Eurex Clearing AG
Comments
to the

FSB Consultative Document

"Application of the Key Attributes of Effective Resolution Regimes to Non-Bank Financial Institutions"

October 2013

A. Introduction

Eurex Clearing AG is a globally leading central counterparty clearinghouse (CCP) and the largest clearinghouse in Europe. Eurex Clearing AG is a subsidiary of Deutsche Börse Group providing central clearing services for cash and derivatives markets both for listed as well as certain over-the-counter (OTC) financial instruments. Eurex Clearing AG actively contributes to market safety and integrity with state-of-the-art market infrastructure both in trading and clearing services as well as with industry leading risk management services for the derivatives industry. Customers benefit from a high-quality, cost-efficient and comprehensive trading and clearing value chain.

Eurex Clearing AG is a company incorporated in Germany and licensed as a credit institution under supervision of the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) pursuant to the Banking Act (Gesetz für das Kreditwesen). Furthermore, Eurex Clearing AG is a Recognised Overseas Clearing House (ROCH) in the United Kingdom and supervised by the Bank of England (BoE). On 01 August 2013 Eurex Clearing AG has submitted an application for re-authorization as central counterparty under the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR) to its national competent authority BaFin.

Eurex Clearing AG welcomes the opportunity to comment on the consultative document on "Application of the Key Attributes of Effective Resolution Regimes to Non-Bank Financial Institutions" published by the Financial Stability Board (FSB) in August 2013.

The next part, section B, of this document contains detailed comments of Eurex Clearing on specific questions.

B: Detailed comments

Part I of the Draft Guidance: Resolution of Financial Market Infrastructure

1. Does the draft guidance adequately cover the principal considerations that are relevant to the resolution of each class of FMI (CCPs, CSDs, SSS, PS and TRs)? Would it be helpful if the guidance distinguished more between different classes of FMI? If so, please explain.

In Eurex Clearing's view, covers and distinguishes the Draft Guidance adequately the primary considerations for various FMIs.

2. Should any further distinction be made in the draft guidance, for the purposes of applying the Key Attributes, between types of FMI that assume credit risk through exposures to participants and those that do not? If so, for which provisions is that distinction relevant?

The Draft Guidance appropriately distinguishes between FMIs.

3. Are the additional statutory objectives for the resolution of FMI (paragraph 1.1) appropriate? What additional objectives (if any) should the draft guidance include, relating either to FMIs generally or specific classes of FMI?

Paragraph 1.1 covers the essential objectives of FMI resolution, *assuming* that it is worthwhile to salvage the FMI's critical functions. This will naturally depend on the definition of critical function, and it should be noted that in certain cases, as implied later in the document, termination or service closure is the least disruptive approach.

5. Should resolution authorities have a power to write down initial margin of direct or (where appropriate) indirect participants of an FMI in resolution (paragraph 4.8)? If so, should the power be restricted to initial margin that is not 'bankruptcy remote' and may be used to cover the obligations of participants other than the participant that posted it? What are the implications of such a power for FMIs and participants? Are any further conditions appropriate in addition to those specified in paragraph 4.9?

In general, resolution authorities should reserve as much power as possible to appropriately tackle a crisis. Writing down initial margin is a direct way to obtain further funds, but must be combined with a modification or closure of the positions this initial margin was covering, so as not to create new uncovered exposure. Furthermore the power should be restricted to initial margin that is not bankruptcy remote.

6. Should the Annex explicitly restrict resolution authorities from interfering with the netting rights of FMI participants (for example, by splitting a netting set through partial transfer of positions in a CCP or partial 'tear up' of contracts)? What is the possible impact on participants' risk management, accounting reporting or regulatory capital requirements if netting rights can be interfered with in resolution, and how might any such impact be mitigated?

There should be no explicit restrictions. The assumption must be that any recovery and resolution actions taken on contracts is designed to secure or appropriately wind down a FMI, and that such action is taken if and when the result of doing so is worse than not.

8. Are the conditions for entry into resolution of FMI (paragraph 4.3) suitable for all classes of FMI? What additional conditions (if any) would be relevant for specific classes of FMI?

There should be flexibility in conducting actions which form part of a spectrum from every day risk management, emergency handling (such as default management), to recovery and resolution. As such, we agree with paragraph 4.3, but note that FMIs should explain what the course of action and form of resolution is in the event that a Resolution Authority does not step in to manage the event.

9. Does the draft guidance (and paragraphs 4.4, 4.8 and 4.9 in particular) deal appropriately with the interaction between the contractual loss-allocation arrangements under the rules of certain classes of FMI and the exercise of statutory resolution powers?

Ideally, the draft guidance would include a broad menu of possible mechanisms available to FMIs and Resolution Authorities to ensure appropriate and effective measures in a wide range of circumstances. To this end, the list of such mechanisms in the CPSS/IOSCO consultation forms an appropriate list.

11. Are there any other FMI-specific considerations regarding the application of any of the resolution powers set out KA 3.2 that should be covered in this guidance?

Eurex Clearing suggests that the wording of 4.8 (vi) be changed to "terminate, tear-up, close out contracts, or settle in cash", so as to allow the Resolution Authority breadth of tools in various circumstances.

13. Are loss-allocation arrangements under FMI rules reflected appropriately in the application of the "no creditor worse off" safeguard in FMI resolution (paragraph 6.1)?

Generally yes, however, the creditors are not the only beneficiaries of FMIs, unless that is understood to mean all those that use its services, including linked FMIs. The coordination of collecting the right amount from them, however, is difficult.

16. Are the proposed classes of information that FMIs should be capable of producing (paragraph 12.1) feasible? Are any of the proposed classes of information unnecessary, duplicative or redundant? What additional classes of information (if any) should FMIs be capable of producing for the purposes of planning, preparing for or carrying out resolution?

For 12.1 (iii), propose to change wording to "…including gross or net exposures or risk and margin requirements where appropriate…". For (vii) it should be considered that FMIs do not usually have the netting agreements of their direct and indirect members. Furthermore, we want to highlight that especially central counterparties in general do not have information about indirect participants.

Part II of the Draft Guidance: Resolution of Systemically Important FMI participants

18. Does the draft guidance achieve an appropriate balance between the orderly resolution of FMI participants and the FMI's ability to manage its risks effectively?

In general, cooperation with the resolution authorities of a failing FMI participant is the preferred course of action, as this allows for a considered wind down or transfer with limited, if any, disruption to the FMI and its services. To ensure that this is a possible course of action, it is crucial for FMIs to have clarity, both legal and operational, for the

intentions of the resolution authorities. Unless the failing participant, under the auspices of its resolution authorities continues to fulfill its obligations, FMIs will be under considerable pressure to enact their default management procedures, which have as primary objective securing the FMI, its non-defaulting members, and the wider markets, which may not be the ideal approach from the resolution authorities' perspective.

19. What actions of the FMI in relation to failing participants could hamper its orderly resolution? How could the impact of such actions on orderly resolution be mitigated or managed?

Any conflicting information or actions, especially in the event of a complex cross-jurisdiction default, from resolution authorities, and the FMI's own regulators could hamper the orderly resolution of the FMI. In particular, any enforced stays of action (or similar restrictions) to begin its own default management process must be coupled with appropriate assumption of the failing participants responsibilities to prevent a knock-on effect at the FMI.

21. Are there any other issues in relation to the handling of the failure of FMI participants that it would be helpful for the FSB to clarify in this guidance? If yes, please elaborate.

It is important to clarify what, if any, the role of traditional administrators, receivers, or similar are with respect to an FMI undergoing a recovery and resolution plan, and thereafter.

C. Closing

We hope that you find these comments useful. If you have any questions please do not hesitate to contact:

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