

KNF – Polish Financial Supervision Authority

Comments on the FSB consultative document
“Cross-border recognition of resolution action”

One of the most important issues relating to the subject of recognition of foreign authorities' resolution actions is the degree of freedom the authorities have in making a decision on recognition. There is no doubt that having an opportunity to support resolution made by foreign resolution authority is a good thing. It allows for better cooperation between authorities which can lead to a better resolution results in terms of public interest. Yet assumption that local resolution authorities should in any case enforce or support foreign resolution actions is wrong. That is why several conditions should be met in order for the host RA to support home RA. FSB paper mentions three of them – one referring to financial stability, other one to public policy, third one to fiscal implications. BRRD that is mentioned on page 7 adds two additional conditions, where one is applicable only to actions towards branches. On the other hand the FSB's condition on public policy seems to consume the one requiring the effects to be compliant with local law. Any effect contrary to the local law would probably be non-compliant with public policy, as the latter has to be in line with the former. Having said that it needs to be pointed out that no legislation can provide full certainty. The best way of ensuring that the host authority supports the resolution action of the home authority is that the action is in the interest of the local entity (and other stakeholders). As the resolution is not a zero-sum game, the gains from cooperation in resolution can benefit both parent and subsidiary (branch), as well as stakeholders of these entities. A situation of minority shareholders who have very limited control over the company should also be taken into account. Summing up the thought - proper distribution of these additional gains can ensure voluntary and successful cooperation. Common interest is the best way to ensure the authorities act quickly and in a consistent manner.

Having said the above, it needs to be noted that the European Framework does differ in treatment of third-country proceedings and other Member States proceedings. As stated in the Box 1, only measures agreed in resolution colleges are automatically recognized and enforced, which still requires the consent of all authorities concerned. It shows clearly, that even in situation of deep economic integration the recognition cannot be automatic therefore the voluntary character of cooperation is crucial. Otherwise there is always risk of authorities referring to one of the exceptions.

For the foreign resolution actions to be enforceable locally, these actions should have a base in domestic law. It is difficult to imagine a recognition of an action that has not been foreseen in domestic legislation. And some inconsistencies between resolution regimes will probably remain even after the KA will have been implemented.

The same argument as mentioned in the previous paragraph to some extent refers to contractual provisions. If such contractual solutions have not been properly underpinned in the law there is an increased risk of either litigation or lack of enforceability in case of a conversion. Another problem is the timing. As these provisions would apply only to new issuances, the usability in the short term would be limited. Apart from that, contractual may prove to be an useful tool, even as a way to support statutory approach. It seems to be the second best option, if the statutory approach is not available.