FEDERATION
BANCAIRE
FRANCAISE

Register of interest representatives: **09245221105-30**

Technical details of a possible EU framework for bank recovery and resolution: FRENCH BANKING FEDERATION'S answer to the consultation.

General remarks :

The French Banking Federation (FBF) represents the interests of the banking industry in France. Its membership is composed of all credit institutions authorized as banks and doing business in France, i.e. more than 500 commercial, cooperative and mutual banks. FBF member banks have more than 25,500 permanent branches in France. They employ 500,000 people in France and around the world, and service 48 million customers.

- The FBF support and is very keen to contribute to the elaboration of a legal framework for bank's recovery and resolution and thanks the European Commission for giving this opportunity to express our views on such a major subject.

- The FBF supports the set-up of a strong supervision framework based on prevention.

- The new proposal must be consistent with the pending regulatory changes (specifically, the CRD4 and Deposit-Guarantee Schemes directive). Moreover, we encourage the Commission to actively cooperate with the FSB so that the European proposals are in line with the measures that will be taken internationally.

- The preparatory and preventive powers of the resolution authority in the resolution plan development phase could be considered intrusive if applied to a healthy establishment that was not having any special difficulties, or if they were out of proportion, or, indeed, if no objective link could be established between new organization of the group and financial stability.

- The FBF estimates that appointing a special administrator implies a transfer of responsibility for the group's management that enables it to perform orderly liquidation, if necessary. Consequently, this measure should only be taken in the resolution phase.

- According to the French banks, these specific powers conferred on the resolution authority should comply with the principles of substitutability and proportionality, and encompass only those of the group's subsidiaries that are systemic in nature.

- The recovery and resolution plans are very sensitive information that must remain strictly confidential. Neither shareholders nor creditors should be able to demand their disclosure.

- Granting explicit financial support, specifically the parent company to the subsidiary, must remain at the discretion of the banking groups, and find a counterparty in the decrease in regulatory requirements applicable to the subsidiary in question in terms of capital, and, where applicable, recovery and resolution plan.

  With regard to the bail-in, the industry is of the opinion that senior debt should not be touched or reduced, except in cases of orderly liquidation.

- The French banks find that the financing of the resolution remains unclear. Whatever the case, the tax on banks should be allocated or counted in the guarantee fund and not be collected in each country where the group has an entity.

- The FBF does not fully understand the objective pursued by the Commission on the financial support arrangements within the groups, specifically when they are made in close-to-market conditions.

Part 1 : scope and Authorities :

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

A/. The FBF considers that most institutions can generate systemic risks. The recent crisis has shown that the groups that have been saved presented very different characteristics: large banks, small banks, universal banks, domestic banks, international banks, non-banks, etc. In fact, systemic risk occurs with a set of factors such as e.g. home equity loans or because of total interdependencies. We favour a broad scope of application for the rules, including both banks and investment companies, reflecting the proportionality principle.

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

A/. In the interest of simplicity and consistency with our answer to the previous question, we suggest that the Commission use the scope of the CRD.

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

A/. Institutions that do not receive deposits from the public may also generate systemic risk and must be able to undergo orderly liquidation under the proposed measures.

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

A/. Yes, as long as it is a holding whose subsidiaries are exclusively or primarily lending institutions or financial institutions. The concept of a financial holding is not clear, and we do not fully know what that covers. If it is a company whose primary corporate purpose is to hold shares in financial companies, then it should certainly be involved in the resolution process. On the other hand, it does not make sense to include an industry group having a corporate bank.

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

A/. Yes, if it is a holding that has businesses that are themselves subject to the resolution scheme. For mixed holdings of which only a portion of the subsidiaries has a financial activity, it seems that the holding's aid must be pro-rated to what is represented by the financial portion throughout the industry group.

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

A/. No, except to comply with their holding specificity, in particular in prudential terms.

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

A/. The FBF thinks it is important, to promote international cooperation and guarantee full understanding and good communication between authorities in charge of entities in the same group, that the resolution authorities **be defined identically in all countries** and that this definition be included in the draft directive. The resolution authorities should be tripartite and, in order to ensure the independence and authority required by its duties, composed of the national supervisor, the central bank, and the ministry of finance. If a banking group were in crisis, the consolidating resolution authority would see to it that the resolution was followed up on, without involving the EBA. Furthermore, the three administrations mentioned above are accustomed to handling confidential data.

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

A/. Yes, specifically if the resolution authority is not simply composed of the supervisor, but instead of the national supervisor, the central bank, and the ministry of finance.

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

A/. The existence of multiple authorities, each of which is in charge of a piece of the resolution process, does not seem to us to be at all compatible with an orderly resolution of a banking group's crisis, least of all when it means managing the situations of several transborder entities. This is yet another reason to champion a tripartite composition of the resolution authority.

***3d**. Even if resolution authorities are a matter of national choice, should an EU framework specify that they should act in accordance with principles and rules such as those set in this document to take account of the fact any bank crisis management action in one Member State is likely to have an impact in other Member States?*

A/. Yes, it is absolutely necessary to provide a European framework for the crisis management, based on the concept of the group's interest, and stipulating the measures that are derogatory to national law on a harmonized basis.

Part 2 : supervision, prevention and preparation

A. Supervision

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

A/. We think that the stress tests are an indispensable tool for appraising a group's financial health and measuring the risks that might be weighing on it. Banks naturally perform their own internal stress testing. In addition, they can perform stress tests at the request of supervisors on assumptions and methodologies that are defined by them for the entire sector or adapted to the situation of each bank in particular.
In conclusion, we think it is not the supervisors' job to perform stress tests, but it is theirs to define applicable methods and scenarios.
Both types of stress test can coexist as long as they have complementary objectives.

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

A/. We have strong reservations about publishing the results of comprehensive stress tests. We think it is up to each bank to disclose the results of its own stress tests - if it wants to.

There is a very high risk of self-fulfilment of the results of the stress tests, specifically when trying to do stress tests on liquidity. The market reactions are immediate and brutal. They lead us to recommend against publishing the results of stress tests, even if they are accompanied by disclaimers.

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

A/. As stated, it may be helpful for the authorities to have an overview of the banks' situation by means of a generalized stress test exercise based on common scenarios and methodologies. We think it is just as important to test scenarios adapted to the groups' risk profile[s].
As for cross-checking the results, it is the duty of the supervisors and the European Banking Authority to perform tests if they consider that the results produced by each country do not reflect the situation of an integrated European single market.

***5**. Please estimate:*
- the one-off costs in EUR (e.g., investments in IT systems);
- the additional ongoing annual costs (e.g. human, subcontracts etc.) that your institution would be likely incur in carrying out the activities related to enhanced supervision.

A/. The cost of procuring human and IT resources will be high. The FBF is not prepared to give estimates until the framework is defined more precisely.

B. Recovery planning

General remarks:

- **Scope**: the recovery plan is a toolbox for the establishment. It lists the measures the establishment would take in case of a manageable crisis to remedy its situation. This

is a step that goes beyond what has already been achieved under Pillar 2. The plan must be created on a consolidated basis, with, potentially, ancillary plans for a very small number of especially significant subsidiaries.

- **The link between the recovery plan and the resolution plan**: This link is not clear from the Commission's consultation. The sequencing and overlapping of plans (recovery and resolution) is unclear. The portion of the plans that describes the group's organization and identifies the crucial activities of the peripheral activities should be identical for both plans. The plans must be credible, realistic, and sufficient.

- **Supervisor's powers in creating the plan**: to be consistent with the consolidated plan, the French position aims to ensure that the group's only contact person is the consolidating supervisor, not, as set out by the Commission, the College of Supervisors, if it exists. This position is supported by the fact that the consolidating supervisor is the one who best knows the group and is therefore best prepared to approve the group's recovery plan as developed by the bank in agreement with the supervisor. A summary version of the group plan could be disclosed to the larger subsidiaries' supervisors.

- **Publicity** It is critical not to provide any publicity to this plan, since its disclosure could have a negative impact on the markets.

- **Mandatory or not**: The Commission does not specify whether the establishment is bound by the provisions of the plan if there is any financial difficulty. The establishments find that, being unable to predict, in a given situation, all the external parameters, the rigidity of imposing the plan's execution, without the option of adapting to the situation of financial distress, means there is a risk that the situation will not be handled optimally.

6*. Are the required contents of preparatory recovery plans suggested in section B1 sufficient to ensure that credit institution undertake adequate planning for timely recovery in stressed situations? Should we include additional elements?*

A*l*. The list in paragraph B1 is broad enough so that each group can create a recovery plan that is proportionate and suited to its situation. However, point c) on intra-group asset transfers should be amended to include the distinction set out in questions 9-20, specifically to differentiate (i) the financial support provided by the group in its normal management framework, including liquidity crises that do not endanger the subsidiary's sustainability, and left to the discretion of the parent company; (ii) transfers performed in the context of implementing the recovery plan for a subsidiary that does not meet the CRD's ratios, and that may intervene in conditions that override common law.

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

A*l*. The FBF finds that the group's plan should be preferred, and, where applicable, only the separate plans of entities whose difficulties could have a systemic effect should be authorized. The automatic duplication of plans, as set out by the Commission, does not seem advisable, because it is likely to make the link between the plans more complex.

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

A/. The group's plan must be developed by the parent company and approved by the consolidating supervisor, who will provide the link with the host supervisors. Otherwise, there is a significant risk of uncoordinated decisions within the group that could adversely affect it if the group, or one of the group's entities, were in a delicate situation.

In addition, it seems absolutely necessary to preserve the confidentiality of this plan; its disclosure could have a negative effect on the markets.

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

A/. The FBF believes that any discussions about the preparation of the group's plan should be held with the consolidating supervisor. There is no need to provide a joint decision procedure. Approval of the recovery plan must be given by the consolidating supervisor, in consideration of the group's interest. A joint decision would weigh down the process and risks questions of confidentiality in relation to the group's strategy.

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

A/. The FBF considers that approval of the group's plan must be given by the consolidating supervisor using the procedure in Article CRD 129, with the option of mediation by the EBA in the event of a disagreement between supervisors.

***8.** Please estimate:*
(a) the one-off initial costs (e.g., investment in IT and other systems);
(b) the additional ongoing annual costs, including the costs of Full-Time Equivalent employees (FTEs), and the number of such FTEs, that your institution would be likely to incur in carrying out the activities related to recovery planning suggested in section B

A/. The costs will be high. The FBF is not prepared to give estimates until the framework is defined more precisely.

C. Intra-group financial support

General remarks:

- **Scope**: The group must be free to define the scope in which it intends to obtain financial support arrangements. These arrangements must not be imposed by the supervisor(s) of the parent company or of the subsidiaries.

- **Implementing transfers under the recovery plan**: Asset transfers made in close-to-market conditions should not enter within the scope of the recovery plan, because, in such cases, it is a decision to be made by the parent company. Transfer protocols signed by banks, meanwhile, should specify the derogatory conditions in which those transfers may be made. Implementing the derogatory conditions of those transfers requires a specific legal framework to be provided in the directive.

- **Meaning of support**: Asset transfers made under market conditions and in compliance with the relevant national legal frameworks will, de facto, often be limited to support of the subsidiaries by the parent company. Indeed, if a parent company actually safeguards its interests when it supports its struggling subsidiary, and reaps financial and/or strategic and/or moral benefits from doing so, the support a

subsidiary gives its parent company or a sibling entity is more of a sacrifice, since the interest to be gained by the entity providing the support is not often demonstrated.

We would like to draw the Commission's attention to the difficulties there are in considering the execution of discretionary intra-group transfers, without considering the required provisions that override common law. It is the parent company who should manage these transfers, in cooperation with its supervisor and the supervisors of the relevant subsidiaries, in order to strike a balance between the corporate interest of the group and all the entities involved, and the protection of the depositors and the system as a whole.

- **Situations in which support is provided**: The Commission is not clear enough in the sequencing of resources. We find it is important to differentiate (i) the financial support provided by the group in the normal management framework, including liquidity crisis situations that do not endanger the subsidiary's sustainability, and that is left to the discretion of the parent company; (ii) transfers made as part of the implementation of the recovery plan, that may be made in conditions that override common law.

- **Publicity**: The Commission stipulates that the transfer conditions included in the transfer protocols be approved by shareholders. This provision does, however, confer a degree of publicity on them, specifically for listed companies. The FBF stresses the possible adverse effects of such publicity on the markets, during development as well as implementation of the transfer.

  The current framework of comfort letters issued by parent companies for their subsidiaries seems sufficient.

- **Non-mandatory nature of asset transfers**: Whatever the case, the parent company must maintain the option of assigning or even closing a subsidiary if that decision fits within the framework of the group's policy. We differentiate asset transfers that cannot be imposed by the supervisor, where the parent company, as in any group, must be prepared to decide on its strategic guidelines. The conditions of financial support are dictated by the common economic, corporate, or financial interest, as appraised with regard to the group's policy, providing a counterparty and not exceeding the parent company's financial possibilities.
  Conversely, the financial support of the parent company, as set out in the recovery plan, would be made mandatory, within the limit of the criteria set out in C4. These provisions of the plan should have consequences on the allocation of equity capital.

- **Consequences for the parent company**: The parent company's undertakings to its subsidiaries through financial support made in advance could result in the off-balance-sheet entry in its accounts of a given undertaking which should be compensated so as not to appear abnormal.

- **Consequences on the subsidiary's equity capital requirements**: In consideration for the undertaking received, equity capital requirements set by the host country's supervisor should be reduced to the Pillar 1 minimum and not contain any additional requirements under Pillar 2.

- **Group plan and plans by entities**: The FBF would warn the Commission against multiple plans, which could obscure the desired all-encompassing view. Adding the national vision of an entity contained within an international group does not seem

relevant. The group's plan must be developed in agreement with the parent company's supervisor. Otherwise, there is a significant risk of uncoordinated decisions within the group that could adversely affect it if the group, or one of the group's entities, were in a delicate situation.
In addition, as stated in the Commission's proposal, the subsidiaries' and the group's recovery plans should factor in this potential support. Therefore, in our opinion, the subsidiary's recovery plan should be reduced to a minimum and rely on any support that its parent company could give it.

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

A*l* Asset transfers made in close-to-market conditions should not fall within the scope of the recovery plan, because, in such cases, the decision is in the hands of the parent company. The group must be free to define the scope in which it intends to obtain financial support arrangements; the conditions of such support are dictated by common economic, corporate, or financial interest, as appraised with regard to the group's policy, providing a counterparty and not exceeding the parent company's financial possibilities. These arrangements must not be imposed by the parent company's or subsidiaries' supervisor(s). They must not be made public. The current mechanism of letters of comfort issued by parent companies for their subsidiaries seems perfectly appropriate.

Meanwhile, transfer protocols, under the recovery plan's implementation, would come under derogatory conditions. In fact, activation of the plan is justified only by the special condition of an entity that the parent company's management tools have been unable to stabilize. Implementing the derogatory conditions of these transfers requires the agreement of the shareholders and the supervisors involved, and an exceptional legal framework. This framework, stipulating the circumstances and conditions of the transfers, must be provided by the directive to permit specific financial support, justified by the survival of the entity and the group, and the impact that the financial company's failure could have on the stability of the entire financial system.

The Commission must be extremely clear in sequencing the resources. The following should be differentiated: (i) the financial support provided by the group in its normal management framework, including liquidity crises that do not endanger the subsidiary's sustainability, and left to the discretion of the parent company; (ii) transfers performed in the context of implementing the recovery plan that may be made in conditions that override common law.

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

A*l* The list of support types provided in C1 (loans, bonds, and security interests) belong, we find, to ordinary support implemented in the context of intra-group asset transfers provided by the group's policy, backed by the shareholders and provided there is an appropriate counterparty.
Under the plan, it seems harmful to us to be limited to these three support categories and deprived of other options. Activation of the plan implies that the entity's situation is likely to deteriorate to the point that a liquidation could be considered that would put general financial equilibrium or the depositors' assets at risk. Therefore, it seems advisable, if this liquidation could have such consequences, to do everything to save what can be saved, and, in such cases, the list proposed by the UNCITRAL provides a wide choice of resources to support an entity in difficulty. However, the use of many of these resources requires that national laws be

adapted, and must therefore be adjusted to the harmonized and derogatory framework of common law as in the directive.

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

A*l* Asset transfers made under market conditions and in compliance with the relevant national legal frameworks will, de facto, often be limited to support of the subsidiaries by the parent company. Indeed, if a parent company actually safeguards its interests when it supports its struggling subsidiary, and reaps financial and/or strategic and/or moral benefits from doing so, the support a subsidiary gives its parent company or a sibling entity is more of a sacrifice, since the interest to be gained by the entity providing the support is not often demonstrated.
We draw the Commission's attention to the difficulties there are in considering the execution of discretionary intra-group transfers, without considering the required provisions that override common law. It is the parent company's supervisor who should manage these transfers, in cooperation with the supervisors of the relevant subsidiaries, in order to strike a balance between the corporate interest of the group and all the entities involved, and the protection of the depositors and of the system as a whole.

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

A*l* The objective clearly stated in the consultation, to consider support in the group's overall interest, means that all of the entities must be included that are subject to supervision on a consolidated basis in the plan. We reiterate that asset transfers made in close-to-market conditions under the group's policy should not be affected by the scheme proposed by the Commission.

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

A*l* NO. The FBF does not think that a mediation process is needed. The FBF considers that the establishment must refer to the consolidated supervisor only. In the event of a disagreement, mediation by the EBA may be an option, but it will not be legally binding for the establishment.

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

A*l* The agreements, like any business transaction, must be entered into in normal conditions. Derogatory conditions may be considered if it is support for a subsidiary in difficulty.

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

A*l* Reasonable frequency defined by the parent company.

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

A*l* The conditions set out in paragraph C4 should only apply to the transfer protocols included in the plan. These protections are necessary, and the FBF wants to add two more: (i) the reason

for their transfer, since the supervisor's (protect the financial system and depositors) is different from the group's (the group's corporate interest) and (ii) the counterparty provided for the transfer (to preserve the third-party interests).

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

A*l* Yes, there should be a reason given for the decision to perform a transfer under the plan, and application of the criteria set out in C4 should be demonstrated.

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

A*l* It is up to the group's senior management to provide financial support to any of the group's entities who needs it, pursuant to national law. Generally, this means that the conditions set out in question 14 must be met, as long as they are totally justified. The appropriate supervisors should be informed. The supervisor of the entity that provides the support must not authorize the transfer, but must be able to state any reservations and stipulate additional conditions.

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

A*l*. If those conditions are to be met, they must be formulated very quickly (e.g. in under 48 hours) and must not be designed as a delaying tactic.

16c. *Should the recipient's supervisor also set a deadline for a response to the consultation?*

A*l*. We do not see the interest of such a limitation if the transfer is made in the interest of the bank receiving it.

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

A*l* The FBF considers that the interests of the groups and of the supervisor in a crisis are not necessarily in agreement. Thus, the supervisor is going to protect the depositors and the financial system as a whole, while the group is going to fight for its survival. That is one of the reasons why we feel that intra group asset transfers made to manage a crisis, specifically a liquidity crisis, but one that does not endanger the depositors nor the financial system as a whole, should be differentiated from transfers to be made under the recovery plan.

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

A*l*. The FBF does not object to the receivable of the establishment that provided financial support being treated as a priority, nor to the claw back mechanism.

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

A*l*. The 12-month deadline seems acceptable to us, but may be adjusted according to local laws.

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

A/. Yes. In the event of bankruptcy, the management's liability is defined by the companies act. Its action should not be challenge able unless there is fault.

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

A/ We do not think the publicity given to these agreements is likely to greatly undermine the banking groups. It does not appear desirable to disclose the support arrangements that have not received shareholder approval.

D. Resolution plan

General remarks:

- **Link with the recovery plan**: Linking and sequencing of the phases does not appear very clearly in the Commission's document. The FBF finds that the Resolution Plan should not be actionable unless and until the recovery has failed.

- **Supervisors' powers to impose operational or structural changes on a healthy entity as a preventive measure**: As part of the plan's development, the Commission stipulates that the supervisor could require a structure to make operational or structural changes. The FBF objects to this power given to the supervisor to require changes to an efficient business model and an organization in good economic health to facilitate a possible resolution at a later date.

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

A/. Like the recovery plans, resolution plans must be created at the consolidated level, in order to maintain an all-encompassing view of the group and permit quick, efficient implementation as needed. All banks and investment companies should prepare a plan on a consolidated basis, in compliance with the proportionality principle for their small establishments.

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

A/. The resolution plan must be designed as a toolbox that can be used by the supervisor or the consolidating resolution authority. The novelty of each situation, and the unpredictability of factors, mean it is impossible to judge whether what is stipulated is likely to effectively prepare for a future crisis.

21c. *Please estimate:*
- the one-off costs in EUR (e.g., investments in IT or other systems);
- the additional ongoing annual cost (e.g. human, subcontracts etc.), including the cost and number of Full-time Equivalent employees,
that your institution would be likely to incur in complying with requirements related to recovery and resolution plans.

A/. The costs will be high. The FBF is not prepared to give estimates until the framework is defined more precisely.

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

A/. The FBF objects to this power given to the resolution authority, as part of the plan's development, to require a structure to make operational or structural changes, or to change an efficient business model and an organization in good economic health to prepare plans that are intended to be used to contend with a hypothetical future crisis. The FBF cannot accept that the future make such heavy demands on the present, e.g. weakening financial institutions that are currently perfectly healthy by chopping them up into "separable" entities. This situation would also have the consequences of reducing the groups' diversity and unifying the models that are accepted by the supervisor.
Points (d): limitation or end of certain activities, (e): reduction or limitation or sale of certain business lines or products, and (f): structural or operational changes to the entity's structure, cannot be considered preparatory or preventive measures for financial crises, and those powers cannot be conferred on the resolution authority. Whatever the case, such demands from the resolution authority cannot be made at this stage unless they are proportionate with the lending institution's systemic importance and have demonstrated that they are an obstacle to an orderly resolution. Furthermore, multiple, uncoordinated demands between the supervisors of the different countries must be avoided.

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

A/. No. Intra-group guarantees must not be limited in principle, because they may be critical to the operation of some subsidiaries.

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

A/. The FBF finds that it is up to the consolidated supervisor to make the decisions; the option of mediation by the EBA may be considered, but it will not be legally binding on the establishment.

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

A/. The proposal appears reasonable, as long as the resolution authority provides evidence of the need for D3 requirements and our previous remarks are taken into account.

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

A/.Yes, with all the reservations expressed about the option for the group's resolution authority to make such decisions, which must be in proportion and directly related to the risk.

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

A*I*. Yes, the banks must have the option to challenge such a decision in the court.

Part 3 : early intervention

General remarks:

- **determining the pivot point toward derogatory law**: At the early-intervention stage, the company's management, in close cooperation with the supervisor, maintains control and responsibility for the management of the company that is on alert, but *in bonis.* The law that applies is common law. It is at this stage that the company's management may decide to implement the recovery plan, in close cooperation with the supervisor, without making the supervisor liable for it. The limit of this position is reached when the establishment is no longer fulfilling its prudential obligations and finds itself forced, by the supervisor, to make decisions such as: increasing its equity capital, restricting certain activities, setting aside some profits, or making uses of intra-group transfers of actif.
  For French banks, this is where the break occurs, and appointing a special administrator is the **first step in the resolution** that the resolution authority takes when recovery measures have not been sufficient or when the establishment has not met the demands made on it by its supervisor.

- **supervisor's powers**: the powers that are set out for the supervisor under early intervention consist of directing a company to e.g. change its management, decide on a capital increase, or reduce its debts, come under the resolution phase.
  At the early intervention phase, the company has the option of appealing the supervisor's decisions, and the interested parties may invoke the liability of the company's management.

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

A/. We are not in favour of extending the implementation terms of Article 136(1) of the CRD in case the establishment is simply likely to no longer meet its prudential requirements. This would amount to creating an ill-defined situation for the bank, whereas the current situation is clear.
The preventive powers set out under the recovery plan (Questions 22 and 23) already allow the supervisor to act satisfactorily, without resorting to an extension of the scope of Article 136(1) of the CRD.

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

A*I*. At the early-intervention stage, the company's management, in close cooperation with the supervisor, maintains control and responsibility for the management of the company that is on alert, but *in bonis.* The law that applies is common law. The company's management may decide to implement the recovery plan, in close cooperation with the supervisor, without making the supervisor liable for it.
It is also best to differentiate the appointment of a provisional administrator from a change in administrators. Indeed, the power to appoint administrators belongs to the shareholders, and not the management, of the company. Consequently, though the supervisor may in some cases

replace the company's management, he cannot take any action on the instruments that come under the powers that are unique to the general assembly of shareholders.

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

A/. The measures that are supplemental to those in Article 136 (1) of the CRD proposed by the Commission do add to the supervisor's powers at the phase when the company has its first difficulties, with the notable exception of the appointment of a special administrator. First of all, we must distinguish the supervisor's first request to change the board of directors from the supervisor's appointment of a provisional administrator. In the first case, the company retains control of its leadership; in the second, it is clearly the supervisor who takes over.
Appointing a special administrator to whom all powers to administrate, manage, and represent the legal person are transferred implies that the establishment can no longer be managed in normal conditions. Therefore, it cannot be early intervention by the supervisor. **Appointing a special administrator within an entity comes under the resolution phase.**
At the early-intervention phase, the supervisor should be prepared to request a change in the board of directors. Finally, we draw the Commission's attention to the fact that the publicity tied to the appointment of a special administrator by the supervisor is likely to accelerate the crisis the company is in.

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

A***/***. Appointing a special administrator comes under implementation of the resolution plan and therefore should not be allowed to occur at this early-intervention phase. However, the limit of this position is reached when the establishment is no longer prepared to meet its prudential obligations and is no longer able to implement the recovery plan. In this case, the supervisor may appoint a special administrator and things move into the resolution phase.

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

A***/***. In the very specific case where a special administrator should be appointed, it is essential to comply with the proportionality principle and be able to stipulate the precise framework for such intervention.

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

A***/***.Yes, in liaison with the group of supervisors from the core college or core resolution college. The other supervisors must be informed of the decisions that are made.

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

A***/***.Yes, as long as the entities it is about show potential systemic risk, the EBA can intervene to facilitate the decision, but not to make the decision;

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

AI. No, the EBA can play the role of mediator, if needed, but not make decisions in place of the group's resolution authority. It is the consolidating supervisor who must make the final decision, in consideration of the entire group's interest.

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

AI. The FBF thinks it could be damaging to adhere to deadlines, since no one can predict the nature of the next crises. We would prefer to rest on the idea of adaptability to the situation.

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

AI. Yes,

Part 4: resolution tools and powers

F. Resolution: conditions, objectives and general principles

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

AI. The option chosen is option 1. Indeed, it is not desirable to have an automatic threshold, and the criteria for bank authorization are not harmonized in Europe. The Commission should ensure that the threshold applied will also be the one proposed by Basel as a "point of non-viability" to ensure consistency between regulatory texts and facilitate understanding by the market.

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

AI. Yes, the resolution objectives are well-defined in the consultation, and clearly mark the difference with the objectives pursued by the company's management. The FBF stresses the importance of clearly separating the recovery and resolution phases, since each one corresponds to different objectives: the recovery phase, during which the company's management keeps control and attempts to maintain the company's corporate interests, and the resolution phase, which is when the company is taken over by the authorities with a higher goal of general interest.

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

AI. The FBF shares the five principles set out in the consultation.

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

Al. Yes, it is very important to preserve equal treatment between creditors in the same class, since each rank of creditors (e.g. the unsecured rank) can contain several classes, whose definition must be specified.

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

Al. Yes.

G. Resolution tools, powers, mechanisms and ancillary provisions

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

Al. Yes, the list seems broad enough, as authorities can use them, according to the circumstances, either in making a choice so as to implement only the best-suited tools, or to use them all together.

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

Al. The FBF considers that the national resolution authorities must be harmonized, while leaving a broad latitude and great flexibility as to the use of those four instruments.

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

Al. Yes, the FBF thinks that the sale of an activity or of the bank as a whole must be permitted, regardless of the shareholders' approval, and also that the shareholders can have recourse only for purposes of compensation. The matter of the sale price is, however, essential, and the FBF has no choice but to agree with the general principles issued by the Commission.

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

Al. The FBF finds it preferable to impose the liquidation of the structure that will have been stripped of virtually all its assets and liabilities as of the moment when what remains cannot be sold and is not viable. Nonetheless, for a certain amount of time, the structure must continue to satisfy any subcontracts that may have existed so that the group's other entities may continue to operate.

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

Al. The bridge bank is an entity under the control of the national authorities, which authorizes it to be capitalized beneath the minimums required by the CRD. However, this situation must not give it too much of a competitive advantage, and to prevent this, the FBF suggests that this

situation be time-limited. The bridge bank must not be recapitalized by a bail-in of the senior debt.

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

A*I*. Yes, the FBF finds that the initial two-year deadline is reasonable, but that it could be extended for two additional years as long as the bridge bank is recapitalized and required to meet prudential ratios.

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

A*I*. The FBF considers that this tool may present risks and cannot be used autonomously. It cannot be used autonomously from the other tools.

***35**. The powers set out in this section G5 are intended to ensure that resolution authorities have all the necessary powers to apply the resolution tools. Are the suggested powers comprehensive? Are any additional powers necessary ?*

A*I*. The FBF agrees with the list of powers proposed by the Commission. Since those override the common law, it is still necessary to provide a legislative framework that overrides the resolution in the directive, particularly as concerns the power to issue new shares, and the means of redress.

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

A*I*. Yes, those provisions seem sufficient.

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

A*I*. The extension of those powers to the subsidiaries must be limited by the resolution scope set out in the resolution plan, i.e., save in limited exceptional cases to the entities that fall within the scope of consolidated supervision.

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

A*I*. The FBF considers it unreasonable to preserve the application of national provisions, and supports the preparation of an exceptional legal framework Europe-wide.

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

A*I*. The three mechanisms must be provided to give the authorities greater flexibility.

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

Al. It is, indeed important to prioritize them, and to put placement under judicial review at the top.

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

Al. Yes, these three mechanisms must be provided.

***40**. Are the notification and publication requirements suggested in section G10 appropriate and sufficient to ensure that all affected persons are adequately informed about a resolution action?*

Al. Yes, the principles set out appear to be sufficient to ensure the creditors are compensated

***41**. Are the principles suggested in section G11 sufficient to ensure that creditors receive appropriate compensation?*

Al. The principles seem appropriate to us. We agree with the principle by which any residual deficit from a resolution should be supported by the resolution fund.

Crisis Resolution Regime – Treatment for close out netting arrangements

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

Temporary suspension of close out netting (G13)

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

Throughout the financial crisis, it has been demonstrated that close out netting mechanisms are resilient and have enabled the efficient mitigation of widespread systemic risk linked to failure of financial institutions. Hence, close-out netting is an instrument of paramount importance to preserve financial stability and any temporary suspension of close out netting rights should not result in a negative impact on such rights.

Even if we appreciate the requirement for a temporary suspension in respect of a resolution plan, the FBF would like to emphasise the following points:

1. The right to suspend contractual termination should be precisely defined and limited to a clear and narrow area of application and should not impact the legal recognition, validity and enforceability of close out netting. A coherent process for close-out, clear protections for title transfer and security arrangements, as well as a suitably comprehensive set of definitions (e.g. covering close-out, netting, set-off, etc) should be set out in the resolution legislation – if the « bottom up » approach as described in the Consultation Paper is intended to be adopted, these provisions should then provide a foundation for a subsequent, more comprehensive framework for close-out netting (i.e. a Netting Directive, extending beyond credit institution failures);

2. The suspension right, and the possible transfer of the contractual rights to a new entity, should be capital neutral and not lead to an increase in the regulatory capital requirements against the relevant positions;

3. Detailed consideration should be given to the treatment of existing Events of Default ("EoDs") under netting agreements (i.e. those that do not arise "*solely by reason of a resolution order*"). Whilst the Consultation Paper suggests that neither the resolution itself nor any related actions should be treated as default events, we believe that the proposals should not prevent other EoDs either:
    a. taking effect in accordance with their terms (e.g. a pre-existing failure to pay); or
    b. the "re-testing" of other EoDs post-resolution, once the suspension is lifted (e.g. a credit-rating downgrade EoD under an ISDA Master Agreement).

    If, however, the proposal is that any acceleration or termination is stayed whilst resolution action is being taken, irrespective of the nature of the EoD giving rise to such rights, then various additional issues need to be considered. For example, can an EoD for which the grace period elapses during the suspension be called and, if so, at what stage in the process? This may be relevant not only for the close-out and netting

agreement but also for other reasons (e.g. credit event triggers). These are issues that will need to be addressed in detail, to avoid legal uncertainty ;

4. Consideration should also be given to coupling the application of the stay with other relevant moratoria, e.g. a stay on related payments. For example, a contracting party of a failing institution should not be required to continue making payments to that institution whilst its close-out rights (or where the other institution's related payment obligations) are suspended. We note from section G12 of the Consultation Paper of the Commission's proposal that "*resolution authorities should have the power to suspend any payment or delivery obligations pursuant to any contract to which the credit institution is a party from the time when the credit institution enters into resolution*" for a similar period. In practice, we believe the relationship between the various moratoria should be more closely linked, to prevent abuse;

5. Impact on collateral requirements – the moratoria may in practice lead to higher collateral requirements, to cover the additional market risk given the adjustment to the timing of close-out and valuation in the event that a stay is imposed. Financial counterparties to the failed institution will in practice have to allow for a longer close-out horizon to protect against the possibility of a use of resolution powers ;

6. The lengths of the stay should be as short as possible to limit the possible negative financial impacts of such stay and to avoid legal uncertainty. In that respect, a two business days stay should be a maximum. Furthermore, it should be subject to clear and precise definition of its beginning and end, and using objective criteria[1]. There should be a degree of international consistency as to the length of stay imposed (particularly with reference to the possibility of counterparties facing different entities within cross-border groups, potentially under multilateral close-out arrangements).

7. There should be a clear and precise definition of the beginning and end of the stay with reference to objective criteria (e.g. formal notification or publication). Notification mechanisms should also be foreseen to inform contractual counterparties of the transfer of their positions to a new entity (i.e. identity of the relevant entity and the positions in question). All such notifications should occur rapidly to enable counterparties to decide how to exercise their rights against the post-resolution entities on a fully informed basis. We note that this is something which has not been addressed by some countries who have already implemented a formal resolution regime[2]. To ensure the smooth operation of any resolution regime, we believe that any pan-EU regime should set down explicit protocols for notifying counterparties, rather than this being handled on an ad hoc basis in the event of a large bank failure. The FBF believes that such protocols could be rolled into the procedural obligations of the resolution authorities, as set out in Section G10 of the Consultation Paper.

8. In addition, the FBF believes that cleared positions with CCPs and any related collateral and security arrangements should remain in such CCPs and be excluded from the scope of the stay. This should also ideally be addressed in EMIR as well. We note the suggestion of the Consultation Paper that the transfer, cancellation or modification of property, rights or liabilities of a failed bank should not affect the operation of systems and rules of systems covered by the Settlement Finality Directive (Directive 98/26/EC). However, the protection of cleared transactions is a different (and somewhat broader) issue than Settlement Finality, and with this in mind it would benefit from being spelt out explicitly in the Commission's proposals.

---

[1] In this respect, we understand a 24 hour period currently exists under the US Federal Deposit Insurance Corporation ("**FDIC**") regime in the U.S.

[2] e.g. in the UK under the Banking Act 2009

9. A related issue is whether transactions entered into by Central Banks, CCPs and payments and securities settlement systems should be excluded from the scope of the suspension. Whilst there may be systemic risk arguments in favour of this approach, query: (i) whether this would be consistent with the principle of equal treatment of creditors advocated above; and (ii) why, if the aim of the use of the resolution power is to resolve the failed institution and allow it to continue as a going concern, why contracts entered into with Central Banks, CCPs and payments and securities settlement systems should not also continue, to ensure market continuity to the relevant institution.

10. The Consultation Paper does not deal clearly with the question of exercise of early termination options. In practice, the prohibition to exercise any form of acceleration or termination right as described in the Consultation Paper would preclude not only the exercise of close-out rights during a resolution period, but also the exercise of early termination options, despite the fact that counterparties may wish to exercise an early termination options based on market movements during the resolution period, rather than as a response to the use of the resolution power. We believe that the exercise of options in a resolution period should be clarified by the Commission generally, particularly bearing in mind:
    i. the different types of early termination options (e.g. early termination options which terminate at nil payment and those which generate a mark-to-market valuation and payment); and
    ii. the possibility of other option exercise rights arising during the suspension period.

11. The Consultation Paper does not state clearly whether such a stay would also extend to termination, valuation and set-off rights more generally and also what role mutuality has to play in determining the eligibility to set-off and the protections against the "splitting" of rights and liabilities that are protected under a title transfer collateral arrangement, a set-off arrangement or a netting.

    In principle, the FBF is in favour of a broad approach to protection covering the entire close-out process, i.e. including termination, valuation, netting and set-off, whether those actions are taken in sequence or independently (particularly since, e.g. the close-out of title transfer arrangements may take place via set-off). This is of fundamental importance from both a credit risk and a capital perspective, even more so where there may be separate "cleared" and "non-cleared" relationships with any failing credit institution.

    In practice, the contractual position of an entity contracting with a failed institution may differ markedly depending on whether it is allowed to set off net obligations as against the failed institution prior to the stay and prior to any resolution, or else whether it is required to wait to exercise its rights separately as against any post-resolution entities (noting that its rights and obligations may in practice be "split" between the original entity and any post-transfer institution).

    Whatever approach is taken in this regard, it is essential that, counterparties' rights both prior to and following any stay are expressly prescribed in any Level 1 instruments.

In conclusion, the FBF would like to insist on the necessity to harmonise the key aspects of a suspension right on an international as well as a European level to prevent regulatory arbitrage and competitive disadvantages.

Scope of rights to challenge resolution (G14)

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

The FBF believes that judicial review of resolution action should be limited to a review of the legality of the action, and that remedies should be limited to financial compensation since the reversal of a transfer may increase systemic risk. Therefore, it should not only be admissible when it is “practically” or “operationally” feasible but also when the transfer was made in breach of resolution rules.

However, the FBF would like to raise the question of the competent court in case of a cross border situation?

Confidentiality (G15)

45. Would the suggested provisions provide adequate protection for confidential information?

Yes, provided that the scope of the provisions on confidential information is extended to the valuation agent (or the entity that performs the valuation).

H. Safeguard

Partial transfers: safeguards for counterparties (H1)

46 a. Do you agree that the classes of arrangement suggested in this section should be subject to the suggested safeguards in the case of partial property transfers? Should any other market arrangements be included?

The FBF generally agrees with the suggested covered classes of arrangements in H(1) and reiterates that the purpose of set off and netting arrangement is to globalise and combine several rights and obligations into one single agreement to allow close out netting provisions.

Thus, any possibility given to a resolution authority to split such an arrangement could call into question a netting arrangement and contravene to its prudential treatment since it may affect its enforcement. For this reason, the FBF believes that such relevant agreement containing close out netting rights and all transactions under them must be transferred to an eligible transferee as a whole or not at all to prevent any possibility of cherry picking of transactions or part of transactions.

As a general rule great care should be taken when drafting the safeguards from use of resolution powers to have a sufficiently comprehensive list of contracts covered (unless the idea is to use an "all inclusive" approach and then list specific exclusions)[3].

46 b. As a general approach, this section H suggests a set of outcomes that Member States need to achieve (i.e. transfer of all or none of the property, rights and liabilities that covered by the various kinds of market arrangements that are specified here). It does not prescribe how that should be done or, in particular, the consequence if such a transfer contravenes these provisions. Is such further provision necessary?

The FBF considers further detailed consideration should be given to this area.

As a general rule, regarding proposal H(1), whilst the Consultation Paper considers the treatment of assets located in the EU (including assets located in a Member State other that the state of the resolution authority), the FBF believes that further consideration needs to be given to the treatment of assets located outside the EU, as well as rights and liabilities governed by the law of a non-EU jurisdiction.

This is particularly relevant, e.g. in the case of Title Transfer Collateral, where the obligation to return equivalent securities may be governed by the law of a member state (e.g. an English law) but the securities may be held in a central securities depository and/or listed on an exchange outside the European Union, and may therefore be outside the scope of any bank resolution legislation.

The Commission proposes that creditors and third parties that are affected by the transfer of assets, rights and liabilities that are located in or subject to the laws of another Member State should not be entitled to prevent, challenge, or set aside the transfer under any provision of law of that other State, but should receive compensation on the same terms, to the extent that their rights are affected by any resolution power.

However, the treatment of assets, rights and liabilities outside the EU (or governed by a law outside the EU) is only considered briefly. Whilst the Commission proposes that, where a transfer is not immediately effective under the law of a third country, that the transferor and the recipient should "*take all necessary steps to ensure that the transfer becomes effective*", this does not, in and of itself, ensure that any creditors will be no worse off. We are particularly concerned by the carve-out of the Consultation Paper, which proposes that "*where a resolution authority purports to transfer all of the property, rights and liabilities of a credit institution to another entity, but the transfer is or may not be effective in relation to certain property because it is outside the European Union, or to certain rights or liabilities because they are under the law of a territory outside the European Union, that transfer should not be treated as a partial transfer and should not be subject to the suggested safeguards*."[4]

The FBF believes that it would run contrary to the "*no creditor worse off*" principle if a resolution authority were free to use a resolution power in such a way that affects the rights of a creditor in respect of third country assets, without any guarantee of how those assets would be treated under their *lex situs*. In our view, the legislation should impose a firmer obligation to ensure that the benefit of security is transferred with the obligations that it secures, as well as any related assets. This would be consistent with the general premise in Section H3 of the Working Paper that the resolution regime should prevent the transfer of assets against which a liability is secured unless both the liability and the benefit of the security are also transferred.

[3] See comments in 46(c) below.

[4] See page 70 of the Consultation Paper

Furthermore, the FBF believes that provisions should determine the consequences of a breach of obligations by Member States to clarify the legal framework / basis of legal action before a Court.

The most recommended approach would be to state that a breach of safeguards would allow the affected counterparty to exercise termination rights. We would need to make sure that such rights are then enforceable in an equal harmonised way within the EU.

46 c. Is further harmonisation of the definitions of the financial markets arrangements covered under this section necessary for the safeguards to be effective?

The FBF believes that a fully harmonised definition of financial market arrangements should be integrated into the proposed resolution regime (to then be integrated into EU rules on close out netting if the "bottom up" approach is preferred) or alternatively such definition should be contained in European netting legislation (the "top-down approach"), knowing that such legislation should limit any opt out possibilities for Member states, if this approach is preferred.

46 d. The objective is to ensure appropriate protection ("no cherry picking") for legitimate financial market arrangements. Is there a risk that the necessary flexibility for resolution authorities could be undermined or frustrated, for example if non-related derivatives are included in a protected netting arrangement?

Any possible form of "cherry picking" will weaken the legal certainty attached to netting and broader set-off arrangements as discussed earlier. So, any possible flexibility given to the resolution authority undermining safeguards effects will lead to an increase in systemic risk and as discussed below, thought should be given to any circumstances in which individual agreements and transactions may have to be "split out" in a resolution scenario, and the compensation arrangements that would apply in such cases.

Appropriate protection for financial collateral, set-off and netting arrangements (H2)

47 a. Please give your views on the safeguards for title transfer financial collateral arrangements and set-off and netting arrangements suggested in this section.

Safeguards mentioned in section H2 a) & b) are essential to maintain a high level of certainty for transfer financial collateral arrangements and set-off and netting arrangements and then maintain a high quality of risk mitigation. Any possibility to cherry pick would undermine such risk mitigation ability.

However careful consideration should be given to the proposed safeguard that the transfer of some, but not all, of the rights and liabilities that are protected under a title transfer collateral arrangement, a set-off arrangement or a netting arrangement between the credit institution and another person should be prevented. The FBF believes that this proposal is broadly positive, and would be consistent with the broader approach to protecting set-off and close-out rights, but may in practice make the transfer of significant individual positions more difficult.

The treatment of non-derivatives positions is significant in this context, bearing in mind the Commission's proposal that the transfer of some, but not all, of the rights and liabilities that are protected under a title transfer collateral arrangement, a set-off arrangement or a netting arrangement between the credit institution and another person should be prevented. In practice, cross-contract rights of set-off, netting and close-out may exist under a range of contracts, which

seek to cover all financial dealings between a counterparty and the failed institution. In some cases, these arrangements may be multilateral (e.g. including affiliates of either the counterparty, the failed institution or both).

Thought should therefore be given to the circumstances in which individual agreements and transactions can be "split out" in a resolution scenario, and the compensation arrangements that should apply in such cases.

We note in addition as regards the treatment of non-derivative positions - the Commission's proposals on the stay of close-out rights and payment/delivery obligations are not (on their face) limited to derivatives positions and may therefore include other arrangements (including e.g. bonds, deposit netting arrangements, etc). A principle of equal treatment of different types of financial contracts should ideally be hard-wired into the legislation. Resolution authorities should not, for example, have the discretion to favour particular obligations (e.g. bonds) over derivatives, which could lead to an early outflow of assets to certain creditors ahead of others. In other words, all creditors should in principle be treated *pari passu*, subject to (perhaps) certain limited exceptions.

47 b. Do you agree that certain retail rights and liabilities and rights and liabilities relating to subordinated debt should be excluded from the suggested safeguard?

Subordinated debts should not be excluded from the scope of the safeguard since we do not know what could be the benefit for such exemption. Furthermore, the FBF is of the opinion that any exemption would lead to legal uncertainty over the scope afforded by the safeguards.

However, to our best knowledge, there is no legal or financial ground for such exclusion. In addition, complex disputes or litigation might arise regarding the concept, nature, definition or scope of the subordinated debt / debtor.

As regards deposits, see our reply to 49(b) below.

Appropriate protection for security arrangements (H3)

48. Please give your views on the safeguards for security arrangement suggested in this section.

The FBF has no particular comments on these proposals.

Appropriate protection for structured finance arrangements (H4)

49 a. Please give your views on the safeguards for structured finance arrangements suggested in this section.

The FBF has no particular comments on these proposals.

49 b. Do you consider that property, rights and liabilities relating to deposits should be excluded from the suggested safeguards?

Experience being drawn from the UK Banking Act of 2009 and the resulting Safeguards Order, attention should be paid to the treatment of "eligible deposits" – whilst it is important to avoid double recovery where a parties' rights are protected under a compensation regime, this does not necessarily mean that all contracts eligible for protection should be carved-out from the safeguards under any resolution regime. This is particularly relevant with the Commission presently looking at extending the protections of the deposit guarantee schemes directive to a wider range of eligible claimants (e.g. including larger corporates). Whilst it is logical that classes of person who cannot claim from a compensation scheme should remain protected, it does not follow that because a class of claimant can be compensated by the compensation scheme that they must be treated by the resolution regime in the same manner as a member of the public who has deposited savings at a bank. This risks creating a disincentive for banks to put in place netting agreements, which may have a knock-on impact on the stability of the financial system.

Partial transfers: Protection of trading, clearing and settlement systems (H5)

50. Is express provision in relation to the protection of trading, clearing and settlement systems necessary, or are the provisions of the Settlement Finality Directive sufficient? If express provision is needed in this context, should the protections be drafted more broadly than those in the Settlement Finality Directive?

Please see our comments under points 8 and 9 of Question 43.

Partial transfers: Compensation for third parties (H6)

51. Is the provision suggested in this section sufficient to ensure that creditors would receive appropriate compensation? Is it necessary to specify the details of such compensation agreements in an EU framework?

The FBF believes that the inclusion of compensation in an EU framework would bring certainty and clarity. However, it might be difficult to reach a similar level of compensation throughout the EU We welcome the Commission's core guidelines for compensation and agree creditors should not receive less favourable treatment as a result of the application of a resolution power than if the failed institution had gone into insolvency under the applicable national law.

We are however concerned by the proposals regarding compensation of the Consultation Paper that Member States would be able to choose the mechanisms by which that compensation is determined and provided. Although these mechanisms would need to meet certain core requirements set down by the Commission, it is suggested that significant discretion would remain with the Member States. As the proposals currently stand, there is a risk of mismatch between the valuation principles negotiated by the failed institution with its counterparties in master agreement/confirmation documentation and the valuation principles adopted by a resolution authority. We believe it essential to prudent risk management that the valuation principles be established in detail in advance (i.e prior to the use of any resolution power).

To the extent these deviate from existing market practice, counterparties should ideally have the opportunity to modify the valuation provisions in existing documentation to ensure these are in line with the principles of the resolution regimes. Such valuation principles must also be sufficiently clear to enable counterparties to act appropriately and efficiently without the risk of challenge once the suspension has been lifted. Such certainly is also crucial from a regulatory

capital perspective (i.e without clearly enunciated compensation it is difficult to assess the level of collateral required in order to have adequate risk mitigation arrangements in place).

Part 5 : Group resolution

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

A*I*. YES. The resolution authority at the group level must have the responsibility and the freedom to decide the make-up of the resolution college. From our viewpoint, this college must be more limited than the supervision college, and include only the resolution authorities of the countries where very significant entities are sited.

We are against the EBA's direct participation in the resolution colleges, since it is not a resolution authority. However, we propose to keep it informed of the activities and decisions made in the matter by the resolution college under the direction of the resolution authority of the group's parent company.

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

A*I*. 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.

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

A*I*. We consider that it is up to the resolution authority of the group's parent company to take all necessary measures to ensure the group's resolution in the best conditions. We are opposed to the idea expressed in the next-to-last paragraph before the questions in Box 53. If the subsidiary of a group had difficulties that were considered as threatening to national financial stability, we think it would be up to the parent company's resolution authority to proceed with the orderly resolution of that subsidiary in coordination with the resolution authority of the country in question. Only if the parent company would not support its subsidiary on behalf of the group's interest should the host country's resolution authority take responsibility for the resolution of the subsidiary in question.

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

A/. We think that the European Union must seek to establish a coordinated resolution approach in liaison with the third-party country in accordance with the guidelines of the G-20 and the Financial Stability Board. Indeed, all the major European banking groups have sites in third-party countries for which it will be important to have a coordinated approach.

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

A*I*. Yes, if the group has very significant sites in third-party countries, the resolution authorities concerned should participate in the resolution college or be informed of the decisions made by the group's resolution authority.

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

A*I*. NO. We think that the responsibility for the group's resolution must rest on the group's resolution authority. Rather than asking for changes in the group's structure, it is up to the group's resolution authority to ensure that the supervision of local entities is done satisfactorily, and to verify that the resolution framework of the country in question is well-adapted to the resolution of the group as a whole.

Part 6: Financing arrangements

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

A*/*. The fund's objective must not be to finance all of the resolution operations, but to cover the residual costs from the resolution. It is clear that any resolution operation must be accompanied by the establishment of liquidity lines that can only be approved by the Central Bank, not by the resolution fund. In terms of equity stakes, as indicated in the consultation document, both the bridge bank and the asset management tool must be held by public capital and, potentially, the resolution authority.
In some cases, the fund could be used to guarantee operations.
From our viewpoint, the existence of capital, subordinated debt, and any bail-in-able debts must, in virtually all cases, be enough to cover an establishment's losses. That is why we think that the resolution fund's reserves may be limited and paid ex post, according to a robust, pre-defined mechanism.

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

A*I*. The intervention fund may be fed in various ways:

- Final ex ante contributions
  In such cases, the financial institutions immediately enter the expense in their operating income and their regulatory ratio. This is equivalent to a tax.
- Ex ante security deposits
  Security deposits are renewable contributions that are reimbursed once a certain deadline is past (a few years), or converted into final contributions if an intervention is necessary before that deadline expires.
  These instruments, already established in France for deposit guarantee scheme and investor compensation systems, combine ex ante and ex post mechanisms: the resources are collected ex ante; but the banks to not record the impact on their profits or their solvency ratios until after the fund has intervened.
  Nonetheless, security deposits immediately weigh on the liquidity ratio and the banks' financing capacities.
- Ex post liquidities
  Ex post financing must also be considered, because it could be raised rapidly and surely by the intervention fund.
  Many formulas could be imagined and submitted for proper ratification by the EBA (deposit guarantee scheme) or the ESMA (investor compensation systems)." For instance:

i/ "debt contracts that are duly backed by contractual obligations, giving the deposit guarantee scheme the irrevocable right to claim those payments, and that are covered by low-risk assets that can be assigned by the deposit guarantee scheme and allocated to that system (see the Chair's compromise on the deposit guarantee scheme directive, December 8, 2010)

ii/ more generally, irrevocable financing arrangements duly backed by contractual obligations and payable on demand with no risk of execution.
Financing / refinancing mechanisms with the Central Bank, strengthened by final ex post contributions, would be part of this definition.

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

Al. The amount of the contributions must be left to the discretion of each member state according to the situation and structure of its national banking system.

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

Al. We suggest they use weighted risks as a key for distributing the contributions to the resolution fund (CRD Risk Weighted Assets). If the eligible debts do represent the potential amount of the undertakings, they do not factor in the nature of the risks borne by each of the banks. That is why the concept of CRD risk-weighted assets seems to be the best key for distribution.

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

Al. The Deposit Guarantee Fund may have two missions, but from our viewpoint, the contributions paid by the banks must be called separately. Conversely, the Deposit Guarantee Fund's reserves may be used either to protect depositors or to facilitate the resolution of a bank in difficulty, the objective being that the resolution prevents having to compensate the depositors as much as possible.

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

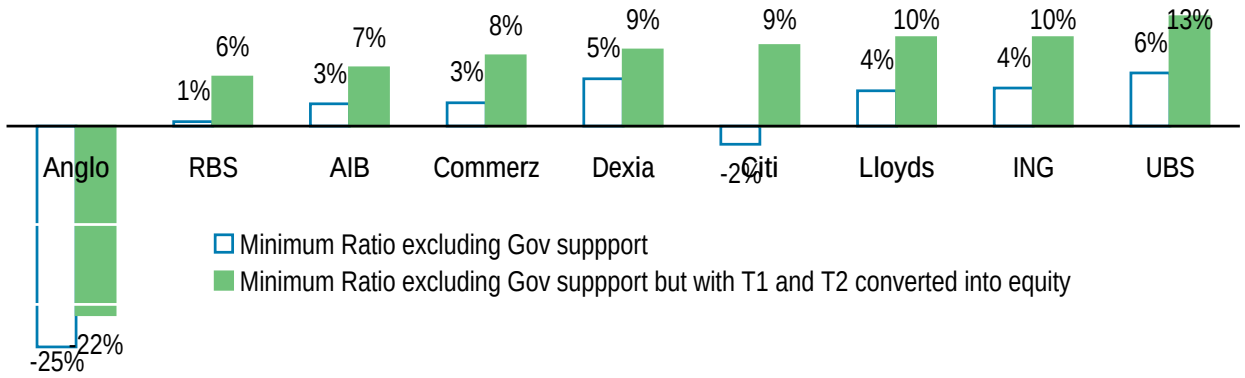
Al. NO. Because the Resolution Fund is used only to pay the residual balance of resolution costs, it does not appear necessary to grant it a privilege over the other creditors.

Annex I: Debt write-down

As an initial comment, we would like to stress that Bail in must remain a resolution tool and as such must be used only in gone concern situations, and not as a recovery tool. Therefore, the trigger for bail in must be the resolution trigger, and the ranking in liquidation must be respected (shareholders and subordinated bond holders must suffer losses according to their ranking).

We believe that senior lenders should not be immune from losses in all circumstances but as a general principle, we are of the opinion that the write down of senior debt is not acceptable unless as a last resort measure in case of orderly liquidation

A recent research study by BNP Paribas shows that, even on the current Basel II basis, the loss absorbency of hybrid regulatory capital would have restored the solvency position of almost all the banks that required state capital injections (see chart below based on the core tier 1 ratios at end of June 2010), with Anglo Irish Bank as the main exception in this particular sample.



On this matter, we differ with the assertion made by the Commission that conversion of hybrid debt would have been insufficient in the case of RBS (page 87). The analysis made by the Commission seems to wrongly include 100% of ABN AMRO's debt.

This demonstration would be even more conclusive with the new capital definition and requirements as set recently by the Basel Committee. A conversion restricted to subordinated debts and preference shares recognized as regulatory capital amply suffices, except in very infrequent circumstances to restore the banks solvency situation. It is also worth mentioning that supervisors do keep the possibility to adjust the capital required, and consequently the needed amount of subordinated debt, according to their assessment of the bank's risk exposure as already mentioned above. Such subordinated debt instruments and preference shares, which may have different characteristics and seniorities, would be deemed to be all eligible to bail-in by law.

Hence we do not consider that the extension of the bail in to senior debt is a necessity.

Second, we believe that extending the bail in features to senior debt would have a disruptive effect on the banks financing in terms of pricing or investor's market depth. This extension will have a negative impact on funding sources and divert traditional bank funding toward secured debts or corporate debts. Moreover it will have a counterproductive effect as it may turn out to be an aggravating factor in precipitating liquidity crises. Banks need to roll over their senior funding steadily (contrary to hybrid debt where refinancing occurs less often) and for very large amounts and there is a risk of liquidity stress if the bank suffers signs of weakness that increase the probability of debt write down or conversion in investor's eyes.

Finally, debt markets do not have the same depth and psychology in the different parts of the world and we believe that the European one would be particularly affected by such an extensive conception of the bail-in features. Against this background, the FBF considers that senior debt must not be included in a bail-in.

If, in spite of the arguments and risks explained above, the Commission were to come to the conclusion that increasing loss absorbency beyond hybrid debt was nevertheless needed, then the targeted approach could at least allow "bail-in-able" debt instruments to be clearly tagged and marketed as such to sophisticated investors. Therefore such a targeted approach could be less disruptive to bank's funding. In any case, should this avenue be pursued, it would need to be demonstrated that increasing loss absorption capacity is a necessity to the banks concerned. Also, banks should be given the choice to satisfy the targeted approach with existing hybrid debt instruments.

Nevertheless it would remain conceivable to adopt the comprehensive approach but only in case of orderly liquidation process if it were to be considered as a way for the Resolution Authority to act more quickly than the judicial authorities. In that circumstance, one could conceive making an exception to the general rule of equal ranking of all creditors of the same class if it was justified to preserve financial stability or public interest. For instance the Resolution authority could then decide to treat senior creditors in a different manner than depositors or retail customers which would stay immune from the bail-in process.

As a concluding remark, we wish to emphasise that bail in for senior debt raises a lot of concerns in respect of related to continuity and stability funding and could have huge counterproductive effects on access to liquidity in certain circumstances. It has obviously not been tested and reaction of lenders to bail in features remains unknown including in case of financial crisis. That is why we strongly believe that such bail in powers should not be decided upon or implemented before the matter is thoroughly investigated and submitted to European Supervisors for consultation. We also advise the Commission to work closely with FSB and the industry on this topic to ensure consistency between EU and non EU frameworks.