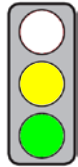


KEY ISSUES

Objective of the Green Paper: By creating a Capital Markets Union, the Commission wants to reduce the dependency of EU companies on bank financing, and increase the investment level.

Affected parties: (Potential) capital market stakeholders, banks, insurance companies, enterprises particularly SMEs.



Pro: (1) The creation of a Capital Markets Union may increase efficiency, strengthen competition and increase growth potential.

(2) Establishing standards for securitisations may strengthen confidence in securitisation markets.

(3) A restructuring and resolution system, particularly for central counterparties, is necessary.

Contra: Easing the capital requirements applicable to infrastructure investment by insurance undertakings is risky.

CONTENT

Title

Green Paper COM(2015) 63 of 18 February 2015: **Creating a Capital Market Union**

Brief Summary

► Context and objectives

- By contrast with the US, companies in the EU principally fund their investments by way of bank loans and only make limited use of the capital markets to raise funds. This makes them susceptible to bottlenecks in bank lending. (p. 2)
- The capital markets will play a greater role in financing EU companies in the future. (p. 4)
- The Commission wants to create a "true" internal market for capital ("Capital Markets Union") (p. 1 et seq.).
- This will (p. 5 et seq.)
 - improve access to financing for businesses, in particular small and medium-sized enterprises (SMEs) and for investment projects ("Aim 1"),
 - increase and diversify the sources of funding for businesses ("Aim 2"),
 - make capital markets more effective and efficient and lower the cost of linking investors with those seeking capital ("Aim 3").
- For this, the Commission proposes:
 - five "early actions" that it wants to tackle as soon as possible and
 - numerous "medium-term actions".

► Early Action 1: Review the Prospectus Directive

- A company seeking finance on the capital markets must usually produce a prospectus for potential investors containing, inter alia, information about the issuer and the security (Prospectus Directive 2003/71/EC, see [cepPolicyBrief](#) (p. 10).
- According to the Commission, some of the requirements in the Prospectus Directive create unnecessary barriers to SMEs when it comes to raising capital. It therefore wants to review the Directive and, in particular, examine when a prospectus is necessary and how the approval procedure and the content of prospectuses can be simplified. It has begun a separate consultation in this regard to run in parallel to this Green Paper. (p. 10)

► Early Action 2: Credit information on SMEs

The Commission is examining whether a common minimum set of comparable information for credit reporting and assessment of SMEs could help them to gain funding via the capital markets. This could also help the development of securitisation markets for SME loans. (p. 10)

► Early Action 3: Reviving securitisation markets

- Securitisations - i.e. the process whereby receivables are pooled together into tradable securities - increase the capacity for banks to lend. However, the securitisation markets collapsed as a result of the financial crisis and "remain impaired". (p. 10)
- The Commission wants to revive the securitisation markets by creating an EU framework for "simple, transparent and standardised" securitisations. This will (p. 10 et seq.)
 - ensure "high standards, legal certainty and comparability" for securitisations,
 - create transparency for securitised SME loans and
 - promote the growth of secondary securitisation markets.

- The Commission has already undertaken the preliminary work by way of delegated acts on the Solvency Directive [Solvency II (2009/138/EC), see [cepPolicyBrief](#)] and on the liquidity coverage ratio (see [ceplnput](#) 07 | 2015). It has also begun a separate Consultation which will run in parallel to this Green Paper. (p. 11)
- ▶ **Early Action 4: Private placement markets**
 - According to the Commission, differences in national insolvency laws and a lack of standardisation in relation to information on the creditworthiness of issuers is obstructing the development of Europe-wide markets for securities which are offered away from public market places (Private placement) (p. 11).
 - A "consortium of industry bodies" recently established a market guide on standardised documentation for private placements. The Commission asks whether additional measures should be taken at EU level (p. 12).
- ▶ **Early Action 5: European Long-Term Investment Funds (ELTIFs)**

The Commission asks what role it and the Member States could play in supporting the take up of the recently established European Long-term Investment Funds (ELTIFs) [COM (2013) 462, see [cepPolicyBrief](#)] (p. 11).
- ▶ **Medium-term measures to improve funding possibilities (Aim 1)**
 - A "simplified" yet "high quality" accounting standard should be developed for SMEs that are looking for access to special trading venues - such as multilateral trading facilities (MTF), i.e. trading venues similar to stock exchanges which are subject to less strict requirements e.g. on the admission of financial instruments (p. 14).
 - The transparency of infrastructure projects should be increased and support given to the creation of a European Investment Project Pipeline (EFSI Regulation, see [cepPolicyBrief](#)) (p. 14).
 - An EU framework for covered bonds - e.g. German Pfandbriefe - could be set up. The Commission will consult on this in 2015. (p. 15)
 - The markets for corporate bonds should be more standardised either by "market led initiatives" or by regulatory measures (p. 15).
 - Barriers to alternative forms of financing such as crowdfunding [COM (2014) 172, see [cepPolicyBrief](#)] should be removed, particularly with regard to cross-border transactions (p. 15).
- ▶ **Medium-term measures for diversifying and extending the availability of capital (Aim 2)**
 - The Commission responds to calls for a relaxation of the regulations on infrastructure investment, particularly regarding the capital requirements for banks [CRD IV (2013/36/EU), see [cepPolicyBrief](#), CRR ((EU) No. 575/2013), see [cepPolicyBrief](#)] and insurance undertakings [Solvency II (2009/138/EC), see [cepPolicyBrief](#)]. The Commission therefore wants to examine the possibility of including a new infrastructure sub-class in the capital requirements. (p. 17)
 - Capital-based schemes for pension provision are important investors for the EU economy. The Commission examines the possibility of creating a "standardised" European private pension product to remove obstacles to the cross-border supply of such products. This would involve EU-wide harmonisation of national rules or an additional EU legal framework (known as 29th Regime). (p. 17)
 - Retail investors have significant savings that, according to the Commission, could in some cases be used "more productively" (p. 19). The Commission is therefore seeking ways to promote cross-border competition for retail investors. Financial services provided by electronic tools could have an important role to play in this regard. (p. 20)
 - Investment in capital markets requires the confidence of retail investors. The Commission therefore wants to examine whether the mandates of the European Supervisory Authorities (ESAs) should be widened in the area of consumer and investor protection (see [ceplnput](#) 04 | 2014) (p. 20).
- ▶ **Medium-term measures to improve the functioning of the markets (Aim 3)**
 - The Commission is examining a review of the ESA Regulations. This will include the functioning, governance and financing of ESAs as well as the subject of dispute settlement (see [ceplnput](#) 04 | 2014). It is hoping that this will give rise to consistent implementation of harmonised capital market regulation. (p. 22)
 - The Commission wants to submit an EU framework for the recovery and resolution of systemically relevant financial institutions which are not banks, such as central counterparties (CCPs) (p. 23). Central counterparties appear, for procedural reasons, in trading venues such as stock exchanges, as parties to contracts between seller and buyer.
 - According to the Commission, there are restrictions and risks when it comes to the cross-border use of collateral in the EU. It therefore asks which measures it should take to remove them. (p. 23)
 - According to the Commission, legislation on investors' ownership rights in relation to securities differs between Member States. Investors may therefore have difficulties assessing the risk of cross-border investments. The Commission asks whether further harmonisation of these ownership rights would be desirable. (p. 23)
 - According to the Commission, businesses face barriers to establishment and operation in other Member States. It therefore asks how these can be overcome by harmonising company law. (p. 24)

- The Commission asks whether, in addition to harmonising conflict-of-law rules [COM (2012) 744, see [cepPolicyBrief](#)], it would also be advisable to harmonise substantive national insolvency legislation. In the Commission's view, this would contribute to the emergence of pan-European equity and debt markets. (p. 25)
- According to the Commission, differences in national tax regimes can create obstacles to cross-border investments such as pensions and life insurance. It therefore wants to propose harmonisation measures. (p. 25)

Policy Context

The Green Paper on Capital Markets Union introduces a Consultation. The Capital Markets Union is the first major project of the new Commissioner for Financial Markets Regulation, Jonathan Hill. He wants to hold a conference on the subject, following conclusion of the consultation procedure, in summer 2015. In the second half of 2015, the Commission then wants to submit an "Action Plan" on the Capital Markets Union. In parallel to the Green Paper, the Commission has submitted two detailed Consultations on the subject of "[An EU framework for simple, transparent and standardised securitisation](#)" and "[Review of the Prospectus Directive](#)".

Options for Influencing the Political Process

Leading Directorate General:	DG Financial Stability, Financial Services and Capital Markets Union
Leading Committees of the EP:	Economic and Monetary Affairs, (ECON)
Leading Federal Ministry:	Federal Finance Ministry
Leading Committee of the BT:	Finance Committee
Consultation procedure:	All citizens may express their opinion. The procedure ends on 13 May 2015; http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index_en.htm

ASSESSMENT

Economic Impact Assessment

Capital should be able to flow to where it can be most effectively deployed. Barriers to the free flow of capital result in losses in efficiency and growth. **The creation of a Capital Markets Union**, which provides for the removal of barriers to cross-border movement of capital, **may therefore increase efficiency, strengthen competition and boost the potential for growth.**

The duty to establish a securities prospectus basically fulfils two functions: the promotion of market efficiency by removing market asymmetries between investors and those seeking capital and the protection of investors as the less informed party. They can, however, represent a barrier to market entry for SMEs due to high costs. **The concessions which the Commission is planning to give to SMEs in relation to prospectus obligations** are therefore double-edged. They **may facilitate market entry but, depending on their design, will be detrimental to market efficiency and investor protection**, because informational asymmetry will increase. In the longer term, this may even jeopardise capital markets financing for SMEs.

A minimum level of standard credit information about SMEs may increase market efficiency as information asymmetries between borrowers and investors are reduced. A general duty of disclosure of this information would, however, represent significant unjustified intervention in the freedom to conduct a business. Companies should be able to decide for themselves whether, how and what information they make available to third parties.

Securitisations may improve the distribution of risk and increase the lending capability of banks. **Setting standards for "simple, transparent and standardised" securitisations may counteract the – arising from the financial crisis and much overstated – stigma attaching to these financial instruments and increase confidence in securitisation markets** by reducing the information deficit on the part of investors. It must be ensured, however, firstly that securitisations without an EU security label are not put at an unjustified competitive disadvantage and secondly that standardisation does not unduly restrict product diversity and innovation.

EU measures to standardise the documentation of private placements should be abandoned. They will not cope with the special character of private placement among professional investors and risk overlooking the special informational requirements of the relevant market players.

Harmonisation of the rules on covered bonds may, in principle, strengthen the internal market because it **facilitates cross-border investment in these products**, particularly as a result of a reduction in information costs. Full harmonisation is, however, unrealistic. It requires an almost unimaginable EU-wide convergence of national regulations, for example under insolvency or property law. Minimum harmonisation would therefore be more realistic, whereby e.g. common duties of transparency are created.

The potential of Crowdfunding is currently restricted by legal uncertainties about the applicable rules. Although this is typical for innovations, simply clarifying which rules apply would already allow greater use of the potential. Even better would be to create uniform EU legislation on Crowdfunding which would avoid restricting cross-border funding and strengthen the internal market.

Easing the restrictions applicable to infrastructure investments by insurance companies is risky. Firstly, there is hardly any data available to justify such preferential treatment. Secondly, in the case of infrastructure investments, there is generally insufficient diversification of risk. If there is nevertheless a reduction in the capital requirements, the insurance regulatory authorities will be required to correctly assess the changing risk profile of the insurance undertakings. In addition, a regulatory restriction on investment in infrastructure projects is advisable in the interests of ensuring sufficient diversification of risk.

A standard EU framework or 29th Regime for private pensions may, insofar as economies of scale are used, facilitate the cross-border sale of such products and thereby **increase competition. It is likely, however, particularly under tax law, that different national rules,** and thus also obstacles to the internal market, **will continue to exist** even in the case of a harmonised pension product.

Although, central counterparties reduce the default risk existing on the financial markets, at the same time there is a convergence of risk within them. The default of central counterparties therefore involves a major threat to the stability of financial markets. **A restructuring and resolution system is, thus, necessary, particularly for systemically relevant central counterparties.** A lack of proper restructuring and resolution procedures gives rise to unacceptable distortions in incentives ("moral hazard") inducing these institutions to take excessive risks since, due to their systemic relevance, they have no need to fear insolvency.

Legal Assessment

Legislative Competency

With regard to the harmonisation of finance market regulation, the legal basis for legislative follow-up measures by the EU is provided by the internal market competence (Art. 114 TFEU) and the competence to coordinate national provisions concerning the taking-up and pursuit of self-employed activities (Art. 53 (1)). Changes to rules on corporate governance and company law are primarily covered by the competence to attain freedom of establishment (Art. 50 TFEU). The creation of corporate forms under EU law, however, can only be based on the flexibility clause (Art. 352 TFEU) which requires unanimity in the Council (see [cepPolicyBrief](#) on Societas Unius Personae). The legal basis for material harmonisation of national insolvency laws may be provided by the internal market competence (Art. 114 TFEU). A special power to harmonise tax rules, which nevertheless requires unanimity in the Council, only exists in relation to indirect taxes (Art. 113 TFEU); for direct taxes, only the fall-back competence for the internal market (Art. 115 TFEU) is applicable, which also requires unanimity in the Council.

Subsidiarity

Dependent on the actual design of the measure but in view of the cross-border nature of financial markets, likely to be unproblematic.

Proportionality with Respect to Member States

Dependent on the actual design of the measure.

Compatibility with EU Law in other Respects

Dependent on the actual design of the measure.

Impact on German Law

Dependent on the actual design of the measure.

Conclusion

The creation of a Capital Markets Union may increase efficiency, strengthen competition and increase growth potential. The planned concessions for SMEs in relation to prospectus obligations may facilitate market access but could, depending on their design, be detrimental to market efficiency and investor protection. Establishing standards for securitisations may strengthen confidence in securitisations markets. Harmonising the rules on covered bonds facilitates cross-border investment in these products. Easing the restrictions applicable to infrastructure investment by insurance companies is risky. A standard EU framework or 29th Regime for private pensions may increase competition. It is likely, however, particularly under tax law, that different national rules will continue to exist even in the case of a harmonised pension product. A restructuring and resolution system, particularly for systemically relevant central counterparties, is necessary.