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Summary of the public consultation on the reorganisation and winding-up of credit institutions

I. Introduction and background information

Introduction

1. In May 2007, the Commission launched a public consultation on: (i) whether Directive 2001/24/EC on the reorganisation and winding up of credit institutions leaves gaps or ambiguities that need to be removed; and (ii) issues arising in the context of crisis management and resolution for banking groups (i.e. parent credit institutions with subsidiaries in other Member States). The purpose of the public consultation was to take stock of Member States' legal frameworks relating to the reorganisation of banking groups, and to identify possible problems preventing smooth crisis management, which may involve asset transfers within banking groups.
2. This paper summarises the responses and presents an overview of the policy issues raised by respondents (Ministries of Finance, Justice, Economic Affairs, financial supervisors, national and international industry associations, deposit guarantee schemes, central banks). The Commission received 51 answers to the consultation; 39 are from Member States' national authorities and 12 from industry.
3. The publicly available responses to the public consultation are available on the Commission's website:

http://ec.europa.eu/internal_market/bank/windingup/index_en.htm

Background

4. As a follow-up to the October 2007 Ecofin Council meeting, the Commission is requested to prepare by mid-2008 a feasibility study and by mid-2009 proposals on how to further improve EU banking groups' crisis resolution and management arrangements in the following areas:
 - In the area of crisis resolution, the Commission is invited to "assess the possible extension of the scope of the present EU Directive on winding up and reorganisation to include insolvent subsidiaries with the objective to increase the efficiency, the optimal reorganisation and winding up of cross border banking groups taking due consideration of the interests of all stakeholders concerned".
 - In the area of crisis management, and "alongside the review of the Winding Up Directive ... the Commission [is invited] to perform a feasibility study on reducing barriers for cross-border asset transferability while introducing appropriate safeguards within banking, insolvency and company law, taking into account that the reallocation of assets in a crisis affects the ability of stakeholders in different legal entities to pursue claims. The overall objective is to reinforce the primacy of private solutions, avoid counter-productive ring-fencing of assets, and facilitate a smooth management of a crisis".

II. Main results of the consultation

Problems, ambiguities in the current text

5. Even though the Directive's rules have never been applied in practice, respondents expressed their views on a number of provisions that might need clarification or amendment. Respondents asked for more clarity on issues related to the role of host authorities, equivalence of claims, form of publication, deadlines, and provisions on information exchange.
6. Respondents also called for new legislation catering for the insolvency of cross-border branches of investment firms and payment institutions, which are at present not covered by any directives. A more precise reference to e-money institutions in this context would also be welcomed by some respondents.

Extension of the Directive — winding-up of cross-border banking groups

7. Member States and the industry broadly supported a legal framework tailored to the winding-up and reorganisation of cross-border banking groups. This would contribute to further enhancing the financial stability arrangements given the increased activity of cross-border financial groups.
8. Respondents proposed a set of possible solutions regarding both the winding-up and reorganisation of cross-border banking groups and the reduction of obstacles to asset transferability. Some of these solutions might be mutually exclusive, while others might be applied cumulatively.
9. Possible options/solutions suggested by respondents could include:
 - (i) Full harmonisation across Member States;
 - (ii) Harmonisation limited to specific circumstances (e.g. in case of intermingled assets, confusion of proceedings, cases of mismanagement);
 - (iii) Coordination of multiple insolvency proceedings by a "lead" insolvency administrator governed by the law of each Member State;
 - (iv) Possibility for all creditors to file claims against any insolvent entities of the group;
 - (v) Mere cooperation (requirement for administrators to cooperate and for the judicial/administrative authorities to consult the authorities of the home country of the parent company).

Asset transferability within a cross-border banking group

10. The following solutions might be considered to address legal obstacles to asset transferability:
 - (i) Full harmonisation to overcome obstacles in terms of company law, banking law and insolvency law;
 - (ii) Harmonisation with respect to some key issues (e.g. group's interest in company law);
 - (iii) Supervisory arrangements for asset transferability (e.g. agreement of home and host banking supervisory authorities) and conditions to allow asset

transferability;

(iv) Mutual intra-group agreement (i.e. intra-group guarantees).

11. However, in the interest of financial stability, such asset transfer should not be detrimental to entities from which assets have been transferred. The overall benefit of stakeholders (shareholders, creditors, governments, and employees) needs to be assured. Adequate safeguards could include:
- guarantees provided by the parent or another entity of the group;
 - access to all proceedings for creditors with a priority right;
 - cooperation and agreement of national authorities to transfer of assets;
 - protection of minority shareholders, creditors and the entity transferring assets as part of a group's winding-up or reorganisation process.

Powers of supervisors

12. Any EU-wide approach to winding-up and asset transferability may require similar specific powers for authorities to fully and effectively cooperate. In this respect, the consultation has demonstrated that the EU legal framework is fragmented. The extent of banking supervisory authorities' involvement in crisis resolution and management varies from one country to another. Future work needs to address this situation in order to enable banking supervisory authorities (hereinafter "competent authorities") and other authorities to work together effectively.

III. Results of the consultation on the reorganisation and winding-up of credit institutions

Problems, ambiguities identified in the Directive

13. The first part of the consultation dealt with issues that might cause problems or lead to ambiguities due to unclear provisions or gaps in Directive 2001/24/EC. Several issues were examined, mostly raised by Member States during previous consultations. Although there is no case where the Directive has been tested, respondents concurred that some specific provisions need to be reconsidered.

Article 5

14. Article 5 requires host Member States' competent authorities to inform home competent authorities about the necessity of reorganisation measures for branches within their territory.
15. Many respondents (14) asked for more clarity, especially for the following reasons:
 - Article 5 only establishes a warning role to be played by the host Member State's authorities, but does not give them competence as regards the adoption of a reorganisation measure, which lies with the home Member State.
 - It is unclear which institution is responsible for notifying the competent authorities in the home country — whether it is the administrative or legal authorities in the host country or the supervisory authority in the host country.
 - The term “emergency” should be clearly defined.
16. However, most of the respondents (18) deemed Article 5 sufficiently clear.

Professional secrecy

17. The majority of respondents (22 Yes/12 No) deemed that there is no need to further clarify professional secrecy questions in relation to Articles 4 and 5, which deal with exchange of information between supervisors and administrative or judicial authorities.
18. In the opinion of a Member State, the communication under Articles 4 and 5 is an implicit exception to the duty of professional secrecy as laid down in Article 44 *et seq.* of Directive 2006/48/EC, but is not explicitly dealt with. In addition, Article 47(b) of Directive 2006/48/EC does not allow the exchange of confidential information between authorities before the opening of winding-up proceedings.
19. Respondents opposing the need for clarification said that Article 47(b) of Directive 2006/48/EC already allows the exchange of information between bodies involved in the liquidation and bankruptcy of credit institutions.

Equivalence of claims

20. Under Article 16(2), the claims of all creditors in different Member States must be treated in the same way and benefit from the same ranking as claims of an equivalent nature. It has been observed that the provision can give rise to practical problems where there is no correspondence between claims in different Member States. For instance, in the field of taxes, the host Member State may have different types of taxes with different ranking according to their type. If the tax claim of the host Member State which has to be regarded as equivalent does not correspond to any of these types, the Directive does not give any indication as to its ranking.
21. Most respondents (19 against 11) supported the need for more clarity of this provision, while some were neutral. Certain Member States suggested that:
 - the ranking of claims should be harmonised;
 - common ranking should be introduced in as many fields as possible;
 - Member States could be required to discuss and solve problems of different rankings of equivalent claims when they arise.
22. Clarity was also requested in the application of rules on ranking and preferential creditors and in remedies against delinquent directors.
23. Other Member States shared the view that the principle of equivalence of rankings for equivalent claims established in Article 16(2) was satisfactory. They argue that it is for the administrative or judicial authority responsible for the proceedings to come to a decision on such equivalence. The absence of any equivalence should imply the absence of priority ranking for the claim concerned.
24. Further examination and a clear definition were also urged regarding the equivalence of claims.

Implementation problem due to different definitions

25. The issue was raised as to whether the conflict of law rules and the carve out of Articles 23 to 26 dealing with set-off, proprietary rights, netting and repurchase agreements could give rise to implementation problems given current differences in wording between different directives such as the Financial Collateral Arrangements Directive (2002/47/EC), the Settlement Finality Directive (98/26/EC) and Directive 2001/24/EC on the reorganisation and winding up of credit institutions.
26. Opinions were divided on this issue. Some Member States and industry representatives found it useful to insert harmonised definitions into the Directives so that they can be implemented more easily in all Member States. Others considered that those differences could not give rise to serious implementation problems. Set-off arrangements and issues concerning proprietary rights are governed by explicit national provisions which create legal certainty. Netting arrangements and repurchase agreements, on the other hand, are mostly dealt with in accordance with the particular terms and conditions stipulated in the relevant agreement governing these arrangements,

thus also ensuring a satisfactory level of legal certainty.

Conflict of laws

27. The Directive draws a distinction between two categories of exceptions to the general conflict of laws rule, which are different in scope. For certain contracts and rights, under Article 20, the Directive requires the application of another law in the context of the proceeding. On the other hand, under Article 21, a creditor's rights "in rem" (his property rights) in respect of assets located in a Member State other than the one where the measures are adopted are protected from the effect of insolvency proceedings.
28. One possible ambiguity arises in the field of covered bonds. It might not be clear which is the applicable insolvency law in the case of a covered bond issued in a Member State (A), backed by mortgages on immovable property located in the same Member State (A), by a credit institution authorised in another Member State (B).
29. Respondents' opinions were divided on this issue. For some respondents, it is necessary to explain in greater detail the application of the general conflict of laws rule and its exceptions. A conflict of laws could arise as a mortgage on an immovable property is necessarily governed by the law of the jurisdiction in which the mortgage is registered, whereas the actual obligation could be subject to the law of the jurisdiction in which the issuing credit institution is supervised.
30. Others were not sure whether the problem of conflicting laws exists in this case. One Member State claimed that if the bond issuer were to seek to appropriate the cover pool for itself, the bondholder would have two sets of remedies:
 - a personal remedy against the insolvent credit institution which would arise under the relevant insolvency regime or covered bond regime, and
 - a proprietary remedy against the assets which would be governed by the *lex rei sitae* of the assets as a right in rem.
31. The co-existence of these two rights governed by different laws was not regarded as problematic. In those respondents' opinion, it would not be possible to do this in any other way — the rights against the assets could not be wholly subject to a law other than the *lex rei sitae*, and the law applicable to the personal claims in insolvency must be the law of the place of the insolvency proceedings.

List of national measures and procedures

32. The idea was tested whether a list of specific measures and procedures (such as name, competent authority, scope, content and effects) for reorganisation measures and winding-up proceedings covered by each national implementation of the Directive should be compiled in an informal manner. This might ease communication between authorities and liquidators in different Member States.
33. The overwhelming majority of respondents supported the idea and regarded it

as useful. This would improve and ease communication between authorities. One respondent emphasised the need for an organised procedure rather than an informal one. Another called for a centralised approach to maintain this list. One Member State suggested the publication of national proceedings on the Commission's website. Such stocktaking could build on the work already conducted by the Legal Committee of the European System of Central Banks, and could give a broad picture of the specific characteristics of the national procedures.

34. Others feared that such a list would complicate, and therefore slow down, communication between authorities. It was also deemed questionable whether a mere list of proceedings would increase awareness of the effects and characteristics of national procedures.

Standardised form for publication

35. There is no standardised form (like the one used in Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings) that competent authorities can use for the publication in the *Official Journal of the European Union*. Opinions were sought as to whether a standard form might also be developed with a view to helping communication between competent authorities in different Member States and facilitating the provision of information to known creditors.
36. The overwhelming majority of respondents said that a standardised form would improve and speed up the provision of information. This would make it easier for creditors to lodge their claims or submit observations relating to their claims within the prescribed time limits.
37. Some Member States however questioned whether such a standardised form would have any added value or even regarded the publication of reorganisation measures as inappropriate as this could lead to panic among depositors.

Submission deadline

38. The submission for publication of an extract from the administrative or judicial authorities' decision (Articles 6 and 13) in order to facilitate the exercise of the appeal in good time is not subject to a specific deadline, but must be carried out at the earliest opportunity.
39. The majority of respondents (23) called for a precise deadline to govern submission for publication. The deadline is regarded as necessary to avoid legal uncertainty and to ensure that information is communicated in time so that appeals can be lodged. Furthermore, respondents suggested that the time period allowed for publication formalities should be as short as possible.
40. Respondents opposing (11) a precise deadline said that there is no necessity to use a specific deadline as the submission must be made "immediately". Furthermore, the concept of earliest opportunity is clear enough and easy to apply for all kind of situations.
41. Others argued that if the deadline expires before the earliest opportunity, there is more legal uncertainty than under the present text. If the deadline expires after the earliest opportunity, the submission may be delayed, which is

undesirable.

42. One Member State suggested that deadlines should be in line with the individual publication deadlines in each Member State.

Centralised contact point

43. There is no centralised system in place for the provision of information on the opening of reorganisation measures and winding-up proceedings. In order to achieve a greater degree of transparency across the EU, the question was raised as to whether a contact point responsible for the publication of relevant information should be designated.
44. The majority of respondents supported a centralised information system to increase transparency. This would facilitate the timely provision of all relevant information to all interested parties, thus securing the equal treatment of all creditors. Some respondents pressed for an online system, which would be easily accessible for all stakeholders. However, it needed to be considered who would bear the responsibility for any mistakes or incomplete information in the system.
45. In the opinion of other respondents, there is no need for such a centralised system as Articles 6 and 13 clearly provide for the publication of relevant information.

Third-country branches

46. The Directive applies to the branches of a third-country credit institution when the latter has branches in at least two Member States. However, the Directive does not provide in such cases for a single proceeding. In accordance with Articles 8 and 19, the authorities of the Member State hosting the branch should inform the competent authorities of the other host Member States about their decision to adopt any reorganisation measure or to open winding-up proceedings regarding the branch they host. The Directive further provides that the administrative and judicial authorities and the competent authorities as well as the administrators and liquidators must “endeavour” to coordinate their actions.
47. Opinions were divided as to whether there is a need to further clarify and improve the provisions regarding third-country branches. Some argued that the Directive could be improved by incorporating provisions which would bring about maximum coordination of the activities of the competent authorities and the administrative or judicial authorities involved in the proceedings, for the benefit of the entire group of creditors and other third parties.
48. Others suggested that a single proceeding should apply to all branches of a third-country credit institution located in the EU. However, some of those in favour of more clarification admitted that it is doubtful whether the implementation of one procedure for all branches is possible. They said that it is difficult to set out a leading criterion for the identification of the relevant national law and authority responsible for the single proceeding. One respondent called for the involvement of third-country authorities. Another Member State wondered whether it is even possible to wind up a branch

without winding up the whole bank.

49. Member States also expressed the view that there was no need to change the relevant provisions. Third-country branches could be subject to different arrangements in different Member States, e.g. in terms of licence conditions.

Deposit Guarantee Schemes

50. With regard to Deposit Guarantee Schemes (DGSs), stakeholders were asked (i) whether DGSs should be informed to the same extent as other competent authorities; and (ii) whether DGSs enjoyed priority rights over other claimants and if this should be harmonised.
51. While a majority of DGSs considered the provision of information to DGSs very important, contributors were split in their opinions about how to ensure this. Whereas some (22) respondents suggested extending the scope of the term “competent authorities” in Directive 2001/24/EC to DGSs, others (16) preferred a separate legal provision on information obligations, and 5 respondents were neutral on this question. Those who were against an extension of the scope often referred to DGSs’ lack of competence for winding up and particularly for reorganisation. One respondent proposed that the extension should apply in the case of liquidation but not in the case of reorganisation. A number of contributors were concerned that professional secrecy might be compromised in the case of privately run DGSs with bank managers on their board.
52. As to priority rights, the replies revealed that six Member States have introduced such priority rights. Some respondents clarified that a DGS subrogated to depositors’ claims would avail of the depositors’ priority rights. The replies of some respondents implied that in the case of a cross-border situation problems might occur as to the equal treatment of DGSs from another Member State. Consequently, the majority of those who responded to this question (22) believed that harmonisation would be useful.

Gaps in the scope of the Directive

53. It has been broadly suggested that the scope of the winding-up arrangements should cover all institutions:
- No Community legislation currently allows harmonised cross-border treatment of investment firms (that hold client money or assets).
 - As credit institutions, electronic money institutions are already covered by the Winding Up Directive but this may not always be the case for e-money institutions under a waiver.
 - It has been noted that some insurance companies (e.g. in reinsurance) are not covered by the Directive on the reorganisation and winding-up of insurance companies.
 - Payment institutions as defined in the Payment Services Directive should also be addressed.

Investment firms

54. Respondents (22 Yes; 6 No) were broadly in favour of new legislation to govern the winding-up and reorganisation of branches of investment firms and collective investment undertakings. 6 respondents differentiated between investment firms and collective investment undertakings, by supporting coverage of the former and opposing that of the latter. Some drew attention to the need for a thorough examination prior to any legislative action.
55. Advocates of coverage argued that in an internationalised sector which is composed of heterogeneous actors, the absence of European coordination in case of bankruptcy could give rise to significant difficulties. Legal uncertainty for investors undermines confidence in and more broadly the stability of the financial sector.
56. Respondents opposing the inclusion of investment firms and collective investment undertakings reasoned that the CAD (2006/49/EC) and the UCITS (85/611/EEC) Directives and corresponding national regulations provide for a strong set of specific rules aimed to protect investors. Therefore, such an extension would lead to a duplication of statutes and would not provide any added value for investors. One Member State emphasised that collective investment firms are not allowed to establish branches in other Member States, so there is no need for such a directive.
57. Respondents from the industry claimed that since investment management firms and collective investment schemes do not accept deposits and do not lend to clients, risks are not comparable to those of credit institutions as clients' funds are segregated and protected. They deem existing legislation to be adequate to handle the reorganisation or winding-up of such firms.
58. Views were divided as to whether coverage should result in a separate directive being drafted or whether the present Directive should be extended to investment firms. A separate directive could take into account the specific characteristics of these entities and would ensure clear and precise regulation of the issues to a maximum extent.

Electronic money institutions

59. Most of the respondents (19) called for more clarity regarding the insolvency of electronic money institutions governed by Directive 2000/46/EC to provide legal certainty especially for e-money institutions waived pursuant to Article 8. Others argued that since e-money institutions are credit institutions, Directive 2001/24 applies to them without any need for clarification.

Group approach to winding-up and reorganisation

Extension of the Directive

60. While some respondents (13) considered that extending the scope of Directive 2001/24/EC to subsidiaries of banking groups was unnecessary or premature, many respondents (19) supported such extension. Respondents called for thorough legal analyses and feasibility studies before any proposal was made

to extend the Directive to banking groups. The following arguments were put forward:

- Insolvency of subsidiaries established in the EEA will lead to the opening of many uncoordinated proceedings.
- Present arrangements are not capable of offering sensitive solutions to problems arising in the context of a wider crisis facing a banking group.
- There is a need to keep pace with market developments and the way groups are organised (centralisation of management, organisation by business lines).
- Ring-fencing of assets should in principle be avoided because it undermines the objective of the winding-up of a banking group. All claims of similar or equivalent type should be treated equally.

61. Respondents who argued against extension voiced the following concerns:

- If an identical approach were taken to determining the competent authorities and the applicable law as regards prudential supervision, reorganisation measures and winding-up proceedings, situations of conflict would necessarily occur at the expense of the efficiency of preventive measures and therefore of credit institutions and creditors.
- Extension would result in subsidiaries being treated as branches in winding-up proceedings. All entities incorporated according to national legislation are independent legal persons belonging to separate legal jurisdictions.
- National laws already provide enough flexibility to face most of the issues.
- There is no evidence to suggest that winding up a cross-border group under the current Directive would be less effective, or less optimal, than if the Directive had a broader scope.
- The extension of the Directive to groups could bring considerable insecurity to the capital market as it would become difficult to assess the quality of securities and/or claims as a whole. Arrangements are closely related to national legal requirements (e.g. covered bonds). Extension could have a negative impact on the protection of covered bond holders.
- Situations should be avoided where unsound group members drag down other solvent group members into insolvency.
- As insolvency legislation is not harmonised, single proceedings are not realistic and any "extension" would raise critical questions about Member States' and courts' competences and applicable laws.

62. Some respondents emphasised that extension of the Winding Up Directive should be thought of alongside the increasing involvement of the consolidating supervisor, as well as the possibility to delegate responsibilities under Article 131 of the CRD. This may include transferring competences on reorganisation

measures. Put another way, the scope of the Directive is ancillary to more general issues such as supervisory and regulatory responsibilities including reorganisation measures.

Group insolvency procedures

63. In the EU, some national legal frameworks already deal with insolvency issues regarding corporate groups. These provisions and case laws could serve as a basis for work on the insolvency of cross-border banking groups. Member States reported the following possibilities regarding insolvency of groups:
- In 9 Member States among the respondents, joint insolvency proceedings including different members of the same group can be initiated. Insolvency law generally allows for this possibility in one Member State, while in the other Member States, the court has the power to decide whether group members can be included in one proceeding.
 - In 13 Member States, it is already possible to appoint the same insolvency administrator for members of the banking group under reorganisation. In one Member State there is only one professional entity that can be appointed as administrator for banks.
 - In 8 Member States, it may be possible to adopt a single reorganisation plan for all members of a banking group under insolvency proceedings. This possibility seems however theoretical in some Member States and can be applied only exceptionally.
 - In 11 Member States, liabilities may be extended to other members of the same banking group under certain conditions. In one Member State if a controlled company (75% owned by another company) goes into winding-up proceedings, the owner of a qualifying holding may bear unlimited financial liability for all liabilities under specific circumstances. The same possibility may apply even without qualifying holdings if a controlling company is required to draw up consolidated annual reports or if companies join forces in pursuing their common business interests and strategy. In other Member States, extension of liabilities is possible in the case of action in bad faith, unpaid equity, loans granted to shareholders with at least 25% of voting shares, asset transfers taking place prior to the insolvency proceedings or mismanagement.
 - Consolidation or pooling of assets and liabilities of different members of the same group is rare in the EU, and is only possible in 3 Member States on an exceptional basis. In one Member State, supervisory authorities have the sole power to make decisions on pooling, while in another Member State, the supervisor and the judicial authority may order a consolidation. In one Member State, pooling may be possible only in the case of fictitious legal personality or if assets are intermingled across different group entities leading to the confusion of assets.
64. The above insolvency techniques that aim to treat insolvent members of the same group in a more coordinated and thus more efficient way are possible only domestically.

Proposed solutions

65. Some respondents emphasised that an extension of the Directive to banking groups must be based on harmonisation of Member States' insolvency laws, including the ranking of claims. Others emphasised that this review should include deposit guarantee schemes together with burden-sharing arrangements between Member States.
66. While supporting a group-wide approach to winding-up, respondents emphasised that any "extension" of the Winding Up Directive should be strictly defined and circumscribed:
- The notion of financial group — which is more an economic concept than a legal one — needs to be carefully defined for winding-up purposes.
 - Conflicts of laws with the Insolvency Regulation need to be considered, and in particular when a bank is a subsidiary of a non-banking group.
 - Specific criteria would have to be introduced for any "extension" of the proceedings (e.g. assets are intermingled, same management).
67. As part of a group-wide approach to winding-up, some respondents have suggested concrete measures:
- The reorganisation or winding-up measures taken by the home authorities could be extended and applied to bank and non-bank subsidiaries, by opening secondary proceedings according to Regulation 2000/1346/EC (Insolvency Regulation).
 - Proceedings may be extended to other entities of the group under given conditions and circumstances. The reorganisation or winding-up measures against the parent could be extended and applied to the subsidiaries where assets are intermingled, or if the subsidiary is nearly fully owned by the parent, and when the parent has expressed its consent to support subsidiaries (specific commitments). In the interest of the procedures, the court of the home Member State could decide to consolidate the insolvency proceedings of the whole group.
 - The same bodies need to be appointed as responsible for the proceedings affecting different entities of the same group.
 - Any deposit holder/creditor, whether in the insolvency proceeding against the parent company or in the insolvency proceeding against a subsidiary, should be able to lodge his claim in the insolvency proceeding against the parent company and against all subsidiaries under insolvency.
 - There should be a possibility for preparing a joint group reorganisation plan.
 - Reorganisation and winding-up procedures involving companies belonging to the same group should be coordinated.
68. A single insolvency procedure for all group members was considered extremely difficult and even unrealistic by certain respondents:
- It would raise critical legal issues in terms of applicable law and

competence of courts.

- Adopting a common EU insolvency proceeding for cross-border banking groups would require major amendments to national insolvency, reorganisation and company laws.
- The responsibilities for the reorganisation and the winding-up of credit institutions are in line with the responsibilities for the authorisation and supervision of credit institutions.

69. As opposed to harmonisation, some respondents suggested further coordinating the multiple insolvency proceedings involving entities belonging to the same group. While some respondents simply suggested improving collaboration between insolvency administrators, the following approach was also suggested:

- The insolvency administrator appointed in the insolvency proceeding opened in the Member State where the consolidating supervisor is located could take the lead in the coordination of all insolvency proceedings.
- The “lead” insolvency administrator should have the possibility to request the opening of insolvency proceeding against subsidiaries in other Member States.
- Measures taken by insolvency administrators appointed in proceedings against subsidiaries should be approved by the lead insolvency administrator. In addition, it was suggested that he should have the power to effect the coordinated sale of the assets of the institutions in question.

Asset transferability in crisis situations

Importance of asset transfers

70. It was confirmed (21 respondents against 2) that asset transferability in a crisis situation was critical for both host and home countries (with regard to subsidiaries):

- Transfers of assets are useful in crisis situations, especially when the group as a whole is still solvent and when restoring the group’s soundness is viable.
- “Ring-fencing” should in principle be avoided.
- Asset transfers enable capital to be allocated most effectively against risks.
- Subsidiaries are becoming less self-contained and more like branches. Consequently, it is getting more and more unlikely that they can continue their business if the parent bank defaults.

71. While critical, asset transferability needs careful safeguards:

- Asset transfers may be beneficial to the group but they could be detrimental to the general creditors and minority shareholders of the insolvent entity.

- Host countries need protection from asset stripping of a subsidiary bank by the parent bank, particularly when this is systemically important for the host country.
- Asset transfers should only be considered at the prevention and management stages of a crisis. Transferring assets in the resolution phase would mean “institutionalised contagion” and would constitute implicit burden sharing.
- Asset transferability raises crucial issues in terms of company law (i.e. the legal treatment of entities included in the corporate structure of a group).
- The direction of asset transfer (from parent to subsidiary, from subsidiary to parent, from subsidiary to subsidiary) might require different considerations.

Legal obstacles

72. The most important obstacles for asset transfers lie in company law:
- Lack of recognition of a group as a distinct legal entity.
 - Asset transfers may lead to an “abnormal act of management, misappropriation of corporate funds”.
 - Agreement of the Board of directors is in many cases needed. This means that it would be necessary to authorise transactions resulting in a transfer of assets from the parent to the subsidiary.
 - The parent undertaking is not allowed to force the adoption of any decision which may be detrimental to the subsidiary.
 - Prohibition of important transfers in some jurisdictions, depending on the type, size and risks involved.
 - The legality of asset transfers is dealt with by case law, and depending on the circumstances of each group. This does not provide a clear and operational framework for crisis management.
73. Different rules exist for the liability of the management in relation to asset transfers between group members:
- In most Member States, management may be held liable in general if they infringe their duties and cause damage to creditors. The conditions, criteria and sanctions vary from one Member State to another.
 - In one Member State, the management body of a subsidiary is not personally liable when assets of the subsidiary are transferred to the parent company or related parties, especially as long as the assets remain within the group. In another Member State, the fact that the transfer took place within a group would be taken into consideration when assessing liabilities.
 - In a few Member States, personal liability of the management is not governed by either banking, company or insolvency law.
74. In a number of Member States, banking laws also treat intra-group transactions with a special focus:

- Intra-group transactions must be carried out at arm's length in half of the respondent Member States, while in the other half there is no such obligation.
- Supervisory action could be triggered by detrimental or disadvantageous transactions that could result in a bank's failure to meet capital requirements.
- Transactions should not carry excessive banking risk and should be performed in accordance with sound administrative and accounting procedures.

The group interest

75. While in most Member States, company law was seen as a major obstacle to asset transferability, in some Member States a specific legal framework for parent/subsidiaries relationships is in place. In these Member States the following legal framework recognises to a certain extent the group interest when transferring assets (domestically):

- For groups subject to a “control agreement” (i.e. a contract enabling one undertaking to take control over the decisions of another undertaking), the parent company may direct orders to its subsidiary. The law requires the mandated actions to be in the interest of the parent company or to serve the interest of the group as a whole.
- In other jurisdictions, companies may conclude a “subordination contract” under which disadvantageous instructions may only be given by the director of the company to the subordinated company when those instructions are in the interest of the director company or other companies belonging to the same group, unless otherwise provided. Fair compensation must take place.
- Case law on “company interest” in some jurisdictions recognises that a company belonging to a group may be asked to temporarily assist another company provided that the support is not disproportionate to the capacities of the supporting entity, and does not lead to serious difficulties, the excessive nature of which is foreseeable. Likewise, it has been deemed that there is no criminal responsibility when financial assistance follows an economic, social or financial interest and when the transfer of assets is not excessive.
- In some jurisdictions, the conclusion of a contract or adoption of detrimental decisions for the subsidiary cannot be challenged or reversed.
- It has been pointed out that agreement must be secured at General Meetings, and in some jurisdictions, transactions detrimental to the subsidiary instructed by the parent company are not prevented if the parent company owns all the shares in the subsidiary.

Possible solutions

76. Respondents proposed the following ways forward to deal with asset transferability and to remove obstacles:

- harmonising key provisions of company and insolvency laws for cross-border banking groups;
- mutual group-wide agreement;
- framing supervisors' responsibilities in authorising a transfer and strengthening their cooperation.

Harmonisation

77. Some Member States called for harmonised measures to overcome the barriers to asset transferability. In the opinion of one respondent, it might be necessary to lay down a legal framework for EU banking groups which entails an enhanced role and responsibility of the parent bank, including the definition of the group interest, the conditions under which such an interest can overcome the individual companies' interest, the possible protection of relevant stakeholders, and the possibility to waive prudential requirements on a solo basis.

Mutual agreement

78. Some respondents (Member States and industry) emphasised that there would be merit in revising and drawing up specific procedures on asset transferability. From the perspective of the host country, it has been pointed out that generally parent banks do not provide any guarantee supporting the subsidiary in case of difficulties. Public agreements on mutual support in the group were seen as a possible way forward. Each of the group's entities would be expected to commit themselves to acting in the group's interest and to sustaining each other by transferring assets to the defaulting entity. At the same time, the possibilities and conditions of asset transfers should be jointly determined by supervisors on an ex ante basis, and agreed upon by all supervisors involved in the crisis management process.
79. The issue was raised as to whether such agreements might be workable in practice since they might not be legally enforceable in crisis situations given the legal obstacles in terms of banking, company and insolvency laws.

Supervisory arrangements

80. It has been suggested by Member States and industry that the legal obstacles to asset transferability might be addressed by specific supervisory arrangements in Directive 2006/48/EC. Under this solution, supervisors would have to authorise the transfer of assets.
81. One industry respondent suggested that:
- Such procedures should be agreed upon by the supervisory authorities in advance to allow for fast and appropriate supervisory decision-making when a crisis arises.
 - The possibilities and conditions for asset transfer between the group's entities should be jointly determined by the supervisory authorities concerned, on an ex ante basis.
82. This arrangement would prevent transfers from being challenged in the event

of subsequent insolvency of the entity that provided support to another entity of the group. The role of the supervisor should be limited to authorising the transfer in order to get around the legal obstacles arising from national banking, corporate and insolvency laws. Supervisors should have to decide in the interest of a group. Some countries emphasised that the powers of the consolidating supervisor needed to be increased.

83. Based on case law used in some jurisdictions, it was suggested that the following criteria be used:
- The financial support requested is justified by a common economic, social or financial interest, within the context of a group policy;
 - The financial support is given for a good and valid reason;
 - The support does not exceed the financial capacities of the entity providing it.
84. In order to avoid excessive legal challenges from third parties (creditors of the entity providing the support, minority shareholders), a set of criteria should frame supervisors' powers:
- The group as a whole is deemed still solvent, but faces difficulties in some parts of the group;
 - The transfer should be explicitly defined in order not to jeopardise the liquidity and solvency of entities transferring the assets as well as of the other entities of the group.
 - The solvency ratio of the entity providing the support remains above a certain threshold after providing support. In other words, the transfer will substantially contribute to resolving severe financial problems without jeopardising the solvency of another entity.
85. Such an approach would require accompanying measures in terms of supervisory powers and responsibilities. In terms of supervisory authorities' accountability, the consultation has evidenced that some competent authorities (in 11 of the respondent MS) could be held liable for damages to third parties if they agree to an asset transfer in a crisis situation since they are not competent in this field. In other jurisdictions, this is either impossible or difficult (10 of the respondent MS). In certain jurisdictions, supervisory authorities can only be held liable if decisions are not "reasonable", or in cases of "gross negligence".

Protection of creditors

86. In many Member States (15), there is no legal requirement for the parent undertaking to guarantee obligations of the subsidiaries vis-à-vis creditors in case of asset transfers. In some Member States where a legal framework recognises the group's interest (and allows for instance for a control agreement), the law requires the parent company to compensate the subsidiary for the losses sustained.
87. If reorganisation measures or insolvency proceedings are applied to the parent or the subsidiary, it has been recommended that the Directive should provide

clear rules on possible challenges against the asset transfer when it proves detrimental for the individual entity (as asset transferor or collateral provider) or for its creditors. This may include, in the case of an asset transfer, some form of legally valid guarantee from the entity on the receiving side of the transfer, recognising the claims against a defaulting entity resulting from contributions made by other entities of the group in proceedings and, where appropriate, conferring priority rights on those transfers.

Link with other supervisory arrangements

88. In some instances, respondents emphasised specific issues in relation to other supervisory arrangements.
- Representatives of the industry stressed that in a liquidity crisis, transfer of collateral may be ineffective since some central banks only accept their own country's local authority securities or government bonds as collateral.
 - Specific arrangements for liquidity risk management were suggested to deal with asset transferability. The parent bank should be in a position to withdraw excess liquid assets held in the subsidiary at least up to the amount of funding provided by the parent bank to the respective subsidiary.
89. As a result of asset transferability, it has been stressed that there would be merit in establishing effective cross-affiliate netting arrangements, namely where obligations owed by one insolvent company may be netted against obligations owed to another member of the same group of companies.
90. It would also be worth exploring whether Article 9(1) (and the related definitions) of the Settlement Finality Directive (or national laws implementing the SFD) could be amended to ensure that collateral security provided by an affiliate of a central bank counterparty to a central bank in order to collateralise emergency liquidity assistance provided by the central bank to that counterparty is insulated more explicitly from insolvency proceedings against the affiliate.

Powers of supervisors

91. The consultation has demonstrated that the power of supervisory authorities in the EU is fragmented. In terms of asset transferability, the following aspects merit further consideration:
- In a number of Member States, there are no limits on transactions that might be considered disadvantageous or detrimental for a credit institution, and certain supervisory authorities are neither explicitly empowered nor required to prevent or prohibit intra-group transactions.
 - In many Member States, it is finally for judicial authorities to deem whether a transaction is detrimental to a credit institution but supervisory authorities also have responsibilities in this regard.
 - The legal framework broadly enables supervisors to address compliance with laws and to ensure the safety and soundness of banks under its

supervision. This may implicitly prohibit disadvantageous transactions. In some jurisdictions, supervisory authorities can explicitly prohibit intra-group transactions in crisis situations, or are obliged to prevent intra-group transactions detrimental to one entity.

92. Likewise, circumstances in which reorganisation measures and/or insolvency proceedings are triggered as well as the involvement and powers of competent authorities in reorganisation measures differ considerably from one Member State to another:
- In some countries, an opinion of a supervisor is needed before initiating judicial reorganisation and liquidation procedures.
 - In other countries, proceedings can only be initiated at the request of supervisory authorities.
 - In some jurisdictions, supervisory authorities may intervene in the management of institutions facing exceptionally serious problems, and are entitled to propose or carry out reorganisation measures.
 - Some supervisory authorities may appoint insolvency administrators or may have an exclusive right to do so.