



FEDERATION
BANCAIRE
FRANCAISE

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**Consultation by the Financial Stability Board
« Effective Resolution of Systemically Important Financial
Institutions »**

FBF RESPONSE

The French Banking Federation (FBF) is the professional body representing 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 450 commercial and cooperative banks. FBF member banks have 40,000 permanent branches in France. They employ 400,000 people, and service 60 million.

General remarks

- The question of resolution of Financial institutions is currently discussed all over the world, at national, but also European and international level reflecting the worldwide localisation of entities constitutive of financial institutions. In our opinion, It is an unavoidable prerequisite that the resolution framework should be decided at an international level most probably through the legal instrument of a treaty (hereinafter The Treaty) that would bind all countries. Only such an harmonized international framework may ensure effective resolution (notably by avoiding voluntary delaying or freezing of the process) and legal security.-The FBF considers it absolutely necessary to provide an International framework for the Effective Resolution of SIFIs, based on the concept of the group's interest, and stipulating the derogatory measures to national law on a harmonized basis. Such a harmonisation could be best achieved with The Treaty which would bind all governments to legislate on this issue. The treaty should be sufficiently precise to ascertain a legal security at each stage of the process.

- We favour resolution process at a consolidated level, led by the group's home resolution authority in coordination with the resolution authorities of key or very significant entities, rather than measures taken separately by different resolution authorities of a group. There should only be one resolution plan for the entire group.
We consider it is up to the resolution authority of the group's parent company to take all necessary measures to ensure that the group's resolution is conducted in the best conditions in coordination with the host competent authorities. If the subsidiary of a group had difficulties that were considered as threatening 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. The keystone of this resolution process lies on a Resolution authorities crossborder cooperation stringent framework that shall be provided by The Treaty.
- Recovery and resolution plans contain very sensitive information that must remain strictly confidential. Neither shareholders, investors, nor any stakeholders should be entitled to request their disclosure. Solely a few people within the regulation or resolution authorities, bound by confidentiality agreements and ideally subject to stringent professional secrecy requirements, shall be entitled to access those information laid down in recovery and resolution plans.
- The FBF supports FSB definition of bail in, which may be implemented to resolve a financial institution which is no longer viable but before bankruptcy, ie only applicable to the senior debts during the resolution phase. The FBF emphasises the necessity of a harmonized framework to ensure the level playing field.
- In a healthy situation the preparation of a resolution plan by a resolution authority may be considered as intrusive if certain measures were to be applied to a healthy establishment that was not having any special difficulties. The resolution plan should not lead to a change in the group's structure. The preparatory phase of the crisis management framework must never override the first goal of financial institutions, which is to create value (while applying prudent management). FBF supports the concept "management for success rather than management for failure"
- Finally, entry in resolution shall not be regarded as an event of default or the first step of a winding up proceeding. However suspension of legal proceedings (creditor actions to attach assets or otherwise collect money or property from the failing firm) and continuation of contract (after short period of stay related to payment to unsecured creditors and customers) shall be provided. Contractual early termination of contracts might be suspended for a short stay subject to adequate safeguards.

I. Proposed policy recommendations

- Effective resolution regimes

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

In general, the proposed tools seem sufficiently comprehensive.

➤ Regarding the scope of the resolution framework:

The FBF considers that most institutions can generate systemic risks. The recent crisis has shown that 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 rules to all financial institutions, including banks, investment companies, insurance and reflecting the proportionality principle.

The project to reach an agreement on harmonisation on the resolution processes at a global level is very ambitious, and requires a firm commitment by the FSB and G20 to promote, preferably through an international treaty, rapid progress towards this important goal. The legal framework must be very clear and well defined in order to guarantee a level playing field for all financial institutions.

➤ Regarding the Resolution authority :

It is important to promote international cooperation and guarantee full understanding and good communication between authorities in charge of entities within the same group. It is also essential to have the same definition for the roles and responsibilities of a "resolution authority » across all countries. This should be provided by the Treaty.

The organisation of the resolution authority should ensure the independence of the authority required by its duties and should preferably be composed of, the national supervisor, the central bank, and the appropriate ministry. If a banking group is in crisis, the consolidating resolution authority would ensure that the resolution is well followed up. Furthermore, the three administrations mentioned above are accustomed to handling confidential data.

We support the choice of a single resolution authority. Indeed, 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 compatible with an orderly resolution of a banking group's crisis, least of all when it means managing the situations of several cross-border entities.

Moreover, we favour a group resolution college led by the group's resolution authority in coordination with the resolution authorities of the different very significant entities, rather than measures taken separately by the different resolution authorities of a group.

We consider it is up to the resolution authority of the group's parent company to take all necessary measures to ensure that the group's resolution is conducted in the best conditions in coordination with the host competent authorities. If the subsidiary of a group had difficulties that were considered as threatening 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. The keystone of this resolution process lies on a Resolution authorities crossborder cooperation stringent framework that shall be provided by The Treaty.

The FBF supports the exclusion of liability granted to resolution authorities and their staff while acting in good faith except in case of willful misconduct.

➤ Regarding the entry into resolution :

The FBF finds that the resolution plan should not be actionable unless and until the recovery has failed.

In the recovery 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 rule that applies is common law. At this stage, the 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 institution 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 assets transfers

In the FBF's view, a credit institution is non-viable or likely to become non-viable if one or more of the following circumstances applies:

- (a) it has incurred or is likely to incur losses that will deplete its equity to a very significant degree,
- (b) the assets of the credit institution are or are likely to be less than its obligations, or
- (c) it is or is likely to be unable to pay its obligations in the normal course of business.

Indeed, it is not desirable to have an automatic threshold for the entry into resolution. A "hard" quantitative trigger such as a solvency ratio, although transparent would be too automatic and simplistic to capture all crisis situations.

Besides, we strongly believe that objective triggers should only be tools aiming at helping the competent authority to take the decision to initiate the resolution. Indeed this decision should remain discretionary. Any trigger will need supervisory judgement confirming the "point of non viability" and "systemic importance" of the institution in order to determine whether orderly winding-down or liquidation can take place. The decision to consider an institution as non-viable should depend on a case by case assessment of the causes of the distress and simultaneously take into consideration a set of triggers or criteria available.

Given the irreversible effects of an entry into resolution, if there is disagreement between the authorities and the institution, the entry into resolution should be confirmed by an emergency legal hearing. However, the Treaty should provide for limitation to this action like requesting the judge to give a verdict within 24 hours only on the legality of the entry into resolution. Appeal to this award shall not be suspensive.

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

The use of resolution tools and powers should be governed by the principle of harmonisation. Nevertheless the tools may be applied nationally with flexibility. Where cross-border groups are concerned there is need for greater consistency of application which should be achieved through resolution colleges or Crisis Management Groups (CMGs).

For the sake of harmonisation, and to ensure a level playing field, there should be a common set of tools and powers provided by The Treaty. Such a common set of tools and powers would be crucial to coordinate resolution in cross-border cases. Actually, an International framework for crisis management, based on the concept of the group's interest, and stipulating the derogatory measures to national law on a harmonized basis could be best achieved with The Treaty which would bind all governments to legislate on this issue. The treaty should be sufficiently precise to ascertain a legal security at each stage of the process, and stipulating the measures that are derogatory to national law on a harmonized basis.

Such a harmonisation at International level is an absolute prerequisite to any further legislation on a crisis management framework.

As a general matter, any change in the statutory hierarchy of claims will have far reaching implication for the overall ranking of claims in insolvency and for shareholders rights. Its implementation in national resolution regimes would therefore require strong political support and its benefits would need to clearly outweigh its costs. To be fully efficient and to maintain a level playing field, all countries should have a similar framework provided by The Treaty, to deal with bail-in of financial institutions within the resolution process.

Above all, three fundamental principles must be respected:

- The ranking of the creditors and the orders of priorities must be maintained
- The pari passu treatment of creditors belonging to the same credit class.
- And no creditor should be worse-off than in liquidation

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

We appreciate that the bail-in of senior debts only takes place as a last resort solution and exclusively within the resolution process.

As general comment, additional resolution tool like the use of debt write down or conversion should not be limited to SIFIs. It should in principle be applicable to all financial institutions. A limitation to SIFIs would lead to a distortion of competition on the capital market between SIFIs which are defined in advance and banks that could also be characterized as national or international SIFIs in the current situation of their imminent failure.

In a resolution process the home resolution authority has the power to fix the quantum of debt to be written off or converted. According to our general principles, there should be no cherry-picking and all debts of the same class must be treated in the same way with the same write-off.

- Definition of Bail in

This concept should be better clarified : bail in consists in applying to liabilities either a haircut (write down) or conversion into equity.

- Conditions of application

We appreciate that FSB proposes a statutory bail in as a resolution tool only (ie not as a recovery tool to put a firm back in going concern) given its far reaching consequences for bank funding while in going concern, and for creditors when applied.

Bail-in of senior debts may only take place as a last resort measure in the resolution process, i.e. in situations equivalent to liquidation, if all reserves and subordinated debts have not sufficed to absorb losses, and if it can be demonstrated that the general interest (value maximization for creditors, financial stability and taxpayer protection) justifies such measure. At this point, senior creditors are prepared to incur losses either in liquidation or in resolution.

For level playing field reasons, bail in should in principle be applicable to all financial institutions (not only SIFIs).

Any national preference in the treatment of creditors should be avoided.

- Trigger

We are favourable to the proposed 'bail-in within resolution' regime, on the following conditions:

- statutory bail-in should be used solely as a resolution tool, and thus at a point at which the non-viability, or impending non-viability, of the institution has been decided by the relevant authorities either with the agreement of the institution or with the adequate expeditious legal blessing;
- applied only at a resolution stage at discretion of the resolution authorities: the tool must rely on a statutory, and not contractual, authority whose conditions are fully harmonised at international level;

- Safeguards

Given that bail in of senior debt will interfere with creditors rights, then the ranking in liquidation must be respected (senior debt holders are affected only after all subordinated debt has been bailed in), and holders of bailed-in debt must not be worse off than in liquidation. It will be necessary to provide an ex post audit to assess that this condition is respected. As already said, creditors should have the right to challenge before the Court the way bail in has been implemented.

- Application to existing debts

As soon as the rule will become applicable, it should not only cover new issues but also every existing liability, as new characteristic under new regulatory rules. If this was not the case, it would increase the complexity because it would create a new category of ranking in resolution. As a consequence, new issuances would have prohibitive prices and this would threaten bank funding.

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

Yes.

It is of paramount importance to have harmonized rules at an international level regarding bail-in and deposit guarantee schemes to ensure their efficiency and avoid distortions of competition. Those rules shall be provided by The Treaty.

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

Above all, three fundamental principles must be respected:

- ranking of creditors and orders of priorities must be maintained
- pari passu treatment of creditors belonging to the same credit class.
- And no creditor should be worse-off than in liquidation.

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

When authorities will decide to bring bail in into play, there should be no cherry-picking and all debts of the same class must be treated in the same way with the same write-off (without any national preference).

Nevertheless further study will be necessary to determine debt categories which must be excluded from the process, when such feature would have more drawbacks than benefits.

Q7 Will it be necessary that authorities monitor whether firms' balance sheet contain at all times a sufficient amount of liabilities covered by bail-in powers and that, if that is not the case, they consider requiring minimum level of bail-in debt ? If so, how should the minimum amount be calibrated and what form should such a requirement take, e.g.,:
(i) a certain percentage of risk-weighted assets in bail-inable liabilities, or
(ii) a limit on the degree of asset encumbrance (e.g., through use as collateral)?

We believe that the scope of bail-inable debt should be wide and that it is not necessary for authorities to monitor the level of bail-inable debts and to require a minimum level. Banks should be free to have contractual bail-inable instruments and statutory bail-inable instruments in addition to equity and senior debt that would be statutorily bail-inable exclusively within resolution. We would be opposed to any creation of 'super-senior' non bail-inable debt which would simply make senior debt partially subordinated.

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

As explained in our response to question 7, the FBF is clearly opposed to the introduction of a required minimum of bail inable debt.

More generally, when it comes to the potential disruptive impact of the bail in framework on bank's funding, we would like to make the following remarks:

- Maintaining a wide scope of bail inable debt should in theory help dilute the pricing impact of the bail in on bank's funding (it being understood that the bail in of senior debt must be clearly interpreted by the market as a last resort option)

- However, we are still wary of the potential disruptive impact of the bail in on banks' funding. Careful consideration should therefore be given to the issue before devising and implementing the new rules, particularly in the current context of market concerns over European Banks liquidity and funding situation. It is of paramount importance to avoid putting certain banks at a competitive disadvantage in case their competitors are located in jurisdiction that do not impose any statutory bail in. Managing properly the Level Field issue is therefore critical, particularly between the European Union and the USA. This should be guaranteed by Treaty. Also, as indicated in our response to question 6, further study should be conducted to evaluate whether by exception certain categories of debt need to be excluded in order not to endanger the continuity of funding in a stress situation.

- **Cross-border cooperation**

Q9 How should a statutory duty to cooperate with home and host authorities be framed? What criteria should be relevant to the duty to cooperate?

As mentioned above, the FBF supports the duty to cooperate for home and host authorities in order to ensure the orderly resolution of a group. However, to be efficient, this cooperation shall be regulated in a stringent framework provided by The Treaty.

FBF thinks it is essential, to promote international cooperation and guarantee full understanding and good communication between authorities in charge of entities within the same group. It is also essential to have the same definition of a « resolution authority » across countries. However, since there is no consistent definition in the document, in order to ensure the independence and authority required by its duties, we support a resolution authorities composed of the national supervisor, the central bank, and the appropriate ministry. If a banking group is in crisis, the consolidating resolution authority (i.e. the home authority in coordination with the host authority) would ensure that the resolution is well followed up. Furthermore, the three administrations mentioned above are accustomed to handling confidential data.

We support the choice of a single resolution authority being responsible for the whole resolution of a group. Indeed, 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.

Moreover, we favour a group resolution college led by the group's resolution authority in coordination with the resolution authorities of the different very significant entities, rather than measures taken separately by the different resolution authorities of a group.

We consider it is up to the resolution authority of the group's parent company to take all necessary measures to ensure that the group's resolution is conducted in the best conditions in coordination with the host competent authorities. If the subsidiary of a group had difficulties that

were considered as threatening 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. The keystone of this resolution process lies on a Resolution authorities crossborder cooperation stringent framework that shall be provided by The Treaty.

Recovery and resolution plans contain very sensitive information that must remain strictly confidential. Neither shareholders, investors, nor any stakeholders should be entitled to request their disclosure. Solely a few people within the regulation or resolution authorities, bound by confidentiality agreements and ideally subject to stringent professional secrecy requirements, shall be entitled to access those information laid down in recovery and resolution plans.

Q10 Does Annex 3: Institution-specific Cross-border Cooperation Agreements cover all the critical elements of institution-specific cross-border agreements and, if implemented, will the proposed agreements be sufficiently reliable to ensure effective cross-border cooperation? How can their effectiveness be enhanced?

See our response to Question 9.

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

Q11 Who (i.e., which authorities) will need to be parties to these agreements for them to be most effective?

As already said, Home resolution authority shall be leading the resolution phase and therefore be part of the Agreement with host resolution authorities of the most significant subsidiaries.

- **Resolvability assessments**

Q12 Does Annex 4: Resolvability Assessments appropriately cover the determinants of a firm's resolvability? Are there any additional factors to be considered in determining the resolvability of a firm?

Factors should be determined by the resolution authority since some of them would be linked to the legal framework at the time of the assessment (exogenous factors) and others would be linked to the structure of the defaulting institution (endogenous factors). Exogenous factors should anyway not count against a firm. No predefined model shall condition the resolvability assessment of the institution.

Q13 Does Annex 4 identify the appropriate process to be followed by home and host authorities?

FBF considers that the resolvability assessment could under no circumstances lead to a change in the group's structure.

The French banking industry objects to any power given to the resolution authority, as part of the plan's development, to require an institution to make operational or structural changes where there is no justification for altering an efficient business model or a healthy organization based on the assumption of triggering of 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.

However, it is of the utmost importance that national regime and resolutions tools are coordinated at an international level provided by The Treaty.

- **Recovery and resolution plans**

Q14 Does Annex 5: Recovery and Resolution Plans cover all critical elements of a recovery and resolution plan? What additional elements should be included? Are there elements that should not be included?

➤ **Starting points for recovery and resolution plans**

As discussed earlier, the FBF thinks the resolution plan should not be actionable unless and until the recovery has failed.

In the recovery 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 rule that applies is common law. At this stage, the 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 institution 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 assets transfers

In the FBF's view, a credit institution is non-viable or likely to become non-viable if one or more of the following circumstances applies:

- (a) it has incurred or is likely to incur losses that will deplete its equity to a very significant degree,
- (b) the assets of the credit institution are or are likely to be less than its obligations, or
- (c) it is or is likely to be unable to pay its obligations in the normal course of business.

Indeed, it is not desirable to have an automatic threshold for the entry into resolution. A “hard” quantitative trigger such as a solvency ratio, although transparent would be too automatic and simplistic to capture all crisis situations.

Besides, we strongly believe that objective triggers should only be tools aiming at helping the competent authority to take the decision to initiate the resolution. Indeed this decision should remain discretionary. Any trigger will need supervisory judgement confirming the “point of non viability” and “systemic importance” of the institution in order to determine whether orderly winding-down or liquidation can take place. The decision to consider an institution as non-viable should depend on a case by case assessment of the causes of the distress and simultaneously take into consideration a set of triggers or criteria available.

Given the irreversible effects of an entry into resolution, if there is disagreement between the authorities and the institution, the entry into resolution should be confirmed by an emergency legal hearing. However, the Treaty should provide for limitation to this action like requesting the judge to give a verdict within 24 hours only on the legality of the entry into resolution. Appeal to this award shall not be suspensive

➤ Responsability for recovery and resolution plans

Recovery plans

The FBF agrees with the FSB that recovery plans are to be implemented under the full responsibility of the institution’s management. As such, the required contents of recovery plans and the tools to be used for timely recovery should be consistent with the private nature of the institution. The FBF believes that it makes sense to improve recovery planning under Pillar II and to focus it on how additional capital or liquidity can be generated in stressed situations so as to comply with supervisory ratios and ensure that an institution remains a going concern.

With this in mind, the level of detail in a recovery plan should be such that suitable measures can be decided on and implemented in an adequate time frame. In the event of a crisis, the recovery plan should be adopted and then fleshed out with more specific detail.

Since recovery and resolution plans contain very sensitive information that must remain strictly confidential, neither shareholders, investors, nor should any stakeholders be entitled to request their disclosure. Solely a few people within the regulation or resolution authorities, bound by confidentiality agreements and ideally subject to stringent professional secrecy requirements, shall be entitle to access those information laid down in recovery and resolution plans.

In the FBF’s view, there should only be one plan for the entire group. No plan should be prepared at subsidiary level.

The group's recovery 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.

The FBF believes that any discussions about the preparation of the group's recovery plan should be held with the consolidating supervisor. 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.

Resolution plans

- The FBF also agrees with the FSB that resolution plans should be prepared by the resolution authorities. However, in order to ensure that information provided by the institutions has been correctly analysed and interpreted in building the Resolution Plan, there should be extensive cooperation between the resolution authority and the institutions to ensure that resolution plans are appropriate and potentially effective. This is essential given the potential for authorities to request actions to improve resolvability.

That is why FBF is concerned that according to §1.14 of annex 5, it is envisaged that some parts of the Resolution Plan written by the authority may not be disclosed to the bank (§1.14 Annex 5) since this is based on this resolution plan that the resolution authority will be entitled to request the institution to change its organisation. Finally, we estimate that the institution should provide informations but not “strategy and scenarios analysis” (§1.10) to the authority.

In the FBF’s view, there should only be one plan for the entire group. No plan should be prepared at subsidiary level.

Like recovery plans, resolution plans must be developed at the consolidated level, in order to maintain an all-encompassing view of the group and permit quick, efficient implementation as needed.

The resolution plan must be designed as a toolbox that can be used by the supervisor or the consolidating resolution authority. The singularity of each situation, and the unpredictability of factors, makes it difficult to work out specific combination of tools for a particular scenario.

Finally, the FBF would like to reiterate (as suggested in the response to Question 13) that resolution plans must not enable authorities to interfere in the business model of banks, or to require changing their legal or operational structure. It is not the role and not the responsibility of the authorities to shape ex ante, through resolution plans, the organisation of healthy banking institutions when it is not fully justified. The intervention in the legal and operational structure must be a very last resort when orderly resolution seems otherwise impossible.

Q15 Does Annex 5 appropriately cover the conditions under which RRP’s should be prepared at subsidiary level?

See our response to Question 14.

In the FBF’s view, there should only be one plan for the entire group at the consolidated level. However, we acknowledge that minorities’ interest shall be taken into account, specially if those entities are listed.

- **Improving resolvability**

Q16 Are there other major potential business obstacles to effective resolution that need to be addressed that are not covered in Annex 6?

In relation to outsourcing, FBF would point out that in some cases financial institutions provide outsourced services to other institutions, and this should be considered.

Q17 Are the proposed steps to address the obstacles to effective resolution appropriate? What other alternative actions could be taken?

No, as suggested in the response to Questions 13 and 14. The right to interfere in legal and organisational structures of an institution is too intrusive.

Moreover, the FSB considers that intra-group transactions are likely to be an obstacle to the orderly resolution of the group. On the contrary, the FBF believes that such transactions are not in themselves obstacles to the resolution of a group and are useful management tools in a group. The main obstacle lies in the lack of cooperation between jurisdictions, which shall be settled by The Treaty in a stringent manner and at international level. In this matter, ring-fencing should be avoided.

Besides, while the FBF agrees that the organisational complexity, if and when it is agreed to be excessive, of a banking group should be reduced, it does not agree on the need to eliminate cross-default clauses in Master agreements.

The proposed requirements on Management Information System quoted page 49 and 63 of the consultation seem very ambitious while, at the same time, a huge work must be done to comply with the new Basel 3 requirements. Therefore we suggest FSB to have a gradual phasing in of these measures, which should be proportional to the need and coordinated with the new supervisory framework. Moreover each institution should determine a hierarchy among the requirements and focus on the most significant data according to its idiosyncratic plan.

Finally, the FBF considers that the requirements listed in the paragraph 4.2 are too intrusive.

Q18 What are the alternatives to existing guarantee / internal risk-transfer structures?

FBF strongly support the intra group guarantees provided by the parent to its subsidiaries since it remains on a voluntary basis. We believe it is an important tool to ensure financial stability. Therefore we do not agree with the FSB's proposal to impose restrictions on intra group guarantees.

Q19 How should the proposals set out in Annex 6 in these areas best be incorporated within the overall policy framework? What would be required to put those in place?

As already said, we are concerned about the legal and organisational changes that seem to be immediately taken by the resolution authority in order to address obstacles that would arise only in a hypothetical resolution situation. Healthy Financial institutions not experiencing any particular

difficulties shall not be weakened to comply with a theoretical crisis situation or to make it more easily resolvable in the event of failure.

Those intrusive measure, if duly justified should only be imposed in a proportionate manner, if an objective link can be established between the organization of the group and its financial stability and, in any event, without the authority dictating organizational models to private groups that must preserve their freedom of action and enterprise.

We strongly believe that the variety of business models and organisations of banking group makes the banking system strong and efficient and safeguard the financial stability; a unique model would certainly not serve the cause of financial stability.

Therefore, if steps can be taken to improve an institution current financial stability, significant organisational changes will impeditment a healthy viable firm.

We would also like to underline that any powers to request changes to operational models should be strictly controlled, at an international level by The Treaty, since multiplication of uncoordinated and possibly inconsistent requests across countries would be disastrous.

- **Timelines for implementation of G-SIFI related recommendations**

Q20 Comment is invited on the proposed milestones for G-SIFIs.

FBF appreciates the gradual planning but estimates that the proposed timeline to complete all parts of recovery and resolution plans before the end of 2012 is very challenging for institutions

We would point out that one essential element is completely absent from the proposed timetable, which is the harmonisation of national resolution regimes, preferably through international treaty, but failing this, through national legislation and the bi-lateral and multi-lateral agreements. In the absence of such harmonisation, the task of regulators and financial institutions will be considerably more difficult and less effective in addressing the problem of resolution of SIFI's.

II. Discussion note

- **Discussion note on creditor hierarchy, depositor preference and depositor protection in resolution**

The FBF is in favour of greater consistency of all regulations through The Treaty. Moreover it stresses that regulators on their side should refrain from all kind of ring fencing and national depositors preference.

Q21 Does the existence of differences in statutory creditor rankings impede effective crossborder resolutions? If so, which differences, in particular, impede effective crossborder resolutions?

The existing differences in creditor rankings between jurisdictions are an obvious impediment to effective cross-border resolution.

Whilst the general order of preference outlined in Annex 7 that runs from secured creditors through to senior debt, subordinated debt and shareholders is a framework that is generally respected, difficulties of application arise when;

- Jurisdictions give privileges to certain classes of creditor (eg the state) that are not present in other jurisdictions
- The definition of depositors covered by deposit guarantee schemes differ between jurisdictions
- The amounts covered by deposit guarantee schemes differ significantly
- Depositor preference and/or deposit guarantee scheme preference is present in some jurisdictions and not others.

These differences should obviously be ironed out.

Q22 Is a greater convergence of the statutory ranking of creditors across jurisdictions desirable and feasible? Should convergence be in the direction of depositor preference or should it be in the direction of an elimination of preferences? Is a harmonised definition of deposits and insured deposits desirable and feasible?

Greater convergence of statutory rankings, of the definition of deposits and insured deposits would be better to make international resolutions easier.

The feasibility of such convergence is dependant on the willpower and ambition of political leaders to move forward such an international harmonisation. We would, as is detailed in our other comments on the proposals, be strongly in favour of such international harmonisation.

The debate on depositor preference brings many complex issues up. In our opinion, it is essential to draw a clear distinction between depositor protection through existing deposit guarantee schemes, and depositor preference over other senior creditors.

The protection of retail and SME depositors, up to a reasonable maximum amount, is in our view essential for the global financial stability and the maintenance of confidence in the financial system. The guaranteed amount should be set at a level that protects a high proportion of retail and SME depositors but exposes the largest retail depositors to potential losses.

This protection does not in our opinion constitute depositor preference, which would only be present if non-insured depositors, and the DGS, subrogated in the rights of the insured depositors, were to benefit from preference over other senior creditors. We believe that convergence should be in the direction of elimination of preferences.

Q23 Is there a risk of arbitrage in giving a preference to all depositors or should a possible preference be restricted to certain categories of depositors, e.g., retail deposits? What should be the treatment of (a) deposits from large corporates; (b) deposits from other financial firms, including banks, assets managers and hedge banks, insurers and pension funds; (c) the (subrogated) claims of the deposit guarantee schemes (especially in jurisdictions where these schemes are financed by the banking industry)?

We do not believe, as outlined above, that depositors should benefit from preference over other senior creditors of a failed institution. Retail deposits should be protected, in order to maintain confidence in the banking system and financial architecture, but this protection should be provided by deposit guarantee schemes. Once subrogated in the rights of the insured depositors, their claims should rank equally with other senior creditors.

We do not think that the fact that the deposit guarantee scheme may be funded by the banking industry should affect the ranking given to the scheme. In the case of failure of a SIFI, the banking industry will in all likelihood be exposed to the institution as a senior creditor, and therefore any cost limitation afforded by a preference given to the deposit guarantee scheme will translate at least partially into reduced recovery under senior creditor exposures.

Therefore, retail deposit insurance aside, we think that all depositors should rank equally with other senior creditors of a failed institution, and can therefore be subject to losses and/or bail-in within resolution.

General depositor preference is in our view a dangerous option that would encourage arbitrage towards instruments that benefit from the preference and strengthen the belief that depositors can be immune from losses, which is a major contributory factor to moral hazard. The practical difficulties in the definition of a deposit for general preference purposes would also be a major obstacle. It would prove to be exceptionally difficult to lay down consistent rules that would adequately make the distinction between a sight deposit, a term deposit, a certificate of deposit, commercial paper, medium term notes and senior unsecured bonds. The potential for structuring and arbitrage of financial instruments would be enormous.

We would also be opposed to any form of depositor preference linked to the term of a deposit (eg 12 months or less). In our view this will simply serve to push investors towards shorter term instruments, thus increasing the likelihood of financial instability.

Q24 *What are the costs and benefits that emerge from the depositor preference? Do the benefits outweigh the costs? Or are risks and costs greater?*

For the reasons explained above, we believe that the risks and costs of depositor preference outweigh the benefits.

Q25 *What other measures could be contemplated to mitigate the impediments to effective cross-border resolution if such impediments arise from differences in ranking across jurisdictions? How could the transparency and predictability of the treatment of creditor claims in a cross-border context be improved?*

Improvements to resolvability linked to the ranking and treatment of creditor claims must be addressed by international agreement between regulators and legislators.

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

Q26 Please give your views on the suggested stay on early termination rights. What could be the potential adverse outcomes on the failing firm and its counterparties of such a short stay? What measures could be implemented to mitigate these adverse outcomes? How is this affected by the length of the stay?

Entry in resolution shall not be regarded as an early termination trigger or event of default

The suggested temporary suspension of close out netting rights raises general concerns as such a suspension runs contrary to the core concept of close out netting. Any impairment of the close-out netting mechanism can have serious repercussions.

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 be defined in such a way to avoid negative impacts on these rights.

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 legal framework.

Besides, 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.

Moreover the temporary stay could have an impact on collateral requirements. Indeed it 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.

Finally, consideration should 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 institutions related payment obligations) are suspended. In practice, we believe the relationship between the various moratoria should be very closely linked, to prevent abuse.

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

Q27 What specific event would be an appropriate starting point for the period of suspension? Should the stay apply automatically upon entry into resolution? Or should resolution authorities have the discretionary right to impose a stay?

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. To ensure the smooth operation of any resolution regime, we believe that any International 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.

Q28 What specific provisions in financial contracts should the suspension apply to? Are there any early terminations rights that the suspension should not apply to?

It should be stated clearly whether such a stay would apply 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.

Q29 What should be an appropriate period of time during which the authorities could delay the immediate operation of contractual early termination rights?

The lengths of the stay should be as short as possible to limit any possible negative financial impacts of such stay and to avoid legal uncertainty. In that respect, a two business days stay should be a maximum, knowing that a 24 hours stay has been retained in the current US FDIC regime.

Furthermore, it should be subject to clear and precise definition of its beginning and end, and using objective criteria. 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).

Q30 What should be the scope of the temporary stay? Should it apply to all counterparties or should certain counterparties, e.g., Central Counterparties (CCPs) and FMIs, be exempted?

The 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.

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.

Q31 Do you agree with the proposed conditions for a stay on early termination rights? What additional safeguards or assurances would be necessary, if any?

The principles set out in the proposal appear to address most of the concerns raised (see also our response to Question 26 as well as well as our concerns in respect of discretionary powers to impose a stay).

However, additional safeguards and assurances should be planned on the following topics:

- a) Close out netting rights in agreements should be transferred as a whole and not in part (in this respect we support the assertion in Annex 8 (II(vi)) that there should not be cherry picking of certain contracts);
- b) Contracts covered by the stay should be clearly defined and exhaustively defined not limited to, for example, the specific list of financial instruments found in the European Markets in Financial Instruments Directive (consider if it might indeed be preferable to list contracts in an all-inclusive manner and then make specific exceptions);
- c) How assets used as security are treated - such assets should be able to be transferred, regardless of location, with the obligation secured;
- d) How non-derivative positions are treated - Recommendations should provide that resolution

authorities should not have the possibility to favour certain types of obligations (eg bonds) over derivatives, to ensure all creditors are equally treated.

Furthermore, any framework setting out a stay on close-out netting provisions should also be accompanied by provisions underlining, confirming and protecting the effectiveness of close-out netting as a risk mitigation instrument. This should entail a call for a further harmonisation of the legal framework ensuring the validity and enforceability of contractual close-out netting provisions.

Currently the legal frameworks covering close-out netting can considerably differ between jurisdictions. This causes not inconsiderable legal uncertainty. Greater legal certainty over all key elements of close-out netting will greatly serve to improve risk management capabilities of all market participants which against would have a stabilising effect. Such greater legal certainty will be particularly welcome as the introduction of provisions implementing a stay as part of a resolution mechanism may result in unwanted new uncertainties or an exacerbation of already existing uncertainties in the different jurisdictions.

Q32 With respect to the cross-border issues for the stay and transfer, what are the most appropriate mechanisms for ensuring cross-border effectiveness?

Q33 In relation to the contractual approach to cross-border issues, are there additional or alternative considerations other than those described above that should be covered by the contractual provision in order to ensure its effectiveness?

Q34 Where there is no physical presence of a financial institution in question in a jurisdiction but there are contracts that are subject to the law of that jurisdiction as the governing law, what kind of mechanism could be considered to give effect to the stay?

As a general comment, questions 32 to 34 raise complex legal issues necessitating further detailed study, which cannot be resolved and achieved within the short this short timeframe.

However, and as already mentioned, the key element is to reach a further international harmonisation of the relevant legal framework, including ancillary aspects such as contract law, company law, insolvency law and the rules on conflict of laws. In view of the general difficulties harmonisation efforts will encounter in these areas; these should be incorporated in the international treaty referred to in our answer to Question 2.