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EBA-Consultation on Draft RTS on Own Funds – Technical Standards on Cooperatives, Mutuals, Savings Institutions and similar Institutions

The Division Bank and Insurance of the Austrian Federal Economic Chamber, as representative of the entire Austrian banking industry, appreciates the possibility to comment on "EBA-Consultation on Draft RTS on Own Funds – Technical Standards on Cooperatives, Mutuals, Savings Institutions and similar Institutions " and would like to submit the following position:

Generally we are of the opinion that EBA possibly goes beyond its authority when it requires additional standards for the qualification as a cooperative. This could lead to the result, that a legal entity in its Member State is regarded as a cooperative whereas EBA would not accept the classification as a cooperative.

Moreover we would like to submit two specific comments with regards to Art 3a para (c) and page 11 para (4c).

Art 3a (c)

Art 3a (c) reads as follows:

"Competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a savings institution for the purpose of Part II of Regulation xx/XX/EU [CRR], where all of the following conditions are met: [...]

(c) the sum of capital, reserves and interim or year-end profits, is not allowed, according to national applicable law, to be distributed to holders of Common Equity Tier 1 instruments. Such condition is deemed to be fulfilled even where the institution issues Common Equity Tier 1 instruments that grant the holders, on a going concern basis, a right on a part of the profits and reserves, unless prevented by the applicable national law. This part shall be proportionate to their contribution to the capital and reserves or,

where permitted by the law of the Member State in which the institution has its registered office, in accordance with an alternative arrangement."

Analysing this provision leads to the conclusion that this text seems to be unclear.

The legal situation in Austria can be described as follows:

On the one hand, savings banks are in principle, what concerns the Austrian legal status, legal entities without owners. They work on the basis of foundation capital and retained earnings in the form of open reserves.

On the other hand, savings banks are today in the situation to issue so called „participation capital". This is Core Tier 1 capital without voting rights granting the holders of such instruments a dividend payment at a pre-indicated level. The capital – what concerns the principal but also the interest/dividend – is fully loss absorbing, meaning, that the owner of the instrument has no right on the principal and the institution can stop interest-/dividend-payments any time. In the case of the insolvency of the institution the holders of such an instrumens have a proportionate right on the proceeds of liquidation.

Against this background it seems unclear, whether the Austrian savings banks fulfil this precondition or not. In our view the text should concentrate on the following aspects:

- The principle is that a savings bank has no owners, meaning nobody who participates in the capital or in the profits of the savings bank.
- There is one exemption: This is if such institutions issue CET1-instruments. In this case savings banks are allowed to distribute to the holders of the instruments interest-/dividend payments. In this case, Art 26, modified by Art 27 would apply.
- In case of a liquidation of a savings bank, the holder of CET1-instruments has a proportionate right on the proceeds of liquidation, and as such the holder is "participating in the capital". Should – after liquidation of all liabilities and after payout of these proportionate proceeds – a remainder be left, this remainder is being distributed to the municipality which founded the savings bank or where the savings bank is located.
- Discretionary repurchases of the instruments or other discretionary means of reducing capital are in any instance possible, under the precondition that the supervisor granted a permission in the course of Art. 72 CRR.

In our view the text should reflect these principles otherwise Austrian Savings Banks would not be included which would be unacceptable.

We do not understand the intention of Art 3a (c). It seems that Art 3a, and therewith also (c), is a kind of prerequisite for the application of Art 25 CRR, and in consequence also for Art 27 CRR, because Art 27 CRR refers to Art 25 CRR. In other words: In order to apply Art 25 and 27 CRR institutions have to comply with the requirements of this RTS. Art 3a (c) of this RTS deals with the question what is distributable to whom. But this question is also dealt with in the context of Art 26 and 27 CRR, meaning, on the one hand a legal prerequisite, on the other hand a legal consequence. Furthermore we understand the differentiation between the "sum of" in the first sentence and "a part of" in the second sentence. We understand this differentiation in the sense that the institution shall not be allowed to distribute the total sum of capital, reserves and

profits but parts thereof. What we also understand is that this rule shall apply to the going concern situation. What we further assume is, that discretionary reductions, where the competent authority gave its prior consent in line with Art. 72 CRR shall not be covered by this provision.

Furthermore we want to underline that in the case the savings bank is a financial holding company (with no banking business itself, a so-called "Anteilsverwaltungssparkasse" or foundation) and its capital is included in the consolidated accounts of the group of credit institutions Art. 25 CRR should also apply.

Therefore we propose the following changes to the text of Art. 3a (c):

"Competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a savings institution for the purpose of Part II of Regulation xx/XX/EU [CRR], where all of the following conditions are met: [...]

(c) the total sum of capital, reserves and interim or year-end profits, is not allowed, according to national applicable law, to be distributed on a going concern basis to holders of Common Equity Tier 1 instruments. Besides that the institution is allowed to issue Common Equity Tier 1 instruments that grant the holders, on a going concern basis, a right on a part of the profits and/or capital and/or reserves, unless prevented by the applicable national law. This part shall be proportionate to their contribution to the capital and reserves or, where permitted by the law of the Member State in which the institution has its registered office, in accordance with an alternative arrangement. Distributions in liquidation and discretionary repurchases of the instruments or other discretionary means of reducing capital are not covered by this provision. Also savings institutions acting as financial holding companies without any banking business are included."

Page 11 (4c)

Furthermore on page 11 in para 4c the last sentence has to be adopted to keep the opportunity for cooperatives to distribute a multiple of the dividends paid on shares that have ordinary voting rights on CET-1 instruments that have no voting rights according to Recital 53 CRR of the Presidency compromise text of May 2012.
Therefore the wording of the last sentence of 4c should be:
"Where an institution issues different types of instruments under Article 27, there should be no privileges between the different types of instruments other than the ones foreseen in Recital 53 and in Article 27(4) of the CRR."

Kindly give our remarks due consideration.

Yours sincerely,

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