

22.09.17**Resolution**
of the Bundesrat

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs

COM(2017) 331 final; Ratsdok. 10363/17

At its 960th session on 22 September 2017, under §§ 3 and 5 of the Law on Cooperation between the Federation and the Länder in European Union Affairs (EUZBLG), the Bundesrat adopted the following opinion.

1. The Bundesrat welcomes the Commission's proposal to complement Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (the European Market Infrastructure Regulation - EMIR) with standards for central counterparties (CCPs) established in a third country which provide an answer to situations in which systemically important parts of central clearing take place outside the EU. Moreover, the Bundesrat considers consistent supervision of CCPs to be a necessary condition of an effective clearing market.

2. Supervisory structure for EU CCPs

- a) The current allocation of responsibilities for the supervision of CCPs established in the EU involves interaction between the competent authorities of the respective State of establishment and multilateral colleges of supervisors, and to a large extent such supervision is competent, efficient and consistent. That supervisory structure also takes into account the well-established principle of European financial market regulation, namely the convergence of fiscal accountability and supervisory responsibility.
- b) Through a complex procedure for the submission of drafts by the competent authority of the State of establishment to the European Securities and Markets Authority (ESMA) and the extension of the colleges by three voting members for ESMA, the proposed regulation could result in complex and inefficient decision-making structures, in particular in cases where prompt action is required.
- c) The Bundesrat therefore calls on the Federal Government to strongly promote clarity in the proposed arrangements to change the allocation of responsibilities for the supervision of CCPs established in the EU and sufficient involvement of the Member States.

3. Requirements for arrangements for systemically important CCPs established in a third country

- a) The Bundesrat underlines the need for the rules on the recognition of CCPs established in a third country to be measured against whether or not they safeguard the financial stability of the EU and its Member States,
- b) It welcomes the fact that in the proposal the Commission has provided for the possibility of refusing recognition of a substantially systemic third-country CCP and requiring an establishment within the EU ('relocation requirement') to safeguard the financial stability of the EU and its Member States.
- c) Particularly in view of the context of the United Kingdom's impending exit from the EU ('Brexit') and the fact that London is currently the leading financial centre, by a sizeable margin, for the clearing of euro interest rate derivatives, the Bundesrat calls on the Federal Government to ensure, through more specific drafting of the proposed arrangements for the recognition of third-country CCPs, that EU law is fully effective in that regard.

In addition, the Federal Government is requested, owing to the continuing Brexit negotiations, to ensure that there is a provision clarifying to what

extent prudential rules such as capital requirements, liquidity, margins and default fund are to apply where there is an obligation on substantially systemic third-country CCPs to set up an establishment in the EU as well as to the main establishment outside the EU.

- d) If there is to be a possibility for systemically important parts of central clearing to be transacted in respect of third-country CCPs ('Tier 2 CCPs'), it is therefore imperative that those rules fulfil three requirements:
- It is mandatory that the third country be required to have a regulatory framework which in all relevant aspects is consistent with the regulatory requirements of EU law.
 - The liquidity of the CCP must be ensured at all times.
 - The systemically important third-country CCP must be subject to effective EU supervision.
4. The Bundesrat calls on the Federal Government to examine whether the rules laid down in the proposed regulation for systemically important CCPs established in a third country do fully meet those conditions and also are appropriate in their practical implementation to safeguard financial stability in the EU and its Member States at all times.
5. Independently of that examination, the Bundesrat makes the following comments in relation to the requirements set out under 3(d) for Tier 2 CCPs, as against the proposed regulation:
- a) Equivalent regulatory framework for Tier 2 CCPs
- The Bundesrat repeats the request made in its opinion of 31 March 2017 (Bundesrat Document 103/17 (Resolution)) that the Federal Government work towards ensuring that the recognition of CCPs established in third countries also be made conditional on their being subject to a recovery and resolution regime which is consistent with the requirements set out in the Proposal for a Regulation on a framework for the recovery and resolution of central counterparties (Bundesrat document 103/17). The competent authorities will also have to examine, strictly and on an ongoing basis, whether the third country's regulatory framework keeps pace with EU law developments made through legislative or administrative changes or decisions of the European Court of Justice.
- b) Securing liquidity
- The Bundesrat welcomes the involvement of the European Central Bank

(ECB) in the process of recognition of third-country CCPs. The requirements to be imposed on the CCPs by the ECB make it possible to ensure liquidity and serve the objective of financial stability.

c) Effective European supervision by ESMA

(aa) The prudential instruments of European supervision vis-a-vis third-country CCPs must be consistent with the set of instruments for EU CCPs. EU CCPs must not be placed at a disadvantage compared to third-country CCPs, as shown by the analysis underlying the proposed regulation.

(bb) It will continue to depend in particular on the cooperation agreements to be negotiated by ESMA whether or not the potential of the instruments laid down by law is also being exploited in practice and above all in the event of a crisis.

(cc) In the view of the Bundesrat, whether or not this is sufficiently ensured must be assessed, essentially, by those who may be fiscally affected by a lack of supervision of systemically important parts of central clearing. These are the Member States in which the clearing members are established.

(dd) The Bundesrat therefore calls on the Federal Government to support sufficient participation of those Member States in the CCP Executive Session of ESMA and in the decisions of the Commission provided for. That influence must, in questions of classification, recognition and the ongoing supervision of third-country CCPs and, in particular, in the decision on whether to refuse recognition of such a CCP on the grounds that it is substantially systemic (Article 2(9)(b) of the proposal concerning Article 25(2c) of the EMIR, as amended), accommodate the possible effects of such decisions on those Member States.

(ee) The cooperation envisaged between European supervision and the supervisory authorities of the third country concerned and any supervisors from further countries must not mean that required European supervisory measures depend on the will of the additional supervisors. The Bundesrat calls on the Federal Government to ensure that this is the case and, for example, to support deletion of the proposed rule in Article 2(10) of the proposal concerning the third sentence of Article 25e(3) of the EMIR, as amended. Under that provision, it is a condition for an on-site inspection that the relevant third-country authority has confirmed in advance that it does not

object to the inspection. Where there is recognition of a systemically important CCP, on-site inspections at any time must already be sufficiently secured in the cooperation agreements and safeguarded without additional obstacles to be overcome.

(ff) The Bundesrat calls upon the Federal Government to promote arrangements which guarantee adequate involvement of European supervision in recovery and resolution of a third-country CCP. Especially in crises, it is essential to ensure the substantial involvement of European supervision. In practice this means, inter alia, full decision-making powers of the European supervisory authorities on the increase or reduction of guarantees.

d) In the event of relocation, a period of transition must be created and circumvention prevented:

(aa) When recognition of a third-country CCP is refused, it becomes necessary for the institutions established in the EU to transfer their clearing business to a CCP authorised in the EU or recognised by the EU. That transitional process, which is necessary in such a situation to safeguard financial stability, must not itself result in destabilisation of the financial markets.

(bb) The Bundesrat calls on the Federal Government to ensure, for reasons of financial stability and proper protection of legitimate expectations, that appropriate transitional provisions are introduced into the Regulation with respect to relocations of the place of clearing operations which become necessary principally on regulatory grounds, without giving rise to any undesirable circumvention.

(cc) The Bundesrat asks the Federal Government to examine whether it is necessary, through the adaptation of further provisions, to prevent a relocation requirement from being circumvented, in order to ensure that institutions established in the EU are not placed disproportionately at a disadvantage. That examination should cover, in particular, the requirements for the recording of derivatives and appropriate risk management in respect of European subsidiaries of third-country banks, exemptions from clearing obligations for intragroup transactions and the scope of Article 25(1) of the EMIR in direct clearing.

(dd) The Bundesrat calls on the Federal Government to table a specific proposal for the practical arrangements governing the relocation procedure in the draft Regulation. This is the only way to ensure that the complex challenges associated with a necessary relocation are

surmounted under a procedure which is laid down and without preventable delays. This is very important for safeguarding financial stability during a relocation procedure.

6. The Bundesrat hereby sends this opinion directly to the Commission.