Comments

of the Association of German Banks on the
Final Report of the High Level Forum on CMU

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Strengthening capital markets union

The Association of German Banks has strongly backed the capital markets union project from the outset (COM Action Plan 2015). As a supporter of the Markets for Europe campaign (2019 Roadmap), we call on the new/current Commission to drive the project forward with ambition. We warmly welcome the recently published report of the High Level Forum on CMU. We believe it identifies many important steps that need to be taken to achieve real capital markets union. We share the view that an efficient, pan-European capital market is essential to financing the post-covid-19 recovery and the modernisation of the European economy and to ensuring Europe’s long-term competitiveness and sovereignty. The UK’s recent announcement on 23 June 2020 that it intends to go its own way in key areas of financial regulation makes rapid progress in building EU capital markets union more urgent than ever.

These comments evaluate a number of the measures proposed by the High Level Forum in its consultation. We would, in addition, like to draw attention to our position paper of 19 February 2020, in which we recommend eight concrete measures to deepen capital markets union that could be implemented in the current legislative term.

No.	Issues to be solved	Proposed recommendations	Comments by Bankenverband
1	Fragmented and scattered company data	Set up a European Single Access Point (ESAP) for company data	We warmly welcome this proposal. Once the ESAP is in place, steps should be taken to establish links through appropriate interfaces to other registers (e.g. national company registers), data sources and mechanisms, especially those required by law (such as officially appointed mechanisms (OAMs) under the Transparency Directive, fulfilment of follow-up obligations under the German Securities Trading Act, approved and filed securities prospectuses, etc.). The ESAP could also act as a starting point for introducing a more integrated disclosure regime for issuers, harmonising regular financial reporting, "ad hoc" disclosure under MAR and prospectus disclosure requirements.
2	Few investment vehicles available for late stage and long-term investment	Targeted review of the ELTIF framework and introduction of tax incentives	./.
3	Insurers' underinvestment in equity	Targeted review of Solvency II and further work at the IASB	./.
4	Banks' withdrawal from market making activity and banks' underinvestment in equity	Implementation of Basel III rules in the prudential framework for banks	./.
5	Limited capacity of banks' balance sheets to extend funding to SMEs	Targeted review of the securitisation framework	We warmly welcome the proposals for revising the existing framework, especially 1. unlocking the significant risk transfer assessment process, 2. recalibrating capital charges, 5. applying equivalent treatment to cash and synthetic securitisations,

			6. upgrading the eligibility of senior STS and non-STS tranches in the LCR ratio, and 7. differentiating between disclosure and due diligence requirements for public and private securitisations.
6	Public listing is too burdensome and costly, especially for SMEs and the funding ecosystem for IPOs in the EU is underdeveloped	Alleviation of listing rules	Although the capital market should also be open to SMEs, it is essential to retain the principle of "same business, same rules". A repeat of past experience (Germany's "Neuer Markt") should be avoided, not least in the interests of investor protection. Alleviation of rules for issuers can typically go hand in hand with corresponding disadvantages for investors. There should be a level playing field for all issuers in the same market. Specific comments: - Clarifying what constitutes preliminary information and when inside information needs to be disclosed to the public (p. 13): This is a useful approach. The following points should be considered when amending the MAR regime. ○ The requirement to disclose interim steps of a protracted process (following Geltl/Daimler) should be reconsidered. ○ If retained, interaction with the disclosure requirement for future events should be clarified (the recently published BaFin Issuer Guide Module C would serve as a good basis). - The HLF's proposal to "introduce a safe harbour in the case of distribution of preliminary information" (p. 67) requires further clarification. We would especially welcome greater clarity with respect to the early stages of lengthy processes which do not yet constitute inside information and therefore do not need to be made public. - Clarification that information available on the internet cannot constitute inside information (p. 67) would be useful. - Interaction between MAR and the Transparency Directive (p. 67): When giving companies more flexibility to avoid premature disclosure, periodic financial information should only trigger ad hoc disclosure if material

			information is leaked, giving rise to specific rumours (as would terminate a permitted delay in accordance with Art. 17(7) of MAR) in the market. - Recalibrate disclosure in cases of insider lists and managers' transactions (p. 14): This is highly welcome. Disclosure requirements relating to insider lists and managers' transaction should definitely be reduced to what is necessary to serve the core purpose of the rule. Changes should include the following. a) Simplifying the maintenance of lists of insiders that, due to their function, regularly have access to inside information ("functional insiders"). b) Reducing the scope of data to be entered into insider lists to what is necessary to ascertain an insider's identity. For example, the requirement to record personal information such as addresses, mobile phone numbers, e-mail addresses and the like should be dropped. The proposal set out in more detail on p. 67 is a step in the right direction. c) Limiting the disclosure of managers' transactions to those that may have a signalling effect to the market (as recommended on p. 68). In consequence, only transactions based on an active investment decision by the insider should have to be disclosed. This means that the following should no longer be in scope: o passive transactions e.g. resulting from inheritance, o transactions such as donations, which, due to their nature, do not generate a benefit to the manager or have a signalling effect to the market, o transactions by an independent portfolio manager. d) Introducing a higher and harmonised de minimis threshold of €50,000 as proposed by the HLF would be a useful improvement. - Reviewing sanctions for breaches of MAR to ensure proportionality (p. 68) is very welcome. - Reviewing thresholds for a prospectus (p. 14): The Prospectus Regulation already provides for a wide range of exemptions from prospectus requirements. In the interests of (retail) investor protection, the scope of these exemptions should not be extended further. Any

			marketing material used instead of a prospectus would carry a significant and unpredictable liability risk, hence creating a disincentive for responsible financial intermediaries to distribute these financial instruments. The sheer volume of an offering or the size of the issuer do not in themselves constitute appropriate criteria for setting a higher or lower level of investor protection. The proposed adjustments of the thresholds (p. 68) from €1m to €2m and from €8m to €10m would not be significant enough to change the overall picture, nor would they allay the concerns set out above. - Alleviations for prospectuses (p. 68): The proposed focus on key aspects and the improvement of incorporation by reference is welcome. - Deadlines for prospectuses (p. 68): The proposed reduction of approval times and the minimum offer period for IPOs is welcome.
7	Underused potential of crypto/digital assets	Legal certainty and clear rules for the use of crypto/digital assets	We very much welcome the recommendation to analyse the existing legal framework for financial services and to clarify its application to crypto/digital assets. We recommend including financial instruments issued digitally or by means of DLT in the scope of existing regulation. No new definition of "crypto-assets" is required for these financial instruments. Existing legislation should merely clarify that it also covers financial instruments issued using new technologies. Targeted adjustments may, however, be necessary to reflect new processes. Any changes should be carefully analysed. We agree that new EU legislation will be necessary for assets outside the scope of the existing framework. For these assets, "crypto assets" could be used as a catch-all term and would need to be defined accordingly.
8	Fragmented provision of settlement services discourages cross-border trading	Targeted changes to CSD passport, supervision and cross-currency rules in CSDR	While we fully support all efforts to further eliminate the fragmentation of the EU post-trading landscape along national lines (p. 15), we would like to draw attention to the fact that many barriers are rooted in differences in national regimes governing tax law, company law and securities law, for instance. We therefore welcome the proposal for a more harmonised application of passporting rules for CSDs and for converging supervision

			of CSDs across member states (p. 16) as a first step. We disagree with the statement on p. 77 that a fully-fledged review of the CSDR would be premature. We would, in fact, highly welcome and support further delaying the implementation of the CSDR mandatory buy-in requirement, including it in the CSDR review and making it optional. Otherwise, there is likely to be a significant negative impact on market activity and liquidity. Even after two years of extensive efforts regarding the implementation of the settlement discipline regime, many technical and legal issues have yet to be clarified. Level 1 and Level 2 would need to be aligned as regards consistency. Furthermore, the scope and the addressee of the buy-in rules among other things are unclear. It should also be noted that the UK has already announced (June 23, 2020) that it will not implement the CSDR settlement discipline regime in order to support and enhance the functioning of UK capital markets.
9	Lack of harmonisation and standardisation across Member States of rules governing the attribution of entitlements to voting rights and shareholders' participation in corporate events prevent investors from the exercise of ownership rights and generally dissuade them from cross-border investment	Targeted review of SRD 2	Definition of "shareholder": We believe a harmonised definition would be problematic as long as company law is regulated at national level. It is company law alone that can determine what constitutes a shareholder. In Germany, for example, the question is determined differently depending on the type of share involved. For companies issuing registered shares, shareholders are those entered in the share register. For companies issuing bearer shares, shareholders must be in possession of the shares. A prerequisite for implementing this recommendation is therefore the existence of a European company law. Recommendation on voting rights and corporate action processing: We welcome this recommendation, which has already been taken up and largely implemented in SRD II (Chapter Ia). The revised and harmonised obligations for intermediaries when processing general meetings and corporate actions will improve communication between companies and shareholders and take effect from 3 September 2020. The new requirements and their impact should therefore be evaluated (with help of market surveys, statistics, consultations, etc.) once a season of

			general meetings has taken place under the new regime. The results of this analysis should determine further initiatives of the Commission. Recommendation on facilitating the use of technology: We also welcome this proposal. Supervisory law is already technology-neutral and should remain so. Investors are already able to use electronic media, though retail customers rarely do so in practice. SRD II promotes greater use of electronic communication. We should therefore wait and see whether, and to what extent, new pricing structures and the establishment of new services create incentives for retail customers to make more use of electronic communication options. Technology is already used end-to-end in the institutional sector (ISO, SWIFT). Here too, therefore, we should wait and see how the market develops under the new SRD II regime and only make any necessary adjustments after subsequent evaluation (see also the previous point). Additional point: SRD II allows member states to set thresholds for shareholder identification. It would be desirable to delete this option in order to counter fragmentation and the inconsistent implementation that has already occurred in the EU. An overview or (even better) a collection of all relevant national legal texts in English is also absolutely essential. The collection should be made available by the Commission.
10	Dependence of EU financial operators on providers of cloud services and risks stemming from it	Standardisation of contractual terms for the provision and use of cloud services by EU financial operators and new rules to enable firms and supervisors to monitor and contain risks	We welcome these proposals in principle.
11	Unsustainable and inadequate pensions, little retail investor participation	Pension dashboard for Member States, pension tracking systems for	./.

	in capital markets, few long-term oriented institutional investors	individuals and auto enrolment in occupational pension schemes	
12	Lack of understanding by and trust of retail investors and their low participation in capital markets	Legislative and non-legislative measures to foster financial literacy and engagement	“Member States should set up national financial guidance bodies for consumers” (p. 90): These recommendations on financial guidance are too imprecise (as to content, funding, etc.). We therefore cannot support them in this overly general form. Measures to enable individual investors to take better informed financial decisions and facilitate their wider engagement in capital markets (p. 19): This objective is welcome but seems to contradict the idea of widening thresholds for prospectus requirements. Investors should most certainly receive the information they need to take informed decisions. Legislative gaps in the requirements to provide such information should therefore be avoided and prospectus exemptions allowed only very restrictively. It is important to avoid situations where offerors of investment opportunities tailor products to fit exemptions so that they can avoid prospectus requirements to the detriment of retail investors (e.g. as in the Prokon case in Germany). Instead, disclosure requirements should be reviewed and streamlined to ensure they are fit for purpose. The proposal to make disclosure documents more coherent and more understandable for retail investors is therefore welcome, particularly if applied to the PRIIPs Regulation, which is expressly mentioned in this context (p. 20 et seq.).
13	Distribution of inadequate investment products due to a conflict of interest or inadequate quality of advice, and inconsistent, non-intelligible, not comparable and	Targeted amendments, in particular to IDD, MiFID II and PRIIPs Regulation to improve disclosure. Amendments to IDD, MiFID II to improve the fairness and quality of	MiFID II has significantly increased the disclosure obligations for investment firms, especially the disclosure of information about costs and inducements. We do not see in which areas of MiFID II investors would benefit from more information. The fairness and quality of investment advice under MiFID II are already of a high level. There is no need for further adjustments. In fact, many banks have stopped offering investment advice due to the high costs

	insufficient disclosures for investment products and services	financial advice. Creation of a voluntary pan-European quality mark (label) for financial advisors. Other non-legislative measures, including a study on the role of inducements for the adequacy of advice	generated by existing regulation. Further restrictions on inducements under MiFID II would inevitably restrict access to investment advice for retail investors. By contrast, we warmly welcome the recommendation to review the PRIIPs Regulation.
14	Unexploited potential from data sharing	Regulatory framework for open finance	./.
15	Lengthy and costly WHT reclaim processes deter cross border investment	Legislative proposal to harmonise tax definitions, processes, forms and put forward a proposal to introduce a standardized system for WHT relief at source	To promote the CMU, further harmonisation of tax law is required. Align tax bases: Corporate tax bases need to be harmonised in the EU so that businesses active purely at national level and those operating across borders face the same taxation framework. This will also enable tax loopholes to be closed and a level playing field to be established. Review VAT on financial services: Additional VAT costs frequently frustrate the creation of efficient business structures. To ensure the competitiveness of European banks in global financial markets, these costs must be avoided.
16	Different and partly inefficient insolvency process across MS discourage cross border investment	Targeted harmonisation of central elements in corporate insolvency law	Measures intended by EU legislation to protect capital market participants against the default risk of a counterparty must be legally effective. The legal assessment of collateral and netting agreements therefore needs to be the same across the EU to exclude the possibility of doubt about the enforceability of such protection, especially in the event of insolvency. It is of paramount importance in this context that these initiatives provide adequate and harmonised safeguards for netting agreements

			since these are an essential risk mitigation instrument for derivatives and securities financing transactions for both financial institutions and corporates. In particular, it will be necessary to provide uniform and sufficiently clear exemptions for such netting agreements from the effects of any moratoria or suspension rights. In addition, consideration should be given to further harmonising the legal framework for netting agreements (currently insufficiently harmonised by the Settlement Finality Directive, the Financial Collateral Directive and the Winding-up Directive).
17	Differences in supervision across MS entails legal uncertainty	Legislative amendments to strengthen governance, powers and toolkit of ESMA and EIOPA	./.

Additional measures suggested by the Association of German Banks:

1. **Shareholder Rights Directive II**: There is as yet no collection of all relevant national rules and regulations. The introduction of SRD II has made such a collection absolutely essential, however. By making a collection of the relevant legal texts available in English the Commission could help to harmonise processes and obligations for intermediaries.

2. **Trading landscape**: Following its recommendation no. 10 on cloud services, the HLF sets out its views on trading mechanisms. Our assessment is that the scope of the share trading obligation (STO) is overly broad, leading to legal uncertainty and unintended consequences. The STO should be dropped. If this is not possible, it should at least be revised. Its application should focus on shares listed in the EU. The discussion about the trading of Swiss shares and the impact of Brexit on trading has clearly shown how essential it is to bear in mind that investors need to be able to access the most liquid markets. Where the CMU is concerned, this applies especially to institutional investors such as insurance companies or funds. Overlapping scopes with third countries must also be avoided. We expect that EU shares will continue to be listed on UK trading venues. For banks operating in both the EU and the UK, this would lead to conflicting rules that could be resolved. The best way to identify shares subject to the STO is the ISIN approach plus the currency. Concerning dual listings we have experienced contradictory situations with Swiss measures (e.g. ABB listed in Stockholm and on SIX or Lafarge listed on SIX and Paris Euronext). While most of the liquidity for these particular examples lies outside the EU, the current EU STO requires firms to execute transactions on EU trading venues. The best way of avoiding all the problems would be to drop the STO altogether, however.