Basel Committee
on Banking Supervision

Resolution policies and frameworks – progress so far

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Executive Summary

1. In March 2010, the Basel Committee on Banking Supervision (the Committee)[1] published a report and a set of ten recommendations prepared by its Cross-border Bank Resolution Group (CBRG) (BCBS Recommendations).[2] At the June 2010 Toronto Summit, the G20 Leaders endorsed the BCBS Recommendations and expressed their commitment to implement them. Since then, international efforts for developing a comprehensive framework for the prevention and management of crises have gained momentum as effective resolution regimes have come to be recognised as a critical component of any effective approach to addressing the too-big-to-fail problem.

2. The Financial Stability Board Recommendations on systemically important financial institutions (FSB SIFI Recommendations) of October 2010[3] called for an assessment, on the basis of the BCBS Recommendations and the draft FSB Key Attributes of Effective Resolution Regimes (FSB Key Attributes), of national authorities' capacity to resolve SIFIs under existing resolution regimes and of the legislative and other changes to national resolution regimes and policies needed to accomplish effective resolution.

3. Following the G20 endorsement of the FSB SIFI Recommendations, the Committee asked the CBRG to conduct the assessment called for by the FSB. All Committee members participated in the survey and responded to a comprehensive questionnaire by March 2011. This report summarises the results and key findings of the survey and will inform the work on resolution within the FSB and standard setting bodies and feed into the elaboration of the FSB Key Attributes.

Overall progress - trend towards special resolution regimes

4. A number of jurisdictions have adopted legislation, or are considering legislation, to improve their resolution regimes along the lines of the BCBS Recommendations. Recent reforms demonstrate a clear trend towards the introduction of special resolution regimes (SRRs) and tools aimed at "public interest" objectives, such as the maintenance of financial stability or the protection of retail depositors. The survey shows progress in implementing the

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[1] The Basel Committee on Banking Supervision consists of senior representatives of bank supervisory authorities and central banks from Argentina, Australia, Belgium, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. It usually meets at the Bank for International Settlements (BIS) in Basel, Switzerland, where its permanent Secretariat is located.

[2] See Basel Committee, *Report and Recommendations of the Cross-border Bank Resolution Group* (March 2010) at www.bis.org/publ/bcbs169.htm.

[3] See FSB, *Reducing the moral hazard posed by systemically important financial institutions - FSB Recommendations and Timelines* (October 2010) at www.financialstabilityboard.org/publications/r_101111a.pdf.

BCBS Recommendations. That said, it will require renewed focus and energy by national authorities to accelerate reforms of domestic resolution regimes and tools. It will also require a renewed attention to the development of frameworks for their cross-border implementation, which includes the development of institution-specific agreements among relevant national authorities through the work of the Crisis Management Groups. Both developments will facilitate further progress in each.

5. Much work remains to be done to achieve full implementation in all of the surveyed jurisdictions. Reforms are underway at a different pace across jurisdictions. Some jurisdictions have already extended their resolution toolkits in line with the BCBS Recommendations and introduced powers that promote financial stability and facilitate the preservation of essential financial functions (stabilisation and continuity powers). In others, these reforms need to be made. Whereas authorities frequently have similar powers under their respective resolution regimes, the threshold conditions for their use may differ. For instance, in some, certain powers, such as the use of bridge banks, are reserved for systemic situations and therefore must be preceded by a systemic risk assessment. In others, the use of certain tools may be subject to confirmation by a court.

Some gaps in national resolution toolkits remain

6. Many countries continue to lack important legal powers to resolve a financial institution in distress. Even if some powers are available, the lack of certain essential powers, including powers to terminate unnecessary contracts, continue needed contracts, sell assets and transfer liabilities, will risk making the resolution of the financial institution's affairs difficult and costly. The BCBS Recommendations identified these legal powers as typically useful to enhance the ability of resolution authorities to continue systemically important financial functions while conducting an orderly resolution or liquidation of the individual financial firm. While some progress has been made, much remains to be done.

7. Authorities in many countries appear to lack the legal powers to temporarily delay the operation of early termination provisions in financial contracts in order to complete a transfer of these contracts to a sound financial institution, a bridge financial institution or other public entity.[4] Even if these powers exist, it is not clear if they will be recognised where financial contracts are governed by foreign laws.

Issues in resolving cross-border groups and conglomerates largely unaddressed

8. Shortcomings continue to exist with respect to the resolution of a financial group, especially in a cross-border context. Current reforms remain focused on deposit-taking banks and the resolution of single legal entities. One jurisdiction has adopted legislation that appoints the same resolution authority to resolve the bank and other financial group entities that are systemically important. In addition, some progress has been made in a few jurisdictions. The current reform discussion in the European Union addresses the interaction of resolution regimes in a group-context, the manner in which intra-group relations should be resolved and how intra-group transfers of assets should be handled in a resolution, in particular in the case of integrated group structures. However these issues are not yet

[4] In the European Union this is precluded currently by certain European Union Directives, notably the Financial Collateral Arrangements Directive (FCAD). The European Commission is proposing such a short stay in its consultation document on a crisis management framework for the European Union, which would require amendments to the relevant directives.

addressed in most jurisdictions. Special resolution tools sometimes exist with respect to insurance companies, but generally do not extend to other non-bank financial institutions, such as investment banks and market infrastructures.

Further work towards effective bail-in and bridge bank powers needed

9. The newly introduced tools or tools under consideration to deal with SIFIs, which include bridge bank powers or bail-in, are untested in many jurisdictions, or untested in their application to a complex multi-entity cross-border group or conglomerate. Further work on the operational and legal implementation of these powers will be necessary to ensure that they can be effectively used without causing the risk of contagion and the destabilising effects to the financial system. This work will need to examine the powers' implications for shareholders, creditors and counterparties, and the funding arrangements needed to support their implementation, as well as mechanisms that ensure their seamless operation in a cross-border context.

10. The maintenance of financial stability and the restoration of post-crisis confidence require clarity and certainty about the treatment of shareholders and creditors of a financial group as a whole and the allocation of losses among them in any resolution. To the extent that resolution affects protected property rights, adequate safeguards include the right to receive adequate compensation for deprivation of those protected rights and, at least, the assurance that creditors have a minimum recovery right equal to what they would have received in the liquidation of the financial institution. Much diversity remains as regards the methodology for calculating compensation, who provides it, and what mechanisms exist for challenging any determination as to the amount of compensation payable.

Sources of temporary funding to support resolution unclear

11. Uncertainty also remains as regards the availability of temporary funding to support resolution measures. Many jurisdictions have institutionalised arrangements, including identified sources of funding or deposit insurance funds (whether ex ante or ex post financed) that authorities can rely on to fund a resolution of a deposit taking institution. However, most jurisdictions do not have resolution funds and seem to continue to rely on ad hoc arrangements by the governments or central banks to fund broader resolution efforts that are not narrowly confined to the protection of depositors.

Differences in protection schemes for depositors and other customers

12. The majority of existing resolution regimes includes features intended to provide for the prompt payment of retail depositors' claims, or alternatively the transfer of their accounts to a healthy bank. There are, however, significant differences among the various deposit protection arrangements, which could complicate cross-border resolutions.[5] These include gaps in coverage in some cases, overlapping coverage in other cases, difficulties in accessing deposit data, differences in payout capabilities and adequacy of funding

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[5] That said, there are usually country specific reasons for differences in coverage. While uniform coverage can aid in resolutions it can present problems where there are wide variations in per capita income and distribution.

mechanisms; and differences in the ranking of deposits (depositor preference) and rules on setting off deposits against amounts owed by the depositor to the bank.[6]

13. In the insurance and securities sectors, there is still greater diversity as regards the nature of schemes and level of protection for insurance policy holders and retail investors. There are currently no international principles to guide the development of policyholder compensation and other forms of compensation scheme although the International Association of Insurance Supervisors (IAIS) has recently commenced standard-setting work in this area.

14. Some countries are currently strengthening their rules on the segregation of client money and securities to facilitate the rapid return to clients of their funds and securities, by requiring increased risk disclosure and, in some cases, imposing restrictions on the amount of client money that may be reinvested with other group companies. However, the legal mechanisms employed to protect client assets differ across jurisdictions and, except in a few cases related to the Lehman bankruptcy, the robustness of these mechanisms in an insolvency situation is untested. Further reform of segregation rules is needed for many countries to deal with the new issues such as unlimited re-hypothecation and appropriate disclosures for clients.

Limited progress in addressing cross-border complexities

15. To date, limited progress has been made in the cross-border area in most jurisdictions. While many countries have implemented necessary improvements to their domestic resolution regimes, uncertainty remains as regards the mechanisms and processes to implement and ensure recognition of resolution measures in a cross-border context, in particular with respect to newer techniques designed to ensure continuity of critical functions (eg bridge bank, transfer powers, bail-in powers).

16. In many countries, there have been few material changes in cross-border information sharing arrangements. At present, there remain constraints in the sharing of information for planning purposes as well as “in crisis” in particular across different authorities, such as between the home supervisor and a foreign central bank or depositor insurer, or among different sectoral supervisors in home and host jurisdictions.

17. A limited number of jurisdictions have entered into cross-border agreements that specifically deal with cooperation and coordination in managing and resolving a financial crisis. Existing cooperation agreements are usually in the form of bilateral or multilateral MoUs focusing on enhanced cooperation in the analysis of cross-border banking resolution issues, planning for potential resolution scenarios and appropriate simulations, and contingency planning or other work designed to improve preparation of the authorities for managing and resolving crises involving financial firms with operations in different countries. The existing cooperation agreements are usually non-binding and are for general application, ie not institution-specific. The FSB is addressing the need for clarity around roles and responsibilities of the authorities at various stages of a crisis; scope and modalities for sharing of information, in particular, pertaining to institution-specific recovery and resolution plans; and modalities for appropriate sharing of information with host authorities not represented in the Crisis Management Group.

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6 See Basel Committee and International Association of Deposit Insurers (IADI), *Core Principles for Effective Deposit Insurance Systems* (June 2009), at http://www.bis.org/publ/bcbs156.htm.

18. There has been no progress towards the development of a framework for cross-border enforcement of resolution actions, such as a cross-border mutual recognition and enforcement of resolution powers between home and host jurisdictions. Given the complexity of the issue and the possible impact on national budgets, the process of considering burden-sharing arrangements is at a preliminary stage.

Some progress in recovery and resolution planning

19. National authorities appear to be at different stages of developing recovery and resolution plans (RRPs) for SIFIs. In general, the BCBS and FSB Recommendations with respect to RRPs for SIFIs and other measures to improve resolvability have so far only been partially implemented. Although a few jurisdictions appear to be further along in the process than others, no jurisdiction has fully implemented the relevant recommendations. In most of the jurisdictions, there are requirements for contingency plans focused on business resilience and the ability for critical operations to continue functioning in times of stress. However, so far only limited progress has been made with what is needed to improve resolvability. Specifically, there is a lack of focus on resolution issues. Only a few respondents have a formal requirement that financial institutions prepare plans for orderly resolution in the event of material financial distress or failure. A number of respondents are in the process of developing formal RRP regimes, while some others are involved as host authorities in the Crisis Management Groups' work in developing RRPs for large internationally active banks. As the development and enhancement of RRPs is a continuing exercise, national authorities will need to continue their momentum, irrespective of their state of progress.

20. To advance the objective of improving resolvability, the FSB recommends that national authorities be equipped with the powers to require financial institutions to make simplifying changes to their legal and operational structures and business practices to facilitate recovery and resolvability measures. The Committee recommends regulatory incentives to encourage simplification of structures and operations that will both enhance business operations and improve resolvability. Few authorities have powers to require changes to the structure and operations of SIFIs solely with the aim of improving their resolvability. Several jurisdictions have begun reforms to enhance regulatory powers related to resolvability as a complement to regulators' supervisory and resolution powers. Progress in this area has mainly been on recovery planning, focused on large banks, with much less progress being made on resolution planning for banks.

Measures to improve resolvability being explored

21. A number of jurisdictions are considering additional measures to improve resolvability. Among the measures being considered are requiring improved risk management or reductions of intra-group guarantees and greater resiliency in service level agreements covering critical functions or services. While implementation of these and other measures will require careful consideration of their possible effect on the operations, funding and risk management of firms, such steps may enhance flexibility in a resolution. As noted in the BCBS Recommendations, an effective resolution framework should incorporate a power for the resolution authority to terminate burdensome contracts. Thus far, steps being taken to implement these measures are typically discretionary rather than explicit statutory or regulatory requirements.

22. Most respondents have required their financial institutions to put into place business continuity measures relating to IT systems and the maintenance of data on a legal-entity basis. While the majority of respondents is considering or already requiring financial

institutions to maintain relevant data on both a consolidated and a legal-entity basis, it is unclear whether this covers all the information that is needed for a resolution.

23. The continued operation of clearing and settlement services in a resolution is another essential aspect of an effective resolution. There are frameworks for the continued operation of essential clearing and settlement services, but these systems generally are not required to be legally separable. Several jurisdictions are examining the continuation of clearing and settlement services under both conditions of non-severability or mandated severability. Testing of recovery and resolution plans also needs to be conducted in many jurisdictions.

Addressing impediments to cross-border resolutions to be a high policy priority

24. As home authorities develop formal RRP regimes or continue their work with host authorities in the Crisis Management Groups' work in developing RRPs for SIFIs, national authorities need to address impediments to cross-border cooperation and coordination. Additional work remains to be done in particular as regards information sharing; and cross-border recognition and enforceability. Cross-border resolution funding and ring-fencing also present unique challenges. Consideration must also be given to differing legal and institutional frameworks among jurisdictions, which may in some circumstances justify using other strategies, such as mandatory subsidiarisation. The Committee will continue to work with the FSB and other bodies to lay out priorities for reform and to develop concrete and pragmatic proposals to move forward with an analytical framework for assessing progress going forward.

I. Introduction

25. The Committee published in March 2010 a set of recommendations to facilitate effective cross-border bank resolutions (BCBS Recommendations). The BCBS Recommendations were based on an extensive stock-take of legal and policy frameworks for cross-border crises resolutions and its follow up work to identify the lessons learned from the recent global financial crisis.

26. The BCBS Recommendations set out practical steps to improve cross-border crisis management and resolutions. These include the introduction of effective national resolution tools and frameworks for the coordinated resolution of financial groups, mechanisms to facilitate their cross-border implementation, firm-specific contingency planning, a reduction of complexity and interconnectedness within group structures, cross-border information sharing and effective risk mitigation techniques, such as netting (with the necessary adaptations to allow for the effective implementation of resolution measures, such as a short stay on early close-out of financial contracts pending their transfer in a resolution), as well as effective exit strategies.

27. International efforts to develop a comprehensive framework for the prevention and management of crises have gained momentum. At the Toronto Summit in June 2010, the G20 Leaders endorsed the BCBS Recommendations and expressed their commitment to implementing them. At the Seoul Summit in November 2010, the G20 reaffirmed their Toronto commitment to the implementation of the BCBS Recommendations at the national level and called on the FSB to build on this work to develop the Key Attributes. The FSB SIFI Recommendations, which were endorsed at the November 2010 Summit, proposed a range of actions, work processes and timelines to promote effective resolution regimes which address the too-big-to-fail issue. In its Recommendations, the FSB called for an assessment

to be undertaken by FSB members of their capacity to resolve SIFIs operating in their jurisdictions under their existing resolution regimes. The assessment should also extend to identification of the legislative and other changes to national resolution regimes and policies needed to accomplish effective resolution,[7] drawing on the BCBS Recommendations and the draft FSB Key Attributes.

28. Following the G20 endorsement of the FSB SIFI Recommendations, the Committee was mandated to conduct this assessment to inform the FSB's further work on effective resolution regimes for financial institutions. At its December 2010 meeting, the Committee asked the CBRG to undertake further work to evaluate progress in national and multi-national efforts to adopt improvements that enhance the authorities' capability to manage and resolve distressed banking institutions in a manner that minimises disruptions to the financial system. In response to the Committee's request, the CBRG developed a comprehensive questionnaire (see Annex). The questionnaire aimed to:

- assess whether and to what extent existing regimes and recent reforms implement the BCBS Recommendations and highlight features of national resolution regimes and policies that meet the BCBS Recommendations;
- point out issues that remain unaddressed in existing regimes or current reforms and continue to present obstacles to effective cross-border resolutions; and
- identify any additional issues related to national resolution regimes and the available powers that may call for additional requirements for effective resolution regimes beyond those currently identified in the BCBS Recommendations or the draft FSB Key Attributes.

29. The survey also sought to address cross-sectoral aspects, including the interaction of different types of resolution regimes governing banking and non-banking financial activities within a financial group or conglomerates as well as the interaction of protection schemes for depositors, insurance policy holders and retail investors.

30. All Committee members responded to the questionnaire by March 2011. This report summarises the results and key findings of the survey.

II. National resolution regimes and tools

31. The terms "resolution" and "resolution regime" are understood as referring to any action by a national authority, with or without private sector involvement, intended to maintain financial stability and/or address serious problems in a financial institution that imperil its viability (eg a substantive condition of authorisation) where, absent resolution, the institution is no longer viable and there is no reasonable prospect of it becoming so.[8] Most countries responded that they have resolution regimes for failing financial institutions, although (notwithstanding the definition provided in the guidance to the questionnaire) the term seems

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7 The FSB SIFI Recommendations (paragraph 21) states that in addition to the capacity to resolve SIFIs, the assessment should include the legislative and other changes to national resolution regimes and policies needed to accomplish effective resolution; this includes in particular changes needed in order to (i) eliminate provisions that hamper cross-border cooperation or trigger automatic consequences as a result of interventions in other jurisdictions, (ii) to oblige seeking cooperation with foreign resolution authorities and (iii) to provide the powers to require changes to an institution's structure and business practices.

8 See BCBS Recommendations paragraph 22.

to have been interpreted in different ways. Consequently, the scope and content of what countries refer to as their resolution regimes vary considerably.

32. Broadly speaking, there looks to be three broad types of resolution regime:

- **Special resolution regimes** that enable authorities to take control of banks and other financial group companies before or upon insolvency and that provide a wider range of resolution or stabilisation powers thereafter. Full-blown special resolution regimes are mainly administrative regimes, and they provide directed transfer powers. This includes an ability to effect partial transfers of the assets and liabilities of the financial institution to third party purchasers or bridge institutions, without needing to obtain the consent of shareholders, creditors and counterparties of the failed institution. Countries which broadly take this approach include Brazil, Canada, Japan,[9] Mexico, Singapore, Switzerland, the United Kingdom and the United States. New laws recently enacted in Germany and Spain also include elements of this approach. Some of these regimes also include the power for the authorities to compulsorily acquire the shares of the financial institution.
- **Special administration or management regimes,** which are hybrid administrative/judicial regimes in which the banking supervisors or resolution authorities appoint special officials (variously referred to as special administrators, provisional administrators, special managers or statutory managers) to implement resolutions. They are designed to facilitate a (going concern) restructuring and/or recapitalisation of the failing institution. Should a restructuring not be possible under these regimes, a forced liquidation or bankruptcy-type process generally applies. Examples of this approach include Australia, Belgium, France and Italy. The powers of these special officials are sometimes not as extensive as those available in the first type of regime, although this is variable. In particular, the regimes in Australia and Italy are really combinations of these two approaches and as such include rather more extensive powers than the Belgian regime, while in France, the special administrator is legally considered as the institution's manager and has then all powers and duties previously exercised by the management
- **Mixed regimes**, without the full range of powers exhibited by the first two groups, in some cases because the powers can only be exercised with the consent or on a majority vote of shareholders and/or creditors, and in some cases because the regime strongly relies on court-administered proceedings, in particular in the insolvency liquidation phase. These arrangements nevertheless are generally distinct from corporate insolvency procedures. An example of a mixed regime is Luxembourg.

33. Only a small number of countries can claim to have resolution regimes which are fully consistent with the BCBS Recommendations. However, many countries have recently extended and enhanced their regimes, while others are in the process of doing so. It will be important to evaluate the extent to which these planned or enacted reforms meet the BCBS and FSB SIFI Recommendations and what remains to be done to enhance the regimes further.

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[9] Under the Deposit Insurance Act of Japan, the Financial Services Agency may appoint the Deposit Insurance Corporation as an administrator so that the Deposit Insurance Corporation may take control of a failed deposit-taking institution and transfer its assets and liabilities to a bridge institution without obtaining the consent of shareholders, creditors and counterparties of such failed institution. Throughout this resolution process, the Deposit Insurance Corporation is allowed to utilise traditional judicial insolvency proceedings if the Corporation determines it proper. In this sense, the Japanese system has an aspect of not only a special resolution regime, but also a special administration regime.

A. Objectives

34. A key difference between bank/financial institution resolution regimes and corporate insolvency procedures relates to their statutory objectives. Special resolution regimes tend to be based on "public interest" objectives, such as the maintenance of financial stability or the protection of retail depositors, whereas the main objective of corporate insolvency procedures is to restructure or wind down the firm in a manner that achieves the best possible recoveries for creditors of the company. Consistent with the broader policy objectives involved, the powers available to the authorities under bank resolution regimes tend to be more extensive than the powers available to court-appointed administrators or liquidators of companies. These powers are designed to ensure continuity of access to critical functions and transfer of parts or all of the business, in some cases without the consent of creditors or shareholders, whereas in corporate insolvency proceedings moratoria on the enforcement of claims come into effect, making continuity of access more difficult, and transfer powers are more often subject to consent or majority votes of creditors or shareholders.

35. The new German arrangements, encapsulated in the recent Bank Restructuring Act, specify objectives relating to the aversion of wider systemic risks emanating from bank failures. The objectives also include a specific reference to ensuring that the banking sector meets part of the costs of resolution. The special resolution regime in the United Kingdom, adopted under the Banking Act of 2009, lists five statutory objectives: protect and enhance financial stability; protect and enhance confidence in the banking sector; protect depositors; protect public funds; and avoid interfering with property rights in contravention of rights under the European Convention on Human Rights. The Act explicitly says these objectives are ranked equally and are to be balanced as appropriate by the authorities on a case-by-case basis. The UK Treasury has published a Code of Practice on the local resolution regime which, amongst other things, provides guidance on the matters to be considered in this respect. Similarly, the Dodd-Frank Act balances the requirements of mitigating risk to the financial system; promoting financial stability; imposing losses on creditors, shareholders and responsible management and directors; and maximising recoveries. Mexico's resolution regime for banks introduced in 2006 lists five objectives: protect depositors' interests and creditor rights; prevent a greater and unnecessary deterioration of bank´s assets; minimise the negative impact on the rest of the financial system; protect the payment system; and reduce potential fiscal costs. It also contains a special treatment for banks whose liquidation could have, in the view of financial authorities, systemic implications.

36. Some countries' resolution arrangements are subject to least-cost requirements (ie the estimated cost of funding the resolution must be no more than the estimated cost, net of recoveries, of paying out insured depositors of the failed institution), notably those of Canada, Japan and in the case of bank resolutions, the United States. These requirements are subject to systemic risk overrides or exceptions, which enable a non-least cost resolution to be adopted if that is deemed necessary to maintain financial stability. In these regimes, therefore, the financial stability objective is effectively the overarching one.

37. Some countries specify objectives linked to depositor, consumer or policyholder protection.[10] Examples are Argentina and Korea. The Korean regime is unusual in also specifying objectives relating to the promotion of competition and financial efficiency.

[10] Some countries including Japan mention that the resolution regime aims at the protection of consumers as well as the assurance of confidence in the financial system.

38. Most countries, however, do not specify objectives for their resolution regimes in legislation. Instead, the most common approach is to embed the objectives of resolution into the general objectives of the authorities that trigger or implement resolutions. These may be set out in policy documents or in MoUs between the relevant authorities.

B. Scope of resolution regimes

39. BCBS Recommendation 1 provides that "national authorities should have appropriate tools to deal with all types of financial institutions in difficulties so that an orderly resolution can be achieved that helps maintain financial stability, minimise systemic risk, protect consumers, limit moral hazard and promote market efficiency." In connection with the underlined words, countries were asked for information on: (i) the scope of their resolution regimes (ie the institutions to which the regime applied); and (ii) the objectives of their regimes.

40. BCBS Recommendation 2 calls on jurisdictions to establish a national framework to coordinate the resolution of the legal entities of financial groups and financial conglomerates within their respective jurisdictions. Countries were asked to respond to various questions related to: (i) the coordination of resolution of entities regulated by different regulators; (ii) intra-group financing issues; and (iii) the possibility of extending resolution proceedings to non-regulated entities within the group.

1. Financial institutions to which resolution regimes apply

41. The resolution regimes in most countries tend to apply mainly to commercial banks and other deposit-taking institutions. The category of other financial institution most commonly subject to a resolution regime is insurance companies, although some regimes also apply to investment firms. By and large, the regimes tend to be more comprehensive in the case of prudentially supervised financial institutions than for other types of financial institution.

42. Most countries' regimes apply on a solo legal entity basis rather than a consolidated group basis. A number of countries do, however, apply more limited versions of their resolution regimes to bank holding companies, but less frequently to non-deposit taking subsidiaries of holding companies. Examples of a resolution regime that ranges more widely over banking groups and other financial institutions are Brazil and Italy. Although the proceedings governing the parent undertaking and its subsidiaries remain separate and there is no pooling of assets, the regime provides for coordination and connections between them. Countries that have enhanced or introduced resolution regimes in recent years, notably Mexico and the United Kingdom, have tended to direct their legislative changes at deposit-taking institutions on a solo basis, although the United Kingdom allows one of the resolution regime tools (temporary public ownership) to be applied to holding companies if there is a serious threat to financial stability from the failure of a banking group headed by a UK-incorporated holding company. In Germany resolution measures can also be applied to holding companies and to conglomerates. A number of countries, including Australia, are in the process of considering extending resolution powers to cover holding companies and subsidiaries, with a view to ensuring robust powers to resolve financial distress in complex groups.

43. The United States, which has established an orderly liquidation authority under the Dodd-Frank Act, has in essence extended its well-established resolution regime for insured deposit-taking banks to bank holding companies, their affiliates and other financial institutions under certain conditions (ie effectively that their failure is deemed likely by the United States authorities to have broader systemic consequences that cannot adequately be

dealt with through normal bankruptcy law) (the "Orderly Liquidation Authority"). The Belgian resolution regime also extends beyond banks to "systemic" financial institutions.

44. In most countries, the resolution regime applies principally to deposit-taking institutions, although in some countries (eg China, France, Italy, Switzerland, the United Kingdom and the United States) special arrangements apply also to investment banks. In these cases, however, the powers available tend to be more restrictive than for deposit-takers and/or only apply to the larger investment banks or those whose failure could have systemic consequences.

45. As regards mutual/hedge funds, corporate insolvency law is generally all that is available for resolution purposes, although in the United States the Orderly Liquidation Authority could apply if the fund's failure has broader systemic consequences that could undermine financial stability.

46. As regards asset management firms which are not authorised deposit-takers, the corporate insolvency law generally applies. A prominent exception is Italy, where asset management companies managing collective investment portfolios are subject to the two key procedures under the resolution regime ie special administration and compulsory administrative liquidation. In the United States, the Orderly Liquidation Authority could apply if the firm's failure were determined to have broader systemic consequences that could undermine financial stability.

47. A fair number of countries apply special resolution-type arrangements, in whole or in part, to insurance companies. Countries with resolution regimes for insurers include Australia, Belgium, Brazil, Canada, France, Japan, Mexico, Spain, Switzerland and Turkey. In the United States, an insurer whether or not systemically important, would be resolved under state insurance liquidation law. In countries without such arrangements, the general corporate insolvency regime applies, with a few additional powers for pre-insolvency intervention. In Singapore, authorities are empowered to secure continuity in insurance coverage when an insurer fails. To facilitate the transfer of policies from a failing insurer, the authorities have the power to direct such a transfer and impose a moratorium on any applications to wind up the insurer or commence proceedings against the insurer. The liquidator of a failed insurer is also required to either seek to sell or transfer the portfolios of the insurer, or continue the business of the insurer until the portfolios are transferred. In Australia, there are close similarities between the resolution powers able to be applied to banks, other deposit-takers, general insurers and life insurers, with some crisis resolution powers also extending to holding companies of each of these categories of financial institution.

48. In almost all cases, resolution regime powers are not available to resolve financial market infrastructure firms; assuming the firm is not a deposit-taker, it is generally subject to corporate insolvency law. In the United States, the Dodd-Frank Act could apply if the firm's failure were determined to have broader systemic consequences that could undermine financial stability. Due to the broad definition of credit institutions in Germany the resolution regime is also available to custodians and CCPs.

49. In most cases, holding companies of financial institutions are subject to general corporate insolvency law rather than the bank resolution regime. Among the exceptions are Australia, Brazil, Canada, Germany, Japan, the United Kingdom and the United States, although in all cases special provisions apply. In Australia, the resolution authority has extensive powers to give binding directions to holding companies, as well as undertaking business transfers as part of a resolution process. In Brazil, the holding company is within the regime in the context of integrated activities or common interests with financial institutions subject to the regime. The Canadian resolution regime applies to holding

companies that are federally regulated in Canada. Japanese bank holding companies may be recapitalised as part of a general recapitalisation of a banking group that is needed to mitigate systemic risk, provided the funds contributed through such recapitalisation process will be used primarily for banking institutions within the group. In the United Kingdom, only one of the resolution regime tools – temporary public ownership – may be applied to UK-incorporated holding companies of banking institutions, and then only if the failure of those institutions is judged to represent a serious threat to financial stability. And, in the United States, the Dodd-Frank Act potentially applies if the failure of the holding company is deemed to have broader systemic consequences that could undermine financial stability.

50. Locally incorporated subsidiaries will generally be treated as domestic institutions under the applicable resolution regimes, and will thus be subject to resolution on similar terms. In contrast, the treatment of local branches of foreign financial institutions differs somewhat across jurisdictions. In the EU/EEA, the authorities of home countries of EU/EEA-incorporated credit institutions are solely entitled to decide on the adoption of reorganisation measures or the opening of winding-up proceedings in application of the home country's laws, and the authorities in EU/EEA host countries (ie where branches or assets are located) must recognise the effects of these measures. In the United States, local law governs insolvency proceedings relating to the operations and assets of the branch. The various approaches to the resolution in an insolvency context of the local branch of a financial institution are discussed in greater detail in Part II of the BCBS Recommendations.

51. In most countries, it seems that there is just one resolution regime which applies to banks, other deposit takers and (in some cases) to other categories of supervised financial institutions. In these cases, the standard corporate insolvency law applies to other entities. However, in some cases, there is more than one resolution regime, with different types of resolution regimes applying to different categories of financial institution – eg to banks, to insurers, to securities firms, etc. By and large, the resolution regime arrangements tend to be more comprehensive in the case of prudentially supervised financial institutions than for other types of financial institutions. In the United States, for example, the Federal Deposit Insurance Act, which applies to insured depository institutions, contains more comprehensive resolution powers than the Securities Investor Protection Act, which governs the liquidation of most securities brokers/dealers. In some countries with a federal structure, there may also be differences between resolution powers depending on whether a financial institution is licensed and supervised at a federal level or a state/provincial level. In the United States, state governments have jurisdiction over insurance companies; in Canada, provincial governments have jurisdiction over provincial credit unions, securities dealers and mutual funds.

2. Distinction between systemic and non-systemic firms

52. In most countries the resolution arrangements do not explicitly distinguish between systemically important firms and other firms. In most cases, the same resolution regime powers apply to banks, for example, regardless of their systemic importance. There are some exceptions, however. Under the United Kingdom's resolution regime, for example, the power to take a financial institution into temporary public ownership may only be exercised if the failure of the institution could pose a serious threat to financial stability. The German and Japanese regimes are similar in this respect. The Mexican regime also allows authorities to implement special resolution methods when the failure of an institution may have systemic implications. The United States Orderly Liquidation Authority also distinguishes between systemic and non-systemic firms.

53. For countries where the same powers are technically available to resolve systemic firms and non-systemic firms, the decision as to which powers are exercised may well be influenced by the institution's systemic importance. For example, in the case of countries with

deposit insurance, small banks and other small deposit-takers that get into acute distress could be closed and depositors paid out, whereas in the case of large, systemic banks, an alternative resolution may be used to ensure that the bank's important functions (including deposit-taking, transaction facilitation and lending) are maintained, either within the bank or in a successor entity. In all cases, it is recognised that a firm's failure could be systemic in some cases but not in others.

54. While national resolution regimes do not, in general, make any kind of ex ante distinction between systemic and non-systemic firms, there is still an implicit recognition of systemic importance, given that resolution regime powers tend to be more comprehensive for banks than for other categories of financial institution. This presumably reflects the reality that, in most cases, banks (dependent on their size and the nature of their activities) are likely to have a wider systemic impact than other categories of financial institution when they get into trouble.

3. Financial groups and conglomerates

55. Most countries have only limited legal powers to resolve a group in a single or a series of coordinated proceedings. Powers tend to be exercised on a legal entity basis within a group. In some cases, these are exercisable under one regime, while in other cases they are exercisable under industry-specific regimes. Most responses indicated that there are coordination arrangements in place to facilitate a coordinated approach to group resolution (eg MoUs between the different authorities). Countries with such arrangements include Brazil, China, Hong Kong SAR, Italy, South Africa and United Kingdom. In some cases, a group-wide resolution is assisted by there being just one resolution authority for all the regulated entities. This is the case, for example, in Belgium and Japan.

56. Some responses suggest that legal reforms are planned or under way to strengthen the capacity to implement a group-wide resolution, including powers to appoint one person to assume control of the group as a whole to oversee the resolution. Supervisory authorities in some cases are exploring group-wide resolution planning requirements and reorganisation powers. Under the European Union's resolution framework being proposed by the European Commission, for instance, there would be a concept of a 'group level resolution authority' – the resolution authority of the European Union Member State where the European Union parent company is established – which would be responsible for planning group resolution.

57. In only a few countries is it currently possible to extend resolution proceedings to unregulated entities within the group, although most respondents noted that if the resolution took place at the level of the parent, this may be sufficient in many cases to effect a resolution of subsidiaries, given the ownership and control exercisable by parents over their subsidiaries.

C. Resolution triggers

58. BCBS Recommendation 1 provides that resolution regimes should enable the authorities to respond rapidly, flexibly and under conditions of legal certainty to a wide variety of circumstances. They should provide for a process of early intervention with clear conditions governing their application. Countries were asked to provide details of the legal conditions which permit the resolution authority in their jurisdiction to activate or "trigger" a resolution regime (ie "resolution triggers").

59. Resolution triggers vary across countries and depend on the type of financial institution being dealt with and (in some countries) the nature of the powers being exercised. In general, they are pre-insolvency, based on qualitative regulatory criteria – eg breach of

laws, prudential or regulatory thresholds, or supervisory orders (eg Australia, Brazil, France, Hong Kong SAR, India, Italy, Japan, Mexico, Singapore, the United Kingdom and the United States), conduct of business in a manner not consistent with the interests of depositors (eg Brazil, China, Singapore and the United States), or a threat to the stability of the financial system (eg Australia, Belgium, Germany, Sweden and the United States) to avoid the risk of regulatory over-shooting (ie that the authorities would act mechanically although the real situation might differ from the model).

60. The triggers are generally exercised at the discretion of the authorities, which means that in practice these regimes are subject to the risk of regulatory forbearance (ie that the authorities may delay too long in activating the regime). On the other hand, discretion permits the authorities to respond "rapidly" and "flexibly to a "wide variety of circumstances", as stated in BCBS Recommendation 1.

61. Some countries seek to address the regulatory forbearance issue by, either directly or indirectly, linking their resolution triggers to "prompt corrective action" type supervisory regimes. Examples are Canada, Korea, Japan, Mexico and the United States. In most other cases, a purely qualitative approach is taken, with fewer explicit links to quantitative prudential thresholds. Even in cases where a quantitative link exists, there are relatively few examples of a hard backstop requirement to trigger resolution linked to a failure to meet a prescribed capital ratio (the main example is the United States, where there is a presumption that the FDIC will be appointed a receiver if an insured bank's tangible equity ratio falls below 2%).

62. To some extent, supervisory discretion comes at the expense of certainty, which might have the effect of ambiguity to reduce moral hazard. In addition, this can be addressed by making more transparent the process that would be followed by the authorities when deciding whether to intervene. The United Kingdom, for example, has published a Code of Practice, which provides guidance as to how and in what circumstances the authorities will use the resolution tools. The OSFI in Canada has published a "Guide to Intervention for Federally Regulated Deposit-Taking Institutions".

63. In some countries, there is a close connection between resolution triggers and the available resolution powers. In the United Kingdom, for example, certain general conditions need to be satisfied before any resolution power can be exercised (ie (i) the bank is failing, or is likely to fail, the threshold conditions for permission to carry on regulated activities; and (ii) it is not reasonably likely that (ignoring the resolution power) action will be taken by or in respect of the bank that will enable the bank to meet the threshold conditions), but additional conditions need to be satisfied before the resolution authorities may exercise a property transfer power or the power to take the bank into temporary public ownership. As mentioned above, the latter power may only be exercised if this is necessary to resolve or reduce a serious threat to financial stability. Brazil and Mexico are other examples of jurisdictions that have carefully calibrated different triggers to different powers. On the other hand, Switzerland applies a single set of threshold conditions for intervention and then requires the authorities to determine the appropriate use of powers in response to the specific situation under consideration.

D. Resolution powers (other than bail-in)

64. BCBS Recommendation 1 provides that national authorities should have "appropriate tools" (ie powers) to deal with financial institutions in difficulties. Examples include powers to sell assets and transfer liabilities, terminate unnecessary contracts, continue needed contracts, and create bridge institutions. The FSB calls for resolution regimes that provide the resolution authority with a broad range of options to resolve a

financial institution where, absent resolution, the institution is no longer viable and there is no reasonable prospect of it becoming so. Countries were asked to respond to various questions on the content and scope of the powers available under their respective resolution regimes.

65. It is difficult to draw firm conclusions about the extent to which the powers and tools available in individual jurisdictions are consistent with the BCBS and FSB SIFI Recommendations. This is true even where authorities frequently have the power to take similar types of actions under their respective resolution regimes. Yet, the conditions under which these powers can be exercised may differ. As mentioned in Section C above, in certain countries some resolution powers (eg business transfer powers or the power to acquire the shares of the financial institution) may legally only be exercised in certain circumstances, whilst in others all resolution powers are, in principle, available once the conditions for activating the powers (eg breach of certain regulatory requirements) have been fulfilled.

66. Another difference may arise from the speed with which certain resolution powers can be exercised, eg whether the exercise of the power is subject to certain actions, prior approval, eg from judicial authorities. Generally, it seems that most countries with administrative resolution regimes empower the resolution authority to exercise resolution powers without the need for court approval. In some cases, however, certain powers do require the approval of the court. In Belgium, for example, the court must review the lawfulness of the transfer by the authorities of any property of the firm and the adequacy of any compensation paid. In Singapore, the court may, on the application of the resolution authority, prohibit legal proceedings that could otherwise be brought against the firm, such as the enforcement of judgments and winding-up proceedings.

67. Finally, the effectiveness of one resolution tool may depend critically on the availability of certain other tools. For example, the power to transfer contracts will only be effective if, at the same time, the authority has the power to temporarily override contractual early termination rights, and the effectiveness of bridge bank powers will depend on the availability of appropriate funding arrangements to support the operations of the bridge bank. Thus, the overall effectiveness of a regime depend on the interplay of all available tools, their effective and speedy implementation, and cannot be gauged merely on the basis of a check-list of individual resolution tools.

1. Power to assume control

68. Many countries reported having powers to assume control of the firm (either where the resolution authority does this itself or where it or a court appoints a special administrator to assume control). Provided the relevant resolution trigger has been met, they have the ability to appoint an administrator, receiver or manager, or similar official over the failing financial institution. He or she nearly always has wide powers to sell or otherwise dispose of the assets of the firm. It is less clear (at least in some countries) whether the relevant official has the power to transfer the *liabilities* of the firm to third parties.[11]

[11] A power to transfer assets, but not liabilities, may make it difficult to transfer the business of the institution to a third party, as an operating business is essentially a collection of contracts, many of which entail both rights and liabilities. Under many systems of law, the party to whom obligations are owed is required to consent to any transfer (or novation) of those obligations from the original obligor to the new obligor. This makes it difficult in practice to dispose of a business quickly, which is one reason why such disposals are frequently achieved by selling the shares of the entity operating the business, rather than the underlying business itself.

69. Most resolution regimes include the power to replace the management of the financial institution. However, powers vary greatly in scope and flexibility. In many cases, the appointment of an official to administer the affairs of the institution will suspend the powers of management as a practical matter, even if technically they remain in office. If the power exercised is the appointment of an administrator or similar official, he or she will run the affairs of the institution to the exclusion of management.

70. To some extent, the effect of the exercise of a resolution power on the shareholders of the institution will depend on the type of power being exercised. If an administrator or similar official is appointed to manage the affairs of the institution, the powers of the shareholders to appoint the board and to approve certain decisions made by management are practically suspended (eg Belgium, Italy, Japan and Mexico) or restricted (eg Germany, Hong Kong SAR, Korea, Singapore and Switzerland). If the power exercised is the compulsory transfer of the "good" business of the institution to a third party purchaser or a bridge institution, then the shareholders generally retain their economic rights in the institution following such transfer. However, it is likely that the rump institution would be placed in administration and then wound up, in which case the shareholders would only benefit from the proceeds of the sale of the good bank and collection of the rump institution's assets after distributions had been made to all the remaining creditors (eg Canada and the United Kingdom).

71. Some countries reported that shareholders may retain consent or veto rights in relation to certain proposed restructuring measures. In this connection, the Netherlands noted that a recapitalisation without shareholder approval is not compliant with the European Union Second Company Law Directive. The European Commission has recognised that European Union Member States may need specific legal authority to derogate from some of the provisions contained in the company law directives, to the extent necessary for the application of resolution powers, provided that trigger conditions and a public interest test for their use are met.[12]

72. Other countries (eg Belgium, Canada, Hong Kong SAR,[13] Japan, Korea, Singapore, Sweden and the United Kingdom) extend the range of resolution powers to include the compulsory acquisition of the share capital of the financial institution (or in certain circumstances, its parent) by the State (ie the power to take the firm into temporary public ownership).

2. Transfer powers

73. In a number of countries, the local resolution regime includes a power to transfer the assets and liabilities of the institution under specified conditions to a third party purchaser, in whole or in part (eg Australia, Belgium, Brazil, Canada, France, Germany, Italy, Mexico and the United States), and in some of these the authority also has the power to transfer the assets and liabilities of the institution to a temporary "bridge" institution (eg Australia, Brazil, Canada, Germany, Japan, Mexico, Switzerland, the United Kingdom[14] and the United States). Other countries, including France and the Netherlands, are planning to add such powers to their regimes.

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[12] See Annex 2 (*Derogation needed for Company Law Directives*) in the European Commission Working Document published in December 2010, which contained technical details of a possible future European Union framework for bank recovery and resolution.

[13] Primary legislation is required.

[14] In the United Kingdom, this power also extends to the shares of the institution.

74. If assets and liabilities of the institution are transferred to a third party purchaser or a bridge institution, then management generally retain their powers in respect of the "rump" institution (ie the part that is not transferred), but this is usually temporary, as the institution will probably be insolvent and thus will be placed in administration or liquidation (eg the United Kingdom and the United States).

75. Most countries do not have powers to reverse initial asset and liability transfers. Exceptions include Canada, Germany, the United Kingdom[15] and the United States, subject in some cases to observance of time limits.

3. Power to impose moratoria on enforcement of third party claims

76. Many countries reported that their resolution regimes include temporary moratoria on the enforcement of third party claims. In most cases, these powers apply in an insolvency rather than a pre-insolvency context and are not discretionary. An exception is Singapore, where the court may, on the application of the resolution authority, prohibit legal claims that could otherwise be brought against the firm, such as the enforcement of judgments and winding-up proceedings.

4. Powers to require essential services to continue

77. The resolution regimes of most countries do not contain express powers to force third party service providers to continue to provide essential services to a financial institution that is undergoing resolution. The legal position will generally depend on the terms of the contract between the service provider and the financial institution and, in particular, the circumstances in which the contract may be terminated. However, countries suggested a number of techniques by which essential services could, in practice, be maintained. One common technique is to guarantee that the obligations of the financial institution under the service contract will continue to be honoured.

78. If the service provider is a subsidiary of the financial institution, taking control of the parent, and thus exercising indirect control over the subsidiary will also help ensure that the service provider can continue to operate.

5. Powers to delay public disclosure of market sensitive information

79. As regards financial institutions with listed securities, securities laws in some jurisdictions may require the public disclosure of proposed resolution measures. These obligations, however, generally only apply to the issuer of the securities (ie the financial institution) and not to the authorities contemplating such measures. Furthermore, not all market sensitive information must be disclosed. In the European Union, for example, the Market Abuse Directive contains a provision permitting an issuer to delay the disclosure of market sensitive (inside) information if such disclosure would prejudice its legitimate interests, provided such omission is not likely to mislead the public and provided the issuer is able to ensure the confidentiality of the information.

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[15] In the United Kingdom, supplementary and onward transfers, as well as reverse transfers are also permitted. These powers are not time limited.

6. Time limits for exercising resolution powers

80. Time limits apply to the exercise of resolution powers in most jurisdictions (eg taking control, suspension of operations, transaction restrictions, restructuring, bridge bank and administration of assets), although they vary considerably, both in terms of the resolution measure involved and across jurisdictions. In Canada, for example, if the CDIC is appointed as the receiver of the financial institution, or if the shares and any subordinated debt of the institution are transferred to the CDIC, it has a maximum of 180 days to effect a restructuring. If a bridge institution is established, it must be disposed of by the CDIC, or failing that wound up, within a maximum period of five years (ie an initial period of two years and the possibility of three one-year extensions via Ministerial Order). In Mexico, a bridge bank may be operated for a period of six months, with an option for one extension for another six-month period. In its consultation paper, the European Commission has suggested that, in order to address competitive concerns associated with the operation of a bridge bank and to ensure that it is a temporary structure with the clear objective of onward sale, a time limit of one year should apply, with a power for resolution authorities to extend that period for an additional twelve months.

81. Countries which do not impose time limits for the exercise of resolution powers include Australia, France, Hong Kong SAR, Spain, Switzerland and the United Kingdom.

7. Legal protection for the resolution authority and its officials

82. The majority of jurisdictions offer legal protection for resolution authorities and officials provided the resolution powers have been exercised in good faith. Such protection is recommended by the Committee in its Core Principles for Effective Banking Supervision Methodology[16] and the Core Principles for Effective Deposit Insurance Systems.

E. Bail-in

83. The FSB SIFI Recommendations call on jurisdictions to consider restructuring mechanisms to allow recapitalisation of a financial institution as a going concern by way of contractual and/or statutory bail-in tools (ie debt-equity conversion and write-down), as appropriate to their legal frameworks and market capacity. Countries were asked to provide information on existing legal frameworks and planned reform initiatives for effective statutory and contractual bail-in mechanisms.

84. Going-concern actions could kick in at various stages, and range from supervisory direction to firms to raise more capital or hold adequate liquidity (eg Australia, Hong Kong SAR, Switzerland, the United Kingdom, most others) or to submit a restructuring plan (eg Germany). In a number of jurisdictions, a debt to equity conversion can be achieved under existing corporate restructuring laws or special resolution regimes (eg Germany), but the approval by creditors and/or court is necessary.

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[16] See http://www.bis.org/publ/bcbs130.htm. The Core Principles Methodology contains the following essential criteria for compliance Principle 1 (5) (*Legal protection*): *(1) The law provides protection to the supervisory authority and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith. (2) The supervisory authority and its staff are adequately protected against the costs of defending their actions and/or omissions made while discharging their duties in good faith.*

1. Statutory bail-in powers

85. Few jurisdictions have explicit statutory powers to bail in creditors, including senior unsecured creditors, through a forced conversion of debt to equity without any contractual basis and without consent of the counterparties. One exception to this is Switzerland, where a recent legislative amendment will, after having become effective, explicitly provide for the authority to impose a debt-to-equity conversion in the context of formal reorganisation proceedings.

86. A number of other jurisdictions are considering the introduction of such powers in the context of broader reforms of resolution frameworks, the focus being mainly on banking institutions. These include the European Union which proposes as part of a comprehensive framework for crisis management and resolution the introduction of a "debt write-down tool" which would enable resolution authorities to write down the claims some or all of the unsecured creditors of a failing institution and, possibly, to convert debt claims to equity. A number of European Union members (eg France and the United Kingdom) are also actively considering the introduction of a statutory bail-in tool.

2. Contractual bail-in

87. No jurisdictions either prohibit or mandate contractual bail-in. In contractual bail-in, the power or obligation to write down and/or convert debt into equity derives from a contract. Some jurisdictions have frameworks in place that sets out under what conditions contingent convertible capital instruments ('cocos') can be taken into account in the capital calculations.

88. Switzerland plans to require its SIFIs to hold "high trigger" (at 7% of CET 1) contingent capital of 3% risk-weighted assets (RWA) to meet a bank's recapitalisation needs when its capital situation is deteriorating. In addition, its SIFIs would be required to hold "low trigger" (at 5% of CET 1) contingent capital of 6% RWA. A conversion of low trigger contingent capital is expected to generate sufficient capital ("liquidation capital") to ensure an orderly resolution, possibly involving the creation of a bridge bank.[17]

89. Under the Mexican framework, banks issue contingent convertible capital instruments which include a contractual conversion clause that specifies that the instruments could be converted into shares if the capital adequacy ratio of the institution falls below 8% RWA, up to the amount considered necessary by authorities to replenish capital. The conversion would occur in the context of a prompt corrective action regime for banks.

90. On the tax treatment, few jurisdictions (eg Canada and Hong Kong SAR) would treat the interest on these instruments as tax-deductible. As for cross-holdings, the European Union and the few other responses (eg Mexico and Switzerland) flagged the need for some restrictions. Switzerland argues for a total ban on cross-holdings between SIFIs. In Mexico, cross-holdings of convertible subordinated debt are not allowed. Banking institutions are not allowed to hold subordinated debt of any kind issued by other institutions.

F. Court involvement, safeguards and other requirements

91. BCBS Recommendation 1 stipulates that a resolution regime should promote market discipline by imposing losses on shareholders, subordinated debt holders, and if

[17] Neither the "high trigger" nor the "low trigger" contingent capital requires any authorities' intervention in order to trigger the conversion or write-off.

appropriate other responsible creditors and counterparties of the financial institution, subject to appropriate compensation mechanisms, while providing safeguards for secured and other senior creditors, and protection of capital market transactions, such as securitisation structures and covered bond programmes.

92. The exercise of resolution powers needs to be justified by the need to restore public confidence in the financial system and should be subject to adequate protections for shareholders, creditors and counterparties and be subject to ex post judicial review. Given the statement in BCBS Recommendation 1 that resolution regimes should enable the authorities to respond rapidly, flexibly *and under conditions of legal certainty* (our emphasis) to a wide variety of circumstances, the consequences of negative judicial review should be clear.

93. The experience with the last crisis stressed the importance of early intervention, that is, intervention before the financial institution is insolvent, in order to protect confidence in the banking system and alleviate the costs and consequences of failure. Yet, early intervention also raises the potential for significant interference with the property rights of creditors and shareholders of the firm, which are frequently protected under national constitutions or international treaties such as the European Convention on Human Rights.

94. Claims should be protected in line with contractual arrangements and the statutory ranking of those claims in insolvency. After all, legal certainty and predictability as regards the treatment of rights is critical for market confidence. The restoration of confidence post-crisis also requires clarity and certainty about the allocation of losses. To the extent that resolution affects protected property rights, adequate safeguards include the right to receive adequate compensation for deprivation of those protected rights and, at least, the assurance that creditors have a minimum recovery right equal to what they would have received in the liquidation of the financial institution.

95. To the extent compensation schemes already exist, much diversity remains as regards the methodology for calculating compensation, who provides it (eg the resolution fund), and what mechanisms exist for challenging any determination as to the amount of compensation payable.

1. Judicial review

96. Countries were asked to indicate the extent to which decisions to activate resolution powers, as well as the exercise of such powers by the authorities, were subject to review by the local courts. They were also asked for information on the nature and extent of the legal remedies available to aggrieved creditors and shareholders of the financial institution, as well as the existence of compensation schemes.

97. A distinction needs to be drawn between: (i) the review by the courts of the actions of the resolution authorities as a matter of administrative law; and (ii) judicial proceedings in tort that may be initiated by aggrieved stakeholders against the authorities. There is also a distinction between: (i) "compensation" for illegal, wrongful or negligent action by the authorities; and (ii) "compensation" that is provided according to an established compensation scheme where resolution powers are exercised in accordance with the applicable resolution regime, but in a manner that affects the property rights of shareholders and creditors.

98. In most countries, the decision to trigger resolution powers, as well as the ongoing exercise of those powers, can be reviewed by the courts as a matter of administrative law. Judicial review is generally not compulsory, although there are some exceptions in certain countries and for certain powers (eg Belgium for "transfer measures"; Luxembourg for

suspension of payments).The courts in a number of countries have powers to reverse a decision to trigger a resolution power (eg Argentina, Belgium, Brazil, France, India, Indonesia, Italy, Luxembourg, the Netherlands, Singapore, Spain, Switzerland, Turkey, the United Kingdom and the United States), and substitute their own decision (eg Hong Kong SAR, Japan, Saudi Arabia, South Africa and Sweden). However, members noted that courts were unlikely to undo resolution measures and generally exercised constraint. No examples were cited of a court actually having done this in a resolution context.

2. Compensation

99. A large number of countries stated that their resolution schemes do not provide for compensation for creditors (other than compensation for depositors via deposit insurance) or shareholders. This is likely to be because these regimes focus on the protection of the interests of creditors and do not provide resolution authorities with powers to override this protection in favour of overall public interest and financial stability considerations, or manage the resolution in a manner that ensures continuity of systemic functions and minimises damage to the wider economy, at the expense of individual stakeholders' rights. It is assumed that these responses refer to situations where the financial institution is already insolvent. If so, the absence of compensation in these circumstances is not surprising; creditors remain entitled to a pro rata distribution of the firm's assets according to ordinary insolvency law principles.

100. Most jurisdictions with resolution powers that may interfere with property rights in a pre-insolvency context have compensation schemes. The United Kingdom is a good example: The basic principle is "no creditor (or shareholder) worse off"; creditors and shareholders are entitled to receive compensation only to the extent that an independent valuer determines that they have received less than they would have if the financial institution had become insolvent without the resolution regime having been used; dissatisfied creditors or shareholders can challenge the valuer's decision in the courts. Australia, Canada and Germany have broadly similar schemes.

101. In the United States, the maximum liability of the FDIC to a creditor is equal to the amount the claimant would have received if the institution being resolved had been liquidated. Within these parameters, the FDIC does, however, have the power to treat similarly situated creditors differently, and to do so without having to compensate them, if such action is necessary to maximise value of the assets, initiate or continue essential operations of the receivership or a bridge financial company, maximise the present value return from the sale of an asset, or minimise the loss on the sale of an asset.

G. Funding of resolution

102. BCBS Recommendation 1 calls on resolution regimes to include mechanisms to fund ongoing operations during the resolution process. One mechanism might be the deposit insurance fund. Others might include temporary financing or temporary guarantees of some or all of the liabilities of the financial institution. Funding of a resolution could be from a pre-funded source, such as a resolution fund financed via levies on financial institutions, or from an ex post funding arrangement, such as where the government provides the initial funding and has the capacity to levy financial institutions to recover any outlays not recovered by the government from the financial institution in question. The FSB SIFI Recommendations call for a resolution regime that would make feasible the resolution of any financial institution "without taxpayer exposure to loss from solvency support" (paragraph 12).

103. Most countries appear to have dedicated deposit insurance funding sources (ex ante or ex post), but this can only be applied to deposit insurance payouts or transfers of

deposits. On the other hand, most jurisdictions do not have dedicated funds that authorities can rely on to fund a resolution. Most country responses referred exclusively to banks and other deposit-taking institutions in this context, so the extent to which funding might be available to resolve other financial institutions is uncertain.

104. There is no real pattern on whether local branches of foreign banks have access to resolution funding provided by the local authorities. The countries in which resolution funding is, in principle, available to local branches of foreign banks indicated that the eligibility criteria are broadly the same as for locally incorporated banks (eg being a member of the deposit guarantee fund, systemic importance, etc). Access to resolution funding in most countries does not depend on the nationality of the shareholders of the bank. In other words, locally incorporated subsidiaries of foreign banks would have access to resolution funding on the same conditions as local banks.

105. In order to protect against losses, provision of funding may be subject to collateralisation, provided this is available. In France, Mexico, Switzerland and the United States, funding provided to an entity that is being restructured or resolved in other ways enjoys a priority over other creditors.

106. A broad division is between:

- voluntary (private sector) arrangements;
- institutionalised arrangements, which include mandatory deposit guarantee schemes and resolution funds, which may or may not be fully or partially pre-funded; and
- discretionary funding options, such as solvency support from the government.

1. Voluntary private sector arrangements

107. Countries were asked to mention any voluntary private sector arrangements in place in their respective jurisdictions, including those which could support a restructuring or resolution without the intervention of the public sector. Countries where private sector financial institutions seem to have established voluntary schemes are:

- Australia and Germany, where there are limited arrangements among banks, credit unions and saving banks to support each other under certain conditions;
- Germany again, where the voluntary Deposit Protection Fund of the Association of German Public Sector Banks in Germany provides for deposit protection beyond the legally required minimum; and
- Korea, where a private bad bank established by the banks jointly can help financial institutions improve the quality of their assets by purchasing non-performing assets.

2. Institutionalised arrangements

108. Many countries have fully or partially pre-funded (ex ante) mechanisms that can be used to facilitate individual resolutions. A broad division is between deposit guarantee schemes and dedicated resolution funds (although these overlap in some cases):

- In a number of countries (eg Argentina, Brazil, Canada, France, Italy, Japan, Korea, Mexico, Spain, Turkey, the United Kingdom, and the United States), deposit guarantee schemes can, under certain conditions, be used to fund resolution. A common condition is the so-called “least cost rule”. Another is that the financial institution must be a member of the scheme; this is the case for Argentina, Canada, France, Japan and Mexico. The technique used generally depends on the legal structure of the scheme and its relationship to the resolution authority. In other jurisdictions (eg Belgium, Hong Kong SAR, India, Singapore, Sweden and Switzerland), deposit protection schemes cannot be used to fund resolution measures, except indirectly to fund the repayment of retail deposits.

- A number of countries (eg Germany, Japan, Korea, Spain, Sweden and the United States) have ex ante or ex post resolution funds that are distinct from deposit guarantee schemes. Some of these are financed entirely by the industry (eg Germany, Sweden and Japan, although in the latter case the government may provide funding in exceptional circumstances), whilst others rely on a mixture of industry and government funds (eg Korea and Spain). As some of these funds have only recently been established, it is not clear how they would be used in a resolution (eg whether they would only be used for the resolution of systemically relevant institutions).

3. Discretionary funding options

109. Discretionary funding options are sometimes referred to as “ex post arrangements” and tend to be employed on a case-by-case basis. They divide into two broad categories: emergency liquidity assistance by the central bank and solvency support by the government.

- Many countries referred to the ability of the central bank to provide emergency liquidity assistance to a financial institution which has temporary liquidity problems, provided the institution is still solvent and the facility is fully collateralised.
- In exceptional circumstances, a troubled institution may receive direct or indirect solvency support from the government. This can be provided through various means, including secured loans, government guarantees, the purchase of impaired assets and, usually as a last resort, direct injections of capital.

H. Netting agreements and temporary stays to facilitate resolution

110. BCBS Recommendation 8 calls on jurisdictions to promote the use of risk mitigation techniques that reduce systemic risk and enhance the resiliency of critical financial or market functions during a crisis or resolution of financial institutions, including through enforceable netting agreements and collateralisation arrangements. The BCBS Recommendations note, however, that “such risk mitigation techniques should not hamper the effective implementation of resolution measures.” More specifically, BCBS Recommendation 9 stipulates that national resolution authorities should have the legal authority to temporarily delay immediate operation of contractual early termination clauses in order to complete a transfer of certain financial market contracts to another sound financial institution, a bridge financial institution or other public entity. Following expiry of the stay, immediate termination rights would be available for contracts not so transferred, but would not be available for contracts transferred until and unless the solvent transferee itself defaulted. In this connection, the BCBS Recommendations indicate that, while the current protections for close-out netting of financial contracts may reduce risk of contagion during normal markets, if all counterparties of a failing bank exercise the right to net exposures upon the initiation of resolution measures, it will undermine financial stability and accelerate contagion during crisis. The BCBS Recommendations also note that the ability of relevant authorities to impose a brief delay on the exercise of netting rights would maximise the possibility of transfer.

111. The resolution regimes in most countries seem to be consistent with BCBS Recommendation 8, as most countries promote the use of risk mitigation techniques that

reduce systemic risk. But fewer resolution regimes are consistent with BCBS Recommendation 9. Authorities in many countries appear to lack the legal powers to temporarily delay the operation of early termination provisions in financial master agreements (eg the ISDA Master Agreement or the Global Master Repurchase Agreement) in order to complete a transfer of these contracts to a sound financial institution, a bridge financial institution or other public entity, Similarly, they appear to lack the powers to stay counterparties under bond and loan documentation from enforcing their rights under these agreements following events of default triggered by the exercise of resolution powers.

112. There are also legal uncertainties regarding the extent to which the imposition by the resolution authorities in one country of a temporary stay on the enforcement of close-out rights under a financial master agreement would be recognised by the courts of other countries and, in particular, the courts of the country whose law governs the contract, assuming the agreement is governed by a foreign law.

113. Most countries do not impose legal restrictions on the exercise of close-out netting and set-off under financial master agreements, nor do they restrict the ability of secured creditors to enforce security interests (although, in relation to the latter point, most countries limited their responses to the enforcement of security interests under derivatives master agreements). Similarly, most countries do not restrict the ability of lenders under loan agreements or bondholders under bond documents from enforcing their rights to accelerate the repayment of debt incurred by the financial institution under such instruments (if the exercise of a resolution power in relation to the financial institution triggers an event of default under the terms and conditions of the relevant instrument).

114. There is thus a mixed picture on the extent to which: (i) resolution authorities have the power to temporarily suspend or delay the exercise of close-out or termination rights under finance contracts; and (ii) such an order by a resolution authority in one country would be recognised in other countries. This is likely to depend on a number of factors, including: (i) whether the order falls within the range of measures covered by a legally binding instrument between the countries concerned on the mutual recognition of reorganisation or insolvency measures; (ii) whether the finance contract is governed by local law or foreign law; and (iii) the location of any collateral securing the obligations of the financial institution.

1. Enforcement of close-out netting and set-off rights

115. In most countries, counterparties under financial master agreements, such as the ISDA Master Agreement and the Global Master Repurchase Agreement, are free to exercise without restriction their rights to close out outstanding transactions under those agreements on the occurrence of an event of default. Some respondents from countries in the European Union cited the Financial Collateral Directive as a reason why legal restrictions on the enforceability of close-out netting may not be imposed.[18]

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[18] The Collateral Directive requires European Union Member States to ensure that financial collateral arrangements and close-out netting provisions can take effect in accordance with their terms, "notwithstanding the commencement or continuation of winding up proceedings or reorganisation measures in respect of the collateral provider and/or the collateral taker" (Article 4(5) (*Enforcement of financial collateral arrangements*) and Article 7(1) (*Recognition of close-out netting provisions*) of the Directive). "Reorganisation measures" is defined to mean "measures which involve any intervention by administrative or judicial authorities which are intended to preserve or restore the financial situation and which affect pre-existing rights of third parties, including but not limited to, measures involving a suspension of payments, suspension of enforcement measures or reduction in claims".

116. Countries that permit the authorities to impose a temporary stay or suspension on the enforcement of close-out rights include the United States. Under United States law, upon the appointment of the FDIC as receiver or conservator, counterparties may close out "qualified financial contracts" (broadly, derivatives, foreign exchange and repurchase transactions) only after a one-business-day stay period has lapsed. If the qualified financial contracts with respect to a given counterparty are transferred to a solvent third party within specified timeframes, such contracts may not be terminated or netted out based solely upon the appointment of a receiver. If an institution or company is subject to the Bankruptcy Code (ie non-banks and financial institutions that are not deemed to be systemically important), then no delay would apply to close-out rights. Germany's response indicated that a temporary delay (until the end of the next business day after notification of a voluntary court-supervised reorganisation procedure) of termination rights in debt relationships is required.[19]

117. The European Commission's recent consultation proposes a temporary stay on the exercise of close-out netting and set-off rights following the notification of resolution. The stay would last 48 hours after the resolution authority makes public its decision or 5 pm on the business day following the day on which the decision is made public, whichever is longer.

118. In the United Kingdom, a resolution regime instrument transferring property or shares of the institution can provide that termination rights and events of default which arise by reason of the instrument "are to be disregarded". This only extends to financial contracts not subject to the European Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements (FCAD). The vast majority of financial contracts are subject to the FCAD. The resolution regime in Australia provides that counterparties may not close out transactions on the basis only of the appointment of a statutory manager or a compulsory transfer of business. The effect of such provisions is that the exercise of the resolution power is deemed to have no factual significance when considering whether an event of default has occurred. There is thus no need to impose a stay on the enforcement of close-out rights because such rights do not exist (at least on the basis of the exercise of the relevant resolution power).

119. In the United States, if the financial institution is placed under the control of the FDIC, the FDIC may prevent qualified financial contracts from being terminated and closed out, so as long as the contracts continue to be performed. Agreements transferred to bridge banks are also immune from contractual close-out, as long as the bridge bank performs on the agreement. A similar scheme operates in Canada; counterparties may not terminate "eligible financial contracts" (EFCs) by reason only of the appointment of the CDIC as receiver of the financial institution or if the EFC is assumed by a bridge bank, provided the CDIC undertakes to guarantee the payment or ensure that all obligations arising under the EFC are assumed by the bridge bank.

2. Enforcement of security interests by secured creditors

120. The majority of countries reported no restrictions on the ability of secured parties to enforce security interests following default by the troubled financial institution. However, the responses of most countries addressed the enforcement of security interests arising under derivatives master agreements, rather than the enforcement of security interests more generally. In many of the countries which answered the question more broadly, it is possible to impose a stay, but only in connection with a liquidation or bankruptcy proceeding.

[19] The provisions of the Financial Collateral Directive are addressed in sec. 23 Credit Institution Reorganisation Act (Kreditinstitute-Reorganisationsgesetz).

121. The United States impose a stay or suspension of rights for certain types of entities where a one business day stay applies to entities subject to resolution under the Federal Deposit Insurance Act or the Dodd-Frank Act. Secured creditors of institutions that are subject to the Bankruptcy Code are not subject to any limitations in terms of enforcing security interests for qualified financial contracts.

3. Events of default under loan agreements and bond documents

122. There seem to be few restrictions in most countries on the ability of creditors under loan agreements and bond documents to enforce their rights under those agreements following the occurrence of an event of default triggered by the exercise of a resolution power.[20] For the countries which reported restrictions, the responses generally referred to specific types of financial master agreements with close-out netting provisions (already discussed above), rather than to loan agreements and bond documents.

4. Cross-border recognition of stays on the enforcement of contractual rights

123. While no country reported that the courts of their country would automatically recognise the imposition by the resolution authorities of another country of a temporary delay on the enforcement of close-out netting rights under finance agreements or financial master agreements, a significant number of countries indicated that recognition could be given on a case-by-case basis, provided certain conditions were met. One frequently mentioned condition was that the financial institution was already undergoing an insolvency procedure (eg Australia, European Union and the United States). The Netherlands indicated that local recognition would be given in principle if the foreign order is given under the applicable law of the agreement.

124. Most responses did not discuss local recognition of a resolution conducted by an administrative authority in another country, although Switzerland reported that under its resolution regime, the Swiss resolution authority (FINMA) is able to recognise all decrees, orders and measures executed by a competent foreign authority in international resolution cases, whether or not these are issued by an administrative or judicial authority. The European Commission also reported that this issue is under consideration.

125. The response from Australia noted that if a netting agreement is governed by a foreign law, the courts of the foreign country might not necessarily recognise the impact of Australia's laws and exercise of powers by an Australian authority on the provisions of the agreement.

I. Segregation of client funds and securities

126. BCBS Recommendation 8 also calls for an effective segregation of client positions to promote resiliency of critical financial or market functions during a crisis or resolution of financial institutions and to reduce systemic risk. These risk mitigation techniques include enforceable netting agreements, collateralisation, and segregation of client positions. Some countries are currently strengthening their rules on the segregation of client money and securities, by requiring increased risk disclosure and, in some cases, imposing restrictions on

[20] An event of default typically permits the lenders under a loan agreement or the bondholders under the bond document to call for immediate repayment of the principal outstanding under the instrument plus accrued interest (ie payment acceleration).

the amount of client money that may be reinvested with other group companies. However, the legal mechanisms employed to protect client assets differ across jurisdictions and, except in a few cases related to the Lehman bankruptcy, the robustness of these mechanisms in an insolvency situation is untested. In this connection, further analysis may be warranted to identify possible legal and operational obstacles to ensuring either that: (i) clients have prompt access to their assets on the failure of a firm; or (ii) custody of these assets is transferred promptly to another firm.

127. The International Organisation of Securities Commissions (IOSCO) recently conducted a survey of national regimes for the protection, distribution and/or transfer of client assets.[21] The report describes the protections that the various regimes afford to client assets, both on a pre- and post-insolvency basis. The IOSCO survey, as well as the responses of members to the BCBS survey, reveals a number of differences among the regimes. These can be explained by differences between the underlying legal frameworks and, in particular, whether client funds are protected under (civil law) custody arrangement or a (common law) trust regime. Some regimes permit institutions to encumber, rehypothecate or otherwise use client securities with written client consent (sometimes for all clients; in other cases, only for non-retail clients); others prohibit the use of client assets. While client securities are segregated under all regimes, there are differences as regards the treatment of client money, which in many jurisdictions is treated as a general obligation of the firm, whereas it is segregated in others. BCBS Recommendation 8 recognises that unlimited re-hypothecation of collateral may threat the client's claim and prompt recovery of client assets.

128. Though most countries have laws requiring the segregation of customer assets from the assets of the investment firm, further reform of such segregation system is needed for many countries to deal with the new issues such as unlimited re-hypothecation and appropriate disclosures for clients. Within the European Union, the Markets in Financial Instruments Directive requires firms: (i) to keep records and accounts that enable them to distinguish assets held for one client from assets held for any other client and from their own assets; (ii) to maintain their records and accounts in a way that ensures their accuracy, and (iii) to conduct, on a regular basis, reconciliations between their internal accounts and records and those of any third parties with whom those assets are held. Japan has also implemented means to discourage a securities firm from unlimited re-hypothecation, where a securities firm is required to put immediately available funds into trust for the benefit of customers in the amount equal to the market value of re-hypothecated client assets.

129. A number of countries are currently strengthening their rules on the segregation of client assets, by requiring increased risk disclosure and, in some cases, imposing diversification requirements regarding the placement of cash. The Financial Services Authority in the United Kingdom, for example, has made a number of changes to the relevant rules, including increased reporting requirements; enhanced corporate governance arrangements; requirements for prime brokers to provide a disclosure annex and daily client reporting covering rights, use and rehypothecation; restrictions on the use of general or omnibus liens by customers; and a 20% ceiling on intra-group placement of client money. In the United States, the Dodd-Frank Act has added a segregation requirement for security based swap dealers, although the rules and regulations implementing this statutory requirement have not yet been drafted.

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[21] See IOSCO, *Survey of Regimes for the Protection, Distribution and/or Transfer of Client Assets* (FR05/11: March 2011) at www.iosco.org.

J. Protection for certain customers of financial institutions

1. Depositors

130. BCBS Recommendation 1 states that one of the necessary features of an effective resolution regime is a process providing for prompt payment to insured depositors or the transfer of deposit accounts to a bridge company or a healthy bank.

131. The resolution regimes in most countries include features intended to provide for the prompt payment of retail deposits, or alternatively the transfer of those deposits to a healthy bank, and are thus consistent with BCBS Recommendation 1. Many countries are working on achieving prompt payout under deposit insurance, but few currently have the capacity to deliver on this. There are, however, significant differences among the various schemes (and among national insolvency laws), which could complicate cross-border resolutions. These include gaps in coverage in some cases, overlapping coverage in other cases, difficulties in accessing deposit data, differences in payout capabilities and adequacy of funding mechanisms, and different national rules on setting off deposits against amounts owed by the depositor to the bank (eg under a mortgage or personal loan).

132. While most respondents have some form of depositor protection, there are still significant variations among schemes and further convergence may be warranted to facilitate cross-border resolution. Some general observations include the following:

- coverage varies widely across countries, both with respect to the deposits covered and the amount of coverage;
- funding of deposit insurance schemes varies widely (eg ex ante, ex post, hybrid);
- there is a wide range of payment methods and payout times vary considerably; and
- most countries do not provide for depositor preference on the liquidation of the bank.

133. In some countries, money from deposit protection schemes can be used under certain conditions and up to certain limits for non-payout resolutions. In the United Kingdom, for example, the industry-funded Financial Services Compensation Scheme (FSCS) can be required to contribute to the costs of a bank resolution. These costs are ultimately capped at what the FSCS would have paid out in the event of the bank being placed into liquidation, net of expected or actual recoveries from asset sales. The FSCS can only be called upon to provide funds in the event that the conditions for triggering the resolution regime have been met.

134. There are many differences among countries regarding the deposits which are protected by deposit protection schemes, although most schemes are aimed at protecting retail deposits. Most countries have an overall cap limiting recovery per depositor per institution (eg Australia, Brazil, Canada, European Union Member States, Hong Kong SAR, Japan, Mexico, Singapore, Switzerland and Turkey). Other countries have deposit insurance recovery limits that are calculated per account (eg Argentina and the United States).

135. In all countries, residency of a depositor in that country is not required for deposit insurance eligibility.

136. Deposit protection schemes also vary regarding the currency in which deposits are denominated. Some countries only provide protection for deposits denominated in the local

currency (eg Australia,[22] Brazil and Japan). Other schemes protect deposits denominated in any convertible currency, but convert the foreign currency to what it is worth in the local currency on the date of the insolvency of the bank (eg Argentina, Hong Kong SAR, Luxembourg, Mexico, the Netherlands, Spain, Switzerland, Turkey, the United Kingdom and the United States).

137. Many countries reported that deposits at foreign branches of locally incorporated banks are not covered by the local deposit insurance scheme (eg Argentina, Brazil, Canada, Hong Kong SAR, Japan, Singapore, Switzerland, Turkey and the United States). Exceptions included Australia and Mexico. In EEA countries, deposits placed with branches in another EEA country of locally incorporated banks are required to be covered by the home country's deposit protection scheme. The position varies as regards deposits placed with branches in a non EEA country of locally incorporated banks. The deposit protection schemes in Belgium, France, the Netherlands, Sweden and the United Kingdom do not protect such deposits.

138. Countries which provide protection for deposits placed with local branches of foreign banks include Argentina, Singapore, Switzerland and Turkey. Countries which do not provide such protection include Australia, Canada and Japan. In EEA countries (as noted above), deposits placed with local branches of banks incorporated in another EEA state are covered by the home country's deposit protection scheme.

139. In Australia, Brazil, Mexico and the United States, foreign banks that wish to accept local retail deposits are required to establish a local subsidiary, and the subsidiary must obtain deposit insurance under the applicable local scheme.

140. The methods by which deposit protection schemes are financed generally fall into three groups: (i) ex ante funding (eg Argentina, Brazil, Germany, Japan, Singapore, Spain, Sweden, Turkey and the United States), (ii) ex post funding (eg Australia, Luxembourg and the Netherlands),[23] and (iii) hybrid systems of ex ante and ex post funding (eg Canada, France and Mexico). Under ex ante funding systems, insurance premia are levied on banks on a flat rate basis, a risk profile basis or a mixture of the two. Recently, the United States has shifted its assessment base from one based on domestic deposits to one based on assets.

141. Countries such as Australia which finance deposit protection schemes through ex post funding rely on a standing government appropriation and, when an institution fails, recoup amounts paid to depositors by taking priority in the distribution of proceeds from the sale of the assets of the failed institution in liquidation and, if necessary, a levy on the industry to make up the difference.

142. Countries employ a variety of methods to ensure quick repayment or transfer of deposits following resolution. EC Directive 94/19/EC calls upon European Union members to make payments within 20 working days of the relevant authority's determination that a financial institution is unable to repay deposits, and there are currently proposals to reduce this time period to seven days. In some countries, resolution authorities/deposit insurers enter into a purchase contract with the healthy bank, under which the healthy bank agrees to assume the deposits of the failed institution (eg Argentina and the United States). Australia is developing a range of payout options to facilitate prompt payout, potentially including

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[22] Currently, the Australian scheme does apply to foreign currency deposits, but will not do so with effect from 12 October 2011.

[23] Luxembourg and the Netherlands currently have ex post funding systems but are planning to move to ex ante funding systems.

payment by cheque drawn on the deposit fund, the use of electronic funds transfer, the use of the failed institution's payment channels, prepaid card, and opening new accounts in another institution.

143. Most countries do not provide for the priority of deposit claims (or for the priority of the subrogated claim of the deposit insurance fund if it makes a payout to insured depositors) over other unsecured creditors of the failed bank. Exceptions include Australia, Switzerland, Turkey and the United States. In Switzerland, deposits up to CHF 100,000 receive depositor preference.

2. Retail investors

144. Most countries have some form of protection for customers of failed investment firms/securities firms/broker dealers. While the BCBS Recommendations do not specifically address customer protection schemes, such schemes are relevant in the context of Recommendation 2. Customer protection schemes may be one element of a special resolution regime for investment firms.

145. Most countries require investment firms to ensure that customer assets are segregated from the firm's own assets, in order to ensure that customers are not prejudiced if the firm goes bankrupt (ie customers should not rank as ordinary creditors of the firm).

146. A number of countries also have compensation schemes that can be activated if the firm fails and there is a shortfall in customer assets (eg due to fraud or if customer cash is invested with an entity that goes bankrupt) (exceptions are Brazil, Mexico and Switzerland). Schemes vary considerably. Key differences relate to the circumstances in which compensation can be claimed and the amount of compensation available. Compensation is, however, generally available to foreign customers of the firm on the same terms as local customers. Many schemes can only be activated in the event of the failure of the firm resulting in a shortfall in customer assets, although some schemes can be activated in a broader range of circumstances. The maximum amount of compensation differs from scheme to scheme but is frequently subject to a relatively low cap. Most schemes are partially pre-funded through levies imposed on industry participants. It usually takes longer to obtain compensation under customer protection schemes than to obtain repayment of insured deposits under deposit protection schemes.

147. The legal position within the European Union has been harmonised to some extent as a result of the European Commission Directive on Investor Compensation Schemes. In July 2010 the European Commission published a proposal to amend this Directive.

3. Insurance policy holders

148. The BCBS Recommendations do not specifically address insurance companies and insurance policies, but the availability of adequate protection for the holders of insurance policies may be relevant in the context of a resolution of financial groups that include insurance firms (BCBS Recommendation 2). For this reason, countries were asked for information on the scope and content of their arrangements for the protection of customers of insurance firms.

149. There is little international convergence in this area. A number of countries do not have any protection schemes, some countries are developing or considering schemes, and some countries have multiple schemes, depending on the type of insurance policy involved (eg life insurance, health insurance, general insurance, etc). Some general observations include the following:

- the two main objectives of protection schemes are either: (i) continuation of policies by an alternative insurance provider; or (ii) compensation for policyholders. Schemes tend to follow one or other of these approaches, but typically not both;
- local and foreign policyholders are generally treated in the same way, although some countries use residency as the test for coverage under a scheme;
- protection for policyholders of foreign branches and policyholders of domestic branches of foreign firms varies widely; and
- issues which might impede the effective cross-border resolution of a financial group with insurance operations include:
  - significant international disparities in protection schemes for insurance policyholders;
  - lack of international standards or principles (although work is currently underway); and
  - inadequate understanding of other countries' schemes, which could lead to communication and coordination problems.

III. Cross-border cooperation and coordination

150. The orderly resolution of a cross-border financial institution requires effective cooperation and coordination among the relevant national authorities in both home and host jurisdictions. This cooperation should begin in the planning phase, with information sharing and extend into the implementation phase. In this respect, there has been much international cooperation since the financial crisis and significant additional work has been identified in a number of areas. At present, there remain constraints in the sharing of information among relevant authorities both for planning purposes as well as "in crisis". The effectiveness of the existing MoUs is limited with regard to crisis management and resolution issues. Much uncertainty remains as regards the mechanisms and processes to implement resolution measures in a cross-border context, in particular those more recent techniques designed to ensure continuity of critical functions (eg bridge bank, transfer powers, bail-in powers). Further work is necessary in these areas.

A. Legal capacity and mandate to cooperate

151. The FSB SIFI Recommendations state that the mandates of resolution authorities be framed so that they are fully obliged to seek cooperation with foreign resolution authorities. Jurisdictions should provide resolution authorities with the capacity in law to cooperate and to share information across borders. When resolving a systemically important financial institution, home authorities should also take into account the effects on host countries.

152. In general, it is uncommon for national authorities to be legally mandated to seek cooperation with foreign authorities. The exceptions are Australia and the United States, and to a limited extent within the European Union. In Australia, there is a broad statutory mandate that APRA should seek to promote cooperation with all financial sector supervisory agencies, irrespective of where a financial institution is incorporated. The United States laws require the FDIC to coordinate to the maximum extent possible, with the appropriate foreign financial authorities regarding the orderly liquidation of any covered financial company that has assets or operations outside of the United States. The FDIC may also request the assistance of any

foreign financial authority as well as provide assistance to any foreign financial authority. The European Union rules provide for consultation among its member states when resolution measures are deemed necessary.

153. Legal requirements to take into account the effect on other jurisdictions are rare. Limited application of such legal requirements could be found in Australia, with respect to New Zealand and within the European Union, where member states are under a general obligation to take into account the effect of their actions on financial stability in other member states. Under the proposed European Union resolution framework, national resolution authorities would have to consider the impact of their actions on financial stability in other member states, give reasons for their decision to the resolution college and, where feasible within the time constraints, discuss those reasons with the other members of the college before taking individual action.

B. Coordination and mutual recognition

154. The FSB SIFI Recommendations call on authorities to review and, where appropriate, eliminate those provisions in national laws that hamper fair cross-border resolution, such as provisions that trigger automatic action in the domestic jurisdiction as a result of official intervention.

155. BCBS Recommendation 4 advises that authorities consider the development of procedures to facilitate the mutual recognition of crisis management and resolution proceedings and/or measures. BCBS Recommendation 4 also recommends, in particular, that authorities undertake further work toward more effective recognition of foreign crisis management and resolution proceedings at the bilateral, regional and international levels. BCBS Recommendation 2 also advises that national authorities and policymakers should examine whether the recommendations developed by the United Nations Commission on International Trade Law (UNCITRAL) for judicial bankruptcy proceedings governing groups of commercial enterprises could be applied to financial groups and conglomerates.

156. Many authorities have an obligation under their respective national mandates to re-evaluate and monitor the local branches or subsidiaries of affected groups when resolution measures are taken in the home jurisdiction. In a number of jurisdictions, the license given to the local branches must be revoked when insolvency proceedings are commenced on the head office.

157. In order to carry out a successful cross-border resolution, it is important that resolution measures can be given effect in a cross-border context. The BCBS survey sought to explore how specific resolution powers, such the establishment of a bridge bank and transfers of operations to a bridge bank, could operate in a cross-border context.

158. By and large, and with the exception of the regime applicable within the European Union under the European Union Winding Up Directives, no regime will automatically recognise a foreign authority's transfer of local institutions' branch operations to a bridge bank. In many jurisdictions, such transfers will be subject to the usual approvals required for change in control and shareholding of regulated entities. For example, a bridge bank will need to meet the conditions for authorisation for carrying out regulated activities, including the need to have adequate regulatory capital. Similarly, if a bridge bank were to acquire the shares of a bank in another jurisdiction, prior approval by the primary regulator would generally be required.

159. The OSFI in Canada noted that it would not be obligated to take action in response to the failure of a foreign financial institution with offices, significant assets, or service

providers located in Canada. Where the assets are located in federally regulated financial institutions or pertained to the business of a federally regulated branch, any action by OSFI would depend on the circumstances (eg the ongoing viability of the Canadian entity on a standalone basis). In addition to the coordination of actions among the home and host regulatory authorities, OSFI could take control of the assets, liquidate, or seek to ensure that the foreign entity meets the exit requirements (eg pay its liabilities to the satisfaction of the Superintendent). The exercise of resolution powers by foreign authorities in other countries will have no effect in Canada unless approval or recognition is given by a Court in Canada.

160. In the United Kingdom, transfer schemes have been recognised under common law and under the existing mutual recognition framework for insolvency measures although such recognition is not necessarily automatic or unqualified, and a United Kingdom court may impose certain conditions or restrictions. The United Kingdom regulator would have to approve and authorise any bridge company to carry out any regulated activities in the United Kingdom. If a non-EEA bridge bank requires authorisation in the United Kingdom, the bridge bank will need to meet the conditions for authorisation – including having an adequate level of regulatory capital. Applications for "approved persons" status under the United Kingdom regulatory regime may need to be made for individual employees of the bridge bank's United Kingdom branch or purchaser's branch if new employees are brought in to run the business.

161. Within the European Union, branches located in a different Member State are included in administration or insolvency proceedings conducted in the home Member State. Accordingly (subject to certain exceptions for specific rights that are determined under the law of the host Member State), any measures taken under those Home State proceedings have effect in relation to the branch in the host Member State. Under the proposed new resolution framework, within the European Union, the exercise of resolution powers by a European Union authority with respect to actions relating to any property or assets located in another European Union jurisdiction would be subject to mutual recognition and enforcement. Under the proposed framework it would be left to Member States to determine how that recognition should be made effective procedurally.

162. As noted in the BCBS Recommendations (section 73) the work undertaken by the United Nations Commission on International Trade Law (UNCITRAL), in particular the current work relating to on enterprise groups in insolvency in the international context may serve as a good basis for a procedural coordination of proceedings of different legal entities in a financial group.

C. Information sharing

163. BCBS Recommendation 7 states that key home and host authorities should agree on arrangements that ensure the timely production and sharing of the needed information, both for purposes of contingency planning during normal times and for crisis management and resolution during times of stress.

164. The survey focused on the ability of national authorities to share information that is critical for recovery and resolution planning, and crisis resolution with relevant authorities including home and host supervisors, central banks and resolution authorities. In general, national authorities have mechanisms in place to share supervisory information across borders. However, these mechanisms are limited and place constraints on the sharing of information among relevant authorities both for purposes of recovery and resolution planning as well as for the coordination in a crisis. A number of supervisory authorities are only explicitly authorised to share confidential information with foreign authorities performing similar functions, ie they are not allowed to share with foreign central banks or finance ministries that do not have supervisory functions, or with resolution authorities. Information

exchange is often subject to certain conditions, eg reciprocity, confidentiality, exclusive use for supervisory purposes, existence of MoUs. Information sharing also may be restricted, where the exchange of customer data is involved, where the information may be used for other than supervisory purposes, or when judicial proceedings are pending. Whether or not the conditions for the sharing of information are satisfied may need to be assessed on a case-by-case basis. As a consequence, there is lack of certainty as regards the rapid access to relevant information from foreign authorities in a crisis.

165. The respondents were also asked about the types of information most relevant for preparing for and managing a crisis or effecting a resolution that are currently not readily available or would not be rapidly accessible in a crisis. The responses centred on the following categories:

- **Group structure and interdependencies** (eg composition of the economic group linked to the financial institution; firm-wide exposures and financial information on, and functionality of, entities within groups, including unregulated entities.)
- **Diagnostic information** (eg asset valuation; liabilities by type, location, collateral, duration; detailed and up-to-date information on depositors, detailed and up-to-date information on derivatives exposure; information regarding capital, solvency, liquidity, intra-group financial exposures, cross-guarantees, and interdependencies, etc – at solo and group levels)
- **Cross-border data** (eg detailed projected cash flow and its changes in each relevant jurisdiction and effective availability of funds to be transferred from a jurisdiction/entity to another within a specific group; information on the possible legal requirements in other jurisdictions and those that are likely to impede effective cross-border resolution, including provision of temporary funding assistance)
- **Economic and systemic implications information** (eg information on other financial institutions' exposures to the entity, extent of participation in each financial market and payment system, nature of its derivatives positions and other entities' exposures via derivatives, its market share in particular regions, industries and economic sectors)
- **Process/logistics** (eg information relating to key home/host authorities involved in the resolution process, points of contacts within firms for data, continuity of service, and disconnection; availability of funding for resolution)

D. Cooperation agreements

166. The FSB SIFI Recommendations stipulate that for each global SIFI, there should be institution-specific cooperation agreements between relevant home and host authorities. These agreements should provide for clarity as regards the roles and responsibilities of home and host authorities in planning for and managing the resolution of the institution, and should be underpinned by national law that provides both the mandate and the capacity to cooperate and share all relevant information among home and relevant host supervisors, central banks and resolution authorities. BCBS Recommendation 4 also recommends that national authorities have a clear understanding of their respective responsibilities for regulation, supervision, liquidity provision, crisis management and resolution. It further recommends that authorities consider institution-specific procedures to facilitate recognition of foreign crisis management and resolution proceedings.

167. Only authorities from a limited number of jurisdictions (eg Australia, the European Union Member States and the United States) have entered into cross-border agreements that specifically deal with cooperation and coordination in managing and resolving a financial

crisis. Existing cooperation agreements are usually in the form of bilateral or multi-lateral MoUs. For instance, the FDIC entered into MoUs with foreign national resolution authorities under which the FDIC and the other resolution authorities have agreed to enhanced cooperation in the analysis of cross-border banking resolution issues, planning for potential resolution scenarios and appropriate simulations, contingency planning or other work designed to improve preparation of the authorities for managing and resolving crises involving financial firms with operations in both countries. The existing cooperation agreements are usually non-binding and are for general application, ie not institution-specific. Elements such as defined roles and responsibilities of the authorities at all stages of a crisis; scope and modalities for sharing of information, in particular, pertaining to institution-specific recovery and resolution plans; and modalities for sharing of information with host authorities not represented in the crisis management group are also generally lacking (see textbox).

Host country perspective: resolution regimes of GIFCS countries

The GIFCS (Group of International Financial Centres Supervisors GIFCS, formally OGBS) participate as member in the CBRG and extended the questionnaire to its members. Certain financial centres may, for tax and regulatory reasons, be host to significant assets of global financial institutions. Most of the smaller financial centres do not have SRRs or dedicated resolution authorities and with some exceptions rely on the general corporate insolvency procedures. Several jurisdictions are in the process of (eg Bermuda) or under preliminary consideration of (eg Isle of Man and Guernsey) introducing SRR. In particular, Bermuda has issued a proposal for SRR for deposit-taking institutions, which is to be implemented in 2012. The proposal includes features that are important for efficient resolution such as providing considerable resolution powers and bail-in provisions, not allowing the court to quash the authority's decision, and allowing the deposit insurance fund to be available to finance the transfer of deposit accounts to another deposit-taking institution. It is also worth noting that Panama has a SRR under banking law that applies to banks and trust companies. Several jurisdictions see the need for changes in legal framework governing the use and/or enforceability of close-out netting and early termination, but no reforms in this area are currently underway in these jurisdictions. Authorities in these jurisdictions generally have not entered into cross-border agreements that specifically deal with cooperation in managing and resolving a financial crisis. The exercise of resolution powers in a foreign home jurisdiction will generally require recognition by a court rather than coordination with the local regulatory authorities.

IV. Resolvability

168. In general, the recommendations in respect of RRPs, as well as other measures to improve resolvability have only been partially implemented. Jurisdictions are at varying stages of development. Although a few jurisdictions (eg Switzerland, the United Kingdom and the United States) appear to be more advanced, no jurisdiction has fully implemented the relevant recommendations. This section sets out the current state of implementation, and highlights existing practices that are in line with the recommendations.

A. Recovery and resolution plans (RRPs)

169. The FSB SIFI Recommendations call for mandatory RRPs that assess the resolvability of global SIFIs and stipulate that RRP should be a continuing exercise. BCBS Recommendation 6 also call for the contingency plans of all SIFIs to address as a

contingency a period of severe financial distress or financial instability and provide a plan, proportionate to the size and complexity of the institution's and/or group's structure and business, to preserve the firm as a going concern, promote the resiliency of key functions and facilitate the rapid resolution or wind-down should that prove necessary. Such resiliency and wind-down contingency planning should be a regular component of supervisory oversight and take into account cross-border dependencies, implications of legal separateness of entities for resolution and the possible exercise of intervention and resolution powers.

1. RRP requirement

170. The survey asked members whether financial institutions in their respective jurisdictions are required to prepare RRPs. In most of the jurisdictions, there are requirements for contingency plans focused on business resilience and the ability for critical operations to continue functioning in times of stress. However, these existing contingency plans do not address the core elements of BCBS Recommendation 6 and of the FSB SIFI Recommendations. Specifically, there is a lack of focus on resolution issues. Only a few respondents, including the United States have in place formal RRP regimes that require financial institutions to prepare plans for rapid and orderly resolution in the event of material financial distress or failure. A number of respondents (eg South Africa, Switzerland and the United Kingdom) are in the process of developing formal RRP regimes, while some others are involved as host authorities in the Crisis Management Groups' work in developing RRPs for large international banks. National authorities appear to be at different stages of developing RRPs for SIFIs in their jurisdictions. As the development and enhancement of RRPs is a continuing exercise, national authorities will need to continue their momentum, irrespective of their state of progress.

171. Except for the United Kingdom, which applies their RRP regime more widely to all deposit-taking institutions, the RRP regimes that are already in existence or being developed usually apply to SIFIs and "systematically relevant" institutions. The determination of systematically relevant institutions differs across jurisdictions. For example, for bank holding companies, the United States uses a quantitative definition based on total consolidated assets. In contrast, the United States RRP regime applies to a non-bank financial company only if the Financial Stability Oversight Council has determined, based on qualitative and certain other criteria (eg assessments of whether an institution poses a threat to financial stability, by reason of its size, concentration, interconnectedness, or the scale and nature of its activities), that the firm should be subject to enhanced prudential supervision. Where foreign financial institutions are concerned, a key criterion is whether the institution operates as a subsidiary or as a branch. Subsidiaries of foreign financial institutions that are subject to the local resolution regimes will also be subject to local RRP requirements where these exist.

172. Based on the survey, RRPs are likely to be kept confidential; need to be approved at a senior level; and be reviewed and updated at least on an annual basis. In the event that a RRP is assessed to be inadequate, it is likely that the submission of a revised plan will be needed. In jurisdictions (eg Switzerland and the United States) where RRPs are a statutory requirement, supervisory sanctions may be imposed if firms fail to submit a revised plan, or their revised plans fail to address the weaknesses highlighted by national authorities. In the United States, if a RRP is determined to be not credible, the institution may be subject to enhanced capital requirements or other restrictions, or potentially ordered to divest assets and operations, as well as take other actions to simplify its structure to improve resolvability. Where there are no statutory requirements for RRPs, national authorities may rely on their general supervisory powers and moral suasion. RRPs are generally not legally binding. The United States legislation expressly excludes any private right of action based on a RRP.

2. Structure and scope of RRPs

173. The majority of the respondents see a distinction between the recovery plan and resolution plan. The distinction stems primarily from the differences in the objectives of the plans, as well as in the party responsible for preparation and maintenance of the RRPs. The general view is that individual financial institutions should be responsible for the recovery plan, while national authorities should be responsible for resolution plans. There is also a distinction between recovery plans and resolution plans in terms of key elements required in the respective plans. Key elements that should be covered in recovery plans include contingency funding plans and capital recovery plans designed to suit a range of scenarios. Respondents have centred on a few broad categories in respect of the key elements required for resolution plans - information on group structures and legal entities, intra-group dependencies and critical functions, and possible resolution options. Other pertinent information required include descriptions of ownership, assets and liabilities, contractual obligations, cross-guarantees, major counterparties, and process for determining ownership and location of collateral.

174. Members were also asked whether they have developed data templates, fact sheets or data triage frameworks to enable national authorities to diagnose the financial condition of a financial institution in distress, and the extent to which financial institutions are required to be pre-positioned to provide such data for diagnostic purposes at short notice upon request. By and large, specifically tailored data templates, fact sheets or data triage frameworks are not yet available to enhance national authorities' ability to quickly diagnose the financial condition of a financial institution in distress. Most respondents focused on the existing prudential reporting regimes, which may not be adequate in times of stress. Only a minority reported having implemented data frameworks specifically tailored for financial institutions in distress. A few countries (eg Australia) have embarked on developing the requisite data frameworks. Some countries feel they have existing data frameworks that are sufficient for this purpose which do not necessarily need to be conformed to a specified data template.

B. Improving resolvability

175. The FSB SIFI Recommendations stipulate that authorities should have the powers, exercisable under clear criteria, to require a financial institution to make changes to its legal and operational structure and business practices to facilitate the implementation of recovery and resolution measures. Should operations in other jurisdictions be affected by such proposed changes, there should be adequate coordination with the relevant host supervisors. Resolvability under existing resolution regimes and the existence of cooperation agreements should be an important consideration in host authorities' determination of any changes to be required in a hosted institution's operations. BCBS Recommendation 5 states that if national authorities believe that financial institutions' group structures are too complex to permit orderly and cost-effective resolution, they should consider imposing regulatory incentives on the institutions, through capital or other prudential requirements, designed to encourage simplification of the structures in a manner that facilitates effective resolution.

176. The FSB SIFI Recommendations states that SIFIs with multiple significant legal entities maintain information on a legal-entity basis; minimise any undue intra-group guarantees, in particular undue use of blanket guarantees; ensure that service agreements are appropriately documented and cannot be abrogated by the service provider in resolution; and ensure that significant global payment and settlement services are legally separable and continued operability is ensured. BCBS Recommendation 6 states that all institutions with significant cross-border operations strengthen and maintain on a regular basis Management Information Systems ("MIS") capable of providing information critical to supervisory and institutional risk assessment and management in the context of any possible resolution.

1. Powers to require changes to firm structures and operations

177. The survey tried to gauge the extent to which national authorities are empowered to impose requirements such as changes to financial institutions' structure and operations to improve the financial institutions' resolvability, from both home and host perspectives. The survey found that national authorities were generally faced with constraints in their existing resolution regimes in this respect. In a large number of the jurisdictions, national authorities do not have powers to require financial institutions to make changes to their structure and operation. Where such powers exist, they usually could not be exercised solely for the purpose of improving resolvability, and are applicable only to entities incorporated in their respective jurisdictions.

178. Some jurisdictions, in particular host jurisdictions, have specific requirements for firm structures at the onset. For example, Brazil and Mexico require local incorporation of foreign banks. Local incorporation is also required for deposit taking institutions in Australia. In addition, Australia also has a "one Authorised Deposit-taking Institution (ADI)" policy that requires that a bank that has acquired another to merge the two entities into a single legal entity in a reasonably short period of time.

179. Several jurisdictions have already started undertaking reforms to equip national authorities with powers to require simplifying changes to their legal and operational structures and business practices to facilitate the implementation of recovery and resolution measures. In the proposed European Union resolution framework, powers to impose changes on a financial institution's structure and operation are included as a complement to measures on resolution planning. In Switzerland, to encourage financial institutions to voluntarily make changes to improve their resolvability, SIFIs may be rewarded with rebates on their respective capital surcharge if their RRPs improve their group- or world-wide resolvability. The United States has powers to impose changes on a financial institution's legal and operation structure under the Dodd-Frank Act. In this regard, some jurisdictions (eg France and Germany) consider that actions taken by supervisors aiming at reducing complexity by enforcing streamlined business structures would need a strong legitimacy.

2. Information systems

180. The survey also asked respondents to provide other examples of specific measures, eg as regards the institutions' IT systems, availability of pertinent information and separability of business units, etc, which are required to improve contingency preparedness and resolvability of institutions in their respective jurisdictions. Most respondents have required their financial institutions to put in place business continuity measures in respect of their IT systems and operations, to mitigate against operational risk incidents. A few jurisdictions (eg Japan) have also explicitly required their financial institutions to maintain deposit data in a manner that will facilitate deposit insurance payouts when needed.

181. The maintenance of relevant information on a legal-entity basis is one of the factors that would facilitate resolution. The majority of respondents (eg Brazil, France, Germany and Sweden) noted that financial institutions in their jurisdictions are required to maintain information, both on a consolidated basis and on a legal-entity basis, even if they are not regarded as SIFIs. However, it is not clear from the responses whether the information required is sufficient for resolution. A number of jurisdictions are in the process of considering reforms to require the maintenance of information on a legal-entity basis. For example, in Switzerland, under the proposed resolution regulation, financial institutions will need to maintain information on a legal-entity basis and include the information in their RRPs. The United Kingdom is also considering the information that would be needed on a legal entity basis and what information is needed on economic functions performed within the legal

entities. The United States has proposed a resolution plan regulation that would require subject companies to maintain and provide certain information on a legal-entity basis.

3. Other measures to improve resolvability

182. A number of jurisdictions are considering additional measures to improve resolvability. For example, the European Union has identified specific measures that would be available to national authorities in the event that impediments to resolution are identified. These include the ability to require financial institutions to draw up service level agreements to cover the provision of critical economic functions or services; require the financial institution to limit its maximum individual and aggregate exposures; require the financial institution to limit or cease certain existing or proposed activities, etc.

183. The use of intra-group guarantees could potentially impede the resolution of financial institutions. In this regard, the survey tried to gauge the extent to which the use of intra-group guarantees has been restricted in the respective jurisdictions. It was found that generally, varying degrees of restrictions have been imposed on intra-group guarantees. However, most of the existing restrictions are not explicit; they are imposed on a discretionary basis, by requiring that guarantees and other types of intra-group exposures be subject to supervisory approval. In most cases, they are neither specific to any financial institution nor linked to crisis management. For example, to reduce the interconnectedness between entities within a group, the United Kingdom has specifically restricted the use of unlimited guarantees. To limit the risk of contagion, Korea has also imposed restrictions on specific intra-group transactions such as cross shareholding, intra-group lending, and intra-group sale of distressed assets.

184. The questionnaire asked respondents whether there are requirements that service level agreements that facilitate continuity of critical services in a resolution, ie agreements between the institution and its affiliates or third-party service providers, be appropriately documented and periodically reviewed and that they cannot be abrogated by the service provider in a resolution. By and large, there are some forms of requirements relating to outsourcing and service-level agreements, eg guidelines that state that outsourcings agreements must be written, appropriately documented and periodically reviewed, and detail some minimum requirements that must be included in these agreements. The focus of the existing requirements, however, is usually on the protection of the financial institutions from the failure of the service provider. The issues regarding how outsourcing or service provider arrangements will work in resolution remain mostly unaddressed in the existing regimes or current reforms. Only Canada has an explicit requirement that service level agreements in respect of material outsourcing arrangements should not contain provisions that preclude the service from being continued in situations where the authorities take control of the institution, or where the institution is in liquidation.

185. The continued operability of significant payment and settlement services is another essential condition for an effective resolution. The survey asked respondents to describe the safeguards in place to ensure the continued operability of significant payment and settlement services, including the extent to which they are legally separable from financial institutions. However, there are usually no requirements for significant payment and settlement services to be legally separable. In the United States, authorities have powers, in the event of failure of a financial institution or financial market utility that is deemed systemically important, to place the company into a bridge entity, or by selling the company and/or its critical operations, hence ensuring the continued operations of the critical services. A few jurisdictions are studying how to ensure continued operability of significant payment and settlement services provided by financial institutions, in cases where they are not yet legally separable. Others are also considering the extent to which explicit requirements need to be put in place to ensure that these systems are legally separable.

V. Suggested policy priorities

186. The survey sought to collect the members' views on aspects of international recommendations and standards that should be revised or reconsidered in the light of recent developments, as well as on any additional issues that should be addressed at the international level to improve the national authorities' capacity to resolve financial institutions effectively in a cross-border context. While some respondents felt that the existing standards are already sufficiently comprehensive and that a challenge is consistent implementation across all jurisdictions, many members made a range of concrete and practical suggestions on policy priorities as well as further concrete steps that could be taken at the international level to make cross-border resolutions more effective, including in particular the following:

- **strengthening supervisory capacity** of relevant national authorities and coordination through college structures in the pre-crisis phase, which should include coordination between central banking, macro-prudential surveillance and financial supervision functions and ensure that RRP effectively becomes an integral part of the supervisory process as recommended by the Committee;
- **developing and maintaining knowledge and skills** relevant to financial crisis resolution so that national authorities remain capable of responding quickly and effectively to financial crises;
- facilitating implementation of the new capital requirements to **enhance loss absorbency**, eg increased equity buffers and non-viability triggered convertible debt instrument;
- harmonising (or achieving greater convergence) at the international level of specific resolution powers, including property transfer and share **transfer powers**;
- ensuring through national law reform or mandatory change of financial contract terms that the exercise of certain resolution powers, such as property transfer powers, that promote continuity, do not trigger default thereby resulting in **early termination** of financial contracts;
- harmonising (or achieving greater convergence) of the **scope of national resolution regimes** (ie as regards the types of institution subject to such regimes) and extending the scope to non-bank financial institutions, including non-bank parent companies;
- enabling national authorities to implement **group-wide resolutions** in the case of distressed financial conglomerates;
- developing RRPs and strengthening resolution regimes for non-bank financial institutions, including **insurance companies and financial market infrastructures**;
- strengthening **deposit protection** schemes in line with the Core Principles for Effective Deposit Insurance Systems published by the Committee and IADI;
- enhancing cooperation on cross-border crisis resolutions through the development and testing of **coherent group-level RRPs** which seek to address the many challenges such as the widespread and complex information sharing problems across jurisdictions and the difficulty of agreeing on mechanisms for burden-sharing;
- enhancing information through creation of **joint databases** with key information;
- identifying and removing the specific **legal obstacles to cross-border cooperation** (eg confidentiality obligations preventing the cross-border sharing of information; preference of domestic creditors over foreign creditors; requirements under local law, such as local threshold conditions for authorisation, that prevent the operation of a bridge institution in a foreign jurisdiction; and

- establishing a **framework for the cross-border recognition and enforcement** of resolution measures and regulatory actions, which may take the form of high-level principles on cross-border coordination and cooperation.

VI. Conclusions and next steps

187. Many countries continue to lack important legal powers to resolve a failing financial institution. Even if some powers are available, the lack of certain essential powers, including powers to terminate unnecessary contracts, continue needed contracts, sell assets and transfer liabilities will risk making the resolution of the financial institution's affairs difficult and costly. A number of jurisdictions have adopted legislation, or are considering legislation, to implement the BCBS Recommendations.

188. The introduction of SRRs and tools aimed at "public interest" objectives shows progress in implementing the BCBS Recommendations. That said, it will require continued focus and energy by national authorities to continue reforms of domestic resolution regimes and tools. Much work remains to be done to achieve full implementation in all major jurisdictions. Reforms are underway at different paces in different jurisdictions. Some jurisdictions have already extended their resolution toolkits in line with BCBS Recommendations and have introduced powers that promote financial stability and facilitate the preservation of essential financial functions (stabilisation and continuity powers). In others, these reforms still need to be made. Further, while authorities in different jurisdictions frequently have similar powers under their respective resolution regimes, the threshold conditions for their use may differ. For instance, in some jurisdictions, certain powers, such as the use of bridge banks or bridge financial institutions, are reserved for systemic situations and therefore must be preceded by a systemic risk assessment. In others, the use of certain tools may be subject to confirmation by a court.

189. Shortcomings continue to exist with respect to the resolution of a financial group, especially in a cross-border context. Current reforms remain focused on banks and the resolution of single legal entities. Only one jurisdiction has adopted legislation that appoints the same resolution authority to resolve both banks and other financial group entities that are systemically important.

190. As regulators develop formal RRP regimes or continue their work with host authorities on the Crisis Management Groups' work to develop RRPs for SIFIs, national authorities need to address impediments to cross-border cooperation and coordination. There is a need for ongoing attention to the development of frameworks for their cross-border implementation which includes the development of institution-specific agreements among relevant national authorities. Additional work remains to be done particularly in the areas of information sharing and cross-border recognition and enforceability. Cross-border resolution funding and ring-fencing also present unique challenges that warrant additional work.

191. The Committee will continue to work with the FSB and other bodies to lay out priorities for reform and work on concrete and pragmatic proposals to move forward with an analytical framework for assessing progress.

Annex

Questionnaire on the resolution of financial institutions

Background

At its meeting on 30 November – 1 December 2010, the Basel Committee asked the Cross-border Bank Resolution Group (CBRG) to undertake an updated stock-take of financial institution resolution policies and legal frameworks, the allocation of responsibilities in a national and cross-border context, and planned reforms on the basis of the recommendations of the CBRG contained in its report of March 2010 (the "**BCBS Recommendations**"). In addition, recommendations by the Financial Stability Board (FSB) of November 2010 (the "**FSB SIFI Recommendations**") on systemically important financial institutions ("**SIFIs**") call for an assessment of the legislative and other changes to national resolution regimes and policies needed to accomplish effective resolution of SIFIs. This questionnaire responds to both mandates and uses as reference the ten BCBS recommendations, the FSB SIFI Recommendations and the FSB's draft Key Attributes of Effective Resolution Regimes ("**draft FSB Key Attributes**"). It has been prepared by the CBRG in consultation with the IAIS, IOSCO, CPSS and IADI. The objectives are to:

(i) assess whether jurisdictions have resolution regimes in place that meet the requirements set out in the BCBS Recommendations, the FSB SIFI Recommendations and the draft FSB Key Attributes and whether reforms of resolution regimes that are underway in individual jurisdictions conform to these recommendations;

(ii) identify specific national policies and practices, and legal or regulatory provisions that hamper effective resolution, in particular in a cross-border context; and

(iii) identify additional issues, relating to the scope of the resolution regime, and the available powers, that should be addressed as part of future efforts on resolution.

The results of this questionnaire will be used by the FSB and other standard-setters to formulate standards and guidance that countries can use to develop reform and make more consistent national resolution regimes.

Consistent with the broad objectives described above, the scope of this questionnaire extends beyond banking organisations to include all financial institutions which may or may not be systemically important. For this reason, respondents are encouraged to consult with other relevant national authorities as appropriate.

I. Key definitions

To reduce the risk that certain questions might be interpreted differently by individual respondents, we offer the following definitions of certain key terms as guidance:

Bail-in – either (a) statutory mechanisms ("*statutory bail-in*") whereby a national resolution authority writes down or converts debt instruments (eg senior or subordinated unsecured debt instruments potentially including uninsured deposit liabilities) under specified conditions to common stock or (b) contractual mechanisms (*"contractual bail-in" or "non-viability contingent capital approach"*) under which debt instruments issued by banks contain a clause requiring them to be written-off or converted to common stock on the occurrence of a trigger event;

Resolution – any action by a national authority, with or without private sector involvement, intended to maintain financial stability and/or address serious problems in a financial institution that imperil its viability (eg a substantive condition of authorisation) where, absent resolution, the institution is no longer viable and there is no reasonable prospect of it becoming so;[1]

Resolution framework – laws, regulations, policies and institutional arrangements that address resolution, including resolution regimes;

Resolution regime – laws, regulations and/or policies that permit national authorities, with or without court approval, to intervene directly in the affairs of a financial institution facing serious problems (see Resolution definition) This intervention can take a number of forms, including (without limitation):

- binding directions to financial institutions to remove or replace directors or managers, take actions to limit further deterioration or facilitate recapitalization;
- the appointment of an official to administer the affairs of the financial institution;
- the transfer of the assets and liabilities of the financial institution to a third party purchaser or bridge company, in whole or in part;
- temporary nationalisation of the financial institution (eg by compulsory acquisition of its share capital);
- compulsory write-down of the liabilities of the financial institution, in whole or in part;
- reorganisation of the capital structure of the financial institution; and
- orderly closure and wind-down of all or parts of the institution's business.

Intervention does not necessarily result in the liquidation of the financial institution;

Resolution authority – a national authority which, either alone or together with other national authorities, is responsible for resolution;

Resolution powers/ tools – powers or "tools" available to the national authorities following a decision to activate or "trigger" a resolution regime: see the definition of Resolution Regime for examples;

Resolution triggers – the legal conditions which permit a resolution authority to activate or "trigger" a resolution regime;

Restructuring "going-concern" – a mechanism that restores an institution's viability through changes to its capital and liability structures and other organisational or structural changes, including replacement of senior management as appropriate;

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[1] See BCBS Recommendations paragraph 22.

Systemically important financial institution (SIFI) – an institution whose disorderly failure, because of its size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity.

II. National resolution regimes

BCBS Recommendation 1 provides that national authorities should have appropriate tools to deal with all types of financial institutions in difficulty so that an orderly resolution can be achieved that helps maintain financial stability, minimise systemic risk, protect consumers, limit moral hazard and promote market efficiency. Countries should have in place special resolution regimes to deal with failing financial institutions, especially those whose collapse could have systemic consequences. The FSB SIFI Recommendations stipulate that each country should have a designated resolution authority responsible for exercising resolution powers over financial institutions.

A. Scope and objectives

1. Does your country have a special resolution regime for financial institutions? If so,

(a) To which financial institutions does the regime apply? Does it apply only to a licensed financial institution on a solo basis or also to the institution's holding company and subsidiaries?

(b) What are its key features, including the triggers for intervention and the nature of the powers available?

(c) How does this regime differ from company bankruptcy?

2. Is there more than one resolution regime in your country? If so,

(a) to which type of financial institution does each regime apply?

(b) what are the key differences between each regime?

(c) how do they interact?

3. Please describe briefly the regime that applies to the following entities and note whether it is the general company bankruptcy regime or a special resolution regime:

(a) deposit-taking institutions;

(b) investment banks;

(c) mutual/hedge funds;

(d) asset management firms;

(e) insurance legal entities and groups;

(f) financial market infrastructure firms (including systemically important payment systems, securities settlement systems, central clearing counterparties);

(g) *any holding company of any of the above;*

(h) *a local office, branch or subsidiary of any of the above;*

(i) *any other firm (eg any firm relevant to the stability of the financial system, whether a financial institution or not).*

4. *What are the statutory objectives of your resolution regime (if any)? If there is more than one objective, are there any rules or guidance on how the various objectives are to be balanced?*

5. *Does your country have a resolution regime that applies only to systemic firms or that makes a distinction between systemic firms and other firms? If so:*

   (a) *what are the criteria and the mechanisms for making this distinction?*

   (b) *what authority makes that determination?*

   (c) *what procedures must be followed to make that determination (including time to complete such processes)?*

   (d) *do the resolution triggers or available resolution powers and range of resolution options, including liquidation, differ and, if so, in which respects?*

   (e) *are there any systemic or potentially systemic firms in your country that are not subject to a special resolution regime?*

6. *Do you have a dedicated resolution authority responsible for overseeing and implementing resolutions of financial institutions? If so please describe your resolution authority's capacity, expertise and resources (eg number of staff).*

B. Financial groups and conglomerates

BCBS Recommendation 2 calls on jurisdictions to establish a national framework to coordinate the resolution of the legal entities of financial groups and financial conglomerates within their respective jurisdictions.

7. *In the national context (eg when the parent and subsidiary are located in your jurisdiction, or where there is a financial group containing entities regulated by different regulators): does the resolution framework provide for coordination where different national authorities are in charge of resolving domestic entities forming part of the same financial group or conglomerate? In particular, does your legal framework allow for*

   (a) *joint application and procedural coordination of domestic proceedings of different legal entities in a group, including appointment of a single administrator for multiple domestic proceedings of different components of the group;*

   (b) *intra-group financing/guarantees after resolution proceedings have commenced; or*

   (c) *the implementation of a joint reorganisation/resolution plan?*

8. *Can authorities extend resolution proceedings to un-regulated subsidiaries of a regulated entity or subsidiaries of a regulated entity's holding company? If so, explain how this can be done.*

9. *Does the supervisor or resolution authority have the power to order or carry out an asset transfer between entities of the same group? If so, how are creditors or shareholders of the transferring entity protected?*

C. Private sector solutions for resolution

The BCBS Recommendations note that an effective resolution regime should provide strong incentives for private sector solutions.

10 *Are private sector arrangements in place in your jurisdiction (eg voluntary private sector funds) that could support a restructuring or resolution without the intervention of the public sector?*

11. *In your view, what mechanisms or incentives might help achieve resolution by the private sector and without public sector intervention?*

D. Resolution triggers

BCBS Recommendation 1 provides that resolution regimes should enable the authorities to respond rapidly, flexibly and under conditions of legal certainty to a wide variety of circumstances. They should provide for a process of early intervention with clear conditions governing their application.

12. *What are the resolution triggers under your resolution regime? If different triggers apply in respect of different resolution powers, please make this clear in your response.*

13. *Can resolution be triggered before an institution is deemed to be balance-sheet insolvent?*

14. *If more than one national authority is or could be (depending on the circumstances) involved in deciding whether to activate the resolution regime or exercise certain resolution powers, what are the respective roles and responsibilities of each authority and how is the decision made?*

E. Resolution powers

The draft FSB Key Attributes call for resolution regimes that provide the resolution authority with a broad range of options to resolve a financial institution where, absent resolution, the institution is no longer viable and there is no reasonable prospect of it becoming so.

15. *Does the resolution regime in your country contain the following resolution powers? Please describe (1) the power; (2) its scope in terms of types of financial institutions (eg banks, insurance legal entities, etc.); (3) the authority that exercises it; and (4) triggers or pre-conditions for their exercise.*

    (a) *Powers to require a change in the management, remove managers and directors; and* *(b)* *and suspend owners', shareholders' or others' rights, including the rights to vote and to participate in the direction, management or operations of the firm;*

(c) *Powers to give directions to a regulated entity, its holding company and its subsidiaries in relation to the conduct of its business, suspending obligations, suspending capital distributions and servicing, repatriating assets;*

(d) *Powers to derogate from requirements for approval (where they exist under national laws) by owners', shareholders' or others' in order to permit a recapitalisation, merger, acquisition, sale of substantial business operations or other measures to restructure the firm;*

(e) *Powers to transfer some or all assets or liabilities, including deposit or insurance liabilities, customer property, data and systems, and the financial institution's ownership in shares, notwithstanding any otherwise applicable consent or novation requirements, to a third party purchaser a specially created "bridge company" or similar entity;*

(f) *With respect to (d), powers to reverse initial asset and liability transfers after a bridge company has been established (eg during a limited period of time);*

(g) *Powers to impose a temporary moratorium, temporarily stay enforcement actions, suspend, for a short period of time, payments to creditors, insurance claimants and customers, seizing of assets by creditors and the exercise of secured creditors' rights over collateral (subject to exceptions for particular classes, eg continued access of eligible depositors to their accounts and continuing access of small businesses to key overdraft and loan facilities);*

(h) *Powers to require other entities in the same group as the financial institution to continue to provide certain essential services to the financial institution or to any other entity to which the business of the financial institution is transferred;*

(i) *Powers to establish and operate a (temporary) bridge institution to take over and continue operating certain essential functions and viable business operations of the failing institution;*

(j) *Powers to establish and operate a separate asset management vehicle ("bad bank"), which could take the form of a subsidiary of the "good bank", a separate firm with a separate charter, or a trust or asset management company, to assume non-performing loans or difficult-to-value assets to the vehicle;*

(k) *Powers to appoint a person/body to manage the institution, or place the firm under temporary public control or administration with powers to operate the financial institution, terminate contracts, continue contracts, sell assets, and take any other actions to wind down financial institution's operations. Please indicate whether the person so appointed has the powers of the board of directors, the powers of shareholders, etc.;*

(l) *Powers to take all actions necessary to liquidate a financial institution including powers to determine and pay claims;*

(m) *Powers to suspend public disclosure of adverse financial developments pending the time until the resolution can be announced; or*

(n) *Any other powers not mentioned above?*

16. *Can the powers in question be exercised only with respect to the financial institution or also with respect to other companies in the group (eg the holding company and/or subsidiaries of the holding company and the licensed financial institution)?*

17. *Can the powers be exercised in relation to the branch in your jurisdiction of a financial institution that is incorporated in another jurisdiction?*

18. *Which (if any) of the resolution powers mentioned above requires court approval* <u>*before*</u> *it can be exercised or may be exercised only by a court?*

19. *Are there any public disclosure requirements in your jurisdiction as regards the exercise of any of the resolution powers mentioned above? If so, who is under the obligation to make such disclosures (eg the resolution authority: the financial institution)?*

20. *To what extent could the exercise of any of the resolution powers mentioned above be impeded by other laws in your jurisdiction (eg market reporting and transparency; takeover provisions; listing rules etc)? Do any such laws allow for waiver of these requirements and, if so, by whom?*

21. *Are the resolution authority and any officials appointed by it to administer the affairs of the financial institution protected from legal liability for the exercise of resolution powers in good faith?*

22. *If binding directions are given to a regulated financial institution (or a subsidiary or holding company) in order to give effect to a resolution, does the law provide the directors and other relevant officers with legal protection for complying with the direction? If not, what is the assessed risk of the directors or other officers declining to carry out the directions?*

23. *Are there any legally imposed time limits for the exercise of certain resolution powers? Eg time limits for the operation of bridge companies, public administration, filing and processing claims, etc.*

F. Bail-in

The FSB SIFI Recommendations call on jurisdictions to consider restructuring mechanisms to allow recapitalisation of a financial institution as a going concern by way of contractual and/or statutory debt-equity conversion and write-down tools, as appropriate to their legal frameworks and market capacity.

24. *Does the resolution regime in your country provide for powers to write down share-capital and, when equity is extinguished, reduce and/or convert into equity all or parts of unsecured and uninsured creditors claims as necessary to absorb losses and recapitalise the continuing parts of the business ("bail-in powers")? If so,*

    (a) *Do the powers apply to all financial institutions?*

    (b) *Under what circumstances and on the basis of what legal triggers can these powers be exercised (eg systemic impact assessment)?*

    (c) *What classes of liabilities are subject to "bail-in"?*

(d) *What legal or other requirements apply to the exercise of these bail-in powers, eg prior approval of creditors, prior shareholder approval, judicial approval other regulatory approvals or consent requirements?*

(e) *How is the conversion ratio determined?*

(f) *Is the extent of bail-in constrained by a legal requirement that prevents affected creditors being made worse off than had the entity been liquidated under conventional insolvency law?*

(g) *How are bail-in powers applied to group structures?*

(h) *What judicial review or other legal challenges are permissible and could these frustrate the quick implementation of a bail-in?*

25. *Has your jurisdiction established a framework for contractual conversions or write-downs? If so,*

(a) *What is the regulatory capital, accounting and tax treatment of these convertible or write-down instruments?*

(b) *Are there any restrictions on holdings/cross-holdings of these instruments?*

26. *Does the resolution regime in your country contain the power to take any other actions that facilitates a "going concern" restructuring of the institution?*

G. Court involvement, safeguards and other requirements

BCBS Recommendation 1 stipulates that a resolution regime should promote market discipline by imposing losses on shareholders, subordinated debt holders, and if appropriate other responsible creditors and counterparties of the financial institution, subject to appropriate compensation mechanisms, while providing safeguards for secured and other senior creditors, and protection of capital market transactions, such as securitisation structures and covered bond programmes. The draft FSB Key Attributes state that the exercise of the resolution powers should be justified by the need to restore public confidence in the financial system and should be subject to adequate protections for shareholders, creditors and counterparties and be subject to ex post judicial review. Adequate safeguards include the right to receive adequate compensation and, at least, the assurance that creditors have a minimum recovery right equal to what they would have received in liquidation.

27. *To what extent is any decision by the resolution authority to activate or "trigger" a resolution power subject to judicial review?*

28. *Does the court have the power to quash (ie reverse) the decision by the resolution authority to activate a resolution power, and substitute its own decision?*

29. *To what extent are any of the resolution powers, if exercised, subject to judicial review? What are the available judicial remedies?*

30. *Do creditors and shareholders of the financial institution have a statutory right to compensation for losses suffered as a result of the exercise of a resolution power? If so, what are the statutory assumptions for determining compensation and what process needs to be followed?*

31. Are there any rights of creditors and shareholders that cannot be protected by compensation?

H. Funding of resolution

BCBS Recommendation 1 calls for a mechanism to fund ongoing operations during the resolution process, for instance, by relying on a deposit insurance fund or alternative financing mechanisms. These latter mechanisms could include financing provided on a preferred recovery basis, such as debtor-in-possession or post-commencement financing available under the same national bankruptcy laws, or public funding combined, if possible, with a process for institution-specific or industry reimbursement. It also calls for powers to put in place temporary funding and liability guarantees of part or all of a financial institution's business and, as a last resort, to take financial institutions into temporary public ownership in systemic cases or to create and operate temporary bridge financial institutions. The BCBS Recommendations also call for clear options or principles for the exit from public intervention. The FSB SIFI Recommendations call for a resolution regime that would make feasible the resolution of any financial institution "without taxpayer exposure to loss from solvency support" (para. 12).

32. Are ex ante arrangements in place to make funding available to support resolution measures? Please distinguish between the provision of liquidity funding, equity financing, and funding for other purposes (such as the removal of impaired assets from the balance sheet or the transfer of liabilities to another entity or to a bride bank).

33. In what circumstances or for what institutions would funding to support resolution not be available?

34. Would funding be available to support the resolution of:

(a) a local branch of a foreign financial institution;

(b) a local subsidiary of a foreign financial institution; or

(c) foreign operations of a domestic financial institution?

35. To the extent that credit or liquidity support is necessary, in what form would this generally be provided (eg a line of credit; guarantee etc), and by whom (eg deposit insurance fund, resolution fund, central bank, treasury)?

36. What specific legal requirements or conditions apply to protect taxpayers where public funding is provided (eg resolution authority becomes a secured creditor, or enjoys a priority over other creditors in the liquidation of the financial institution)?

37. Does your country have a deposit insurance fund? If so, can the fund be used to finance non-payout resolutions, such as the transfer of deposit accounts to another deposit-taking institution?

38. Does your country have a resolution fund? If so, how is it funded, and how would it be used following the exercise of resolution powers?

I. Risk mitigation techniques to reduce systemic risk

BCBS Recommendation 8 calls on jurisdictions to promote the use of risk mitigation techniques that reduce systemic risk and enhance the resiliency of critical financial or market functions during a crisis or resolution of financial institutions. These risk mitigation techniques include enforceable netting agreements, collateralisation, and segregation of client positions.[2] BCBS Recommendation 9 stipulates that national resolution authorities should have the legal authority to temporarily delay immediate operation of contractual early termination clauses in order to complete a transfer of certain financial market contracts to another sound financial institution, a bridge financial institution or other public entity.

39. In what circumstances does your resolution regime impose restrictions on:

(a) the exercise of close-out netting under financial master agreements (eg the ISDA Master Agreement and the Global Master Repurchase Agreement) and contractual rights of set-off following the exercise of resolution powers

(b) the enforcement of security interests by secured creditors of the financial institution following the exercise of resolution powers?

(c) the activation of payment acceleration and early termination clauses under finance agreements (eg loan agreements and bond documents) due to events of defaults triggered by the exercise of resolution powers?

40. If your resolution regime provides for powers to temporarily delay immediate operation of contractual early termination clauses, what is the length of time of the delay?

41. In what circumstances would a foreign authority's order of a temporary delay on the exercise of contractual rights under finance agreements or financial master agreements be recognised in your jurisdiction?

42. Do you see any need for changes in your legal framework governing the use and/or enforceability of close-out netting and early termination following events of default or termination events triggered by the exercise of resolution powers (including, eg "walk-away clauses", "change of control", "material adverse change" clauses?

43. BCBS Recommendation 8 calls for greater convergence of national rules governing the enforceability of close-out netting and collateral arrangements with respect to their scope of application and legal effects across borders. Please note reforms underway in your jurisdiction in this area and specific aspects that should be addressed at the international level that would require a greater degree of international convergence to make cross-border resolution effective.

44. BCBS Recommendation 8 calls for transparency and clarification of rules governing segregation of client funds and securities. Please note reforms underway in your

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[2] The BCBS Recommendation also calls for greater standardisation of derivatives contracts, migration of standardised contracts onto regulated exchanges and the clearing and settlement of such contracts through regulated central counterparties, and greater transparency in reporting for OTC contracts through trade repositories. Work on OTC derivatives contracts has been taken forward by the FSB OTC Derivatives Working Group, which released a comprehensive set of recommendations which have been endorsed by the G20. The FSB OTC Derivatives Working Group will conduct regular assessments of progress in implementing its recommendation. This aspect of the BCBS Recommendations is therefore not part of this questionnaire.

jurisdiction in this area and specific aspects that should be addressed at the international level that would require a greater degree of international convergence to make cross-border resolution effective.

45. *The BCBS calls on authorities to consider adopting limits on re-hypothecation of customer or other collateral. Please note reforms underway in your jurisdiction in this area and specific aspects that should be addressed at the international level that would require a greater degree of international convergence to make cross-border resolution effective.*

J. Protection for certain customers of financial institutions

BCBS Recommendation 1 calls for a process, such as through a deposit insurance system, providing for the prompt payment to insured depositors or transfer of their accounts to a bridge company or a healthy bank. In case of failure of a financial group or conglomerate with retail business in other sectors adequate protection will need to extend to customers of securities firms and insurance policyholders.

1. Depositor protection

46. *Please provide a brief description of the arrangements in your jurisdiction for the protection of deposits placed with financial institutions, focusing on:*

    (a) *which deposits are entitled to protection (eg is there an upper limit; restriction to local currency deposits only, only deposits of residents, etc?);*

    (b) *the method by which the deposit arrangements are funded; and*

    (c) *techniques to ensure that protected deposits are paid quickly or transferred to a sound financial institution following the exercise of resolution powers.*

47. *Do your deposit protection arrangements protect:*

    (a) *deposits placed with foreign branches of financial institutions incorporated in your jurisdiction?*

    (b) *deposits placed with local branches of foreign financial institutions?*

48. *Do your deposit protection arrangements provide the same level of protection for:*

    (a) *domestic and foreign customers of a financial institution incorporated in your jurisdiction?*

    (b) *customers of foreign branches of a financial institution incorporated in your jurisdiction?*

    (c) *deposits regardless of the currency in which the deposit is denominated?*

49. *Does your jurisdiction provide for depositor priority/preference? If so, please describe the types of deposits that benefit from depositor priority. In particular, note whether the following are protected:*

    (a) *deposits at locally incorporated banks?*

(b) *deposits at local branches of foreign banks?*

(c) *deposits at foreign branches of locally incorporated banks?*

50. *What issues in relation to deposit protection arrangements could potentially impede effective cross-border resolution?*

2. Investor protection

51. *Please provide a brief description of the arrangements in your jurisdiction for the protection of customers of failed securities firms/investment firms/broker dealers, focusing on:*

(a) *investor protection schemes, including the method by which such schemes are funded;*

(b) *rules requiring segregation of customer assets (eg client money rules); and*

(c) *rules ensuring that investors have reasonably prompt access to their claims following the failure of the firm.*

52. *Does your investor protection scheme and other rules provide the same level of protection for:*

(a) *domestic and foreign customers of a securities firm/investment firm/broker dealer incorporated in your jurisdiction?*

(b) *customers of foreign branches of a securities firm/investment firm/broker dealer incorporated in your jurisdiction?*

(c) *Customers of domestic branches of a foreign securities firm/investment firm/broker dealer?*

53. *What issues in relation to investor protection of failed securities firms/investment firms/broker dealers could potentially impede effective cross-border resolution?*

3. Insurance policy holder protection

54. *Please provide a brief description of the policyholder protection schemes in your jurisdiction, including details on the policyholders and beneficiaries entitled to protection, the level of protection, the method by which such schemes are funded, and the government or private entities involved. In your response, please distinguish between general insurance, life insurance, health insurance and reinsurance (or other categories as appropriate).*

55. *Do your policyholder protection schemes and other rules provide the same level of protection for:*

(a) *domestic and foreign insurance policy holders of an insurance legal entity or group incorporated in your jurisdiction?*

(b) *policyholders of foreign branches of an insurance legal entity or group incorporated in your jurisdiction?*

(c) *policyholders of domestic branches of an insurance legal entity or group incorporated in a foreign jurisdiction?*

56. *What issues in relation to insurance policy holder protection of failed insurance firms could potentially impede effective resolution of cross-border insurance legal entities or groups?*

III. Cross-border cooperation and coordination

BCBS Recommendation 4 recommends that national authorities should consider the development of procedures to facilitate the mutual recognition of crisis management and resolution proceedings and/or measures.

A. Legal capacity and mandate to cooperate

The FSB SIFI Recommendations stipulate that the mandates of resolution authorities be framed so that they are fully obliged to seek cooperation with foreign resolution authorities. Jurisdictions should provide resolution authorities with the capacity in law to cooperate and to share information across borders. They also recommend that when resolving a SIFI, home authorities should take into account the effects on host countries.

57. *Does the resolution authority have the capacity in law or in practice to cooperate and share information with resolution authorities in home and host jurisdictions?*

58. *Does the resolution authority in your jurisdiction have an explicit legal mandate to seek cooperation with national authorities in other countries:*

(a) *in relation to a financial institution incorporated in a foreign jurisdiction whose operations could become subject to resolution in your jurisdiction?*

(b) *in relation to a financial institution incorporated in your jurisdiction with operations in another country?*

59. *Does the resolution authority in your jurisdiction have an explicit legal mandate to take into account the effect on host countries of resolution measures taken by the home country (and vice versa)? If so, how?*

60. *Are the national authorities in your country otherwise required to take into account the possible effects in other countries of any decision to exercise resolution powers in your country?*

61. *Does your country provide foreign supervisors with the legal authority to conduct investigations, on-site examinations or otherwise obtain information from financial institutions in your country that are subsidiaries or branches of financial institutions based in the foreign supervisor's country?*

B. Coordination and mutual recognition

The FSB SIFI Recommendation call on authorities to review and, where appropriate, eliminate those provisions in national laws that hamper fair cross-border resolution such as depositor priority rules within resolution that give preferential treatment to domestic depositors over those of foreign branches, or that trigger automatic action in the domestic jurisdiction as a result of official intervention and/or the initiation of resolution or insolvency proceedings in another jurisdiction, while reserving the right to act on their own initiative in the absence of effective cooperation and information sharing. In your answers to the questions, please distinguish as appropriate between the arrangements applicable to different categories of financial institution.

62. Does your domestic legal framework trigger any automatic consequences or actions as a result of official intervention and/or the initiation of administration or insolvency proceedings in a foreign home/host jurisdiction? For instance, are any stays or other insolvency ramifications with respect to local branches or affiliates triggered by the appointment of a foreign administrator/receiver.? If so, does the legal framework provide for means to stop these consequences from happening?

63. What legal effect will the exercise of resolution powers in a foreign home jurisdiction have in your country? Give an example of, or explain the sequence of events for, the actions your jurisdiction would or must take in response to the failure of a foreign financial institution with offices, significant assets, or service providers located in your jurisdiction. In what circumstances will the legal system in your country recognise the exercise of resolution powers in other countries? Is recognition automatic or would a procedure need to be followed to obtain recognition? If a procedure needs to be followed, please briefly explain the procedure. In particular, please explain whether the resolution authority has the authority to recognise the exercise of resolution powers in another country, or whether recognition must be obtained from the court.

Please consider the following scenarios:

(a) The financial institution incorporated in the foreign home jurisdiction has a <u>local branch in your jurisdiction</u>. The home resolution authority establishes a bridge company in the home country and seeks to transfer the institution's operations, including the branch in your country to the bridge. In what circumstances will the legal system in your country recognise the transfer/change of ownership? If a procedure needs to be followed, please briefly explain the procedure.

(b) The financial institution incorporated in the foreign home jurisdiction has a <u>local (regulated) subsidiary in your jurisdiction</u>. The home resolution authority establishes a bridge company in the home country and seeks to transfer the institution's assets and liabilities, including ownership in shares in the subsidiary in your country to the bridge company. In what circumstances will the legal system in your country recognise the transfer/change of ownership? If a procedure needs to be followed, please briefly explain the procedure.

(c) What is different if the financial institution incorporated in the foreign home jurisdiction has a local <u>unregulated</u> subsidiary in your jurisdiction?

(d) What if the financial institution incorporated in the foreign home jurisdiction holds assets <u>in your jurisdiction</u>? What is required to transfer ownership to the foreign bridge company or other entity (where such a capacity exists)?

64. Give an example of, or explain the sequence of events for, the actions your jurisdiction would take to resolve a failing financial institution with (a) a branch; (b) a subsidiary (c) a service provider, or (d) assets located in a foreign jurisdiction? Eg will the domestic authority seek to consult and/or coordinate actions with its foreign *counterparts prior to taking the action in its domestic jurisdiction? Will the course of action chosen depend on the criticality of the foreign assets/operations for the viability of the domestic firm?*

65. Has your country developed, or is it considering the development of, in coordination with other countries, a legal framework in which resolution powers exercised in one jurisdiction can be made enforceable in another jurisdiction (eg through a reciprocal mutual recognition and enforceability of laws between home and host jurisdictions)?

C. Information sharing

BCBS Recommendation 7 recommends that key home and host authorities agree on arrangements that ensure the timely production and sharing of the needed information, both for purposes of contingency planning during normal times and for crisis management and resolution during times of stress.

66. Can the resolution authority in your jurisdiction share information relevant for recovery and resolution planning and crisis resolution with

(a) home/host resolution authorities,

(b) home/host supervisors,

(c) home/host central banks, and

(d) other authorities (eg foreign treasuries, judicial authorities)?

67. What conditions apply? Under what circumstances can information not be shared cross-border?

68. What types of information that are not currently readily available or would not be rapidly accessible in a crisis do you consider most relevant for preparing for and managing a crisis or effecting a resolution?

D. Cooperation agreements

BCBS Recommendation 7 recommends that national authorities have a clear understanding of their respective responsibilities for regulation, supervision, liquidity provision, crisis management and resolution and that they agree on arrangements that ensure the timely production and sharing of the needed information, both for purposes of contingency planning during normal times and for crisis management and resolution during times of stress.

The FSB SIFI Recommendations stipulate that for each global SIFI (G-SIFI), there should be institution-specific cooperation agreements between relevant home and host authorities. These agreements should provide for clarity as regards the roles and responsibilities of home and host authorities in planning for and managing the resolution of the institution, and should be underpinned by national law that provides both the mandate and the capacity to co-operate and share all relevant information among home and host supervisors, central banks and resolution authorities. Authorities should explore avenues to formalise these agreements and over time make them more binding. The agreements should, inter alia:

- establish the objectives and processes for cooperation through crisis management groups, and provide for holding at least annual meetings including top officials of the home and relevant host authorities to assess the robustness of the G-SIFIs Recovery and Resolution Plans;

- define the roles and responsibilities of the authorities at all appropriate stages of a crisis; and
- set out the legal bases in the respective national laws and the modalities for information sharing during good times and in crisis, including sharing with any key host authorities that are not represented in the crisis management group.

69. *Have authorities in your jurisdiction entered into cross-border agreements that specifically deal with cooperation and coordination in managing and resolving a financial crisis? Please note whether they are*

    (a) publicly available;

    (b) binding or non-binding;

    (c) bilateral or multi-lateral; and

    (d) institution-specific or of general application.

70. *If authorities in your jurisdiction have entered into a cross-border agreement relevant for crisis management and resolution, what are its key elements? In particular, does the agreement:*

    (a) Establish a process for cooperation through crisis management groups;

    (b) Define the roles and responsibilities of the authorities at all stages of a crisis;

    (c) Provide for a documented communication plan;

    (d) Establish the scope and modalities for sharing of information and specify the scope of information to be shared, in particular, pertaining to institution-specific recovery and resolution plans;

    (e) Establish modalities for sharing of information with host authorities not represented in the crisis management group;

    (f) Address funding arrangements and their use in a cross-border context (including potential "burden sharing" arrangements); and

    (g) Commit authorities to regular stress-tests or joint simulation exercises?

71. *Please note other relevant provisions and modalities that are addressed in the agreement.*

IV. Recovery and resolution planning

A. Improving resolvability

BCBS Recommendations 5 calls on supervisors to work closely with relevant home and host resolution authorities in order to understand how group structures and their individual components would be resolved in a crisis. If national authorities believe that financial institutions' group structures are too complex to permit orderly and cost-effective resolution, they should consider imposing regulatory incentives on the institutions, through capital or other prudential requirements, designed to encourage simplification of the structures in a manner that facilitates effective resolution. The BCBS recommends that all institutions with significant cross-border operations strengthen and maintain on a regular basis Management Information Systems ("MIS") capable of providing information critical to supervisory and institutional risk assessment and management in the context of any possible resolution. This information should include organisation structures, counterparty exposures by counterparty and legal entity, payments and exchange systems on which the firm operates, securities settlement systems (and CCPs) in which the firm participates. Supervisors should have access to MIS as well as the foregoing systems to assist in their evaluation of the institution's risk management and resolution contingency planning, and to enhance the firm's ability to identify risks while experiencing severe financial distress.

The FSB SIFI Recommendations stipulate that authorities should have the powers, exercisable under clear criteria, to require a financial institution to make changes to its legal and operational structure and business practices to facilitate the implementation of recovery and resolution measures. Should operations in other jurisdictions be affected by such proposed changes, there should be adequate coordination with the relevant host supervisors. Resolvability under existing resolution regimes and cooperation agreements should be an important consideration in host authorities' determination of any changes to be required in a hosted institution's operations. Host jurisdictions may wish to decide, in light of the systemic significance (or otherwise) of the hosted foreign institution for their financial system and economy, and in light of the applicable resolution regimes and cooperation agreements, whether to permit a branch presence, or to permit a subsidiary presence, so that resolution is a local responsibility, but with co-ordination with the home (or group) regulatory and resolution authority. The FSB also recommends that SIFIs with multiple significant legal entities maintain information on a legal-entity basis; minimise any undue intra-group guarantees, in particular undue use of blanket guarantees; ensure that service agreements are appropriately documented and cannot be abrogated by the service provider in resolution; and ensure that significant global payment and settlement services are legally separable and continued operability is ensured.

72. *Does the resolution regime in your jurisdiction provide for powers to:*

    (a) *require changes to a financial institution's structure and operations to improve its resolvability and, if so, under what conditions?*

    (b) *impose requirements to improve the resolvability of a financial institution incorporated in your jurisdiction as regards its cross-border operations (eg simplify its cross-border corporate structure, operate in foreign jurisdictions only through self-contained subsidiaries, or only via branches)?*

    (c) *impose requirements to improve its resolvability of a financial institution incorporated in another jurisdiction as regards its operations in your jurisdiction?*

73. *What changes, if any, are being made or have been made to branching or subsidiarisation requirements relative to foreign banks operating in your jurisdiction?*

74. *What specific measures, eg as regards institutions' internal IT systems and availability of certain types of information, separability of business units, etc., are required to improve contingency preparedness and the resolvability of institutions in your jurisdiction?*

75. *Please discuss the extent to which:*

(a) SIFIs in your jurisdiction with multiple significant legal entities are required to maintain information on a legal-entity basis;

(b) your jurisdiction imposes restrictions on the use of intra-group guarantees and other types of intra-group risk transfer or intra-group reliance in order to reduce contagion in time of stress;

(c) your jurisdiction requires that service level agreements are appropriately documented and periodically reviewed and cannot be abrogated by the service provider in a resolution; and

(d) your jurisdiction requires that significant global payment and settlement services are legally separable or that their continued operability can be ensured in other ways.

B. Recovery and resolution plans

BCBS Recommendation 6 calls for the contingency plans of all SIFIs to address as a contingency a period of severe financial distress or financial instability and provide a plan, proportionate to the size and complexity of the institution's and/or group's structure and business, to preserve the firm as a going concern, promote the resiliency of key functions and facilitate the rapid resolution or wind-down should that prove necessary. Such resiliency and wind-down contingency planning should be a regular component of supervisory oversight and take into account cross-border dependencies, implications of legal separateness of entities for resolution and the possible exercise of intervention and resolution powers. The FSB calls for mandatory recovery and resolution plans (RRPs) that assess the resolvability of G-SIFIs and stipulate that recovery and resolution planning should be a continuing exercise. More specifically, the draft FSB Key Attributes call on authorities to conduct regular stress-tests and reviews of these plans.

76. Are financial institutions in your jurisdiction required to prepare RRPs that cover key operations and entities? If so:

(a) To which types of financial institution do such requirements apply?

(b) Do the requirements apply to local branches or subsidiaries of foreign financial institutions, or do you rely on the home country RRP?

(c) Do these requirements distinguish between recovery plans and resolution plans? If so, how?

(d) What are the key elements that must be addressed in RRPs?

(e) What is the role of the national authorities in reviewing RRPs? Which authorities administer the RRP requirements and will utilize their content?

(f) Do you require RRPs to be approved at a particular level with the financial institution (eg its Board of Directors)?

(g) How frequently are RRPs required to be reviewed and updated?

(h) Are RRPs subject to stress-tests that include severe stress-scenarios?

(i) What sanctions apply when an RRP is deemed inadequate?

(j) Is there a requirement to publish an RRP or a summary thereof?

(k) What would be the legal status of an RRP in cases where the national authorities exercised a resolution power in relation to the financial institution?

77. To what extent have your resolution authorities developed data templates, fact sheets or data triage frameworks to enable them to diagnose the financial condition of a financial institution in distress, including as to its liquidity, solvency and capital position? To what extent are financial institutions required to be pre-positioned to provide such data for diagnostic purposes at short notice upon request?

V. Other issues

78. What, in your view, are the three most important concrete steps that could be taken at international level to make cross-border resolutions more effective?

79. What are the key issues that your jurisdiction is seeking to address or is addressing to enhance its capacity to effectively and efficiently resolved distressed financial institutions?

80. Please note any aspects of the BCBS Recommendations, the FSB SIFI Recommendations and the draft FSB Key Attributes that should be revised or reconsidered in the light of recent developments in your jurisdiction.

81. Please note any additional issues that should be addressed as part of future efforts on resolution.

VI. List of relevant documents and abbreviations

To facilitate references to applicable laws and regulations and other important documents, such as MoUs, please list the main documents you are referring to and the abbreviations used in the table below.

Abbreviation	Law or other document	Web link (if available)

Similar to references to key documents above, your response is likely to include various references to decision making bodies and authorities. Please list the main bodies you are referring to in your response in the table below.

Abbreviation	Name of body or authority	Web link (if available)