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# EU Banking Package in the Trilogues

## Definitions should be more targeted to avoid unintended negative side effects for non-financial companies

Position Paper of Deutsches Aktieninstitut prepared for the Trilogues on the EU Commission's Banking Package implementing the remaining parts of the Basel III framework, 17 March 2023

# Introduction

The Banking Package aims to transpose the remaining parts of the 3rd Basel Capital Adequacy Framework into European law. Deutsches Aktieninstitut has followed the legislative process to date from the perspective of non-financial companies to ensure that the new regulations take the specific economic structures of the non-financial companies into account and that there are no unintended negative effects for the real economy.

At the start of Trilogues, this position provides an assessment on the points in the overall legislative package that we have also previously commented on.

# 1 General Assessement

Generally, the EU Commission, the Council of the EU and the European Parliament have addressed and taken into account many of our concerns, but have also created new uncertainties for non-financial companies on one important point.

In particular, we welcome:

- ... that the exemption for the own funds requirements regarding CVA risks of derivatives used by non-financial entities under Art. 382 (4) CRR will be retained. This facilitates the management of currency, interest rates and commodity price risks common in the international, highly interconnected economy.

- ... that a transition period until 2029 for the so-called alpha factor of the Standardized Approach for the measurement of counterparty risks (SA-CCR) according to Art. 465 (4) CRR is included in all three negotiating positions. This also facilitates risk management and ensures that there is sufficient time for a careful analysis of which alpha factor is appropriate in the long term - also in an international comparison.

- ... that lower risk weights should apply to loans for unrated corporates for a transitional period (Art 465 (3) CRR) until the end of 2031. This takes into account that a high proportion of European companies are not rated and also gives time to carefully monitor developments in the rating and credit market.

- ... that both the Council and the European Parliament want to keep the current risk weight of 20 percent for commonly used instruments of trade finance (Art. 111 in conjunction with the annexes). This takes into account the low risk character of the respective instruments as well as their high importance for the international, interconnected European economy.

However, the definition of „ancillary services undertaking" creates new uncertainties and should be more targeted which is explained below.

## 2 More targeted definition of “ancillary services undertaking”

The proposed, significant extensions of key definitions in the CRR – in particular Art. 4(1) No. (18) (ancillary services undertaking) and Art. 4(1) No. (20) (financial holding company) – pose a considerable threat of negative effects to non-financial companies.

In particular, the expansion of the definition of "ancillary services undertaking" may lead to companies in the real economy becoming classified as a "financial holding company" at the group level, even though the business model of these companies clearly consists of the production of goods and their sale.

This surely cannot be the objective.

Recital (42) clarifies that the legislation seeks to identify cases of circumvention and wants to increase the clarity of the definitions. However, the proposed definition of "ancillary services undertaking" does not clarify, but rather makes it less clear and almost arbitrarily broad, as it covers not only acts of circumvention, but also contractual constellations that are common in the business of non-financial companies.

Therefore, we certainly support the Council’s proposal to supplement Art. 4(1) No. (20).

This clarification at least gives supervisory authorities in Art. 4 (1) No. (20) some discretion when classifying a group of companies for regulatory reasons, namely to disregard individual indicators when it appears appropriate as the relevant indicator does not convey a fair and true view of the main activities and risks of the group. This amendment to the Commission’s proposal should therefore certainly be included in the final text.

However, in our view, this is not yet sufficient to limit the unintended side effects for non-financial companies. For this to be accomplished, Art. 4 Para. 1 No. (18) must also be worded much more appropriately. At the very least, the following changes should be made to the current texts:

### 1) Deletion of “operational leasing” in Art. 4 Paragraph (1) Number (18)(b).

Operational leasing, unlike financial leasing, is not connected to financing, but is ultimately a form of payment for the transfer of an object for use over time (similar to rent). For this reason alone, it is doubtful why operational leasing is included at

all in the proposed definition, when according to the explanatory memorandum, its purpose is to curb circumvention and evasion.

Operational leasing is already of considerable importance to non-financial companies. Moreover, business models based on "transferring a good for use over time instead of buying" (“pay per use”-models) will increase in some sectors in the future because people's usage habits are changing. It is obvious that e.g. “car sharing” or “car subscriptions” do not constitute circumventing activities. A classification as a "financial holding company" on this basis would therefore clearly go beyond the aim of the legislation. This should be prevented. Therefore, "operational leasing" should be deleted from the definition of ancillary services undertaking.

### 2) A clarification in recital (42)

According to Recital (42), the legislation intends to prevent possible circumvention actions by broadening the definitions. However, due to the broadness of the definition, there are circumstances that formally fall within the scope of application that are certainly not circumvention actions. The above-mentioned operational leasing is only one particularly prominent example.

If it is not the intention that non-financial companies are classified as "financial holding company" due to a formality, this should also be clarified in a recital. An example of such a Recital could be: "Industrial groups whose core business is to manufacture and / or distribute goods and services and whose financial services activities support such core business shall not be in the scope of Art. 4 para 1 point (18). There is still no intention to extend the scope of financial regulation to those non-financial groups, if the focus of activities is in the industrial sector."

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