of the fact that:

- the EBA will exercise the regulatory powers conferred to it within an environment where many (and extremely important) legislative acts falling within its scope of action, are being reviewed,
- cooperation between supervisory authorities has not proved sufficient to resolve so complex problems, as the ones revealed during the recent failure of the international investment bank, Lehman Brothers.<sup>175</sup>

(c) Although significant regulatory powers have been conferred to the EBA (and the other Authorities), the main *corpus* of the European banking law and other branches of European financial law still stems (based on the TFEU) from legislative acts of the European Parliament and the Council, and from the delegated acts (the *novum* of the TFEU with regard to the Union's legal acts) and implementing acts of the Commission in the form of regulatory or implementing technical standards, respectively, that are elaborated with significant contribution from the EBA (and the other Authorities) (through the development of the relevant drafts). Considering, also, the fact that the current micro-prudential supervision of financial institutions is still exercised by national competent authorities, even after the establishment of the ESFS there is still asymmetry between:

- creating the regulatory framework governing the content of micro-prudential supervision ("financial regulation"), performed, primarily, at Union level, and
- exercising micro-prudential supervision ("financial supervision"), performed at national level.<sup>176</sup>

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<sup>175</sup> On this incident, see, indicatively, **Claessens, Herring and Schoenmaker (2010)**, p. 42-46.

<sup>176</sup> Regarding the situation before the establishment of the ESFS, **Lastra (2006)**, p. 298, with reference to Thygesen) characteristically notes: "*There is an inevitable tension in the current*

To be sure, operation of the ESFS seeks to strengthen both Union dimensions, primarily the first dimension by attempting to create a "single rulebook" (by means of regulatory technical standards), but essentially the second dimension as well, with the EBA (and the other Authorities) exercising the tasks and powers conferred to them.

(d) The tasks and powers of the ECB in the area of the micro-prudential supervision of financial services providers operating in the EU, are still defined on the basis of the provisions of **article 127, para. 5, of the TFEU**. Conversely, it has a direct involvement in the functioning of the ESRB, which is now a European body for macro-prudential oversight of the European financial system.

(e) Finally, the EBA has not become a, literally, European supervisory authority of the banking system in the European Union, in accordance with the relevant proposal of the de Larosière Report which was politically adopted. Note, however, that the de Larosière Report has submitted a second proposal, for medium-term implementation, for investigating the possibility of transformation of the three Authorities into a system which would rely on only two European Authorities, mainly according to the "functional approach" model of the institutional structure of the financial system's micro-prudential supervision.<sup>177</sup>

There was a proposal to conduct the investigation by reviewing the way the ESFS operates no later than three (3) years after its start of operation,<sup>178</sup> which also noted the difficulties in the implementation of such an endeavour.<sup>179</sup> Nevertheless, this is not included in the current political priorities of the Union's institutions.

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*EU structure: a national mandate in prudential supervision, combined with a single European currency and a European mandate in the completion of the single market in financial services".*

<sup>177</sup> Regarding this approach and its alternatives, i.e. the "sectoral approach" and "full integration approach" of the financial system's supervisory authorities), see **Group of Thirty (2008)**, 49-50.

<sup>178</sup> **De Larosière Report (2009)**, para. 215-216. On this, see **Gortsos (2010)**, p. 135-136.

<sup>179</sup> *Ibid*, para. 218, sentences a and b.

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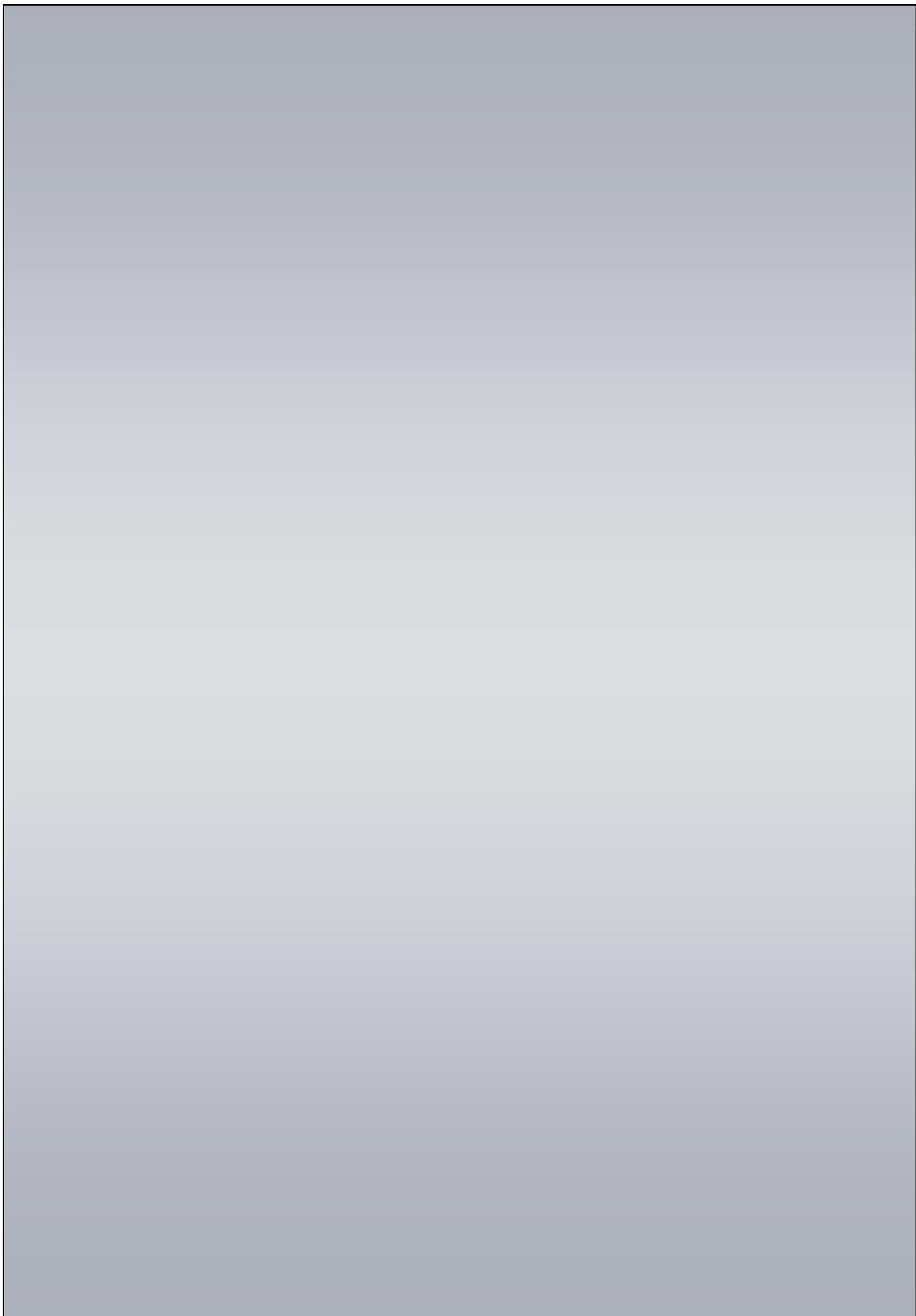
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