EUROPEAN ASSOCIATION OF CO-OPERATIVE BANKS
The Co-operative Difference: Sustainability, Proximity, Governance

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EACB comments on the Commission's Targeted Consultation
Review of the Crisis Management and Deposit Insurance ("CMDI") framework

Commission's accompanying background information on the consultation

INTRODUCTION AND GENERAL CONTEXT

Background of this targeted consultation

In response to the global financial crisis, the EU took decisive action to create a safer financial sector for the EU single market. These initiatives triggered comprehensive changes to European financial legislation and to the financial supervisory architecture. The single rulebook for all financial actors in the EU was enhanced, comprising stronger prudential requirements for banks, improved protection for depositors and rules to manage failing banks. Moreover, the first two pillars of the banking union – the single supervisory mechanism (SSM) as well as the single resolution mechanism (SRM) – were created. The third pillar of the banking union, a common deposit insurance, is still missing. The discussions of the co-legislators on the Commission's proposal to establish a European deposit insurance scheme (EDIS), adopted on 24 November 2015, are still pending.

In this context, the EU **bank crisis management and deposit insurance framework** lays out the rules for handling bank failures while protecting depositors. It consists of three EU legislative texts acting together with relevant national legislation: the Bank Recovery and Resolution Directive (BRRD – Directive 2014/59/EU), the Single Resolution Mechanism Regulation (SRMR – Regulation (EU) 806/2014), and the Deposit Guarantee Schemes Directive, DGSD – Directive 2014/49/EU)[1]. For the purpose of this consultation, reference will be made also to insolvency proceedings applicable under national laws.[2] For clarity, the consultation only concerns insolvency proceedings **applying to banks**. Other insolvency proceedings, notably those applying to other types of companies, are not the subject of this consultation.

Experience with the application of the current crisis management and deposit insurance framework[3] until now seems to indicate that adjustments may be warranted. In particular:

One of the cornerstones of the current framework is the objective of shielding public money from the effects of bank failures. Nevertheless, this has only been partially achieved. This has to do with the fact that the current framework creates incentives for national authorities to deal with failing or

1 Provisions complementing the crisis management framework are also present in the Capital Requirements Regulation (CRR – Regulation (EU) 575/2013) and the Capital Requirements Directive (CRD – Directive 2013/36/EU). The winding up Directive (Directive 2001/24/EC) is also relevant to the framework.

2 It should be noted that insolvency laws are not harmonised in the EU and they may be very different from country to country, both in terms of type of procedure (judicial or administrative) and available measures.

3 European Commission (30 April 2019), Commission Report (2019) on the application and review of Directive 2014/59/EU (BRRD) and Regulation 806/2014 (SRMR).

likely to fail (FOLF) banks through solutions that do not necessarily ensure an optimal outcome in terms of consistency and minimisation in the use of public funds. These incentives are partly generated by the misalignment between the conditions for accessing the resolution fund and certain (less stringent) conditions for accessing other forms of financial support under existing EU State aid rules, as well as the availability of tools in certain national insolvency proceedings (NIP), which are in practice similar to those available in resolution. Moreover, a reported difficulty for some small and medium-sized banks to issue certain financial instruments, that are relevant for the purpose of meeting their minimum requirement for own funds and eligible liabilities (MREL), may contribute to this misalignment of incentives.

The procedures available in insolvency also differ widely across Member States, ranging from pure judicial procedures to administrative ones, which may entail tools and powers akin to those provided in BRRD/SRMR. These differences become relevant when solutions to manage failing banks are sought in insolvency, as they cannot ensure an overall consistent approach across Member States.

The predictability of the current framework is impacted by various elements, such as divergence in the application of the Public Interest Assessment (PIA)[4] by the Single Resolution Board (SRB) compared to National Resolution Authorities (NRA) outside the banking union. In addition, the existing differences among national insolvency frameworks (which have a bearing on the outcome of the PIA) and the fact that some of these national insolvency procedures are similar to those available in resolution, as well as the differences in the hierarchy of liabilities in insolvency across Member States, complicate the handling of banking crises in a cross-border context.

Additional complexity comes from the fact that similar sources of funding may qualify as State aid or not and that this depends on the circumstances of the case. As a result, it may not be straightforward to predict *ex ante* if certain financial support is going to trigger a FOLF determination or not.

The rules and decision-making processes for supervision and resolution, as well as the funding from the resolution fund, have been centralised in the banking union for a number of years, while deposit guarantee schemes are still national and depositors enjoy different levels and types of guarantees depending on their location. Similarly, differences in the functioning of national deposit guarantee schemes (DGSs) and their ability to handle adverse situations, as well as some practical difficulties (e.g., when a bank transfers its activities to another Member State and/or changes the affiliation to a DGS) are observed.

Discrepancies in depositor protection across Member States in terms of scope of protection, such as specific categories of depositors,[5] and payout processes result in inconsistencies in access to financial safety nets for EU depositors.[6]

The possible revision of the resolution framework as well as a possible further harmonisation of insolvency law are also foreseen in the respective review clauses of the three legislative texts.[7] By reviewing the framework, the Commission aims to increase its efficiency, proportionality and overall coherence to manage bank crises in the EU, as well as to enhance the level of depositor protection, including through the creation of a common depositor protection mechanism in the banking union.

4 As also explained in detail later, the PIA is carried out by a resolution authority to decide whether a failing bank should be managed under resolution or insolvency according to national law.

5 While the protection of standard banking deposits by DGSs has been harmonised, exceptions excluding certain deposits (for instance those of public authorities) or extending the protection above the EUR 100 000-threshold are defined on a national basis.

6 Study financed under the European Parliament Pilot Project 'Creating a true banking union' on the Options and national discretions under the Deposit Guarantee Scheme Directive and their treatment in the context of a European Deposit Insurance Scheme and EBA opinions of 8 August 2019, 30 October 2019, 23 January 2020 and 28 December 2020 issued under Article 19(6) DGSD in the context of the DGSD review.

7 It is relevant in this respect to notice the European Commission's Report (2019) on the application and review of Directive 2014/59/EU (BRRD) and Regulation 806/2014 (SRMR).

Crisis management and deposit insurance, including a common funding scheme for the banking union, are strongly interlinked and inter-dependent, and present the potential for synergies if developed jointly. Additionally, in the context of the crisis management and deposit insurance framework review, the State aid framework for banks will also be reviewed with a view to ensuring consistency between the two frameworks, adequate burdensharing of shareholders and creditors to protect taxpayers and preservation of financial stability.

Structure of this consultation and responding to this consultation

In line with the better regulation principles, the Commission is launching this targeted consultation to gather evidence in the form of relevant stakeholders' views and experience with the current crisis management and deposit insurance framework, as well as on its possible evolution in the forthcoming reviews. Please note that this consultation covers the reviews of the BRRD, SRMR and DGSD.

The targeted consultation is available in English only. It is split into two main sections: a section covering the general objectives and the review focus, and a section seeking specific more technical feedback on stakeholders' experience with the current framework and the need for changes in the future framework.

Part 1 – General objectives and review focus (Questions 1 to 6)
Part 2 – Experience with the framework and lessons learned for the future framework
A. **Resolution, liquidation and other available measures to handle banking crises** (Questions 7 to 28)
B. **Level of harmonisation of creditor hierarchy in the EU and impact on 'no creditor worse off' principle (NCWO)** (Questions 29 to 30)

C. **Depositor insurance** (Questions 31 to 39)

A general public consultation will be launched in parallel[8]. It covers only general questions on the bank crisis management and deposit insurance framework and will be available in 23 official EU languages. Some general questions are asked in both questionnaires. This is indicated whenever this is the case. Please note that replies to either questionnaire will be equally considered.

Views are welcome from all stakeholders.

You are invited to provide feedback on the questions raised in this online questionnaire. We invite you to add any documents and/or data that you would deem useful to accompany your replies at the end of this questionnaire, and **only through the questionnaire**.

Please explain your responses and, as far as possible, illustrate them with concrete examples and substantiate them numerically with supporting data and empirical evidence. Where appropriate, provide specific operational suggestions to questions raised. This will allow further analytical elaboration.

You are requested to read the privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with.

The consultation will be open for 12 weeks.

CONSULTATION

8 https://ec.europa.eu/info/publications/finance-consultations-2021-crisis-management-deposit-insurance-review_en

The crisis management and deposit insurance (CMDI) framework was introduced as a legislative response to the global financial crisis, to provide tools to address bank failures while preserving financial stability, protecting depositors and avoiding the risk of excessive use of public financial resources.

The CMDI was in particular designed with the aim of handling the failure of credit institutions of any size, as well as to protect depositors from any failure.

The CMDI framework also provides for a set of instruments that can be used before a bank is considered failing or likely to fail (FOLF). These allow a timely intervention to address a financial deterioration (early intervention measures) or to prevent a bank's failure (preventive measures by the DGS).

When a bank is considered FOLF and there is a public interest in resolving it,[9] the resolution authorities will intervene in the bank by using the specific powers granted by the BRRD[10] in absence of a private solution. In the banking union, the resolution of systemic banks is carried out by the Single Resolution Board (SRB). In the absence of a public interest for resolution, the bank failure should be handled through orderly winding-up proceedings available at national level.

The CMDI framework provides for a wide array of tools and powers in the hands of resolution authorities as well as rules on the funding of resolution actions. These include powers to sell the bank or parts of it, to transfer critical functions to a bridge institution and to transfer non-performing assets to an asset management vehicle. Moreover, it includes the power to bail-in creditors by reducing their claims or converting them into equity, to provide the bank with loss absorption or recapitalisation resources. When it comes to funding, the overarching principle is that the bank should first cover losses with private resources (through the reduction of shareholders' equity and the bail-in of creditors' claims) and that external public financial support can be provided only after certain requirements are met. Also, the primary sources of external financing of resolution actions (should the bank's private resources be insufficient) are provided by a resolution fund and the DGS, funded by the banking industry, rather than taxpayers' money. In the context of the banking union, these rules were further integrated by providing for the SRB as the single resolution authority and building a Single Resolution Fund (SRF) composed of contributions from credit institutions and certain investment firms in the participating Member States of the banking union.

Deposits[11] are protected up to EUR 100 000. This applies regardless of whether the bank is put into resolution or insolvency. In insolvency, the primary function of a DGS is to pay out depositors[12] within 7 days of a determination of unavailability of their deposits. In line with the DGSD, DGSs may also have functions other than the pay-out of depositors. As pay-out may not always be suitable in a crisis scenario due to the risk of disrupting overall depositor confidence[13], some Member States allow the DGS funds to be used to prevent the failure of a bank (DGS preventive measures) or finance a transfer of assets and liabilities to a buyer in insolvency to preserve the access to covered depositors (DGS alternative measures).[14] The DGSD provides a limit as regards the costs of such preventive and alternative measures. Moreover, DGSs can contribute financially to a bank's resolution, under certain circumstances.

[9] Resolution is considered in the public interest when normal insolvency proceedings would not sufficiently achieve the resolution objectives. See Article 32 BRRD.

[10] In the following, reference to the BRRD should be understood as including also corresponding provisions in the Single Resolution Mechanism Regulation (SRMR).

[11] If not excluded under Article 5 DGSD.

[12] Article 11(1) DGSD.

[13] The main challenges are related to (i) the short-term interruption of depositors' access to their deposits for pay-outs, (ii) the cost to the DGS and to the economy, and, (iii) the inherent risk of destruction of value in insolvency.

[14] Article 11(6) DGSD.

The functioning of the DGSs and the use of their funds cannot be seen in isolation from the broader debate on the European deposit insurance scheme (EDIS). A possible broader use of DGSs funds could represent a sort of a renationalisation of the crisis management and expose national taxpayers unless encompassed by a robust safety net (EDIS). A first phase of liquidity support could be seen as a transitional step towards a fully-fledged EDIS, in view of a steady-state banking union architecture as the final objective for completing the post-crisis regulatory landscape. In the consultation document the references to national DGSs, as concerns the banking union Member States, should be understood to also encompass EDIS, bearing in mind the design applicable in the point in time on the path towards the steady-state.

Finally, the CMDI framework also includes measures that could be used in exceptional circumstances of serious disturbance to the economy. In these circumstances, it allows external financial support for precautionary purposes (precautionary measures) to be granted.

The main policy objectives of the CMDI framework are to:

- limit potential risks for financial stability caused by the failure of a bank;
- minimise recourse to public financing / taxpayers' money;
- protect depositors;
- facilitate the handling of cross-border crises; and
- break the bank/sovereign loop and foster the level playing field among banks from different Member States, particularly in the banking union.

PART 1 – GENERAL OBJECTIVES AND REVIEW FOCUS[15]

Question 1

In your view, has the current CMDI framework achieved the following objectives? On a scale from 1 to 10 (1 being "achievement is very low" and 10 being "achievement is very high"), please rate each of the following objectives.

	1	2	3	4	5	6	7	8	9	10	Do not know / No opinion
The framework achieved the objective of limiting the risk for financial stability stemming from bank failures											X
The framework achieved the objective of minimising recourse to public financing and taxpayers' money											X
The framework achieved the objective of protecting depositors											X
The framework achieved the objective of breaking the bank/sovereign loop											X
The framework achieved the objective of fostering the level playing field among banks from different Member States											X
The framework ensured legal certainty and predictability											X
The framework achieved the objective of adequately addressing cross-border bank failures											X
The scope of application of the framework beyond banks (which includes some investment firms but not, for example, payment service providers and e-money providers) is appropriate	X										

If possible, please explain: [text box]

Most of our members believe that the objectives of the CM framework have broadly been achieved and that especially a higher degree of financial stability is ensured.

[15] Questions 1-6 of the general part of this targeted consultation correspond to questions 1-6 of the general public consultation.

Nevertheless, improvements are necessary. In this respect, our key messages are:

1. The determination of the scope of resolution framework only in order to differentiate between banks on the basis of their size may simplify the matter but is not fit for purpose. Also the business model, funding structure and risk profile are relevant criteria.
2. The future framework should not change for banks without systemic impact, in particular in respect of the member banks of an IPS.
3. All banks, and especially small and mid-size ones without a systemic impact (with a retail-oriented business model and a relatively low risk profile), should not be subject to disproportionate resolution preparation and resolution requirements, as enshrined in Article 1 para. 1 BRRD which requires both resolution and competent authorities to take proportionality into account. In general, the principle of proportionality should be emphasized and converged in the European Union.
4. The requirements for resolution planning and the removal of the obstacles to resolvability should be clearly limited to the preferred resolution strategy determined by the resolution authority.

Regarding legal certainty and predictability of the CMDI framework we see room for improvements regarding numerous aspects, especially regarding the transparency of resolution decisions taken, the transparency of the calibration of the MREL target, both interim and final, subordination requirement and the methodology used by resolution authorities to calibrate the market confidence charge.

Regarding the objective of depositor protection, the achievements of the framework and its infrastructure are appreciated. Nevertheless, there is room for improvements.

Regarding the objective of fostering a level playing field between banks and different Member States, although the framework has fostered an alignment at EU level, we have a negative assessment because we believe it is not proportionate for small banks.

The framework did not succeed in creating the general perception that that it achieved the objective of breaking the bank/sovereign loop. In the past years there were cases of public bail-out, which raised questions. While some of our members see an inconsistent application by the SRB as the major cause, some others blame the framework.

The Wirecard case has shown that also non-regulated financial service providers can seriously hamper financial stability. Moreover, the resolution framework is highly costly for banks. The EU should fill any loopholes for regulatory arbitrage and assess potential dangers to financial stability by the failure of investment firms, non-regulated factoring companies, payment service providers, e-money providers and new market players (Fintechs) would be included in resolution planning and MREL.

Furthermore, it should be discussed whether the focus on the financial stability should be expanded to the economy in general, meaning that all providers of “critical functions” which the public has an interest in not being wound-down because of the importance could be included in a form of crisis management. The recent crisis saw several cases e.g. in the aviation industry where governments had to bail-out or guarantee liabilities in favor of big airlines. Including critical function providers beyond financial institutions would ensure a cross-sectoral level playing field and help preserve public money. This would imply that for other parts of the economy other adequate frameworks are established.

Which additional objectives should the reform of the CMDI framework ensure? Do you consider that the BRRD resolution toolbox already caters for all types of banks, depending on their resolution strategy? In particular, are changes necessary to ensure that the measures available in the framework (including tools to manage the bank's crisis and external sources of funding) are used in a more proportionate manner, depending on the specificities of different banks, including the banks' different business models? [text box]

In order to increase proportionality in resolution planning, it should be clearly established that requirements related to resolution planning and removal of obstacles to resolvability be limited to what is strictly necessary to carry out the established resolution strategy of the bank after the measures set out in the recovery plan have been carried out.

In that vein we fully subscribe to the following considerations reported on page 23 of the consultation document, i.e. (i) "a proportionate approach to managing bank failures should ensure that entities can access funding sources without having to modify their business model" and (ii) "the existence of a variety of business models is an important element to ensure a diversified, dynamic and competitive banking market".

Consequently, we agree on the idea that changes are necessary to ensure that the measures available in the framework should be tailored on the specificities of different banks arising from their business models.

Resolution requirements apply already by now to all institutions, but simplified requirements can be applied in certain cases. Even where simplified requirements are applied, the power of the SRB / NRAs to take resolution measures is not affected, see Art. 11 (5) SRMR. The gradation expressed in the simplified requirements is also objectively justified and legally required in terms of the different risks faced by institutions and their systemic relevance as well as the resulting different resolution strategies. Some members see that, also in consideration of different national situations, the number of problematic cases that arose in the liquidation of small / medium-sized banks has not been in itself of a magnitude significant to justify a generalised expansion of the full resolution regime as a focus of the review or as a pressing matter. A general expansion of all resolution requirements cannot be an end in itself. The primary objective must be that that the existing framework is strictly and efficiently applied.

The situation of smaller institutions, especially of small and non-complex institutions as defined in Article 4(1) (145) CRR II should carefully be assessed regarding MREL requirements and other resolution elements . Imposing such instruments to banks, who do not have access capital markets, cannot be a practical solution. Forcing small banks to access capital markets would also trigger a number of additional regulatory consequences.

Such a careful approach is also enshrined in Article 45c para 2 subparagraph 2 BRRD II according to which if the resolution plan provides for winding up the entity under normal insolvency proceedings or other equivalent national procedures (negative PIA procedures), the resolution authority shall assess whether it is justified to limit the requirement referred to in Article 45(1) BRRD II for that entity, so that it does not exceed an amount sufficient to absorb losses. In addition, it must be borne in mind that the European legislator just recently decided to exempt entities whose resolution plan provides that the entity is to be wound up under normal insolvency proceedings from MREL supervisory reporting and public disclosure requirements

(Article 45i para 4 BRRD II).

We see furthermore a need for

- strengthening the crisis management regulations by a further risk reduction in bank balance sheets in individual countries;
- assessing the currently far too complex and therefore risk-generating resolution procedures (time-critical responsibilities of SRB, ECB, Commission, Council)
- clarifying the responsibility for the FOLF determination, which can certainly generate conflicts of interest for the supervisory authorities.

With regard to the MREL calibration in the context of the Pillar 2 Requirement (P2R) we advocate for a clarification as to whether the risks relevant for the determination of the P2R by the supervisory authority should be taken into account by the resolution authority when calibrating the Recapitalisation Amount.

Moreover, the role and tools available to sectoral DGSs/IPSs should be adequately addressed in the framework, given the important functions of additional monitoring of member banks, which historically has allowed the minimisation of risks, the possibility of early intervention in crisis management and, finally, the orderly exit from the market of less efficient intermediaries, avoiding the involvement of taxpayers and the destruction of franchise value.

With regard to IPS, we recommend to consider whether the special purpose funds gathered as an aid fund, necessary for carrying out IPS main objectives should be exempted from instruments of resolution procedure, as well as the IPS aid funds already granted in form of financial support to member banks in need, and exempted from the bankruptcy estate, in case of bankruptcy. It would be of crucial meaning to secure the IPS against the loss of its aid funds due to the aid provided to its participants in need.
It is worth to ponder under BRRD, changing the category of claims in bankruptcy proceedings, taking into account the role of the institutional protection schemes (IPS). It looks justified to place the IPS receivables in question in category 2.
Under the BRRD we suggest allowing for group resolution plans at the level of the IPS similarly as in other cooperative solidarity systems.

Last but not least, on the ground of DGS/EDIS consultation, we question the need to protect deposits by public bodies and local governments by this legal framework.

Question 2

Do you consider that the measures and procedures available in the current legislative framework have fulfilled the intended policy objectives[16] and contributed effectively to the management of banks' crises?

On a scale from 1 to 10 (1 being "have not fulfilled the intended policy objectives/have not contributed effectively to the management of banks' crises" and 10 being "have entirely fulfilled the intended policy objectives/have contributed effectively to the management of banks' crises"), please rate each of the following measures.

[16] The main policy objectives of the CDMI framework are to:

- limit potential risks for financial stability caused by the failure of a bank;
- reduce recourse to public financing / taxpayers' money;
- protect depositors; and
- break the bank/sovereign loop and foster the level playing field among banks from different Member States, particularly in the banking union.

	1	2	3	4	5	6	7	8	9	10	Do not know / No opinion
Early intervention measures [17]							x				
Precautionary measures [18]					x						
DGS preventive measures											x
Resolution [19]							x				
National insolvency proceedings, including DGS alternative measures where available[20]					x						

If possible, please explain your reply, and in particular elaborate on which elements of the framework could in your view be improved. [text box]

- **Early intervention measures**

Applying EIMs in current legal frames may be perceived by market participants as the signal of further deterioration of the situation of given institution (e.g. higher risk premia in inter-bank lending, loss of investor/depositor confidence, etc.). One can distinguish between three drivers of adverse market reactions: a) Labelling of EIM through link to BRRD and thus resolution: Some of the EIMs in Article 27(1) BRRD overlap with regular supervisory powers that NCAs/SSM have under Article 104(1) CRD/Article 16 SSMR, such as powers requiring changes in the organisational structure or business strategy of an institution2 . The overlap is also reflected in the preconditions: there is no material difference to apply supervisory powers or EIMs. The partial overlap might create a "labelling" effect of EIMs. If a certain measure can be applied either as supervisory measure or as EIM, the application as EIM might be considered as an escalation signalling a severe deterioration of an institution's situation or the necessity of a stronger supervisory response.

- **Precautionary measures**

We think that there is not enough evidence since the introduction of the CMDI to assess whether "Precautionary measures" have fulfilled the intended policy objectives in a European context. Based on past experience it is important these remain exceptional tools . More clarity is needed on the conditions to deploy these tools as the current drafting of Art. 32(4)(d) resorts to concepts which are not defined anywhere in the legislation. This has led to an uneven and

[17] BRRD Articles 27 and following

[18] BRRD Article 32(4)(d) (i) to (iii)

[19] We refer in this respect to the use of the tools available in resolution, i.e. bail-in, sale of business, bridge institution and asset management vehicle as well as the use made so far of the available sources of funding in resolution (resolution fund and DGS particularly).

[20] We refer here to the functioning of available insolvency proceedings at national level as well as the use of DGS resources for alternative measures in insolvency, where these are available in national law.

less stringent activation of this tool than initially envisioned by the co-legislators.

- **Resolution**

It should be noted that the resolution requirements apply already now to all institutions. However, simplified requirements would fit certain institutions. Even if simplified requirements are applied, the power of the SRB / NRAs to take resolution measures is not affected, see Art. 11 (5) SRMR. The gradation expressed in the simplified requirements is also objectively justified and legally required in terms of the different risks faced by institutions and their systemic relevance as well as the resulting different resolution strategies. A general expansion of all resolution requirements cannot be an end in itself. The primary requirement is that applicable regulations are strictly and effectively applied.

Certain resolution tools have been well thought out, but are quite problematic in their application, especially in the case of instruments issued before the entry into force of the framework. The bail-in tool can be very dangerous if applied to certain types of liabilities, especially if they were underwritten by retail customers before the entry into force of the BRRD.

- **National insolvency proceedings**

Should insolvency proceedings for banks show weaknesses in individual countries, this can hardly justify the damage to functioning insolvency proceedings in other countries through uniform requirements. Differences in consumer protection and rights to appeal of insolvency administrators can have an impact on DGSs and payments to DGSs in insolvency proceedings. The matter should be addressed with greatest care and reflect differences of bank insolvency procedures.

As for the cost assessment of crisis management, while keeping untouched the existing privilege of DGS in insolvency proceedings, the least cost test should be improved and standardized.

Question 3

Should the use of the tools and powers in the BRRD be exclusively made available in resolution or should similar tools and powers be also available for those banks for which it is considered that there is no public interest in resolution? In this respect, would you see merit in extending the use of resolution, to apply it to a larger population of banks than it currently has been applied to? Or, conversely, would you see merit in introducing harmonised tools outside of resolution (i.e. integrated in national insolvency proceedings or in addition to those) and using them when the public interest test is not met? If such a tool is introduced, should it be handled centrally at the European (banking union) level or by national authorities? Please explain and provide arguments for your view.
[text box]

A timely market exit of banks, which do not meet the public interest test should be ensured, when they fail and there is e.g. no reasonable prospect that any alternative private sector measures would prevent the failure of the institution within a reasonable timeframe. Therefore, it is key that banks can be liquidated timely and efficiently by authorities without the use of state aid. It would be adequate to handle such a procedure on a national basis and ensure that the relevant legislation is fit for purpose.

The existing resolution regime already affects all banks. Resolution plans must be drawn up by the resolution authority for all banks and decisions on MREL requirements must be made in this context. The different size / risk profile / systemic relevance of individual banks must be taken into account, which of course lead to different results in the assessment of the necessity of resolution measures and the resolution strategy and which, with the distinction between full and simplified requirements in resolution planning, is fully justified.

Carrying out a resolution is not an end in itself. Neither an expansion of the resolution rules nor the creation of a separate liquidation regime outside of the resolution rules is necessary. There are already sufficient possibilities within the existing regime for the application of the resolution regulations to all institutions for which the regulations are appropriate. There may be a need for an improvement of national liquidation rules.

We would like to remind the Commission that the resolution framework was initially envisioned as the default framework to deal with failing banks. It already provides harmonized and comprehensive tools such as the sale of business or asset separation tool which can be used to carve out a "good bank" and wind down a "bad bank". If the need arises, it also provides external funding to support a resolution with harmonized and clear conditions to access the SRF/National Resolution Fund.

Question 4

Do you see merit in revising the conditions to access different sources of funding in resolution and in insolvency (i.e. resolution funds and DGS)?[21] Would an alignment of those conditions be justified? If so, how should this be achieved and what would the impact of such a revision be on the incentives to use one procedure or the other? Please explain and provide arguments for your view.

- *Yes*
- No
- **<u>No opinion</u>**

Please elaborate [text box]

In our opinion, the DGSs funds are available for paying out depositors or financing a transfer of deposits to another bank in order to avoid an imminent payout in the first place, while the use of resolution funds should remain as it is. Some adjustments could be considered to eliminate the risk of regulatory arbitrage

Funds from the single resolution fund (SRF) and deposit protection fund pursue different goals, namely with deposit protection a consumer-oriented protection and with the use of the SRF a taxpayer oriented protection.

Should the conditions of access to these funds be revisited, it is important to keep the scope and the two modes of access separate. In resolution, tools other than bail-in should be preferred, and the latter should be adopted only if really needed, depending on the circumstances. As for DGSs' intervention, a more standardised formulation of least cost at

[21] In short, the resolution fund can be accessed only in resolution and only after a bail-in of at least 8% of the bank's total liabilities and own funds; the DGS can be accessed based on the least cost test in insolvency and under the conditions in Article 109 BRRD in resolution; under applicable State aid rules, liquidation aid can be granted under some competition conditions, which include a burden sharing of shareholders and subordinated creditors.

European level could be envisaged.

Question 5
Bearing in mind the underlying principle of protection of taxpayers, should the future framework maintain the measures currently available when the conditions for resolution and insolvency are not met (i.e. precautionary measures, early intervention measures and DGS preventive measures)? Should these measures be amended? If so, why and how?

- *Yes*
- *No*
- ***No opinion***

Please elaborate [text box]

- No comment

Question 6
Do you agree or disagree with the following statements regarding a potential reform of the use of DGS funds in the future framework?

	Agree	Disagree	Do not know / No opinion
The DGSs should only be allowed to pay out depositors, when deposits are unavailable, or contribute to resolution (i.e. DGS preventive or alternative measures should be eliminated[22]).		X	
The possibility for DGSs to use their funds to prevent the failure of a bank, within pre-established safeguards (i.e. DGS preventive measures), should be preserved.	X		
The possibility for a DGS to finance measures other than a payout, such as a sale of the bank or part of it to a buyer, in the context of insolvency proceedings (i.e. DGS alternative measures), if it is not more costly than payout, should be preserved.	**X**		
The conditions for preventive and alternative measures (particularly the least cost methodology)[23] should be harmonised across Member States.			**X**

If none of the statements above reflects your views or you have additional considerations, please provide further details here: [text box]

Regarding Alternative Measures:

We would like to point out that the options in Art 11 DGSD which allow member states to introduce alternative DGS measures should be preserved, but these measures should always be subject to the limitation that the costs incurred for resolution/insolvency by the DGS do not exceed the hypothetical amount of compensating covered deposits.

However, there should be an explicit ban to use public resources (for alternative measures) in the counterfactual liquidation scenario of the PIA.

The use of alternative measures through a DGS should not result in losses to DGS. If there are, these losses should be ring-fenced within the national banking sector concerned, i.e. not passed on to other national banking-sectors.

It is important that any deployment of DGS alternative measures in liquidation comes with strings attached. Echoing article 19 SRMR, we propose that the use of DGS alternative measures in liquidation must be subject to a positive decision from the Commission. Like for Fund aid (which is not State aid), the Commission must assess whether the use of the DGS would distort, or threaten to distort, competition so as to be incompatible with the internal market. This check by the Commission would lead to the imposition of burden-sharing requirements stemming from state-

[22] If the preventive or alternative measures were eliminated in a future framework, the DGS could use the voluntary schemes to finance such measures.
[23] The least cost methodology requires a comparison between the cost of an alternative intervention and the loss that the DGS would have to bear in case of payout.

aid rules. Without such mechanism, this would undermine the very principle that creditors and shareholders should be bailed-in, and also create considerable level-playing-field concerns.

PART 2 – EXPERIENCE WITH THE FRAMEWORK AND LESSONS LEARNED FOR THE FUTURE FRAMEWORK – DETAILED SECTION PER TOPIC

A. Resolution, liquidation and other available measures to handle banking crises

(i) Measures available before a bank's failure

Early intervention measures (EIMs)

EIMs allow supervisors to intervene and tackle the financial deterioration of a bank before it is declared failing or likely to fail (FOLF).[24] These measures can be important to ensure a timely intervention to address issues with the bank, with a view to, where possible, preventing its failure or to at least limiting the impact of the bank's distress on the rest of the financial sector and the economy.

Experience shows, however, that early intervention measures have hardly been used so far. Reasons for such limited use include the overlap between some early intervention measures and the supervisory actions available to supervisors as part of their prudential powers[25], the lack of a directly applicable legal basis at banking union level to activate early intervention measures[26], the conditions for their application and interactions with other Union legislation (Market Abuse Regulation). It might be necessary to assess whether the use of EIMs could be facilitated, while remaining consistent with the need for a proportionate approach.

Question 7

	Yes	No	Do not know / No opinion
Can the conditions for EIMs or other features of the existing framework, including interactions with other Union legislation, be improved to facilitate their use?			X
Should the overlap between EIMs and supervisory measures be removed?			X
Do you see merit in providing clearer triggers to activate EIMs or at least distinct requirements from the general principles that apply to supervisory measures?	x		X
Is there a need to improve the coordination between supervisors and resolution authorities in the context of EIMs (in particular in the banking union)?	X		

Please elaborate on what in your view the main potential improvements would be: [text box]

[24] Article 32 BRRD lays down when a bank can be declared FOLF.

[25] The European Banking Authority (26 June 2020), Discussion Paper on the Application of early intervention measures in the European Union according to Articles 27-29 of the BRRD (EBA/DP/2020/02).

[26] EIMs provisions are only contained in BRRD and not in the SRMR. Since BRRD needs transposition, and certain aspects of it may vary from Member State to Member State, there may be differences as to how these powers can be activated. This may impact their use, particularly in a cross-border context.

No comment

Precautionary measures

Precautionary measures allow the provision of external financial support from public resources to a solvent bank, as a measure to counteract potential impacts of a serious disturbance in the economy of a Member State and to preserve financial stability.[27] The available measures comprise capital injections (precautionary recapitalisation) as well as liquidity support.

The provision of such support (which constitutes State aid) is an exception to the general principle that the provision of extraordinary public financial support to a bank to maintain its viability, solvency or liquidity should lead to the determination that the bank is FOLF. For this reason, specific requirements must be met in order to allow such measures under the BRRD as well as under the 2013 Banking Communication.[28]

Past cases show that this tool is a useful element of the crisis management framework, provided that the conditions for its application are met. Past work has also highlighted the possible use of precautionary recapitalisation as a means to provide relief measures through the transfer of impaired assets[29], and similar considerations have been extended to asset protection schemes[30].

Question 8

Should the legislative provisions on precautionary measures be amended? What would be, in your view, the main potential amendments?

- ***Yes***
- *No*
- *No opinion*
- *Please specify your reply [text box]*

We see no need to amend the principles of extraordinary public support as laid down in the current BRRD. In fact, extraordinary public financial support should be maintained in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability as it is currently laid down in Article 32(4)(d)(i)-(iii) BRRD.

However, precautionary measures as set out in Art. 32(4)(d) BRRD are exceptional tools to deal with distressed banks and should remain exceptional. Based on past experience, more clarity is needed on the conditions to deploy these tools as the current drafting of Art. 32(4)(d) resorts to concepts which are not defined anywhere in the legislation. This has led to an uneven and less stringent activation of this tool than initially envisioned by the co-legislators.

In particular, the article does not express what “solvent”, “precautionary” or “temporary” mean.
- Regarding “solvent”, the ECB considered MPS to be solvent with a backward-looking perspective focused on the compliance with CET1 Pillar 1 requirement at the moment of the state aid request, which is quite lenient. Instead, the solvency must in our view be assessed

[27] These measures are provided in Article 32(4)(d) BRRD.
[28] In particular, BRRD and SRMR require that the measure is limited to solvent banks and it does not cover incurred and likely losses. Also, the amount is limited to the shortfall identified in an asset quality review, stress test or equivalent exercise.
[29] The necessary conditions to allow the use of precautionary recapitalisation to support an impaired asset relief measure are outlined in detail in the Commission Asset Management Companies blueprint, page 36, see European Commission staff working document (March 2018), AMC Blueprint.
[30] European Commission (16 December 2020), Communication from the Commission to the European Parliament, the Council and the European Central Bank: Tackling non-performing loans in the aftermath of the COVID-19 pandemic (COM(2020) 822 final, p. 16).

with a forward-looking perspective with the latest capital plan (this should become the rule for all competent authorities in the EU in the case of precautionary measures).
- Precautionary liquidity support should be deemed "precautionary" only if it tackles a hypothetical liquidity shortfall under a stress test scenario. Such approach would echo what is required for a precautionary recapitalisation.
- For liquidity support, "temporary" should mean that the aid is only available for a limited period of time after the commission's approval. For capital support, "temporary" should mean that the bank buys out the government after a defined period of time.

Article 32(4)(d) also provides that the precautionary recapitalization is possible only if a stress test or an asset quality review is carried out where both should be necessary to clearly distinguish incurred, likely and unlikely losses, the latter being the ones that can be covered with the precautionary recapitalization.

DGS preventive measures (Article 11(3) DGSD)

DGSs can intervene to prevent the failure of a bank. This feature of DGSs is currently an option under the DGS Directive and has not been implemented in all Member States.

Such a use of DGS resources can be an important feature to allow a swift intervention to address the deteriorating financial conditions of a bank and potentially avoid the wider impact of the bank's failure on the financial market. The DGSs' intervention is currently limited to the cost of fulfilling its statutory or contractual mandate.[31]

Recent experience with this type of DGS measures gave rise to questions about the assessment of the cost of the DGS intervention, and about the interaction between Article 11(3) DGSD and Article 32 BRRD, with respect to triggering a failing or likely to fail assessment.

Question 9

In view of past experience with these types of measures, should the conditions for the application of DGS preventive measures be clarified in the future framework? What are, in your view, the main potential clarifications?

- Yes
- **No**
- No opinion
- Please specify your reply [text box]

(ii) Measures available to manage the failure of banks

The BRRD provides for a comprehensive and flexible set of tools, ranging from the power to sell the bank's business entirely or partially, to the transfer of critical functions to a bridge institution or the transfer of non-performing assets to an asset management vehicle (AMV) and the bail-in of liabilities to absorb the losses and recapitalise the bank. The framework also provides for different sources of funding for such tools, including external funding, mainly through the resolution fund and the DGSs.

Outside resolution, the extent of the available measures to manage a bank's failure depends on the characteristics of the applicable national insolvency law. These

[31] In particular, the DGS can act in a preventive capacity only if the cost of that intervention does not exceed the cost of fulfilling its statutory or contractual mandate.

procedures are not harmonised and can vary substantially, from judicial proceedings very similar to those available for non-bank businesses (which entail generally the piecemeal sale of the bank's assets to maximise the asset value for creditors), to administrative proceedings which allow actions similar to those available in resolution (e.g. sale of the bank's business to ensure that its activity continues). These tools can be funded through DGS alternative measures, which allow the DGS to provide financial support in case of the sale of the bank's business or parts of it to an acquirer. Moreover, financial support from the public budget can be used to finance such measures in insolvency, provided that the relevant requirements under the applicable State aid rules (Banking Communication), including burden sharing, are complied with.

As already indicated in the Commission Report (2019), practical experience in the application of the framework showed that, in the banking union[32], resolution has been used only in a very limited number of cases and that solutions outside the resolution framework, including national insolvency proceedings supported with liquidation aid, remain available (and subject to less-strict requirements).

This raises a series of important questions with respect to the current legislative framework and its ability to cater for effective and proportionate solutions to manage the failure of any bank. In order to address these questions, it is appropriate to look at the following elements of the framework:

- The decision-making process regarding FOLF;
- The application of the public interest assessment by the resolution authorities, i.e. the assessment which is used to decide whether a bank should be managed under resolution or national insolvency proceedings;
- The tools available in the framework, particularly to assess whether those available in resolution are sufficient and appropriate to manage the failure of potentially any bank or whether there is merit in considering additional tools;
- The sources of funding available in the framework, in particular to determine whether they can be used effectively and quickly and whether they can be accessed under proportionate requirements.

In the context of this assessment, it seems also appropriate to keep in mind the strong links between the CMDI and the State aid rules and to explore their interaction, where relevant.

Scope of banks and PIA, strategy: resolution vs liquidation and applicability per types of banks

Resolution authorities can only apply resolution action to a failing institution when they consider that such action is necessary in the public interest. According to Article 32(5) BRRD, the public interest criterion is met when resolution action is necessary for the achievement of one or more of the resolution objectives and the winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent. The resolution objectives[33] are considered to be of equal importance and must be balanced as appropriate to the nature and circumstances of each case.

Additionally, the BRRD[34] provides that, due to the potentially systemic nature of all institutions, it is crucial that authorities have the possibility to resolve any institution, in order to maintain financial stability.

[32] Outside the banking union, resolution seems to have been the preferred way for dealing with failing banks.

[33] Continuity of critical functions, avoidance of significant adverse effect on the financial system, protection of public funds, protection of covered deposits and investors covered by investor compensation schemes, protection of client funds and client assets – see Article 31 BRRD.

[34] See recital 29 BRRD.

However, as described above, experience in the banking union, has shown that, once a bank has been declared as failing or likely to fail, resolution was applied in a minority of cases. Outside the banking union, resolution has been used more extensively.

Question 10

What are your views on the public interest assessment?

	Agree	Disagree	Do not know / No opinion
The current wording of Article 32(5) BRRD is appropriate and allows the application of resolution to a wide range of institutions, regardless of size or business model		X	
The relevant legal provisions result in a consistent application of the public interest assessment across the EU		X	
The relevant legal provisions allow for a positive public interest assessment on the basis of a sufficiently broad range of potential impacts of the failure of an institution (e.g. regional impact)	X		
The relevant legal provisions allow for an assessment that sufficiently takes into account the possible systemic nature of a crisis	X		

Please explain [text box]

Banks which can be liquidated with a standard liquidation process without any external support and without any impact on financial stability should not fall under a resolution regime. Certainly, BRRD Art 32 (5) sets out the criteria for the Public Interest Assessment in a fairly generalist way. We believe that the current wording leaves room for interpretation and therefore creates uncertainty.

In fact, there has been an inconsistent application of the PIA across the EU and bv the SRB. This can generate significant competitive distortions.

Finally, the EU crisis management framework would benefit from greater ex-ante clarity about which banks will enter resolution, and for which a FOLF situation will lead to liquidation under national procedures. In this respect, more harmonized and clear criteria as to what banks are considered as systematically relevant are in this respect welcome.

FOLF triggers, Article 32b BRRD, triggers for resolution and insolvency (withdrawal of authorisation, alignment of triggers for resolution and insolvency)

When an institution is FOLF and there are no alternative measures that would prevent that failure in a timely manner, resolution authorities are required to compare resolution action with the winding up of the institution under normal insolvency proceedings (NIP), under the PIA. The same elements of comparison (resolution and NIP) are used when assessing compliance with the 'no creditor worse off' principle (NCWO), which ensures that creditors in resolution are not treated worse than they would have been in insolvency.[35]

If resolution action is not necessary in the public interest, Article 32b BRRD requires Member States to ensure that the institution is wound up in an orderly manner in accordance with the applicable national law. This provision was introduced with the aim of ensuring that standstill situations, where a failing bank cannot be resolved, but at the same time a national insolvency proceeding or another proceeding which would allow the exit of the bank from the banking market cannot be started, could no longer occur. However, it is still unclear whether the implementation of this Article in the national legal framework would address any residual risk of standstill situations, in particular in those cases where the bank has been declared FOLF for "likely" situations (for example "likely infringement of prudential requirements" or "likely illiquidity") and a national insolvency proceeding cannot be started as the relevant conditions are not met. Moreover, due to the variety of proceedings at national level included in the concept of "normal insolvency proceedings", different proceedings may apply when a bank is not put in resolution. Additionally, due to the different ways Article 18 Capital Requirements Directive has been transposed by Member States, the withdrawal of the authorisation of a failing institution is not always justified or possible. Moreover, it is important to assess whether the FOLF determination was taken sufficiently early in the process in past cases.

Question 11

Do you consider that the existing legal provisions should be further amended to ensure better alignment between the conditions required to declare a bank FOLF and the triggers to initiate insolvency proceedings? How can further alignment be pursued while preserving the necessary features of the insolvency proceedings available at national level?

- **Yes**
- No
- No opinion

Please explain [text box]

With a view to a stronger interlinking of triggers for FOLF and liquidation under national proceedings, we believe that in principle the implementation of the new provision in Art. 32b BRRD and its suitability in practice should be awaited before a change of the rule and its principles is sought.-Modifications should rather focus on certain "fixes"

[35] Under points (47) and (54) of Article 2(1) BRRD, respectively, normal insolvency proceedings are defined as 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable to institutions under national law and either specific to those institutions or generally applicable to any natural or legal person', and winding up is defined as 'the realisation of assets of an institution'.

Question 12

Do you think that the definition of winding-up should be further clarified in order to ensure that banks that have been declared FOLF and were not subject to resolution exit the banking market in a reasonable timeframe?

- ***Yes***
- *No*
- *No opinion*

Please explain [text box]

Yes, this should be clarified.

For example, article 32b BRRD provides that when a bank is declared FOLF and there is no public interest in placing it in resolution, the bank should be "wound up in an orderly manner in accordance with the applicable national law". Winding-up should be defined as being liquidated under normal insolvency proceedings (NIP) or in accordance with the national law, where it requires a bank to be liquidated before insolvency unless national law envisages a role for the DGS to intervene.

The term used consistently throughout the BRRD is "normal insolvency proceeding" (NIP). The definition of NIP should be crafted in a sufficiently encompassing way, in order to include all procedures, which entail a mandatory winding up of the bank, but also voluntary/private liquidation. Consequently, Article 32b should be amended to require that the national insolvency procedures (in the new encompassing definition) apply in case of lack of public interest.

Question 13

Do you agree that the supervisor should be given the power to withdraw the license in all FOLF cases? Please explain whether this can improve the possibility of a bank effectively exiting the market within a short time frame, and whether further certainty is needed on the discretionary power of the competent authority to withdraw the authorisation of an institution in those conditions.

- *Yes*
- ***No***
- *No opinion*

Please explain [text box]

In principle, the default solution for negative PIA-banks should be to withdraw the license and liquidate the bank. The license should cease, it is evident that the bank is not able, within a reasonable timeframe, to restore the conditions for its authorization and the license is no longer needed for the liquidation of the bank.

However, flexibility is necessary to reflect the circumstances of the individual cases, for example to allow the intermediary to exit the market through the sale of business, within a reasonable timeframe, before the actual insolvency proceedings begins. In our view, it is not possible to find a general rule since it always depends on the relevant case. If critical ‘depositor’ or ‘payment’ functions have to be preserved there will be a need to continue the banking licence. If no critical functions are preserved a withdrawal of the license can improve the possibility of a bank

effectively exiting the market, which should be the key objective for the failing bank falling outside the resolution regime. There is a merit in considering a clarification of the articulation between Article 32(4) BRRD and Article 18 CRD, specifying that the supervisor may withdraw the bank's license when the institution is declared FOLF and there is no public interest in resolution. It appears, in any case, appropriate to avoid excessively prescriptive rules, which would require automaticity, such as an obligation to withdraw the license in FOLF cases with negative PIA. This is why, better articulation between the supervisory and resolution objectives and a high level of collaboration of the respective authorities is needed. Depending on the insolvency regime in force in each Member State, it may or may not be appropriate to withdraw the license in order to use resolution-like tools in a simplified winding up procedure.

So we would advise against a strictly automatic license withdrawal as a mandatory consequence of a FOLF decision. Also when private measures, especially by another group entity or an IPS are still possible (Art 113(6) and (7) CRR. Otherwise, Article 32 (1) (b) BRRD would be undermined, which is mandatory due to the intensity of the interference with legal interests. Private measures (including those of institutional protection schemes) must continue to be given the opportunity to avert FOLF in a timely manner. In addition, a number of bank activities do not cease to exist immediately but are properly processed over a period of time.

Question 14

Do you consider that, based on past cases of application, FOLF has been triggered on time, too early or too late?

- *On time*
- *Too early*
- *Too late*
- ***No opinion***

Please elaborate on your reply [text box]

The main goal should always remain the recovery of an institution and the withdrawal of the license should not be carried out automatically. If the stress test does not stem from a liquidity issue, sufficient time must be given for a proper analysis of recovery measures and recovery prospects. Still, we believe that there is currently not enough evidence since the introduction of the CMDI as it is too recent, and few resolutions were initiated.

Notice should be taken of the possibility of conflicts of interest within the supervisory authorities mandated with the FOLF decision. Especially when the institutions considered for FOLF decisions were ultimately supervised by the same supervisory authority, the FOLF decision could make their own supervisory activities questionable. Against this background, consideration should be given to transferring the decision-making authority to third parties, e.g. the resolution authorities.

Question 15

Do you consider that the current provisions ensure that the competent authorities can trigger FOLF sufficiently early in the process and have sufficient incentives to do so? If not, what possible amendments/additions can be provided in the legislation to improve this? Please elaborate in the text box below.

The correct incentives for responsible authorities to trigger FOLF are in place:

- ***Yes***
- *No*
- *No opinion*

Please elaborate on your reply [text box]

The answer is positive, referring to the situation in some countries, where the special banking insolvency law provide for effective and smart liquidation tools.

The circumstances of Article 32(4)(a)-(d) BRRD under which an institution shall be deemed as failing or likely to fail seem sufficient. Based on the mandate of Article 32(6) BRRD the EBA also published Guidelines on the interpretation of the different circumstances under which an institution shall be considered as failing or likely to fail. Hence, adequate guidance is already provided.

Adequacy of available tools in resolution and insolvency

As mentioned above, a comprehensive set of tools is available in resolution (sale of business, bridge institution, asset management vehicle, bail-in). In particular, the resolution authority can transfer part of the assets and/or liabilities of a bank to a third party (or a bridge institution). Under some national laws, such a possibility also exists in insolvency.

Question 16

Do you consider the set of tools available in resolution and insolvency (in your Member State) sufficient to cater for the potential failure of all banks?

- ***Yes***
- *No*
- *No opinion*

Please elaborate on your reply [text box]

Our members take the view that the tools available are largely sufficient, especially in the resolution framework which provides the Art. 4 BRRD tools in all EU Member States.

Some members underline the importance of the possibility of preventative (11.3) and alternative (11.6) measures.

Furthermore, the wording of the legislative text should be modified to make explicit that the resolution powers include powers to merge a bank with another bank.

Question 17

What further measures could be taken regarding the availability, effectiveness and fitness of tools in the framework?

	Agree	Disagree	Do not know / No opinion
No additional tools are needed but the existing tools in the resolution framework should be improved		X	
Additional tools should be introduced in the EU resolution framework	X		
Additional harmonised tools should be introduced in the insolvency frameworks of all Member States	X		
Additional tools should be introduced in both resolution and insolvency frameworks of all Member States			X

Please specify what type of tool you would envisage and describe briefly its characteristics. [text box]

Some members think that is necessary to extend the tools provided by the resolution framework (or at least some of them, such as the sale of assets, bridge institutions etc.) to national insolvency proceedings and other mandatory liquidation in a harmonized manner.

Moreover, when not arranged for in national law, insolvency and other liquidation administrators should be enabled to make preferred payments to DGSs in advance if the DGSs pro-rata portion in bankruptcy has been assessed. Such assessment would require full harmonisation of the super preference of DGSs' claims in insolvency proceedings. Such super preference in combination with the right of an insolvency or liquidation administrator to make preferred payments would significantly reduce any liquidity needs of DGSs.

Also, the liquidators of a failed credit institution should be allowed to use existing liquidity and unencumbered assets of the failed credit institution to reimburse depositors. This would again mitigate liquidity needs of DGSs (assuming super preferred DGS claims). Strengthening the position and role of DGSs in national laws should be a priority for a resilient and improved crisis management.

Currently, the resolution planning process always considers bail-in as a variant resolution strategy. It should be possible to consider a transfer tool in the resolution plan as feasible and credible without the need to require a bail-in tool as a variant strategy.

Question 18

Would you see merit in introducing an orderly liquidation tool, i.e. the power to sell the business of a bank or parts of it, possibly with funding from the DGS under Article 11(6) DGSD, also in cases where there is no public interest in putting the bank in resolution?

- Yes
- ***No***
- *No opinion*

Please explain [text box]

We would like to remind the Commission that the resolution framework was initially envisioned as the default framework to deal with failing banks. It already provides harmonized and comprehensive tools such as the sale of business or asset separation tool which can be used to carve out a “good bank” and wind down a “bad bank”. If the need arises, it also provides external funding to support a resolution with harmonized and clear conditions to access the SRF/National Resolution Fund.

We therefore believe that the instrument ‘sale of business tool’ pursuant to Article 38 BRRD is sufficient. For us it seems to be sufficient that according to Art 11 (6) DGSD the means of the DGS funds may also be used to finance measures to preserve the access of depositors to covered deposits, including transfer of assets and liabilities and deposit book transfer. The introduction of such a liquidation tool in national insolvency laws would give rise to questions with regard to constitutional law and would have to fit with national insolvency laws.

If the reply to the above is Yes:

Question 18.1

How would you see the implementation of such a tool?

	Agree	Disagree	Do not know / No opinion
There would be benefits in introducing such a tool in all the insolvency laws of EU Member States		**X**	
There are legal challenges for the introduction of such a tool in insolvency			**X**
Such a liquidation tool (and its dedicated source of financing) could be introduced in the resolution framework and be at the disposal of the resolution authority, while still applying to non-public interest banks		X	
Such a liquidation tool should be managed centrally (i.e. at supra-national level) in the banking union and at Member State level in the rest of the EU		**X**	

Please explain your answers further [text box]

When talking about a liquidation tool devoted to banks which do not met the public interest test, we are referring to nationally supervised banks, which consequently should be resolved at national level, using national funds.

Question 18.2

In what way, if any, should that tool be different from the sale of business in resolution? Do you consider that there is a risk of duplication with the sale of business tool in resolution (and that there would be incentives for DGSs to use such a tool and their funds as opposed to resolution authorities)?

If so, please explain how such a risk could be addressed [text box]

We believe that there is a risk of duplication and this should be avoided by drawing a line between the banks under the SRB (those supervised by ECB) and those supervised at national level (hence under national resolution authorities), envisaging in the latter case a possible use of DGS's funds at national level.

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Resolution strategy

As part of resolution planning, resolution authorities are defining the preferred and variant resolution strategy and preparing the application of the relevant tools to ensure its

execution. For large and complex institutions, open-bank bail-in is, in general, expected to be the preferred resolution tool. This comes hand in hand with the need for those institutions to hold sufficient loss absorbing and recapitalisation capacity (MREL).

However, depending on the circumstances, it may be useful to consider the case of smaller and medium-sized institutions with predominantly equity and deposit-based funding, which may have a positive public interest to be resolved, but whose business model may not sustain an MREL calibration necessary to fully recapitalise the bank. For such cases, other resolution strategies are available in the framework such as the sale of business or bridge bank which, depending on the circumstances, may allow lower MREL targets and may be financed from sources of financing other than the resolution fund (for example, DGS).

The potential benefits of these tools depend on the characteristics of the banks and their financial situation and on how the specific sale of business transaction is structured. However, depending on the valuation of assets as assessed by the buyer, and the perimeter of a transfer, there may still be a need to access the resolution fund (complying with the access conditions) in order to complete the transfer transaction.

Question 19

Do the current legislative provisions provide an adequate framework and an adequate source of financing for resolution authorities to effectively implement a transfer strategy (i.e. sale of business or bridge bank) in resolution to small/medium sized banks with predominantly deposit-based funding that have a positive public interest assessment (PIA) implying that they should undergo resolution?

- ***Yes***
- *No*
- *No opinion*

Please explain [text box]

Some of our members believe that resolution for small/medium sized banks currently work at their national level.

Taking into account our statement under question 18.2, transfer strategies as preferred resolution strategies should not be limited to other than large and complex institutions. There is no justified reason for limiting the possible tools to a predefined bank. The choice of the appropriate tool is subject to the assessment performed by the resolution authority and should be well adjusted to every single institution. As practice has already shown a transfer tool can be even more suitable for large banks than the bail-in tool. Also, since the bail-in tool leads to a high MREL the potential application of a transfer tool should also be assessed and, if credible and feasible, chosen as the preferred resolution strategy to avoid any disproportionate burden for institutions.

Funding sources in resolution

In order to carry out a resolution action, the resolution authority may decide to access the SRF/RF if certain conditions are met, in particular the need to first bail-in shareholders and creditors for no less than 8% of total liabilities, including own funds (TLOF)[36].

[36] Article 44(5) BRRD requires a minimum bail-in of 8% TLOF and provides for a maximum RF contribution of 5% TLOF (unless all unsecured, non-preferred liabilities, other than eligible deposits, have been written down or converted in full) when a resolution authority decides to exclude or partially exclude an eligible liability

Article 109 BRRD also provides the possibility of using the DGS in resolution, however only for an amount that would not exceed the amount in losses that the DGS would have borne under an insolvency counterfactual. The availability of sufficient sources of funding and the provision of proportionate conditions to access them are central to ensure that the resolution framework is adequate to cater for potentially any bank's failure.

As explained above, in the banking union, those cases where resolution has not been chosen have usually benefited from State aid under national insolvency proceedings (including DGS alternative measures under Article 11(6) DGSD and State aid from the public budget) or from preventive DGS measures under Article 11(3) DGSD. Both the use of aid in NIPs and Article 11(3) DGSD are subject to different (and arguably less-stringent) conditions than those for the use of the resolution funds under the SRMR and BRRD. This divergence may be seen as creating a disincentive to use resolution. This can particularly be the case for small and medium sized banks as they may rely more than other banks on certain types of creditors (such as depositors or retail investors) on which it has proved to be difficult to impose losses.

This issue may be exacerbated by the fact that these categories of banks may have more difficulty in accessing debt issuance markets and therefore acquire loss-absorption capacity through, for example, subordinated debt. While some banks rely on more complex issuance strategies, for others (including in some cases sizeable entities) equity and deposits are the main sources of funding. As a result, meeting the requirement to access RFs/SRF for these banks to execute the resolution strategy[37] may entail bailing-in deposits. At the same time, it is arguable that a proportionate approach to managing bank failures should ensure that entities can access funding sources without having to modify their business model. Also, the existence of a variety of business models is an important element to ensure a diversified, dynamic and competitive banking market.

However, any potential amendment in this direction should limit risks to the level playing field among banks. This would require that the criteria used for a potential differentiation in these access conditions to funding, as well as the calibration of such conditions, are carefully targeted to avoid unwarranted differences of treatment.

Question 20

What are your views on the access conditions to funding sources in resolution?

or class of eligible liabilities, and the losses that would have been borne by those liabilities have not been passed on fully to other creditors, or when the use of the RF indirectly results in part of the losses being passed on to the RF (Article 101(2) BRRD).

[37] For solvency support

	Agree	Disagree	Do not know / No opinion
The access conditions in BRRD/SRMR to allow for the use of the RF/SRF are adequate and proportionate to ensure that resolution can apply to potentially any bank, while taking into account the resolution strategy applied			X
There is merit in providing a clear distinction in the law between access conditions to the RF/SRF depending on whether its intervention is meant to absorb losses or to provide liquidity			X
The access conditions provided for in BRRD/SRMR to allow the authorities to use the DGS funds in resolution are adequate and proportionate to ensure that resolution can apply to potentially any bank, while taking into account the resolution strategy applied			X
The access conditions to funding in resolution should be modified for certain banks (smaller/medium sized, with certain business models characterised by prevalence of deposit funding) for more proportionality			X
The DGS/EDIS funds should be available to be used in resolution independently from the use of the RF/SRF and under different conditions than those required to access RF/SRF. In particular, it should be clarified that the use of DGS does not require a minimum bail-in of 8% of total liabilities including own funds			X
Additional sources of funding should be enabled.			X

Please explain your responses [text box]

Sources of funding available in insolvency

Funding sources are also available for banks that do not meet the public interest test and are put in insolvency according to the applicable national law.

There are, in particular, two sources of potential public external funding:

- DGS funds to finance alternative measures pursuant to Article 11(6) DGSD. In this case, the DGS can provide funding to support a transaction to the extent that this is necessary to preserve access to covered deposits and that it complies with the least cost test (i.e. the loss for the DGS is lower than the loss it would have borne in case of payout in insolvency) and State aid rules, as applicable;
- Financial support from the public budget. Such financial support can be provided by Member States subject to compliance with the requirements enshrined in the State aid framework,[38] which include among other things burden sharing by shareholders and subordinated debt and a requirement that the aid is granted in the amount necessary to facilitate an orderly exit of the bank from the market.

It is important to examine the consistency and proportionality in the conditions for accessing external financial support across different procedures, and their related potential incentives.

Question 21

In view of past experience, do you consider that the future framework should promote further alignment in the conditions for accessing external funding in insolvency and in resolution?

- **Yes**
- No
- No opinion

Please explain [Text]

The alignment of resolution and insolvency provisions would reduce the risk of breaching NCWO.

Moreover, we see the need for more uniformity at European level.

The principle 9 of the IADI needs to be in place ("core principles emergency funding arrangements for temporary liquidity needs"). Sources may include the government, the central bank and market borrowing. As stated above, full harmonization of super preference of claims of DGSs would highly reduce any potential liquidity needs of DGSs. Therefore, funding arrangements by the government or central bank as last resort remain crucial.

The above mentioned two sources of potential public external funding of Article 11(6) DGSD and financial support from the public budget (in exceptional cases only) should be maintained in the crisis framework, with the latter being subject to the Commission's state aid approval, if public funds are used.

Governance and funding

[38] This includes first and foremost the 2013 Banking Communication.

The current governance setup of the resolution and deposit insurance framework relies on both national and European authorities. Outside the banking union, the management of bank crises is in principle assigned to national authorities (i.e. national resolution authorities, DGS authorities and authorities responsible for insolvency proceedings), while the banking union governance structure is articulated on a national and European level (managed by the SRB).

The framework aims to align the governance structure and the source of funding. In particular this implies that funding held at national level is managed by national authorities, while the SRB manages the Single Resolution Fund, although there are exceptions (e.g. if a national DGS is used to contribute to the resolution of a bank in the SRB remit, the SRB has a role in deciding on its use under the existing BRRD framework).

This element may be particularly relevant in the context of a reflection on potential adjustments to the framework. In particular, a question may arise whether a more prominent role should be reserved for national DGSs/EDIS for financing crisis measures, how it would relate to the NRAs role (within the SRB governance), or even whether the management of such measures should also be assigned exclusively to national authorities or whether some coordination or oversight at European level could be beneficial to ensure a level playing field. Conversely, a reflection seems warranted on the role of the SRB in the management of EDIS.

Question 22

Do you consider that governance arrangements should be revised to allow further alignment with the nature of the funding source (national/supra-national)?

- Yes
- No
- **No opinion**

Please explain [text box]

No comment

Question 23

Is there room to improve the articulation between the roles of SRB and national authorities when the DGS is used to finance the resolution of a bank in the SRB remit?

- **Yes**
- No
- No opinion

Please explain [TEXT BOX]

In general the coordination and collaboration between supervisors and resolution authorities should be improved.

Ability to issue MREL and impact on the feasibility of the resolution strategy

MREL rules are an essential part of the framework, as they aim to ensure that banks can count on sufficient amounts of easily bail-inable liabilities to increase their resilience, ensure resolvability according to the resolution strategy identified and preserve the stability of the financial system in the eventual implementation of the resolution strategy. The bank-specific MREL calibration by the resolution authority reflects the chosen resolution strategy. In addition, the MREL capacity is key to ensure a sufficient burden

sharing by the existing shareholders and creditors in case of failure.

At the same time, the ability to issue MREL, particularly through subordinated instruments, depends on several features of each bank and its business model. Certain banks (e.g. some banks with traditional funding models relying largely on deposits) may have more difficulties in accessing debt issuance markets than other, more complex, institutions. While significant progress has been achieved by banks in reducing MREL shortfalls over the past years, when it comes to reaching their MREL targets under the applicable resolution strategy (and complying, if needed, with the conditions for accessing the resolution fund), challenges remain for certain banks[39]. They relate to the sustainable build-up of MREL-eligible instruments, especially against the background of fragile profitability and capability to roll-over instruments in the short-term, in particular in times of economic crisis.

Question 24

What are your views on the prospect of MREL compliance by all banks, including in the particular case of smaller/medium sized banks with traditional business models?

	Agree	Disagree	Do not know / No opinion
While issuing MREL-eligible instruments remains a priority, certain banks may not be capable of closing the shortfall sustainably for lack of market access.	X		
Possible adverse market and economic circumstances can also affect the issuance capacity of certain banks.	X		
Transitional periods could be a tool to deal with MREL shortfalls. resolution authorities could consider prolonging these under the current framework.	X		

Please explain [text box]

It is important that the funding strategy of the bank is taken into account. When the funding model of the (mid-sized) bank is highly linked to depositor funding, MREL issuance might not be the best strategy. In this case also the risk profile of the institution should also be significantly less than in a bank that is for example solely relying on wholesale funding.

In this regard, the introduction of transitional periods is also crucial to ensure the necessary flexibility for those newly formed cooperative groups whose funding is structurally based on retail deposits from a number of small local banks. The current extraordinary circumstances create a situation where issuing (expensive) funding is not needed at all as for those banks confronted with additional cash inflows, the current monetary policy by the ECB as well as government support is an extra argument for not issuing additional funding instruments.

[39] Joint report by the services of the European Commission, the European Central Bank (ECB) and the Single Resolution Board (SRB) (November 2020), Monitoring report on risk reduction indicators, pg 33.

Given the extraordinary situation COVID-19 introduced, and referencing the current provisions in Article 45m(1)(a) to (c) and 45m(7)(a) to (c) of the BRRD, respectively to Article 12k(1)(a) to (c) and 12k(7)(a) to (c) of the SRMR, we propose that the Commission generally extends the transitional period for compliance with MREL requirements by one year (from 1 January 2024 to 1 January 2025). This one year extension would enable institutions in different Member States to adequately face the impact of the current crisis on their funding requirement and balance sheet management. At the same time, the current approach of further institution-specific extensions for compliance with MREL due to individual situations should be maintained.

We therefore reiterate the need for the Commission, in light of the Covid-19, pandemic to consider extending the timelines for MREL targets for all institutions until 1 January 2025 and to further adjust the framework to incentivise resolution authorities to extend the timeline for compliance with MREL requirements for specific institutions to which other institution specific circumstances laid down in 45m(1) and 45m(7) BRRD II apply (individual situation; business model).

Banks that are liquidated outside of the resolution rules and, according to the will of the legislator, are to be passed directly on to insolvency proceedings, do not, however, need any MREL as recapitalization amount. Only recently in the context of BRRD II the European legislator once again determined that: "Where the resolution plan provides that the entity is to be wound up under normal insolvency proceedings or other equivalent national procedures, the resolution authority shall assess whether it is justified to limit the requirement referred to in Article 45(1) for that entity, so that it does not exceed an amount sufficient to absorb losses in accordance with point (a) of the first subparagraph."

Question 25

In case of failure of banks, which may lack sufficient amounts of subordinate debt (see question above) and/or would not meet the PIA criteria, what are your views on possible adjustments to the MREL requirements?

	Agree	Disagree	Do not know / No opinion
MREL adjustments for resolution strategies other than bail-in can help in this context			**X**
Rules defining how the MREL is set for banks likely not to meet the PIA criteria should be clarified			**X**
In any case, for all banks, an adequate burden sharing by existing shareholders and creditors should be ensured			**X**

Please explain [text box]

We do not see any need for revising the MREL requirements. The nature of the preferred resolution strategy is the key factor that will determine the size of these requirements. If a transfer strategy in resolution is truly credible, this should translate into lower MREL requirements

Treatment of retail clients under the bail-in tool

The bail-in tool can be applied to all the unsecured liabilities of the institution, except where they are statutorily excluded from its scope[40]. Resolution authorities have the discretionary power to exclude certain liabilities from bail-in, but this can only take place under a limited set of circumstances and, where it leads to the use of the resolution financing arrangement, it requires authorisation from the Commission and the Council.

If a significant part of an institution's bail-inable liabilities, particularly MREL instruments, is held by retail investors, resolution authorities might be reticent to impose losses on those liabilities for a number of reasons[41][41]. First, the bail-in of debt instruments held by retail clients risks affecting the overall confidence in the financial markets and might trigger severe reactions by those clients, which could translate in contagion effects and financial instability. Second, bailing-in retail debt holders, especially in case of self-placement (where the institution places the financial instruments issued by themselves or other group entities with their own client base), could hinder the successful implementation of the resolution strategy. Indeed, the imposition of losses to the customer base of the institution under resolution could lead to reputational damage, which in turn could impede the business viability and the franchise value of the institution post- resolution.

In order to ensure that retail investors do not hold excessive amounts of certain MREL instruments, BRRD II[42] introduced a requirement to ensure a minimum denomination amount for such instruments or that the investment in such instruments does not represent an excessive share of the investor's portfolio.[43] MiFID II[44], which has been applicable since January 2018, also included a number of new provisions aimed at strengthening investor protection in respect of disclosure, distribution and assessment of suitability, among others.

Nevertheless, the question has arisen whether the protection of retail clients should be reinforced, either by further empowering resolution authorities to pursue that objective or through directly applicable protection in the context of resolution. These considerations are independent of the possible measures that may be implemented to address the specific

[40] Which includes covered deposits and a few other types of liabilities to ensure the continuity of critical functions and reduce risk of systemic contagion.

[41] In this respect, please see the statement of the EBA and ESMA on the treatment of retail holdings of debt financial instruments subject to the Bank Recovery and Resolution Directive.

[42] Directive (EU) 2019/879.

[43] See Article 44a BRRD.

[44] Directive 2014/65/EU.

case of mis-selling of financial instruments to retail clients.

Question 26

What are your views on the policy regarding retail clients' protection?

	Agree	Disagree	Do not know / No opinion
The current protection for retail clients (MiFID II and BRRD II) is sufficient in the resolution framework, both at the stage of resolution planning and during the implementation of resolution action.	**X**		
Additional powers should be explicitly given to resolution authorities allowing them to safeguard retail clients from bearing losses in resolution.		**X**	
Additional protection to retail clients should be introduced directly in the law (e.g., statutory exclusion from bail-in).	**X**		
Introducing additional measures limiting the sale of bail-inable instruments to retail clients or protecting them from bearing losses in resolution may have a substantial impact on the funding capacity of certain banks.	**X**		

Please explain [text box]

Consumer protection concerns have already been taken into account in Art. 44a BRRD. It is difficult to understand, however, why a retail investor may in fact acquire shares in a bank without limits, although these would be the first to be accessed in the liability cascade under resolution law, but for a Tier 2 instrument, e.g. in the form of a simple subordinated deposit, minimum denomination / investment amounts in the five-digit range are required.

Beyond this, we consider the current legal framework sufficient: according to the current rules, issuers are already obliged to fulfil comprehensive information duties (prospectus regime, MiFID II, etc.). Therefore, potential investors are already provided with all information required for the investment decision. Furthermore, these instruments may only be sold to suitable investors.

When providing investment advice, in addition to the requirements for the suitability assessment according to MiFID II, Art 44a BRRD II introduced several safeguards to ensure the protection of retail

clients willing to invest in subordinated eligible liabilities.

Distributions have been adapted to comply with the newly introduced requirements in the BRRD II. Changing the legal requirements in this regard only few months after the application of the BRRD II would, in our view, be too burdensome for institutions as internal processes would have to be changed shortly after the implementation of the BRRD II.

It should therefore be noted that customers are explicitly and duly informed about the risk involved in the purchase of eligible liabilities or liabilities subject to bail-in.

Furthermore, an extension of the sales restriction of Art 44a BRRD II would lead to a restriction of the possible product range for retail investors as well as for European banks when issuing debt instruments on the capital market, which would have a negative impact on the financial economy.

Finally, a potential competitive advantage for third country issuers not subject to BRRD II (e.g. Switzerland) should also be mentioned in this context. For instance, the distribution of debt instruments issued by third country banks would not be subject to comparable restrictions. This potential regulatory arbitrage should be avoided in any case.

At the same time, the legislator should consider the importance of retail clients as a relevant investment group in several EU Member States as illustrated by a EBA/ESMA analysis (EBA/ESMA, Statement of the EBA and ESMA on the treatment of retail holdings of debt financial instruments subject to the Bank Recovery and Resolution Directive (ESMA71-99-991), e.g. Figure 3.).

Therefore, we do not support to expand the restrictions or exclude retail clients from sale opportunities with regard to own funds or other eligible liabilities.

We also do not see any case for complementary measures to ensure that retail customers are not affected by bail-in.

Question 27

Do you consider that Article 44a BRRD should be amended and simplified so as to provide only for one single rule on the minimum denomination amount, to facilitate its implementation on a cross-border basis?

- Yes
- **No**
- No opinion

Please explain [text box]

Article 44a BRRD II was just recently added to the framework. The provision had to be transposed into national law by 29 December 2020 in each Member State. Also for the purpose of legal certainty one should wait for its practical effects instead of amending it before any meaningful evaluation and deeper review could take place.
A simplification of the wording and the mechanisms could make sense as the current text uses incomprehensible wording that should be significantly clarified.

Question 28

Do you agree that the scope of the rule on the minimum denomination amount to other subordinated instruments than subordinated eligible liabilities (e.g. own funds instruments) and/or other MREL eligible liabilities (senior eligible liabilities) should be extended?

- Yes
- **No**
- No opinion

Please explain [text box]

We do not think that in the context of this framework an extension of the minimum denomination amount should be discussed. In order to achieve a more convergent approach to the protection of consumers the matter should rather be addressed in the context of the MiFiD.

B. Level of harmonisation of creditor hierarchy in the EU and impact on NCWO

Liabilities absorb losses and contribute to the recapitalisation of an institution in resolution in an order that is largely determined by the hierarchy of claims in insolvency. EU law already provides for a number of rules on the bank insolvency ranking of certain types of liabilities[45]. For the remaining classes of liabilities, there is little harmonisation at EU level.

Notably, some Member States have granted a legal preference in insolvency to other categories of deposits currently not mentioned in Article 108(1) BRRD[46]. In this context, the question is whether there should be a generalised granting of a legal preference to all deposits at EU level.[47] The arguments in favour would be that this would ensure a level playing field in depositor treatment across the EU, contribute to minimizing the risks of breach of the NCWO principle and properly reflect the key role played by deposits in the real economy and in banking. Additionally, if the three-tiered ranking of deposits[48] and DGS claims currently put in place by Article 108(1) BRRD were to be replaced with a single ranking, whereby all those claims would rank *pari passu*, the use of the DGS in resolution and in insolvency would be facilitated.

Moreover, there is still the possibility that the order of loss absorption in resolution deviates from the creditor hierarchy in insolvency, which has the potential to lead to breaches of the NCWO principle'. The lack of harmonisation in the ordinary unsecured and preferred layer of liabilities in insolvency can also create difficulties when carrying out a NCWO assessment in case of resolution of cross-border groups, particularly within the banking union where the SRB is currently required to deal with 19 different insolvency rankings.

On the other hand, arguments against providing such preference would be that it would treat financial instruments held by the same type of creditors differently and could affect the costs of funding of institutions. Changes to the relative ranking of deposits could also lead to an increased risk of losses in insolvency for the DGS in case of pay-out.

[45] Namely, own funds items, senior non-preferred debt instruments, covered deposits and claims of DGSs subrogating to covered deposits, and the part of eligible deposits from natural persons and micro, small and medium-sized enterprises (SMEs) exceeding the coverage level provided by the DGSD – see Articles 48(7) and 108 BRRD.

[46] More specifically, eligible deposits of large corporates, in the part exceeding the coverage level of the DGS, and to deposits excluded from repayment by the DGS pursuant to Article 5(1) DGSD.

[47] It should be mentioned that in the United States all depositors benefit from the same ranking.

[48] Meaning, the relative ranking of deposits laid down in Article 108(1) BRRD, whereby covered deposits rank above eligible deposits of natural persons and SMEs, which in turn rank above the remaining deposits

Question 29

Do you consider that the differences in the bank creditor hierarchy across the EU complicate the application of resolution action, particularly on a cross-border basis?

- Yes
- **No**
- No opinion

Please explain [text box]

Legal certainty and enforceability of claims: The enforceability of claims on the basis of the creditor hierarchy shall not be a matter of uncertainty. Accordingly, the bank creditor hierarchy should be enforceable in all MS under a sound legal framework even under difficult circumstances. This premise is of particular importance for domestic as well as cross border crisis management actions mitigating at the same time the risk of legal disputes.

Differences in the bank creditor hierarchy across the EU are relevant for a level playing field (different treatment of customers in various jurisdictions and different capability of recovery among DGSs in case of pay-out).

The current three-tiered ranking of deposits in Article 108 BRRD should not be touched. In particular, covered deposits should be super-preferred to ensure a high reduction of DGS liquidity needs. Our view is that superseniority of covered deposits in their current form should be secured and rather be fully harmonized. This would be essential for strengthening DGSs and increasing depositor confidence. It is only logical and consistent that deposit guarantee schemes that pay out depositors the full protected amounts shall primarily be reimbursed from the liquidated assets. Otherwise, the consequence would be an unjustified severe disadvantage for DGS.

A level playing field can rather be achieved by a harmonisation of the definitions of covered deposits (e.g. by integrating other kinds of deposits). However not all of our members believe that the scope of covered deposits should be broadened.

Question 30

Please rate, from 1 (lowest) to 10 (highest), the importance of the following actions:

	1	2	3	4	5	6	7	8	9	10	Do not know / No opinion
Granting of statutory preference to deposits currently not covered by Article 108(1) BRRD											X
Introduction of a single-tiered ranking for all deposits	X										
Requiring preferred deposits to rank below all other preferred claims	X										
Granting of statutory preference in insolvency for liabilities excluded from bail-in under Article 44(2) BRRD											X

C. Depositor insurance

Enhancing depositor protection in the EU[49]

As a rule, deposits on current and savings accounts are protected up to EUR 100 000 per depositor, per bank in all EU Member States. However, based on the experience with the application of the framework, differences between Member States persist in relation to several types of deposits.

Certain deposits benefit from a higher protection because of their impact on a depositor's life. For example, a sale of a private residential property or payment of insurance benefits typically creates a temporary high balance on a depositor's bank account above the standard coverage of EUR 100 000. The protection of such temporary high balances currently varies from EUR 100 000 up to EUR 2 million depending on the Member State.

In the current framework, public authorities are and some local authorities may be excluded from the deposit protection. In this view, deposits by entities such as schools, publicly owned hospitals or swimming pools can lose protection because they are considered public authorities.

Financial institutions, such as payment institutions and e-money institutions, and investment firms may deposit client funds in their separate account in a credit institution for safeguarding purposes. Currently, the lack of protection against the banks' inability to repay in some Member States could be critical for the clients as well as for the business continuity of the firms, if bank failures occur.

Question 31

[49] Questions 31-33 of the technical part of this targeted consultation correspond to questions 7-9 of the general public consultation.

Do you consider that there are any major issues relating to the depositor protection that would require clarification of the current rules and/or policy response?

- **Yes**
- No
- No opinion

Please elaborate [text box]

We do not see major issues that require clarification. The existing additional issues have been largely addressed within the three Opinions of EBA on the implementation of the Deposit Guarantee Schemes Directive.

Nevertheless, on the following issues there could be room for improvement:

- It should be clarified in Article 16 DGSD (depositor information) that the depositors shall be provided with the information referred to in Article 16(1) DGSD at the beginning of the business relationship with the institution (only) and not again and again in the course of follow-up transactions with the bank.
- Regarding the interaction between DGS contributions and resolution planning, we would like to draw the attention to the following: although Article 6 of the Commission Delegated Regulation (EU) 2016/1450 and Article 45 (6) (e) BRRD explicitly require the resolution authority to assess the extent to which the DGS could contribute to the financing of resolution in accordance with Article 109 for the determination of MREL, the resolution authorities do not apply this provision. We therefore see no reason for keeping this provision as it only creates burden but no relief for credit institutions. The Commission should stipulate that taking into account the DGS into the MREL calibration is not subject to the discretion of the resolution authorities.

Question 32

Which of the following statements regarding the scope of depositor protection in the future framework would you support?

	Agree	Disagree	Do not know / No opinion
The standard protection of EUR 100 000 per depositor, per bank across the EU is sufficient.	X		
The identified differences in the level of protection between Member States should be reduced, while taking into account national specificities.			X
Deposits of public and local authorities should also be protected by the DGS.		X	
Client funds of e-money institutions, payment institutions and investment firms deposited in credit institutions should be protected by a DGS in all Member States to preserve clients' confidence and contribute to the developments in innovative financial services.		X	

Please elaborate on any of the above statements, including any supporting documentation (where available), or add other suggestions concerning the depositor protection in the future framework: [text box]

The DGSD has set harmonised and sufficient standards for European DGSs and considers national specificities in an adequate way. The EBA opinions have not identified any major weaknesses in DGSs operations under DGSD rules.

The financial means paid to DGSs serve a political aim to protect covered deposits due to the justified preference given to respective depositors, natural persons, and SMEs below 100.000 EUR. For these depositors covered deposits are of high importance and decide the fate of the individual financial situation or viability of the SME.

We do not believe that a protection should apply to public and local authorities, and e-money institutions, payment institutions and investment firms. As elaborated under Question 6, contributions to DGS are already challenging for credit institutions given the long lasting low-interest environment and recent payouts have already put pressure on some DGS and their contributors in certain member states. Article 5(2)(b) DGSD already provides the national discretion to include deposits held by local authorities with an annual budget of up to EUR 500 000 up to the coverage level laid down in Article 6 DGSD. This assimilates the statues of small local authorities to SMEs.

However, we do not think that beyond this category public and local authorities and the mentioned financial undertakings should be included in DGS and profit from "risk-free" deposits at the expense of other DGS members as the need of protection cannot be compared with natural persons or SMEs. The status of depositors can be considered as an expression of proportionality in the framework. Public and local authorities and the abovementioned financial institutions have access to information which retail clients (natural persons and SMEs) do not have, thus the flow of information justifies a different protection level. One additional reason as to why we do not think that public or local authorities and financial institutions should be protected by DGS funds is the risk

of contagion to the financial system. Again, public or financial depositors should not be able to transfer their risk at the expense of the DGS and therefore of credit institutions. We therefore advocate maintaining the current possibility for Member States to include deposits of public and local authorities and e-money institutions, payment institutions and investment firms rather than a mandatory harmonized protection.

Adding additional groups of covered depositors would create substantial additional costs to the financial sector. In fact, it would significantly increase the target levels of national DGSs without any recognizable benefits from a financial stability perspective. This would result in a significant increase in contributions by banks undermining their efforts to invest in bank resilience and innovation.

Keeping depositors informed

Depositor confidence can only be maintained when depositors have access to information about the protection of deposits and understand it well. Under the current rules, credit institutions shall inform actual and intending depositors about the protection of their deposits at the start of the contractual relationship, e.g. upon opening of the bank account, and onwards every year. To this end, credit institutions communicate a so-called depositor information sheet, which includes information about the DGS in charge of protecting their deposits and the standard coverage of their deposits. Depositors receive such communication in writing, either on paper, if they so request, or by electronic means (via internet banking, e-mails, etc.).

Question 33

Which of the following statements regarding the regular information about the protection of deposits do you consider appropriate?

	Agree	Disagree	Do not know / No opinion
It is useful for depositors to receive information about the conditions of the protection of their deposits every year.			**X**
It would be even more useful to regularly inform depositors when part of or all of their deposits are not covered.[50]		**X**	
The current rules on depositor information are sufficient for depositors to make informed decisions about their deposits.	**X**		
It is costly to mail such information, when electronic means of communication are available.	**X**		
Digital communication could improve the information available to depositors and help them understand the risks related to their deposits.	**X**		

Please elaborate on any of the above statements, including any supporting documentation (where available) or ideas to improve the information disclosure, or add other suggestions concerning the depositor information in the future framework: [text box]

We do not consider it necessary or useful to inform depositors when part of or all of their deposits are not covered. We consider it sufficient to publish all relevant information on the website, without contacting customers individually and directly, but informing them through general communications sent by the banks on deposit insurance. Moreover, in most of the cases any such information would already be inaccurate when it reaches the customer, as deposits tend to change several times a day. This would require banks to constantly monitor all deposit accounts, determine which coverage level is applicable in a specific case and assess whether this coverage level has been exceeded or not. The added value from a customer perspective is doubtful, as in most cases she or he will only get outdated information.

From our experience it is sufficient to inform depositors actively only when starting the business relationship with the respective bank. After that such an information (i.e. the information sheet) should be made passively available at any time (website, paper form in branch) but should not be sent every year. Many customers (mis-)understand such an actively sent sheet either as a hint to financial difficulties of their bank, as undesirable spam or as not sustainable under environmental aspects (paper). Last, the risk of a deposit cannot be defined as its amount but is based on the financial soundness of the bank.

Any extension of the current depositor information framework would not bear any real benefit for depositors but only costs for credit institutions/DGSs. Rules regarding deposit protection are well known to clients and any diverging rules would rather create uncertainty for the covered depositors. Digital communication is useful but should never be mandatory due to the problems that come with

[50] This may be the case in situations where part of the deposits exceed the coverage level or where depositors are not eligible for depositor protection.

clients who do not have internet access or do not wish to use digital communication but only as an alternative.

Using digital means of communication can help to improve the information available to depositors on the one hand and can save costs for the institutions on the other hand as mailing such information is at large expensive.

Making depositor protection more robust, including via the creation of a common deposit insurance scheme in the banking union

Currently, national deposit guarantee schemes (DGSs) are responsible for protecting and reimbursing depositors. DGSs are funded primarily by annual contributions of the national banking sectors. By 3 July 2024, the available financial means of each DGS must reach a target level of 0.8% of the amount of the covered deposits of its members.

The 2015 Commission proposal to establish an EDIS for bank deposits in the banking union builds on the system of the national DGS funds and enhances the mutualisation across the private sector in the banking union. It aims to ensure that the level of depositor confidence in a bank would not depend on the bank's location. It also reduces the vulnerability of national DGSs to large local shocks and weakens the link between banks and their national sovereigns.

Since 2015, discussions are ongoing on completing the third pillar of the banking union (i. e. a common deposit guarantee scheme) in the Council's Ad Hoc Working Party, High Level Working Group set up by the Eurogroup and in the European Parliament. Most recently, the set-up and features of a possible compromise on a first stage common deposit insurance scheme focusing on liquidity provision were discussed at political level.[51] In a nutshell, on the basis of these discussions, a common scheme could rely on the existing national DGSs and be complemented by a central fund to reinsure national systems.[52] This first stage of EDIS based on liquidity support could be followed by steps towards a fully-fledged EDIS with loss-sharing, which would ensure an alignment between control (supervision and resolution) and liability (deposit protection), and further reduce the nexus between banks and sovereigns.

Question 34

In terms of financing, does the current depositor protection framework achieve the objective of ensuring financial stability and depositor confidence, and is it appropriate in terms of cost-benefit for the national banking sectors?

[51] Letter by the High-Level Working Group on a European Deposit Insurance Scheme (EDIS) Chair to the President of the Eurogroup, 3 December 2019.
[52] Various designs and parameters could be envisaged, pertaining to – among other things – (i) the allocation of the funds between the central fund and the national DGSs, as well as a cap on the central fund or on mandatory lending, (ii) the build-up phase of the fund and the mandatory lending component, (iii) interest rates, maturities and repayment of the loans, or (iv) the overall scope of the scheme.

	Agree	Disagree	Do not know / No opinion
The current depositor framework achieves the objective of ensuring financial stability and depositor confidence.	X		
The cost of financing of the DGS up to the current target level of 0.8 % of covered deposits is proportionate, taking into account the objective to ensure robust and credible depositor insurance.	X		
A target level in a Member State could be adapted to the level of risk of its banking system.			X

Please elaborate on the above statements, including any supporting documentation (where available), or add other suggestions concerning the financing of the DGS in the future framework: [text box]

The existing DGS framework already protects depositors and provides for depositor confidence and financial stability. From our practical experience since the introduction of the DGSD it is sufficient to finance those measures the respective DGS/IPS is mandated for. Noteworthy doubts about financial stability and depositor confidence did not come up.

Question 35

Should any of the following provisions of the current framework be amended, and if so how?

	Yes	No	Do not know / No opinion
Financing of the DGS[53]		X	
The DGS's strategy for investing their financial means [54]		X	
The sequence of use of the different funding sources of a DGS (available financial means, extraordinary contributions, alternative funding arrangements)[55]		X	
The transfer of contributions in case a bank changes its affiliation to a DGS[56]			X

Please elaborate on the above, including any supporting documentation (where available), or add other suggestions concerning the above or other elements of the future framework: [text box]

Deposit guarantee systems must be a tool to give confidence to depositors that their deposits are protected and that they will be able to access their deposits at all times without long interruption. The focus should be on securing this objective.

The main rule should be that the system is built in a way which makes sure that a DGS can handle payments to depositors without resorting to funding of the members of the DGS. This is necessary to avoid unintended spill-over effects of limited bank failures to the whole banking system which could trigger a systemic shock. Also, investor confidence is secured and funds may continue to be raised from the market when there is no expectation of (future) losses, regardless whether those where already occurred or at the moment expected.

Moreover, for any DGS, operational flexibility in determining the most appropriate sources of funding for each crisis solution is essential for financial stability.

The current provisions on the financing of the DGS, its investment strategy and the sequence of the use of the funding sources are suitable.

National DGSs, after having reached their target level, should be adequate for the purposes of depositor protection. It should not be the case, except perhaps in clearly stated extraordinary situations, that banks' contributions to DGS continue after the target level is reached (excluding the impact of increasing level of covered deposits).

The rules on transfer of contributions needs to be improved as they lack clarity in terms of the precise amount to be transferred. Reference is being made to the respective EBA opinion.

Regarding the sequence of the different funding sources of a DGS, we believe more options are useful but no essential amendments of the framework in this regard are necessary.

[53] Article 10 DGSD
[54] Article 10 DGSD
[55] Article 11 DGSD
[56] Article 11 DGSD

Question 36[57]

Which of the following statements regarding EDIS do you support?

	Agree	Disagree	Do not know / No opinion
It is preferable to maintain the national protection of deposits, even if this means that national budgets, and taxpayers, are exposed to financial risks in case of bank failure and may create obstacles to cross-border activity[58]			**X**
From the depositors' perspective, a common scheme, in addition to the national DGSs, is essential for the protection of deposits and financial stability in the euro area.			**X**
From the credit institutions' perspective, a common scheme is more cost-effective than the current national DGSs if the pooling effects of the increased firepower[59] are exploited.		**X**	
From the perspective of the EU Single Market, EDIS could exceptionally be used in the non-banking union Member States as an extraordinary lending facility in circumstances such as systemic crises and if justified for financial stability reasons.			**X**

Please elaborate on any of the above statements, including any supporting documentation, or add suggestions on how to achieve the objective of financial stability in the European Union and the integrity of the Single Market: [text box]

The members of the EACB have doubts that an EDIS would per se be more cost-efficient if the alleged increased fire-power, or better the increased loss-mitigating capacity is exploited. There are good reasons to believe that rather the contrary would be the case (higher administration cost, more payout cases than currently on national level). A higher cost-efficiency of EDIS would therefore be a precondition commonly demanded for the support of EDIS and not a common presumption.

Question 37

In relation to a possible design of EDIS, which of the following statements do you support?

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[57] Question 36 of the technical part of this targeted consultation partly corresponds to question 10 of the general public consultation

[58] The obstacles to cross-border activity may arise because, under Article 8(5)(e) and 14(2) DGSD, cross-border deposits located in branches are protected in the country of registration of the bank and, in the event of payout, may be subject to reimbursement longer than 7 working days.

[59] At face value, a common scheme with a target level lower than 0.8% of covered deposits in the euro area can ensure the same level of protection as the current network of national DGSs. The assessment of the so-called pooling effect could allow to lower the bank contributions to the national DGSs.

	Agree	Disagree	Do not know / No opinion
As a first step, a common scheme provides only liquidity support subject to the agreed limits to increase a mutual trust among Member States.			X
At least a part of the funds available in national DGSs is progressively transferred to a central fund.			X
If the central fund is depleted, all banks within the banking union contribute to its replenishment over a certain period.			X
Loss coverage is an essential part of a common scheme, at least in the long term.			X

Please elaborate on any of the above statements, including any supporting documentation, or add suggestions concerning a possible design, including benefits and disadvantages as well as potential costs thereof: [text box]

The members of the EACB have doubts that an EDIS would per se be more cost-efficient if the alleged increased fire-power, or better the increased loss-mitigating capacity is exploited. There are good reasons to believe that rather the contrary would be the case (higher administration cost, more payout cases than currently on national level). A higher cost-efficiency of EDIS would therefore be a precondition commonly demanded for the support of EDIS and not a common presumption.

Question 38

Which of the following statements regarding the possible features of EDIS do you support?

	Agree	Disagree	Do not know / No opinion
Setting a limit (cap) on the liquidity support from the central fund is appropriate to prevent the first mover advantage.[60]			X
Any bank that is currently a member of a national DGS is also part of the common scheme.			X
The central fund should be allocated 50% or more and the national DGS 50% or less of the total resources.			X
Appropriate governance rules and interest rates provide the right incentive for the repayment of the liquidity support, while taking into account their procyclical impact.			X
The central fund also covers the options and national discretions currently applicable in the Member States.			X
A common scheme provides for a transitional period from liquidity support towards the loss coverage with a view to breaking the sovereign-bank nexus.			X

Please elaborate on any of the above statements, including any supporting documentation, or add suggestions concerning possible features of such a common scheme: [text box]

The members of the EACB have doubts that an EDIS would per se be more cost-efficient if the alleged increased fire-power, or better the increased loss-mitigating capacity is exploited. There are good reasons to believe that rather the contrary would be the case (higher administration cost, more payout cases than currently on national level). A higher cost-efficiency of EDIS would therefore be a precondition commonly demanded for the support of EDIS and not a common presumption.

Question 39

Under the current Commission's proposal on EDIS, a common scheme would co-exist with the Single Resolution Fund. Against the background of the general macroeconomic and financial environment for banks and subject to the cost benefit analysis, do you think that synergies[61] between the two funds should be explored to further strengthen the firepower of the crisis management framework and to reduce the costs for the banking sector?

In that respect, which of the following statements do you support?

[60] In this context, the first-mover advantage means that one DGS depletes all funds as an initial beneficiary and, consequently, is better off than other DGSs

[61] Such synergies could take the form of bilateral loan commitments, guarantees, or possibly a merger of the two funds.

	Agree	Disagree	Do not know / No opinion
The Single Resolution Fund and EDIS should be separate.	**X**		
The Single Resolution Fund should support EDIS when the latter is depleted.		**X**	
Synergies between the two funds should be exploited.			**X**
Synergies between the two funds should be used to reduce the costs of the crisis management framework for the banking sector.			**X**
Synergies between the two funds should be used to strengthen the firepower of the crisis management framework.		**X**	

Please elaborate on the above, including any supporting documentation regarding the benefits and disadvantages of the above options as well as potential costs thereof: [text box]

The Single Resolution Fund and Deposit Protection should be separate. The funds in the DGS are meant to protect the depositors (covered deposits) and they should not be used for any other purpose.

Resources of the resolution and deposit protection fund pursue different goals. Notably, the deposit protection framework serves the purpose of consumer protection of deposits while the resolution fund serves the purpose of saving the taxpayer money. We reject a mix-up of these goals through mutual access or a merger of the funds. This would be at the expense of consumer protection.

Even the SRB has repeatedly stated that in the worst-case scenario, with regard to liquidity problems, even a resolution fund increased by the ESM backstop might not be sufficient. If deposit protection funds were to be accessed in this case, this would undermine the trust of depositors across the board and provoke a bank run.

In addition, merging the funds would mean merging the second and third pillars of the banking union. From a governance point of views this would raise concerns.

The overall aim of the legislation should be to have a well-functioning and reliable DGS which guarantees depositors' covered deposits, but which does not in itself, create a risk to financial stability. Unwanted and unexpected risks allow financial losses to spread through the financial system in an unanticipated way. If a DGS is constructed without adherence to certain necessary core principles, there is a risk for contagion which could trigger a systemic shock to the financial system. This happens if investors fear that their investments to a bank are in danger. The investor uncertainty created by ill-constructed and/or vague legal norms of the DGS might hinder recapitalization of a bank and cause severe liquidity and capital adequacy problems. To avoid this, it is of paramount importance that rules are unambiguous and clear and there are necessary guiding principles in place.

Additional information

Should you wish to provide additional information (for example a position paper) explaining your position or raise specific points not covered by the questionnaire, you can upload your additional document here. Please note that the uploaded document will be published alongside your response to the questionnaire, which is the essential input to this targeted consultation.