Comments

Association of German Banks

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EU and US 7 September 2012 call for input on regulatory issues for possible future trade agreement

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Ladies and gentlemen,

The Association of German Banks represents the interests of the privately owned banks in Germany in the field of banking and economic policy.

We are writing this comment letter to express our support for including financial regulation issues in any negotiations on a comprehensive EU-US agreement to further liberalise transatlantic trade and investment.

The US remains the most important financial market outside the EU. For German banks, US rules – whether legislation by Congress, regulation by US authorities or case law – are highly important.

The recent “regulatory wave” in response to the financial crisis means that EU-US and global (G20, FSB, Basel Committee, IOSCO, etc.) coordination of financial market regulation is essential.

Differing financial system structures and legal traditions will not allow identical rules. It will therefore be paramount to apply principles of national treatment (i.e. competitive equality) and recognition of comparable home-country standards when regulating US operations of EU banks (and vice versa). The more we align rules internationally, the more likely such recognition will be.

By contrast, we would not like to see US regulators applying standards to our banks that are extraterritorial, duplicative or discriminating.

Unfortunately, we have quite a number of such concerns regarding the on-going implementation of the Dodd-Frank Act (DFA) by relevant US authorities, although final versions of the respective implementing rules are still pending and may, ideally, take our concerns into account.

- As regulators and banking associations from the EU, Germany as well as other countries have stated, the October 2011 Volcker Rule implementation proposal is much too extraterritorially burdensome for non-US banks and discriminates against issuance of non-US government bonds.

- We look forward with interest to the Fed’s proposed rules regarding application of the prudential requirements for SIFIs under DFA Section 165 to non-US banks. In any event, the Fed should recognise home-country regulation (incl. implementation of FSB/Basel rules) of non-US banks (or at least factor in their real impact on the US system) when implementing prudential requirements for non-US bank SIFIs under DFA.

- The June 29 (Federal Register: July 12) 2012 CFTC proposal on cross-border aspects of DFA derivatives rules is overly extraterritorial (by broadly defining “US persons” and subjecting non-US banks’ worldwide dealings with them to its rules) and gives non-US banks too little time to adapt their compliance systems to the US standards, although the latter are still not properly detailed(!). In addition, while we lauded the CFTC in our comment letter for its “substituted compliance” approach in principle, we warned that it should not unilaterally extend US rules globally just because comparable EU derivatives rules are not yet finalised and recommended basing such recognition of (upcoming) EU standards on a MoU between the CFTC and EU authorities and using a principle-based approach to recognition rather than a rule-by-rule comparison. While the CFTC’s October 12th no-action letters are helpful, they still leave the key issues unresolved.

- The so-called “swap desk push-out” provision (forcing US branches of non-US banks to give up derivatives business if they want to keep their access to the Fed discount window) is discriminatory (US-incorporated banks may retain most of such business). Ideally, DFA should be amended to remedy what is recognized to be an unintended oversight (bill H.R. 1838, as passed by the House Financial Services Committee, would accomplish this, but still lingers in the House and would have to be accepted also by the Senate). Failing such an amendment, the Fed should mitigate the discrimination of non-US banks in line with the legislative intention. We also observe that any discriminatory application of the swap desk push-out provision to US branches of foreign banks would violate the basic principle of national treatment and equality of competitive opportunity which is enshrined in US banking law and the General Agreement on Trade in Services and would also not be compatible with any future EU-US integration agreement. The need for resolution on the swap desk push-out provision (Section 716 DFA) is ever-more pressing in view of the approaching July 2013 effective date.

Against this background, we would very much welcome it if the following financial regulation principles could be agreed on as part of a negotiated EU-US economic integration agreement.

- Inclusion of the principle of national treatment and equality of competitive opportunity (cf. GATS). The principle of national treatment should be achieved in the agreement for GATS modes 3 and 4 of banking and security services (commercial presence and temporary movement of personnel) and possibly also with regard to such services providers’ access to financial infrastructure (e.g., exchanges, payment and clearing systems, central bank facilities). It might also be extended to some cross-border business (e.g., with sophisticated client groups not in need of investor protection by their home jurisdiction). Methodically, negotiations on financial and other services could be based on the four GATS modes of delivery. As the US tries to negotiate services in the Trans-Pacific Partnership with a negative list approach, this, rather than the less stringent GATS approach, should be the standard for EU-US talks as well. It would allow most minor barriers to trade and investment to be dismantled upon entry into an agreement and focus political capital on trimming the exceptions in substance and over time.

- Mutual recognition of comparable regulation between relevant EU and US financial regulators should be encouraged. This should be supplemented by ex-ante consultation mechanisms between relevant financial regulators on both sides of the Atlantic. Such consultation mechanisms should help in finding comparable rules and ensuring their mutual recognition.

- Use of international standards by bodies such as the G20, FSB, Basel Committee and IOSCO as the basis for US and EU financial regulation should be encouraged. This would facilitate determination of comparability and recognition by regulators.

We feel that an economic integration agreement which included such principles of financial regulation would strongly contribute to avoiding fragmentation of financial markets due to insufficiently coordinated regulation with its protectionist or extraterritorial side-effects.

While we highly value the on-going financial market policy cooperation between the US and the EU through the US-EU Financial Markets Regulatory Dialogue (FMRD), we believe that inclusion of the above principles could strengthen the FMRD's efforts to achieve consistent regulatory reform. Any negotiations on a transatlantic agreement should, in the field of financial services, include the parties to the FMRD.

The Association of German Banks would be willing to further contribute to the terms and objectives of negotiations on a transatlantic agreement as soon as such negotiations are agreed to in principle.