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Comments on

- **the Proposal for a Regulation on structural measures improving the resilience of EU credit institutions**
- **the Proposal for a Regulation on reporting and transparency of securities financing transactions (both published 29th Jan 2014)**

The Division Bank and Insurance of the Austrian Federal Economic Chamber, as representative of the entire Austrian banking industry, would like to submit the following position on the above cited proposals of the European Commission:

1. Proposal for a Regulation on structural measures improving the resilience of EU credit institutions

General remarks

We agree with the policy's overall goal of increasing the resilience of the financial sector, and specifically also with the aim to ensure that no bank should be too-big-to-fail. Supervisory tools like a resolution regime that allow the resolution of banks without causing systemic damage contribute to this goal.

But since the beginning of the financial crisis an enormous number of new regulations have already been implemented (e.g. Basel 2.5), are in the process of implementation (e.g. Basel III) or are being prepared (e.g. Basel trading book review). These regulations already meet the major aim of creating a more stable banking sector and have structural components as well, including resolution or the limitation of activities. Prior to the adoption of further fundamental structural changes, legislators and regulators should **better apply a step by step approach:** first implementing the proposals and finalized regulations in the pipeline (without a "Liikanen regulation"), then analyzing the impact and the changes in the market environment driven by these changes and only afterwards analyzing potential further improvements. A parallel process of implementation of new provisions and discussing further amendments does not seem reasonable.

We must not forget that specific business models and banking structures were not a main cause of the crisis. In fact, many of the failed institutions were not universal banks. It has to be said that a one-size fits all structural measure might not be the right answer. As already outlined in the Liikanen report, poor risk management and weak funding policies were at the heart of the crisis. Integrated universal banks are more resilient and can better absorb shocks than specialized entities. These problems have already been addressed by existing or prepared new regulations.

As a consequence, we do not see a necessity for a mandatory change of the European universal banking system. If there were a potential necessity of separation, it should be analyzed by the supervisor on an individual basis.

From our perspective the adequate answer to the underlying problem of proprietary trading would be adequate supervision and an adequate level of loss absorbency. In our view the additional risk charge driven by Basel 2.5 and Basel III of three to four times higher capital charges for trading activities should be sufficient. Banks should be left a room for maneuver for an economically efficient way of capital allocation and diversification. A proper capitalization, strengthening banks diversity and appropriate regulations are the main factors of a stable and well-functioning banking sector and hence should be in the focus of any further improvement.

The definition of trading activities does not give a clear intention of how to separate proprietary trading, which would be forbidden if thresholds are applicable, and certain other trading activities which would be still possible. Such regulation bears the risk of unnecessary legal uncertainty that becomes a disproportionate “cost” factor especially to small and medium sized credit institutions.

Furthermore the intended regulation hands over a variety of main issues to the Member States which would be counterproductive from a “level-playing-field”-perspective.

Specific Comments

Art. 3 para 1 (b):
In terms of the scope the proposal seems to be mistakable. In case the thresholds are to be checked on a solo level, only those entities would be included which have “neither a parent undertaking nor are a subsidiary” by themself. In conclusion any subsidiary from a non-EU parent would not be covered by this regulation at all as none of the points under lit. (b) is covering this constellation. Therefore we recommend an extension at Art. 3 […] which would be in accordance with the general approach of the regulation at all as stated under *3.3.2 Scope*.

<u>Art. 3 para 1 (b) (iii) *new*:</u> EU branches **or subsidiaries in the EU territories** of credit institutions established in third countries.

Art. 9:
We understand Art. 3 in conjunction with Art. 9 that the competent authority has the competence to prohibit proprietary trading activities only for banks which do reach the thresholds of Art. 3, as the whole Regulation shall be applicable only to these banks. However a clarification of this view in Art. 9 would be desirable.

Art. 10 para 3:
The possibility to response to a conclusion made by the competent authority after its assessment, as set in Art. 9 […], is a welcome one. Nevertheless, the timeline for this kind

of response should face a revision. The authority has a conditional timeline of up to two months for its conclusions after the finalization of the assessment. Any argumentations in response to the conclusion by the institution need to be done within the same time period (see Sub 2). To avoid the appearance of this regulation like a potential mission impossible we recommend a clear defined and separate timeline for an institution's argumentative response.

Art. 10:
The regulation enables far going measures to be taken by the competent authority without any aspect of remedies. We highlight the necessity to include the appropriate feasibility to appeal, which contains a suspensive effect. Otherwise, especially in situations where the thresholds are not met the competent authority will be empowered to act on its own behalf, which could weaken legal certainty, violence the principle of proportionality and foil the level playing field.

In general we think that the supervisors have too much discretion which leads to a high level of uncertainty. On the one side we have thresholds which are still unclear, on the other side the reference in Art.10 para 1 and 2 to the criteria "threat to the financial stability of the core credit institution or to the Union financial system as a whole...." will lead to various interpretation by the supervisors making it impossible for banks to develope appropriate business strategies with regard to trading activities.

In this context (see Art. 10 para 3) the burden of proof should not lie with the bank. The competent authority requesting a separation / not to carry out the trading activities should prove that such decision is essential for the financial stability of the credit institution / Union.

Art. 22 para 1:
We see the approach to base the calculation of the thresholds on the consolidated accounts of the EU parent as best to get a fair amount of all the group's trading activities and would enable a comparison to other market players where necessary. Nevertheless here we see the necessity to sure that all kind of EU parents and their group structures are recognized.

Art. 22 para 1 new: For the purpose of Article 3(b)(ii), the calculation of the thresholds shall be based on the consolidated accounts of the EU parent**, in accordance to Art. 1 of Directive 83/349 EC**.

2. Proposal for a Regulation on reporting and transparency of securities financing transactions

We support the continuing EU-wide effort to promote market transparency. In general we would like to state that SFTs should not only be examined in light of the shadow-banking discussion. The transactions that are subject to the Regulation are also used for the purpose of liquidity management by regulated credit institutions. In our view, it must be ensured that the exemption for central banks will not lead to a situation where the interbank business is reduced to the benefit of transactions with central banks. In our view a more differentiated approach seems advisable.

Taking into account the big number of regulatory measures introduced with respect to financial markets during the last years we have to state that the introduction of measures on transparency in SFT as suggested in the draft regulation need to be well thought through and evaluated in terms of benefits, costs and consequences this course of action will result in.

The ongoing expansion of financial market regulation has already brought a lot of new reporting obligations and will continue to do so. These are and will be vested in a variety of new legislative acts – EMIR, SSR, AIFMD, CSDR and MiFIR to name but a few. The effects and consequences of these legislative projects are not evident yet, since they have only been in force for a very short time or will come into force in the foreseeable future, thus not giving them even a chance of proving their efficacy yet. One thing they have in common is that they have resulted in considerable cost to the financial industry which has made every effort to establish legal compliance as well as installing highly sophisticated IT infrastructure to achieve technical compliance.

In addition to that and taking EMIR for an example (as the most recently introduced regulation which includes reporting obligations with regard to financial instruments) we have observed a considerable amount of problems arising in the early stages of the new reporting regime, which have proven hard to solve over the last few weeks since introduction of the reporting obligation. These problems range from unclear definitions, unclear scope, problematic timing of new information on new obligations up to service infrastructures who seem to not have provided their services with the timing necessary for successful EMIR reporting in all instances.

We therefore believe that the standards which have recently been introduced and those to be finalised in the coming months should first be evaluated for their effects and their sufficiency in reaching the regulatory goals before additional standards are introduced.

Apart from this general concern we have some more specific comments:

- The rather subordinate role of proportionality in the present text and the application of the regulation to mass collateralisation- and SFT-systems (e.g. application of T2S) could result in immense volumes of reported transactions which will not convey additional information compared to a more moderate approach, especially considering that the goal seems to be to mirror EMIR transaction reporting, where many different kinds of events regarding a single transaction have to be reported. A possible way to alleviate this would be to allow for cumulated reporting at a reasonable point in time after the transaction [e.g. T+2].

    - As addressed in the previous paragraph, we miss the concept of proportionality in the current proposal in terms of differention between the different transaction volumes, the market participant’s depth of involvement in the respective transaction type, the purpose of the respective transaction et al. It should therefore be considered to exclude transactions below a certain size from the reporting obligation, or to exclude from or to impose less stringent reporting obligations for transactions concluded by or with counterparties whose positions in the respective instruments are below a threshold (which would have to be determined by ESMA).

- The duplication of reporting is addressed in Article 4 (6). The passage states that in cases where the details of a SFT have to be reported to a trade repository in accordance with Article 9 of Regulation (EU) No 648/2012 and that report effectively contains the details referred to in the SFT regulation, the obligation will be considered to have been complied with.

  This seems to be a very EMIR-centred approach. As pointed out above a lot of new legislation has been or are about to be implemented in this field and nearly all of these acts include reporting obligations. It would therefore be essential to also include other legal acts like the SSR, AIFMD, CSDR, MiFIR, etc. in the exemption for already reported transactions or to evaluate in depth the need to do so due to possibly overlapping requirements.

  We also stress that the feature that details already reported due to another legal act would not have to be reported due to SFT will only be effective if a thorough harmonisation between the mentioned legal acts and the SFT is implemented. It will be necessary to align the reporting details on a granular level.

- This leads to another important topic – reporting details. According to the draft-regulation the technical standards detailing the reporting fields will be submitted by ESMA one year after the publication. We believe this to be a very reasonable timing. It will however be important for the industry to get information regarding the reporting fields as soon as possible. It will be very important to conceive of a conclusive concept regarding the reporting details. This was reflected by one of the rather suboptimal outcomes regarding reporting details according to EMIR when important fields still lacked final definition a few weeks prior to the reporting start date, making it all but impossible for medium to smaller sized institutions to ready the necessary resources to make profound changes in their reporting infrastructures virtually last-minute. (TRN instead of UTI with regard to ETDs, the status of LEI implementation, etc.)

- We understand that the regulation is set for transparency in SFT- and rehypothecation-markets. It has been pointed out that the restriction of market activities was not the main goal. We are grateful for this approach and openly endorse it. We believe, however, that starting to gather information on the SFT- and rehypothecation-markets by launching an exhaustive survey will be a harsh measure if is conducted in the form of a binding legal act that has a very broad scope and would probably even include small scale and retail business. We therefore argue that an approach featuring a first assessment of the markets which focuses on large in scale transactions and large market-participants and which is not a binding legal act in the first place would be more favourable.

- We also emphasize that the definition of the terminology regarding “rehypothecation” and “reuse” of collateral is essential and should be discussed in depth with regard to the different legal theories regarding “hypothecation” throughout Europe.

We ask you to consider our remarks with due regard.

Yours sincerely,

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