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

40th ANNIVERSARY
THE VOICE OF CO-OPERATIVE BANKS IN EUROPE

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DG Internal Market and Services Working Document 'Technical Details for a Possible EU Framework for Bank Recovery and Resolution

Ladies, Gentlemen,

The European Association of Co-operative Banks (EACB) welcomes the opportunity to comment on DG Internal Market and Services Working Document "Technical Details for a Possible EU Framework for Bank Recovery and Resolution", also known as the 'Crisis Management' Consultation.

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

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

We will remain at your disposal,

Yours sincerely,

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GENERAL COMMENTS

The members of the EACB take note that the Commission feels the need to set out a general framework to improve the effectiveness of the arrangements for dealing with troubled and failing banks, especially on a cross border basis, in order to ensure financial stability.

The EACB supports the 7 general principles set out in this context in the Commission's Communication of October 2010: 1) put prevention first, 2) provide for credible resolution tools, 3) enable fast and decisive action, 4) reduce moral hazard, 5) contribute to a smooth resolution of cross-border groups, 6) ensure legal certainty and 7) limit the distortions of competition. However, there are still uncertainties as regards the possibilities for an EU framework on Crisis Management.

Possible EU Framework for Crisis management in context

As mentioned in the Communication of October 2010, the Commission intends to proceed gradually towards such a framework. As a first step, the Commission seeks to adopt a legislative proposal for a harmonised EU regime for crisis prevention and bank recovery and resolution. This so-called working document on the 'technical details' of such possible framework is the basis for this legislative proposal. It appears however a rough understatement to pretend that this working document is addressing "technical details". If put into practice, these proposal will lead to far-reaching changes to the way in which banks operate on a day to day basis. Some of the suggested preventative powers and early intervention measures would be very intrusive considering that they would apply to banks which still have 'a going concern' status.

It should also be reminded that the Commission has designed a coherent package of reforms of the rules applicable to financial institutions and markets, which take into account the lessons of the crisis and aim at preventing or at least mitigating future ones and better managing them if they occur[1]. A future crisis management framework is obviously only a part of this overall package. Therefore, the crisis management should be seen in the context of the other prudential measures on the way such as Basel III/CRD IV, the enhanced supervision via the new ESA's and other regulatory measures to prevent a future crisis. A crisis management framework is thus not an isolated exercise. The Commission should avoid overregulation and avoid creating a situation of *regulatory impasse*.

Moreover, at a global level there is a need to maintain a level playing field. The possible future EU framework should not put European banks and/or their subsidiaries operating on a global level at a disadvantage in comparison with their non-EU counterparts. Because European banks may be subject to additional costs, requirements and administrative burdens that cannot be foreseen for the moment. This still needs to be assessed by the Commission through a thorough Impact Assessment.

Specific Features of cooperative banks

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

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

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

Then, the EACB appreciates that the Commission has mentioned and taken account of certain specificities of the cooperative banking model in C3. However, there are a number of other specific co-operative features that have to be taken into consideration.

The cooperative business model has developed in different ways in the different Member States of the European Union. Today, the co-operative form of enterprise is common and is recognized in Member States. At European level, the cooperative legal form as such is recognized by Art. 54(2) TFEU In addition, Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society underlines the efforts of the European Union to contribute to the economic development of co-operatives[3].

As stated in the Statute for a European Cooperative Society (SCE), "*co-operatives are legal entities with particular operating principles that are different from those of other economic agents* (Recital 7)"[4]. Co-operative banks are to promote members' interest by providing services to them. They have to be profitable, but they do not have the aim to generate maximum profit. Co-operative banks serve their members on a long-term and intergenerational basis. As co-operative banks do not prioritize the maximization of profits, they do not attract large investors, but individuals who invest a limited amount of money. Moreover, co-operative banks are democratically controlled by their members, and typically each member has one vote regardless of the amount of capital he holds.

Co-operative banks serve more than 159 million customers in Europe with an average market share in SME financing of around 29%. They have naturally expanded the scope of their activities in recent years by moving into cross-border markets and rolling out new services. However, this expansion has respected their core values and their corporate governance rules. In fact, it has to be underlined that co-operative banks in the different Member States, despite numerous differences, share some common and defining features.

- *Promotion of Members' Economic Interest*

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

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

- *Cooperative solidarity schemes*

A key element of European co-operative banks is that they have established solidarity schemes a long time ago. The aim of these schemes is to prevent the failure of any individual bank belonging to the network. The aspects of collaboration and mutual support are deeply rooted in the co-operative philosophy. Most of these support schemes

[3] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).
[4] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).

have been and still are in operation. As these systems do prevention, early intervention and use resolution tools, it seems desirable to acknowledge their role in the crisis management framework.

Since their creation, co-operative banking groups have undergone their own specific developments in the different member states, along the way of national economies. Thus, also the features of these schemes of co-operative banks differ between Member States

- *Institutional Protections Schemes*

For decades, and in particular during the recent financial turmoil, institutional protection schemes have demonstrated their effectiveness, proven their stability and helped to avoid bank failures. While there may be differences regarding the details of these institutional protection schemes, the following elements are common to them all in accordance with Article 80(8) CRD:

- they protect credit institutions and ensure their liquidity and solvency;
- they are based on private arrangements; and

they are financed by private means solely.

There are also co-operative protection systems, which do not comply with the requirements of Article 80 (8) of the CRD, nevertheless, in case of troubled co-operatives; *de facto* these have also been ensuring the liquidity and the repayment of all liabilities of their members.

In order to fulfil its tasks, an institutional protection scheme has to be pro-active and intervene at an early stage before a bank fails. Thus, they enhance the stability of the banking systems before a crisis occurs[5]. A possible future EU Crisis Management could require the creation of other instruments and procedures that such a system does not require at all, but which would rather hamper its functioning. We do not think that this is the right approach. We therefore consider that any future regime should respect the existing internal recovery and resolution measures of these schemes in place.

- *Mutual guarantee schemes*

Banking groups that meet the requirements in Article 3 CRD and Article 69(1) CRD (Directive 2006/48/EC) have mutual guarantee schemes in place.

These guarantee systems may provide for: a) a guarantee by the central body of each affiliated institution; b) a two-way guarantee (i.e. a guarantee by the central body of each affiliated institution and vice-versa); or c) a cross-guarantee (i.e. a guarantee (a) by the central body of each affiliated institution, (b) a guarantee by each affiliated institution of the central body, and (c) a guarantee by each affiliated institution and the central body of all other affiliated institutions).

These ensure that there are no legal or practical impediments to the prompt transfer of own funds and liquidity within the Group to ensure that the obligations to creditors of the central body and its affiliates can be fulfilled. The Group as a whole must be able to grant

[5] The Mutual Support Scheme of the German co-operative banks ("Die Sicherungseinrichtung") for instance has been in place for over 75 years and has been functioning very well ever since. It has been fulfilling its role perfectly for many decades, also during the recent crisis. Since the establishment of that scheme, no depositor has ever lost any money – regardless how large, small or fraction thereof - due to the default of a co-operative bank.

the support necessary under its applicable arrangements from funds readily available. However, the details of these arrangements depend on the type of guarantee scheme.

In addition, in accordance with the applicable guarantee system, applicable law and/or the Articles of Association[6], ensure that no liabilities or commitments are left unresolved when one of the affiliated institutions exits the Group or is wind down. This includes any arrangements providing that the entire assets of the central body and the affiliated institutions as a whole are available for the payments of obligations versus (the totality of) creditors of such central body and affiliated institutions as a whole'.

- *Common Equity Instruments of co-operative banks*

Due to these particularities, Common Equity Instruments of co-operative banks dispose of many features that make them inappropriate for debt conversion. Today, conversion into equity of assets does not exist in a cooperative bank.

- In many cooperative banks the number of shares that a member can buy is limited. But even where such limits do not formally exist, it is not desirable to have major shareholders.
- In some banks only natural persons can be members and acquire shares
- In most cases, co-operative shares are not transferable, but redeemed by the co-operative bank. Where co-operative shares are transferable, there is often no market for them and they can only be transferred at nominal value.
- Membership in a co-operative often implies that members are subject for a call for additional capital under specific circumstances, what could generate problems for those who did not intend to become shareholders.
- In many jurisdictions the issue of co-operative shares is only possible against cash payment or under conditions against contribution in kind. This could create problems regarding debt write down. Moreover, cooperatives may redeem shares, but are often prevented by law from subscribing their own shares, purchasing or accepting them as security (see Art. 4 of the SCE Statute).
- Co-operative mutual principles imply in most cases that members buy the shares at nominal value when entering the co-operative and that they are redeemed at nominal value when they give up membership. Of course, if there are no retained earnings and losses occur, capital could be written down and the redeemed amount would correspond to a (written-down) book value.
- In some co-operative banks there is even a cap on dividends.
- Finally, in some co-operative banks, in particular those that prepare their accounts on the basis of IFRS, the co-operative bank has the unconditional right to refuse the redemption of shares

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

[6] Articles of Association' means all the documents and instruments governing the affiliation's arrangements

- *Non-listed Banks*

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

Consequently, we ask the Commission to take the above mentioned specificities of the cooperative banking sector into account, when setting up specific measures concerning crisis management. This can be achieved either by following the principle of proportionality or through specific exemptions for cooperative banks (e.g. regarding the cooperative's well established or operating measures for intra-group financial support systems).

SPECIFIC COMMENTS

Introduction

Any recommendations or even proposals for regulatory measures for an EU Crisis Management framework should take into account the effectiveness of existing regulatory framework i.e. national company law codes, and cooperative laws.

Any guidance for an EU Crisis Management framework should be designed to allow the most appropriate application in accordance with laws, codes, regulations and other relevant social and economic factors of individual jurisdictions[7].

The proportionality principle

The proportionality principle should be a central element in examining the possibilities for a future EU Crisis Management framework.

The practical application of the solutions should be proportionate and may vary depending on the legal form, size, nature and complexity of the institution relevant financial and legal model. This approach seems essential given that each institution has its own legal and economic model and national set of preventive measures at hand. In addition to the type, complexity and systemic relevance, we consider that the focus of activity should also play a role.

As such the application of the principle of proportionality could entail that some credit institutions (or investment firms) may be outside the scope given their activities of limited dimension and scope. It might for example not make sense to require a very small bank that can by no means pose a problem to the financial stability to draft a recovery plan. National authorities should have the power to decide that certain rules do not apply to certain banks or investment firms (*de minimis* rule). Therefore, the Commission is requested to concretely take into account the proportionality principle in its broadest sense possible in any future EU Crisis Management framework.

Level of application

The application of any guidance should reflect the differences in terms of consolidated and non-consolidated groups. Consolidation implies the power to govern the financial and operating policies of the consolidated entity so as to obtain benefits of its activities.

Such distribution of powers as described above must also have implications for any drawing up of recovery and resolution plans and/or intra-liquidity transfer plans. The application of the proportionality principle in such cases should result in the implementation of the specific requirements and plans at group level with an emphasis on the parent undertaking.

In highly integrated consolidated groups as described in Art. 3 CRD and Art 69 CRD such control may even imply that the central liquidity management, the central solvency management, a cross guarantee system and other far reaching institutional powers and the full implementation of principles would only be possible on a consolidated level.

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

Part I: Scope and Authorities

- Scope: credit institutions and certain investment firms (P1.1a)(p. 11)

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

We consider that in principle the same categories of credit institutions and investment firms that are subject to the Capital Requirements Directive (Directive 2006/48/EC) should be subject to any possible Crisis Management regime. More specifically, if all banks should be subject then all investment firms should be subject as well regardless of whether they already also fall under other regimes in order to ensure an equal level-playing field. It should be kept in mind that there is a wide variety among credit institutions, as is the case for investment firms.

Given that the Commission's particularly aim of an EU Crisis Management framework is to have an orderly wind down in case of the failure of cross-border banks, it should be mentioned that many cooperative banks are small to medium-sized banks that operate mainly at the local and regional level. Their primary mission is to provide services to their members/customers who are typically, individuals, household and SMEs, i.e. retail banking. As such, their retail banking activities remain focused on their regions.

The question is whether these activities of such limited scope should be subject the scope of the envisaged measures or could be outside the scope.

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

In general, the suggested investment firms under Category 1 and 2 are appropriate.

However, we suggest that the principle of proportionality should be applied regarding the size and systemic relevance.

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

We consider that the need for the application of resolution tools and powers will most likely emanate from the risk of especially investment activities of banks and/or investment firms. Therefore, any future regime should be designed mostly for these types of institutions instead of retail banking institutions.

- Extended Scope of resolution tools and powers to bank holding companies (P1.1b) (p. 12)

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

Bank holding companies should be within the scope of the resolution scheme, especially as they are very much involved with the risks of their member banks. Otherwise, the door would be opened for structuring opportunities.

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

We think this should only be the case for banking groups which are considered as a single financial entity from a prudential perspective (cf. Art. 3 CRD and Art. 69 CRD). Such groups have cross-guarantee systems in place. Therefore, the bank holding company is automatically included in a resolution in case one of its affiliates meets the conditions for resolution.

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

Additional safeguards may be required as there could be situations, where a healthy holding company itself (or its healthy parts) could be brought into danger when certain resolution tools are used.

- Designation and responsibilities of resolution authorities (P1.2) (p. 13)

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

Yes, the Member States should be responsible for determining which national body/bodies shall act as the resolution authority in order to retain existing national arrangements. Nonetheless, the Member states should ensure that there are no conflicting interests between supervision and resolution. Of course, the aim must be that the designation of authorities by Member States does not impede coordination in a case of cross-border crisis.

The concept of an authority as a lead point at national level (in case the resolution authority exists of more than one authority) could also be translated to the European level. This will ensure that there is one of the Member States authorities in the lead to coordinate the cooperation in case of cross border crisis.

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

A mere functional separation between supervisory and resolution functions is not necessarily appropriate. Conflict of interest has to be avoided. It has to be ensured that there are different lines of responsibility. There should not be a mixing up of both functions. If the supervisor also has the responsibility of resolution powers, it may jeopardize the correct execution of both functions. Therefore, we suggest that there should be a clear distinction between the supervisory functions and the resolution functions.

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

The main aim is that a resolution authority is functional, effective and able to exercise its power with speed and concrete decisiveness without unnecessary delays and possible internal conflicts. In addition, there should just be a well organized resolution process.

At the same time there is a need for checks and balances. It is necessary to ensure that the decision meets the impact of the measure taken. However, if the decision making is too dispersed and too many actors are involved to take each individual decision it may hamper the resolution process. Therefore, we consider it not necessary to require that the various decisions and functions involved in resolution decision making are allocated to separate authorities beyond what is said under 3b.

If nevertheless, the resolution authority was made up of many administrative authorities, it would be necessary that the responsibilities and roles of the different authorities are clear and that there is adequate coordination between them to ensure fast decision making.

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

A common framework at EU-level, and preferably also globally, should be adopted. In this way it can be avoided, that the responsible authority acts only in the national best interest which results in distortions in competition.

However, the framework should give leeway to take account of different market, legal frameworks and specific characteristics of the institutions.

Part 2. Supervision, Prevention and Preparation

A. *Supervision*

- Supervisory Programme (A1) and Stress testing (A2) (p. 16)

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

In order to avoid extra and overlapping work, we consider that the tests should be developed in co-operation with credit institutions and supervisors.

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

The aggregate results of the tests which are executed by the institutions should be adequate and at disposal of the authorities could be made public. However, the individual results of an institution should not be made public.

If the results give reason for a supervisor to act, the actions of supervisors can be made public in those cases, where the actions could have a reassuring effect on the market. In these cases appropriate safeguards should be available.

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

Yes, the test should be conducted following a globally accepted and common methodology which takes the particularities of the national markets into account.

5. Please estimate:
- **the one-off costs in EUR (e.g., investments in IT systems);**
- **the additional ongoing annual costs (e.g. human, subcontracts etc.)**

that your institution would be likely incur in carrying out the activities related to enhanced supervision.

In this phase of the discussion it is not possible to make any kind of cost estimation due to the fact that many parameters are undefined. Any estimation would be ‘a wild guess’.

B. *Recovery Planning*

- Recovery Plans (B1) (p. 19)

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

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

Furthermore, we have doubts regarding the intention to draw up such plans and assess them in accordance with comparable criteria across countries (as mentioned in the last paragraph of B2, page 20) given the differences in legal framework, business models, market size etc.

Since in some Member States there is regulation in place on the elaboration of recovery plans, the experience with such legislation should be taken into account and any future legislation should interfere as little as possible with existing national legislation.

Furthermore, it seems necessary to consider the principle of proportionality for recovery plans. We consider such plans are inappropriate for small and medium sized banks.

- Assessment of (Group) Recovery Plans (B2, B3 and B4) (p. 20-21)

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

It should in principle not be necessary to require entity-specific plans for affiliated banks in banking groups that meet the requirements in Article 3 CRD and Article 69(1) CRD (Directive 2006/48/EC). For such groups only group specific plans make sense. The central body of the group shall be in these cases responsible for the plans inside the group. In particular in such co-operative banking groups headed by a Central body, the group recovery plan pre-exists in the form of compulsory internal solidarity mechanisms.

Moreover, we think that individual plans for institutions that adhere to schemes that ensure the solvency and liquidity according to Art 80(8) CRD do not make sense. Such systems will interfere at an early stage and require specific recover plans from the institution not only recovery plans but as recovery concepts. Thus individual plans would result in a mere duplication. A group recovery plan would only make sense in case of problems of the whole institutional protection scheme.

It may depend on an individual case whether entity specific or group plans are appropriate. Individual plans may make sense for systemic entities as well as for cross border subsidiaries. In all other cases the size, the nature of the activities and the systemic importance of the entity or group concerned should be considered. Therefore it should remain at the discretion of the banking group, in agreement with the supervisor to determine whether there is a need for both entity-specific and group recovery plans. A process of cooperation leading to a joint decision within the college of supervisors should guarantee the consistency of the group recovery plan for cross border banks.

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

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

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

Yes, a formal joint decision procedure is necessary between the consolidating supervisor and the host supervisor(s) supervising the subsidiaries involved in the recovery plans.

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

EBA can play a decisive role but only on cases where the matters escalate.

8. Please estimate:

a) the one-off initial costs (e.g., investment in IT and other systems);

b) the additional ongoing annual costs, including the costs of Full-Time Equivalent employees (FTEs), and the number of such FTEs, that your institution would be likely to incur in carrying out the activities related to recovery planning suggested in section B.

As mentioned before, in this phase of the discussion it is not possible to make any kind of cost estimation. Too many parameters are undefined. Any estimation would be ‘a wild guess’.

C. *Intra-group Financial Support*

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

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

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

The system of guarantees may provide for: a) a guarantee by the central body of each affiliated institution; b) a two-way guarantee (i.e. a guarantee by the central body of each affiliated institution and vice-versa); or c) a cross-guarantee (i.e. a guarantee (a) by the central body of each affiliated institution, (b) a guarantee by each affiliated institution of the central body, and (c) a guarantee by each affiliated institution and the central body of all other affiliated institutions).

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

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

Therefore, we consider this possibility of a framework should not impede with the existing frameworks and practices for intra-group financial support of cooperative banking groups, (e.g. those under the protection of an accepted Institutional Protection Schemes or other protections systems providing support to their members) in the different Member States and/or affect the rules under Article 3 CRD and Art. 80(8) CRD and others.

The answers provided below are given taking into account the experiences and best practices that cooperative banks have obtained. At the same time, we are also keeping in mind the possibility for other banking models to use intra-group financial support systems.

- Group financial support agreement (C1) (p.24)

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

It is not desirable to limit or restrict the ways and means of intra-financial support. The national authorities shall be in the right position to assess whether the proposed ways, tools and means of support are appropriate for the specific entity concerned.

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

The support should be possible in every direction. As mentioned, within cooperative groups the guarantee systems may provide for: a) a guarantee by the central body of each affiliated institution; b) a two-way guarantee (i.e. a guarantee by the central body of each affiliated institution and vice-versa); or c) a cross-guarantee (i.e. a guarantee (a) by the central body of each affiliated institution, (b) a guarantee by each affiliated institution of the central body, and (c) a guarantee by each affiliated institution and the central body of all other affiliated institutions). The banking group or the protection system in coordination with the national authorities shall be responsible for determining which type of financial support is possible and suitable for the group concerned according to the rules of the support system

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

It should be possible to include financial institutions on the grounds that these are also subject to supervision on a consolidated basis.

- Review of proposed agreement by supervisors and mediation (C2) (p. 25-26)

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

It is not deemed necessary to have a mediation procedure.

- Approval of proposed agreement by shareholders (or members of credit institutions for cooperatives) (C3) (p. 26)

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

The fundamental elements or the restrictions of those elements should be specified in advance, but there should also be room for consideration. So we prefer general principles.

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

The (framework)agreement should specify the general principles of remuneration in advance. If those principles are composed in a right way, there should be no need for regular reviews, unless it is necessary due to external changes.

- Possible Conditions for Group Financial Support (C4)(p.26-27)

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

No, we think that these conditions are far too strict in particular, for cooperative support schemes. In these schemes support is also granted even if it is not reasonably certain that a loan will be reimbursed (see condition (d)). The proposed restriction would contradict the arrangements and the rationale of arrangements of cooperative banks according to Art. 3 CRD and Art. 80(8) CRD.

- Decision to provide group financial support (C5)) (p. 27-28)

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

Yes, the decision should be reasoned and the criteria seem appropriate.

- Notification of Group Financial Support decision to supervisors and their right to object (C6) (p. 28)

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

The bottom line of supervisory assessment should be whether the conditions set out under C5 are met or not

Therefore, the supervisor should not have the power to prohibit or restrict a proposed transaction. Such powers could lead to discrimination of creditors in case the supervisor makes a decision to prohibit support to a certain bank within the group. This is especially the case for the mutual guarantee systems of cooperative banks.

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

The maximum time limit should be 48 hours (i.e. 2 bank business days).

16c. Should a time limit be set also for the reply to the consultation by the supervisor of the beneficiary?

Yes, this is deemed necessary also with a maximum time limit of 48 hours.

- **Request for financial support by the supervisor(C7) (p. 28-29)**

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

No, the role of supervisors should only consist of verifying that the financial support complies with the requirements listed in section C4. The ultimate request for financial support lies with the central body especially in groups according to Art. 3 CRD. However, supervisors may warn an central body that they see a need to provide support or an institution on the need to receive financial support and to require that the participants to the support should be informed about it.

- **Insolvency protections from transferor and its creditors (C8) (p. 29)**

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

In theory both mechanisms suggested could be appropriate. However, both require amendments in the national insolvency legislation; these amendments can be difficult to implement and require possibly a long time for implementation.

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

There should be clear time limits, which are the same as in the insolvency legislation.

- Exclusion of liability of management (C9) (p. 30)

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

Yes, however it should remain possible to hold the management liable for damages caused with gross negligence, but not (automatically) for wrong decisions. This also depends on the framework for requesting financial support.

- Disclosure (C10)

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

The specific content of the agreement should not be disclosed, but the general existence of the agreement could be made public.

If there are any actions based on the agreement, these actions could be made public, when they increase confidence of the market unless the publications of the actions put in place could lead to distortions on the market.

D. Resolution Plans

- Individual Resolution Plan (D1) (p. 31)

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

The principle of proportionality should be applied in this respect. In assessing whether and to what extent there is a need for a Resolution plan, the size, nature, complexity of the institution and focus of activity should be taken into account. Therefore, only systemically relevant institutions should be in scope of such requirement.

Moreover, resolution plans have to be seen as the logical sequence to recovery plans, on the assumption that those fail. Recovery and resolution plans are interconnected. Resolution plans only make sense for banks in case they are subject to resolution. Resolution plans should never be only prepared by the resolution authority as proposed by the Commission. Only the institution knows its structure and business model well enough to propose coherent and feasible resolution plans. The resolution plans should therefore be set up in coordination and coordination with the relevant credit institution. In so far, we also refer to our answers the relevant question 6 on page 12).

In the preventive phase, as the bank has not yet shown signs of financial stress, it is not acceptable that resolution authorities have the power to intervene in an intrusive way in the business model of the institution and the way it conducts its banking activity.

The preparation and review of resolution plans on an annual basis imply a very costly burden for banks. Maintenance should be performed on a proportionate basis.

Finally, resolution colleges should be established in terms similar to supervisory colleges.

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

The suggested concept for resolution plans could in fact be useful for the resolution authorities. However in any case the resolution plans should be established in coordination and cooperation with the relevant credit institution. Here also as mentioned above in question 21a the necessary degree of details remain unclear.

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

The one-off and ongoing costs depend on how detailed the plans should be and the amount of work they require

As mentioned before, in this phase of the discussion it is not possible to make any kind of cost estimation. Too many parameters are undefined. Any estimation would be 'a wild guess'.

- Preparatory and Preventive Powers (D3) (p. 33-35)

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

Many of the proposed new supervisory powers are or could be seen as similar to existing powers in CRD and should be primarily used as such. The proposed powers to intervene in a preparatory and preventative stage may be too far reaching for banks in a 'still going concern' situation. This concerns especially the suggested powers in point (d) (e) and (f).

It is for instance very intrusive to require banks to make changes to their legal and or operational structure as it interferes with their corporate governance, national company law requirements and other existing codes and laws specific to banks. In addition, the service level agreement requirement is not sufficiently clear. The service level agreement generally is a part of the agreement with the suppliers. When it is drawn up, the functions concerned must also be transferred to the supplier. We think this power is much too far reaching than the others listed on page 34 and 35. Therefore, the proposed powers might be used for resolution but should not be used as early intervention powers.

Moreover, banks should not merely be notified about the impediments via the list of measures the authorities are planning to take. Banks should be consulted already in the initial stage and also have the possibility to react, oppose to and request for reasoned opinions as regards the identified impediments in addition to the possibility to propose alternative measures.

We emphasize that if any measures should be taken these should be proportionate to the systemic importance of the bank and the likely impact of its failure on financial stability in the Member States. They should also be necessary and non-discriminatory following the principles set out on page 37. There should be a more clear way how the actions taken by the authorities are linked to the situation of the institution gets worse. The most far reaching tools should be used only in drastic situations.

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

No, we do not see the need to establish such express powers to require limitations on intra-group guarantees. It is also dangerous to create such powers as it could deteriorate the situation of the creditors.

We understand that the intra-group guarantee system may create obstacles and limit the ability to sell the guaranteed business. However, in the groups that meet the requirements in Article 3 CRD (Directive 2006/48/EC) the members of the group have such specific systems in place in order to safeguard the banking groups especially as a preventive measure. These kinds of limitations do not fit in the mutual guarantee schemes of the groups mentioned.

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

The service level agreement which is not sufficiently clear could pose a problem if a third party should take over critical parts of the business of cooperative banks.

- Group Treatment (D4) and General Principles (D5) (p. 37)

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

As mentioned certain powers suggested are rather intrusive and may in fact interrupt the normal functioning of the bank concerned and may even have repercussions for other banks and national banking systems. If a resolution authority has identified certain impediments and requires a bank to draw up a service level agreement in order for a third party to take over critical parts of the business, the bank that may have to take over certain parts of the business may be affected in a certain way and also get into difficulties.

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

No, we consider that if necessary the power to require such changes should be in the hands of the resolution authority responsible for the affected entity in coordination with the group level resolution authority and the central body of the bank concerned.

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

Yes, in principle these safeguards provided in the form of the principles can be sufficient if applied correctly. However, as mentioned there should also be a safeguard of transparency as regards the process for identification of the impediments by the resolution authorities.

Part III. Early Intervention

It should be mentioned that early intervention is also mentioned in the proposal for a Directive on Deposit Guarantee Schemes (recast) (DGS). It is necessary to ensure that the proposed measures on early intervention in this Crisis Management framework and the DGS are convergent.

- Early Intervention Powers (E1) (p. 39)

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

We have reservations as regards the trigger 'likely breach of CRD' suggested. The trigger described seems to be flexible enough, if not too flexible. The concept 'likely breach' is too vague and subject to different interpretation. There should be more concrete indicators/triggers when early intervention measures can be taken for example when manifest errors are made. Therefore, if there is a need to expand the application of CRD 136(1), the content and meaning of "likely" should be described more precisely.

Moreover, under the new capital requirements of Basel III banks are required to set up a capital buffer of 2.5%. It has to be clarified how this buffer and the underlying mechanism go together with the 'likely breach' trigger. Furthermore, for the use of the early intervention powers it should be ensured that in case of intervention, the intervention and benefits should be in a right balance with the costs.

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

The powers proposed are sufficient, if not too far reaching.

However, where the recovery plan incorporate the restricting of the asset side of bank's balance sheet the power may be required to sell bad or non performing loan portfolio's or to externalize it.

- Special Management (E2) (p. 40-42)

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

The appointment of a manager should only be a tool of last resort under certain circumstances e.g. when serious administrative irregularities or serious violations of laws, regulations or bylaws governing the bank's activity are found.

Indeed, it would be disproportionate and too intrusive to nominate a special manager who takes over the management when the bank is still going concern. Moreover a new member who is unfamiliar with the organisation may also contribute to aggravate the situation.

As a tool of early intervention, instead of appointing a special manager, it could be better and even more effective to enhance the supervision at this point in time and closely supervise the bank.

For this situation, we suggest to apply the principle of proportionality and necessity in a very strict manner.

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

In line with our response to question 25a, we prefer Option 2.

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

Yes, the principle of proportionality should be applied in this respect.

- **Implementing (Group) Recovery Plans (E3) (p. 43-44)**

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

Yes, the consolidating supervisor should take the necessary decisions for the whole group in coordination with the relevant supervisory authority of the failing subsidiary.

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

Yes, they should be bound by these decisions in order to ensure the effective functioning of the group. Nevertheless, there should be a possibility internally for the subsidiary and its supervisor to discuss the decision made by the central body and its supervisor and come to a more coordinated approach within the suggested timeframe.

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

Yes, it could be appropriate in case matters escalate, as a tool of last resort. The decision should be binding for the supervisors involved.

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

A short timeframe is appropriate. However, we consider that a timeframe o 24 hours is too short especially considering that it concerns a group recovery plan in which several supervisors will be involved. We consider a timeframe of maximum 48 hours more suitable.

- Assessment of Group Level Recovery Plans (E5) (p. 44-45)

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

Yes, the consolidating supervisor has the better overview.

Part 4: Resolution Tools and Powers

F: Resolution: Conditions, objectives and general principle

- Conditions for Resolution (F1) (p. 46-47)

As regards the Conditions for Resolution, we would like to point out

- Resolution authorities should call a resolution situation and exercise the resolution powers only at the point of non-viability of a bank (failing or likely to fail);

- the decision to consider an institution as non-viable should depend on a case by case assessment by the authorities of the facts that have given place to the problems, and simultaneously take into consideration a set of triggers or criteria available.

- It should be ensured that resolution is the “last resort” alternative;

- The options open for resolution as presented in the Commission’s diagram (page 10 of the Commission’s public consultation) should not be sequential. Instead, all the options should be available for the resolution authority to decide upon on a discretionary basis according to the characteristics of the bank;

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

We see that option 1c is the most relevant, but some members consider that it cannot function as a stand-alone indicator since it may only be caused by a liquidity problem, while the institution remains solvent. Other triggers should also be considered than the ones suggested in Option 1 as options a and b are not the right ones. Moreover, an insufficient level of Tier 1 instruments, as the only a trigger, does not seem to be well-justified. There are instruments in Tier 2 capital (e.g. cumulative preference shares), which from a legal point of view are treated as registered capital and not as a liability.

Furthermore, we consider that there should be a right combination and balance of quantitative and qualitative conditions. It is also not desirable that a single option can trigger conditions for resolution. There should be an interplay between the different options. In addition, a specific order in which the trigger conditions can occur is not realistic as either the bank itself can assess that they are failing or likely to fail for which quantitative evidence is at hand or the supervisors as such notice it for which quantitative data is needed to underpin the assumption. Therefore, we suggest that there should be at least a combination of option 1 and 2 in order to allow authorities to apply resolution tools or exercise resolution powers.

- **Resolution Objectives (F3) (p. 48-49)**

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

The objectives are very general. We acknowledge that the main aim is to maintain the financial stability but creating a right balance in order to avoid an environment that enhances moral hazard is of utmost importance. Maintaining the financial stability should also be the guiding principle for the resolution authority to decide which resolution tool and how a resolution tool is being used.

Moreover, we think that even at this point, the mandates of deposit guarantee schemes and resolution authorities should be clearly distinguished.

Furthermore, we consider that the protection of depositors should not be an objective for resolution authorities. Of course, no government can ignore the concern of millions of citizens which are savers. However, there are well-funded deposit guarantee schemes, which perfectly serve the interest of savers in concrete cases. Beyond these individual cases the protection of savers is best addressed by maintaining financial stability, preventing contagion, protecting public funds and ensuring the continuity of essential financial services. Moreover, the focus on savers might be too narrow as well. Many citizens will be concerned about their mortgage loans, their SME loans or their payment facilities.

We therefore suggest deleting this last objective or at least modifying it by simply referring to “citizens” instead of “insured depositors”.

- **General Principles governing Resolution (F4) (p. 49-50)**

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

They are mostly appropriate, but the extent to which the senior management will bear the responsibility is not clearly stated and should be clarified. We also agree that the resolution authorities should seek to minimize the overall costs of resolution.

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

This general principle should be included.

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

This might be useful, but there might be serious difficulties to perform such a valuation in times of stress. The risk of establishing a too low asset value is desirable to be minimised by specific legal clauses (e.g. choice and responsibility of the independent value or sharing the profit in case of re-selling the assets concerned.)

F. *Resolution tools, powers and mechanisms*

- Resolution Tools: General (G1) (p.51)

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

The tools seem to be comprehensive. There must (!) be a free choice for the authority in order to be able to apply what is assumed as being the most effective tool in the particular situation. It is not the affected bank that should have the possibility to influence the decision of the authority. If anyone, it should be the creditors of the affected bank. The resolution authority should also be free to use resolution tools individually or in combination with others.

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

Yes, resolution authorities should under certain circumstances be restricted to use these tools.

However, if national framework allow different tools should be able to be used as well. Moreover, while the most widely known resolution tools are mentioned, it is desirable that the framework does not exclude the emergence or inclusion of other tools, and the amendment of the tools mentioned should not be a lengthy process.

- The sale of business tools (G2) (p. 52)

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

The condition for using the sale of business tool is only 'the least cost' condition. We consider that certain other conditions should be provided in order to use this tool. The establishment of the 'fair value' in this regard seems especially important.

With regard to the marketing we consider that indeed the process should be open transparent, non-discriminatory, free from conflict of interest and without disadvantages for acquirer.

However, it should only be open and transparent only to the necessary extent. If this tool is used in a case a bank is likely to fail, it does not seem necessary to make such sale or the rights, assets and liabilities public as this could have negative effects on the business of the bank.

- Bridge bank tool (G3) (p. 52-54)

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

No, the express requirements for a residual bank should be assessed case by case and should most logically follow the national liquidation rules.

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

The bridge banks should be permitted to operate without fully complying with the capital requirements if it needs to be set up quickly and there is no time to wait for the completion of licensing and registration procedure.

However, the question is to what extent a bridge bank is supposed to fulfil the capital requirements and if there is a need to have for instance a capital buffer considering that it will need to be wound up after 2 years.

Moreover, if there are some exceptions allowed for a bridge bank then there must also be some restrictions as regards the activities of the bridge bank. This may not be desirable for a proper functioning of the bridge bank.

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

The idea of a bridge bank is to be a temporary tool. The time limit however has to be considered case by case, but there should also be a general time limit, which may be continued in special cases on special grounds. The general time limit of 2 + 3 years of maximum extension seems to be appropriate.

However, there might emerge specific circumstances (e.g. enduring stress period together with lengthy liquidation procedures), where even the extended period might be insufficient. In exceptional circumstances a longer operation period of the bridge bank could be permitted

- Asset separation tool (G4) (p. 54-55)

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

Yes, this should be prohibited.

- Resolution Powers (G5) 9p. 55-57)

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

The powers on section G5 appear to be comprehensive enough and far reaching, if not too far reaching. It is not appropriate that resolution authorities can exercise the suggested powers without complying with any procedural requirements. There should be at least some requirements in place to allow for some transparency and, checks and balances.

- Transfer powers: Ancillary provisions (G6) (p. 57-58)

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

Are any additional provisions necessary?

There seems to be a contradiction between (a) in the third paragraph under item G6 starting with "Second,..." (a) on page 57 and (a) and (b) in the fourth paragraph under item G6 starting with "Third,..." on page 58: According to (a) in the third paragraph under item G6 resolution authorities should be able to "*provide for the transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, assets or liabilities transferred*" and under (a) on page 58 continuity contracts may be entered into by the transferor, "*so that the recipient assumes the rights and liabilities of the transferor relating to any financial instrument, right, asset or liability that has been transferred and is substituted for the transferor*".

We do not see how these two provisions fit together: in our understanding a financial instrument is EITHER transferred free from any liability or encumbrance OR the recipient assumes the rights and liabilities of the transferor (including liabilities and encumbrances). Therefore, these two provisions may apply only alternatively but not cumulatively. We would like to ask for a clarification in this respect.

Otherwise, no additional provisions are necessary. The powers in section G5 appear to be sufficient.

- Transfer powers: continued support from transfer (G7) (p. 58)

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

No, we do not consider it appropriate for resolution authorities to also impose these requirements on other entities of the group if these are not affected.

- Transfer of property (G8) (p. 58-59)

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

Is any additional provision necessary?

This provision appears to be sufficient.

- Resolution Mechanisms (G9) (p. 60)

39a. Should all member States be required to make provision in national law for all three mechanisms by which resolution can be carried out that are suggested above?

If the same mechanisms are not available in all Member States, could this pose an obstacle to coordinated cross-border resolution?

Member States should be required to transpose all three mechanisms into national law. If the provisions are not the same, this could cause problems on a cross-border basis.

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

We prefer the receivership model to be a primary model.

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

In principle, it would be better to give only the tools and powers to resolution authorities, and the possible insolvency and other procedures would be described in the national corporate and company law.

- Procedural obligations of resolution authorities (G10) (p. 61-62)

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

Yes, these requirements are appropriate and sufficient to ensure that the affected parties are informed. However, it may not desirable to inform all other parties in this similar way.

- Compensation and valuation (G11) (p. 62-63)

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

Yes.

- Limited suspension of certain obligations (G12) (p. 64)

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

The suspension of delivery of obligations might cause problems, however the suspension may be needed in some cases.

We do not consider it appropriate to exclude eligible deposits within the meaning of the DGS from any such suspension. In a crisis the “run on deposits” should be prevented. The clients are protected by the deposit guarantee schemes. Therefore, there is no need for the clients to withdraw their monies. A massive withdrawal of all the eligible deposits will, however, weaken the bank even more. Eligible deposits should be allowed to follow their own rules according to the DGS and should be handled in this way.

- Temporary suspension of close out netting (G13) (p. 64-66)

43. Please give your views on the temporary suspension of close out netting rights suggested in section G13, including the appropriate length of the suspension. Should any classes of counterparty be excluded from the scope of such a suspension: for example, Central Banks, CCPs, payment and securities settlement systems that fall within the scope of the Settlement Finality Directive?

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

- Narrow and clear definition of the area of application: The right to suspend contractual termination clauses should only be triggered in connection with specific resolution measures (transfer of assets and liabilities to a bridge bank).

- Clear and short time frame: the effect of the suspension must be subject to a clearly defined and sufficiently short time frame (ideally not exceeding two days). To avoid any legal uncertainty, the exact beginning and end of the suspension period has to be defined as clearly as possible using objective criteria.

- No extension to other contractual rights: The rights of the counterparty to exercise other contractual rights (including termination rights based on non – performance of contractual obligations other than any rights solely arising because of the reorganisation measure triggering the suspension right) must remain unaffected by the suspension.

- International Coordination: The key aspects of a suspension right would need to be harmonised on an international as well as on a European Level (including an amendment of the Financial Collateral Directive and the Directive on the Reorganisation and Winding up of Credit Institutions) in order to avoid conflicts with existing international and European rules, competitive disadvantages and regulatory arbitrage.

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

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

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

- Scope of rights to challenge resolution (G14) (p. 66)

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

There must always be the possibility of appropriate legal protection. We agree that the judicial review should be limited to a review of the legality of the action and that remedies should be limited to financial compensation. The court should have the power to reverse actions in cases, gross negligence or intentional misbehaviour of authorities or when the transfer was made in breach of the resolution rules, to the extent that reversion is practically feasible. It should indeed be borne in mind that reversing assets and liabilities transfers would lead to an extremely complex situation, both financially and legally.

- Confidentiality (G15) (p. 67)

45. Would the provisions suggested in section G15 provide adequate protection for confidential information?

Yes, we agree with the suggested provisions.

H. Safeguards

- Partial transfers: safeguards for counterparties (H1) (p. 69)

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

Yes, we agree.

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

The member states should have the possibility to apply the rules that are appropriate for them. There is thus no need for further provisions.

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

No Comment

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

No Comment

- Appropriate protection for financial collateral, set-off and netting arrangements (H2) (p. 71-72)

47a. Please give your views on the safeguards for title transfer financial collateral arrangements and set-off and netting arrangements suggested in section H2.

It is imperative to prevent resolution authorities from cherry picking not only the transactions but also financial collateral entering into the scope of the transfer. We therefore agree with the proposed safeguards.

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

No, we don't agree. We see no justification for such exemptions. The purpose and expected benefits of such an exemption are unclear. There is, to our best knowledge, no legal or financial ground for such exclusion. In addition, complex disputes or litigation might arise regarding the concept, nature, definition or scope of the subordinated debt/ debtor. Furthermore, legal uncertainty may arise on which rights and liabilities are within the scope of the exemption.

- Appropriate protection for security arrangements (H3) (p. 72)

48. Please give your views on the safeguards for security arrangements suggested in section H3.

We believe that the proposal brings sufficient safeguards regarding the security arrangements.

- Appropriate protection for structured finance arrangements (H4) (p. 72-73)

49a. Please give your views on the safeguards for structured finance arrangements suggested in section H4.

We do not have specific objections regarding structured finance arrangement safeguards.

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

Yes, we agree.

- Partial transfers: Protection of trading, clearing and settlement systems (H5) (p. 73)

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

We would like to see an express reference to the Settlement Finality Directive, stating, that the rights set forth therein prevail over the actions taken by the resolution authority.

51. Is the provision suggested in section H6 sufficient to ensure that creditors would receive appropriate compensation? Is it necessary to specify the details of such compensation arrangements in an EU framework?

The provisions regarding appropriate compensation for creditors are sufficient. There is no need to specify the details on EU-level. However, it should also be provided for that where “bad” assets are transferred, the entity assuming these bad assets also has a compensation claim against the credit institution. A transfer should, thus, also not lead to a more favourable treatment of the creditors.

Part 5. Group Resolution

- Resolution Colleges (P5.1) (p. 75-78)

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

No, we do not agree. We think that all resolution authorities of the group's entities should have the right to be member of the college. We agree with the Commission that the resolution authorities of group's entities meeting the conditions for resolution **must** participate to the college.

It must be made sure that the national authority has sufficient influence.

- Group Resolution (P5.2) (.78-80)

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

It seems to be an appropriate balance, although the alignment with national law regarding competition law and company law has to be taken into account.

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

No, it must be possible to consider which toll should be applied case by case.

- Multilateral arrangements with third country (P5.3) (p. 80-81)

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

No.

- Firm specific arrangements (P5.4) (p. 81)

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

No Comment

- Assessment of third country resolution arrangements (P5.5) (p. 81-82)

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

No Comment

Financing Arrangements

- Requirements for each Member State to establish a bank resolution fund (P6.1) (p. 83-84)

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

If Resolution Funds are created (and the majority of the EACB members are not convinced they should be), its purpose should be limited to absorb residual losses and administrative costs born in the course of an orderly wind down.

In particular note has to be taken of the fact of the existence of DGS which will play a very important role with regard to the resolution of retail banks. The existence of DGS will lower the cost for the resolution of retail banks considerably.

Moreover, we are not of the opinion that all credit institution should contribute to the Resolution Funds. The aim of the funds is to cover the cost incurred in connection with the use of resolution tools and in accordance with the resolution objectives and the general principles governing resolution. Since the failure of very small credit institutions will not affect the financial stability, it is questionable why these very small institutions should contribute to a fund that finances the possible failure of much bigger institutions.

We are well aware of the difficulties to draw a line between systemically relevant institutions and others, but we believe that at least very small institutions should not be obliged to contribute to the fund. We propose an exemption level as a certain percentage of the total eligible liabilities of the relevant institution. Furthermore, there should a general exemption for those credit institutions that are member of a recognized Institutional Protection Scheme according to the (new) DGS Directive, because in case of “failure” it will not be the Resolution funds that need to bear the costs of reorganising this institute but rather the funds of the IPS.

- Financing of the Fund (P6.2) (p. 84)

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

No need to be more explicit

- Calculation of contributions to the Fund (P6.3) (p.84-

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

It should be left to the discretion of the Member States. Thus the member state can take into account specific circumstances of the relevant market. It does not seem appropriate to look for a European “one-fits-all” solution because banking industries within the European Union seem to be too different to find a common basis for the calculation of contributions that reflects the risks to financial stability of every single bank in any Member State.

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

A more risk adjusted basis is preferable.

- Relationship with DGS (P6.4) (p. 85)

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

Yes, this should be taken into account, especially in cases where banks have institutional protections schemes in place. In case there is a separation of funds at member state level, these funds must be kept separate and the management of the IPS-fund must be in hand of the IPS itself.

But as set out in our answer to question 59a we think that the basis for the calculation of contributions to the fund should be left to Member States legislation.

- Privileged creditor position (P.6.5) (p. 85)

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

Those creditors who provide a bank in financial stress with a liquidity support to restructure the bank should have a priority claim in a later insolvency proceeding of the bank. However, granting such privileged position should be an exception.

There is no need to expand the powers of the resolution authority. This could strongly effect the priorities in normal insolvency legislation.

Annex I: Debt write-down

General Remark

The members of the EACB are in favour of a limited approach to bail-in debt. If it all necessary, only elements out of lower/non Tier 1 and Tier 2 should eventually have this clause. In general, we are not in favour of establishing an overall legal right to demand conversion/write down for all eligible liabilities. It should not be applied to all other (senior) debt related to banking business. This is mainly because we see only a very small investor base, if any, for buying these kinds of instruments. There is thus the risk that the market for these instruments will not be sufficiently large to serve all banks. However, eventually, a separate category could be considered, that will be established with bail-in features and proper recognition for regulatory capital or stress purposes.

Moreover, there is an urgent need to take certain particularities for co-operative banks on board especially with regard to the conversion of subordinated debt into equity. While the mechanism is conflicting with the specific governance of co-operative banks (see our general remarks at the beginning of the document), excluding them from such mechanism would lead to severe discrimination.

Instead, co-operative banks should have the possibility to limit voting-rights of converted shares and be given a call option in order to exclude non-users/investors from holding capital when the situation allows and the bank has recovered and shares are at nominal value. Without such possibilities the debt equity conversion would be far more intrusive for cooperative banks than for any other bank.

1. **Comprehensive Approach (p. 86-88)**

62a. What classes of debt (if any) would need to be excluded from a statutory power to write down senior debt?

In fact, to ensure proper functioning of credit markets, exclusions might be necessary. We suggest excluding: swap, repo and derivatives counterparties and other trade creditors; short-term debt (defined by a specified maximum maturity); all retail and wholesale deposits and secured debt (including covered bonds) are covered by master netting agreements (even if uncollateralised).

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

62b. Is it desirable to undermine the principle that creditors of the same ranking should be treated similarly? Should a discretionary power allow authorities to discriminate within classes of debt?

It is not acceptable to treat creditors with same insolvency ranking differently if the objective is to be achieved. The compensation paid to the creditors will of course have to differ if the treatment differs. Creditors within same debt class should be treated equally among themselves. Creditors should know at all times how they will be treated.

62c. What are the consequences of the fact that this approach may result in the ranking of creditors in the context of resolution being different to that in normal insolvency? Is further provision needed to address this?

It is likely that we will see migration of to those debt instruments that are not covered by bail-in provisions. However, the overall cost of (capital + debt capital) should remain the same regardless of what funding instruments are used.

62d. What measures would be appropriate to reduce debt restructuring and regulatory arbitrage? For example, would it be necessary to require a minimum amount of debt remains in scope at all times?

If the market is functioning perfectly none is needed (please see above). In the real world, it is likely that some minimum ratios of bail-in debt need to be set.

2. Targeted Approach (p. 89)

63a. What factors should authorities take into account when determining the correct amount of 'bail-in debt' that should be issued acknowledging the need to ensure that institutions are 'resolvable' while avoiding single market distortions?

It is difficult to determine specific factors/criteria.

The targeted approach is an alternative to the comprehensive approach. The targeted approach makes it necessary to determine a fixed amount of "bail-in-able" debt in advance. The comprehensive approach has the advantage for the authority that they can decide at the time bail-in-capital is needed, but has the disadvantage, that creditors cannot be sure of the fate of their legal position until the authority has decided.

Nevertheless, if targeted approach is desired and targeted to SIFI institutions then additional bail-in debt can be replaced by increasing Tier 2 capital requirements for SIFIs. Creation of yet another tier of capital does not seem to fit into current models. More generally, the upcoming requirements of Basel III and CRD IV should be looked at together with these considerations.

63b. Would a market for large amounts of such debt exist at a cost which is lower than equity?

We doubt that there is a market for future non Tier 2 issuance.

If any, we see only a very small investor base for buying these kinds of instruments. Moreover, there is the risk that the market for these instruments will not be sufficiently large to serve all banks.

63c. As an alternative to a statutory requirement to issue certain instruments with specified terms, might institutions be permitted to insert a write down term in any debt instrument they deem appropriate to meet the fixed requirement for 'bail in' debt? Would there be any drawbacks to such an approach?

If we can determine the amount of debt that needs to be included in scope of bail-in, it should not make any difference what debt instrument is used as long as there is total transparency and disclosure.

3. Market Capacity for such instruments (p. 89-90)

64a. Would the trigger be sufficiently clear and predictable (i.e. will instruments be rateable and will markets be able to price them) if linked to the failure of an institution?

If the trigger is as vague as "close to the point of failure of the institution" it leaves a lot of room for speculation. Linking the trigger to ratings makes the measures meaningless since ratings are hardly leading indicators. If discretion of the resolution authorities is exercised, then different regimes will behave differently. The "point of failure" is subjective to a degree.

64b. Are market participants likely to have an appetite for such instruments? Why or why not? If you consider that the pool of likely investors would be small, are there any adjustments which could be made to make such instruments more attractive without undermining the objectives of the tool?

In time investment policies will change. If the price is right the instruments will find suitable investors. A derivative market will emerge to strip the bonds off the bail-in characteristics so that investors will get what they want.

64c. What are the most likely classes of investor: e.g. other banks or investment firms, insurers, pension funds, hedge fund and other high yield investors, retail? Should certain types of investor be restricted from holding such instruments?

No Comment

4. Compensation Mechanisms (p. 90-91)

65. Under what circumstances would additional compensation mechanisms be needed and what form might they take?

If creditors are left worse off than in insolvency as a result of the use of resolution tools, compensation should at least be a possibility, if not automatic. (E.g. if debt instrument holders are treated different from other liabilities ranking) Regulation should not exclude the use of warrants or other write up mechanisms.

Moreover, we refer to our General Comments prior to question 62a.

As pointed out that conversion would create serious problems for cooperative banks with regard to the governance (please see our general remarks on page 38 and the specific features on common equity of cooperatives on page 5/6). While a subordinated debt write up would lead to similar. On the other hand conversion will not lead to results that differ from a write up. Thus we suggest that due to the specific governance of cooperatives and mutuals a write up should remain possible.

5. Group Treatment (p. 91)

66. Should a regime of the kind discussed in this Annex allow flexibility in where within the group 'bail in debt' issue or held? What are the relative pros and cons of such an approach and what mechanisms would there be for ensuring all resolution authorities have viable resolution tools?

There are different kinds of legislation in Europe in this sense. These differences must be kept in mind. For instance in OP-Pohjola-Group the holding of the voting rights (not the equity) of Pohjola Bank is regulated by law (acting as central bank of amalgamation of co-operative banks). This means that the resolution at the Pohjola Bank level can not affect the voting rights of the Group even in case debt is converted to equity. A different "class" of equity would need to be created.

6. Ensuring creditor confidence and adequate liquidity (p. 91-92)

67. Is there a case for giving some creditors of a newly bailed in institution 'super senior' status? Should such a status be discretionary or a rule? What sorts of claim should be included and what mechanisms for transition back to a normal state should be considered?

To minimize the amount of public money that is needed in case of resolution a super senior status should be granted to senior debt issued after the resolution. Such a status should be temporary.

68. Is it necessary to design a 'bail-in' mechanism for non-joint stock companies? How might this be achieved without unduly benefitting the members at the expense of creditors?

There is an urgent need to take certain particularities for co-operative banks on board especially with regard to the conversion of subordinated debt into equity. While the mechanism is conflicting with the specific governance of co-operative banks (see our general remarks at the beginning of the document), excluding them from such mechanism would lead to severe discrimination.

Instead, co-operative banks should have the possibility to limit voting-rights of converted shares and be given a call option in order to exclude non-users/investors from holding capital when the situation allows and the bank has recovered and shares are at nominal value. Without such possibilities the debt equity conversion would be far more intrusive for cooperative banks than for any other bank.

Annex II: Derogations to Company Law Directives

- Use of Resolution powers (p. 93)

69. Are these provisions sufficient for the effective application of the resolution powers? Please specify the missing provisions, if any.

The suggested provisions would seem sufficient to establish a derogative legal framework to enable authorities to act quickly and efficiently.

The need for a derogative framework is particularly relevant in order to respect shareholders' and creditors' rights in cases of intra-group financial support in the form of assets transfers or the break-up of an institution in the framework of a resolution.

- Early Intervention (p. 93-94)

70. Do you agree on the need to create a mechanism for a rapid increase of capital? What would be your preferred option for the mechanism? Is there a need to specify that this mechanism can only be used close to the resolution triggers, i.e. not throughout the entire early intervention

The proposals seem to be sufficient. There is no need to ring-fence their use to resolution triggers.

We would support the second option envisaged i.e. that the general meeting would give the bank management a mandate ex-ante to take a decision on the capital increase in an emergency situation. This mandate should be renewable on a yearly basis. This provision should be part of the derogative framework that the future Directive should implement and should complement the protection measures of shareholders' and creditors' rights that the Commission has proposed in the present consultation.