EACB Comments on

Commission Green paper on Capital Markets Union

Brussels, 5th May 2015

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Introduction

The members of the European Association of Co-operative Banks (EACB) welcome the opportunity to contribute to the discussion launched by the European Commission on the development a Capital Markets Union by way of its green paper.

We agree that in the context of European Capital markets there is room for improvements in terms of integration, harmonisation and flexibility with the aim to better channel the diverse flow of savings to the diverse type of investments. This can undoubtedly help to increase investments (SMEs, infrastructure projects) and hence foster growth and employment. In this context, we would like to highlight the special role of retail banks and particularly cooperative banks due to their direct relationship both with retail investors and SMEs.

Our responses to the consultation questions are to be found below:

1. **Beyond the five priority areas identified for short term action, what other areas should be prioritised?**

The EACB supports the Commission's plans to promote investments throughout Europe. It also supports the statement of the EU Commission that each new regulation must be designed to support the real economy and that small and medium-sized enterprises (SMEs) are key drivers in terms of growth and jobs.

We welcome that the Commission recognises in the Green Paper that any improvement to the European Capital Markets has to acknowledge the key role of banks (as issuers, investors and intermediaries) in financing the EU economy, and that improvements in capital markets should not substitute but rather supplement bank financing. This role clearly assumes a special relevance for retail banks and particularly for cooperative banks because of their direct relationship with retail investors on the one hand, and with SMEs on the other. Throughout the crisis they maintained and strengthened their role as financing and stabilising anchor for the real economy. More generally, financing in Europe has been and still is bank dominated; hence the aim of this Capital Markets Union (CMU) initiative should be to complement these well-established functions of banks via capital market tools rather than diluting them.

Nevertheless, due to numerous regulatory requirements introduced over the past decades, the costs incurred for granting a loan and other financing services offered to the economy increased. We have observed that – as a consequence – a portion of the traditional banking business has moved to the unregulated sector. This means that stricter banking regulation is in conflict with the merely planned regulation of "shadow banks". Harmonisation of rules and regulations applicable to the unregulated sector and banks should be one aspect of enabling fair competition.

Moreover, as recent financial regulation initiatives are still being implemented, it is of utmost importance that banks can enter a phase of stability, not challenged by further

potential changes in the regulatory and consequently in the economic environment (e.g. by channelling a big portion of deposits and loans business into capital markets.)

The CMU initiative should seek to ensure a holistic approach on the needs of entities demanding and supplying capital. To do so it is necessary to acknowledge the crucial role of intermediaries enabling the necessary diversification as well as expertise through their products and services.

To achieve this, we consider that the improved application of the principle of proportionality for retail banks would allow them to fulfil their financing role in the future, in particular with regard to SMEs. Strong banks are essential for securing sustainable growth of the EU economy. In turn, sustainable economic growth is based on strengthening the financing of SMEs and local enterprises. Experience shows that cooperative banks are the ideal partners for facilitating financing needs of SMEs. In this respect, maintaining the SME credit risk supporting factor provided under Art. 501 CRR, and set for review by 2017 is a priority.

With regard to the financing of small and medium-sized enterprises in all European regions, we would like to point out that the regulatory costs, a lack of expertise, and the effort required for capital market financings – as well as the high credit quality requirements of capital market investors – are clearly market entry barriers for many SMEs.

Having said that, the objective of safeguarding SME financing could be achieved with the following measures, for example:

- Introduction of lending tests: existing and future regulatory initiatives should be reviewed as part of an impact assessment on the lending capacities of retail banks, in order to ensure that small and medium-sized enterprises have unrestricted access to bank credit.
- The special capital requirements for SME loans (supporting factors) must be maintained in the long run. In addition, promotional lending as well as liquidity from financial services networks should not be considered in the Leverage Ratio. Moreover, leeway should be provided to consider updates in the scope of transposition into national/European law of financial markets regulations aimed at improving corporate financing (for example, in the current review of the Net Stable Funding Ratio). (See also our response to Q16).

Moreover, the design of the Capital Markets Union should be driven by a comprehensive EU strategy. Any negative interaction between initiatives already adopted (or being discussed) – or conflicting provisions governing the same facts – impede investment, and are a major burden for the banking sector. Before creating new rules, there should be a comprehensive analysis of the effects and cross-relationships of existing banking and capital market rules (as well as those currently prepared. At the same time, current and proposed financial markets regulation should be reviewed and balanced with the objective of lift short-term barriers in the form of overly bureaucratic regulations and improving the financing of the economy without supplanting investor protection.

In addition, we consider that appropriate advice is of great importance to retail clients in order to access the capital markets. In particular credit institutions provide such advice and – in many cases- individual retail clients only learn about the important role of capital market products from their banks (see also Q19).

This should be taken into account when defining the requirements regarding the permissibility of non- independent investment advisory services for level 2 of MiFID II[1]. These requirements as proposed by ESMA and currently under discussion could place in question the decision of the European legislator to maintain a choice between commission-based investment advisory services and fee-based investment advisory services. The offer of personal investment advice is regarded as added value by many clients, something which has been confirmed by several surveys. This service, however, is mainly paid for through commissions. If the quality enhancement criteria are formulated in a too restrictive way, the market will be driven towards the provision of mainly on-line services or to a withdrawal of the availability of investment services to the less affluent part of Europe's population. Indeed, exaggerated requirements may lead cooperative banks to withdraw from their role as intermediaries, due to cost and liability restrictions. Restricting inducement based investment advice would lead to the situation evidenced in markets of the member's states that have a ban on inducements already in force - with the result that investment advice is provided only to wealthy clients. This unintended effect is the opposite of investor protection. This also leads to declining capital market access on the part of retail clients. It is therefore of great importance to ensure in the drafting of the legal acts implementing MiFID II that the offer of personal investment advice to a large number of retail clients continues to be feasible and thus possible for banks.

Moreover, it is with great concern that we noticed ESMA's plans to apply product governance requirements within the scope of MiFID II on execution-only business (see also Q 17).

2) What further steps around the availability and standardisation of SME credit information could support a deeper market in SME and start-up finance and a wider investor base?

We are of the opinion that any changes to the legal framework for SMEs should not lead to further administrative burden or implementing costs for SMEs.

Moreover, many privately and/or family-owned business companies, and in particular start- ups are reluctant to provide extensive disclosure of company-related information.

[1] The EACB notes that it is aware that some Member States have decided to introduce investment service on a national level paid only through fees. Neither EACB nor any of its members in those Member States challenges these national decisions nor their efforts to make these measures legally binding for all investment firms offering or providing investment services in that member state. However, the EACB wants to underline the importance of choice for investment services on a pan-European level.

We regard a compulsory introduction of the IFRS scheme for SMEs as a step into the wrong direction. The provision of company and credit information should be made on a voluntary basis, but not be compulsory.

4) Is any action by the EU needed to support the development of private placement markets other than supporting market-led efforts to agree common standards?

No. The members of EACB do not consider any further EU action necessary.

We do not consider that the absence of a European standard has been the barrier for the development off private placement market and drafting one will, on its own, not create markets. The limited level of private placement is something to be assessed on a case-by-case basis since it may depend on several reasons (such as lack of investors, the availability of alternative sources of funding or little interest by borrowers). In addition, private placements presuppose a certain minimum placement size and they are certainly no substitute for small-sized bank loans.

Concerning the standardised documentation developed as an industry initiative and referred to on page 11 of the green paper it should be noted that it (1) has only been available since the beginning of 2015 (2) has been used in only very few issuances to date and (3) is extremely extensive (from around 100 pages). This makes placements more expensive and the documentation fails to provide legal certainty – an issue which is highly important to investors. We would therefore urge the Commission to refrain from giving this market standard preferential treatment or promoting EU-wide standardisation.

5) What further measures could help to increase access to funding and channelling of funds to those who need them?

The macro-economic conditions, central economic policy issues labour market policy, education policy, etc.) as well as other structural problems are also affecting the current investment environment.

Having said that, an efficient and stable legal framework is necessary in that regard. As already expressed in our response to Q 1, the –sometimes- limited capacity of the banking systems is also a result of the currently high regulatory implementation pressure and the resulting poorer economic conditions for corporate financing by retail banks. We consider that the measures proposed in our response to Q 1 above would significantly improve credit financing by many companies and contribute to the improvement of the financing conditions for SMEs.

With a view to creating synergies between bank financing and financing via the capital market, securitisations may be considered crucial in establishing the necessary link: banking expertise is required to originate and service receivables, and mobilise capital markets for financing them. Furthermore, European securitisations have shown a predominantly good performance in the past. For this reason, we welcome the considerations made regarding the creation of an EU framework for simple, transparent

and standardised securitisation, which could potentially contribute to the promotion of SMEs.

In our view, criteria should be developed to allow the inclusion of ABCP and synthetic securitisations. In any case, criteria for high-quality-securitisations currently discussed at a European and international level (please refer to the workstreams of EBA, BCBS, IOSCO) must not lead to regulation inconsistencies, or distort competition. The Commission should take these considerations into account – as far as possible – in the consultations taking place in parallel to the Green Paper.

Last but not least, it should be noted that it is of utmost importance to ensure the diversity of business models in the European banking sector as a prerequisite for stability and covering different needs within the market.

8) Is there value in developing a common EU level accounting standard for small and medium-sized companies listed on MTFs? Should such a standard become a feature of an SME growth market? If so, under which conditions?

The members of the EACB are very sceptical towards the idea of introducing a new European Accounting Standard for small and medium-sized companies.

Within the EU, publicly traded companies have been required to apply International Financial Reporting Standards (IFRS) to their consolidated financial statements since 2005; this move already established comparability of financial statements.

However, the vast majority of small and medium-sized companies prepare their financial statements in accordance with Member State accounting rules which are based on the European Accounting Directive.

Further harmonisation of financial accounting for small and medium-sized companies in Europe currently should be avoided by all means, since the entire governance and regulation structure (e.g. taxation, appropriation of profits, capital conservation and covenants of loan agreements) is not harmonised.

9) Are there barriers to the development of crowdfunding or peer to peer platforms including on a cross border basis? If so, how should they be addressed?

For the time being we can observe divergent conditions/provisions for crowd-funding in EU Member States. In order to support the development of cross border platforms the Commission should look into the different approaches and identify best practice examples.

From the perspective of potential company founders, the access to financing – especially in the early stage of the company – represents a major challenge. Despite the fact that crowd- funding may be an alternative, many aspects of crowdfunding regarding functioning, opportunities and risks, but also control or regulation, has not yet been assessed properly.

From an investor perspective, crowdfunding is a high-risk investment where total loss of the funds invested is possible. Referring to the risk level, it is irrelevant whether the investment is considered a credit or equity product.

Moreover, it is questionable if crowd investors are always fully aware of (and able to bear) the risks involved with their investments, based on business valuation and other communicated information. Asymmetry of information compared to the crowdfunding initiator (and potential fraud) makes it difficult for investors to carry out proper risk assessments of the project to be financed.

In addition, the operators of crowdfunding platforms do not assume any liability for the accuracy of the information provided on the financing projects. In order to provide retail clients with a simple and possibly reliable assessment of the risks involved, the platform operator needs to publish the analysis of the existing risk assessment for each financing project in a transparent manner. In the interests of investor protection, the comparability of safeguarding measures with other asset classes must be given for investors. Therefore, we recommend that the platform provider – depending on certain thresholds – provides a short product information leaflet and a prospectus for larger amounts. This is to protect retail clients and the interests of capital-seeking, 'start-up' company founders alike.

11) What steps could be taken to reduce the costs to fund managers of setting up and marketing funds across the EU? What barriers are there to funds benefitting from economies of scale?

Costs for fund managers both for setting up and marketing their products have increased as a result of recent regulation (e.g. AIFMD and UCITS V).The administrative burden for fund managers should be re-evaluated to distinguish between provisions which really improve investor protection and financial stability on one side and those who are of little help but have a substantial negative cost impact on fund managers on the other side.

Moreover, the charges raised by national supervisory authorities (NSAs) for listing and/or passporting investment funds such as UCITS, ongoing costs for periodical reporting to the regulator as applicable and the costs for amending of the legal documents could be reduced.

In addition, recent financial regulation – in particular MIFID II – contains provisions which will dilute the role of UCITS and AIFs as intermediaries and prevent especially smaller banks from actively offering them (e.g. due to stricter regulations regarding "inducements").

European investment funds are – compared to their US-counterparts – relatively small in size, regardless whether they are UCITS, AIFs, Private Equity Funds or Venture Capital Funds. This is the result of a large number of providers, fragmented markets and a lack of risk investment culture in Europe. Improvements to this situation are of very long term nature and hence cannot be the immediate step to be taken by the CMU initiative. Instead, we would recommend first to improve investment rules related to the

acquisition of SME-securities in any form, to reduce unnecessary cost burdens for them (see above) and to take measures to raise their attractiveness for both retail and institutional investors.

12. Should work on the tailored treatment of infrastructure investments target certain clearly identifiable sub-classes of assets? If so, which of these should the Commission prioritise in future reviews of the prudential rules such as CRD IV/CRR and Solvency II?

As a general remark we would like to express our strong concerns regarding the level playing field between capital market oriented companies and non-capital market oriented companies. Legal changes in prudential rules or others must not lead to the discrimination of non-capital market oriented banks vis à vis capital market oriented banks.

13. Would the introduction of a standardised product, or removing the existing obstacles to cross-border access, strengthen the single market in pension provision?

We welcome the emphasis given in the Green Paper to capital-based schemes for pension provisions. Several member states support the creation of personal pension assets. These promotional programmes have usually been in place for several years – or even decades – with different characteristics regarding requirements for funding and product features. These differences result in particular from the fact that the governmental programmes are usually linked to national economic and social policy measures, which contradicts the necessity of a cross-border offer and a corresponding demand. A reorganisation would therefore mean that common procedures need to be replaced, as explained in the Green Paper. The risk is that a change of systems in this area jeopardises the existing capital-based schemes i.e. a European standardisation would create an unnecessary parallel universe, while many employees would be worried about their existing contracts. For these reasons, the members of the EACB oppose a European-wide reorganisation or standardisation of the models in place regarding capital-based private and company pension provisions. If the intentions are to harmonise the statutory or company pension provisions on EU level, EU tax and labour law would have to be harmonised as a prerequisite.

16. Are there impediments to increasing both bank and non-bank direct lending safely to companies that need finance?

Regarding current banking regulation (Basel III, or CRD IV/CRR), it must be ensured that the existing provisions with regard to the eligibility of loans extended to SMEs – remain unchanged and that no new regulation is introduced leading to disadvantages for the financing of such companies. In particular:

- **Long-term maintenance of the SME scaling factor in accordance with Art. 501 of the CRR**

Referring to the empirical analysis, we support maintaining the capital requirements for counterparty credit risk for SME loans. In order to keep the effective capital adequacy for SME loans (i.e. corporate lending in retail business) at the current level (6%), the CRR provides for a scaling factor of 0.7619. This scaling factor for SME loans should be maintained for the long run.

- **Basel Committee (BCBS) revisions to the Standardised Approach (SA) for credit risk**

The plans of the BCBS to review the SA for credit risk, which determines fundamental aspects for the treatment of credit risk for all banks, raise serious concerns on supporting the need of the real economy for increased lending capacity. The review is carried on without keeping in the picture that risk weights for loans to corporates had not led to any difficulties during the crisis. While the efforts of policy makers are clearly focusing on growth and on making it more attractive to lend to SMEs, the suggestions of the BCBS for the treatment of exposures to corporates are rather pointing in an opposite direction. The risk weights for such exposures are to be aligned to two risk drivers that are deeply industry specific, and penalising for SMEs: the company's revenues and its leverage (own funds ratio), i.e. the smaller the company (the lower its revenues) the higher the capital charges. Thus, loans to SMEs with less than 20% capital and a volume of revenues below € 5mn, would get a risk-weight of 130% (instead of today's 100%), which would definitely make it far less attractive to lend to SMEs.

In addition, the BCBS suggests a "fix granularity criterion" for the retail portfolio (in which certain SMEs exposures may fall), which would considerably limit the possibility of smaller institutions to lend to SMEs and in many cases even make it impossible for them to grant competitive conditions for SME loans.

The proposal of the BCBS may have detrimental effects on the financing of SMEs in the EU, and seem to counter the aim to create growth.

- **Fundamental review of Net Stable Funding Ratio (NSFR)**

The NSFR included in the Basel Committee's proposals provides that directly extended, long-term loans have to fulfil higher refinancing requirements on the equity and liabilities side than receivables from bonds and short-term loans. This will be detrimental to corporate financing with long-term maturities or long-term fixed interest rates, particularly regarding debt funding of SMEs. Referring to Article 510 of the CRR, the mandatory introduction of a long-term refinancing indicator should be assessed very critically.

- **Practical rules for the consideration of loans secured by property**

The consideration of property as collateral plays a key role within granting processes of SME loans. Depending on the approach applied by the respective institution, the handling

of such loans is governed by Article 124 or Article 199 of the CRR, respectively. Under the Credit Risk Standard Approach (CRSA) pursuant to Article 124 (2) of the CRR, the risk-weighting for exposures secured by liens/mortgages on residential property is 35% and the risk weighting for exposures secured on commercial property is 50%. Under the Internal Ratings-Based Approach (IRBA), property is recognised as loan collateral. In essence, the privileges provided for in both approaches lead to comparable capital requirements. These optional privileges considerably increase the credit availability for SMEs, both from the perspective of regulatory capital requirements and from the operating risk perspective of the bank. They must therefore remain in place. Should property no longer (and sufficiently) be recognised as collateral for regulatory purposes, a significant drop of SME loan availability would be the result.

- Negative impacts on the long-term extension of loans due to the currently-discussed impairment model of IFRS 9 (expected loss, impairment) have to be examined, and should be avoided in the implementation.

- **Exemption of promotional lending from inclusion into the leverage ratio:**

The inclusion of promotional loans in the calculation basis of the leverage ratio leads to a higher demand of capital on the side of public-sector development banks and banks intermediating such loans. Credit institutions would be forced to limit their promotional lending activities as a consequence of the imminent multiple charges on promotional loans. Hence, access to different forms of funding would not be simplified – instead, it would become more complicated, contradicting the original objective.

17. How can cross border retail participation in UCITS be increased?

The ESMA proposal as reflected in its Technical Advice to the Commission on the implementing measures for MiFID II extends the product governance obligations on manufacturers and distributors not only when a product is launched and actively distributed and when investment firms offer advice, but also to all secondary market activities, including execution-only business. An extension of the product governance responsibilities to the distribution in the secondary market would lead to higher costs and higher legal risks in the distribution of financial instruments and would grossly inflate the cost of doing execution-only business. We understand that in most cases there are not direct distribution relationships and links between the plurality of manufacturers and distributors in secondary capital markets. The construction of such a communication network is virtually impossible, given the enormous variety of products and distributors. Regular reporting by every single distributing bank to potentially all manufacturers in the market during the entire life of an instrument would require the establishment of a new infrastructure with countless bilateral channels of communication between manufacturers and distributors.

To limit the effects of such a product governance obligation, the distributor would have to limit its product range significantly. The consequence would be that investors would no longer obtain via their investment firm a broad selection of financial instruments and the objective of open architecture would be undermined.

Thus, there is a danger that a requirement of this kind would make it more difficult to invest in financial instruments, either because of increasing costs or because fewer products will be offered. Indeed, this additional bureaucratic burden, whose effectiveness in increasing protection for clients is totally unclear, would run counter the efforts to stimulate cross-border capital flows which form the centrepiece of the Commission's capital markets union project.

18. How can the ESAs further contribute to ensuring consumer and investor protection?

The activities and duties of the European regulatory authorities should be reviewed as part of the Capital Markets Union.

First of all, we believe the level of cooperation and coordination amongst these authorities still leaves room for improvement. Regulatory authorities should consider interdependencies with (and impacts on) other regulatory areas at an early stage, and be in continuous dialogue with other standard setters (such as the IASB).

In addition, all measures taken by ESAs should be subject to consultation on a mandatory basis, including those with no direct binding effects (e.g. guidelines, recommendations and comments), since these measures tend to have binding character for market participants. The consultation timeframes should be such that allow market participants to adequately assess the proposals and provide useful feedback to the ESAs. For example, the publication of FAQ by regulatory authorities without prior consultation may lead to the loss of regulatory methodology and random results in the medium- to long-term. Thus, FAQ – in certain cases- do not support legal certainty in the end. Therefore, the goal should be to avoid legal uncertainty for market participants with regard to the interpretation of standards. Subsequent adjustments by ESAs incur significant adjustment costs.

In this context, ESAs need to carefully assess the overall impact and interaction of implementing measures with level 1-regulation when designing such in order to avoid any unintended consequences. For example, we see that in certain cases institutions are (or are considering) withdrawing particularly from investment business and are offering their customers fewer products and services. Market access and offerings for retail clients in particular are becoming seriously restricted. Implementation of MiFID II seems that in all probability will have the same effect. ESAs should also make sure that their measures remain within the limitations of level-1 regulations, in order to comply with the political determination of the European Parliament, Council and Commission.

19. What policy measures might increase retail investment? What else could be done to empower and protect EU citizens accessing capital markets?

Securities are a fundamental element in the process of a well-balanced asset building process, and are indispensable in the wake of the low interest rate environment (also for pension provisions).

For institutions, uncoordinated multiple regulation significantly increases costs and liability risks. This effect is particularly burdensome for smaller institutions which cannot afford the related higher costs on an ongoing basis.

As we have already stresses, we consider that appropriate advice is of great importance to retail clients in order to access the capital markets. In particular credit institutions provide such advice and – in many cases- individual retail clients only learn about the capital market products and their role from their banks.

However, we fear that the new plethora of new regulation the lacks a holistic view and thus, has unintended consequences. Indeed, the new – not so well calibrated regulatory framework- increasingly leads banks to withdraw from offering investment advice – to the detriment of investors who invest in securities-based products on a less informed basis, or refrain from such investments altogether. This effect contradicts the policy objective of establishing equities (and securities in general) as a fixed component of long-term asset building and the whole idea behind CMU.

This should be taken into account when defining the requirements regarding the permissibility of non- independent investment advisory services for level 2 of MiFID II. These requirements as proposed by ESMA and currently under discussion could place in question the decision of the European legislator to maintain a choice between commission-based investment advisory services and fee-based investment advisory services. The offer of personal investment advice is regarded as added value by many clients, something which has been confirmed by several surveys. This service, however, is mainly paid for through commissions. If the quality enhancement criteria are formulated in a too restrictive way, the market will be driven towards the provision of mainly on-line services or to a withdrawal of the availability of investment services to the less affluent part of Europe’s population. Indeed, exaggerated requirements may lead cooperative banks to withdraw from their role as intermediaries, due to cost and liability restrictions. Restricting inducement based investment advice would lead to the situation evidenced in markets of the member states that have a ban on inducements already in force - with the result that investment advice is provided only to wealthy clients. This unintended effect is the opposite of investor protection, since it would severely restrict the advice offered, especially in rural areas and for clients with a lower income, who particularly depend upon such support for their financial planning and retirement provisions. This also leads to declining capital market access on the part of retail clients. It is therefore of great importance to ensure in the drafting of the legal acts implementing MiFID II that the offer of personal investment advice to a large number of retail clients continues to be feasible and thus possible for banks.

Against this background, we would like to make the following recommendations:

- Regulation must follow a holistic approach: it needs to be oriented upon actual market circumstances, and must create sensible improvements for consumers. In its current form, regulation often 'puts the brakes' on the securities business – without any discernible added value for clients.

- Impact assessments at a European level to analyse the overall impact as well as the impact of individual regulatory initiatives in individual member states:

The regulations' impact on capital market access for investors, and the actual benefits for clients must be taken into account (for example, the consequences of a de facto inducement ban through ESMA's Level 2 measures for national markets and clients). National specificities – such as a functioning advisory market – must be reflected to a higher extent; the impact of regulations at a national level needs to be analysed (in more detail) in advance.

- Regulatory proposals and initiatives must be harmonised to a greater extent (regulatory consistency): for instance, refer to the differing, inconsistent cost transparency requirements set out in MiFID II, UCITS and PRIIPs regulations).

Basic financial knowledge is another important aspect with regard to the promotion of the European retail segment of the capital market: responsible capital investment decisions require the necessary knowledge about economic relationships. Education initiatives aimed at increasing the wider population's financial market knowledge play a key role in the support of private asset building and adequate pension benefits.

In addition to investor education initiative and cultural aspects, the taxation of capital market investments (and their respective returns) plays a vital role in encouraging retail clients to invest more or less funds in this area. Thus, initiatives on an additional Financial Transaction Tax (FTT) are another step in the completely wrong direction. This tax will inhibit largely retail investors from transferring their investments into capital markets, thus reducing their potential pension savings through inferior investment results – not to mention additional detrimental consequences of this tax to capital markets and their stakeholders.

20. Are there national best practices in the development of simple and transparent investment products for consumers which can be shared?

The members of EACB stand very critical towards binding requirements regarding simple and standardised financial products. The product design should be left to the market. This also applies to investment funds: UCITS – highly-regulated and therefore clear and transparent financial instruments – were introduced at a European level and are suitable for almost all investor groups. Indeed, investment funds such as UCITS are simple products offered to retail investors, which offer in most cases simple portfolio management for a variety of asset classes as well as a broad diversification, thus offering a well-functioning protection mechanism.

21. Are there additional actions in the field of financial services regulation that could be taken ensure that the EU is internationally competitive and an attractive place in which to invest?

In principle, regulatory measures should be examined to assess whether they lead to regulatory arbitrage or distortions of competition. Specific initiatives –currently debated- that should be examined more closely in this respect are structural reform of the banking sector and the Financial Transaction Tax (FFT).

In general, the successful implementation of the EU product and asset manager passport (as part of the UCITS IV Directive) form a positive example. These passports are also a sign of international competitiveness and the attractiveness of the European investment location.

23. Are there mechanisms to improve the functioning and efficiency of markets not covered in this paper, particularly in the areas of equity and bond market functioning and liquidity?

Market making has an important role in ensuring tradability of securities. New regulations contradicting the ensuring of liquidity through market making should therefore be avoided.

An example of this is the extension of the "systematic internalisers" regime to the non-equity. In particular the way ESMA proposes that this regime should be implemented is not sufficiently well calibrated. Indeed, we are concerned that it could inter alia:

- unintentionally create liquidity problems in smaller regional markets which are characterised by (1) a very limited number of liquidity providers, (2) a limited number of end-clients, (3) small issue sizes and (4) infrequent trading.
- harm smaller banks which use bonds as main funding instruments in order to sustain and finance the local communities and to grant credit to SMEs and households.

The thresholds proposed by ESMA for the definition of systematic internalisers in bonds leads to the classification of virtually all credit institutions as systematic internalisers, due to the very low threshold values. The existing practice of fixed-price transactions/security offers in many countries leads to a quick fulfilment of these criteria. Such a result does not appropriately reflect the principle of proportionality. Due to the lack of experience of all parties involved regarding the systematic internalisers regime in the non-equity area, higher thresholds should be set initially. In order to avoid the creation of a rather costly system for the continuous monitoring of (relative) thresholds for small and medium-sized credit institutions, the establishment of a de minimis regulation for absolute thresholds should be considered.

The question as to whether the new MiFIR rules will lead to more transparency depends in particular on the appropriate classification of bonds into liquid and not-liquid titles. If non-liquid bonds were erroneously classified as "liquid" bonds, they would represent unbearable risks for systematic internalisers, which could not be hedged. As a result, the

willingness to provide prices for such bonds at all would significantly decline: this would be the direct opposite of what should be achieved by higher price transparency.

Another area that needs attention is that of repurchase agreements (repos), a market which generates and secures liquidity. Yet the repo markets are being constantly restricted by regulators – for instance, by the projected introduction of the financial transaction tax or the net stable funding ratio (NSFR), the planned regulation on securities financing transactions (SFTR), or the leverage ratio in its current EU version.

Indeed, it is a challenge to introduce standards and to improve transparency, without threatening the liquidity and efficiency of the European capital market or introducing distortions in global competition.

24. In your view, are there areas where the single rulebook remains insufficiently developed?

We recommend a review of the existing regulation of the capital market as part of the introduction of future rules and regulations. The objective should be a set of regulations which avoids double regulation and duplicative provisions and inconsistencies and takes into account the cross-dependencies of financial market regulation. It remains highly important to strike the right balance between stability, investor protection, and performance of the financial markets.

One example of an area where the single rulebook has yet to become a reality is the disclosure regime for issuers in the capital markets. The requirements currently in place at European level are not adequately coordinated. As a result, they impose an excessive burden on issuers while offering investors little added value. This is evidenced in the various disclosure requirements under the First Company Law Directive (68/151/EEC, now 2009/101/EU), the Prospectus Directive (2003/71/EU), the Transparency Directive (2001/34/EU), the Market Abuse Regulation (96/2014) and the PRIIPs Regulation (1286/2014). Harmonisation across these directives and regulations is long overdue so that duplication and overlaps can be eliminated and an appropriate level of investor protection can be established. Further details are set out in our comments on the revision of the Prospectus Directive.

Another objective should be to identify and reduce excessive formalism in the interests of investor protection. As important as investor protection is, excessive formalism will potentially discourage investors and encourage banks and savings banks to withdraw from their role as mediators due to cost and liability risks. Today, excessive regulation is already leading to the withdrawal of retail clients from capital market investments. As a consequence, many of our clients refrain from using the support provided by investment advice, and thus potentially miss important opportunities on the capital market (also refer to our response to question 19).

In addition, key regulation should be set at Level 1, not at Level 2 (e.g. ban on conclusion of TTCAs with retail clients in MiFID II, but planned transfer of this legal concept to professional clients at Level 2, although the Financial Collateral Directive is designed to facilitate the use of these instruments precisely with such clients).

25. Do you think that the powers of the ESAs to ensure consistent supervision are sufficient? What additional measures relating to EU level supervision would materially contribute to developing a capital markets union?

The EACB believes that the powers of the ESAs to ensure consistent supervision are sufficient. However, in out view the level of cooperation and coordination amongst these authorities still leaves room for improvement. Regulatory authorities should consider interdependencies with (and impacts on) other regulatory areas at an early stage, and be in continuous dialogue with other standard setters (such as the IASB).

In addition, all measures taken by ESAs should be subject to consultation on a mandatory basis, including those with no direct binding effects (e.g. guidelines, recommendations and comments), since these measures tend to have binding character for market participants. The consultation timeframes should be such that allow market participants to adequately assess the proposals and provide useful feedback to the ESAs.

Within this context, the following measures could be useful:

- Prior to the publication of a consultative paper, industry experts and representatives from associations should be invited to discuss relevant issues with the regulatory authorities. Working drafts of consultative papers should be provided confidentially to these experts and representatives prior to their publication. In addition, the inclusion of associations offers a broad basis for exchange.
- Before a standard is made legally binding, an impact analysis should be carried out, depending on the issue discussed and the potential consequences.
- Any comments or remarks submitted the exchange of ideas as well as the results of the impact analysis where applicable, should be assessed comprehensively and taken into account in the publication of the final standards. In this context, explanations why suggestions received in the course of consultations were not taken into account should be included into final documents.

Moreover, as we have already argued above the ESAs need to carefully assess the overall impact and interaction of implementing measures with level 1-regulation when designing such in order to avoid any unintended consequences. For example, we see that in certain cases institutions are (or are considering) withdrawing particularly from investment business and are offering their customers fewer products and services. Market access and offerings for retail clients in particular are becoming seriously restricted. Implementation of MiFID II seems that in all probability will have similar effect. ESAs should also make sure that their measures remain within the limitations of level-1 regulations, in order to comply with the political agreement of the European Parliament, Council and Commission.

26. Taking into account past experience, are there targeted changes to securities ownership rules that could contribute to more integrated capital markets within the EU?

The European Commission has tried over several years to come up with a proposal for a Securities Law Legislation (SLD). The effort has not led to an approach that could serve as a basis for targeted changes to securities ownership rules. We are not of the opinion that Members states should be held any longer to wait for a possible EU harmonisation. We therefore ask the European Commission to clear the way to national reforms in compliance with international standards.

Having said that, a certain degree of harmonisation – particularly with a view to securities investor rights would be welcomed. With this in mind, when it comes to a conflict of laws rule, we would like to note that the Commission itself in its Consultation on Legislation on Legal Certainty of Securities Holding and Dispositions, offered under Principle 14 a conflict-of-laws rule, according to which the national law of the country where the relevant securities account is maintained by the account provider would apply. Since all three EU directives that already address this issue, i.e. Article 9(1) of the Financial Collateral Directive, Article 9(2) of the Settlement Finality Directive, and Article 24 of the Winding-Up Directive the connecting factor determining the conflict-of-laws rule is the place where a securities account is 'maintained' we consider that the future conflict-of-laws-rule should be harmonised with these rules.

Concerning the international developments in this area, we would be of the view that the basic idea of the "acquis communautaire" in this area (PRIMA) and the approach set out in the Hague Securities Convention (Account Agreement Approach – AAA) are not incompatible in the sense that the later still attaches the applicable law to the place where the securities account is held. There is only a difference in methods of determining the place where the account is held.

27. What measures could be taken to improve the cross-border flow of collateral? Should work be undertaken to improve the legal enforceability of collateral and close-out netting arrangements cross-border?

Despite the Financial Collateral Directive and the Finality Directive – both of which include rules governing the protection and/or recognition of close-out netting, the legal framework for close-out netting still diverges across the various member states. A more extensive harmonisation of the legal framework, supporting the effectiveness and enforceability of netting agreements (especially in the form of contractual netting agreements contained in master agreements or in the rules and regulations of central counterparties), would be an important step to strengthen netting agreements as a key tool for mitigating risks in financial transactions. This applies all the more since recent regulatory initiatives (CRR, EMIR, BRRD, and SFT) increase the need for collateral. This presupposes a robust, uniform EU-wide legal framework for handling financial col-lateral (particularly in connection with cleared and non-cleared OTC derivatives) and close-out

netting (segregation of client collateral, effectiveness of close-out netting as the basis for calculating the regulatory collateral, etc.). When continuing to develop the legal framework for close-out netting, the UNI-DROIT netting principles recently adopted (in coordination with the European Commission) should be taken into account.

Moreover, a potential measure to enhance collateral flow is to explicitly exempt collateralized trades from taxation (uncollateralized exchange of liquidity). Due to the low risk, low margin and high volume nature of the securities financing business (repos and securities lending) these is particularly vulnerable to external cost.

28. What are the main obstacles to integrated capital markets arising from company law, including corporate governance? Are there targeted measures which could contribute to overcoming them?

European company law contains two corporate forms allowing simplified cross-border activities, including the transfer of the company's domicile: the Societas Europaea (SE) and the European private limited liability company. Therefore, we believe that no further measures at EU level are required. To the extent that companies choose a national corporate form, the corresponding national requirements are to be taken into consideration. However, this is unproblematic due to the fact that appropriate corporate forms are available for companies active primarily in cross-border segments.

Moreover, we would like to refer to the harmonisation processes that are already taking place at the EU- level regarding company and insolvency law.

29. What specific aspects of insolvency laws would need to be harmonised in order to support the emergence of a pan-European capital market?

In our view, a harmonisation of the substantive insolvency law would not provide a considerable contribution to the emergence of a pan-European capital market. Whilst it is correct that the so-called issuer risk must also be taken into account when making an investment decision, this assessment is primarily based upon the issuer's solvency, with the applicable insolvency law being considered as a secondary aspect, if at all.

We welcome the harmonisation of conflict rules and the mutual recognition of insolvency proceedings (EU Regulation on insolvency proceedings).

30. What barriers are there around taxation that should be looked at as a matter of priority to contribute to more integrated capital markets within the EU and a more robust funding structure at company level and through which instruments?

A comprehensive harmonisation of tax regulations shall not be targeted, given the fact that the European Union has no mandate for direct tax regulations. However, individual tax obstacles in conflict with the Capital Markets Union may be addressed and lifted:

- Uniform tax regulations for cross-border investments are of particular importance not only for banks. Banks are regularly involved in the settlement of tax issues on behalf of their clients in their capacity as financial intermediaries. In this context, further progress in the simplification of cross-border withholding tax reductions as part of double-taxation agreements would be a useful contribution to a stronger integration of EU capital markets. From an investor's perspective, the reimbursement of withholding tax payable in some member states on interest and dividend payments need to be simplified and accelerated.
- In the case of an investment in accumulating foreign investment funds, it has to be made sure that practicable and fair requirements apply to the proof of income in the country of taxation.
- An analysis should be carried out on the equal tax treatment of equity and debt financing in the EU member states. Incentives should be provided for member states to create a level playing field.

In addition, we strongly believe that initiatives introducing an FTT in a limited number of countries are absolutely counter-productive to the goals laid down in the CMU Green Paper and will increase corporate costs for raising capital. Moreover, the financial transaction tax would have negative effects on retirement provisions of small savers making them more expensive.

31. How can the EU best support the development by the market of new technologies and business models, to the benefit of integrated and efficient capital markets?

Care should be taken to ensure that new technologies are subject to the same supervision and security standards as traditional technologies.

New business models are being developed mainly by non-bank financial intermediaries or shadow banks. The European Commission should make a point of taking into account the regulatory approach adopted in this area and of addressing the issue of systemic risk.

32. Are there other issues, not identified in this Green Paper, which in your view require EU action to achieve a Capital Markets Union? If so, what are they and what form could such action take?

We consider that the demand side of the market is not taken into account appropriately in the discussion about the Capital Markets Union. The improvement of access to capital alone cannot be sufficient from our perspective. With a view to the financing of small and medium-sized companies, this also includes a comprehensive, empirically-based analysis of the demand from such companies for financing instruments offering terms close to the capital market. In this context, concrete obstacles for capital market financing need to be identified.

Moreover, the strengthening of capital markets requires financial knowledge and education on the connectivity between the economy and capital markets. It is necessary to implement broad educational initiatives at schools, at universities and for the general public. Financial literacy initiatives should contain basic information on the economic and financial circuits as well as information on capital markets. The goal should be twofold: On the one hand to inform people about possibilities of investments, and on the other hand to inform about ways to finance businesses through capital market instruments.

Apart from the positive sentiment for capital markets, we suggest initiatives to strengthen the entrepreneurial spirit and motivate people to start their own business. Such rise in entrepreneurial spirit would have positive effects on the demand of capital market products.

Having said that, a Capital Markets Union must not be an end in itself. Prior to any measures concerning the EU markets on the basis of the US examples – US models have been used as references by the EU Commission – a detailed assessment of the different national and regional conditions is required in order to turn the Capital Markets Union into a success. Capital market financing of companies and public households was never as important in Europe than in the US, from a historic perspective. This goes back to a long-standing tradition in Europe, based on cultural factors (financing of public services, credit culture, etc.) and should not be created artificially.

Until that time, it is important to further develop the stable relationships between companies and banks or at least to prevent additional burdens (see our proposals in response to question no. 1). Stability in the business environment and long-term legal certainty are key success factors for a Capital Markets Union: constantly changing regulations are not only an impediment to an adequate risk assessment – they are a burden upon strategic (re-)orientation and upon any fundamental revision of business models for all market participants.

The EACB trusts that its comments will be taken into account.

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