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C o m m e n t s

on the Proposal for a Regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council
(referred to in the following as "the Proposal")

Berlin, 27 September 2013

I. General remarks

1. Basic idea is right

In the Association of German Banks' view, the basic idea underlying the Proposal, namely establishing a Single Resolution Mechanism (hereinafter "SRM") and a Single Bank Resolution Fund, is logical in the overall context of the "Banking Union" project and to be welcomed.

Not only the ongoing supervision of credit institutions but also their resolution should be decoupled from individual interests of EU Member States – not limited, if possible, exclusively to the eurozone. In the event of the cross-border resolution of a credit institution, decisions need to be taken quickly by a central institution and implemented in a coordinated manner. Ideally, a central, independent institution equipped with resolution powers should therefore be set up. The advantage of a European authority is that it would have more comprehensive information at its disposal than national resolution authorities. Establishing such an authority would also be logical in the context of a Banking Union and the transfer of wide-ranging supervisory powers to EU level within the framework of the Single Supervisory Mechanism (hereinafter "SSM"), as responsibility for the recovery and resolution of an institution should also lie at the same level as supervision – oversight and liability should not be allowed to drift apart.

A pan-European resolution regime including a Single Bank Resolution Fund for all Member States would be a major contribution towards further European financial market integration and towards strengthening financial stability.

2. Putting the project on a stable legal footing

The legal basis chosen for this regulatory project – Article 114 of the TFEU (powers in regard to the establishment and functioning of the internal market) – may at first sight appear to be a practical and quick route towards an SRM and a Single Bank Resolution Fund. Yet the concerns voiced in this respect carry considerable weight: Article 114 of the TFEU aims at an approximation of Member States' legal provisions to a standard defined under EU law. Under the Proposal, the establishment of a Single Resolution Mechanism will, however, see national resolution powers transferred to EU level – powers which will inevitably interfere in the context of resolution with the rights of an institution's customers, counterparties and investors. Basing an obligation for banks to pay contributions to finance a Single Bank Resolution Fund on Article 114 of the TFEU is also rightly questioned.

The project is too important to put it – even just temporarily – on a less than sound legal basis. This is more likely to damage the credibility of the SRM and the Single Bank Resolution Fund. A sound, legally certain solution therefore needs to be found for all stakeholders; this will, we believe, ultimately mean amending the EU Treaty. No unnecessary time pressure should be built up in this respect since the SRM, alongside a fully functioning SSM, presupposes that the resolution tools provided for in the proposal for a Directive establishing a framework for the recovery and resolution of credit institutions and investment firms (hereinafter "BRRD") are available in all Member States.

3. Transitional "network" solution

In the short term at any rate, obtaining the amendment of the EU Treaty actually required for this regulatory project will be virtually impossible. The path towards a pan-European resolution mechanism and resolution fund is nevertheless not blocked: until an adequate legal footing has been established, use should be made – on the basis of the current EU Treaty – of the networks of national resolution authorities and national resolution financing arrangements that are to be set up under the BRRD.

4. Optimising "networks"

The BRRD trilogue should be used, particularly in regard to the networks that are to be set up, to remove the weaknesses identified in the Proposal: the European Commission rightly points out in Recital 6 of the Proposal that the draft BRRD does not prevent Member States from taking separate and potentially inconsistent decisions regarding the resolution of cross-border groups which may affect the overall costs of resolution and that the draft BRRD does not achieve full harmonisation. The BRRD should therefore harmonise national resolution regimes and national resolution financing arrangements (particularly the rules on the levying of contributions) more strongly than hitherto planned. The decision-making processes in

resolution of a cross-border group (relationship between home and host supervisor and mediation by the EBA) should be simplified to allow quicker decisions.

II. Individual remarks

1. Ensuring synchronisation of the SRM and BRRD

To avoid any distortion of competition, it should be ensured that the resolution rules and requirements for the design of the Single Bank Resolution Fund set out in the Proposal and based largely on ECOFIN's ideas in the BRRD also agree with the version of the BRRD adopted by the Council and the European Parliament. To avoid any differences or inconsistencies, it would be advisable in the deliberations on the Proposal to exclude as far as possible the areas of regulation taken over from the BRRD and to bring these into line with the adopted version of the BRRD in a final step.

2. Questioning the territorial scope of application

As with the SSM, the territorial scope of application of the SRM should also be questioned. In line with the objectives of the Proposal, one of which is that the SRM should prevent Member States from taking separate and potentially inconsistent decisions regarding the resolution of cross-border groups, it would actually have been logical to set up the SRM for all Member States. At the same time, we realise that, with the discussion already on the territorial scope of application of the SSM in mind, such an approach would in all probability not find any consensus in the Council. The proposed synchronisation of the SRM with the SSM under the Proposal (Article 2 in conjunction with Article 4 of the Proposal), thus giving non-eurozone countries the chance to opt in to the SSM/SRM, is therefore logical and opens up at least scope for further integration.

3. Retaining the material scope of application

The approach whereby the scope of application of the SRM and the Single Bank Resolution Fund will cover all credit institutions and investment firms, irrespective of their legal form or membership of a particular (deposit or institutional) protection scheme (Article 2 and Article 65 of the Proposal) is appropriate.

As correctly pointed out by the European Commission in the Explanatory Memorandum accompanying the Proposal, the financial crisis has shown that it is not only for big international banks that a European resolution framework is needed. The inclusion of all credit institutions is also necessary to avoid any two-class system of regulation for resolution of institutions, as the same business, the same risks and all market participants should be uniformly subject not only to the same supervisory rules but also to the same resolution rules. There would therefore be no justification for not subjecting savings banks and cooperative

banks in Germany, for example, to the SRM and/or for exempting them from the requirement to contribute to the Single Bank Resolution Fund, since they too may cause systemic risk, particularly because of their very similar business models, their close interconnectedness via institutional protection schemes and their ownership structure, as well as their uniform market presence (see in this connection Schön/Hellgardt/Osterloh-Konrad, WM 2010, 2145, 2150 et seq.). What is more, institutional protection schemes and deposit guarantee schemes are not designed to deal with a systemic crisis (see in this connection Christoph Pleister, Chairman of the Management Committee of the German Federal Agency for Financial Market Stabilisation, at the hearing on the Restructuring Act held by the German Parliament's Financial Affairs Committee on 6 October 2010 (see transcript 17/29, p. 15).

In addition, any restriction of compulsory contribution to the Single Bank Resolution Fund to "significant" institutions which are subject to direct ECB supervision under the SSM would mean that the national resolution financing arrangements to be established in every Member State under the BRRD would scarcely be adequate any longer following exclusion of important contributors.

4. Questionable: involvement of the European Commission in the SRM

As the current institutional framework does not allow the transfer of final decision-making authority to the Single Resolution Board, the decisions on whether and how an institution is to be resolved and whether and to what extent the financial resources of the Single Bank Resolution Fund should be used are to be reserved for the European Commission (Article 16(6) of the Proposal). This effectively means that the Commission is being assigned the role of a resolution authority. It does not rule out conflicts of goals between the Commission's tasks as a competition watchdog and the resolution function. What is more, the proposed tiered structure – national resolution authorities, Single Resolution Board and European Commission – make it questionable whether decisions can be taken quickly, independently and free of political implications as far as possible and then implemented in a coordinated manner. In our view, only a newly established institution – a European Resolution Authority – could ensure that decisions are made quickly, independently and free of political implications as far as possible.

5. Avoiding parallel structures

We believe that the Proposal falls short of the envisaged aim of a Single Resolution Mechanism. Instead, there is the threat of three entities in the near future at national level (national resolution authority) and EU level (Single Resolution Board and Commission) dealing with resolution planning and resolution issues. It is, in particular, questionable whether the proposed decision-making structure will allow quick decisions. The Proposal largely fails to clarify how, for example, inefficient double inquiries at institutions are to be avoided.

6. Optimising cooperation with national resolution authorities

Performance of the tasks conferred on the Single Resolution Board, e.g. the drawing up of resolution plans for all entities and groups falling under the scope of application of the SRM (Article 7(1) of the Proposal), will only be possible in close cooperation with national supervisors. The structure should therefore be geared more strongly to collaboration and cooperation and not reduce the role of national resolution authorities to purely implementing bodies.

In addition, it remains unclear how conflicting supervisory decisions/assessments or conflicts within the SRM are to be dealt with. For example, the national resolution authorities are to be obligated to implement or carry out the resolution scheme decided by the Single Resolution Board (Article 16(8) and Article 25(2) of the Proposal). They are, however, to be liable for measures not covered by the Regulation (Article 87(4) of the Proposal). Particularly with this in mind, mechanisms for settling conflicts should be established.

7. Limiting investigatory powers

As regards the power to request information under Articles 32 and 33 of the Proposal, the *nemo tenetur se ipsum accusare* principle (holding that nobody should be required to incriminate themselves) should be respected by giving the addressees of such requests the right to refuse to provide information if, in so doing, they would expose themselves or a family member/close relative to the threat of criminal prosecution under national law. This is also called for under Article 47 of the EU Charter of Fundamental Rights.

8. Clearly regulating the relationship between the Single Bank Resolution Fund and national resolution financing arrangements

Only the Explanatory Memorandum accompanying the Proposal states that the Single Bank Resolution Fund is to replace the national resolution financing arrangements of the Member States participating in the SSM/SRM that are to be established under the BRRD (see section 4.3.5.). This approach needs to be enshrined in the Proposal as well, however. Wording to this effect should therefore be inserted.

The Proposal fails to clarify what happens to the resolution financing arrangements already in place in some Member States (in Germany, the Restructuring Fund) once the Single Bank Resolution Fund has been set up. To avoid any double burden for institutions, it should be ensured at regulatory level that they are only required to pay contributions into the Single Bank Resolution Fund.

9. Limiting ex ante and ex post contributions to the Single Bank Resolution Fund

Institutions required to pay into the Single Bank Resolution Fund are to be obligated – as also envisaged under the BRRD – to pay annual ex ante contributions (Article 66 of the Proposal) and, in the event that additional funds are needed, extraordinary ex post contributions (Article 67 of the Proposal). The rules in this respect should be amended to include – like with the German Restructuring Fund, for example – a cap designed to keep the burden on banks within tolerable limits. The constitutional requirement to avoid any overburdening of taxpayers or contributing institutions, which threatens to occur particularly in the initial build-up phase, should be taken into account. The right to raise extraordinary contributions meets with reservations, as these have a procyclical effect and put a strain particularly on high-earning institutions.

10. Ruling out any Single Bank Resolution Fund liability for legacy debt

The SRM and the Single Bank Resolution Fund are key building blocks in the "Banking Union" project. This project is designed for future crisis management, while it can merely facilitate "cleaning-up work" at national level in the wake of the 2008 crisis through the resolution tools provided for under the BRRD. Legacy debt incurred under national responsibility should on no account be transferrable to European level. Neither the SRM nor the Single Bank Resolution Fund should therefore allow the shifting of liability for legacy debt incurred under national responsibility to European level – any 'communitisation' of fiscal liability for such legacy debt must be ruled out. For this reason, this legacy debt – as already proposed under the SSM for institutions directly supervised by the ECB – should be identified by means of a comprehensive balance sheet assessment conducted at contributing banks before the SRM commences operation and then eliminated or hedged. This is the only way to ensure that, even if such risk materialises after the SRM commences operation, the consequences affect the Member States under whose supervision it arose.

11. Ensuring resolution funding particularly in the initial build-up phase

The Proposal fails to clarify how resolution funding is to be ensured particularly during the first few years of the Single Bank Resolution Fund's build-up phase. According to the Commission's plans, the Fund will probably only reach its target volume of around € 55 billion in 2025. Member States are not to be required to provide extraordinary public financial support for resolution (Article 6(4) of the Proposal). It is likely to be possible to reduce the volume of funds needed by conducting a comprehensive balance sheet assessment at the contributing banks before the SRM commences operation (see section II.10). However, the proposed bail-in resolution tool, which ensures that owners and creditors make a contribution to resolution, is only to be available from 1 January 2018 (Article 88 of the Proposal). To relieve the taxpayer as early as possible of any resolution costs, this tool should be introduced uniformly throughout

the EU at the same time as the SRM and the Single Bank Resolution Fund (see in this connection also section II.17).

Particularly bearing in mind the Single Bank Resolution Fund's 10-year build-up phase, a credible funding concept is needed to cope especially with any systemic crisis. Ultimately, the only suitable safety net is a backstop in the form of public funds. ECON's approach of extending the range of resolution tools provided for under the draft BRRD to include "government financial stabilisation tools" – guarantees, equity support and temporary public ownership – is therefore basically right. To avert threats to financial stability, it may be necessary to allow their use in individual cases in the event of a systemic crisis.

12. Investing Single Bank Resolution Fund resources appropriately

Unlike the version of the BRRD reflecting ECOFIN's ideas, the Proposal contains concrete provisions on investment of Single Bank Resolution Fund resources (Article 70(3)). In our view, the resources should be invested in liquid and risk-free instruments. Otherwise, if they are needed in a resolution case, there may be undesirable effects on the market concerned or the Fund would have less money at its disposal. With this in mind, the requirement that the amounts held in the Fund should be invested in obligations of all Members States participating in the SRM/SSM does not appear appropriate. Where new investments are concerned at any rate, only high-grade sovereign bonds should be purchased.

13. Financial liability for damage caused by the Single Resolution Board in the performance of its duties: no allocation of costs to institutions

It is right that the Single Resolution Board should be liable for any damage caused by it or its staff in the performance of its duties and should generally compensate national resolution authorities for any damage resulting from resolution (Article 78 of the Proposal). The Proposal does not say, however, who ultimately is to bear the financial burden imposed by such liability. It should be ensured that the Board cannot shift the financial burden it incurs to the entities covered by the SRM – possibly also to the entity damaged by it in the performance of its duties – via the annual contributions levied to cover the Board's administrative expenses. For constitutional reasons, sovereign responsibility and liability should not be separated.

14. No use of deposit guarantee schemes in the context of resolution

Should the Proposal be adopted unchanged, we believe that it allows the European Commission direct recourse to national deposit guarantee scheme funds via the bail-in tool and the participation of statutory deposit guarantee schemes under Article 99 of the BRRD and Article 73 of the Proposal. The result, as repeatedly pointed out by the German Banking Industry Committee in the past, may be insufficient deposit guarantee scheme funds. To prevent any negative impact on financial stability, the Member State concerned would then – after

additional contributions have been levied and loans obtained where necessary from the Single Bank Resolution Fund – ultimately have to step in as lender of last resort because of a decision taken at EU level.

Moreover, in its present form, the Single Bank Resolution Fund threatens to serve as the nucleus of a Single European Deposit Guarantee Scheme. In this context, we have serious reservations about the possibility under Article 73(4) of the Proposal for Fund resources to be made available to eurozone deposit guarantee schemes whose resources are no longer sufficient to cover payments to depositors. This would mean introducing "through the backdoor" a Single Deposit Guarantee Scheme in the eurozone that would be financed by the Single Bank Resolution Fund and that would be at odds with the separation of deposit protection and resolution funding called for by the German Banking Industry Committee.

15. Ensuring effective legal protection

The current legal protection at European level against European Commission measures in the form of an action for annulment under Article 263, paragraph 4 of the TFEU does not appear adequate when it comes to the resolution of entities, e.g. with regard to the length of the proceedings. The Proposal should therefore also ensure and regulate in detail effective legal protection for this area. This should also include the delineation issues resulting from cooperation with national supervisors (national or European legal protection). It should, in addition, be ensured that institutions also have the right to obtain temporary legal protection against measures taken by the Commission. For example, particularly in the case of measures restricting or suspending business activities, waiting for a decision in the main proceedings may be unreasonable.

16. Administrative rules of procedure needed

Finally, the Proposal raises the question of what administrative rules of procedure apply under the SRM if the European Commission or the Single Resolution Board take action directly against a supervised institution, e.g. through the Commission's decision on the resolution of an institution (Article 16(4) of the Proposal) or the Board's instructions to an institution under resolution (Article 26(2) of the Proposal). As yet, there are no provisions on, among other things, hearing institutions before supervisory measures are taken, on the reasons given for as well as the form and time limits of decisions, on the official language to be used, or on the right to inspect records. The Proposal should therefore be amended along the lines of state aid and anti-trust legislation (see Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty) to include administrative rules of procedure for specific areas.

17. Adjusting the date of entry into force

The date chosen for the SRM to commence operation and for the establishment of the Single Bank Resolution Fund should be a realistic date. It appears doubtful whether the conditions for the SRM to commence operation will be fulfilled by the proposed date of entry into force of the Regulation, i.e. 1 January 2015 (Article 88 of the Proposal).

There is, for example, no telling at present whether the SSM will already be fully functioning by this date. Among other things, numerous questions – particularly concerning what form cooperation between the ECB and national supervisors under the SSM is to take – still need to be sorted out. It is also doubtful whether the tools provided in the BRRD for the orderly resolution of institutions will be available in all Member States by this date.

In addition, the bail-in resolution tool should not only be available – as proposed – from 1 January 2018. To relieve the taxpayer as early as possible of any resolution costs, this tool should be introduced uniformly EU-wide at the same time as the SRM and the Single Bank Resolution Fund. Otherwise there is the danger that Single Bank Resolution Fund (still in the build-up phase) will not have sufficient resources. Institutions should be given a reasonable period of time to build up the required bail-inable liabilities (Article 10 of the Proposal).

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