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Bundesverband deutscher Banken e. V.
Bundesverband Öffentlicher Banken Deutschlands e. V.
Deutscher Sparkassen- und Giroverband e. V.
Verband deutscher Pfandbriefbanken e. V.

Die Deutsche Kreditwirtschaft

Stellungnahme

ESMA – Discussion Paper on CRA 3 Implementation

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks financial group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,200 banks.

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Introductory Remarks

The German Banking Industry Committee (GBIC) thanks ESMA for the opportunity to comment on the Discussion Paper on CRA3 Implementation. We would like to address several general issues relating to the Discussion Paper before providing more detailed comments to the specific questions asked. Any reference to the regulation shall be understood as a reference to the regulation (EC) No 1060/2009 of the European Parliament and Council on credit rating agencies as lastly amended through regulation (EU) No 462/2013 of the European Parliament and Council (CRA3).

We would like to ask ESMA to consider possible difficulties during the implementation phase when setting a time frame for implementation of the disclosure obligation. As reporting of information generally goes along with changes to information technology systems, it will trigger considerable costs and be time consuming. Current experiences, for example with the implementation of the transaction reporting under the EU Regulation on OTC derivatives, central counterparties and trade repositories (EMIR), have shown that many questions regarding details of the reporting obligation arise during the implementation phase. If such questions, which in some instances are of basic nature, may not be immediately answered by supervisors or regulators, persons obligated to fulfill such reporting obligation may face the dichotomy of having to build an information technology environment in order to fulfill the reporting obligation but not having the detailed information to do so. In case of EMIR the current situation is triggering very high additional cost, as implementation projects may not be completed in due course and personnel costs continue to accumulate. We therefore suggest an exchange on details of the disclosure obligation prior to setting a time schedule. The importance of such exchange will be of even higher importance if the disclosure obligation and or templates will overlap with data which is provided to the European Central Bank for the European Data Warehouse. In this case it is highly recommendable to use the same templates and formats to avoid double work or potential inconsistencies.

We would like to emphasize the importance of Article 8b (2) of CRA3 setting forth the obligation to observe national and Union data protection rules. When determining details in the RTS regarding information on SFIs to be disclosed, close consideration should be given to data protection laws as well as bank secrecy laws to be observed in several EU member states. We strongly advocate that the disclosure restrictions are being enlarged also to information that is considered confidential for the originators or sponsors, even if not captured by data protection laws or similar. Otherwise non-bank originators like corporates or captives would have to fear that important corporate secrecies like terms of trade or internal risk management strategies would get public and accessible to competitors (e.g. in the securitisation of trade receivables within ABCP- conduits). Also for financial institutions, the obligation to protect personal data is of utmost importance as such protection is footed in data protection laws and bank secrecy rules. Moreover, issuers, originators and sponsors may also be subject to data protection laws outside of national and EU borders. Thus information to be provided under Article 8b of CRA3 should be within the boundaries of internationally and generally accepted data protection frameworks or confidentiality agreements. Persons should not be obliged to disclose information under Article 8b CRA3 where this is in breach of laws or business secrecies.

I Information on Structured Finance Instruments (SFI)

General Remarks

Article 8b CRA3 obliges issuers, originators and sponsors to publish certain information in connection with structured finance instruments (SFIs). The definition of the term SFI in Article 3(1)(l) of the regulation remains unclear in the context of the definition of securitisation in CRD II. In our view it is essential that a clear definition of the SIFs is established before a timeframe is set for the disclosure requirement.

Q1: Which categorisation of SFI asset classes should ESMA apply while developing the disclosure requirements?

It is very useful that ESMA has proposed identifying categories of SFI asset classes for the purposes of developing the disclosure requirements. It is widely acknowledged that the securitisation definition in the Banking Consolidation Directive under the Capital Requirements Directive regime potentially captures a wide range of transactions, including credit risk tranched arrangements not traditionally considered to be securitisations. Hence, there is a risk that, in the absence of the identification of relevant categories, the scope of Article 8b would not be sufficiently clear.

GBIC would therefore like to ask ESMA to make it clear that Article 8b will only be applied to SFIs which have a rating and which are accessible for public investors (both retail and institutional investors). In addition, GBIC recommends that Article 8 b should be limited to SFIs which are covered by the Prospectus Directive and the Transparency Directive.

We consider that Article 8 b does not apply in respect of, among other things, private or unlisted transactions. This means in effect that certain SFI categories for other purposes (such as asset-backed commercial paper, ABCP) should not be a relevant category for the purposes of Article 8 b in general. We consider the European Central Bank's (ECB) categorisation for loan level information to be appropriate. However the special features of ABCP programmes, particularly with full support, should be taken into consideration because the rating process fully relies on the coverage of the sponsoring bank. Hence there is neither a review of underlying assets or cash flows by the rating agencies or investors nor would a stress test on these instruments be feasible. Furthermore, as these programs contain usually several 100.000s of single receivables which revolve extremely quickly, a disclosure would be extremely costly, burdensome and without any additional value for rating agencies or investors.
We would like to draw attention to the fact that bonds verified on indexes or other benchmarks should not be classified as SFIs. Unlike securitisations, the default risk associated with these instruments depends exclusively on the issuer's solvency, and not on the relevant benchmark. The reference to indexes or benchmarks is an expression of the bond's interest-rate structure and has no influence on the credit risk.

GBIC would also like to ask ESMA to clarify the geographic validity of the publication requirements. In our understanding of Article 1(1) CRA, it remains unclear whether branches and subsidiaries based outside the European Union are also subject to the publication requirement under Article 8b. GBIC suggests that only SFIs where the issuer, originator or sponsor is established in the EU and which are rated and publicly traded between market players in the European Union should be subject to the publication requirements under Article 8b. In this context we strongly reject the approach that already a trading of the SFI in the EU may trigger the disclosure requirements.

Q2: In light of paragraph 13, do you consider that the scope of Article 8(b) should be limited to those SFIs which are covered by the Prospectus Directive and Transparency Directive, or that its scope should not be limited to those Directives and should cover all SFIs traded in the EU?

We believe that the scope of Article 8 b should be limited to those SFIs in respect of which an obligation arises under the Prospectus Directive to publish a prospectus (which, given the usual wholesale denomination of asset-backed securities, will arise primarily where an application for admission to trading on an EEA regulated market is made rather than in a non-exempt public offer scenario).

Q4: To which tranching mechanisms should the disclosure requirements be applied? (e.g. single-tranche transactions?)

The definition of securitisation in Article 4 Section 61 Capital Requirements Regulation should be applied to prevent the use of several definitions within the EU. According to this, a securitisation position is indicated by the dependence on the reference portfolio and tranching made up of at least two tranches

Q6: In your view, which information is required to ensure a meaningful description of the SFI?

In our view, it would be sufficient to provide for the same level of information that is facilitated by the ECB in testing the ECB eligibility of securities. An increased level would be likely to reduce rather than improve the transparency for the investor. In the absense of ECB loan level data the level of information should be in line with Art 409 CRR to avoid deviant information flows between bank and rating agency regulation and to ease the process of capturing relevant data for the originator or sponsor.

In the case of ABCP programmes (if not excluded anyway according to Q1), no additional information should be requested for Full Support Transactions as the investor is fully protected from the default risk of securitized portfolios by the creditworthiness of the sponsor. However, if no Full Support Transaction is available and the program is sufficiently granular, aggregated information (as prevalent and generally acknowledged for such type of transaction) should be sufficient as also indicated by the EBA in the context of article 122a (7) CRD (Ariticle 409 CRR).

Q8: For which category of SFIs should the disclosure requirements be adapted (e.g. where the underlying assets backing the SFIs are poorly granular)?

In our view, the disclosure of information on an individual claim level would only be appropriate for non-granular portfolios (e.g. where the concentration risk of an underlying asset exceeds 5 % of the pool), regardless of whether this was a true sale transaction or a synthetic securitisation. The reason for this is that the significance of the information for the investor is reduced by the enormous quantity of data at individual claim level.

Q11: In case of "event-based" approach, what (material) events should trigger a reporting update? In particular, please provide your views on SFI-specific events (e.g. performance of tranches and/or underlying assets).

We do not believe that an event-based approach should be adopted. We consider that it would be extremely difficult to properly define relevant "material changes" for these purposes in an appropriate manner for the full possible range of SFIs without drawing on concepts referred to under the Market Abuse Directive provisions relating to ongoing disclosures (e.g. significant effect on price, etc).

We consider that periodic disclosure will be most appropriate as such monitoring process will likely need to involve charting data movements over time, based on regular interval information.

Q13: Please provide your views on whether the disclosure requirements should apply to SFIs that are "live" at the date of the RTS coming into force or only to SFIs issued after that date?

The disclosure requirements should only be implemented for new businesses, in particular because they cannot be fulfilled for existing transactions.

Q14: If the reporting obligation were to apply to "live" SFIs, what do you think would be an appropriate phase-in period or schedule?

There should be a minimum phase-in period of one year. In the case of ABCP programmes (if not excluded according to Q1) or other revolving structures (e.g. master trusts), the requirements should only apply,if – after a phase-in period period of a least two years – new assets are added to the program. This transition period is necessary to give the sponsoring bank enough time to clarify and negotiate with the (mainly third party) originators the consequences and implications of the disclosure rules concerning 'their' receivables and decide about the continuance of such ABCP programme. In this context, again,

we highly emphasise the necessity to exclude certain ABCP programmes from the definition of SFIs in this regulation and/or lower the level of details that have to be disclosed. Otherwise third party originators (e.g. corporates) will most likely object against disclosing their business secrecies or customers information to the public with the result that such instruments will not be available to finance real economy business.

Q15: Do you have any other comments on the frequency of the reporting? Do you think any other approach should be considered?

We consider that the requirements introduced under Article 8 b should be consistent with other disclosure initiatives (especially Art. 409 CRR) to the extent possible, and this includes with respect to reporting frequency. In the absence of coordination, market participants will struggle to comply and will be faced with a disproportionately onerous regime without a corresponding benefit.

Q16: Are different templates needed for each of the asset classes subject to the disclosure requirements?

The templates should be based on those of the European Data Warehouse (where applicable), as these were developed at considerable expense for the various asset classes. The high level of additional expense for new templates would otherwise be disproportionate for the disclosing parties.

If transactions are not eligible for ECB purposes the templates should be adopted to the information provided under Art. 409 CRR.

Q17: Do you consider that the scope and content of the ECB templates set to report loan-level data are appropriate for addressing CRA 3's disclosure requirements?

Yes, the scope and content of the ECB templates are adequate

Q18: Do you consider that the data collected through the ECB templates would allow other investors to conduct comprehensive and well-informed stress tests for their own specific requirements on the cash flows and collateral values supporting the underlying exposures? If not, explain what further information should be reported (e.g. prospectus, transaction summary, pool performance data, credit support information, investor reports, due diligence reports) and, if applicable, please consider other relevant reporting requirements.

The information in the ECB templates are more than adequate for the investors. Investors would not be able to process further information requirements. However it should be noted that ECB templates requirements do not accommodate mixed pools and do not cover all asset classes.

II European Rating Platform

General Remarks

We welcome the development of a rating platform which will also provide easy access to less regular users. This means that ratings can be used more sensibly In our opinion, the rating platform provides a good opportunity to improve the quality control of the ratings. We support the efforts being made to enforce higher quality standards for ratings in order to increase the transparency and comparability of the ratings and to enhance their methodology.

The need for a broad range of consistent and high-quality rating services suggests that rating agencies must have a significant minimum size. The markets are also focused on a small number of well-known ratings which they understand, so that there is a natural oligopoly for rating agencies. In our opinion, this

calls for an objective supervisory authority which may counter disincentives and unequal bargaining power on the part of the rating agencies to lower internal standards and increase prices. We realise that high-quality ratings will not come free of charge and that the rating agencies will have to invest in their processes. This may lead to the development of different business models, which do not necessarily have to be based on the traditional issuer-based pay model.

Q21: Particularly for users of ratings: Taking into consideration the rating classification described above, could you suggest (including a detailed reason):

a. Other rating types not captured in the above categorisation;

Hybrids.

b. Which rating categories or rating components should ERP cover;

Issuer ratings should include the following rating components:
Long-term rating
Short-term rating
Outlook
Stand-alone/viability rating
Government support (notches)
Systemic support (notches)
We would suggest to mark each component with the date of publication.

c. Other actions or events affecting the ratings, that should be published on the ERP.
No additions.

Q22: For displaying the press release information, which of the two options do you prefer and why? Particularly for CRAs: Can you provide evidence on costs that you would incur under the two proposed options? Could you suggest other ways of retrieving, storing and make available on the ERP the press release information?

With reference to rating actions and other publications by rating agencies, it should be ensured that there will be no access problems when using links to the rating agencies' websites.

We think either way is fine as long as the hyperlinks lead directly to the respective press release and are always up to date as well as available to the public. If this cannot be ensured, we would prefer that the document will be made available on the ERP website. It would also be important that the press releases can be downloaded as pdf files (either on the ERP website or via the hyperlink from the rating agencies website).

Q23: Shall the ERP provide supporting rating information in addition to the press releases/report? If so, what kind of information on the rating / rating action would be beneficial?
All material information on rating methodology should be available on the platform. This applies to bank ratings for long-term and short-term liabilities, individual ratings, ratings for hybrids and covered bond ratings of issuers free of charge.
Moreover, the individual rating reports should be published to explain the respective ratings.

Q24: Particularly for users of ratings: Which option do you consider as the best option for displaying the data on the new ERP? Please specify the specific time frames (if different from the proposed ones).
We prefer option C (all data reported until midnight will be published in one shot the next day at 11am) for the following reasons:

- We think it is important to give CRAs enough time to fix any technical or content errors. The rating agencies publish their reports often in the (late) evening, and it may happen that reports contain errors. In this case CRAs will have sufficient time to correct any possible errors.
- Users of the ratings, do not have to check the ERP several times a day for news. It is an advantage that users of ratings will know that, every day after 11 a.m., they can check on the ERP for all updates of the previous day.

Q25: Particularly for users of ratings: As regards options (c) and (d), in case of the ratings reported on a Friday or before a bank holiday, when the rating information has to be made available on the ERP: on the next calendar day or the next working day?
- In case of the ratings reported on a Friday, it is sufficient that the data will be published at 11 a.m. on the next working day (Monday).
- In case of ratings being published before a bank holiday, the data should be published the next calendar day, as there are many different bank holidays in different countries, and it would create confusion in those countries that do not have a bank holiday.
- In case Monday is a bank holiday, data reported on Friday should be published on Monday.
- This should exclude common bank holidays that are the same in every country (e.g. Christmas Holidays, New Year, etc).

Q28: Particularly for users of ratings: Which information should be added to the rating information to facilitate the comparison across ratings from different CRAs on the same entity while avoiding misunderstanding on the meaning of each rating? Under which form should this information be displayed (full reports, aggregated information, direct links, reference to the CRAs website, etc)?
In addition to the rating reports, we would also welcome a clear presentation of individual ratings. To this end, it would be advisable not only to compare the various ratings of each financial institution but also to provide aggregated information on financial institutions at national or international level, broken down into the various rating agencies.

Even though most market players are probably familiar with the meaning of the various ratings, it would be desirable to provide the definitions of the agencies' various ratings.

Q31: Particularly for users of ratings: Could you provide suggestions on how ERP could present the rating information so as to allow an easy access and understanding of the rating data? If possible please provide a clear description and/or a visual representation like the one given above.
It would be useful to implement the possibility to download the data in CSV (Excel) format.

Q32: Particularly for users of ratings: Besides the access via a web page, which other means of accessing the ERP do you consider relevant?
We prefer accessing the ERP via a website. In addition, issuers could provide a link to the ERP platform of ESMA.
To improve the information services, interested parties should be able to subscribe to E-Mail alerts on the ERP website to draw attention to specific rating actions (e.g. downgrading of an issuer) and to provide market participants in due course with important information. Additionally, a monthly newsletter could be published to provide information on recent ratings or changes. Easy access to the content of the ERP website via mobile device could be very useful.

Q34: Particularly for users of ratings: do you agree with the proposed option? (please state the reasons for your preference).
We agree that it is important that the ERP displays both historical performance statistics and historical individual rating information, since the latter is often requested by different counterparties and is not

always available on the CRA websites. CRAs often charge for this service and either do not provide this information or provide it as an inaccessible picture on their website.
Therefore, we appreciate the already existing possibility to download the performance statistics as PDF and CSV (Excel) files, and we suggest these two download options for the individual ratings as well. The historical individual rating information files should include the date, the rating and the rating action of individual ratings.

Q35: Particularly for rating users: Do you consider it of use that the ERP would provide for a mapping of rating scales to improve the comparability of ratings of different CRAs?

Rating histories as well as supplementary information on rating scales including mapping and information on rating methods would be very useful with a view to the comparability of ratings.

III Fees Charged by CRAs to their clients

General Remarks

The current market structure opens the opportunity for rating agencies to exploit their market power in price negotiations. The agencies usually argue that their internal costs have increased because of more stringent regulatory requirements. In our opinion, there is no identifiable higher value to the ratings themselves. For many years, the agencies have enjoyed very high margins. In the past few years, for instance, both S&P Ratings and Moody's Investors Service have reported a profit margin from operations of more than 40 percent (see McGraw Hill 2012 Annual Report, Segment Reporting, p. 55, and Moody's 2012 Annual Report, p. 38). We therefore do not see the link between fees and costs in such increases.
We would welcome a pricing policy which is geared more towards the agencies' costs and provides deeper insight into cost structures.

Q38: Do you consider that identification of "common practices" (within a CRA and across the CRA market) can help to identify discriminatory and non-discriminatory practices?

The proposed approach could in fact make sense. Market players generally welcome gaining better understanding of agency practices.

Q39: Do you agree on the proposed periodic reporting illustrated above to be submitted by CRAs to ESMA on the application of their pricing policies and calculating their fees? Do you think there are other relevant criteria that should be included to allow ESMA to monitor the non-discrimination requirement?

Regular disclosure of the fee structures of rating agencies can create transparency with regard to the fee structure. In the past, the structure of the fee schedules used by a rating agency was not comparable to the previous year's structure. Merely by changing the thresholds and the quotients used to calculate the fees in accordance with issue volumes, the total fees were no longer comparable with those of the previous year. In view of the short duration of rating agreements, this practice has enabled the agencies to implement significant increases in their fees on a regular basis, and it was not clear for market players in what way these fee increases were related to increases in the agencies' costs.

For this reason the underlying scale of fees and charges should be reviewed, and an increase in the absolute level of fees for the same service should be made transparent. The fees charged by rating agencies should be comprehensible for their clients.

Q40: What is the frequency with which such reporting should be provided to ESMA?

In our opinion, annual reporting is realistic because the duration of the agreements concluded between agencies and issuers may vary widely.

Q42: Do you agree on the approach to assess whether fees are dependent on the level of the credit rating issued by the credit rating agency or on any other result or outcome of the work performed? Do you consider that other approaches or criteria should be applied? What cases do you think should be comprised in the concept "any other result or outcome of the work performed"?

It goes without saying that the level of the fees must not depend on the level of credit rating issued. Likewise, the timing of fees or increases in fees must be independent of the date when ratings are issued or when reports are published. Additionally, in the case of cross-border CRA-groups, we would suggest to create more transparency of intra-group service-relations. It is to be feared that cost-shifting across the atlantic could lead to perceptible rises in costs over here.

Q43: Do you agree on the approach to assess whether fees are dependent on the provision of ancillary services? Do you consider other approaches or criteria should be applied too? Do you consider that a risk indicator (percentage) between ancillary services fees and the rating and follow-up fees from a rated issuer or any related party can help to identify possible discriminatory practices? If so, what percentage do you consider appropriate? What would you consider a "significant" percentage?

In our opinion any fixed percentage caps for ancillary services fees in relation to rating and follow-up fees are not a reasonable solution. This approach could lead to the risk of eluding the caps through increasing the rating and follow-up fees.

Q46: What are your views towards the approach that different business models and fee structures should be taken into account when assessing whether fees are cost-based?

In principle, it makes sense that fees should be cost-based. In this context, ESMA should also ensure that rating agencies will not transfer costs between different (international) offices or companies.
At the same time, care must be taken not to create market entry barriers for new agencies. At the beginning of a new rating agency's activities in the market, its costs (especially sunk costs) may be particularly high. If these costs are not passed on to clients, this does not pose a problem, providing that all clients are treated in a comparable manner.
In the case of variable price components, e.g. when the level of fees is coupled to the issue volume, it must be borne in mind that there are economies of scale because the underlying analytical effort is independent of the issue volume.