INTESA SANPAOLO COMMENTS ON
THE FSB CONSULTATIVE DOCUMENT
"EFFECTIVE RESOLUTION OF SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS"
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Executive Summary

Intesa Sanpaolo is pleased to be able to respond to the FSB consultation on "Effective Resolution for Systemically Important Institutions (SIFIs)". We fully support the efforts of the FSB in establishing a sound regulatory framework to resolve SIFIs without systemic disruption and without exposing taxpayers to the risk of loss. As a cross-border bank with a strong international focus, Intesa Sanpaolo has a keen interest in responding to this consultation. The contents of the present position will mainly focus on the areas of major concern to our business. Our key recommendations can be summarised as follows:

Effective Resolution Regimes

- We support the extension of the new measures to all systemically relevant financial actors. The proposal should be applied consistently across jurisdiction so as to avoid ring-fencing and ensure a level playing field;
- The lack of legal harmonisation at cross-jurisdictional level represents a stumbling block to the effective resolution of SIFIs;
- The resolution powers identified are comprehensive. It is key however, to clearly define in advance the triggers for resolution and to apply them uniformly across jurisdictions.

Bail-in powers

- Though strongly supporting the rationale behind a bail-in within resolution (i.e. shareholders and creditors should bear the main losses of resolution), we call for a thorough assessment of the legal consequences as well as the potential impact of the proposal on financial stability;
- Some debt categories (secured debt, deposits, etc) must be excluded from the scope of the proposal in order to ensure market stability and avoid contagion;
- The inclusion of senior unsecured debt within the scope of the bail-inable debt would be particularly harmful, as it is likely to produce market distortions, impact commercial banks' funding and unfairly advantage shareholders vis-à-vis bondholders, with potential losses for retail investors;
- The pros and cons of a contractual approach to bail-in need to be further evaluated.

Cross-Border Cooperation

- Supervisory coordination through the establishment of Crisis Management Groups (CMG) and the development of international agreements is a key step towards full cross-border crisis management;
- Home authorities should maintain primary responsibility for cross-border crisis management. The new measures should be included within the Pillar II framework.

Resolvability Assessments

- Resolvability assessments would considerably enhance the drafting of recovery and resolution plans. However, they require as a precondition legal harmonisation across jurisdictions.

Recovery and Resolution Plans

- Responsibilities between home and host authorities with regards to recovery and resolution planning must be clearly established.

Improving Resolvability

- Intra-group guarantees are a source of stability for financial institutions. The stress should be on creating an adequate framework for intra-group support rather than on limiting their use.

Discussion note on conditions for a temporary stay on early termination rights

- Given the potential impact on legal certainty and systemic stability, statutory powers to impose a stay on early termination rights should be based on a set of transparent and pre-defined criteria as well as triggers. It is essential that these are fully harmonised across jurisdictions.

I. Introduction

Intesa Sanpaolo is one of the leading banking groups in Italy, with a strong international presence focused in Central-Eastern Europe as well as Middle Eastern and North African countries. As one of the top banks in Europe, we welcome the opportunity to comment on the Financial Stability Board (FSB) consultative document on Effective Resolution of Systemically Important Financial Institutions (SIFIs). Our comments mainly focus on the aspects of the document which are of particular relevance for our Group and do not thus cover the entire scope of the consultation.

II. Effective resolution regimes

Intesa Sanpaolo welcomes the FSB proposal and overall objective of ensuring that SIFIs can be resolved without major disruptions for the financial system and the economy as a whole. We fully share the objective to avoid large-scale government intervention and resorting to taxpayers' money in the event of SIFIs' resolution.

We support the scope and focus of the proposal. The new measures should be applied to all systemically relevant financial actors, and not only to the banking sector. In this regard, we welcome the ongoing work of the FSB with CPPS, IAIS and IOSCO in developing guidance for the application of the new framework to non-bank SIFIs such as insurance companies, financial infrastructures and other financial institutions. Regulatory initiatives should properly be calibrated to the risks posed by the different actors. It is fundamental that resolution frameworks are established at national level and that authorities can dispose of the same preventative and resolution powers as well as of the tools to address failures of cross-border institutions. Furthermore, in order to ensure a level playing field and effectively prevent future financial crises, these tools should be applicable to all relevant actors that might pose systemic threats.

The resolution powers identified in the consultation paper are comprehensive, and should adequately guarantee that authorities in all jurisdictions are able to resolve SIFIs in an orderly manner. The protection of resolution authorities while in the exercise of their powers against the risk of lawsuits is a critical element, as demonstrated by the bail out of some European banks in the recent crisis. It is equally important however, to ensure legal certainty and adequate information for shareholders as well as to avoid any increase in ex-post litigation.

We support the FSB objective to foster legal harmonisation, which is an essential condition for coordinated resolution of cross-border SIFIs and for maintaining a level playing field. We are also supportive of the steps envisaged by the FSB in promoting supervisory coordination through the establishment of resolution colleges or Crisis Management Groups (CMG). We welcome the development of legally binding cooperation agreements as an important step towards further cross-border harmonisation.

Likewise, we maintain that harmonisation of resolution tools is a crucial precondition for a coordinated approach to cross-border resolutions. While we support most of the stabilisation and liquidation tools presented in the consultative document, we maintain some reservations on the use of a bail-in tool within resolution. We share the view that shareholders and debt holders should primarily bear the costs of resolution and incur losses *pari passu*, according to their creditor status. It is however arguable whether a bail-in statutory power granted to authorities in a resolution phase, which is likely to entail serious breaches in creditors' status and possibly even greater market disruption than in the event of an ordinary liquidation procedure, would effectively be of added value.

We maintain the view that national resolution funds for ex-post recovery would be of limited benefit in the event of systemic crises and might have the unintended consequence of increasing moral hazard. Any proposal to merge resolution funds with national deposit insurance schemes should be duly assessed. It should be kept in mind that the two bodies respond to fundamentally separate functions. It is essential that any use of deposit insurance schemes to finance preventative or resolution measures not impinge on their capacity to refund depositors. Furthermore, a merger between the two bodies could negatively affect depositors' confidence in national schemes, thus increasing the risk of bank-runs in the event of a crisis.

Harmonisation of triggers for the use of resolution tools across jurisdictions is key to ensure legal certainty and avoid ring-fencing. It is thus regretful that the FSB consultative document does not identify any criteria for the definition of resolution triggers. It is essential that these are clearly defined in advance. They should combine clear-cut quantitative as well as qualitative criteria, and should leave necessary room for supervisory judgement. Their employment and consequent depletion in the event of cross-border SIFIs' resolution must be concerted among authorities so as to prevent arbitrage. We regard this as a crucial point for the successful application of the framework on a cross-border basis.

III. Bail-in powers

The proposal to restructure SIFIs' liabilities in order to maintain their systemically important operations and functions would ensure, in principle, that creditors bear the main losses of resolution while minimising contagion and social costs. However, it does not seem evident that a statutory power to write-down debt or to convert debt into equity in a resolution phase, i.e. in a gone-concern phase, would necessarily leave creditors better off than in an ordinary liquidation procedure. There is a risk that combining conversion of subordinated debt into equity with the write-down of senior debt would disproportionately advantage equity holders (former subordinated creditors) at the expense, for example, of senior bondholders, as the former could see the value of their investments recover over time. This would create disruptions not only in the ranking of claims in insolvency proceedings but also in the functioning of capital markets, with consequences for SIFIs' funding.

We recommend that bail-in within resolution be used as a very last resort tool, only once the use of other tools has clearly failed. It is crucial that conditions and triggers for the use of bail-in are clearly defined in advance and harmonised across jurisdictions in order to avoid arbitrage and ensure a level playing field. A number of safeguards and exclusions of debt categories would be required in order to preserve stability. The impact on commercial banks' capacity to access funding should be carefully assessed. Its legal restrictions and consequences for market stability should be clearly understood. As concerns coordination in the activation of bail-in mechanisms across jurisdictions, we support bail-ins to be initiated by the group resolution authority and coordinated at resolution-colleges or CMGs level.

Leaving aside any merit, it is essential that bail-in tools can be applied to all financial institutions. Restricting their scope to SIFIs only is likely to produce distortions between SIFIs and non-SIFIs, especially with regards to capital-markets funding.

It also seems evident that a bail-in could prove useful only in the event of idiosyncratic crisis. Recent experience with the use of bail-in tools in Denmark clearly shows that there might be a number of resulting negative consequences for systemic stability, with other financial actors finding it harder to access funding in the market at a time of great distress. Therefore, the consequences of the employ of such instruments in the event of systemic crises should be clearly understood.

In order to effectively minimise costs for investors and society, statutory bail-in should only be restricted to junior debt (i.e. subordinated debt and preference shares/hybrids securities). Debt categories such as retail and wholesale deposits as well as secured debt (including covered bonds) should be explicitly excluded from the scope of bail-inable debt.

We maintain the view that the inclusion of senior unsecured debt within the scope of a statutory bail-in would be particularly harmful and should be avoided. The impact on commercial banks' funding models and on market competition, especially at a time of volatility and distress, still needs to be carefully evaluated. A bail-in on senior debt, although not retroactively applied, is likely to provoke disruption in the funding models of EU commercial banks, for which senior debt represents a key source of funding. There is a real risk of a dry-up of this funding category to the advantage of other secured instruments, such as covered bonds, which would possibly be excluded from the scope of the proposal. Recent trends in European bond markets, clearly reacting to the possible introduction of bail-in measures in the EU, show that there has been a strong increase in covered bond markets activity, with a proportional decrease in senior debt issuance. Investors are thus seemingly increasing their appetite for instruments which would possibly be not subject to bail-in, to the effective detriment of senior debt categories.

In addition, the exclusion of debt classes such as derivatives from the scope of the new framework would represent a comparative advantage to institutional counterparties such as investment banks. Such a privilege would be difficult to justify and risks provoking distortions to the level playing field. This obviously points in the direction of a very dangerous market distortion and might cause concerns among current senior bondholders.

A statutory debt write-down, without any possible recovery or write-up, might expose senior debt holders to a worst downside than compared to equity holders (whose investment could recover its value over time), in clear contrast with the traditional ranking of claims. Moreover, nobody can realistically estimate how big the risk premium could be in the event of a statutory write-down. However designed, this will have an impact on the cost of funding for banks and therefore put pressure for an upward re-pricing of the lending portfolio.

Furthermore, it is essential to provide for compensation mechanisms in the event that authorities impose greater-than-needed haircuts to bailed-in debt holders. In this respect, we caution against the FSB proposal to issue warrants in order to compensate holders of bailed-in claims from undue losses as this would interfere with the duties and the decision-making of the shareholders' assembly, thus possibly impinging on legal certainty. We therefore call for the FSB to include a possibility of write-up for the bailed-in claims, so as to minimise interferences with national company law while ensuring compensation for bailed-in claims holders. In addition, this approach could ensure that bondholders would not be more penalized than shareholders.

Interplay effects with other regulatory proposals, such as the new liquidity requirements under Basel III, should also be carefully considered. The introduction of a Net Stable Funding Ratio (NSFR) as currently envisaged would require banks to invest in long-term, stable sources of funding in order to withstand financial distress on a year-time horizon. It thus seems contradictory to encourage, on the one hand, longer-term funding while penalising, on the other, financing through senior unsecured debt.

As far as the Italian market is concerned, it should be borne in mind that senior unsecured debt represents a crucial source of investment for retail clients. To give an example, during the last 10 years, issuance of bonds has significantly increased in Italy, from 16.5% of total liabilities at the end of 1999 to 21% in 2009 and 2010 (for a total amount of Euro 811 bn), whilst the percentage of bonds on total liabilities was equal to 16% and has been steady over the same period in the Euro area[1]. At the end of 2010, certificates of deposits (CDs) in Italy amounted to Euro 25 bn (down by 29% compared with 2009). Such amount represented 2.7% of customer deposits[2]. Hence, there is ground to believe that a bail-in of unsecured senior debt would ultimately have a negative impact on depositors and taxpayers, in clear contradiction with the very rationale of the proposal, which our Group strongly supports.

Furthermore, senior bank bonds are held by pension funds, insurers and other asset management firms which are usually attracted by the safety and reliability of these instruments. In addition to this and unlike other countries, in Italy senior unsecured bonds are mostly held by private investors and

[1] Data is from the Intesa Sanpaolo Research Department.
[2] Data is from the Intesa Sanpaolo Research Department.

SMEs. In case of a bail-in, these categories would be particularly exposed to losses and risk of contagion as the presence of both a strong retail market coupled with a proxy of retail (such as investment funds, pension funds and insurance companies) risks ultimately burdening on taxpayers' savings. This would in turn increase the risk of runs, as senior unsecured creditors might have incentives to exit their debt investments ahead of any triggering of a bail-in on unsecured debt.

As regards contractual options for debt write-down, compared to a statutory approach, a targeted approach would have a number of objective advantages as the fixed volume of 'bail-inable' debt could eventually be made up of institutional bonds only, excluding retail bonds from this provision. The characteristics of these new instruments as well as triggers and conditions for conversion would be contractually defined. Investors would be able to express their preferences more precisely and be compensated proportionally to the risk undertaken. However, there are still a number of fundamental points that need to be clarified. These mainly relate to incentives, size of issuance, uncertainty about funding costs as well as rating and marketability of the new instruments. It is indeed difficult to quantify with certainty the cost of implementing such tools in the absence of more precise information and precedent market practice. As a preliminary consideration, it can be argued that impact costs might be generally higher, for instance due to the possible limited pool of investors, as only a segment of the traditional fixed-income investors might be able to subscribe these capital instruments. Moreover, combining contractual and statutory bail-in might produce market distortions.

The proposal put forward by the FSB prescribing SIFIs to hold a minimum amount of debt subject to a potential bail-in might be sensitive, provided that the debt categories are clearly identified in advance by law. However, it seems difficult to quantify in advance a fixed amount, as this would not only be determined by internal factors such as the capital structure and fundamentals of a company but also on significant external variables related to the magnitude of the crisis.

IV. Cross-border cooperation

Home-host relationships play a crucial role in contributing to a level playing field when it comes to cross border cooperation. In this sense, we welcome the FSB proposal, which establishes further steps to enhance effective cooperation, envisaging adequate processes and procedures. Furthermore, we are fully supportive of further convergence and harmonisation of resolution regimes. This is particularly important at the EU level, and we also appreciate the steps taken so far by EU regulators in this respect.

Based on our experience as a cross-border group, we believe that the establishment of supervisory colleges has proved particularly successful in the EU. The institutionalisation of a dialogue between home and host supervisors has avoided duplication of information in reporting activity while considerably contributing to greater transparency in the information provided. Colleges of supervisors have also proved effective in ensuring that common decisions are quickly taken.

However, the role and responsibilities of home and host authorities should be further clarified. In this respect, binding rules should be put in place when an agreement is not possible among regulators. We think that the final decision must be assigned to the home regulator, as particular consideration should be given to the consolidated supervision.

Consistently with what provided by the EU law and in recognition of the centrality of supervision at consolidated level, in the event of disagreements, priority must be assigned to home regulators. In this respect, we welcome the FSB acknowledgment of the EU rules under the Winding up and Reorganisation Directives, which give home authorities binding resolution powers towards other jurisdictions. Consideration should also be given to cases where branches are established outside of the EU, where such provisions would not be applicable. In this respect, there is a need to further clarify home and host authorities' responsibilities. This is a crucial step to avoid ring-fencing and regulatory arbitrage. It is also essential that group resolution authorities coordinate the work of resolution colleges and determine their composition.

Intesa Sanpaolo welcomes the idea to develop cross-border cooperation agreements both at multilateral and bilateral level. These should be legally binding and must clearly establish respective competences between home and host authorities in the event of resolution. It is important that they assign primary responsibility for coordinating cross-border crisis management and resolution measures to home authorities. In order to ensure full effectiveness and enforcement, the agreements must be signed by all relevant host authorities where a cross-border financial group has subsidiaries and branches – both at the EU and extra-EU level.

It is desirable that cross-border cooperation arrangements be fully integrated within the Pillar II framework. A holistic approach is necessary to ensure wide-ranging coordination between resolution measures and present and perspective capital adequacy of cross border financial groups. Efforts in ensuring a level playing field and regulatory harmonisation should continue being pursued.

V. Resolvability Assessments

We welcome the proposal to introduce resolvability assessments as a complementary tool to other preventative measures. Resolvability assessments would foster credibility of recovery and resolution plans (RRPs), making it easier for both authorities and firms to identify the most appropriate measures to prevent systemic crises. It is important that SIFIs be subject to individual evaluations, with the possibility to introduce better-tailored and specific measures. However, the proposal remains vague regarding the definition of criteria to be used in the resolution assessments as well as the necessary legal reforms to be implemented across jurisdictions. In our view, both aspects need further in-depth analysis.

The criteria establishing what is “a credible and feasible resolution” need to be clearly defined and equally applied by all jurisdictions. It is also necessary to strike a balance when considering endogenous and exogenous factors affecting resolution. The weight of exogenous factors when assessing resolution feasibility should be carefully pondered, as these should not by any means penalise the structure, operations and management of a firm, especially in the absence of evident endogenous obstacles to resolution.

The absence of cross-jurisdictional harmonisation in the definition of tools and of coordination in their use, risks nullifying the validity of resolution assessments and appears as a main stumbling block. Authorities in some jurisdictions might not have the powers to implement the necessary changes. This risks disproportionately penalising SIFIs, since their capacity to take any measure in response to assessments might be out of their own control. Furthermore, the powers of home and host authorities to request implementation of any measure in response to the outcome of the assessments should be further clarified. This is all the more relevant in the absence of legal convergence across jurisdictions. We thus call for the FSB to request G20 governments to take concrete actions towards further harmonisation of national legal frameworks.

VI. Recovery and Resolution Plans

We generally support the elements identified by the paper for the development of RRPs. We would like to stress in this context the importance of RRPs in contributing to better supervision and prevention and, more importantly, in leading to an easier assessment of whether one institution’s structure is aligned with its own business-model.

The boundary between recovery and resolution measures be clearly identified and the respective triggers properly determined. In the absence of defined standards, recovery measures might be too far reaching and go beyond the objective of restoring an institution as a going concern. We recommend, in this respect, that recovery planning be fully integrated in the contest of Pillar II measures, in order to better identify eventual necessary capital and liquidity adjustments for the institutions involved.

We do believe however, that a number of safeguards should be implemented. RRPs should be proportionate to the complexity of the firm, flexible and regularly updated to adapt to unforeseeable conditions. Recovery measures should not excessively penalise any business segment in particular and should be proportionate to all business activities within the institution. In this regard, we support the use of both firm-specific and systemic stress-tests in order to identify the necessary measures. We caution however, against possible risks associated with the desire, on the part of the authorities, to achieve “ready-pack” solutions ex ante or to use recovery plans to ring-fence jurisdictions. At the same time, as regards resolution plans, intrusiveness of the authorities in the operational structure and functioning of an institution should be limited. Authorities should only use powers to require structural changes to the business model or legal structure of a SIFI as a last recourse action, and in case that resolution is inevitable. Due to the sensitivity of the information included in RRPs, we also suggest the development of stringent confidentiality rules and limits regarding the access to the relevant information.

We have some reservations on the role of the authorities in drafting resolution plans. In our view, these should be prepared at consolidated level by institutions themselves, which we believe are best suited to draw up the necessary resolution measures, having a better insight on the structures and interdependencies within a group, and thus being able to develop more realistic plans. It is clear nonetheless, that authorities should supervise the development of plans and assess their validity as well as their feasibility.

We fear that leaving the possibility to host authorities to maintain their own RRPs (whenever they deem the group resolution plan as insufficient), as suggested in the consultative document, could encourage ring-fencing and possibly prevent cross-border cooperation. In order to ensure maximum consistency, RRPs should be coordinated at group-level and assessed by consolidating supervisors. Resolution colleges or CMGs should assess recovery plans in parallel with consolidating supervisors in order to prevent possible frictions. The latter should also be responsible for taking formal decisions within colleges or CMG in case of disagreement. It is thus fundamental to further clarify relationships between the home and host authority in the development, maintenance and implementation of RRPs.

VII. Improving resolvability and timelines for implementation of G-SIFI related recommendations

As argued under other sections of this document, we regard the lack of harmonisation in insolvency procedures and legal frameworks at cross-jurisdictional level as the main stumbling bock to the effective resolution of SIFIs. The implication of the new measures and the necessity to maintain a level playing field should be duly taken into account. In this respect, while we agree with the proposed timeline for the implementation of more technical aspects of the new framework, we urge the FSB to provide a timeframe for the necessary legal and regulatory reforms to be implemented, as these are *sine qua non* conditions for the implementation of the framework itself.

As regards the adequacy and development of Management Information Systems (MIS), it should be kept in mind that providing the relevant information and elaborating the necessary requests at consolidated level will be costly, and that it will require firms to make considerable investments in IT services. There will also be a number of ongoing expenses related to the cost of updating the databases, which of course, would also depend on the frequency of the information requested.

We agree with the FSB that unnecessary complexity in group-structures should be reduced. However, regarding intra-group transactions and guarantees, we would like to underline that these can be a source of stability and strength for cross-border institutions. We fear that the FSB' provisions in this respect might be at odds with forthcoming EU proposals on this subject, whereby EU regulators are currently working on a framework to establish intra-group financial support, which would serve to specify the circumstances and conditions under which assets may be transferred between entities. We strongly support the establishment of a regime where group entities in a cross-border group are allowed to cooperate, in particular through financial support and a more centralised liquidity management. In this regard, we agree that intra-group transactions should be carried out at arm's length and that each group entity should be able to benefit from the assistance. As regards the specification of a timeline for the reconstitution of all separate legs of a transaction, we believe that a timeframe of at least 72 hours would be necessary to recover all positions.

VIII. Discussion note on conditions for a temporary stay on early termination rights

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

As a general remark, imposing a stay on the provisions of existing documentation through statutory powers would reduce legal certainty and validity of the contractual framework in force between the parties.

The FSB proposal, as formulated, would not impact cases linked to failure to pay. However, it would surely have an impact in the determination of whether an event of default has effectively taken place and when it has taken place, i.e. the exact date when a resolution to wind-up, officially manage or liquidate a SIFI has been implemented. The determination of a precise date is very important because, *inter alia*, it is strictly linked to the close-out procedures concerning derivatives master agreements, where certainty on the time reference to ask for market quotations - which has to be as close to the above mentioned event as possible, in order to preserve the fairness of the calculation - is paramount.

As regards the length of the procedure, we believe in principle that the longer the stay, the higher the probability that markets would move away from the levels immediately preceding the event, thus making it more difficult to maintain the alignment of the calculations leading to the determination of the claim with the marking-to-the-market, and increasing the chances of possible disputes among parties. By contrast, the shorter the stay, the lesser the possibility to implement appropriate restructuring actions.

In addition, introducing further exemptions proposing that the stay *"would not extend to all payments and delivery obligations"* could create even more uncertainty.

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

Theoretically, since the proposed stay would be linked to the initiation of formal resolution proceedings, we maintain that these should indeed be the triggering event. In order to mitigate the uncertainty, the trigger should be defined in advance, as clearly and as objectively as possible. Moreover, other important mitigating factors would be that a) the starting point of the stay should preferably be announced publicly and formally by the resolution authorities; b) the stay - if any - should not be discretional.

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

The suspension should be limited to early termination provisions linked to certain aspects of "bankruptcy" in the event of default, specifically, to those concerning a resolution to wind-up, officially manage or liquidate the affected party.

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

As already highlighted, on the one hand, a 24-48 hours suspension seems to be too short of a delay for allowing resolution authorities to carry out complex actions such as transferring critical operations/portfolios to a bridge bank or implementing a bail-in. On the other, longer stay periods would further increase uncertainty concerning, for instance, the need/timing for unaffected parties to re-hedge their positions.

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

The scope of the temporary stay should be aimed at avoiding a disorderly evolution of the crisis, buying time to identify possible solutions in order to mitigate the disruption effects that usually unfold in the wake of financial distress.

We consider that Central Banks, CCPs as well as payment and securities settlement systems falling within the scope of the EU Settlement Finality Directive should be excluded from the scope of such suspension clauses.

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

The objectives of the proposal can be supported. However, implementation of early termination rights should not impinge on legal certainty, preserving the validity of netting agreements. Transfers and moratoria should not jeopardise the reliability of such arrangements given their key function in the mitigation of risk and crisis management. There is the risk that both a moratorium and transfer might virtually render a netting agreement null and void (both from a domestic and a cross-border perspective).

In addition, a number of safeguards would be needed as regards suspension of early termination rights for cross-border contracts. If a regulatory authority intends to transfer a netting agreement including its financial contracts to a solvent entity and/or impose a moratorium on netting, it is likely that some rights and liabilities and covered assets under the financial contracts and/or the related credit support/collateral agreements, will be governed by foreign laws that would not necessarily recognise such a transfer/moratorium. In this respect, a safeguard for the parties might be to include a deed of assignment/novation in their financial contracts so that the execution of the transfer would be enforceable in accordance with the foreign laws governing rights and liabilities linked to the financial contracts and to the related parties.

It should be stressed that the home jurisdiction may have no right to transfer such financial contracts, in accordance with the applicable foreign laws/jurisdictions of the solvent entity. As a consequence, not only the laws and jurisdiction of the solvent party might not allow such a stay (see e.g. Article 7(1) (b) of Directive 2002/47/EC), but this might also affect rights of third parties that are not directly linked to the troubled entity. Third parties could take action against such a transfer in order not to recognize it. Such a situation would produce legal uncertainty, affecting the troubled/failing entity, the bridge institution and also third parties. In this case, conflict of law/legislation/private international law rules could be applicable and invoked by the latter.

Other safeguards could focus on ensuring that these resolution measures would be compliant with the applicable foreign laws. Such a solution would require the troubled entity and the bridge bank to look, *inter alia*, for permission from the relevant authority and to take all of the necessary steps to make the transfer enforceable and effective, in accordance with the foreign law.

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

The temporary suspension of payment or delivery obligations should reflect a "top-down approach". The emphasis should be on promoting convergence and among different legal frameworks for close-out netting and on further harmonization, especially in the case of EU countries. Netting provisions should have a clear-cut legal basis and should be tailored to the specific purposes of the resolution framework.

This is particularly relevant in the case of the EU, given that the existing legislation already provides for a high degree of legal certainty when it comes to close-out netting rights. Indeed, enforceability of close-out netting rights is already thoroughly disciplined in the CRD (Part 7, Annex III of Directive 2006/48 EC). Moreover, the BCBS has made a number of recommendations concerning national-level implementation of cross-border resolution measures. These include the design and set-up of national frameworks where authorities have powers and tools to restructure or resolve all types of financial institutions, thereby including the power to temporarily delay the immediate operation of contractual termination clauses so as to allow, for instance, transfers of certain financial market contracts to another sound financial institution. It is therefore important that the suggested framework does not overlap with existing provisions, thereby impinging on legal certainty.

In accordance with our preference for maximum harmonisation and the necessity of a top-down approach, we caution against regulatory overlap and legal uncertainty potentially resulting from the proposed framework. Given the amount of legislation already disciplining close-out netting rights, at least in the EU, as well as current separate initiatives on the subject, we call for regulators to adopt a consistent and unitary approach through specific and tailored legislative proposals.

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

We do not see any additional alternative provision or consideration to be added, also in light of the fact that mandatory provisions of foreign law could prevail over such contractual provisions.

The possibility of impairment of one troubled entity’s *par condicio creditorum* following a partial transfer to a bridge bank should also be considered.

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

The only solution would be to equally apply mandatory regulation upholding the stay to all jurisdictions. Hence, it is fundamental that the relevant rules are as harmonised as possible across different jurisdictions.

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