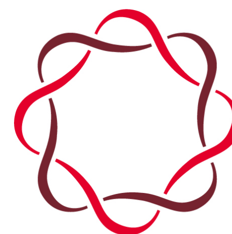

FINANCE DENMARK

Response from Finance Denmark to the EU Commission's "Have Your Say" consultation:

Regarding the European Commission's legislative proposal to amend the Capital Requirements Directive (Directive 2013/36/EU)

Position paper

16. februar 2022

Dok. nr. FIDA-119627797-127-v1

Governance issues

Governance arrangements (CRD article 88, paragraph 3)

The proposal entails a new requirement regarding the governance arrangements of the companies. Article 88, para 3, makes it mandatory for the companies to establish individual statements setting out the roles and duties of each member of the management body. We find this requirement to have far reaching implications. The proposal is especially problematic due to that it is not aligned with most jurisdictions in the EU where the management body is seen as a collective body. In these cases, it is not possible to allocate specific responsibilities, or such an allocation has an exclusive internal effect.

Fit & proper (CRD article 91-91d)

The proposal entails five new articles that replace the existing Article 91 on fit and proper requirements. Finance Denmark overall support fit and proper requirements for management and senior executives in the sector, and that the same requirements apply across borders, ensuring a level playing field in the EU.
In general, however, it is crucial that the requirements do not create a rigid and inflexible regime that hinders the recruitment of new competencies and thereby hinders the development of the financial sector, where innovation is a key component.

While ex ante fit & proper assessments entail some advantages, including the avoidance of reputational risk for the candidates that are not approved, it also holds the risk of creating bottlenecks at the supervisory authorities hereby delaying the recruitment of new candidates for management and key functions. We would therefor prefer that ex post assessments are maintained with the possibility for companies to approach the authorities for a de facto ex ante assessment in high profiled cases.

If a requirement of ex ante assessments should be introduced several issues should be considered.

First of all, it is important to stress the need for rapid and effective case handling by the authorities, which in our view will require massive resources at the authority level Otherwise, it will be very intrusive for the company and the individual candidate to wait for approval from the authorities before the candidate can take up the position. It is positive that the CRD proposal introduces time limits for the case handling. However, a total time limit of up to 120 working days, as provided for in Articles 91b (4) and 91d (4), is too long. Furthermore, it is not clear from the proposal what the consequences are if this time limit is not respected. In addition, it is important to provide for the possibility of derogations to the ex ante principle in urgent cases. This is reflected in the proposal for directors, Article 91b (8), but it is not clear which situations the provision covers.

Furthermore, taking the abovementioned need for rapid case handling and resources at authority level into consideration, the necessity to introduce a general ex ante requirement for all candidates and not just high profiled management should be carefully evaluated.

The ex ante principle lastly presents a potential problem in relation to board members. Under Danish company law, it is not a requirement that candidate proposals for board elections must be notified or submitted prior to the general meeting. This means that candidates for a board election can be presented during the general meeting. If the candidate is elected and hereby formally take up the position, it will not be possible for the institution to comply with the requirement to carry out the fit and proper assessment ex ante. It should therefore be clarified how the proposal's ex ante approach should be adhered to in these situations.

ESG risks (CRD art. 100)
CRD brings a significantly greater focus to managing ESG risks. It is natural that there should be an increased focus on sustainability risks, and Finance Denmark support this development. The financial sector is in the process of incorporating climate risks into risk management, etc. However, the wording of certain provisions especially the stated possibility of risks of misalignment "with the relevant Union policy objectives or broader transition trends towards a sustainable economy" leaves a very wide room for interpretation which should be avoided.

Finance Denmark notes that the EBA, EIOPI and ESMA must develop guidelines ensuring consistency and common standards for stress tests of ESG, cf. CRD6 Article 100. However, it is also very important that the EBA and the ECB work together primarily to ensure uniform access to data for institutions in the euro area and outside the euro area.

The disclosure requirement for ESG risks to SIFI is extended to all institutions where small and non-complex institutions must report annually, while the rest half-yearly. However, as ESG risks are very much risks materialized in the medium and long term, annual reporting for all institutions would be sufficient. It is positive that the EBA should take proportionality into account in determining the format for re-porting.

It is important that the EBA makes a baseline assessment of any differences in risks on "green" and "significant harmful" activities before deciding on changing risk weights in pillar I. When advancing the analysis to mid-2023, it is important that sufficient resources in the EBA are allocated to the work. In addition, Finance Denmark notes that the preamble to CRD6 states that the systemic risk buffer can be used to manage climate risks if the authorities consider it an effective and proportionate instrument and the authorities are given the opportunity, by means of amendments to the Directive, to impose institutions an additional capi-tal requirement in Pillar 2. The authorities thus have powers in this area before the EBA's evaluation is carried out. This should be taken into account when consider-ing changing risk weights in Pillar 1.

Pillar 2 and buffer requirements (CRD Articles 104a (6) and (7), 131(5), 133 (2a))
We welcome the proposed amendments to the provisions on Pillar 2 capital re-quirements and capital buffers that specify that when an institution becomes bound by the output floor, the nominal amount of Pillar 2 capital requirements shall not increase due to the output floor and that any Pillar 2 requirements and Systemic Risks buffers should be reviewed to ensure that no double-counting of risk already covered by the output floor, and, by the same token, that the O-SII buffers should be reviewed to ensure that the calibration remains appropriate.

These provisions should also apply for subsidiary institutions that are not (formally) bound by the output floor as the output floor only applies at top consolidated level in the banking group.

Contacts:

Governance: Jens Kasper Rasmussen <jkr@fida.dk>
ESG: Anne Reinhold <anr@fida.dk>
Pillar 2 and buffers: Michael Friis <MFR@fida.dk>