EUROPEAN COMMISSION CONSULTATION

TECHNICAL DETAILS OF A POSSIBLE EUROPEAN CRISIS MANAGEMENT FRAMEWORK

Washington DC, March 3, 2011

Submission by:
International Monetary Fund
700, 19th Street NW
Washington D.C., 20431
U.S.A.

Contact:
Mr. Daniel C. Hardy
Division Chief
Monetary and Capital Markets Department
+1 (202) 623-8490
dhardy@imf.org

Please note that the views expressed in this submission are those of the IMF's staff and not necessarily those of the IMF's management or Executive Board. They do not in any way prejudge the outcome of any future Executive Board's discussion on this or related topic.

GENERAL COMMENTS

1. IMF staff welcomes the opportunity to contribute to this consultation.[1] We appreciate the Commission's efforts to better harmonize EU Member States' legal and institutional arrangements for banking crisis management.

2. We believe that it is urgent to move rapidly towards establishing an integrated EU framework for crisis prevention, crisis management, and depositor protection through binding and institutionalized arrangements. The main building blocks of this framework include:

(i) a robust and flexible early-intervention framework that provides the supervisory and resolution authorities with the tools and mandate to intervene and resolve ailing institutions at an early stage;

[1] These comments have been prepared by staff members of the European, Legal, Monetary and Capital Markets, and Strategy, Policy, and Review Departments.

(ii) clear rules to allocate losses to private stakeholders and to share the burden of potential public support among Member States;

(iii) mechanisms for rapid financing of resolution efforts, including but not limited to deposit guarantee scheme pre-funded by the industry;

(iv) cost effectiveness when choosing among resolution tools, according to least-cost criteria specified in paragraph 18; and

(v) the creation of an European Resolution Authority, which would be designed specifically to deal cost effectively with the resolution of (systemic) cross-border EU credit institutions and could be under the aegis of the European Banking Authority (EBA).

Only an integrated EU framework would entirely resolve the unavoidable coordination problems that emerge in managing a cross-border banking crisis thereby fully and effectively underpinning the single financial market while contributing to maintaining financial stability.

3. Although some important components are present in the proposed crisis management framework and the provisions suggested in Section G8 enhance cross-border recognition of resolution measures, the system continues to be structured along national lines. The deepest coordination problems remain unsolved, since the framework does not specify the principles that would guide the burden sharing process among Member States. Furthermore, the framework needs to be carefully integrated with other important components of the EU regulatory framework—such as the EU directives regarding company law, deposit insurance and financial conglomerates—that are in the process of being revised.

4. Finally, the envisaged crisis management framework comprises elements that are still subject to an evolving international debate, such as the use of contingent capital and the application of debt write-downs ("bail-ins") ahead of intervention. It is therefore important to ensure appropriate coordination with other ongoing reforms at the international level and to avoid the risk of generating uncertainty on the forthcoming new legal framework that might affect financial markets developments.

Scope

5. Experience has shown that banks (and selected other financial intermediaries such as bank holding companies) need a dedicated resolution system. This need traces back to their general importance to the economy, and the socially unacceptable costs of contagion and financial instability, which may arise when banks are resolved as "gone" concerns under standard corporate bankruptcy processes. Thus, the proposed new resolution system should replace, not coexist with, national corporate bankruptcy codes—that is, it should automatically cover all banks (and selected other financial intermediaries, pursuant to selection procedures to be developed) with due consideration for prevailing provisions specifically applicable for banks given the above mentioned peculiarities of their nature.

Institutional framework

6. We see the proposal of setting up resolution colleges modeled on the existing supervisory colleges as an intermediate step to enhance cooperation and coordination within the EU. The need for strong coordination among the various authorities involved in recovery and resolution planning is particularly important if mandatory changes in business and legal structures of an institution can follow, and if resolution authorities need to form a view on the potential impact of their measures on the financial stability of several Member States. Hence, it is of crucial importance that colleges provide robust mechanisms for communication, exchange of information, risk assessment, and coordination under the leadership of the leading authority, with the EBA playing an active role in order to avoid inconsistencies and overlapping requirements, to mediate, and to solve disputes (see below).

7. While we recognize that, at this intermediate stage, institutional diversity in the Member States may be maintained, such diversity is likely to complicate coordination. It will therefore be essential that:

i. responsibilities for the intervention and possible winding down of ailing institutions are clearly allocated to help coordination and strengthen accountability;

ii. in case more than one agency is involved, appropriate coordination and lines of communication are set up, so that when a particular measure is adopted by one authority, the consequences of the measure for the resolution process are duly taken into account; and

iii. in case of a single agency, appropriate internal and external checks and balances arrangements are in place to reduce risks of potential regulatory forbearance and conflicts of interest. For instance, the establishment of dedicated units may be envisaged within the same authority, with the skills and competencies necessary to perform bank resolution. More generally, setting up clear and transparent policies and rules, and holding regulatory authorities accountable to them, would add certainty to the framework and reduce the risks of potential forbearance.

The role of the European Banking Authority

8. To foster cooperation and ensure the consistent application of Community rules, we support the proposed active role of the EBA in the outlined crisis management framework. This would include giving a role to the EBA in the development and coordination of recovery and resolution plans, and in early intervention. To ensure transparency and accountability, rules and procedure guiding the mediation process should be established.

9. In principle, we would also see merits in the proposal to assign to the EBA a role in mediating and resolving disagreement among national resolution authorities. It should be acknowledged, however, that there might be instances in which supervisory and resolution

authorities need to act swiftly with limited or no opportunities to reach an agreement with other supervisory and resolution authorities or to wait for EBA mediation. In this case, one option could be to have overriding procedures and mechanisms to ensure a swift and fair implementation of rules and regulation established ex ante.

10. However, it is likely that bank resolution/crisis management of cross-border firms, especially if of systemic nature, will have consequences for the fiscal responsibilities of Member States. Unless clear principles that would guide burden sharing among Member States are established, the dispute resolution role of the EBA in a major crisis is bounded to be limited.

11. Since many EU cross-border banks have important business outside the EU, the outlined mechanisms may not be suitable in cases where authorities of non-EU jurisdictions are involved. In this case, consideration should be given to alternative mechanisms to ensure effective coordination in resolving international financial groups, including possibly through the role of an EU-level authority.

Burden sharing

12. As indicated above, we believe that the envisaged framework should be strengthened in order to establish principles to determine the criteria and parameters that would guide the burden sharing process among different jurisdictions. While resolution losses should be borne by private stakeholders, public liquidity and capital support may, on occasion, be needed, if only on a temporary basis. In light of the potential need for temporary financial support, the resolution framework should outline the main guidelines which would help finding an agreement on how sharing the costs relating to the resolution of an international financial group, or more generally of a cross-border financial crisis. Generally, we feel that for such arrangements to have the necessary traction, they would need to ensure appropriate participation by national fiscal authorities, among others. An interesting approach is provided by the cooperation agreement on cross-border financial stability among Nordic and Baltic finance ministers, central banks, and financial supervisory authorities.[2]

[2] "Cooperation agreement on cross-border financial stability, crisis management and resolution between relevant Ministries, Central Banks and Financial Supervisory Authorities of Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway and Sweden," August 17, 2010 (http://www.riksbank.se/upload/Dokument_riksbank/Kat_AFS/2010/8a37263c.pdf).

Resolution fund

13. The key objective of the proposed crisis management framework is that the final cost of the resolution should be borne by private stakeholders. Even so, temporary public finding may still be necessary. The proposed establishment of national resolution funds, which would be prefunded by contributions from the industry, could help minimize the need for public funds to support bank resolution. [3]

14. However, since deposit guarantee schemes should be allowed to finance resolution measures (insofar as depositors benefit and costs are lower than under a deposit payout), the interaction and the distribution of costs between resolution, and deposit guarantee funds warrants further consideration. There is currently an international debate on how best to mesh the functions of these two funds.

15. While on practical grounds, Member States may wish to choose between merging the resolution fund and deposit insurance into a single fund or having separate arrangements depending on their respective market structure and institutional setting, there are advantages in adopting a common approach.

16. In any event, the arrangement should be properly designed and its main characteristics harmonized so as to preserve a level playing field among institutions in different Member States and facilitate cross-border cooperation. In particular, the design should specify:

i. the scope—the use of fund resources should be subject to strict ex ante conditions aimed at avoiding bailouts, and general guidelines governing the relationship between resolution and deposit insurance funds should be established;

ii. the perimeter of contributing institutions;

iii. the base of the contribution, which could include some off-balance sheet items in addition to the eligible liabilities indicated in the Consultation; and

iv. the rate of contribution, which might be adjusted for the systemic importance of an institution and vary over the economic cycle.

17. Moreover, funding arrangements should include the possibility of obtaining supplementary funding, including from the state, when fund resources fall short of resolution needs (with the outlays to be recovered from the industry through ex post levies).

---

[3] See, International Monetary Fund, "Resolution of Cross-Border Banks—A Proposed Framework for Enhanced Coordination," SM/10/146, June 11, 2010 (http://www.imf.org/external/np/pp/eng/2010/061110.pdf).

18. Finally, in our view, the arrangement should specify that :

i. the use of fund resources in the resolution process be explicitly guided by the objectives of minimizing moral hazard and total costs for the resolution fund and the deposit guarantee scheme (DGS). This criterion could be waived only in exceptional and well-defined circumstances (systemic crises) pursuant to a clear override process; and

ii. funds would not provide emergency liquidity support to ailing institutions, which would remain within the realm of the lender-of-last-resort functions usually attributed to central banks.

iii. Furthermore, should Member States opt for a single fund, clear mechanisms that would protect the interest of insured depositors and the DGS should be established.

Recovery and resolution plans and early intervention

19. In our view, the content, interaction, timing, approval process of recovery plans (Part 2, Section B) and resolution plans (Part 2, Section D) need to be better clarified.

i. Although the purposes are different (restore the viability vs. promote the orderly winding-down of institutions), synergies should be maximized as measures in the recovery plan, such as improving information provision, would also facilitate resolution planning.

ii. If two different authorities are responsible for the assessment and approval of those plans, appropriate mechanisms of coordination/cooperation should be envisaged in order to avoid undue burdens and duplications.

20. The interaction between recovery plan and early intervention powers should also be clarified. Among the early intervention powers (E1), supervisors can require credit institutions to draw up and implement a specific recovery plan. However, the preparation of recovery plan should be ensured (proportionally) by all credit institutions regardless to their conditions.

21. Since recovery plans will provide important reference for the early intervention measures (which will be harmonized at EU level) and supervisors will have the powers to ensure that no impediments hamper the implementation of such plans, in our view it is important that common criteria are used across countries for drawing up and assessing recover plans.

Special resolution tools

22. We have some reservations on the approach according to which, while special resolution tools would be triggered for ailing banks when the public interest of financial stability is at stake, ordinary insolvency proceedings should apply in all other cases.

23. We are of the view that special resolution tools (including through orderly liquidation) should apply for all troubled institutions, whether or not ex ante they are considered systemic, so as to ensure continuity of critical functions, minimize public financial support, and reduce legal uncertainty. This means, for instance, that purchase-and-assumptions operations and other restructuring mechanisms should be used also for banks that are deemed non-systemic institutions. These allow for prompt resolution, which mitigates depositor contagion and therefore reduces the risk of an idiosyncratic failure developing into a systemic shock.

Special management

24. While we consider the appointment of a special manager a useful corrective measure, we believe that the powers of the special manager should be strengthened. Granting to the special manager the powers and functions of the bank management might not be sufficient. If bank owners retain their full rights, recalcitrant shareholders would maintain a veto power over corrective measures that are not in their interest. A situation of conflict of powers or a stalemate would be detrimental for the administration and the financial soundness of a bank.

25. The special manager—or official administrator—should have therefore broad powers to restructure an ailing bank. The powers of the special manager should entail assessing the financial situation of the bank, establishing a new balance sheet recognizing losses, designing a restructuring strategy, and making use of the resolution tools. This figure should not owe fiduciary duties towards shareholders, nor would it be bound to take action in the pursuit of creditors' interest, but would rather act in the interest of overall financial stability under the instructions of the authorities. Such a broad but clear mandate would be consistent with the objectives of public involvement and reduce exposure to possible legal challenges.

Convertible capital instruments

26. While the use of these securities could be a useful addition to the crisis management toolkit, they are not intended to be a standalone tool. [4] As proposed, they should therefore be used within a comprehensive framework that includes strengthened supervision, an enhanced capital base, improved disclosure, and an effective resolution regime. Ensuring consistency, transparency, and standardization will be important to avoid complex structures and to support cross-border crisis management.

27. However, convertible capital instruments remain still untested, key challenges concerning their operational aspects cannot be downplayed, and hence careful scrutiny is

[4] For a more detailed analysis, see C. Pazarbasiouglu, J. Zhou, V. Le Leslé, and M. Moore, "Contingent Capital: Economic Rationale and design Features," IMF Staff Discussion Notes SDN/11/01, January 25, 2011 (http://www.imf.org/external/pubs/ft/sdn/2011/sdn1101.pdf)

warranted in order to avoid potentially adverse effects on market dynamics. Therefore, supervisors will need to be vigilant in monitoring (i) their design and issuance; (ii) the implied transfer of risks within the financial system; (iii) prudential requirements for shareholders and impact of conversion on corporate governance aspects; and (iv) the potential buildup of systemic risks, including liquidity risk.

Debt write-down as an additional resolution tool

28. We agree that a mechanism that would enable resolution authorities to write down the claims of some or all of the unsecured creditors and to convert debt into equity could offer a valuable additional resolution tool that would allow authorities to minimize bailout costs borne by taxpayers. The proposed legal framework for implementing this important resolution tool need to be carefully elaborated and coordinated at international level, including by taking into account work done by the Basel Committee on Banking Supervision and the Financial Stability Board, in order to preserve level playing field and avoid unintended consequences on the functioning of bank debt markets. Also, the phasing in of such mechanisms needs to be carefully planned.

29. We believe that the various approaches to "bailing-in" creditors are not mutually exclusive and may provide complementary benefits, with contingent capital and equity as the first line of defense.

30. We believe that a high degree of certainty should accompany the use of this restructuring power. A number of thorny aspects associated with the potential use of debt-write down instrument need to be carefully evaluated; for example, (i) the order of priority valid under insolvency proceeding, which in turn need to be harmonized across jurisdictions to avoid distortions; or (ii) its interaction with other resolution tools as well as other debt instruments, including contingent capital.

31. The option to give to some creditors a "super-senior status" in a context analogous to a debtor-in-possession financing seems worth exploring. It would be important to define the categories of claims eligible for such status, such as those relating to operational expenses. Also, claw-back rules would need to be addressed.

RESPONSES TO THE CONSULTATION

Part 1: Scope and Authorities

Question Box 1: Credit institutions and certain investment firms (P1.1a)

1a. What category of investment firms (if any) should be subject to the preparatory and preventative measures tools and the resolution tools and power?

1b. Do you agree that the categories described below are appropriate? If not, how should the class of investment firm covered by the proposed recovery and resolution framework be defined?

1c. Are the resolution tools and powers developed for deposit-taking credit institutions appropriate for investment firms?

We agree that investment firms that are part of a banking group should fall under the scope of the proposed framework. While this option would enable a group-wide approach to recovery and resolution, which would reduce the risks of regulatory arbitrage within groups, it should not imply substantive consolidation of all assets and liabilities into a single entity, as each institution would continue to be resolved according to the rules applicable to it.

A definition of banking group would need to be spelled out, defining the parameters which can identify such groups and entitling the authorities to impose related requirements.

The proposed framework could also be extended to (systemically important) financial institutions that are not part of a banking group. Should the proposed regime be extended to non-banks, care should be taken to ensure appropriate references to such entities throughout the various requirements of the new regime. Appropriate coordination must also be ensured with other ongoing reforms at the EU level, such as on financial conglomerates.

Nonetheless, careful consideration should be given to the resolution and insolvency rules applying to non-banking financial institutions, and to what extent special resolution tools are applicable. For instance, while for banks there is a need to ensure the continuity of critical functions—by, for instance, facilitating a transfer of transaction service business to other banks—the focus for other financial institutions could be on having an effective regime for orderly liquidation, including on certain elements such as segregation rules and treatment of clients' assets.[5] At the same time, a specific EU regime for the insolvency of certain categories of institutions (e.g., broker-dealers) would be most beneficial to bring certainty to third parties' expectations.

[5] For this reason, the rationale for an administration regime could be different for banks—where we believe that administrator should facilitate restructuring on an ongoing basis—and other financial institutions, where attention should be paid to aspects of orderly liquidation.

We also believe that there needs to be a clearer understanding of the differences between the various types of non-banking financial institutions, which may raise separate considerations in terms of their resolution process.

Lastly, it seems worthwhile considering the extension of the proposed regime to unregulated group entities, which may often perform functions that are critical for the continuity of the business (service contracts, IT, etc.).

Question Box 2: Extended scope of resolution tools and powers to bank holding companies (P1.1b)

2a. Do you agree that bank holding companies (that are not themselves credit institutions or investment firms) should be within the scope of the resolution regime?

2b. Should resolution authorities be able to include bank holding companies in a resolution even if the holding company does not itself meet the conditions for resolution: i.e. is not failing or likely to fail (see conditions for resolution)?

2c. Are further conditions or safeguards needed for the application of resolution tools to bank holding companies?

We concur with the view of including bank holding companies under the proposed framework in order to facilitate comprehensive and coordinated mechanisms for bank resolution. Conditions similar to those imposed on banks' creditors/shareholders should be imposed on bank holding companies' creditors/shareholders.

We would also favorably consider a regime that would impose stronger obligations on the parent undertaking, including the assurance of capital support under a capital restoration plan. Such a wider concept would help avoid circumvention of regulations.

Question Box 3: Authorities responsible for the resolution (P1.2 and P1.3)

3a. Do you agree that the choice of the authority or authorities responsible for resolution in each Member State should be left to national discretion? Is this sufficient to ensure adequate coordination in case of cross border crisis?

3b. Is the functional separation between supervisory and resolution functions within the same authority sufficient to address any risks of regulatory forbearance?

3c. Is it desirable (for example, to increase the checks and balances in the system) to require that the various decisions and functions involved in resolution – the determination that the trigger conditions for resolution are met; decisions on what resolution tools should be applied; and the functional application of the resolution tools and conduct of the resolution process – are allocated to separate authorities?

3d. Even if resolution authorities are a matter of national choice, should an EU framework specify that they should act in accordance with principles and rules such as those set in this

document to take account of the fact any bank crisis management action in one Member State is likely to have an impact in other Member States?

Please, see general comments on "Institutional framework" above.

Part 2: Supervision, Prevention and Preparation

A. Supervision

Question Box 4: Stress testing (A2)

4a. Should the stress tests be conducted by supervisors, or is it sufficient for institutions to carry out their own stress tests in accordance with assumptions and methodologies provided by or agreed with supervisors, provided that the results are validated by supervisors?

4b. The current crisis has shown that stress test disclosure is necessary to reassure markets and to bring to light potential problems before they become too large to be managed. It cannot, however, be excluded that in some circumstances disclosure without consideration of the possible impact in the market could do more harm than good. Do you agree that under exceptional circumstances the results of the stress tests should be made public only after appropriate safeguards have been agreed and introduced?

4c. Do you agree that in an integrated European market, stress testing should be conducted on the basis of a common methodology agreed at the EU level and subject to cross verification?

We are of the view that stress testing should be carried out by supervisors in order to avoid differences in interpretation and application of stress test scenarios and methodology. The use of deliberately severe stress tests should not be a one-off exercise but viewed as a regular supervisory tool to assess bank-level and sector-wide resilience to shocks. Nevertheless, individual institutions should continue to be required to perform their own stress test analyses as an integral part of their capital planning and risk management process.

While detailed disclosure of methodology, main macroeconomic assumptions and key parameters is crucial for the credibility of disclosed stress tests, we concur with the proposal that adequate safeguards should accompany the publication of the results to avoid the risk of a gridlock in the financial system. If stress tests are performed as part of the supervisory activity on an individual institution or group of institutions, which could trigger enhance supervision or early intervention, for example, we see merits in carrying them out on a confidential basis in order to avoid triggering negative market dynamics that could further complicate supervisory and resolution actions. In addition, forced disclosure of the results might induce the use of less severe stress tests, thus diminishing their usefulness and credibility. In this context, it would not be necessary to follow a common methodology. Coordination among authorities would, however, be desirable for cross-border groups and it should be possible within the respective supervisory colleges.

Recovery planning (B1-B4)

Question Box 7

7a. Is it necessary to require both entity-specific and group preparatory recovery plans in the case of a banking group? How to best ensure the consistency of recovery plans within a group?

7b. Should supervisor of each legal entity be allowed to require any changes to entity specific recovery plans, or should this be a matter for the consolidating supervisor?

7c. Is a formal joint decision (in accordance with the procedure set out in Article 129 CRD) between the consolidating supervisor and the other relevant competent authorities appropriate for decisions regarding the group preparatory recovery plan?

7d. Should the EBA play a mediation role in the case of disagreement between competent authorities regarding the assessment of group preparatory recovery plans?

Recovery plans should be subject to periodic review by both institutions and supervisors. In particular, supervisors should require (and ensure) that recovery plans are kept in line with findings of supervisory programs, stress tests, and other supervisory actions, and with the institution's evolving business activities.

We agree with the proposal that supervisor should have the powers to require institutions to take any necessary measures to ensure that there are no impediments to the implementation of the plan in situation of financial stress, subject to proportionality and assessments of costs and benefits of those measures. In case of cross-border institutions, close cooperation among authorities is called for, as underlined in our general comments.

Since recovery plans will provide important references for the early intervention measures (which will be harmonized at EU level), it would be important that common criteria are used across countries for drawing up and assessing recovery plans.

B. Intra-group financial support

Question Box 9

9. Is a framework specifying the circumstances and conditions under which assets may be transferred between entities of the same group is desirable? Please give reasons for your view.

We agree with the proposal of setting up a framework specifying clear circumstances and conditions under which assets can be transferred between group entities. The issue of intra-group financial support presents delicate economic and legal challenges, and a delicate balance needs to be struck between acknowledging that business lines may operate across

legal entities and safeguarding rights of shareholders and creditors of individual firms of the group.

Under the proposed regime, it is important to circumscribe the concept of group interest on the basis of certain objective elements (for example, the degree of operational integration, the role played by the parent company, etc).

Moreover, in order to achieve legal certainty, the common framework should make a distinction between transferable and nontransferable assets and set up rules on the order of transfer.

At any rate, it should be clarified that intra-group asset transferability operates as an early intervention mechanism and is not supposed to be used as a resolution tool to deal with insolvent institutions.

We concur with the proposed safeguard that the supervisor of the transferor could have the power to prohibit or restrict a transfer of assets, pursuant to the agreement and subject to the mediation role to be performed by EBA, when this transfer threatens the liquidity or solvency of the transferor or financial stability in the transferor's jurisdiction.

Question Box 10: Group financial support agreement (C1)

10. Section C1 suggests that the support that might be provided under an agreement should be limited to loans, guarantees and the provision of collateral to a third party for the benefit of the group entity that receives the support. Do you agree that financial support should be restricted in this way, or should it allow a broader range of intra-group transactions?

In our view, the UNICITRAL definition of intra-group transactions might be too broad to determine allowed transactions in group financial support agreements. At this stage, we would see merits to limit intra-group support to loans, guarantees and provision of collateral provided that this does not prevent necessary intra-group capital and liquidity support. The possibly range of allowed transactions might be expanded later on, when national legal frameworks are more harmonized.

Question Box 11: Group financial support agreement (C1)

11a. Should this type of financial support be provided only down-stream (parent to subsidiary) or also up-stream (subsidiary to parent) and cross-stream (subsidiary to subsidiary), or should this be left to the discretion of the parties, (subject to approval by competent authorities)? What would be the advantages and disadvantages of each option?

11b. Should the agreement be restricted to credit institution and investment firms subsidiary, or should it be able to include financial institutions on the grounds that these are also subject to supervision on a consolidated basis?

Provided that conditions for intra-group asset transferability are clearly specified, we would not limit the proposed regime to any predefined pattern (downstream, cross-stream or upstream). This approach would be consistent with the objective of enabling operational integration within banking groups and would minimize risks of potential frictions among different authorities.

The extension of the regime to any financial institution being part of the group could be made subject to the existence of appropriate intra-group coordination mechanisms in the resolution framework.

Question Box 12: Review of proposed agreement by supervisors and mediation (C2)

12. Is a mediation procedure necessary, and if so, would the approach under consideration be effective?

Please see general comments on "The role of the EBA" above.

Question Box 13: Approval of proposed agreement by shareholders (C3)

13a. Should the agreement specify the consideration for the loans, provision of guarantees or assets, or simply set general principles as to how consideration should be determined for each specific transaction under the agreement (e.g. how the rate of interest should be set)?

13b. If the remuneration is determined by the agreement, how frequently should the terms for remuneration be reviewed?

While it may be unfeasible to specify all the details regarding intra-group financial support given unforeseen market conditions in a distressed scenario, the shareholder agreement could include a number of provisions ensuring a certain degree of certainty, such as the category of assets subject to a transfer or the parameters for determining the consideration. The appropriateness of the inclusion of information could also depend on whether disclosure of the agreement is made.

Question Box 14 – Possible conditions for group financial support (C4)

14. Do you agree with the conditions for the provisions of intra-group financial support suggested in section C4?

We are of the view that the conditions for allowing intra-group transferability should be clearly spelled out. Therefore, the analysis should take into account that while intra-group financial stability could be restored, certain non-viable parts of the group may be best liquidated.

The proposed regime could warrant a limited degree of flexibility regarding the terms and conditions at which financial support can be provided by the transferor to the transferee. Provided that the operation does not jeopardize the financial soundness of the transferor and

all other suggested conditions apply, the terms of agreement could be below market terms (for instance, by deferring the payable consideration). Otherwise, it may not prove to be practical given that the transferee is an entity in financial difficulties and it is likely that the consideration may not be at full arms' length.

Question Box 15: Decision to provide group financial support (C5)

15. Do you that decision to provide financial support should be reasoned? Are the criteria suggested in section C5 appropriate?

We agree that the decision to provide financial support should be (i) reasoned; (ii) as detailed as possible on its justifying criteria; and (iii) based upon the least cost principle.

Question Box 16: Notification of group financial support decision to supervisors and their right to object (C6)

16a. Do you agree that the supervisor of the transferor should have the power to prohibit or restrict a proposed transaction under a group financial support agreement on the grounds suggested? Should any other grounds for objection be included in the framework?

16b. What is the appropriate time limit for the reaction of the competent authority?

16c. Should a time limit be set also for the reply to the consultation by the supervisor of the beneficiary?

We agree that the supervisor of the transferor should have the power to prohibit or restrict a proposed transaction if the conditions for group financial support are not met (i.e., it would threaten the soundness of the transferor) or if the support jeopardizes the financial stability in the country where the entity providing support is established.

While the proposed framework of maximum 48 hours for response by the authorities may be in general appropriate, there may be instances where decisions have to be swift, and an overriding procedure could be conceived.

For instance, consideration might be given the introduction of an exceptional circumstances clause that would allow the consolidating supervisor/resolution authority to override the envisaged consensus-building and disagreement-resolution mechanisms with the safeguard provision of an ex-post review by the EBA.

Question Box 17: Request for financial support by a supervisor (C7)

17. Do you consider that supervisors should have the power to require an institution to request financial support?

We agree that supervisors should have the power to require an institution to request financial support from the group. This approach would be consistent with early intervention powers to require the implementation of resolution plans allowing for possibility of intra-group

transfers. We also believe that all supervisors (consolidating and others) should have this power, which is consistent with the point of view expressed above on the possibility to provide financial support across the group entities.

Question Box 18: Insolvency protections for the transferor and its creditors (C8)

18a. Is either or both of the suggested mechanisms for protecting the claim of a transferor in relation to intra-group financial support appropriate?

18b. If adopted, should either be subject to a time limit (for example, the priority claim or claw back right would apply only if the relevant insolvency is commenced within a specified period – such as 12 months – after the transfer)?

It may be appropriate to give to the transferor a priority claim over the bankruptcy estate of the transferee, depending on the concrete terms of the transfer and whether the consideration was detrimental to the economic interest of the transferor on a standalone basis (disregarding the financial interest of the group as a whole).

As regards the claw-back regime, we believe that all the envisaged safeguards—including an approval by the host supervisor—should be sufficient to ensure protection for the shareholders and creditors of the transferee and hence we do not see the need for the envisaged claw-back regime.

Question Box 19: Exclusion of liability of management (C9)

19. Do you agree with the exclusion of liability for management proposed in section C9?

We agree with the proposal to exclude the liability of management provided that the transfer is made in strict compliance with the conditions envisaged under the proposed regime. Careful consideration could also be given to any criminal law aspect which may be relevant in this context.

Question Box 20: Disclosure (C10)

20. Do you agree that agreements for intra-group financial support should be disclosed?

We agree that agreements for intra-group financial support should be disclosed since this would promote transparency among creditors and other stakeholders.

C. Resolution Plans

Question Box 21: Individual Resolution plans (D1)

21a. Should resolution plans be required for all credit institutions or only those that are systemically relevant?

21b. Would the requirements for resolution plans suggested above will adequately prepare resolution authorities to handle a crisis situation effectively? Are additional elements needed to ensure that resolution plans will provide adequate preparation for action by the resolution authorities in circumstances of both individual and wider systemic failure?

We support the application of the requirement to prepare resolution plans to all credit institutions (and other relevant institutions that will be covered under the proposed regime).

Yet, the requirement should be applied proportionately. This would imply that for small institutions the resolution plan could simply consist of an indication of bankruptcy proceeding and insured depositors' payout by the respective deposit guarantee scheme.

Question Box 22: Preparatory and preventive powers (D3)

22a. Are the preparatory and preventative powers proposed in section D3 sufficient to ensure that all credit institutions can be resolved under the framework proposed? Are any further specific powers necessary?

22b. Specifically, should there be an express power to require limitations to intra-group guarantees, in order to address the obstacles that such guarantees may pose to effective resolution? (The FSB has identified such an obstacle: the guaranteed activities may be more difficult to separate from the rest of the organisation in times of stress, and may limit the ability to sell the guaranteed business.)

22c. In what cases, if any, might the exercise of such powers have an impact on affiliated entities located in other Member States? In such cases, should the EBA play a mediation role, or should the group level resolution authority make the final decision about the application of measures under section D4 to single group entities (irrespective of where they are incorporated)?

We wish to emphasize that, in preparing the resolution plan, resolution authorities should carry out a comprehensive cost-benefit analysis of any measures proposed to address or remove impediments to the application of the resolution tools.

The Consultation correctly notes that the resolution authorities' powers to request changes to legal or operational structures of credit institutions should not prevent them "from exercising the right of establishment".

However, in the case of cross-border branching, it is unclear what role the host authorities would have in the validation process of a credit institution's recovery and resolution plans and what mediation mechanism would apply in case of disagreement between the home and host-country authorities.

As indicated in our contribution to the previous Consultation, we see merits in acknowledging an increasing role for host countries authorities in the supervision and resolution of cross-border branches.

Question Box 23: Preparatory and preventive powers: General principles (D5)

23a. Do the provisions suggested in sections D4 to D6 achieve an appropriate balance between ensuring the effective resolvability of credit institutions and groups and preserving the correct functioning of the single market?

23b. Do you consider that only the group level resolution authority (rather than the resolution authorities responsible for the affected entities) should have the power to require group entities to make changes to legal or operational structures (see point (e) in the list of possible preparatory and preventative powers in (E4))?

23c. Are there sufficient safeguards for credit institutions in the process for the application of preparatory and preventative measure that is proposed in sections D4 to D6?

The Consultation emphasizes that "before proposing measures to address or remove impediments to the application of the resolution tools or the exercise of resolution powers, resolution authorities should consider the impact such measures would have on financial stability in other Member States."

While we certainly concur with that general principle, as indicated above, we would be inclined to extend its interpretation so as to comprise the financial stability of third non-EU States in which a credit institution conducts its financial activities.

At any rate, to form such an assessment, a close and continuative cooperation and collaboration among supervisory, resolution, and macro-prudential authorities is required.

We believe that an assessment of the "resolvability" of an institution would need to take into account the operational and financial capacity of the resolution authority to apply the tools or exercise the powers to be realistic.

We consider that changes to the legal or operational structures of the group entities' (as part of the possible preparatory and preventative powers under D3) could be required by both individual resolution authorities and the group level resolution authority (as opposed to only the group level resolution authority). Such an approach would be consistent with the responsibilities assigned to resolution authorities of the individual entities of the group.

Role of the European Systemic Risk Board

Given the key role of the European Systemic Risk Board (ESRB) in identifying systemic risk in the EU and in issuing risk warnings to national supervisors, the ESRB can play a useful role in the early intervention stage. For instance, risk warnings on systemic risks resulting for example from excessive asset concentrations or imbalances could constitute a trigger for early intervention across institutions in different countries. To this effect, a good cooperation

and exchange of information with resolution authorities should be developed, so that resolution tools can be readied for the materialization of such (systemic) risks.

Part 3: Early Intervention

Question Box 24: Early intervention powers (E1)

24a Is the revised trigger for supervisory intervention under Article 136(1) CRD (i.e. extended to include circumstances of likely breach) sufficiently flexible to allow supervisors to address a deteriorating situation promptly and effectively?

24b. Are the additional powers proposed for Article 136 sufficient to ensure that competent authorities take appropriate action to address developing financial problems? Are there any other powers that should be added?

We agree with the revision of the trigger for supervisory intervention under Article 136(1) CRD to include circumstances of likely breach.

We also support the expansion of the list of early intervention powers.

While preserving an appropriate balance between rules and discretion, we see merits in further exploring the option of establishing a pre-defined sequence of increasingly severe intervention measures as the problem worsens. This approach could ensure that banks have little incentive to delay implementing corrective measures and authorities find it difficult to forebear. However, such sequencing should not preclude supervisory discretion and should be used as a backstop to, rather than as substitute for supervisors' judgment.

Question Box 25: Special management

25a. Should supervisors be given the power to appoint a special manager as an early intervention measure?

25b Should the conditions for the appointment of a special manager be linked to the specific recovery plan (Option 1 in section E2), or should supervisors have the power to appoint a special manager when there is a breach of the requirements of the CRD justifying intervention under Article 136, but the supervisors have grounds to believe that the current management would be unwilling or unable to take measures to redress the situation (Option 2 in section E2)?

25c. If the conditions for appointment of a special manager are based on Article 136, is an express proportionality restriction required to ensure that an appointment is only made in appropriate cases where justified by the nature of the breach?

Please see general comments on "Special management" above.

Question Box 26: Implementing the recovery plan (E3-E4)

26a. Do you agree that the decision as to whether a specific group recovery plan, or the coordination at group level of measures under Article 136(1) CRD or the appointment of special managers, are necessary should be taken by the consolidating supervisor?

26b. Should the supervisors of subsidiaries included in the scope of any such decision by the consolidating supervisor by bound by that decision (subject to any right to refer the matter to a European Authority that could be the EBA)?

26c. Is a mechanism for mediation by a European Authority appropriate in this context and should the decision of that Authority be binding on all the supervisors involved?

26d. Is the suggested timeframe (24hours) for decisions by the consolidating supervisor and the EBA appropriate in the circumstances?

27. Do you agree that the consolidating supervisor should be responsible for the assessment of group level recovery plans?

We consider that the decision to implement a group recovery plan should be taken by the consolidating supervisor in consultation with other relevant supervisors of the group entities.

As indicated above, we see merits in the EBA acting as a mediator in case of disagreements among supervisors. To ensure transparency and accountability, rules and procedure guiding the mediation process should be established.

Part 4: Resolution Tools and Powers

Resolution: conditions, objectives, and general principles

Question Box 28: Conditions for Resolution (F1)

28. Which of the options proposed, either alone or in combination, is an appropriate trigger to allow authorities to apply resolution tools or exercise resolution powers? In particular, are they sufficiently transparent, and practicable for the authorities to apply? Would they allow intervention at the appropriate stage?

We consider that the trigger(s) need to provide sufficiently flexibility to the supervisor/resolution authority to intervene at a suitably early stage prior to balance sheet insolvency. A key lesson from the crisis is that resolving an ailing bank in a way that mitigates contagion and preserves financial stability requires prompt intervention and resolution. Option 2 is the appropriate trigger to allow for intervention at a sufficiently early stage based upon regulatory criteria; that is, as we interpret it, the resolution authorities have the power to apply the resolution tools and exercise the resolution powers when a credit institution no longer fulfils, or is likely to fail to fulfill, the regulatory conditions for its continued authorization, provided that, as suggested by the Consultation, no other measures are likely to avert failure. Options 1 and 3 would have some disadvantages. The former

describes conditions that are perhaps too close to insolvency and therefore too late for intervention. The latter refers only to capital whereas liquidity may more likely be the cause of the failure. At any rate, it may be appropriate to include as condition for intervention another set of circumstances, based on the violation of any law or regulation or on any unsafe and unsound practice that may significantly weaken the bank's condition, seriously jeopardize depositors' interests, or dissipate the bank's assets.

As regards the requirement that resolution be necessary in the public interest, as mentioned above we do not believe that special resolution should apply only when the public interest of financial stability is at stake. The public interest of financial stability may become a decisive element in determining the extent to which the authorities can force the execution of certain resolution tools.

Question Box 29: Resolution Objectives (F3)

29. Do the resolution objectives suggested in section F3 comprehensively encapsulate the public interest considerations that justify resolution? Should any have precedence? Are there any other objectives that we should consider?

Although it is implicitly acknowledged, it is important to clearly state that one of the main resolution principles is to mitigate moral hazard when winding down nonviable businesses by first imposing losses on shareholders and creditors.

Question Box 30: General principles governing resolution (F4)

30a. Are the guiding principles for resolution suggested in section F4 appropriate?

30b. In particular, is it necessary to include a general principle that creditors of the same class should be treated equally or should resolution authorities be able to derogate from this principle in specific circumstances?

30c. Is it necessary to require independent valuation, and are the objectives of that valuation appropriate?

We are of the view that resolution authorities should be able to treat differently creditors of the same class subject to limited, objective and proportionate criteria. Some creditors in a particular class may present a systemic risk and others of the same class may not. This arrangement would provide sufficient flexibility in managing the resolution process and could greatly reduce the cost of the resolution.

As indicated above, we would also suggest requiring that an explicit objective of minimizing costs for the banking industry and taxpayers should guide the resolution authority when making choices between alternative actions consistent with achieving the resolution objectives, with the ability to override the criterion in case of a systemic threat.

Resolution Tools, Powers, Mechanisms, and Ancillary Provisions

Question Box 31: Resolution tools: General (G1)

31a. Are the tools suggested in section 2 and elaborated in the following sections sufficiently comprehensive to allow resolution authorities to deal effectively with failing banks in the range of foreseeable circumstances? Are there any others that we should consider?

31b. Should resolution authorities be restricted to using these tools, or should Member States be able to supplement the proposed EU resolution framework with national tools and powers?

In addition to the resolution tools mentioned under Section G1, we see merits to comprise certain powers mentioned under Section G5, such as those relating to the cancellation of shares or to the power to issue new shares.

In our view, Member States should be able to supplement the EU resolution framework with national tools, but at the same time a certain harmonization of the effects of these instruments should be achieved, in order to ensure cross-border recognition of resolution measures. Also, any exemption from claw-back rules, applicable if a resolution tool is used by the authorities, should be considered.

Question Box 32: Sale of business tools (G2)

32. Do you agree with the conditions for the sale of business tool suggested in section G2, and in particular the requirement for marketing?

"Marketing" the sale of a failing credit institution (or parts thereof) in the phase preceding its intervention entails significant contagion and signaling risks. A delicate balance must be struck between ensuring a fair and competitive process and protecting financial stability since information leakages could cause panic. The need to operate swiftly and the limited possibilities to carry out a sale process in a distress situation also militate against an open marketing option. The marketing needs to take place on a confidential, not a 'transparent' basis, with qualified potential acquirers being subject to confidentiality agreements, but allowing for the possibility of some ex post transparency requirement after the resolution tool is implemented. Also, in certain jurisdictions it may be necessary to have explicit provisions characterizing the sale of assets and/or liabilities as a pool; this concept—opposed to a sale of single assets and liabilities—may not be familiar in all jurisdictions.

Question Box 33: Bridge bank tool (G3)

33a. Should the EU framework include an express requirement that the residual bank (i.e. the entity that remains after the transfer of some, but not all, assets and liabilities to a purchaser) must be wound up? Are there likely to be circumstances where the residual bank is required to provide support to the purchaser or other remaining group entities?

33b. Should a bridge bank be permitted to operate without complying with the CRD requirements, in particular without minimum capital? If that is the case, should its activities be subject to restrictions

33c. A bridge bank is intended to be a temporary structure. Is it appropriate to limit the operation of the bridge bank to 2+3 years? Would it be preferable to impose a shorter or a longer limit?

We are of the view that arrangements should not rule out the possibility of funds from the deposit insurance scheme or resolution fund being used to support a bridge bank transaction provided that the least cost criteria is met. In a bridge bank (as well as in a purchase and assumption) transaction, it is quite likely that the amount of good assets might be insufficient to match transferred liabilities. In this event, and provided that the operation satisfies the least cost criteria, funds from the deposit insurance scheme or resolution fund might be used to balance assets with liabilities.

We would also see merits in allowing for an expedited licensing process for a bridge bank and permitting it to operate without complying with some CRD requirements, such as minimum capital, as long as it is only a temporary entity, its range of activities are limited, and it is closely supervised.

If a bridge bank cannot be sold, winding up of the bridge bank should be undertaken in a way which does not impose any losses on creditors transferred to the bridge bank. Creditors to a bridge bank need to be guaranteed otherwise they will destabilize the bridge bank by running as soon as they are transferred.

Question Box 34: Asset separation tool (G4)

34. Should the use of the asset management tool as a stand-alone tool for resolution be prohibited in order to avoid the 'rescue' of a failing bank?

The use of an asset management tool may not be excluded tout court as long as appropriate safeguards are taken to avoid moral hazard, such as dilution of shareholders, exclusion of management, etc. It may not be appropriate to define an asset management vehicle as wholly owned by public authorities, as market participants may also have a stake in it.

Question Box 36: Transfer powers: Ancillary provisions (G6)

36. The ancillary provisions set out in section G6 are intended to ensure that where business has been transferred to another entity through the use of a resolution tool, the transfer is effective and the business can be carried on by the recipient. Are the suggested provisions sufficient? Are any additional provisions necessary?

We understand that the proposition that no person may exercise any right, obtain possession or take control over any property of the troubled institution is limited to a limited period

necessary to ensure continuity of contracts in favor of the transferee and would not infringe upon, for instance, secured creditors' claims.

37. Should the power suggested in section G7 be extended to allow authorities to impose equivalent requirements on other entities of the same group as the residual credit institution?

38. The objective of the provisions suggested in section G8 is to ensure that where a transfer includes assets located in another EU Member State (e.g. in a branch) or rights and liabilities that are governed by the law of another Member State, the transfer cannot be challenged or prevented by virtue of provisions of the law of that other Member State. Are the suggested provisions sufficient to achieve this objective? Is any additional provision necessary?

We believe that it is very important that, when a transfer of shares, assets or liabilities includes assets or liabilities located in a Member State other than the State of the resolution authority, such transfer should have effect in the law of both states.

Question Box 39: Resolution mechanisms (G9)

39a. Should all member States be required to make provision in national law for all three mechanisms by which resolution can be carried out that that are suggested above? If the same mechanisms are not available in all Member States, could this pose an obstacle to coordinated cross-border resolution?

39b. Should receivership – which allows resolution authorities to take full control of the failing institution - be the primary framework for resolution?

39c. Is any provision considered in this section necessary, or is it sufficient simply to provide for the resolution tools and powers?

As argued above, we are in favor of an official administration regime that would allow taking control of an ailing bank at an early stage. We recognize that there are different models for taking control of an institution and resolve it, and each derives from a specific legal tradition; what is essential is that intervention can be made at an early stage of the corrective process.

Regardless of the various models applied, it is important that countries develop arrangements for the mutual recognition of measures applied in resolution proceedings. This should apply whether the measures are based on an administrative or judicial proceeding or on an executive order (in the latter case, it may be more difficult to set up a mutual recognition mechanism).

There is no wide consensus on a single model for bank insolvency framework, which reflects the institutional/legal history of jurisdictions.[6] Nonetheless, we believe that a special regime for bank insolvency that is administrative in nature offers the main advantage of vesting decision making in the hands of experts in banking matters and allowing them to move quickly and efficiently to deal with an insolvent bank. To ensure that the banking authorities are accountable for their actions, provision for ex post judicial review of the legality (and not the merit) of the regulatory acts will need to be provided for.

Question Box 42: Limited suspension of certain obligations (G12)

42. Please give your views on the suggested temporary suspension of payment or delivery obligations? Is it appropriate to exclude eligible deposits? Should any other obligations be excluded?

In addition to the suspension described in Section G12, the authorities may need to impose, for a limited period and in exceptional circumstances, a moratorium on the bank claims.

Question Box 43: Temporary Suspension of close out netting (G13)

43. Please give your views on the temporary suspension of close out netting rights suggested in section G13, including the appropriate length of the suspension. Should any classes of counterparty be excluded from the scope of such a suspension: for example, Central Banks, CCPs, payment and securities settlement systems that fall within the scope of the Settlement Finality Directive?

We agree with the suggested temporary suspension of the close out netting right. However, we are of the view that it would require an amendment of the Financial Collateral Arrangements Directive (FCAD), which currently rules out a stay on close out. Consideration should also be given to amending the FCAD to prevent counterparties closing-out or enforcing other rights against a solvent transferee, whether a purchasing bank or a bridge bank, as a result of the transfer of their contract from the failed bank. This currently would seem to be the effect of the FCAD and seems to go beyond the purpose of the protection conferred by FCAD as the counterparty is effectively given an option to exercise rights that it would not have had if the failed bank had remained solvent and allows it to recover any unsecured debt in whole rather than as a claimant in the failed bank's insolvency.

[6] For a review of different regimes, see International Monetary Fund and the World Bank "An Overview of the Legal, Institutional, and Regulatory Framework for bank Insolvency," April 2009 (http://www.imf.org/external/np/pp/eng/2009/041709.pdf).

Question Box 44: Scope of rights to challenge resolution (G14)

44. Do you agree that judicial review of resolution action should be limited to a review of the legality of the action, and that remedies should be limited to financial compensation, with no power for the court to reverse any action taken by resolution authorities?
Alternatively, should the court have the power to reverse a transfer of assets and liabilities in limited circumstances where unwinding of the transfer is practically feasible and would not cause systemic risk or undermine legitimate expectations?

We generally agree with the proposed approach circumscribing judicial review to a review of the legality of the action, with the following additional clarifications:

i. In lieu of preventing the opening of any legal action in relation to a troubled bank for a period of 90 days, it should be considered whether, in general terms, any such legal challenge should not stay the resolution measure, unless extremely serious circumstances apply.

ii. Drawing from recent law enacted by a Member State (see the recent Belgian Bank Resolution Law of 2 June 2010), the standards for limiting judicial review may include "the concrete circumstances of the case, and in particular the urgency with which the resolution decisions were taken, the practices on the financial markets, the complexity of the case, the menaces for the saving system and the danger of damage to the national economy due to the failure of the bank/insurance firm concerned."

iii. A proper understanding of the concept of "legality and legitimacy", which is the subject of the judicial review, may be necessary; the courts should be entitled to check whether the supervisor has duly taken into account all the elements of the case and whether its decisions are non arbitrary and are motivated.

iv. Recognition that official actions are undertaken on the basis of a mandate to support general financial stability rather than to protect the interests of particular groups, unless otherwise provided for.

v. Judicial review should be performed with speed and clarity.

Part 5: Group Resolution

Question Box 52: Resolution colleges (P5.1)

52. Do you agree that the group level resolution authority should decide on the composition of the resolution colleges?

We agree with the proposal of setting-up resolution colleges modeled on the existing supervisory colleges; in particular we agree that the group resolution authority should decide on the composition of the resolution college. Since the group level resolution authority needs

to reach a view on the financial stability impact of its actions in other countries, robust consultation procedures should be envisaged.

As indicated above, we would also favor a more active role by an EU body (such as the EBA) in mediating or resolving disputes among national authorities; this should be matched by clearer rules on the criteria defining the importance for domestic financial stability of a particular group (which is the factor justifying many decisions under the proposed group resolution framework).

Question Box 53: Group resolution (P5.2)

53a. Does the framework suggested in Part 5 strike an appropriate balance between the coordination of national measures that is necessary to deal effectively with a failing group, and the proven need for authorities to act quickly and decisively where the situation requires it?

53b. Should the framework set out explicit detail about how each resolution tool might be applied at group level?

As indicated above, we believe it is crucial to establish some general principles that would set forth the criteria and parameters that would guide the burden sharing process among different jurisdictions. Without such agreement, it is more likely that resolution measures will be taken on a stand-alone basis by each national authority.

Question Box 54: Multilateral arrangements with third countries (P5.3)

54. Should it be a priority for the EU to strive for an internationally coordinated approach?

55. Should firm specific arrangements with third country authorities be required, as suggested in section P5.4?

Given the prominent role that EU financial institutions play in the global financial markets, reaching a consensus on an internationally coordinated approach for resolution of global firms should be a priority for the EU. Among the steps that might facilitate this process, countries could consider introducing in their legislation a general principle/obligation to cooperate with other Member States and other third countries in the early intervention and resolution of an ailing cross-border institution

Part 6: Financing Arrangements

56. Do you agree that if the resolution authority is not satisfied about the resolution framework of a third country it should be able to require changes to the organisation or operating structure of the credit institution?

As answered to the questions on recovery planning (B1-B4), we agree that supervisors should require institutions to take any necessary measures to ensure that there are no

impediments to the recovery *and* resolution plans, subject to proportionality and assessment of costs and benefits of such measures.

Question Box 57: Establishing a Resolution Fund (P6.1)

57. Is it sufficient to make a general reference to the financing of resolution tools or is it necessary to be more explicit about what a fund can or cannot finance (e.g. recapitalisation, loss sharing, etc.)?

We believe that it would appropriate to clearly specify what a resolution fund can or cannot finance in order to avoid moral hazard and the risk that funds are used to bail-out firms. Please, see also general comments on "Resolution fund" above.

Question Box 58: Financing the Fund (P6.2)

58. Should there be more explicit provision about the alternative funding arrangements, for example reference to specific types of arrangements such as debt issuance or guarantees?

We believe that an explicit provision about alternative funding arrangements would be preferable. Please, see also general comments on "Resolution fund" above.

Question Box 59: Calculation of contributions to the Fund (P6.3)

59a. Should the basis for the calculation of contributions be fully harmonised or left to the discretion of Member States?

59b. Are eligible liabilities an appropriate basis for calculating contributions from individual institutions, or a more risk adjusted basis be preferable? The latter might take account of elements such as: a) the probability that the institution would enter into resolution, b) its eligible liabilities, c) its systemic importance for the markets in question, etc. However, would that add too much complexity?

Please, see general comments on "Resolution fund" above.

Question Box 60: Relationship with the DGS (P6.4)

60. Do you agree that when the DGS of a Member State is also able to finance resolution, this should be taken into account when calculating the contributions to the Fund? Are additional safeguards necessary to protect the interests of insured depositors?

When the DGS of a Member States is also able to finance resolution, in our opinion, this should be taken into account when calculating the contribution to *and* the size of the Fund. Furthermore, the use of resolution fund resources should be explicitly guided by the objectives of minimizing moral hazard and costs for fund and the DGS. (This criterion could be waived only in exceptional and well-defined circumstances (systemic crises) pursuant to a clear override process.)

Should Member States opt for a single fund, we agree that consideration should be given to mechanisms that would protect the interest of insured depositors and the DGS.

Some countries have private supplemental DGSs or mutual guarantee schemes among certain classes of banks, in addition to a statutory DGS. We would favor a presumption that these schemes be expected to finance resolution of related banks, before the Fund is tapped.

61. Do you agree that a resolution fund should have a priority ranking over the claims of all other unsecured creditors? Do you consider that this privileged position should be extended to other creditors in order to ensure temporary funding in the context of resolution?

We would suggest that the statutory DGS and the Fund have the same preferred creditor status so as to facilitate coordination and cooperation, when needed.

Annex I: Debt write-down

Please see general comments on "Debt write-down as an additional resolution tool" above.