*European Association of Co-operative Banks*
*Groupement Européen des Banques Coopératives*
*Europäische Vereinigung der Genossenschaftsbanken*

**Financial Stability Board (FSB)**
**c/o BCBS**
**Centralbahnplatz 2**
**CH-4002 Basel**

fsb@bis.org

Brussels, 2 September 2011

HG/VH/WSC/B2/11-117

**Consultative Document 'Effective Resolution of Systemically Important Financial Institutions. Recommendations and Timelines'**

Ladies, Gentlemen,

The European Association of Co-operative Banks (EACB) welcomes the opportunity to comment on the Financial Stability Board's Consultative Document on *"Effective Resolution of Systemically Important Financial Institutions. Recommendations and Timelines"*.

Please find our general, specific remarks and answers to the questions on the following pages.

Please do not hesitate to contact us, in case you should have any questions.

We will remain at your disposal,

Yours sincerely,

Hervé Guider
General Manager

Volker Heegemann
Head of Legal Department

## GENERAL COMMENTS

### Introduction

The members of the EACB take note of the FSB's package of proposed policy measures to improve the capacity of authorities to resolve systematically important financial institutions (SIFIs). We acknowledge that the aim of recommendations to the G20 for a global framework for resolution of G-SIFIs should be to necessity to address moral hazard, to avoid future systemic disruption of the financial system and avoid exposing the tax payer to the risk of loss.

- ***Effective Resolution Regime and definition of G-SIFIs in context***

We understand that there is a need to accelerate reforms for domestic resolution regimes and tools in addition to the need to accelerate the establishment of a global resolution framework for G-SIFIs for cross-border enforcement of resolution actions. However, this necessity should be seen in a wider context. The Basel Committee has designed a coherent package of reforms of prudential rules applicable to financial institutions. These aim at preventing or at least mitigating future ones and better managing them if they occur[1]. A future resolution regime is obviously only a part of this overall package. Therefore, it should be seen in the context of the prudential measures such as Basel III to prevent a future crisis. The establishment of a national resolution regime, let alone a global cross-border regime is thus not an isolated exercise. It is necessary avoid overregulation and going at a too great pace which may result in creating a situation of *regulatory impasse*.

It should furthermore be mentioned that despite the fact that the FSB's recommendation for a resolution regime is specifically focus on financial institution of systemic relevance, this distinction between systemic and non-systemic financial institutions is not necessarily made by national jurisdictions. In most cases, as is the case at EU level, the FSB recommendations translated into EU and national law apply to all financial institutions regardless of their systemic importance.

In addition, the problem is exactly what is considered a SIFI, global SIFI. Definition of G-SIFI: financial institutions that could be systematically significant or critical in particular circumstances any ailing financial institution that can cause contagion and have disruptive effects on financial markets therefore should be subject to this type of resolution regime. The assessment methodology for determining what constitutes a global systemically important financial institution/bank as set out in the BCBS consultative document of 19 July is of a relative character. It divides an absolute 'amount' of systemic importance to the banks in the calculations used rather than considering systemic importance as absolute type of characteristic.

Moreover, when using the indicators proposed in the BCBS methodology for determining whether a financial institution is of systemic importance has to be seen in the relevant context, or the frame of reference. The market share of a financial institution at a global market level will maybe be minimal but may be significant at a global regional/local market level due to its concentration in this area.

[1] European Commission: Regulating financial services for sustainable growth - a progress report

- ***Specific Features of cooperative banks***

First of all, we would like to remind the FSB that cooperative banks were not at the root of the crisis and have shown to be more resilient during the crisis[2].

We appreciate that it is mentioned on page 11 that the crisis response as regards resolution should be tailored to the specific nature of the firm's activities and to the sectoral differences. If put into practice, these recommendations will lead to far-reaching changes to the way in which banks operate on a day to day basis. Therefore, we consider that any recommendations can only be made taking into account the specifcities of the cooperative banking model into account.

The cooperative business model has developed in different ways in the different countries. Today, the co-operative form of enterprise is common and is recognized in many jurisdictions. Co-operative banks are to promote members' interest by providing services to them. They have to be profitable, but they do not have the aim to generate maximum profit. Co-operative banks serve their members on a long-term and intergenerational basis. As co-operative banks do not prioritize the maximization of profits, they do not attract large investors, but individuals who invest a limited amount of money. Moreover, co-operative banks are democratically controlled by their members, and typically each member has one vote regardless of the amount of capital he holds. In fact, it has to be underlined that co-operative banks in the different countries, despite numerous differences, share some common and defining features.

- *Promotion of Members' Economic Interest*

The statutory aim of cooperative banks is explicitly defined as promoting economic interest of its members rather than maximizing profit. Thus, the primary mission of co-operative banks is to provide services to their members/customers who are typically, individuals, household and SMEs, i.e. retail banking. This leads to a more prudent approach to banking, to a focus on retail banking and finally to a longer term perspective to business. The majority of cooperative banks are small to medium-sized banks that operate mainly at the local and regional level.

Member ownership entails that ownership in a cooperative is thus different from being a shareholder in a joint stock company. It implies that cooperative banks are not capital-market orientated. The expectations of the members of cooperative banks are therefore different. They do not expect high returns but rather the provision of services is in the focus.

- *Cooperative solidarity schemes*

A key element of most European co-operative banks is that they have established solidarity schemes a long time ago. The aim of these schemes is to prevent the failure of any individual bank belonging to the network. The aspects of collaboration and mutual support are deeply rooted in the co-operative philosophy. Most of these support schemes have been and still are in operation. As these systems do prevention, early intervention and use resolution tools, it seems desirable to acknowledge their role in the crisis management framework.

---

[2] International Labour Organisation, 2009. Resilience of Cooperative Business Model in Times of Crisis, p. 35. Online available at: http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_108416.pdf.

- *Institutional Protections Schemes*

For decades, and in particular during the recent financial turmoil, institutional protection schemes have demonstrated their effectiveness, proven their stability and helped to avoid bank failures. While there may be differences regarding the details of these institutional protection schemes, the following elements are common to non-consolidated banking groups:

- they protect credit institutions and ensure their liquidity and solvency;
- they are based on private arrangements; and
- they are financed by private means solely.

There are also co-operative protection systems, which do not comply with the these requirements. Nevertheless, in case of troubled co-operatives; *de facto* these have also been ensuring the liquidity and the repayment of all liabilities of their members.

- *Mutual guarantee schemes*

Co-operative banking groups that are consolidated also have mutual guarantee schemes in place. These ensure that there are no legal or practical impediments to the prompt transfer of own funds and liquidity within the Group to ensure that the obligations to creditors of the central body and its affiliates can be fulfilled. The Group as a whole must be able to grant the support necessary under its applicable arrangements from funds readily available. However, the details of these arrangements depend on the type of guarantee scheme.

In addition, in accordance with the applicable guarantee system, applicable law and/or the Articles of Association[3], ensure that no liabilities or commitments are left unresolved when one of the affiliated institutions exits the Group or is wind down. This includes any arrangements providing that the entire assets of the central body and the affiliated institutions as a whole are available for the payments of obligations versus (the totality of) creditors of such central body and affiliated institutions as a whole'.

Since their creation, co-operative banking groups have undergone their own specific developments in the different member states, along the way of national economies. We consider that it is necessary that these protection systems and guarantee systems are respected in order to maintain the status quo for cooperative banks.

- *Common Equity Instruments of co-operative banks*

Due to these particularities, Common Equity Instruments of co-operative banks dispose of many features that make them inappropriate for debt conversion as is required following the BCBS proposal to ensure the loss absorbency of regulatory capital at the point of non-viability of 19 August[4] and the Press Release of the Basel Committee of 13 January[5]. The Basel document provides for a definition of "bail in": the conversion of debt

[3] Articles of Association' means all the documents and instruments governing the affiliation's arrangements
[4] http://www.bis.org/publ/bcbs174.pdf
[5] http://www.bis.org/press/p110113.pdf

into capital or write down. Today, however conversion into equity of assets does not exist in a cooperative bank.

- In many cooperative banks the number of shares that a member can buy is limited. But even where such limits do not formally exist, it is not desirable to have major shareholders.
- In some banks only natural persons can be members and acquire shares
- In most cases, co-operative shares are not transferable, but redeemed by the co-operative bank. Where co-operative shares are transferable, there is often no market for them and they can only be transferred at nominal value.
- Membership in a co-operative often implies that members are subject for a call for additional capital under specific circumstances, what could generate problems for those who did not intend to become shareholders.
- In many jurisdictions the issue of co-operative shares is only possible against cash payment or under conditions against contribution in kind. This could create problems regarding debt write down. Moreover, cooperatives may redeem shares, but are often prevented by law from subscribing their own shares, purchasing or accepting them as security.
- Co-operative mutual principles imply in most cases that members buy the shares at nominal value when entering the co-operative and that they are redeemed at nominal value when they give up membership. Of course, if there are no retained earnings and losses occur, capital could be written down and the redeemed amount would correspond to a (written-down) book value.
- In some co-operative banks there is even a cap on dividends.
- Finally, in some co-operative banks, in particular those that prepare their accounts on the basis of IFRS, the co-operative bank has the unconditional right to refuse the redemption of shares

By conclusion, debt conversion would create problems regarding the governance of most co-operative banks. This would not only require a modification of our cooperative structure, our cooperative identity but it would also be in complete opposition with the cooperative bank model, while cooperative banks have shown very good resilience in the face of the financial crisis. Moreover, we doubt that it would lead to satisfactory results from a prudential perspective.

- *Non-listed Banks*

Many central banks or banking holding companies of co-operative banks are non listed joint stock or private limited companies. The purchase or sale of shares of non-listed companies is difficult as there is no relevant market for these shares. The sale of limited quantities of shares would create difficulties. In many co-operative banking groups the central bank is typically owned by local co-operative banks. They also define the business policy of that central bank, which is typically focussed on serving the needs of local banks.

*Consequently*, we ask the FSB to take the above mentioned specificities of the cooperative banking sector into account, when providing the overall recommendations to address the moral hazard posed by SIFIs to the G20 leaders in Cannes on 3-4 November 2011. This can be achieved either by following the principle of proportionality or through acknowledging specifically the features of cooperative banks (e.g. regarding the

cooperative's well established or operating measures for intra-group financial support systems).

**SPECIFIC COMMENTS**

## Introduction

We acknowledge that there is a need to establish an international framework for effective resolution of SIFIs, in order to ensure a level playing field and prevent that any national authorities can pose an obstacle.

We also agree that general corporate liquidation procedures are not suitable for major financial institutions, their activities and their balance sheets.

However, any recommendations should allow taking into account, as much as possible, existing regulatory frameworks at national level i.e. national company law codes, and cooperative laws and build up on them. The existing powers to liquidate financial firms are often an integral part of and subject to general company law requirements e.g. requirement of a court order to start liquidation, which cannot be easily dismissed. It requires a legal overhaul to change these requirements, which takes time.

Any recommendations should be based on allowing for the most appropriate application in accordance with laws, codes, regulations and other relevant social and economic factors of individual jurisdictions[6].As mentioned, we concur that cross border resolution is impeded by major differences in national resolution regimes, absence of mutual recognition to give effect to resolution measures and lack of planning for handling stress and resolution. It is thus necessary to require jurisdictions to enter into cross-border arrangements that specifically deal with cooperation and coordination in managing and resolving a financial firm. Current existing cooperation agreements are bilateral or multilateral cooperation agreements, non-binding and of general application[7]. We agree that the new cooperation agreements should be binding, institution specific and provide for legal certainty in a time of crisis.

While the paper's title is about the effective resolution of SIFIs, there are many elements that give the impression that the toolbox is not only designed for resolution, but also for recovery. We do not think that it would be appropriate to authorize recovery measures under the suggested regime, since it would leading to wiping out the limits between supervision and management. It should also be emphasized that the resolution measures cannot be imposed before the recovery plan has been completed by the management of the institution.

## Definition of G-SIFIs and level of application

The assessment methodology for determining what constitutes a global systemically important financial institution/bank is set out in the BCBS consultative document of 19 July is of a relative character. It divides an absolute 'amount' of systemic importance to the banks in the calculations used rather than considering systemic importance as absolute type of characteristic. It will be important to maintain the same "SIFI" definition throughout all the texts that deal with those institutions in order to ensure a harmonized treatment and avoid confusion. Therefore, the definition of a "SIFI" should only be discussed in the context of the aforementioned consultation.

[6] Italian Cooperative Banks' Statute on Deposit Guarantee Schemes and By Laws on Implementing Rules for Additional Support Interventions Article 2.

[7] BCBS (2010) Report and recommendations of the cross-border Bank Resolution Group. Basel: http://www.bis.org/publ/bcbs169.pdf , p.4.

While the FSB's recommendation for a resolution regime is specifically focussed on financial institution of systemic relevance, this distinction between systemic and non-systemic financial institutions may not necessarily made in all national jurisdictions, when implementing them. Many elements that will be translated into EU and national law will apply to financial institutions regardless of their systemic importance[8]. Moreover, it may in many cases be impossible to apply certain measures to banks of a global dimension only. Therefore, it will be very important to point out that measures taken by the national authorities should be proportionate depending on the legal form, size and nature of a company.

The need for the application of resolution tools and powers will most likely emanate from the consequences of banks' activities such investment activities and wholesale banking. investment firms. Therefore, any future regime should be designed with a focus on those activities and less on retail banking.

[8] BCBS (2010) Report and recommendations of the cross-border Bank Resolution Group. Basel: http://www.bis.org/publ/bcbs169.pdf , p.12.

## I. Effective resolution regimes (pp. 8-11 +Annex 1, pp. 23 -34)

**Q1**. Comment is invited on whether **Annex 1: Key Attributes of Effective Resolution Regimes** appropriately covers the attributes that all jurisdictions' resolution regimes and the tools available under those regimes should have.

We acknowledge that the main aim must be to maintain the financial stability and create a right balance in order to avoid an environment that enhances moral hazard. Maintaining the financial stability should also be the guiding principle for the resolution authority.

Generally, it should be noted that the distinction between resolution, liquidation and insolvency is not clear. The discussion paper focuses on the improved resolution via a so-called designated administrative authority, while it remains unclear whether the financial institution is going to be liquidated in the end, or only the banking activities are terminated and the legal entity is going to further exist with doing non-banking business. In any event, in many jurisdictions the resolution is followed by liquidation.

Referring to resolution powers, the competences listed in Annex I, Point 4 typically are vested at the administrator in the course of insolvency proceedings (requiring insolvency of the financial institution). It seems necessary that

- Resolution authorities can call a resolution situation and exercise the resolution power only at the point of non-viability of a bank (failing or likely to fail);
- The decision to consider an institution as non-viable should depend on the resolution authority. It should explain its judgment on with regard to a set of triggers and based on criteria available.
- It should be ensured that resolution is the "last resort" alternative;
- The options open for resolution as presented (page 25-26 in Annex I) should not be sequential (cf. Point 4.2). Instead, all the options should be available for the resolution authority to decide upon on a discretionary basis according to the characteristics of the bank. It is not the affected bank that should have the possibility to influence the decision of the authority. If anyone, it should be the creditors of the affected bank. The resolution authority should also be free to use resolution tools individually or in combination with others.

Ad Point 6.2. There is only a limited need that the administrative authority should make provisions to recover any losses incurred form unsecured creditors, given they can receive compensation via the deposit guarantee schemes. Further in decentralised banking sectors there exist contractual ex ante mechanisms preventing the insolvency of a member bank at large.

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

In addition, the "Attributes" draw up a very intrusive system with far reaching powers of the resolution authorities. Such a degree seems only justified when vital interest of societies and nations are at stake. For this reason we shall strongly oppose any effort for a wide roll out of such concept that would imply its application to a majority of banks.
The powers that are considered rather intrusive are especially:

- Ad Point 4.1 (vii) If a resolution authority has identified certain impediments and requires a bank to draw up a service level agreement in order for a third party to take over critical parts of the business, the bank that may have to take over certain parts of the business that may be affected in a certain way and also get into difficulties.

- Ad Point 2.6. The protection of "*resolution authorities and its staff ...against law suits for actions taken and/or omissions made while discharging their duties in the exercise of resolution powers in good faith, including actions in support of foreign resolution proceedings*" would go to far. While we agree that judicial review should be someway restricted, since it should not exclude rapid action in the case of tumbling SIFIs, we think that the limits in question should be appropriate.

  Thus, it could be considered to exclude any court action prior to the intervention of resolution authorities. It is therefore important that confidentiality is required from the authority. Any plan being prepared by the authority in advance, it must be discussed with the institution to optimize it.

  When, however, it comes to a legal review of measures already taken, we believe that a far more differentiated approach is necessary. Courts should not be restricted from reversing any measures that have definitely turned out to be wrong, inefficient and useless. Moreover "good faith" as a very subjective element is not the right limit to a review of the action of the authority or its collaborators. The authority and its collaborators should not be protected in cases of negligence, especially gross negligence, intentional misbehavior and any excess of their resolution rules.

Furthermore, we would like to recall that the need for resolution tools at the global level emanates from the risk of especially investment banking and of wholesale banking activities. Therefore, any future regime should be designed with regard to these types of activities rather than on retail banking.

Finally, we would consider it appropriate to have some indications regarding the interference of a resolution scheme with a deposit guarantee scheme.

**Q2**. Is the overarching framework provided by **Annex 1: Key Attributes of Effective Resolution** specific enough, yet flexible enough to cover the differing circumstances of different types of jurisdictions and financial institutions?

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

However, there should also be limits regarding flexibility: while the triggers for launching resolution should be sufficiently flexible on one side to reflect the national legal and factual specifics as mentioned above, they should set out the precise, and restrictive conditions regarding to the circumstances under which resolution tools and powers may be activated and are really justified and should be considered only as tools for decision-making authority by resolution.

Despite all flexibility that may be required the process selling of assets has to be open, transparent, non-discriminatory, free from conflict of interest and without disadvantages for acquirer. However, if this tool is used in a case a bank is likely to fail, it does not seem necessary to make such sale or the rights, assets and liabilities public as this could have negative effects on the business of the bank.

Highest standards regarding the authorities practices and transparency are also required when it comes to the different elements of the bail-in mechanism: While the impact of write-off or a debt conversion on the balance sheet are very similar, the impact for the holder of the instrument is highly different: especially regarding these choices there has to be a clear principle that creditors rights have to be preserved to the maximum possible and that any deviation from that principle has to be well justified.

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

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

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

Ad Point 12.1. Confidentiality issues should adequately be safeguarded. An unrestricted right to exchange information of all kind might be difficult to abide where there are sensitive materials at stake e.g. in context of M&As. Accordingly the sharing and spreading of information should be restricted and documented.
Finally, it should be made clear that the regime has to result in a resolution, which implies a restructuring if not orderly liquidation of the company. A resolution scheme must not be abused as a tool of "supervision with other means", that is used to discipline an institution.

## II. **Bail-in powers** (pp. 11 – 13 +Annex 2 pp. 35-40)

**Q3**. Are the elements identified in **Annex 2: Bail-in within Resolution: Elements for inclusion in the Key Attributes** sufficiently specific to ensure that a bail-in regime is comprehensive, transparent and effective, while sufficiently general to be adaptable to the specific needs and legal frameworks of different jurisdictions?

The Committee should clarify the difference between the statutory bail in the context of the resolution of SIFIs (an overall legal right to demand conversion/write down for all eligible liabilities) and the conversion mechanism for Lower Tier I and Tier 2 instruments as imposed by the Basel Committee in its press release on January 13th 2011 and any contractual bail-in arranged by the institutions themselves.

With regard to approach taken to determine the amount of bail in debt, the members of the EACB consider it necessary to provide a great degree of clarity and legal certainty to creditors, despite of the fact that it is not possible to calibrate ex ante the scale of the potential need for fresh capital in a crisis situation. It must be clear to all creditors that there is a potential danger that their debt may be converted or written down, since the institution in question is subject to a SIFI resolution scheme.

In addition, it is important that those creditors, who provide indispensable operations, are affected last when the resolution is triggered. Otherwise the bank is unable to function. Thus it is necessary to assess closely the inevitable exceptions to conversion (e.g. ISDA contract providers are needed to ensure continuity of operations).

A key aspect in this respect is also the question of whether the bail-inable capital will be finally written-off or converted into capital. The implications for the creditors concerned may be fairly different. Accordingly, there should be clear that a write-off should only be second choice and that conversion should always be the first option.

Common Equity Instruments of co-operative banks dispose of many features that make them inappropriate for debt conversion. Today, conversion of equity into shares does not exist in a cooperative bank. Therefore, the debt conversion is inappropriate, when the aim is to preserve the bank and its character.

**Q4**. Is it desirable that the scope of liabilities covered by statutory bail-in powers is as broad as possible, and that this scope is largely similarly defined across countries?

Yes. The scope of liabilities covered by statutory bail-in powers should be as broad as possible and covers all kinds of existing liabilities, especially towards other financial institutions. It is of paramount importance to have harmonized rules at the international level regarding bail-in and deposit guarantee schemes to avoid distortions of competition.

**Q5**. What classes of debt or liabilities should be within the scope of statutory bail-in powers?

It would make sense to extend the scope of liabilities covered by statutory bail in order to reduce the impact on tax payers as much as possible. This being said, we nevertheless think that certain classes of creditors should be treated differently such as depositors, employees and furnishers. This being said, we nevertheless agree that depositors should be treated differently. Moreover, it is for continuing operations after resolution it may be

essential to grant specific treatment for specific classes of creditors e.g. employees and furnishers.

Most important, in order to ensure proper functioning of credit markets, exclusions might be necessary. We therefore suggest excluding: swap, repo and derivatives counterparties and other trade creditors; short-term debt (defined by a specified maximum maturity); secured debt (including covered bonds) are covered by master netting agreements (even if uncollateralized). Moreover, the situation regarding deposits and the relationship between a resolution scheme for SiFis and deposit guarantee schemes has to be clarified and assessed in detailed.

This being said, we nevertheless think that there should also be a clear ranking between certain classes of creditors, with possibly holders of prudential capital instruments on the first level, bond holders and other financial creditors on the second level and furnishers on the third level, etc.

There should be principles regarding the treatment of different classes of liabilities, which should be largely similar at global level in order to ensure a common level-playing field.

However, to prevent further withdrawal of liquidity, measures would be needed to ensure that acceleration or termination rights under excluded claims were not triggered by the use of this tool."

**Q6**. What classes of debt or liabilities should be outside the scope of statutory bail-in powers?

In fact, to ensure proper functioning of credit markets, exclusions might be necessary. We suggest excluding: swap, repo and derivatives counterparties and other trade creditors; short-term debt (defined by a specified maximum maturity); and secured debt (including covered bonds) are covered by master netting agreements (even if uncollateralised). Moreover, we think that the claims of employees and furnishers (up to a certain amount) should be outside.

The treatment of deposits depends on the relationship of the scheme and deposit guarantee schemes. It has to be clarified.

As for the other instruments, we think that a there should also be a clear ranking between certain classes of creditors, with possibly holders of prudential capital instruments on the first level, bond holders and other financial creditors on the second level and furnishers on the third level, etc.

In order to prevent further withdrawal of liquidity, measures would be needed to ensure that acceleration or termination rights under excluded claims were not triggered by the use of this tool."

**Q7**. Will it be necessary that authorities monitor whether firms' balance sheet contain at all times a sufficient amount of liabilities covered by bail-in powers and that, if that is not the case, they consider requiring minimum level of bail-in debt ? If so, how should the minimum amount be calibrated and what form should such a requirement take, e.g.,:

(i) a certain percentage of risk-weighted assets in bail-inable liabilities, or

(ii) a limit on the degree of asset encumbrance (e.g., through use as collateral)?

No. We believe that it is not necessary for authorities to monitor the level of bail-in able debt and to require a minimum level.

Such solution would result in an additional capital requirement. The Basel Committee already imposes a higher level of capital for SIFIs .

We therefore banks should be free to have contractual bail-inable instruments and statutory bail-inable instruments in addition to the equity.

Moreover, we regret the Committee rejects the idea of contingent capital. We suggest to further explore the aspect of contingent capital.

**Q8**. What consequences for banks' funding and credit supply to the economy would you expect from the introduction of any such required minimum amount of bail-inable liabilities?

What will create an impact is the fact that a certain class of debt **is** bail-inable at all. The requirement for SIFIs to hold a certain amount of bail-inable debt will have to be studied in detail.

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

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

Further, it should be considered that by the conversion from debt capital into equity, the share of the equity **shareholder will be diluted**. This should be avoided by appropriate measures. One way of reducing dilution of the common shareholders would be to issue a sufficiently high number of new shares upon the conversion.

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

## III. Cross-border cooperation (pp. 13 – 16 + Annex 3, pp. 41-45)

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

It is important to promote international cooperation and guarantee full understanding and good communication between authorities in charge of entities within the same group. It is also essential to have the same definition of a 'resolution authority' across countries.

A formal joint decision procedure is necessary between the consolidating supervisor and the host supervisor(s) supervising the subsidiaries involved in the recovery plans but the final decision should be made by the group's consolidating supervisor.

We are in favour of a group resolution decided on by the group's resolution authority in coordination with the resolution authorities of the different very significant sites, rather than measures taken separately by the different resolution authorities of a group.

The resolution authority of the group's parent company or the central body should to take all necessary measures to ensure the group's resolution in the best conditions. If the subsidiary of a group or one of the affiliated of a central body had difficulties that were considered as threatening to national financial stability, we think it would be up to the parent company's or to the central body resolution authority to proceed with the orderly resolution of that subsidiary or that affiliated in coordination with the resolution authority of the country in question.

A host country's resolution authority should take responsibility for the resolution of a subsidiary in question if the parent company does not give support to its subsidiary. We think that is aspect should not be of concern to cooperative banks that have established solidarity schemes.

As a consequence, recovery and resolution plans are very sensitive information that must remain strictly confidential. Neither shareholders nor investors should be able to demand their disclosure. However such information should only be shared to a few people within the key host authorities which belong to the Cross-border Crisis Management Group (hereafter CMG). These persons should be bound by confidentiality agreements and ideally subject to stringent professional secrecy requirements. All this should be clearly settled in an International Treaty.

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

See our response to Question 9.

The sharing of information should be expressly subject to professional secrecy.

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

In general, the individual supervisors should be responsible in case of entity specific recovery plans of a cross-border group the national supervisor has a better overview. In case of banking groups, it should be a matter for the consolidating supervisor.

It could however be suggested that for an impartial analysis of the situation, a tripartite agreement is necessary: ministry of economy (or finances), national central bank and supervisory authority

## IV. Resolvability assessments (p. 16 +Annex 4, pp. 47-51)

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

What should be mentioned are the special protection schemes in distinctive decentralized banking sectors.

Within certain cooperative banks there are measures in place that prevent a member bank from the group to go bankrupt at large. This group internal protection schemes make sure that a financial institution has sufficient liquidity in periods of stress and will hence prevent insolvency.

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

We believe that a resolvability assessment is a crucial part of an effective Crisis Management Framework, because it may help to uncover existing weaknesses. However, there are great concerns about whether on the basis of very superficial criteria it is possible to reach an internationally similar standard in the assessment. For this it would require further definitions that also increase the predictability of the regulatory institutions a rating scale.

Besides, EACB considers that the resolvability assessment should under no circumstances lead to a change in the group's structure.

We have strong reservations to provide any power for the resolution authority, as part of the plan's development, to require an institution to make operational or structural changes where it is not necessary. There should be not possibility for altering an efficient business model or a healthy organization in order to prepare plans intended to be used to contend with a hypothetical future crisis. Plans for future action must not have impact on the present by weakening financial institutions that are currently perfectly healthy by chopping them up into "separable" entities. This situation would also have the consequence of reducing the groups' diversity and unifying the models that are accepted by the supervisor.

If at all, such powers should only be attributed to 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, with restriction expressed above about the option for the group's resolution authority to make such decisions, which must be in proportion and directly related to the risk.

## V. Recovery and resolution plans (p. 17+Annex 5, pp. 53-60)

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

As a general principle, there should be a single recovery plan applying to the entity at the consolidated level.

The contents of the plans appear to be sufficient in general terms, if not too extensive and difficult to realise. The important questions remain the required degree of practical detail that these plans have to deliver. However, the more practical details there have to be in the recovery plans, the more difficult it becomes to update them on regular basis. This could create an administrative burden.

Ad Point 1.17, Annex 5 requiring authorities to assess the willingness of the bank's management to implement corrective measures, and where necessary, enforce the implementation of recovery measures. It should also be mentioned that the plan of resolution cannot be active in a stage prior to resolution and as such allow the bank to be managed by the recovery plan. It should be a means of last resort.

No information on the plans should be shared outside a small circle either within the institution or the authorities. For consolidated groups, both plans should in principle be prepared at the group level in order to be effective and be consistent.

The resolution plan is in the responsibility of authority, but must be discussed with the institution during its set up.

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

Generally, it should be made clear what entity legally counts as a subsidiary. Further, it is questionable whether subsidiaries should in all circumstances be bound to draw up a RRP. The scope of the obligation to prepare a RRP is unclear (see question 14), also with regard to subsidiaries.

Moreover, it is the consolidated level that is supposed to solve the problems of the subsidiary. Only the consolidated level may define a strategy or reorganization plan for the group. A process of cooperation leading to a joint decision within crisis management group should guarantee the consistency of the group recovery plan for cross border banks.

It should in principle not be necessary to require entity-specific plans for affiliated banks in highly consolidated banking groups. For such groups only group specific plans make sense. The central body of the group shall be in these cases responsible for the plans inside the group. In particular in such co-operative banking groups headed by a Central body, the group recovery plan pre-exists in the form of compulsory internal solidarity mechanisms. Should nevertheless the central body of the group decide or consider that an entity specific plan is necessary for one of its affiliated bank, it is the central body who is responsible of the design and the implementation of this specific plans.

## VI. Improving resolvability (pp. 17-18 + Annex 6, pp. 61-65)

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

We strongly refuse the idea that intra-group guarantee systems are not be desirable since they may create obstacles for resolution and limit the ability to sell the guaranteed.

In fact, a key element of European co-operative banks is that they have established solidarity schemes a long time ago. The aim of these schemes is to prevent the failure of any individual bank belonging to the network. This is also what they did in the recent crises. The aspects of collaboration and mutual support are deeply rooted in the co-operative philosophy. Most of these support schemes have been and still are in operation. As these systems do prevention, early intervention and use resolution tools, it seems desirable rather to acknowledge their role in the crisis management than to see potential problems for resolution. After all, resolvability is not of value in itself, but rather an aspect when financial stability cannot be achieved by other means

A possible future global resolution should not require the creation of other instruments and procedures that such systems do not need and which could rather hamper their functioning. We therefore consider that any future regime should respect the existing internal recovery and resolution measures of these schemes in place.

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

No. The proposed steps are not deemed appropriate to address the obstacles to effective resolution.

Furthermore, the right to interfere in legal and organisational structures of an institution is too intrusive.

Besides, while we agree that the organisational complexity of a banking group should be reduced, we do not agree on the need to eliminate cross-default clauses in Master agreements.

The real obstacles are the laws of different countries which should in these cases from a pragmatic point of view and for legal certainty should be subject to these measures that apply on an international level in order to ensure a level playing field.

With regard to intra-group transactions and exposures it should be noted that there are on a European level already restricting measures in place. They should be sufficient to safeguard an adequate engagement in intra-group exposures. The identification of such transaction appears to be redundant given the strict accounting rules requiring the identification of material related party transaction deviating from customary practices.

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

Finally, we consider that the requirements listed in the paragraph 4.2 are too intrusive

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

It is better to have some kind of framework, in which the circumstances and conditions are determined beforehand that would allow for liquidity transfer.

However, it should be mentioned that a key element of European co-operative banks is that they already have established different kinds of intra-group financial support systems. The aim of these schemes is to prevent the failure of any individual bank belonging to the network. The aspects of collaboration and mutual support are deeply rooted in the co-operative philosophy. Most of these support schemes have been and still are in operation. In particular during the recent financial turmoil, these schemes have demonstrated their effectiveness and helped to avoid bank failures. They are one of the reasons why co-operative banking groups have proven to be stable even in difficult times.

These systems ensure that there are no legal or practical impediments to the prompt transfer of own funds and liquidity within the group to ensure that the obligations to creditors of the central body and its affiliates can be fulfilled. The group as a whole must be able to grant the support necessary under its applicable arrangements from funds readily available. However, the details of these arrangements depend on the type of guarantee scheme.

While there may be differences regarding the details of these institutional protection schemes, the following elements are common to them all: they protect credit institutions and ensure their liquidity and solvency; they are based on private arrangements; and they are financed by private means solely.

Therefore, we consider this possibility of a resolution regime should not impede with the existing frameworks and practices for intra-group financial support of cooperative banking groups, (e.g. those under the protection of an accepted Institutional Protection Schemes or other protections systems providing support to their members) in the different Member States.

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

## VII. Timelines for implementation of G-SIFI related recommendations (pp. 18-19)

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

The timelines proposed for the implementation are too short and restrictive.

We understand that there is a need to accelerate reforms for domestic resolution regimes and tools in addition to the need to accelerate the establishment of a global resolution framework for G-SIFIs for cross-border enforcement of resolution actions. However, this necessity should be seen in a wider context. The Basel Committee has designed a coherent package of reforms of prudential rules applicable to financial institutions. These aim at preventing or at least mitigating future ones and better managing them if they occur[9]. A future resolution regime is obviously only a part of this overall package.

Therefore, it should be seen in the context of the prudential measures such as Basel III to prevent a future crisis. The establishment of a national resolution regime, let alone a global cross-border regime is thus not an isolated exercise. It is necessary avoid overregulation and going at a too great pace which may result in creating a situation of *regulatory impasse*. It is thus necessary to extend the timelines for implementing these recommendations.

[9] European Commission: Regulating financial services for sustainable growth - a progress report

**Discussion note on creditor hierarchy, depositor preference and depositor protection in resolution** (pp.20-21+ Annex 7, pp. 67 – 70)

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

It is likely that differences in creditor rankings could in some way hinder effective cross-border resolutions.

However, we believe that this does not constitute the main issue: as long as a bank is to go bust, all creditors feel at risk, whatever the creditor hierarchy, especially if they fear that losses could exceed the volume of equity and subordinated debt. The main goal should be, in all cases, to avoid threatening the senior debt and beyond. In such a context, creditor hierarchy is a minor element compared to core Tier 1 and 2 ratios, legal powers of the Resolution Authority, financial resources of the Resolution Fund and the credibility of the process itself for the markets.

Besides this, legal differences between various debt issuances and jurisdictions go well beyond creditor hierarchy, be it contractual terms, procedures, legal delays, legal actions. Contract law, insolvency law, claims law should also be considered for further harmonization. Changing one specific element, creditor hierarchy in this case, hardly changes the global picture.

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

Again, any convergence could be considered as desirable in theory. But it seems unlikely that the convergence of the statutory ranking of creditors could have significant effects without a more comprehensive convergence of the various legal systems involved, not talking about a standardization of issuance contracts for instance.

It is fair to say that depositor preference could facilitate the action of a resolution authority if this authority needs to carve out deposits and transfer them to a bridge bank, leaving other general creditors behind. But it is quite possible to solve this *pari passu* issue, as long as a guarantee is granted to these general creditors, for instance by a DGS/Resolution Fund, that they will not be treated less favorably through a liquidation procedure, than if depositors would have shared that burden with them.

The implied costs for the DGS/ Resolution Fund would quite fairly echo what it needed to do to rescue depositors, and would probably diminish the amount of money that the DGS/ Resolution Fund would probably have to spend in other ways in such cases.

For these reasons, we do not see depositor preference as strictly needed in such a deposit bridge bank scheme. As a whole, the benefits of depositor preference look quite limited to FGD.

There is a more embarrassing element, which is directly linked to banks financing.
Any change of existing creditor rankings in a given jurisdiction could trigger unpredicted or undesirable consequences on creditors' behavior. That could especially be the case

with other unsecured creditors if depositors were to get a higher position in the rankings. Other unsecured creditors would be next in line after subordinated debt holders and, given the usually huge amounts of deposits, would consider themselves as being not far of subordinated creditors.

Where it plays an important role for bank financing, the market for general unsecured debt would then be at risk of being dried up, in favor of more secured creditors (covered bonds holders, securitized debt investors), with no benefit for the stability of the financial sector.

It is also right to stress that a harmonized depositor preference would require, to be effective, a harmonized definition of deposits (and of insured deposits if a difference had to be made in terms of creditor hierarchy). The European Union efforts in this field show that even if some convergence could be possibly achieved, the harmonization that would be supposedly required to enhance the effectiveness of a resolution process, is a long way to go.

For these various reasons, would a harmonization be needed, the elimination of preferences would therefore seem more advisable than the opposite. The usual back side of harmonisation is the lack of taking sufficiently into account the distinctive national legal specifics and real economy.

23. Is there a risk of arbitrage in giving a preference to all depositors or should a possible preference be restricted to certain categories of depositors, e.g., retail deposits? What should be the treatment of (a) deposits from large corporates; (b) deposits from other financial firms, including banks, assets managers and hedge banks, insurers and pension funds; (c) the (subrogated) claims of the deposit guarantee schemes (especially in jurisdictions where these schemes are financed by the banking industry)?

It makes sense to try to preserve the role of other financial institutions in monitoring the risks of the banks where they put their deposits. This is one of the reasons why various DGSs do not guarantee financial institutions' deposits. In any case, the coverage limit of the guarantees usually forces financial institutions and large corporate to look beyond the guarantee offered by the DGS. All in all, this could urge for targeting a similar difference between retail deposits and others, in creditor rankings.

At the same time, instituting harmonized differences between depositors (retail/ corporate/ financial firms/ insured/ non insured) at a cross-border level, seems a rather difficult task and, again, should be put in balance with the possible benefits.

On both sides, this does not help, the case for a possible depositor preference.

We also believe that the creditor rankings of depositors and DGSs when subrogating their claims should be the same: a DGS role is to protect depositors and not necessarily to strip them from a bigger part (neither from a smaller part) of their uncovered deposits after the enforcement of the subrogation. Being financed by the banking industry does not affect in any way this point of view.

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

As previously stated, the main risk we would see in a possible depositor preference, at least in a national or EU context, would be the consequences for the general unsecured banking debt market. This would push banks financing more and more on the covered

bond and securitization side and, paradoxically, would leave even less room for resolution if senior debt had to be involved (which, again, is not advisable). It would also leave fewer assets in the banks for claims' recovery. As a whole, we consider risks and costs greater.

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

Please see answers to questions 21. and 22.

It seems difficult to expect significant effects if some more important elements are not dealt with, and especially differences in debt issuance contractual terms and their consequences in the various jurisdictions legal systems.

Harmonization of national laws would facilitate the implementation of measures agreed at international level. It is necessary that measures taken at international level are not contrary to national measures. Otherwise, it is required to pose questions as regards the management of this situation.

**Discussion note on conditions for a temporary stay on early termination rights**
(pp. 21-22 +Annex 8, pp. 71-74)

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?

In order to minimise adverse effects described, a right to suspend contractual termination clauses in the case of netting arrangements should only be considered subject to the following conditions:

- Narrow and clear definition of the area of application: The right to suspend contractual termination clauses should only be triggered in connection with specific resolution measures (transfer of assets and liabilities to a bridge bank).
- Clear and short time frame: the effect of the suspension must be subject to a clearly defined and sufficiently short time frame (ideally not exceeding two days). To avoid any legal uncertainty, the exact beginning and end of the suspension period has to be defined as clearly as possible using objective criteria.
- No extension to other contractual rights: The rights of the counterparty to exercise other contractual rights (including termination rights based on non – performance of contractual obligations other than any rights solely arising because of the reorganisation measure triggering the suspension right) must remain unaffected by the suspension.
- International Coordination: The key aspects of a suspension right would need to be harmonised on an international as well as on a European Level (including an amendment of the Financial Collateral Directive and the Directive on the Reorganisation and Winding up of Credit Institutions) in order to avoid conflicts with existing international and European rules, competitive disadvantages and regulatory arbitrage.

This should not only be introduced on an EU level but should be introduced globally to minimize any adverse competition aspects.

Considering the short time of suspension, it appears appropriate that the there are limited exemptions. However, we doubt whether within such a short time frame it is feasible to accomplish e.g. a (partial) transfer. In order for a transfer to be effective, close-out-netting would have to be suspended until the (partial) transfer has been completed. A suspension of 5 days seems more realistic in this respect.

With regards to potential exemptions for CCPs we refer to the Commission's work on EMIR. Any regulations and exemptions have to aligned between such a framework on EU-crisis management and EMIR.

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?
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 initiation of insolvency or resolution proceedings.

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

With regards the employees and employers there should be made an exemption.

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

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?

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?

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

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?

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?