European Banking Federation

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Mr Mark Carney
Chairman of the FSB
Bank for International Settlements
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Email: fsb@bis.org

Brussels, 23 October 2013

Subject: ***FSB Consultative Document on the Application of the Key Attributes of Effective Resolution Regimes to Non-Bank Financial Institutions***

Dear Mr Carney,

The European Banking Federation (EBF) welcomes the opportunity to comment on the above mentioned Consultative Document. The EBF fully supports the initiative of providing guidance for the resolution of non-bank financial institutions, in particular financial market infrastructures (FMIs). Various regulations in most parts of the world and in Europe in particular are reinforcing the role and use of infrastructures in financial markets as a means to reduce systemic risk globally. It is hence essential that these infrastructures are adequately regulated to limit their likelihood of default but also that resolution regimes are properly defined to ensure the continuity of critical services in all relevant circumstances, including in case of default.

Representing European banks in their capacity as users of financial market infrastructures, the EBF would like to make the following comments on Appendix I (resolution of FMIs) and appendix III (client asset protection in resolution) of the Consultative Document. The Federation has, for the time being, no specific comment on the resolution of systemically important FMI participants and will make no comment on Appendix II (resolution of insurers).

General comments

As highlighted in its response to the CPSS-IOSCO Consultative Report on *Recovery and resolution of financial market infrastructures* of July 2012, the EBF remains of the opinion that the priority for the resolution authority is to ensure continuity of the crucial infrastructure services considered as systemically important. In this respect, any consequences in terms of corporate structure of the FMI could be disregarded.

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In general, the expected international guidance should provide for transparency requirements in order to ensure appropriate information to all stakeholders in relation to the FMI. Although the EBF acknowledges that a resolution plan may be specific and that any decision from authorities will have to be tailored to the actual situation of the concerned FMI, some degree of transparency is necessary for participants to assess their risks in using and participating in FMIs.

The EBF appreciates the conveyance of the FSB Key Attributes onto the resolution of FMIs. However, the Consultative Document does still not recognise the key differences within the FMI category itself. At least, central counterparties would need their own tailored recommendations which would follow the ones being proposed by the Consultative Document. For other FMIs, the consequences of a default may not be as severe from a capital perspective and thus the resolution tools could be more specifically tailored.

Resolution of financial market infrastructure (Appendix I)

The EBF fully supports the statutory objectives of effective resolution, namely pursuing financial stability and allowing for the continuity of critical functions without losses for taxpayers.

The EBF calls for the recognition of principles regarding close-out netting even in resolution. Close-out netting is a widely used mechanism in financial markets that contributes to effective crisis management and the stability of the markets.

As stated in its response to the CPSS-IOSCO Consultative Report on Recovery of FMIs of August 2013, the EBF proposes that loss allocation to clients and indirect clients is only considered as a resolution tool (if even there, but certainly not as a recovery tool). Only the resolution authority should have the power to enforce the implementation of such transfers.

The EBF in principle supports the basic principles listed in the Consultative Document according to which reducing or writing down variation and initial margins should only be allowed in circumstances where the FMI services are extremely critical.

The EBF stresses that loss allocation rules should never be determined by the FMI on its own but they should be drafted together with, at least, all respective authorities and with all clearing members. These rules should be fully transparent to all clients and indirect clients of the FMI.

As for the funding of resolution, the EBF believes that losses incurred by the government should be recovered from shareholders, operators and owners. As a measure of last resort only, these losses can be recovered from direct FMI participants. Any obligation to recover losses by the financial system more widely is likely to threaten the financial stability and cause uncertainty in the markets.

The EBF is also of the opinion that most, if not all, of the information listed under "Access to information and information sharing" should be published to relevant authorities, participants, clients and indirect clients. Some of the information could also be made public.

Finally, the EBF points out that while a satisfactory regime for the resolution of systemically important FMI participants will require SIFIs to have continued access to FMIs (i.e. exchanges,

payment, clearing and settlement systems), the rules of many of these systems do not currently provide for continuity of access in the event of resolution. An appropriate balance needs to be found.

Client asset protection in resolution (Appendix III)

The EBF agrees that client asset protection is an important feature of any recovery and resolution plans.

The EBF notices with satisfaction that the existence of different client regimes has been taken into account. Indeed, the term 'client' has several meanings also within Europe. For some jurisdictions, client assets can be understood as those belonging to the end investor (i.e. private person or corporate) whereas in a majority of markets, 'client' refers to the next institution in the chain of holdings. This question (lowest denominator of the term 'client') needs to be clear for resolution purposes but due to local market specificities, the Federation would recommend to leave this question to local authorities to decide.

The EBF is also of the opinion that client assets should be insolvency remote as long as the client has not himself decided to limit his rights over the assets. When a client enters into a "security financial collateral" arrangement in relation to the assets, they are limited by the intermediary's right of retention; when a "title transfer" takes place in favour of a third party, the intermediary no longer has an obligation of restitution of these assets. European banks also feel that market participants would benefit from further delineating the provisions which solely relate to prime brokerage from those which relate to agency securities lending.

Regarding asset segregation, the guidance should make clear that actual segregation is not the only method of achieving the goal of protecting against the loss of client assets in the event of the insolvency of the firm.

Finally, regarding the allocation of losses, the FSB should recognise that the level of information will vary depending on type of firm activity and may be limited to specifying which legal framework or insolvency the regime would apply.

In conclusion, let me once again underline our readiness to provide constructive feedback on the future development of this important topic for the banks in their capacity as users of and participants in FMIs. If you require any further information on the points raised in this letter, please do not hesitate to contact my colleague Christophe Bonte (c.bonte@ebf-fbe.eu).

Yours sincerely,

Guido Ravoet