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Position of the European Financial Congress[1] in relation to the Financial Stability Board's consultative document on Continuity of Access to Financial Market Infrastructures ("FMIs") for a Firm in Resolution[2]

Methodology for preparing the answers

The answers were prepared in three stages:

Stage 1

A group of experts including several dozen specialists were invited to participate in the survey. They received selected extracts of the consultation document as well as selected consultation questions in Polish. The experts were guaranteed anonymity.

Stage 2

The Gdańsk Institute for Market Economics[3] received 19 opinions from key financial market institutions in Poland and from individual experts. All the responses were collected, anonymised and presented to the experts who took part in the consultations. The experts were asked to mark in the other consultation participants' opinions the passages that should be included in the final position as well as the passages they did not agree with. Experts could also adjust their positions under the influence of arguments presented by other experts that they had not known previously.

Responses were obtained from experts representing:

- universal banks,
- financial conglomerates,
- regulatory and supervision bodies,
- consulting firms and law firms,
- the academia.

Stage 3

On the basis of the responses received, the survey project coordinators from the European Financial Congress prepared the final version of the European Financial Congress's answers presented below.

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[1] European Financial Congress (EFC – www.efcongress.com). The purpose of the regular debates held within the EFC is to ensure the financial security of the European Union and Poland.

[2] http://www.fsb.org/wp-content/uploads/Continuity-of-Access-to-FMIs-Consultation-Document-FINAL.pdf

[3] Instytut Badań nad Gospodarką Rynkową (IBnGR) – the first independent think tank in Central and Eastern Europe, founded in 1989 by a group of economists associated with the democratic opposition and the "Solidarity" movement.

Answers of the European Financial Congress to the consultation questions[4]

Question 1:

Does the consultative document appropriately address the tensions that may arise between the various financial stability objectives, with regard to the safety and soundness of providers of critical FMI services on the one hand and to the orderly resolution of the recipients of such services on the other?

The document accurately identifies a potential conflict between the resolution purposes of the two types of entities, especially with regard to determining the following issues:

a. The information requirements for institutions that use the services of FMI providers (the Annex to the consultative document),
b. The obligation to include in the agreements between the providers and recipients of critical FMI services the provisions concerning the procedure to be applied when the recipient that is in the lead-up to, or in, the resolution regime.

We agree that it will be necessary to prepare adequate contingency plans detailing the procedure to be applied in the lead-up to, and upon entry into, resolution. We also agree that it will be necessary to implement certain mechanisms to warrant/ secure liquidity for the entity in resolution towards FMI to maintain continuity of critical processes for the entity in resolution.

It would be reasonable to make a simulation to test the effectiveness of the solutions proposed in the consultative document. Ideally, such a simulation test should be made on the G-SIBS institutional models mapped as accurately as possible. This will allow for foreseeing possible scenarios and events as well as to assess the relevance of the proposals, solutions and recommendations presented in the consultative document.

The following areas in the consultative document need to be elaborated on and specified in much greater detail:

a. The role and obligations of the relevant authorities with regard to (i) gathering the information referred to in the Annex to the document, (ii) cross-border cooperation between those authorities should a recipient of critical FMI services become insolvent, and (iii) the ability to interfere with the provisions of a contract between the recipient and the provider of the critical FMI services to ensure that the institutions that are in the lead-up to, or have already entered into, the resolution regime are actually able to use the critical services.
b. Assuring the providers of critical FMI services that the fact that they provide services to the institution that is in the lead-up to, or that has already entered into, resolution will not have a direct impact on their financial standing. This can be done by creating schemes of settlement guarantees, payment guarantees, etc. that should operate on a cross-border basis.

The issue of bank custodians needs to be specified in greater detail. There should be also a clear distinction between banking functions and custodian functions (as an element of FMIs). More

[4]The questions were selected from a broader pool of questions provided in the Financial Stability Board's consultation document. The original numbering has been preserved.

consistency is required when it comes to the use of entity names, especially in the context of their role with respect to indirect or direct access.

Question 3:

What are your views on the proposal in sub-section 1.1 of the consultative document that providers of critical FMI services clearly set out in their rulebooks or contractual arrangements the rights, obligations and applicable procedures in the event of an FMI participant entering into resolution?

The idea to regulate the rights, obligations and applicable procedures in the event of an FMI participant entering into resolution is right. However, any rights, obligations and procedures applicable to an entity in resolution should be set out clearly in the domestic legislation (which should result from the arrangements made at an international level to ensure international harmonisation). FMI rules or contractual arrangements should only reflect the legal framework effective in a given country and it would be advantageous that those regulations be quoted, for example, as an appendix to the rules and contractual arrangements, (so that the effective legal status is transparent for the FMI participant). The market participants should have full knowledge regarding the possible course of the resolution processes.

It seems justified to oblige the recipients of critical FMI services to prepare *ex ante* plans concerning collaterals on high quality assets to secure payments for critical FMI services. In addition, it is worth considering the possibility of additional guarantees from the resolution authorities or other national institutions concerning payments for critical FMI services delivered to recipients, including an adequate collateral on sufficiently high quality assets of the recipients of critical FMI services.

Question 4:

Sub-section 1.1. of the consultative document proposes that the exercise by the provider of critical FMI services of any right of termination or suspension of continued access to critical FMI services arising during resolution of an FMI participant be subject to appropriate procedures and adequate safeguards. What are your views on those procedures and safeguards? In your answer, distinguish where relevant depending on whether the firm that enters resolution continues or fails to meet its payment, delivery and collateral provision obligations to the FMI or FMI intermediary.

Where a firm in resolution continues to meet its payment obligations, the provider of critical FMI services should not have the right to terminate or suspend continued access to critical FMI services – this assumption is right and it is fully justified by supporting and continuing the resolution process, the purpose of which is to prevent the deterioration of the crisis. An entity must not be discriminated against, only because it entered resolution.

Where a firm that enters resolution fails to meet its payment obligations, the firm should be treated just like any other firm that fails to meet its payment obligations (and that has not entered resolution) – any other behaviour would be discriminating against the business that provides critical FMI services.

As stated in Sub-section 1.1 of the consultative document, the resolution authority and the authorities of the recipient of critical FMI services should be in regular contact with the management board of the provider of critical FMI services so that the provision of critical services may be controlled and maintained on an ongoing basis, and so that the authorities may develop a solution to that temporary problem together. As for entities that are temporarily unable to meet their payment obligations, such access should be maintained for a term set out in regulations so that the entities are able to take efforts to restore liquidity.

To achieve that goal, it would seem helpful to use the procedures set out in the resolution plans of the recipient of critical FMI services that provide for collaterals on high quality assets (specified in the plans) to secure payments for critical FMI services.

Nevertheless, it should be suggested that any decisions concerning actions taken by FMIs towards a participant in resolution should be subject to consultation with (or, even approval of) the resolution authority. Access to FMI services is of key importance for maintaining access to the entire financial market and for ensuring continuity of the critical functions exercised by the institutions, especially in the case of entities of systemic importance. As a consequence, the coordination of actions between the resolution authority and FMI with respect to resolution implementation towards a participant is of key importance for the effectiveness of the entire process.

It is necessary to ensure the right protection, especially in situations where there is a limited number of entities that provide such services on the market or if the use of services from another provider may be impossible/ difficult.

Question 5:

Sub-section 1.2 of the consultative document proposes that the general rights, arrangements and applicable procedures of a provider of critical FMI services that would be triggered by entry into resolution of an FMI participant, its parent or affiliate, should be the same irrespective of whether the firm entering into resolution is a domestic or foreign FMI participant. What safeguards should be considered and what measures are needed to ensure a consistent approach is taken across providers of critical FMI services to these safeguards?

The rules on which an FMI takes actions towards the FMI participants should be the same for all its clients, whether domestic or foreign. All of them should be subject to the same rules set out in the domestic law applicable to the FMI. A consistent approach to an entity in resolution should arise from a certain minimum level of harmonisation of domestic law due to its reliance on international standards. Such an approach results, on the one hand, from the growing cross-border nature of the financial markets. On the other hand, it is required in order to ensure solid and sustainable legal framework.

Developing a single and exhaustive list of safeguards and measures at this stage is difficult due to differences in the legal frameworks and varying degrees of market maturity in terms of digital service use. It is for that very reason (in keeping with Sub-section 1.2 of the consultative document) that the safeguards to be included should be available and possible to apply in all the legal systems of the countries covered by the resolution process, and the safeguards in a given country (e.g. in the home country) should be effective towards a provider of critical FMI services in another country (e.g. in the host country). Upon determining the safeguarding instruments, a detailed legal analysis

should be performed to find out whether those instruments are enforceable in different legal systems of the countries covered by the potential resolution process. Other safeguarding instruments might be added to the existing ones as part of such an analysis and used to expand the procedures regarding safeguards.

Ultimately, there should be a common scheme of settlement guarantees that would ensure uniform rules of safeguards enforcement, regardless of the location of the user and provider of critical FMI services. To achieve that goal, it would be necessary to:

a. Develop a catalogue of safeguarding instruments and the levels of the liquidity required
b. Define the rules of enforcing the rights under those instruments for the providers of critical FMI services
c. Ensure compliance of the rules of the guarantee scheme(s) with domestic regulations, including in particular the bankruptcy law, banking law and tax law.

Question 7:

Do you agree with the proposal in section 2 of the consultative document that firms should be required to develop contingency plans to facilitate continuity of access in both the lead-up to, and upon entry into, resolution? Does the consultative document address all aspects of the information and analysis that may be required for such contingency plans?

It seems right to follow the proposal in section 2.1 of the consultative document stating that firms should be required to develop contingency plans to facilitate continuity of access in both the lead-up to, and upon entry into, resolution. Contingency plans are of key importance for the effective implementation of the process of access to critical FMI services. Such a contingency plan will be a form of support for the resolution authority when developing and refining the resolution plan; ultimately, the contingency plan will facilitate the implementation of the resolution process because it will indicate solutions that may be applied immediately in order to facilitate continuity of access to FMI, especially that crisis management means that there is no time and that very important decisions need to be taken fast. It seems that refining existing documents (e.g. recovery plans or resolution plans), rather than introducing a requirement to create additional contingency plans, would be equally reasonable in terms of ensuring continuity of access to FMI.

The rules, procedures and obligations of the parties in the event of a threat to continuity of access to critical FMI services should be reflected both in the newly created contingency plans (or, in the refined recovery/ resolution plans), and in particular they should be reflected in the agreements between the user and provider of critical FMI services. Contingency plans and the language of the said agreements should be subject to periodic reviews by relevant authorities.

The consultative document addresses the scope of data and information that should be gathered by users of critical FMI services in sufficient detail. However, it does not provide for the need to test it in order to confirm its effectiveness or the need for adjustment. The tests of scenarios concerning the behaviour of the parties in a critical situation need to be analysed more in-depth and presented in a much more precise manner. Regular assessment of the feasibility of such contingent plans, both at the level of a single FMI and at the level of the system in which it operates will be a key aspect (where the second type of assessment should be initiated and supervised by the resolution authority).