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**Response by the Danish Financial Supervisory Authority (Finanstilsynet) and Danmarks Nationalbank on the Consultation on a possible recovery and resolution framework for financial institutions other than banks**

Finanstilsynet and Danmarks Nationalbank welcome the opportunity to comment on the consultation. Please find our overall response to the questions set out in the European Commission's consultative working document. We kindly ask the Commission services to take our view into consideration in the preparation of a formal proposal. We support the Commission's ambitious timeframe mentioning the possibility of adopting a proposal already in 2013 as initiatives in this area are already advanced at both international and national level within the European Union.

**Financial market infrastructures - detailed comments**

**Possible recovery and resolution tools (Part 3.2)**

**General (question 1-6)**

Finanstilsynet and Danmarks Nationalbank welcome the European Commission’s work in this area. Financial market infrastructures such as CCPs and CSDs facilitating clearing and settlement of financial transactions play an important role for the stability of the financial system. Failure of such infrastructures could severely disrupt the functioning of the financial market. Given the centralisation of many of these crucial functions and the interconnectedness with other financial institutions, it is key to secure that FMIs can continue their critical operations and services through periods of stressed market conditions without commitment of public funds.

Many FMIs operate cross border or are part of a globally operating group. A European recovery and resolution framework should reflect this by thorough harmonized rules at EU level and by paying due consideration to the developments of similar work streams at international level by the Financial Stability Board and Committee on Payment and Settlement Systems and the International Organization of Securities Commissions to ensure consistency at a global level. Thus, Finanstilsynet and Danmarks Nationalbank find it important that these international recommendations on recovery and resolution are implemented in the European Union with its internal financial market in a harmonized way through EU-legislation.

While the implementation of a resolution regime may necessitate small amendments to the Settlement Finality Directive and the Financial Collateral Arrangements Directive, Finanstilsynet and Danmarks Nationalbank find that such amendments should be carefully drafted not to impact on the objectives these directives were set out to fulfill.

FMIs provide a range of different services thereby generating different types and levels of risk. CCPs and CSDs that extend credit are especially vulnerable to risks arising from the default of their participants while other FMIs’ vulnerability to credit risks are limited. Such differences in risks taken on by the FMIs should in our view call for a distinction between FMIs assuming credit risks and other FMIs.

Both EMIR and the coming CSD regulation provide organizational and prudential rules for CCPs and CSDs. A resolution regime should build on such existing supervisory legislation with the primary focus of preventing failure of an FMI.

**Objectives (question 7-10)**

We agree that the general objective for the resolution of CCPs and CSDs should be continuity of critical services. From a more operational point of view, it is important to prepare for a possible failure and create legal certainty and predictability about the triggering of resolution.

**Recovery and resolution plans (question 11-12)**

In general, we support the use of forward looking recovery and resolution plans. The drafting of such plans should take into consideration the particular role of the FMI and the risks assumed by the FMI. It is important that such plans are balanced within the scope of the resolution regime and involve the relevant supervisory authorities/college as well as the resolution authority. Recovery plans prepared by the FMI itself should be subject to the resolution authority’s approval and it should be clear that such plans are not exhaustive and do not release management of its responsibilities. The appropriateness of both recovery and resolution plans should be reviewed on an on-going basis.

**Resolution triggers (question 13-15)**

Finanstilsynet and Danmarks Nationalbank would support a set of harmonized conditions for triggering the resolution regime at EU level to secure legal certainty and avoid regulatory arbitrage. In general, such conditions could be formulated so that they would trigger the use of the resolution regime where an FMI is no longer viable or likely to be viable and there are no other actions left that will enable it to continue its critical operations.

**Resolution powers (question 16-19)**

For a common resolution regime to function, it is important to define a common set of resolution powers. In general, we support the powers suggested in the consultation document. However, in relation to the possibility of imposing a moratorium on payment-flows, it is crucial that such a power should not be used on payments in a CCP, payment system or securities settlement system. We agree that such a moratorium is against the objective of continuity of critical functions. Only if a FMI takes credit risk, it could be considered further whether a moratorium on payment-flows should be a possible resolution power.

**Resolution tools (question 20-23)**

Finanstilsynet and Danmarks Nationalbank find that use of various resolution tools and criteria for using such tools should as far as possible be harmonized at EU level in order to facilitate legal certainty and smooth cooperation between authorities at the time where a resolution has been triggered. Reorganisation tools should take into account that there are few substitutes or alternative service providers to a particular FMI which may limit the number of transfer options other than transfer to a bridge institution or alternatively transfer into public administration pending a sale back into private hands. It is important that the use of loss allocation, selective tear-up arrangements and refinancing tools beyond contractual arrangements are harmonized at EU level and are not drawn upon prior to triggering of the resolution regime. Moreover, it is important that the use of such tools are limited in order to avoid systemic risk, i.e. that bankruptcy in one institution spread to other financial institutions. Such limitation will also enable institutions participating in FMIs forecasting the risk connected with their participation. The application of such tools could reflect the difference between FMIs. For instance haircutting is only relevant where the FMI has collected margin prior to the resolution.

**Group resolution (question 24)**

Regarding failure in a group of FMIs, the resolution regime should only be applicable to the CCPs within the group which are impacted by the default.

**Cross border resolution (question 25-29)**

We are open to the possibility of special resolution colleges even though we question the need for a resolution college in relation to all FMIs. More thought should be given to analyse whether resolution colleges should only be established in the case of a FMI (CCP or CSD) with credit risk. Furthermore, we think that potential rules about a resolution college should be built upon EMIR particularly regarding involvement of supervisory colleges.

**Safeguards (question 30)**

We agree that the hierarchy of claims in insolvency should be observed and that creditors, as a main principle, should not be worse off than in insolvency. In order to respect this hierarchy, the shareholders should be impacted before the CCP-members and other creditors.