Consultation EBA-CP-2012-11

Response of the Association of German Independent Public Savings Banks (*Verband der Deutschen Freien Öffentlichen Sparkassen e.V*)

I. The Association of German Independent Public Savings Banks

The Association of German Independent Public Savings Banks, established in 1920, represents six German Independent Savings Banks as well as one German savings bank under public law which developed from a Independent Savings Bank. The members also include Hamburger Sparkasse AG which has a total balance sheet of EUR 38.5 billion being the largest German savings bank. Die Sparkasse Bremen AG, another major savings bank, is also a member of the Association. Overall, the regular members have an aggregate balance sheet total of EUR 57.7 billion (status: 31 December 2011).

The Independent Savings Banks in Germany are members of the regional savings bank organizations and as such also a member of the German Savings Banks Association (*Deutscher Sparkassen- und Giroverband – DSGV*). In addition, they belong to the institutional guarantee-scheme of the Savings Banks Finance Group (*Sparkassen-Finanzgruppe*). The shares in the Independent Savings Banks are held by foundations or financial holding companies having the task of the long-term operation of the savings bank business at the regional level under their articles of association.

36 Independent Savings Banks from nine other countries in Europe and the association of Swedish Independent Savings Banks, Fristående Sparbankers Riksförbund (FSR), have joined the association as extraordinary members.

II. Introduction to the activity of the Independent Savings Banks in Germany: Exercise of public tasks since more than 100 years

The Independent Savings Banks perform a public task. They are traditionally an important part of the German savings banks organization. They have made a material contribution in supplying the regional economy, especially small and mid-size companies and financially weaker groups in the population with financial services since the 18th century. The Independent Savings Banks offer the broad public an alternative to commercial banks and accordingly reinforce the competition in the banking sector to the benefit of the general public. The goal of the business activity is not to maximize profit.

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The Independent Savings Banks perform the public task in the private legal form of a German stock corporation (*Aktiengesellschaft*). However, under their articles of association they have an obligation to perform the public task. The Independent Savings Banks are additionally to banking supervision subject to special governmental supervision. Their structure and activities are comparable to savings banks under public law and, therefore, they are authorized under national law (Section 40 German Banking Act (*Kreditwesengesetz* – "**KWG**")) to use the designation "Savings Bank" (*Sparkasse*) in their company name.

With regard to the economic and social role of the Independent Savings Banks we greatly appreciate the initiative of the European Banking Authority (EBA) to include the savings banks in a separate regulatory regime for the Common Equity Tier 1 ("**CET 1**") capital which takes into account these specific aspects, supplementing the Draft Capital Requirements Regulation of the Commission dated 20 July 2011 ("**CRR**") in accordance with the draft of the Council dated 21 May 2012.

The concept of savings banks has due to historic reasons developed differently in the individual Member States of the EU. European regulations on the notion of a savings bank must reasonably take into account these individual national characteristics which have grown over the course of time. However, the Draft Regulatory Technical Standard ("**RTS**") in the present version as proposed in the consultation paper would have the effect that the Independent Savings Banks in Germany would not fall under the definition of a savings bank under Article 25 CRR. This would result in an unequal treatment within the German savings bank sector resulting in an unjustified adverse impact on the Independent Savings Banks. Therefore, in the opinion of the Independent Savings Banks in Germany an adjustment of the RTS is necessary.

III. Consultation Questions

1. Consultation Question 1

Q 01: "Are the provisions on the conditions according to which competent authorities may determine that a type of undertaking recognized under applicable national law qualifies as a mutual, cooperative society, savings institution for the purpose of Own Funds sufficiently clear?"

a. The criterion in Article 3a lit. a) RTS should be modified due to substantive reasons. The current wording precludes without justification some of the largest German savings banks which are traditionally an inherent part of German savings banking (on this point below in 2, p. 5 ff.).

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b. The present wording of criterion Article 3 lit. b) RTS links the definition of savings bank to the issuance of capital instruments under Article 27 CRR. This provision is unclear. It could be construed as meaning that the mere possibility of issuing capital instruments pursuant to Article 26 CRR excludes an institution from being classified as savings bank. Such an interpretation leading to alternativity between Article 26 and Article 27 CRR would exclude all Independent Savings Banks in Germany from the notion of a savings bank under the RTS because the Independent Savings Banks can issue stocks, thus, capital instruments under Article 26 CRR. Such a restriction would be contrary to the purpose of Articles 25 and 27 CRR.

Article 25 and 27 CRR create necessary exceptions for certain credit institutions which cannot comply with some of the stricter requirements in Article 26 CRR due to national or institution-specific provisions. These provisions shall take account of the special function of these credit institutions. In the case of savings banks this is the commitment to a public task being in the general interest. The Independent Savings Banks are required under their articles of associations to serve the public good. Their activities are supervised by governmental authorities in order to secure the pursuit of their public task. The Independent Savings Banks have been part of savings banking in Germany for well over 100 years.

Furthermore, the objective geared to the common good is laid down in the articles of association of the respective parent companies. In the case of the Independent Savings Banks in Hamburg and Bremen (Hamburger Sparkasse AG, Die Sparkasse Bremen AG), the parent companies are financial holding companies which hold 100% of the stocks in the savings banks. A change of this task of the financial holdings according to their articles of association is not possible without the consent of governmental institutions. Accordingly, the articles of association of the financial holding company of the savings bank in Bremen can only be amended with the consent of the Senator for the Interior. In Hamburg any change of the task under the articles of association – being especially laid down in the preamble of the articles of association of the HASPA Finanzholding – requires the consent of the Senate of the Free and Hanseatic City of Hamburg. Since the amendment of the task under the articles of association is subject to the consent of governmental institutions controlled by the parliament, the Independent Savings Banks are governed by the same restrictions as savings banks under public law.

Furthermore, it is excluded to make use of profits of the savings banks in Bremen and Hamburg for private benefit as their sole shareholders may only allocate their net earnings to their reserves or use them for charitable purposes.

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Therefore, an exclusion of the Independent Savings Banks from the scope of Article 25 CRR simply due to their legal form as a stock corporation would not be justified. This applies especially in light of the fact that, in addition to issues with respect to the structure of CET 1 capital instruments, other topics are linked to the scope of Article 25 CRR as well (see below in point IV., p. 7 f.).

Moreover, such specific provision in Article 3 lit. b) RTS would not comply with the CRR regulatory framework. Articles 25, 27 CRR give the savings banks the possibility to issue CET 1 capital instruments pursuant to Article 27 CRR in addition to CET 1 capital instruments under Article 26 CRR. Such an institution has the choice between Article 26 and Article 27 CRR if it issues core capital instruments[1]. It would not be covered by the delegation of power in Article 25 (2) lit. a CRR to limit this possibility to choose between these instruments by introducing an alternativity between them and a restriction to savings banks not issuing instruments under Article 26 CRR.

In its currently submitted version, Article 3a lit. b RTS would probably have the result of excluding even broad parts of the public law savings banks in Germany from the scope of Article 25 CRR because the allotted capital (*Dotationskapital*) endowed in the public law savings banks, as a general rule, satisfies the requirements of Article 26 CRR. However, such a broad exclusion cannot be intended and demonstrates that this criterion for delineation is not suitable.

Proposal:

This requirement should be deleted. A suitable definition of the notion of a savings bank is already possible under Article 3a lit. a RTS in the version proposed below (in point 2., p. 7).

Alternatively, it should be clarified that the possibility of issuing capital instruments under Article 26 CRR does not preclude classifying an institution as a savings bank under Article 25 CRR from the outset. The following wording would be appropriate for this purpose:

> "*with respect to Common Equity Tier 1 capital, the institution is able to issue, according to national applicable law or company statutes, at the level of the legal entity, capital instruments referred to in Article 27 of Regulation xx/XX/EU*

[1] The draft of the Commission dated 20 July 2011 and the draft of the Council dated 21 May 2012 have a different wording. However, we discern from both versions that the relationship between Article 26 and Article 27 CRR does not constitute alternativity between these instruments and that instead there is a possibility to choose between them.

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[CRR]; this does not prevent the institution from issuing Common Equity Tier 1 capital instruments under Article 26 of Regulation xx/XX/EU [CRR] as well;".

c. The criterion under Article 3a lit. c) RTS aims at restricting distributions to the owners. Sentence 1 of the provision is unclear. Accordingly, the "sum" of capital, reserves and interim or annual profit may not be distributed. According to the wording, these items in sum may not be distributed. However, such a provision does not have any reasonable area of application in the case of commercial undertakings.

The provision could also be understood as meaning that no distribution can be made from any of the designated individual items. However, such an interpretation would not make sense from an economic point of view and would be almost completely set aside by sentence 2.

Under the exception provided for in sentence 2 distributions on a regular basis are permissible in our view. It is not fully clear which restriction the criterion "on a going concern basis" involves. However, the distributions are not subject to any specific requirements according to this provision. To the extent not precluded by national law, the amount of the distributions is freely negotiable between the institution and the equity investors. The requirement has no relationship whatsoever to the nature or specific function of a savings bank. Therefore, the provision has no reasonable function in the context of the definition of a savings bank. It should be deleted.

A reasonable delineation of the savings bank sector can already be made by the reference in Article 3a lit. a RTS to national law (see on this point immediately below in point 2., p. 7). Restrictions on distributions, to the extent that they are a feature of the definition of a savings bank, are provided for in the national regulations or they follow from its public task which precludes excessive distributions.

Proposal:

The criterion should be deleted.

2. Consultation Question 2

Q 02: "Are there issues which need to be elaborated further?"

The consultation draft on Article 3a lit. a) RTS is based on the fact that the savings bank falls under the scope of one of the State Savings Bank Acts. This wording excludes in Germany the two largest Independent Savings Banks from

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the definition of a savings bank, namely, Hamburger Sparkasse AG and Die Sparkasse Bremen AG. There is no State Savings Bank Act in Hamburg. Die Sparkasse Bremen AG does not fall under the Bremen Savings Bank Act.

The exclusion of the two largest Independent Savings Banks is not justified. The sole shareholder in both savings banks is in each state a charitable institution with the goal of promoting the concept of savings and granting broad sectors of the population access to banking services. The articles of association commit the stock corporations to these public task of their respective sole shareholders and, thus, to the public good and limit the activity primarily to the economic region where they have their registered offices (regional principle). The activity of these two Independent Savings Banks is not different from the activity of the savings banks under public law which are set forth in the Savings Bank Acts and, thus, fulfill the criterion under Article 3a lit. a) RTS.

Because the business activity of the Independent Savings Banks is the same as the business activity of the savings banks under public law, the Independent Savings Banks may also use the designation "Sparkasse" (Savings Bank) which is protected by law in Germany.

Section 40 KWG defines the notion of a savings bank as follows:

> *"(1) The term "Savings Bank" (Sparkasse), or a term in which the words "savings bank" appear, maybe used in the firm name or as an addition thereto or to describe the purpose of the business or for advertising purposes only by*
>
> 1. *public savings banks holding a license in accordance with section 32;*
>
> 2. *other enterprises which, when this Act came into force, were legitimately using such a term under the former regulations;*
>
> 3. *enterprises which are newly established by the restructuring of the enterprises specified in number 2 as long as, by virtue of their articles of association, they display special features (in particular, business objectives geared to the common good and a restriction of their principal activities to the economic locality in which the enterprise is domiciled) to the same as extent as before the restructuring."*

Section 40 (1) KWG covers the public law savings banks as well as the Independent Savings Banks. The public law savings banks fall under Section

40 (1) no. 1 KWG. The Independent Savings Banks are subject to regulation under Section 40 (1) nos. 2, 3 KWG.

The German legislator recognized hereby the historically developed structural differences within the German savings bank sector and gave priority to the function of savings banks geared to the common good. The Federal legislator has provided for this in Section 40 KWG and the Federal States have implemented this in the respective State Savings Bank Acts. The criteria set forth in Section 40 (1) no. 3 KWG describe, as do the respective laws of the Federal States, the function of the Independent Savings Banks, namely, a task geared to the common good and a limitation of the main business activity to the economic region in which the savings bank has its registered office.

Proposal:

Article 3a lit. a RTS should be modified.

> "- *in Germany: institutions referred to under Section 40 para. 1 German Banking Act (Gesetz über das Kreditwesen KWG) or under*
> *i. 'Sparkassengesetz für Baden-Würtemberg (SpG)'*
> *[...]*
> *xv. 'Thüringer Sparkassengesetz (ThürSpkG)'".*

3. Consultation Question 3

Q 03: "Are there any additional conditions which shall be added, any additional commonalities of the European cooperative banking sector (to be understood as comprising mutuals, cooperative societies, savings banks or similar institutions)?"

Other criteria do not need to be included. The criterion under Article 3a lit. a RTS in the version proposed here ensures for institutions located in Germany that only those institutions fall under the definition of a savings bank whose business activity serving the public good justifies the application of the special provisions in Articles 25, 27 CRR.

IV. Overall Aspects: No Exclusion of Independent Savings Banks due to mere terminological Considerations

The exclusion of Independent Savings Banks from the scope of Article 25 CRR merely due to their legal form as German stock corporation is – as has been shown – not justified. This applies especially in light of the fact that, in

addition to issues with respect to the structure of CET 1 capital instruments, other topics are linked to the scope of Article 25 CRR as well.

For example the deduction of a holding in another savings bank pursuant to derogation rule in Article 46 (3) CRR is directed exclusively towards institutions under Article 25 CRR. The Independent Savings Banks belong to the same institutional guarantee-scheme as the savings banks under public law. However, if the Independent Savings Banks would not fall under Article 25 CRR, holdings in other institutions of the Savings Bank Finance Group would have to be deducted from the liable equity capital in contrast to other German savings banks. This would lead to an unjustified discriminatory treatment of the Independent Savings Banks.

Therefore, in the context of further provisions of European regulation it would be impossible to simply refer to the definition of savings bank under Article 25 CRR. A nearly unmanageable number of amendments in each respective provision would be necessary in order to address the specific structure of the Independent Savings Banks and the performance of their public task.

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