bba
The voice of banking

Financial Stability Board
Bank for International Settlements
Centralbahnplatz 2
CH-4002 Basel
Switzerland

fsb@bis.org

28th November 2014

Dear Sirs,

Cross-border recognition of resolution action

The British Bankers' Association welcomes the opportunity to respond to the above consultative document. The Financial Stability Board has led critical work to promote the development of robust regimes to govern the resolution of financial institutions and has an important on-going role to play in refining the framework and promoting its consistent implementation. In this context, we welcome the September 2013 Progress Report and the focus it has brought to address the remaining uncertainties related to cross-border recognition of resolution actions.

Whilst we understand the constraints within which the FSB operates, we are disappointed at the lack of ambition shown by the proposals to give effect to the requirements of Key Attribute 7.5. This is particularly so given that few jurisdictions have adopted statutory powers to recognise, enforce or give legal effect to foreign resolution measures. As the paper notes, court-based processes may pose particular challenges when dealing with the resolution of financial institutions and there are particular complications in relation to the application of bail-in powers. It stops short, however, of acknowledging that contractual approaches cannot facilitate asset transfers in resolution, which are more challenging due to the nature of property rights, yet could be an essential element of a resolution proceeding. Although supportive measures taken under domestic frameworks and contractual arrangements have a role to play in achieving cross-border recognition, we regard formal recognition procedures as a much more robust and effective means of achieving legal and commercial certainty for bail-in of debt instruments, and a necessity for recognition of asset transfers and therefore for effective cross-border resolution.

In addition to the above, it is also disappointing that the paper does not discuss Cross-Border Cooperation Agreements (Key Attribute 9) among home and relevant host authorities and their potential role in support of the recognition of foreign resolution proceedings.

We comment on the substance of the document below. We would welcome the opportunity to discuss any of the issues associated with this topic at your convenience.

1. **Are the elements of cross-border recognition frameworks identified in the report appropriate? What additional elements, if any, should jurisdictions consider including in their legal frameworks?**

Section 1.2 of the report identifies the basic elements necessary for an effective cross-border recognition framework. We underline that any cross-border recognition framework must respect legal entity distinctions – separate treatment for a parent undertaking and its subsidiaries, taking into account their respective locations.

BBA
Pinners Hall
105-108 Old Broad Street
London
EC2N 1EX

T +44 (0)20 7216 8800
F +44 (0)20 7216 8811
E info@bba.org.uk
www.bba.org.uk

Whilst Scenario 3 provided in the Annex is informative, we would welcome further detail on the approach to recognition of asset transfers and how to overcome conflicts of laws issues and suggest that this could be addressed under section 1.2.

The approach, under part 3 of 1.2, to define only the instances where foreign resolution proceedings should not be recognised, thereby creating a presumption in favour of recognition, is welcome. The provisions as drafted are, however, extremely broad and subject to domestic judicial or regulatory interpretation in a manner that hinders the development of a universal recognition standard. The inclusion of “material fiscal implications” with the examples of loss to local public authorities or taxpayers is particularly concerning.

2. **Do you agree that foreign resolution actions can be given effect in different ways, either through recognition procedures or by way of supportive measures taken by domestic authority under its domestic resolution regime? Do you agree with the report’s analysis of these approaches?**

Whilst there is a place for foreign resolution actions to be given effect through either recognition or supportive measures we believe there should be a strong preference for formal recognition proceedings and encourage the FSB to promote such measures as the most effective means of satisfying Key Attribute 7.5.

A formal recognition procedure is particularly important to facilitate bail-in. As is noted by scenario 4a, included in the Annex to the consultative document, the cross-border application of the bail-in tool to write-down liabilities is likely to be complicated by reliance on supportive measures. Such an approach requires that the relevant host resolution authority has the power to exercise the bail-in and that the relevant resolution triggers have been met under the domestic regime. In the absence of a local regime or failure to meet local triggers the write-down cannot proceed under a support framework. Even if the host authority has a bail-in regime and the relevant conditions have been met, it is possible that the local regime could give rise to different outcomes to that of the home authority. Furthermore, where a firm in resolution does not have a branch, but does have local assets / liabilities governed by local law, supportive measures are unlikely work. In all cases, supportive measures will be slower and less certain than recognition proceedings.

This legal and commercial uncertainty is a serious concern to banks and their investors. Whilst contractual requirements can alleviate this problem, to a certain degree, they have significant operational and competitive consequences. A recognition approach mitigates these problems and offers the possibility for greater levels of cooperation facilitated by enhanced legal and commercial certainty.

3. **Do you agree that achieving cross-border enforceability of i) temporary restrictions or stays on early termination rights in financial contracts and ii) ‘bail-in’ of debt instruments that are governed by the laws of a jurisdiction other than that of the issuing entity is a critical prerequisite for the effective implementation of resolution strategies for global systemically important financial institutions (G-SIFIs)? Is the effective cross-border implementation of any other resolution actions sufficiently relevant for the resolvability of firms that the FSB should specifically consider ways of achieving their cross-border enforceability?**

As is noted above, whilst contractual solutions have a role to play in enhancing cross-border enforceability, their efficacy does not extend to asset transfers in this context. BBA members have a clear preference for statutory frameworks to provide certainty and minimise operational and competition challenges.

We also believe that the equal treatment of creditors irrespective of location is a fundamental element of any cross-border regime, whether this is achieved through statutory or contractual

methods, and would highlight that the contractual recognition of bail-in requirement in the EU Bank Recovery and Resolution Directive (BRRD) discriminates between EU and non-EU creditors in its approach.

We would welcome a more specific definition of “financial contract” to assess applicability and scope, ideally providing definitions in conformity with other international bail-in regimes, such as BRRD.

Notwithstanding this, we welcome the substantial progress which has been made by the industry and official sector in the development of an ISDA Protocol to support the cross-border enforcement of a temporary stay of early termination rights and support official measures to promote the adoption of this agreement.

As noted above, we see merit in the FSB considering further steps which could be taken to promote effective cross-border transfers of assets in resolution.

Finally, whilst cross-border recognition of home state resolution actions is generally to be supported, we would note one area in which express cross-border recognition going the other way of local host insolvency regimes would be highly beneficial. In many jurisdictions, systemically vital payment and settlement systems rest on legal regimes designed to ensure settlement finality between the participants. This is ensured typically by removing the impact of insolvency laws that might operate to invalidate payments/property transfers and/or ensure that collateral/security offered by a participant to support its participation is not vulnerable to be set aside. The continued operation of those local systems in host countries depends on the continued confidence of the participants in the perceived primacy of the settlement finality legal regime and any potential for a home country resolution regime to impose treatment on payments/property transfers at variance to the local settlement finality rules would be a threat to that confidence - particularly in systems where participants are not able to elect to avoid settlement activity with other participants with respect to which they have concerns. Accordingly, we would recommend that there be both a carve out from recognition of resolution in relation to matters covered by local settlement finality regimes applicable to payments/settlement infrastructure together with positive recognition going the other way of primacy of those rules over conflicting home state resolution and insolvency laws.

4. **Do you agree that contractual approaches can both fill the gap where no statutory recognition framework is in place and reinforce the legal certainty and predictability of recognition under the statutory frameworks once adopted?**

The PRA already requires UK-authorised institutions to include contractual terms in capital and debt instruments issued under foreign law and it is noted that Article 55 of the Bank Recovery and Resolution Directive introduces a requirement in this regard. Such approaches have a role to play in providing legal certainty and predictability in the absence of statutory frameworks for recognition but should not be regarded as an adequate substitute nor, as noted above, are they appropriate for recognition of asset transfers. We note that contractual approaches will be subject to uncertainty as to their efficacy until their enforceability and resilience to grounds for failure to enforce (see above) are tested in key jurisdictions.

As contemplated by the Key Attributes, Cross Border Cooperation Agreements also have an important role to play in filling this gap and laying groundwork and principles required to develop regulatory understanding as a basis for statutory frameworks. We therefore urge further consideration of agreements, although note they will still stop short of providing the requisite level of certainty and predictability of recognition.

In summary, whilst we can see an interim role for contractual approaches, we strongly encourage the FSB to work with member jurisdictions to develop statutory frameworks for recognition. We note that in the absence of such an approach, the burden of managing the complexities and costs associated with differing contractual requirements across jurisdictions will fall on clients and firms.

Once formal recognition procedures are in place we do not consider it should be necessary to continue to require contractual approaches.

5. **Are the key principles for recognition clauses in debt instruments set out in the report appropriate? What other principles or provisions do you consider necessary to support the exercise of 'bail-in' powers in a cross-border context?**

The proposed principles look uncontroversial and are already in line with market practice within the EEA. The use of such recognition clauses should be widely adopted by all regulators, not merely home jurisdictions of G-SIBs to ensure standard market practice and risk assessment (and hence pricing). We see an important role for the FSB to encourage international regulators to remove impediments to banks including such clauses in debt instruments. For example, the underlying instrument should not be treated any differently from a tax or regulatory perspective to an equivalent instrument which does not contain a contractual recognition clause.

To minimise operational complexity for firms and their clients we recommend that any requirements for contractual recognition clauses should be restricted to liabilities to be counted towards TLAC requirements. We note that the scope of the BRRD requirement for bail-in recognition clauses is far (and in our view unnecessarily) wider than proposed in the FSB paper and would support the BRRD being amended so that the EU is aligned to the rest of the world.

We note that paragraph 2.2.2 of the paper says the rule would only apply to "new issuances" and suggest it is clarified that the requirement would not apply to new issuances under existing contracts given the challenges for firms to amend contracts.

We would also urge regulators to adopt practical and proportionate requirements for the provision of enforceability opinions, potentially covering entire debt programmes (assuming issuance with requisite bail-in language), rather than for each individual issuance of TLAC-eligible debt instrument.

Other comments

We note that the last paragraph of 2.1.3 suggests that jurisdictions monitor the adoption of provisions for contractual stays on termination rights by firms which are not prudentially regulated and consider steps such as the imposition of requirements through market conduct regulation to promote their use. We highlight the risk that this will result in differential outcomes across countries and therefore encourage the FSB to provide guidance to jurisdictions to mitigate this.

Yours faithfully,

Adam Cull, Senior Director, International & Financial Policy
adam.cull@bba.org.uk +44 (0)20 7216 8867