Deutsches Aktieninstitut

Prudential Requirements of Investment Firms Should Avoid Regulatory Overlaps with Shareholder Rights Directive

Position Paper of Deutsches Aktieninstitut on the amendments under discussion to the EU Commission proposal for a regulation on prudential requirements of investment firms, 5 September 2018

Background

This short position paper summarises the preliminary view of Deutsches Aktieninstitut[1] on the proposed amendments 248 to 253 tabled on the EU Commission proposal for a regulation on prudential requirements of investment firms, COM(2017)0790 – C8-0453/2017 – 2017/0359(COD)).

These amendments would oblige subsidiaries of large asset managers and third country large asset managers to disclose details of their investment policy under a newly introduced Art. 51a which would read as follows:

Amendment 248:

Article 51a
Investment policy
1. Subsidiaries of large asset managers and third country large asset managers shall disclose on an individual basis the following information regarding their investment policy, in accordance with Article 45:

Amendment 249:

(a) the participation rate for all direct and indirect holdings where beneficial ownership exceeds 5% of any class of voting equity securities, broken down by Member State and sector;

Amendment 250:

(b) a description of the investment objective regarding the entities held according to point (a);

Amendment 251:

(c) the number and dates of all investor meetings and discussions that have taken place within the period covered by the disclosure report between any representative of any subsidiary and members of the management or the supervisory board of the entities held according to (a) and a description of the issues discussed, in particular where they relate to the business strategy;

[1] Deutsches Aktieninstitut (EU transparency register: 38064081304-25) represents the entire German economy interested in the capital markets. The about 200 members of Deutsches Aktieninstitut are listed companies, banks, stock exchanges, investors and other important market participants. This position paper is based on discussions in the issuers' working group which is the central forum of opinion building for listed companies in the Germany.

Amendment 252:

(d) the voting behaviour at shareholders' meetings, in particular the percentage of approval of proposals put forward by the management of the entities held according to (a), and the recurrence to proxy advisor firms;

Amendment 253:

(e) the voting guidelines including, but not limited to, a description regarding participation rights of employees as well as other social, environmental and governance issues;

Evaluation of the Amendments

Deutsches Aktieninstitut is concerned about a number of aspects of the proposed amendments.

Premature conclusions - political issues raised are under discussion in a broader context

> We feel that the issues addressed by the amendments clearly need a closer and more intensive discussion before conclusions are drawn.

The general background of the amendment appears to be the question whether large asset managers may negatively influence the competitive behaviour of the companies of the same sector because they hold stakes in multiple companies (so called common ownership). The debate on this subject is not only at a very early academic stage with unclear evidence, the European Commission DG Competition is also currently carrying out a more detailed analysis, the results of which are not expected until the end of the year. We therefore regard it as premature to consider far reaching consequences on that broad issue.

The same applies to the proposal for publication of the voting guidelines "including, but not limited to, a description regarding participation rights of employees as well as other social, environmental and governance issues, regarding the entities held according to (a)." The debate on potential obligation of investors regarding the incorporation and transparency of social, environmental and governance aspects of their investment behaviour is already discussed under the Sustainable Finance Action Plan of the EU Commission. Any premature regulatory change in that respect will most likely interfere with the results of the broader debate.

Inconsistency to and interference with Shareholder Rights Directive II

> Interference and inconsistency will also most likely be created with the Shareholder Rights Directive II (SRD II) which has to be transposed into national company law by June 2019.

The SRD II already obliges investors (among them those who are in scope of the regulation on prudential requirements of investment firms) to publish a voting

policy/engagement policy as well as "publicly disclose how their engagement policy has been implemented, including a general description of voting behaviour, an explanation of the most significant votes and the use of services of proxy advisors." They also shall "publicly disclose how they have cast votes in the general meetings of companies in which they hold shares" (see Art. 3g para 1 sub. (b))

In addition, the proposal to disclose details of investor meetings is too far reaching (see above amendment 251, Art. 51a para 1 sub (c)). We are concerned that this could create legal uncertainty about what can be discussed. Also, public pressure on both investors as well as portfolio companies may increase so that the obligation most likely will result in a reduced willingness to engage with each other. It should also be noted that investor meetings are already regulated by a number of regulations such as the Market Abuse Regulation and national company law to ensure equal treatment of investors where necessary and appropriate.

Overall, we therefore prefer giving the obligations under SRD II time to work before implementing additional requirements for market participants that are already within the scope of the SRD II.

Unclear scope and wording issues

(Large) institutional investors may be investment firms under MiFID and the "regulation on prudential requirements of investment firms", but also may not. Thus, they may be covered by the regulation or they may be not depending on their legal status. Furthermore, the regulation can by definition only address investment firms located in the European Union. Both systematic topics underline that the issues raised need to be discussed having in mind existing regulation and existing broader policy initiatives.

Conclusion

> In sum, Deutsches Aktieninstitut calls for not implementing the amendments in the final report of the European Parliament.

The amendments appear to be linked to the debate on "common ownership". However, it is far too early to draw any conclusions from that debate.

In addition, it has to be noted that the main objective of the EU Commission's proposal for a regulation on prudential requirements of investment firms is not to regulate the relationship between investors and portfolio companies but to introduce more proportionate and risk-sensitive rules for investment firms. As a consequence, this creates overlaps with existing rules that correctly already address the relationship between listed companies and investors - in particular the

Shareholder Rights Directive II and to a certain extent also the EU Transparency Directive which already ensures transparency on major holdings of shareholders irrespective of whether the shareholder qualifies as an investment firm or not. Both legislative acts have been revised only recently after careful consideration.

Having this in mind, we the EU Commission's proposal for a regulation on prudential requirements of investment firms should not be overloaded with an issue that is better addressed by other legislation. If policy makers felt that the issue of common ownership needs to be discussed, we would prefer a separate discussion and would be most willing to take part in that debate.

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