Minutes of the meeting of the Commission Expert Group on Banking, Payments and Insurance

Bank Regulation and Supervision

25 November 2020 (virtual meeting)

Opening Remarks

The Chair welcomed members of the group and set out the agenda of the meeting, which focused on potential changes to the Capital Requirements Directive (CRD), specifically as regards the administrative sanctioning regime and certain supervisory powers, as well as the macro-prudential risk framework.

Exchange of views on potential changes to the administrative sanctioning regime

COM explained that the administrative sanctioning regime had not been revised since the adoption of the CRD IV. Therefore, in the context of the establishment of the SSM, some shortcomings have been identified by supervisory authorities that might warrant changes to that regime. Any such changes could be included in the next banking package.

The first potential change that was discussed was the expansion of the list of sanctionable breaches in Article 67 of the CRD. COM presented two possible ways of doing this. The first one would entail widening the scope of the sanctioning powers by introducing references to specific requirements to that list. The second one would involve giving supervisory authorities a general administrative sanctioning power for breaches of CRD/CRR[1] requirements not explicitly referred to in Article 67 of the CRD.

Overall, the majority of members were supportive of the idea of expanding the sanctionable breaches in Article 67 of the CRD. In their view, this would provide a higher harmonisation of the current administrative sanctioning rules and hence ensure a more level playing field for supervisors and institutions alike. Most members were in favour of expanding the list with specific requirements. Only three members expressed their preference for a general administrative sanctioning power, while three members raised concerns on the legal certainty of such generic clause.

As regards possible requirements to be introduced in the list, some members expressed concern about the possibility to make breaches of minimum capital requirements (Pillar 1) sanctionable. In their view, this could worsen the financial situation of an institution. They also pointed out to the fact that others dissuasive tools were already in place to deal with such breaches (e.g. withdrawal of the banking license). In addition, the EBA expressed some doubts on whether issuing a financial penalty in the case of such breaches could be considered proportionate.

[1] Capital Requirements Regulation.

The ECB clarified that the possibility to sanction breaches of minimum capital requirements would not aim to worsen the financial situation of an institution. Rather, it would serve as a deterrent for the institution and ensure the institution's compliance with those requirements. In addition, the ECB stressed that those sanctioning powers could be applicable to members of the management body of an institution in order to make them liable for their behaviour and sanction them directly without worsening the financial situation of the institution.

COM then moved to discuss the next point, namely the potential need to clarify further the distinction between enforcement and sanctioning measures. COM also floated the idea of adding on more enforcement tool to the supervisory toolbox, namely periodic penalty payments. In COM's view, this would give supervisors additional means to enforce effectively the application of prudential requirements.

All members intervening welcomed such clarifications between enforcement measures and administrative sanctions. They were also supportive of the idea of including the power for supervisors to impose period penalty payments. One member supported this type of measure as it is already in place in its national laws. In addition, one member stressed the issue of the appropriateness of using both measures (administrative measures and penalties) for the same breaches.

Finally, COM provided its views on the potential need for clarification of the definition of the total annual net turnover. It put forward two possible options to tackle this issue. The first option would be to specify that the total annual net turnover would be equal to the indicator used as a basis for calculating the own funds requirement for operational risk set out in Article 316 of CRR. The second option would entail a clarification of the individual elements that needed to be included in the calculation of the abovementioned indicator (through guidelines or through a technical standard to be developed by the EBA).

All members intervening confirmed that they welcomed such clarifications, which would clarify the application of pecuniary measures for all institutions in the EU. One member expressed its preference for the first option and the clarification directly in CRD. One member expressed some concerns in relation to the use of the business indicator, pointing out that the latter would change under the new standardised approach for operational risk.

Exchange of views on potential changes in the supervisory powers

Following the broad introduction from COM explaining the approach developed in the non-paper, the ECB provided a detailed overview of the varying applications at national level of the three supervisory powers covered by the non-paper.

Regarding the acquisition of qualifying holding by banks, three members intervened to highlight the importance of avoiding that competent authorities would be overburden by a massive amount of notifications, as they could be required to carry out a large number of additional supervisory procedures. In their view, the additional cost for supervisors could be significant. Regarding what threshold(s) could be applied, three members pointed out that the threshold in Article 89 of the CRR could be more relevant than the existing thresholds contained in the first paragraph of Article 22 of the CRD. In addition, members pointed out that they needed sufficiently detailed and relevant criteria in order to be able to assess the scope of the new power.

Regarding the transfer of assets, participants raised no specific comment. Some members indicated that the comments made on the acquisition of qualifying holding by banks were also relevant for this specific supervisory power.

Regarding the supervisory power related to mergers and demergers of operations, members were supportive of the idea. One member insisted that notifications and the possibility to oppose to mergers or demergers should be applicable irrespective of the size of the bank (including small and non-complex credit institutions). On the opposite side, some members were of the view that the principle of proportionality should be respected and hence that small and non-complex institutions should be exempted from the notification. One member stressed the need to have a careful approach, as harmonisation on this type of power could have implications on the business of institutions.

Exchange of views on possible changes to the macro-prudential risk framework

COM presented the suggestions for targeted procedural clarifications and technical enhancements of the systemic risk buffer (SyRB) and countercyclical capital buffer (CCyB), as well as the suggestion to extend the hub function of the ESRB to notifications under Article 458 of the CRR. These changes could be included in the Basel finalisation package. A major review of the macroprudential framework in the CRR and CRD is only scheduled for 2022, based on Article 513 of the CRR.

Several members voiced support to COM for tabling these macroprudential provisions. Delegates were invited to submit their feedback and comments in writing. Several members expressed support for the hub function of the ESRB and the other proposals to reduce complexity. While not opposing the clarification of some articles of the CRD, one delegate pointed out that the complexity of the procedures may reflect the need to balance different objectives. Some members wondered whether it would not be better to wait with amendments that require national implementation until the 2022-review, as the CRD would be re-opened again on that occasion. Several members agreed that there were issues with the credit-to-GDP gap as leading indicator for the CCyB buffer guide, which might need to be reflected in the CRD or the respective ESRB recommendation. However, there was also a call to consider the consequences of giving less importance to this harmonised indicator in the buffer guide for the CCyB. As regards the envisaged greater flexibility for timing the phasing-in of an increased CCyB rate, it was suggested to consider the additional layer of complexity that this might introduce and discuss this also in the context of the ECB's topping-up power.

Final remarks and closing of the meeting

The Chair thanked the members for their inputs and the useful discussion and invited them to submit written comments by 11 December 2020. She indicated that a follow-up meeting could be organised, if needed.