



European Banking Industry Committee

European Banking Federation (EBF) • European Savings Banks Group (ESBG) • European Association of Cooperative Banks (EACB)
European Mortgage Federation (EMF) • European Federation of Building Societies (EFBS)
European Federation of Finance House Associations (Eurofinas)/European Federation of Leasing Company Associations (Leaseurope)
European Association of Public Banks (EAPB)

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RE: EBIC comments on cornerstones of the forthcoming EU Framework for Bank Recovery and Resolution

Dear Commissioner,

The European Banking Industry Committee (EBIC) welcomes and supports the Commission's work on an EU framework for bank recovery and resolution which sets out to minimise the systemic and fiscal consequences of bank failures. Our associations and members also welcomed the opportunity to contribute to this work via the recent consultation by DG MARKT. EBIC would now like to take the opportunity to outline common views on several aspects of the forthcoming EU framework.

Need for coordinated global effort on crisis management

Firstly let us highlight that resolution frameworks need to be introduced globally to ensure a level playing field. A common harmonised framework needs to be developed since the crisis has revealed that ring-fencing and national approaches will further increase the severity of a crisis. The EU should coordinate with the Financial Stability Board (FSB) and the Basel Committee on Banking Supervision (BCBS) to avoid any policy divergence. Furthermore, the Commission should strive for compatibility of the forthcoming framework with those of third countries. Thus we would appreciate a resolution framework to be globally concerted in its basic principles.

Proportionality as the guiding principle

If the EU framework is to cover the entire banking sector (as well as certain investment firms), it will apply to a large variety of institutions, i.e. large and small, international and regional, and retail and universal banking models with different ownership and organizational structures and with different risk profiles and degrees of diversification. All of these are also already subject to comprehensive regulatory supervision and will soon be subject to a range of additional measures all designed to enhance the stability of the banking system.

Thus, in order to prevent excessive burdens for smaller and less complex institutions – but also for all banks in general –, and so as to consider to what extent banks unlikely to be of systemic relevance should be subject to the envisaged measures, proportionality should be a guiding principle for the use of the different tools and powers of supervisors and resolution authorities. For instance with a view to stress tests and resolution plans as well as living wills, requirements should be clearly proportional with regard to an institution's nature, scale and complexity. Proportionality should also be respected when proposing ex-ante strategic, structural or business model changes, should these really be deemed necessary. Thus, for the forthcoming framework, we invite the Commission to concretely take into account the proportionality principle in the broadest sense possible.

National discretion for the designation of resolution authorities and the allocation of responsibilities

Concerning the designation and allocation of the resolution authority, EBIC takes the view that these should be left to national discretion. The new framework should not require the establishment of (new) separate resolution authorities, and allocation of responsibility within the existing national supervisor should be a possibility. In the latter case, concerns of possible supervisory forbearance can be resolved by appropriate 'Chinese walls' and appropriate confidentiality rules within the supervision authority, supported by appropriate protocols with host regulators and agencies. Should, on the other hand, a Member State decide to establish or maintain a separate resolution authority, it should be provided with the set of information as is provided to the supervisor in order to avoid a multiplied reporting burden. In any case, responsibilities should be clearly allocated and communicated, whether domestically or internationally.

As regards the cross-border context, EBIC takes the view that within the relevant (supervisory or resolution) colleges, all members should try their utmost to avoid disagreements. The consolidating supervisor and consolidating resolution authority should lead this joint decision making process in an EU-only context. The European Banking Authority (EBA) could play a valuable mediating role in order to facilitate this process. Furthermore, EBA should ensure cooperation with consolidated supervisors of non-EU headquartered banking groups with a significant presence within the EU.

Need for clearly defined triggers for preventative and resolution actions

EBIC understands that the Commission will determine triggers for preventative, early intervention and resolution actions. Here EBIC urges the Commission to ensure that such triggers are clearly defined and provide transparency and legal certainty. In addition, triggers need to be clearly distinguished from each other, as preventive and early intervention actions address the 'going-concern phase', whereas resolution actions apply only as a matter of last resort and at the point of non-viability (gone-concern scenario) of a bank. Triggers for preventative and early intervention powers are necessary in a 'near resolution' scenario but setting a trigger activated in a situation where the institution still is clearly a 'going concern' would unduly interfere with property rights of shareholders, creditors and other stakeholders of the firm well before it has failed or is likely to fail, making regulators responsible for the management of the firm. Shadow directorial responsibilities and market disclosure obligations need to be considered very carefully.

We also emphasise that for both early intervention and resolution there should be a right combination and balance between qualitative and quantitative conditions; furthermore it is not desirable that a single indicator can trigger conditions for early intervention or resolution. In addition, whilst a trigger being met should oblige the relevant authority to become active, it should nevertheless not cause any automatic chain reaction; rather the resolution authorities should draw on their own judgment taking into account the situation at the individual institution concerned.

Concerns on prevention and resolution tools

As concerns the possible measures to be taken at the various stages, EBIC would like to highlight that the tools chosen should be proportionate to the impact of the breach of the relevant requirements and should be compatible with the overall business model of the bank. We also would like to highlight the need for legal certainty, which during both the preventive and the early intervention stage, and also during the resolution stage, should stress accountability of the resolution authorities and contestability of their decisions.

In addition we have to express our concern as regards the tool of imposing a 'special manager' during the early intervention stage. Not only are we highly sceptical that this tool would prove effective, we also are apprehensive of the disproportionate intrusiveness of this measure and its signal towards markets and investors, which could lead to severe and unintended market reactions. Thus we believe that this tool should only be used when all recovery options have failed and should entail clearly defined competences, confidentiality requirements, accountability and a strict time limit (i.e. less than one year).

The proposed possibility of preventative supervisory intervention in groups or group structures is met with fundamental reservations. Splitting a group into independent functional units would be at odds with the objective of centralised management and control for most institutions in the preventative phase. Furthermore, it would considerably reduce institutions' capacity to extend large loans, which would undoubtedly have an adverse impact on the real economy. It should also not be overlooked that the current structure of many institutions has its roots in history or has been determined by the need to meet regulatory or fiscal rules which might render very difficult a re-organisation of activities. We nevertheless believe that it is advisable for institutions of a certain degree of complexity to have adequate resources in place to continuously monitor their structure and evaluate the potential for simplification (as is already generally done).

At any point it is critical that there is no confusion as to who is the 'lead authority'. Up to the point of the resolution phase the supervisory authority should be in the lead. It should also be clear that in the recovery phase, it is the management which is in control of the firm, albeit under enhanced supervision if considered necessary.

The 'bail-in' tool could only work as a measure of last resort when all other measures, including the use of contingent capital instruments, have failed. Further investigation is needed into the feasibility and mechanics of the various suggested proposals for bail-in of senior debt. By applying the bail-in tool it must also be ensured that the continuation of the affected institution is only temporary. It must be avoided that such a bail-in results in an institution being kept permanently in the market at the expense of its competitors.

If a bail-in mechanism is eventually constructed it is important to ensure that there is a clear ranking of creditors, such that senior debt would only be converted or written-down in the case of an orderly resolution and if the contribution of shareholders and other debt instruments have played their role and prove to be insufficient. The possible systemic consequences of conversion or write-down of debt instruments or the write-down of equity or debt instruments in this way will need to be carefully examined. Also, any proposals should be fully compatible with the Basel Committee's requirements of Tier 1 and Tier 2 capital instruments that will need to contain a conversion feature at the point on non-viability. The existence of such capital may obviate the need for a bail-in and must be exhausted before this measure is applied. Concerning the 'bail-in' scenario as such, we also need to point out that, at present, issues persist for companies not organised as joint-stock companies and highlight that for such banks, a permanent write-off should not be the only option left in such a scenario.

Furthermore, and as a general message relating to the outcome of a resolution or restructuring process, it should be ensured that creditors of the same class are treated equally and that unsecured and secured creditors should not be worse off than they would be as the result of an orderly liquidation.

Resolution funds

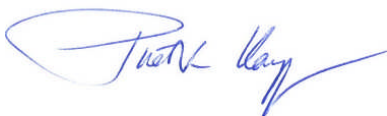
As regards the resolution fund, EBIC would like to highlight the need to keep in mind the cumulative impact and burden of this and other (existing or proposed) measures on the banking industry. Furthermore EBIC objects to introducing or maintaining additional national bank levies in parallel to contributions to resolution funds. EBIC also finds it important to ensure that, if established, the resolution funds function according to common principles and stresses that there should be an appropriate and clearly defined basis for the calculation of contributions. However, the detailed level of banks' contributions to the fund as well as the question of ex-ante or ex-post financing of the fund should be left to Member States' discretion, where, if a mandatory ex-ante financing system is to be implemented, a sufficient transition period needs to be ensured in order to allow institutions in the countries concerned a reasonable timeframe to build up the necessary funds.

EBIC furthermore stresses that the use of these funds needs to be clearly defined. Here we find that the purpose of the fund should be dedicated to resolution exclusively (liquidation or orderly wind-down) and be at least ring-fenced from the general budget. As regards the context of deposit guarantee schemes (DGS), EBIC finds that DGS and resolution funds are, in principle, separate matters. However, possible synergies between them could be explored. In the case where a DGS ensures the funding capacity for resolution purposes, it should be considered that there is no need to create new funds. Thus the Commission should leave this aspect to Members States' discretion, also with the view to avoiding a double burden.

Let us conclude by underlining that we appreciate and share the Commission's recognition of the importance of an effective planning and implementation of the early intervention stage. We also welcome the objective to prevent a future need for state interventions in the banking sector. Nevertheless, we need to call for increased efforts to secure international alignment to alleviate concerns arising for the global level playing field.

We are confident that you will agree on the importance of the issues we raise, especially as we highly appreciate the Commission's awareness of the complexity of this undertaking. Of course we are at your disposal for future discussion or input.

Yours sincerely,



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EBIC Chair



Peter KONESNY
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