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Public ConsultationEffective Resolution of Systemically Important Financial Institutions
19 July 2011

The Bank and Insurance Department of the Federal Economic Chamber representing all Austrian Banks would like to comment on the Consultation Paper as follows:

Questions for public consultation

1. Comment is invited on whether Annex 1: Key Attributes of Effective Resolution Regimes appropriately covers the attributes that all jurisdictions' resolution regimes and the tools available under those regimes should have.

Generally, it should be noted that the **distinction between resolution, liquidation** and **insolvency** is not fully clear. The discussion paper focuses on the improved resolution via a so called designated administrative authority, while it remains unclear whether the financial institution is going to be liquidated in the end, or only the banking activities are terminated and the legal entity is going to further exist with doing non-banking business. In any event, in many jurisdictions the resolution of a company is followed by the liquidation of the company. Referring to resolution powers, the competences listed in Annex I, Point 4. typically are vested at the administrator in the course of insolvency proceedings (requiring insolvency of the financial institution).

Ad Point 6.2. There is only a limited need that the administrative authority should make provisions to recover any losses incurred from unsecured creditors, given they can receive compensation via the deposit guarantee schemes.

Ad Point 7.3. It is unclear how court proceedings will not affect the effective implementation of resolution actions. In many jurisdictions the administrator is entitled to initiate and continue pending lawsuits with the consequence that the resolution actions will almost certainly be hindered.

2. Is the overarching framework provided by Annex 1: Key Attributes of Effective Resolution specific enough, yet flexible enough to cover the differing circumstances of different types of jurisdictions and financial institutions?

The aim to achieve **convergence in the resolution** regimes of different jurisdictions, will be difficult. Insofar the framework is not flexible enough. Further, there are major differences in national resolution, insolvency and liquidations regimes. A harmonisation of these measures cannot adequately reflect the national legal and factual specifics. In this context it should be noted that where a financial institution operates cross-border the issue of the applicable law is important.

With regard to **institution-specific cross-border cooperation agreements** it should be noted that under the EU Winding up and Reorganisation directive 2001/24/EC the home authority of the financial institution is solely and including the branch in another member state in charge of the proceedings. The cooperation agreements should sufficiently take that principle into account.

With regard to the **recovery and resolution plan** according to Point 11.3 of the document it is unclear how such document can have an accurate information value. The data reflected in the plan can hence be only very general; otherwise it will immediately be dated.

With regard to Point 11.5 of the document it can be stated that in the Austrian jurisdiction there are rules implemented prohibiting the **unilateral termination of contracts** based on the initiation of insolvency proceedings (sec 25b Insolvency Act; see further below).

With regard to Point 12.1 of the document **confidentiality issues** should adequately be safeguarded. An unrestricted right to exchange information of all kind might be difficult to abide where there are sensitive materials at stake e.g. in context of M&As. Accordingly the sharing and spreading of information should be restricted and documented.

3. Are the elements identified in Annex 2: Bail-in within Resolution: Elements for inclusion in the Key Attributes sufficiently specific to ensure that a bail-in regime is comprehensive, transparent and effective, while sufficiently general to be adaptable to the specific needs and legal frameworks of different jurisdictions?

First of all the overall package of all current and outstanding prudential measures (e.g. Basel III/CRD IV) should be more considered and not seen isolated. If a Global-SIB is recognized (according to the proposed methodology of BCBS) additional capital requirements will arise (from 1% up to 2.5% of their RWA plus a further 1% addition for the empty bucket). These capital requirements are in the opinion of the BCBS to be met with Common Equity Tier 1-instruments. Moreover a recognized G-SIB will fall into the proposed Resolution Regime and is expected to meet additional capital requirements with certain debt instruments (write-down/conversion into equity) – in this respect a temporary write-down should be considered as best alternative. In a comprehensive view G-SIBs are confronted with a set of new capital requirements resp. quotas (Common Equity Tier 1, Additional Capital, Capital Conservation and Countercyclical Capital Buffer, SIFI-Surcharge and Resolution Bail-In debt). In our opinion it seems that certain mismatches between SIFI-Surcharge (to held with Common Equity) and Resolution Bail-In debt as well as Additional Tier 1-capital and Resolution Bail-In debt will e
merge which could hamper the effectiveness of the proposals.

Referring to the proposed write down resp. conversion mechanisms certain problems can occur for cooperations because of their specific nature. Due to these specificities, Common Equity Instruments of cooperative banks dispose many features that make them inappropriate for debt conversion.

4. Is it desirable that the scope of liabilities covered by statutory bail-in powers is as broad as possible, and that this scope is largely similarly defined across countries?

We tend to a level playing field.

5. What classes of debt or liabilities should be within the scope of statutory bail-in powers?

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6. What classes of debt or liabilities should be outside the scope of statutory bail-in powers?
1. Debt or liabilities that were incurred in order to prevent the default of the financial institution should remain outside the scope of the statutory bail-in powers. Otherwise, it will be difficult to find financing creditors in times of stress and prior to the resolution of the institute.

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7. Will it be necessary that authorities monitor whether firms' balance sheet contain at all times a sufficient amount of liabilities covered by bail-in powers and that, if that is not the case, they consider requiring minimum level of bail-in debt ? If so, how should the minimum amount be calibrated and what form should such a requirement take, e.g.,: (i) a certain percentage of risk-weighted assets in bail-inable liabilities, or (ii) a limit on the degree of asset encumbrance (e.g., through use as collateral)?

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8. What consequences for banks' funding and credit supply to the economy would you expect from the introduction of any such required minimum amount of bail-inable liabilities?

Almost certainly would creditors require an **adequate compensation** for the risk that their share in debt capital will be converted into equity. That will raise refinancing costs.

We are afraid that a Bail-in mechanism is not capable to supply the financial institute with liquidity. This measure will only cover crises that are not caused by a liquidity shortage.

One of the most important issue will be the exchange ratio applied to the conversion of creditors' claims into equity shares. It is unclear how this should be determined.

9. How should a statutory duty to cooperate with home and host authorities be framed? What criteria should be relevant to the duty to cooperate?

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10. Does Annex 3: Institution-specific Cross-border Cooperation Agreements cover all the critical elements of institution-specific cross-border agreements and, if implemented, will the proposed agreements be sufficiently reliable to ensure effective cross-border cooperation? How can their effectiveness be enhanced?

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11. Who (i.e., which authorities) will need to be parties to these agreements for them to be most effective?

In the proposed concept it should be the home authority.
Cross-jurisdictional authorities (such as EBA in the EU) could develop a framework for national supervisory authorities. On the basis of such framework, national authorities may then draw up bilateral agreements that over time could tend to converge.

*12. Does Annex 4***: Resolvability Assessments** *appropriately cover the determinants of a firm's resolvability? Are there any additional factors to be considered in determining the resolvability of a firm?*

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13. Does Annex 4 identify the appropriate process to be followed by home and host authorities?

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14. Does Annex 5: Recovery and Resolution Plans cover all critical elements of a recovery and resolution plan? What additional elements should be included? Are there elements that should not be included?

Ad Point 1.17, Annex 5 requiring authorities to assess the willingness of the bank's management to implement corrective measures, and where necessary, enforce the implementation of recovery measures. The enforcement means – if necessary at all – should be adequate and have **no punitive character, eg the payment of fees**.

The scope of the obligation to set up a recovery and resolution plan should be clarified that it has to be drawn up exclusivly by the parent credit institution on consolidated level.

15. Does Annex 5 appropriately cover the conditions under which RRPs should be prepared at subsidiary level?

We are of the opinion that the recovery and resolution plan should be exclusivly be drawn up by the parent credit institution on consolidated level. Subsidiaries should adequatly be taken into in this plan of the parent credit institution. We do not see the necessity for subsidiaries to prepare their own RRPs."

16. Are there other major potential business obstacles to effective resolution that need to be addressed that are not covered in Annex 6?

Where the authorisation of the bank should be withdrawn by the authority or put back by the institute in the course of the resolution all banking business should be terminated beforehand. If

for the sound withdrawal/restitution of the authorisation the effective resolution would be required, the credit institution would need to meet all supervisory measures addressed to actually operating banks, although the resolving bank does not as such do any banking business. The resolving institution would have to meet amongst other obligations the provisions dealing with the appropriate amount and quality of capital (common equity ratio). This will certainly complicate the resolution of the financial institution.

17. Are the proposed steps to address the obstacles to effective resolution appropriate? What other alternative actions could be taken?

The identification of such transaction appears to be redundant given the strict accounting rules requiring the identification of material related party transaction deviating from customary practices.

Regarding the possibility to transfer clients and business lines to a bridge institution for an orderly resolution it should be noticed that the transfer of receivables might necessitate the approval of the debtor in case the banking confidentiality is touched. Granting this approval can be expensive for the resolving bank.

18. What are the alternatives to existing guarantee / internal risk-transfer structures?

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19. How should the proposals set out in Annex 6 in these areas best be incorporated within the overall policy framework? What would be required to put those in place?

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20. Comment is invited on the proposed milestones for G-SIFIs.

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21. Does the existence of differences in statutory creditor rankings impede effective crossborder resolutions? If so, which differences, in particular, impede effective crossborder resolutions?

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22. Is a greater convergence of the statutory ranking of creditors across jurisdictions desirable and feasible? Should convergence be in the direction of depositor preference or should it be in the direction of an elimination of preferences? Is a harmonised definition of deposits and insured deposits desirable and feasible?

The usual back side of harmonisation is the lack of taking sufficiently into account the distinctive national legal specifics and real economy.

Greater convergence will require political willingness of various nations to partially revise their legal frameworks.

23. Is there a risk of arbitrage in giving a preference to all depositors or should a possible preference be restricted to certain categories of depositors, e.g., retail deposits? What should

be the treatment of (a) deposits from large corporates; (b) deposits from other financial firms, including banks, assets managers and hedge banks, insurers and pension funds; (c) the (subrogated) claims of the deposit guarantee schemes (especially in jurisdictions where these schemes are financed by the banking industry)?

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24. What are the costs and benefits that emerge from the depositor preference? Do the benefits outweigh the costs? Or are risks and costs greater?

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25. What other measures could be contemplated to mitigate the impediments to effective cross-border resolution if such impediments arise from differences in ranking across jurisdictions? How could the transparency and predictability of the treatment of creditor claims in a cross-border context be improved?

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26. Please give your views on the suggested stay on early termination rights. What could be the potential adverse outcomes on the failing firm and its counterparties of such a short stay? What measures could be implemented to mitigate these adverse outcomes? How is this affected by the length of the stay?

The parameters and length of such stay should be clearly pre-defined and be as short as possible to implement resolution measures.

27. What specific event would be an appropriate starting point for the period of suspension? Should the stay apply automatically upon entry into resolution? Or should resolution authorities have the discretionary right to impose a stay?

The initiation of insolvency or resolution proceedings.

28. What specific provisions in financial contracts should the suspension apply to? Are there any early terminations rights that the suspension should not apply to?

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29. What should be an appropriate period of time during which the authorities could delay the immediate operation of contractual early termination rights?

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30. What should be the scope of the temporary stay? Should it apply to all counterparties or should certain counterparties, e.g., Central Counterparties (CCPs) and FMIs, be exempted?

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31. Do you agree with the proposed conditions for a stay on early termination rights? What additional safeguards or assurances would be necessary, if any?

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32. With respect to the cross-border issues for the stay and transfer, what are the most appropriate mechanisms for ensuring cross-border effectiveness?

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33. In relation to the contractual approach to cross-border issues, are there additional or alternative considerations other than those described above that should be covered by the contractual provision in order to ensure its effectiveness?

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34. Where there is no physical presence of a financial institution in question in a jurisdiction but there are contracts that are subject to the law of that jurisdiction as the governing law, what kind of mechanism could be considered to give effect to the stay?

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Kindly give our remarks due consideration.

Yours sincerely,

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Austrian Federal Economic Chamber