2011-10-21

Statement by the Committee on Finance 2011/12:FiU17

Subsidiarity check of proposal for a directive on credit institutions and investment firms

Summary

In this statement the Committee examines the Commission's proposal for a directive on credit institutions and investment firms[1] (COM [2011] 453 final). In the opinion of the Committee, the proposal as it is currently worded is not compliant with the principle of subsidiarity. The Committee therefore proposes that the Riksdag should decide to submit a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission, in accordance with Chapter 10, Article 6 of the Riksdag Act.

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[1] Proposal for a directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate.

The Committee's proposal for a decision by the Riksdag

Subsidiarity check of proposal for a directive on credit institutions and investment firms

The Riksdag should decide to submit a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission with the wording set out in appendix 2.

The Committee proposes that the matter be determined after it has been tabled only once.

Stockholm, 18 October 2011

On behalf of the Committee on Finance

Anna Kinberg Batra

The following members participated in the decision: Anna Kinberg Batra (M), Tommy Waidelich (S), Pia Nilsson (S), Göran Pettersson (M), Jörgen Hellman (S), Ann-Charlotte Hammar Johnsson (M), Carl B Hamilton (FP), Bo Bernhardsson (S), Per Åsling (C), Marie Nordén (S), Staffan Anger (M), Per Bolund (MP), Anders Sellström (KD), Johnny Skalin (SD), Ulla Andersson (V), Jörgen Andersson (M) och Sven-Erik Bucht (S).

Account of the matter

The matter and its consideration

The Riksdag has been given the opportunity to submit a reasoned opinion on the Commission’s proposal for a directive on credit institutions and investment firms. On 1 September 2011, the Chamber referred the Commission’s proposal to the Committee on Finance. The period for submitting a reasoned opinion expires on 24 October.

On 9 September 2011, an explanatory memorandum (2010/11:FPM148) was submitted to the Riksdag, containing the Government's preliminary assessment of the application of the principle of subsidiarity to the proposed legal instrument.

In connection with the Committee's meeting of 11 October 2011, State Secretary Johanna Lybeck Lilja from the Government Offices gave a closer account of the Government's assessment of the proposed directive's compliance with the principle of subsidiarity.

The main contents of the proposed directive

The financial crisis has generated a large number of measures designed to secure financial stability. In the G20 Pittsburgh Summit Declaration in September 2009, a global agreement was reached on measures, among other things, to improve the capitalisation of banking systems. In December 2010, the Basel Committee delivered a new proposal for a regulatory framework for banks - the Basel III agreement. Within the framework of the future European supervisory structure, the Council of the European Union agreed in June 2009 that uniform regulation of credit institutions and investment firms is of great importance for the functioning of the internal market.

The financial crisis also generated action on the part of the Commission in the field of corporate governance. As part of the measures to limit exaggerated risk-taking and short-term thinking, the Commission intended, by means of a broader approach, to evaluate and report on existing practices for corporate governance in financial institutions and then to present its recommendations and, where necessary, legislative proposals. The Commission's first measure was to present a Green Paper on 2 June 2010 on corporate governance in financial institutions and remuneration policies.

As a step in its efforts to create more stable financial systems, the Commission has proposed a number of amendments to current EU regulations, among other things, on capital adequacy, debt ratios and liquidity in credit institutions and investment firms. The proposal also contains

sections focusing on corporate governance issues and sanctions. The proposal, which is referred to as CRD 4 (Capital Requirements Directive 4), aims to introduce the global Basel III agreement and to harmonise existing capital adequacy rules. The proposal consists of two parts: a directive[2] and a regulation[3]. The Commission states that the regulation and the directive form a package and that the directive should therefore be read together with the regulation. According to the Commission, the two legal instruments should, together, form the legal framework governing banking activities and supervision rules for credit institutions and investment firms.

The directive and regulation replace directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions and directive 2006/49/EC on the capital adequacy of investment firms and credit institutions.

[2] COM (2011) 453 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

[3] COM (2011) 452 on prudential requirements for credit institutions and investment firms.

The Committee's examination

Introduction

The principle of subsidiarity is regulated in Article 5 of the Treaty on European Union. Under this principle, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

According to the Protocol to the Lisbon Treaty on the Application of the Principles of Subsidiarity and Proportionality, the European Commission, the European Parliament and the Council are to forward their draft legislative acts to national parliaments so that they can assess whether the the proposals are compliant with the principle of subsidiarity. Under Chapter 10, Article 6 of the Riksdag Act, the Riksdag shall examine whether draft legislative acts conflict with the said principle.

If a national parliament considers a proposal to conflict with the principle, it is entitled to submit a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission. Such an opinion shall be submitted within eight weeks from the day the proposal was made available in all the official languages of the Union.

Application of the principle of subsidiarity to this matter

The Commission's assessment

In the draft directive, the Commission states the following concerning the question of the compliance of the proposal with the principle of subsidiarity:

> In accordance with the principles of subsidiarity and proportionality set out in Article 5 TFEU, the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved by the EU. Its provisions do not go beyond what is necessary to achieve the objectives pursued. Only EU action can ensure that credit institutions and investment firms operating in more than one Member State are subject to the same requirements and thereby ensure a level playing field, reduce regulatory complexity, avoid unwarranted compliance costs for cross-border activities, promote further integration in the EU market and contribute to the elimination of regulatory arbitrage

opportunities. EU action also ensures a high level of financial stability in the EU.

The Government's assessment

The Government, which has examined the entire proposal from the point of view of the principles of subsidiarity and proportionality, welcomes in its preliminary position (September 2011) the fact that the Basel III agreement is now to be implemented in the EU. At the same time it emphasises how important it is that the contents of the agreement are not watered down when it starts to apply in the EU. The Government also expresses its support for the fact that the current regulatory framework with two directives will, to a large extent, be made into a regulation as this will create a more uniform regulatory framework in the EU. It will help to strengthen both financial stability and the internal market in the field of finance in the EU. The Government makes the following assessment:

The Government considers that the prinicple of proportionality is extra important here, in view of the technical complexity and scope of the proposal. In this context it is worth pointing out that the Commission has chosen a measure that involves a common regulatory framework for all 8,300 banks, credit institutions and investment firms in the EU. Its reason for proposing regulations at EU level rather than national level is stated as being that the objectives of the planned measures cannot be sufficiently achieved by the member states. Only EU action can ensure that financial stability is safeguarded at EU level.

The Government is positive to the new regulatory framework and that it, just like the current framework, is regulated to a large extent at EU level. However, the proposal contains provisions about what level of capital base institutions should have at different points in time. The provisions are formulated as absolute requirements, which prevent member states from introducing more stringent requirements in legislation, thus the provisions have the character of maximum rules. An excessively low level for an institution's capital requirements can have serious consequences for central government finances and the economy as a whole. The member states must therefore have the opportunity and right, at national level, to take measures that may be considered justifiable in order to secure financial stability in the country.

The Commission proposes that member states wishing to increase their capital adequacy use one of two capital buffers that it proposes should be introduced[4] through the directive, more specifically the countercyclical buffer

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[4] It is proposed that two extra capital buffers are introduced. One is the capital conservation buffer in the form of "tier I capital" and amounts to 2.5 per cent of risk-weighted assets. If the credit institutions fail to meet this requirement, they will face constraints on discretionary distributions of earnings. The other

and that they work with higher capital requirements within the framework of supervision. However, these measures cannot be equated with a higher general capital adequacy and risk being insufficient. According to the Basel III agreement, the countercyclical buffer explicitly aims to subdue excessively strong credit growth in the economy. This means that in normal times it will be zero. For this reason, the countercyclical buffer is neither sufficient nor equal to having ligher levels of basic capital adequacy. The Commission does admittedly propose that the size of the countercyclical buffer should take into account other things than just credit growth, but this possibility may be difficult to implement in a predictable way in the regulatory framework.

The Government considers that the proposal's provisions on what level of capital base institutions should have at all times appear to be in conflict with the principle of subsidiarity.

The position of the Committee

To start with, the Committee wishes to say that it welcomes the Commission's work with regulations to create a more stable financial system and considers that the proposal can contribute to financial stability at Union level. Furthermore, the Committee is very positive to the proposal to implement the Basel III agreement in the EU.

On 29 July 2011, the Commission announced that all official language versions of the proposal for a directive had been sent to the member states' national parliaments. This marked the start of the eight-week period for the subsidiarity check. The translation of the draft regulation is not expected to be ready until the end of October 2011. In view of the fact that the Commission itself points out that the regulation and directive are to be regarded as a package and emphasises the importance of them being read together it would, in the opinion of the Committee, have been helpful if the two legal instruments had been sent to the national parliaments at the same time. In the opinion of the Committee, it is unfortunate that both proposals could not be examined for compliance with the principle of subsidiarity at one and the same time. This makes it considerably more difficult to carry out a subsidiarity check of the proposal as a whole.

As regards the proposal as a whole, the Committee considers that the full harmonisation proposed by the Commission of various parts of the proposal is not compliant with the objective of contributing to financial stability at Union level. The risk is that the content of the Basel III agreement may be watered down when such harmonisation is implemented as legislation to apply in the

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buffer is the countercyclical buffer between 0 and 2.5 per cent of risk-weighted assets, also in the form of tier I capital. The aim of the countercyclical buffer is to subdue excessively rapid credit expansion during periods of economic growth.

EU, as what were intended to be minimum regulations instead become an enforceable EU standard. The provisions relating to the basic levels for capital requirements (also know as Pillar I requirements[5]) are formulated in the proposal as absolute requirements that prevent member states from legislating for greater requirements. The same applies, in principle, to the two capital buffers that are to be introduced according to the proposal. Because they are formulated this way, the provisions have the character of maximum rules. The Committee considers that member states should be able to take further measures as they see justified to safeguard financial stability at the national level. This is particularly important as it is the member states themselves who have to bear the brunt of central government finances and socio-economic costs if a credit institution fails or there is a financial crisis.

The size of the financial sector in relation to the economy varies between the member states. A member state with a large financial sector is more vulnerable to financial crises, and a failure or a financial crisis would mean greater strain on public finances for such a member state than for a member state with a smaller financial sector. According to the Committee, the objective of the Commission's proposal - which is ultimately financial stability - can be attained much more easily if the basic capital requirements constitute minimum requirements in the same way as stated by the international Basel III regulatory standard and provided that the member states retain the possibility to raise the level of capital requirements if they consider it justified in order to safeguard financial stability at the national level.

As early as 19 May 2011, Sweden and six other member states put forward to the Commission objections to the proposal for maximum levels regarding the institutions' capital bases.

The Committee does not consider the Commission's proposal that member states wishing to increase capital adequacy should make use of the countercyclical buffer and work with higher capital requirements within the framework of supervision is equal to having higher levels of general capital adequacy. In the opinion of the Committee, there is a risk that the proposals are insufficient. According to the Basel III agreement, the countercyclical buffer explicitly aims to subdue excessively strong credit growth in the economy. This means that in normal times it should be zero. For this reason, the countercyclical buffer is neither sufficient nor equal to having higher levels of basic capital adequacy. The Commission does admittedly propose that the size of the countercyclical buffer should take into account other aspects than just credit growth, but this possibility may be difficult to implement in a predictable way in the regulatory framework.

To summarise, the Committee notes that the proposal's provisions on what level of capital base institutions should have at all times and the provisions on

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[5] Capital requirements regulated by law or provision.

the two kinds of capital buffer (capital conservation buffers and countercyclical buffers) are formulated as absolute requirements, which prevent member states from adopting legislation containing greater requirements. In the opinion of the Committee, an excessively low level of capital requirements for institutions can have serious consequences for central government finances and the economy as a whole. In view of the fact that it is ultimately the individual member states that are forced to bear the brunt of the cost if an institution fails or if there is a financial crisis, the member states must have the opportunity and right at national level to take the measures they consider justifiable in order to safeguard financial stability in their country. The Committee is thus of the opinion that the Commission’s proposal conflicts with the principle of subsidiarity and proposes that the Riksdag submit a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission with the wording set out in appendix 2.

Finally, the Committee notes that there are a number of regulatory proposals in the Commission's proposal which require thorough analysis, both on grounds of principle and from a horizontal perspective, before it is possible to assess whether such sector-specific regulation is appropriate or not. An example is the proposal for more lenient sanctions in cases where breaches are reported by the institutions themselves. The Committee presumes, however, that such analyses will be carried out during continued negotiations on the proposal as a whole.

Special statements of opinion

2011-10-21

List of proposals considered

COM(2011) 453 final

Proposal for a directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate.

Reasoned opinion of the Riksdag

The Riksdag welcomes the Commission's work on regulations for introducing the Basel III agreement in the EU and considers the proposal to be largely well formulated and that it has the potential to strengthen financial stability in the EU and to strengthen the internal market in the financial area. However, the Riksdag has objections to the full harmonisation proposed by the Commission in certain points of the proposal. The risk is that the content of the Basel III agreement may be watered down when such harmonisation is implemented as legislation to apply in the EU, as what were intended to be minimum regulations instead become an enforceable EU standard.

The Commission's proposal for a directive on credit institutions and investment firms[6] (COM/2011) 453 final, which is presented in the statement from the Committee on Finance 2011/12 FiU17 Subsidiary check of proposal for a directive on credit institutions and investment firms, has been examined by the Riksdag from the point of view of the application of the principle of subsidiarity. As the Commission writes in the directive, however, the proposal consists altogether of two parts: a directive and a regulation. The Commission places particular emphasis on the fact that the regulation and the directive form a package and that the directive should therefore be read together with the regulation. According to the Commission, the two legal instruments should, together, form the legal framework governing banking activities and supervision rules for credit institutions and investment firms. The Riksdag, which has had the task of examining the directive from the point of view of subsidiarity, has therefore also considered the importance that the regulation has in this context.

The provisions relating to the basic levels for capital requirements (also known as Pillar I requirements) are formulated as absolute requirements that prevent member states from legislating for greater requirements. Because they are formulated this way, the provisions have the character of maximum rules. The Riksdag considers that the member states should be able to take further measures as they see justified to safeguard financial stability at the national level. This is particularly important as it is the member states themselves who have to bear the brunt of the cost of central government finances and socio-economic costs if a credit institution fails or there is a financial crisis. In addition to this, the size of the financial sector in relation to the economy varies between the member states. A member state with a large financial sector is more vulnerable to financial crises, and a failure or a financial crisis would mean greater strain on public finances for such a member state than for a member state with a smaller financial sector.

According to the Riksdag, the objective of the Commission's proposal - which is ultimately financial stability - can be attained much more easily if the basic capital requirements constitute minimum requirements in the same way as stated by the international Basel III regulatory standard and provided that the member states retain the possibility to raise the level of capital

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[6] Proposal for a directive of the European Parliament and of the Council on the right to carry out activity in credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate.

requirements if they consider it justified in order to safeguard financial stability at the national level.

The Riksdag does not consider that the Commission's proposal that member states that wish to increase their capital adequacy should make use of the countercyclical buffer and work with higher capital requirements within the framework of the supervision are on an equal footing with a higher general level of capital adequacy. The proposals run the risk of being insufficient.

According to the Basel III agreement, the countercyclical buffer expressly aims to subdue excessively strong credit growth in the economy. This means that in normal times it will be zero. For this reason, the countercyclical buffer is neither sufficient nor equal to having higher levels of basic capital adequacy. The Commission does admittedly propose that the size of the countercyclical buffer should take into account other aspects rather than just credit adequacy, but this possibility may be difficult to implement in a predictable way in the regulatory framework.

In the view of the Riksdag, the Commission should submit a new proposal corresponding to the proposal that we have now considered but with an amendment in which it is clearly stated that the member states will be able to raise the level of the basic capital requirements if they consider it justified to safeguard financial stability at the national level.