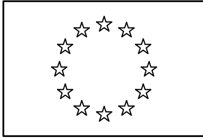


EUROPEAN COMMISSION
Internal Market and Services DG

FINANCIAL INSTITUTIONS
Banking and financial conglomerates

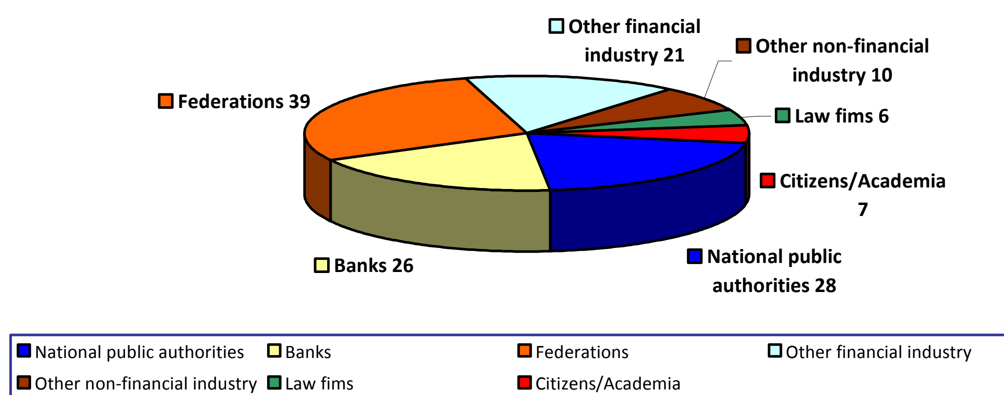
5 May 2011

Overview of the results of the public consultation on technical details of a possible EU framework for bank resolution and recovery

1. WHO RESPONDED TO THE PUBLIC CONSULTATION?

The Commission received 140 responses from a variety of stakeholders:

- 28 responses from national public authorities, from 22 EU Member States and 1 EEA Member State
- 3 responses from EU/international organisations (EBA, IMF and ECB).
- 86 responses from industry stakeholders (26 banks, 39 federations and 21 other financial industry)
- 10 contributions from non-financial industry and 6 responses from law firms
- 7 private individuals/academic committees



2. SCOPE AND AUTHORITIES

2.1. Scope

The majority of respondents agree with the Commission that there is a sound case for applying a resolution regime to all credit institutions and investment firms, but that any decision on what type of institutions to be included must be taken on the basis of a proportionality test; the systemic relevance of the institution concerned is the option favoured by most contributions. The Commission is called upon following the CRD line when defining the categories of investment firms to be covered.

In order to achieve an effective group resolution, respondents suggest that bank holding companies be included in the framework as well. Aware that this option brings along

problems (such as the risk that the resolution of the financial part of the group is done at the expense of the non financial), some respondents recommend the creation of sub-holdings for the financial part only (in the context of preventative powers). Some respondents also point out that a clear definition of financial holding is necessary. Some are worried that, by applying resolution at holding level, the groups might engage in a strategy of moving their assets to third countries. Resolution authorities should be able to include bank holding companies even if the holding company does not itself meet the conditions for resolution

2.2. Authorities

The main view within the contributions favours leaving the choice of authorities responsible for resolution to each Member State's national discretion, provided that it is clear who the authority in charge is. Banks express their preference to have the same responsible authority in all Member States, as this would facilitate cross border resolution. However, most respondents suggest that contact points or an adequate composition of resolution colleges be defined in the framework.

A considerable amount of contributions consider it more effective to combine resolution and supervision in the same institution, but establish functional separation. Another possibility, as expressed by some of the respondents, would be to establish a differentiation between decision (trigger) and execution. The risk of forbearance should not thus imply the creation of a separated resolution authority.

Even if resolution authorities are a matter of national choice, respondents believe that the EU framework should require that any action take account of the possible impact in other Member States.

3. SUPERVISION, PREPARATION AND PREVENTION

3.1. Supervision

National authorities found it difficult to estimate the need for increased resources at this stage. Some federations anticipated considerable costs, but without specifying any amounts; other expressed their wish to have the employee dimension taken into account. Only Santander made a quantitative estimation, divided into a one-off cost (spread over 2 years) of 6 million Euros and an additional ongoing annual cost of 2.7 million Euros.

3.2. Recovery Planning

There is general agreement with the content of the preparatory recovery plans suggested by the Commission. A number of additional elements were suggested by supervisory authorities and banks (such as the identification of potential legal, operational and regulatory implementation barriers; the governance and ownership of the institution; the assessment of the credibility of the recovery plan, including probability of success in response to both idiosyncratic and market wide stress). Federations call for minimal harmonization and proportionality, while law firms consider that additional criteria must be taken into account (such as equal treatment for creditors).

In case of banking groups, most respondents opt for a group preparatory recovery plan. If entity-specific recovery plans are to be drafted, Member States consider that both host and consolidating supervisors should be allowed to require changes to recovery plans,

while the industry believes that only the consolidating supervisor should have such powers.

The proposed mediation role given to EBA in case of disagreement between competent authorities was welcomed by the respondents. However, public authorities and federations do not always mention if the decision issued by EBA should be binding or not for the supervisors involved in the disagreement. Banks are divided: some accept EBA's implication, while others believe that any disagreement should be solved by the consolidating supervisor.

3.3. Intra-group financial support

In general, respondents are split on the issue of intra-group asset transfer. Some Member States believe that a framework for asset transferability would improve the ability of groups to prevent financial difficulties and to increase the overall legal certainty and transparency; others fear that it would blur the boundaries of the limited liability of individual companies and become a source of contagion within a group. The main concern from host countries is the provision of up-stream financial support, thus they propose that the supervisor of the subsidiary should have the power to veto each individual transfer on grounds of protection of financial stability. The banking industry is mainly in favour of the framework with the exception of a few respondents, who think that banks are already able to transfer assets within groups under the current rules and are concerned that the framework might reduce flexibility.

To Commission's proposal of limiting the support to loans, guarantees and the provision of collateral to a third party for the benefit of the group entity that receives the support, MS give their support, while the vast majority of the industry respondents would prefer a broader scope. Most respondents believe that any kind of intra-group support should be possible (down-stream, up-stream or cross-stream) and that a mediation role of EBA is necessary; however, on this last issue, again the views are split regarding whether this should imply a binding decision or not. Host MS generally object to a legally binding decision of consolidating supervisor or of EBA.

If the remuneration is fixed within the agreement, respondents consider that only its parameters should be determined, while the price should be established at the moment when the financial support is granted. According to most respondents, a review should not be required.

There is broad acceptance across the board of the conditions proposed by the Commission for the provisions of intra-group financial support. All respondents agree that the decision should be reasoned; only 2 contributions from law firms suggest leaving the matter to national law.

National supervisory authorities agree to grant the power to prohibit or restrict a transaction under a group financial support agreement to the supervisor of the transferor, but the industry is less supportive on the ground that supervisors might use this power for protectionist or ring-fencing purposes. Regarding the deadlines for reaction, the vast majority of respondents indicate that maximum 48 hrs is an appropriate time limit for the competent authority to make a statement and that the supervisor of the beneficiary should also be imposed a time limit for reply.

On the matter of insolvency protections for the transferor and its creditors, the majority of responses coming from supervisory authorities demonstrate a preference for having in

place both a priority claim for the transferor and a claw back regime. The industry side is divided between either accepting both mechanism as appropriate, or giving preference to the priority claim, as long as certain conditions are respected (the financial support should be capped at a certain amount, the priority claim ranks below all claims that enjoy priority according to national law, etc). Law firms, on the contrary, tend to reject both legal instruments. MS consider that, if adopted, each instrument should be subject to a time limit, although they tend not to mention the exact amount of months. The industry is more specific, establishing a 12 months maximum limit. A small number of banks and federations consider that no time limit should be imposed whatsoever.

Answers from Member States on the disclosure of agreements for intra-group financial support reflect a general positive approach. Some respondents call for a case-by-case evaluation of the disclosure needs or a limited disclosure only to the interested parties. Banks are divided. The majority of federations do not opt for disclosure.

3.4. Resolution Planning

3.4.1. Individual resolution plans

As for the scope, Member States consider that resolution plans should be required for all credit institutions, provided that such an obligation is proportionate to the size and systemic nature of the entity covered. The industry, on the other hand, expresses mixed views: some prefer to have all institutions covered by the framework in order to circumvent the difficulties of establishing the systemic relevance of a firm on an ex ante basis, whereas others prefer that small firms, which are not interconnected, to be carved out.

As for the content, the elements suggested by the Commission are considered to be adequate in order to prepare for resolution. However, some respondents are concerned about too much auto-complacency it is almost impossible to foresee all possible scenarios. As for the additional elements, the following were suggested:

- key dependencies of economic functions on the central functions of the group and the proposed solutions to these in a resolution scenario,
- exposures to other financial institutions,
- details of the governance process for the preparation and implementation of the plan (for example cooperation between authorities),
- specific resources for the execution of resolution within the required timescale,
- information about key contracts, guarantees and safeguards.

3.4.2. Group resolution plans

With the exception of the ECB, IMF, four Member States and three industry organizations, all the other respondents consider that preventative powers would be an unjustified interference in the freedom of the firm to organise its business. In relation to the proposed powers, most respondents particularly oppose to: requiring the credit institution to limit or cease certain existing/proposed activities; restricting or preventing the development or sale of new business lines or products and requiring changes to legal and operational structures of the entity for which the resolution authority is responsible. Authorities that oppose reason that such powers will conflict with the powers already granted under Pillar 2 of

the CRD. Some respondents could accept them as long as they were to be used at the early intervention stage. Some contributions also warn about their impact on the single market.

3.4.3. General principles

Asked if resolution planning achieve an appropriate balance between ensuring the effective resolvability of credit institutions and groups and preserving the Single Market, respondents generally qualify the suggested powers as rather intrusive and thus able to interfere with the normal functioning of the Single Market. In this direction, different points were raised:

- the power to require changes to the legal or operational structure of a banking group raises concerns given its potential effects on the Single Market;
- the procedure foreseen at group level is partly inconsistent with the procedure proposed at the entity specific level;
- the "public interest" notion in D5 is not clear enough;
- the proposed powers conflict with the freedom of institutions to structure their own organisation.

A scenario where only the group resolution authority is entitled to require changes did not receive any support amongst Member States: they opt either for involving both home and host resolution authorities. Banks are split: some consider that no resolution authority should be given such power on the basis of perceived future impediments to resolution; those that accept to grant such decision only to the group level resolution authority require either that (i) the organizational structure of a firm be taken into account in day to day supervision and demands for changes as a result of recovery or resolution planning be kept to an absolute minimum, or that (ii) possible requests pass through the home regulator and when necessary, the College of Supervisors and the EBA. Federations think that, in order to avoid the mistakes of the recent financial crisis, changes to legal or operational structures should not be decided by a single authority; it would be fairer and more effective to confer such a power to the resolution college as a whole with a decisive mediation role played by EBA.

In terms of safeguards, answers are divided: on one hand, there are those who believe that the proposed safeguards are adequate and, on the other, those that suggest adding extra guarantees beyond the right of appeal and judicial review, such as:

- greater clarity on the determination of significant impediments;
- an appeal and mediation process as an initial phase before legal appeal/judicial review – perhaps the EBA or a college of resolution authorities, subject to suitable safeguards around confidentiality;
- the implementation of the powers should be stayed pending a finally binding judicial decision being handed down;
- any proceedings should be held in private with no public disclosure;
- clarification of the conditions under which a right to challenge rises: where the affected entity can challenge such a decision; who has the right to challenge the decision; if a Court declared such a change unjustified, how is the bank compensated for the damages suffered.

4. EARLY INTERVENTION

4.1. Early intervention powers

The revised trigger for supervisory intervention under Article 136(1) CRD is welcomed by Member States, who consider it sufficiently flexible to allow supervisors to promptly and effectively address a deteriorating situation. The industry respondents and some MS are concerned that the wording 'likely breach' gives too much discretion to supervisors; this trigger is considered to be too vague and subjective and might lead to contradictory interpretations across jurisdictions.

Many respondents pointed out that a number of early intervention powers are already available to supervisors under Pillar 2. The industry also expressed concern about maintaining confidentiality, as market awareness of the use of early intervention tools could exacerbate a firm's problems and lead to financial instability. Some respondents pointed out that certain powers that are too visible to the market - such as requiring the institution to negotiate restructuring of debts or requiring the replacement of the management – should be withdrawn from the list. Two respondents suggested that, before an early intervention phase is triggered, there should a period of confidential or 'silent' intervention where supervisors can impose measures when a firm is likely to fail to meet the CRD requirements.

When consulted on whether the additional powers proposed for Article 136 are sufficient to ensure that competent authorities take appropriate action to address developing financial problems, Member States agree, but call for flexibility as to decide on the use of additional tools. Most of the industry considered that the powers are too far reaching, especially if they are linked to 'likely breaches'. The main suggestion is there should be a clear distinction between early intervention and resolution. Certain powers seem to mix the two phases. Further suggestions are made:

- the replacement of the management or special management should be linked to specific conditions such as suspect of fraud or inability to ensure prudent management;
- the early intervention should be dived in 2 phases: a first phase of intervention of supervisor with the management of the firm, with the possibility to appoint a special management at a much later stage.

Law firms consider that there should be clear rules in the framework ensuring creditors' engagement in early intervention. They made the point that early intervention measures designed to restore capital will be embedded in the Basel 3 capital buffers anyway, so there is no more need to include them in the EU framework.

4.2. Special management

Most public authorities support the special manager tool. However, some Member States either express reservations or are clearly against it. They consider that, if made public, the appointment of a special manager risks creating a loss of confidence in the distressed bank and thus has negative financial consequences. Several suggestions were maid by those in favour:

- the mandate of the special manager should be enlarged and not limited to preparing a restructuring plan;
- the triggers should be more stringent than those for early intervention powers, as this measure is more intrusive (e.g. it should be linked to actual breaches of the

CRD requirements, to the risk of suspension of payments or of insolvency or to the inability of the bank managers to ensure a sound and prudent activity, etc.);
- the liability of the special manager should be addressed;
- early intervention powers should include, in addition to the power to appoint a special manager in the terms proposed by the Commission, the possibility to appoint a manager to assist the board of directors and veto their decisions.

The industry expresses mixed views on the proposal to appoint a special manager. Many banks and federations suggest using it as a resolution tool instead of an early intervention one, thus only making it available when a firm is very close to failure. Other industry respondents - especially from the MS who already use "special management" -, although in favour, pointed out that this measure should be used only as a last resort.

Public authorities prefer that the supervisor appoints one or more special managers only when the management of the credit institution is not willing or able to take the required measures based on Article 136 CRD; in other words, the triggers should not be linked to the failure of a firm's recovery plan, as this could delay the appointment of a special manager. All the industry respondents were in favour of a proportionality restriction.

4.3. Group treatment

Some respondents agree that the assessment and implementation of the recovery plans should be done by the consolidating supervisor, while others state that the appointment of a special manager is a matter for the consolidated supervisor. The majority of Member States concur that the decisions as to whether a specific group recovery plan, or the coordination at group level of measures under Article 136(1) CRD or the appointment of special managers should be taken by the consolidating supervisor, provided that all other relevant supervisors of the group are consulted. Banks follow the same line. While some federations agree that the consolidating supervisor should take these decisions, others prefer to grant this power to the consolidating supervisor in coordination with the supervisory college.

Regarding the binding or non-binding character of the consolidating supervisor's decision, there is a clear division between Member States. Those that agree with such binding decision (as well as the big majority of banks and federations) also consider that, in case of disagreements, the EBA should be able to mediate. Arguments for denying the binding character include:
- risk on real conflict of administrative law of different member state, plus the issue of applicability of foreign administrative law and right to appeal such decisions in domestic courts;
- these decisions should be taken as joint decisions consistent with the approach taken in relation to group financial support; and
- the national supervisory authorities of subsidiaries should have the legal responsibilities for the stability of the national financial systems.

4.4. Assessment of group level recovery plans

Most contributions reflect the idea that the assessment of group level recovery plans should be done by the consolidating supervisor. Federations suggest that the consolidating supervisor be assisted by the supervisory college. Where disagreements rise, EBA should intervene as a mediator.

5. RESOLUTION TOOLS, POWERS AND MECHANISMS AND ANCILLARY PROVISIONS

5.1. Conditions for resolution

The Commission proposes three different sets of trigger conditions for resolution. While the EBA and the IMF state their preference for Option 2 (a condition based on supervisory assessment of continued compliance with the conditions for authorisation), Member States are split between either considering Option 1 alone (which focuses on conditions that are similar to those for insolvency but, by including cases where the institution is *likely to* meet the conditions specified, allows intervention before actual balance sheet insolvency), option 2 alone or the two of them combined. Few Member States propose different triggers, such as:

- the use of two categories: one trigger to reflect that the credit institution did not manage to restore its solvency in a certain period and another one to reflect the probability: (i) that circumstances leading to the exhaustion of the own funds occur; (ii) that the market value of the credit institution's assets is lower than the liabilities; (iii) that the entity is no longer able to fulfil its contractual obligations.
- the new common equity Tier 1 ratio;
- the going-concern risk.

Industry respondents indicate their preference for Option 1, mentioning that Option 3 (which is a purely quantitative, capital trigger) is included in Option 1 anyway. The following conditions should be applied to triggers:

- only be used after all other alternatives have been explored to keep the bank in going concern;
- not automatic and as objective as possible;
- aligned with the triggers for bail in;
- harmonised across EU and internationally;
- easy to understand for investors.

Law firms favour a combination of quantitative conditions, supplemented by Option 3. Representatives of the non-financial industry support the Option 2 trigger.
A significant amount of respondents manifest a clear concern about the use of the term "*likelihood*", which might create legal uncertainty.

Asked to evaluate the resolution objectives put forward by the Commission, all respondents consider them as sensible. Those contributions coming from public authorities express mixed views as half of respondents considered that financial stability should be given precedence over all the other objectives and the other half responded that all the objectives should be equally considered. Some respondents suggested that we include the following objectives:

- protection of client assets held by the institution;
- minimisation of costs of resolution;
- protection of shareholders and creditors regardless of the jurisdiction and
- protection of financial stability in countries other than the one of the resolution authority.

As for the general principles governing resolution, the overwhelming majority of respondents consider them acceptable. The main view from the authorities is that creditors of the same class should be treated equally, the only exceptions accepted being those based on public interest concerns. By contrast, the industry does not envisage any possible derogation. Besides, some respondents specifically require that the legal framework spells out the ranking of creditors. On the matter of valuation, there is general

acceptance of independent valuation, leaving open the possibilities of (i) doing it ex post and (ii) including it in the living wills.

5.2. Resolutions tools and powers

5.2.1. General

The resolution tools recommended by the Commission are considered by the respondents as sufficiently comprehensive to allow resolution authorities to deal effectively with failing banks; very few contributions suggest including partial nationalisation and/or capital injection within the options available, provided that they are properly restricted in order to avoid moral hazard. However, the authorities call for "minimum" harmonisation in this area, while some industry respondents disagree, mentioning that the tools are comprehensive and that Member States should not be allowed to add more.

5.2.2. The sale of business tool

Respondents agree with the conditions suggested by the Commission for the application of the sale of business. As for the marketing, most of the respondents believe that it should be transparent and done at a fair price (if marketing takes place under stressful market conditions or in a weekend, confidentiality should apply).

5.2.3. Bridge bank tool

There is general agreement that an express requirement that the residual bank be wound up should be included; only a minor number of contributions consider that the framework should remain silent on this possibility. The Commission is asked to consider the prospect of maintaining the bank temporarily alive in order to provide services to the bridge bank. The bridge bank must comply with the CRD requirements and, regarding its duration in time, half of the respondents consider that no time limit should be established, whilst the other half agreed with the limits proposed by the Commission.

5.2.4. Asset separation tool

The majority of the respondents believe that the asset management tool should only be used in combination with the other tools.

5.2.5. Resolution powers

In general, authorities consider the resolution powers proposed by the Commission are comprehensive enough. The industry, on the other hand, finds them too far reaching. Some respondents propose additional powers:

- power to change the maturity of debts or the amount of interests paid.
- temporary public ownership,
- powers to transfer claims for the return of segregated client's assets.

5.2.6. Transfer powers: Ancillary provisions

The Commission's provisions to ensure that the transfer is effective and the business can be carried on by the recipient are generally welcomed by the respondents. However, some clarity is needed as to the scope of any overriding rights to terminate, accelerate or declare default under an agreement or other instrument.

5.2.7. Transfer powers: continued support from transferor

On the matter of extending the power to require a residual credit institution to provide any necessary services or facilities as to allow authorities to impose equivalent requirements on other entities of the same group, the vast approach is positive. Some respondents propose that these obligations be limited to the provision of services and premises and be done at arm's length commercial terms.

5.2.8. Transfers of foreign property

Where a transfer includes assets located in another Member State or rights and liabilities that are governed by the law of another Member State, respondents follow the Commission approach, stating that the transfer cannot be challenged or prevented by virtue of provisions of the law of that other Member State. The doubt as to whether this is the same outside the EU is however raised.

5.2.9. Resolution mechanisms

The Commission proposes three different models by which resolution can be carried out: (i) a receivership model, (ii) one based on administration and (iii) an executive order or decree mechanism. Member States vote for full flexibility and the recognition of their national discretion when applying either one of the three proposed models. While the industry would prefer the development of a common EU framework, they also recognize that Member States have very different legal models and that this provision should be left to the discretion of MS, provided that it does not impinge on the level playing field in the EU. As long as it is clear what resolution mechanism(s) Member States use, different resolution mechanisms should not stand in the way of an efficiently coordinated cross-border resolution.

While half of the respondents opt for the harmonization of resolution mechanisms as far as possible, the other half consider that it is sufficient to provide for the resolution tools and powers and that flexibility should govern the legal means in which the resolution powers are exercised. If harmonization is not possible, it is suggested that Member States develop arrangements for the mutual recognition of mechanisms applied in resolution proceedings.

5.2.10. Procedural obligations of resolution authorities

The notification and publication requirements seem appropriate to the respondents. However, in terms of the publication, it would be onerous to require publication in one or more newspapers in each of the locations where

the institution has branches. It is also suggested that, in addition to publishing a statement on the websites of the authorities and the EBA, there should be a requirement to publish the statement on the institution's website. Attention should be given to the sensitivity of timing, e.g. the time of disclosure should not mean an additional risk to the resolution process.

5.2.11. Protection of stakeholders: compensation

The core principle that no creditor should be worse off as a result of resolution than in bank liquidation, although possibly difficult to apply, receives wide support. The suggestion that the assessment of compensation is based on valuation by an independent valuer was also welcomed (one bank, however, noted that the use of an independent valuer may not always be proportionate and one Member State considered that any such requirement should not compromise the speed of intervention). Some contributions also note that the EU framework should specify the principles for valuation and the reference date should be harmonized.

5.2.12. Temporary suspension of rights

- Limited suspension of certain obligations: Opinion on a power for resolution authorities to enforce a temporary suspension of payment or delivery obligations is fairly evenly split. The majority of Member States support the proposal, although a couple express concerns about the interaction with the Settlement Finality Directive and with the Financial Collateral Directive if a stay affected rights in relation to financial collateral. A number of industry respondents and a couple of Member States oppose such a power, or express strong concerns based, variously, on the risk that it could spread contagion, its impact on financial infrastructure systems, lack of clarity about its scope, and the possible losses that might be incurred by affected counterparties if, as a result of the stay, they were unable to perform their own delivery obligations to third parties.

  Opinion is also divided on the exclusion of protected deposits from any such suspension. While some support the suggestion, others note that it could be impracticable (difficult to identify protected deposits, or the amount covered by the DGS if aggregating several accounts), and a couple warn that the existence of such a power risked increasing the chances of a bank run.

  A number of respondents suggest further exclusions, such as: all obligations entered into clearing and settlement systems; trade creditors and non-financial creditors; salaries and other operational costs; and payments under secured funding instruments such as covered bonds.

- Temporary suspension of close out netting: Most Member States support the need for a temporary suspension of close out netting rights, as suggested in the consultation. A number point out that a proposal would need to clarify the interaction with other EU measures, including the Financial Collateral and Settlement Finality Directives, EMIR and MiFID, or to deal with the impact of resolution on default and cross-

default clauses. Many of the respondents that support the principle of a temporary suspension consider that there should be an exemption for central banks, CCPs and payment and settlement systems for reasons of financial stability. Industry respondents are more divided on this issue. While many recognize the need for, and support a stay, provided it is limited, subject to strict conditions and backed by the safeguards proposed in section H of the consultation, a couple strongly disagree and others express concerns. Particular concerns are expressed by exchanges, clearing and settlement systems and bodies representing this industry sector. Others note the need for clear notification procedures to avoid legal uncertainty about the exact beginning and end of the period of suspension.

- Scope of rights to challenge resolution: Member States are divided on this issue: some agree that the judicial review of resolution decisions should be limited to a review of the legality of the decision - without the possibility to revert it - and to set compensation, where appropriate, while others object to a complete exclusion of the possibility to revert the resolution decision. They observe that a complete exclusion may be incompatible with effective judicial protection, or with the European Convention of Human Rights or the European Charter of Human Rights or with the constitutions of Member States. A Member State points out that excluding the possibility for the Courts to quash the decision may result in increasing the liability for damages of the authorities Another Member State suggests that the Court should have the power to declare unlawful and quash a decision that is found irrational, illegal, procedurally improper or incompatible with a Convention right.

  Most industry respondents support the idea of limiting judicial review to the legality of the action and of excluding the power of the court to revert the authority's decision. Some respondents suggested limiting the power of a Court to reverse a decision to certain cases, e.g. when the authority has infringed the rules on resolution and when the reversal of the decision is practically feasible and would not cause systemic risk or undermine legitimate expectations. The concepts of "legitimacy and legality" should be clarified.

5.2.13. Confidentiality

All Member States but one support the confidentiality rules proposed in the consultation document. In addition, Member States made the following suggestions:

- confidentiality requirements should also apply to the special manager;
- the framework should allow for an exchange of confidential information with third country authorities, provided that the confidentiality requirements are equivalent to those in the EU;
- any breach of confidentiality should be subject to sanctions.

All the banking industry respondents stress the importance of confidentiality and consider the provisions proposed by the Commission to be adequate to protect confidential information. The following specific comments and suggestions come from the industry:

- other parties should be explicitly included in the list of professionals bound by confidentiality, such as the entity or person that perform the evaluation, the managers of the firm at the time when the resolution decision is taken, the advisers of the potential acquirer;
- it should be clearly established that the confidentiality rules should override national rules on public access to documents;
- the allowance that information could be published if "it is in summary or collective form" can lead to misinterpretation, since there may particular cases when, even in aggregate form, the information remains sensitive, for example in the case when one or more institutions are in the resolution stage;
- the employees of the resolution authority and the authority advisers need to be able to use the information for the purpose of effecting, or seeking to effect, the resolution transaction, but this would not be covered by the formulation proposed.

Respondents from other non-financial industry express the view that the provisions were too far reaching and that more transparency would be desirable. In their view, better public understanding of the risks to which a credit institution is exposed and of the way these risks are addressed by the institution itself and the supervisory authorities, will prove to be beneficial.

5.3. Safeguards

5.3.1. Partial transfers: safeguards for counterparties

Overall, there is almost universal support among respondents for the principle that safeguards of the kind suggested in the consultation are necessary, and the majority agrees with the approach that EU legislation should prescribe the outcomes to be achieved, and leave Member States flexibility of implementation in order to adapt appropriately to the differences in national law. However, a number of respondents (both public and industry) expressed the view that the framework should specify the consequences of any contravention of the safeguards. Several recommended in this regard that in the case of a breach the counterparty should be able to exercise termination rights.

There is strong support from industry respondents for the suggested safeguards. Those respondents contribute a range of technical comments, including the need to ensure equivalent protection for assets and liabilities located outside the EU or subject to the governing law of a third country; and the difficulty of defining the structured finance arrangements to ensure a sufficiently comprehensive application of the safeguards. Particular concerns are expressed in response to a number of provisions in section H about the treatment of foreign property and the consequences if robust legal opinions could not be provided as a result of that treatment.

The majority considers that further harmonisation of definitions is not necessary, although several argue in favour of harmonisation on the grounds that current definitions in EU and national law vary and this could give rise to legal uncertainty.

Respondents generally consider that the scope of protection suggested in the consultation is appropriate and adequate.

A minority of Member States express concern that an inflexible 'no cherry picking' rule could unduly constrain the freedom of action of resolution authorities. One suggests that the safeguards should be limited to contracts that need to be protected for reasons of financial stability, and another that compensation could offer an alternative in cases where contravention of the principle was necessary. Industry respondents overwhelmingly disagree that there is any significant risk that the safeguards would detrimentally affect the flexibility of resolution authorities, and stress that they are necessary to ensure legal certainty of financial market arrangements that are important for financial stability.

5.3.2. Appropriate protection for financial collateral, set-off and netting arrangements

All respondents support the safeguards for title transfer financial collateral, set-off and netting arrangements. One MS, while supporting these safeguards, suggests that it would be necessary to limit asset encumbrance to ensure that heavy use of secured funding does not limit the ability of authorities to ensure an orderly resolution while limiting costs to taxpayers.

A slight overall majority of respondents (including all public authorities) also supports exclusion for retail rights and liabilities – although a majority of industry respondents opposes the latter exclusion on the grounds that any exclusion is unjustified or it could undermine legal certainty. One law firm points out the possible impacts on regulatory capital of the proposed exclusions.

5.3.3. Appropriate protection for security arrangements

All respondents to this question supported the safeguard for security arrangements.

5.3.4. Appropriate protection for structured finance arrangements

Respondents generally support the suggested safeguard for structured finance arrangements. One Member State suggests that there should be some scope for authorities to separate contracts under such arrangements in appropriate cases. Some industry respondents consider that more clarity is needed as to the scope of the safeguard. A law firm argues that structured finance arrangements pose particular difficulties in the context of resolution as a result of their complexity and the potential number of roles played by banks, and that the safeguard as suggested in the consultation may not, alone, be sufficient to provide certainty for such arrangements.

Member States and most industry respondents support an exclusion of insured deposits. A couple of industry respondents question the logic of a carve out for all eligible deposits and several disagree on the grounds that any exclusion would lead to legal uncertainty.

5.3.5. Partial transfers: Protection of trading, clearing and settlement systems

A slight majority of respondents believe that an express provision is necessary in relation to the protection of trading, clearing and settlement systems. Such a provision would enhance legal certainty. Besides, the scope of the Settlement Finality Directive is considered too narrow and, in particular, does not cover physical commodities transactions. Nevertheless, a significant minority considered the SFD to be sufficient.

On the matter of partial transfers and the need to compensate third parties – respondents show their support the principles outlined in the consultation. Opinion is divided as to whether it is necessary to specify the details of compensation in the EU framework, with a small majority supporting the view that general detailed provision is not needed. However, a number of respondents argue that the EU framework should include more detailed provision on the specific issue of valuation. The framework should deal, in particular, with valuation principles, including the method of valuation and the reference date.

6. GROUP RESOLUTION

6.1. Resolution colleges

The composition of the resolution colleges receives diverging approaches in the contributions. Some Member States agree with the Commission, while others think that all the authorities should be members of the colleges, but that it will be for the lead authority to decide which entity takes part in the meetings depending on the issues to be dealt with. Some Member States consider that the resolution colleges should only be established intra EU, leaving outside those banks that have established FSB CBS. It is suggested to include into the colleges significant branches. Finally, some respondents disagree with the need to establish resolution colleges.

As for the industry, the overwhelming majority is in favour of the Commission proposal.

6.2. Group resolution

The majority of Member States consider that the effectiveness of the proposed coordination mechanism is diminished by the fact that the host resolution authority may decide not to comply with the scheme and to take independent measures where they reasonably consider it necessary for reasons of national stability. Each national resolution authority should remain responsible for the legal entities incorporated in its jurisdiction and host countries need to exercise independent judgement even in branch bank structures. However, they all agree that coordination by the group level resolution authority is desirable. The very few Member States that agree with the suggested framework require additional elements to be considered, such as making the group resolution plan not binding or make the 24h deadline more flexible.

The industry's view is that the framework suggested does strike a reasonable balance.

However, all respondents call for flexibility, given that each financial crisis is different and a too detailed regulation risks ruling out efficient measures not foreseen today.

6.3. Multilateral arrangements with third country

Respondents agree that an internationally coordinated approach is most definitely desirable and suggest using international fora such as G-20, FSB and BCBS in order to promote it. Nevertheless, the creation of an international legal framework should be preceded by harmonization of EU rules. Some respondents point out that this will not be a short-term option.

6.4. Firm specific arrangements

This tool is perceived by most respondents as a useful interim stage until a general global agreement is reached. When/if used, it should be applied on a voluntary basis. One Member State considers that national resolution authorities should be responsible for their national branches located in 3rd countries, while another one states that individual solutions for single institutions should not be legally binding. Banks welcome as many countries to be covered by the framework. Federations consider it to be a good starting point, but the optimal outcome is for the EU to mutually recognize 3rd countries' resolution schemes.

6.5. Assessment of third country resolution arrangements

While admitting that the possibility of requiring changes to the organization or operating structure of the credit institution in a third country has a rather intrusive character, the public and the private sector take opposite views: most of Member States' supervisory authorities consider it justified; the industry, on the contrary, does not find it neither appropriate, nor proportionate.

7. FINANCING ARRANGEMENTS

Overall, there is limited support from industry for the need of resolution financing, with many arguing that alternative arrangements already exist (DGS, national levies) or are in the process of being installed. Notable exceptions are those from Member States where resolution funds already exist. Also, call on the Commission to take into account ongoing reforms to improve resilience of financial system (e.g. Basel III/CRDIV).

7.1. Requirement for each Member State to establish a bank resolution fund

Many Member States call on the Commission proposing a general requirement for them to make financing available for resolution, but leaving the design of such a requirement at the discretion of Member States. At most, some general principles can go in the Directive. As regards defining what the fund can do, some argue that it should also be able to finance

recapitalisation measures / restructuring procedures for going concern but then such financing being subject to strict conditions (e.g. shareholder/creditor write-offs, restructuring).

The financial industry remains unconvinced of the need to set up a specific resolution financing regime and argue that it can increase moral hazard (less incentive for market to police the system) and come with significant deadweight costs (bind up resources in ex ante funds that could otherwise finance real economy). They also call on the Commission to take into account other risk mitigation instruments (e.g. CRDIV/Basel III), changes to the DGS, other resolution measures (e.g. RRPs) as well as national financing measures (e.g. systemic taxes/levies). Many argue that DGS is already sufficient for financing purposes. Furthermore, a generally held view is that it is not necessary to specify what a regime can finance. However, if a financing regime is established, most respondents stress that the overarching purpose should be to absorb residual losses and administrative costs and that there should be coordination so as to avoid e.g. double imposition. On the contrary, there is wide opposition to funds being used for liquidity support, as this would be too significant and quickly deplete any funds.

While relatively few contributions from the non-financial industry comment on the financing aspect, those who do highlight the uphill task of ensuring a coordinated outcome in an area where a number of Member States have already adopted a financing approach. Others highlight the difficulty of mustering political will to establish funds of sufficient size and the need to ensure risk based contributions so as to avoid prudent institutions not cross-subsidising risky ones.

7.2. Financing of the Fund

While some Member States highlight that it is difficult to foresee how much funds will be needed ex ante and that, therefore, it is important to develop ex post financing arrangements, respondents provide little guidance how such arrangements could look like. Others stress that it is important to keep maximum flexibility about alternative funding arrangements and that therefore no further detail is needed. The financial industry's predominant view is that this does not need to be further spelled out but rather left to national discretion. Some actually call for less prescription, so as to maximise flexibility.

7.3. Calculation of contributions to the Fund

Some Member States highlight the need to follow a DGS approach, with harmonised risk-weighted parameters to be taken into account when determining contributions. Some call for base to be harmonised so as to avoid double imposition and unlevel playing field and agree that eligible liabilities best way forward. Others highlight the need for full discretion so as to cater for different national circumstance and in the same vein do not see need for any harmonisation in this field, as long as Member States can credibly show that they have some form of resolution financing in place.

Some contributions from the financial industry stress the need for full harmonisation as regards base, so as to ensure level playing field and avoid

competitive distortions. Most also stress the virtues of risk based contributions. Others stress the need for discretion in order to cater for existing safeguards at Member State level.

7.4. Relationship with the DGS

Most public authorities welcome the possibility of exploiting synergies between DGS and resolution financing. Some argue that more funds will be needed in the future to cover new resolution obligations, while others point out that, if the two instruments become integrated, then safeguards will be needed to ring fence resources for depositor pay-out function. On contributions, some disagree with DGS contributions being fully deducted from resolution fund contributions. Instead, the base for calculating contributions to both funds should be coordinated (e.g. deducting customer deposits from calculation basis of bank levy).

At a general level, financial industry representatives widely welcome the recognition of synergies between DGS and resolution financing, as many argue that both are crisis management tools. Many argue that there should be no requirement for national resolution funds separated from DGS and therefore welcome the intentions to allow Member States to establish a single legal entity. However, some respondents call for separation of DGS and resolution financing, as objectives differ, the contributors and the base for contributions are likely to be different and decision-making procedures for mobilising the finances may be different. Some fall in between, arguing that the two funds should be managed separately, which does not mean that there needs to be two entities. As regards the contributions, most agree that contributions to DGS should be deductible from those to a resolution fund.

7.5. Privileged creditor position

While many Member States do not see the need for ex ante resolution funds, in the event that they were established, most support giving a priority ranking to such funds / creditors financing resolution. The argument put forward is that this would incite participation in resolution financing.

The financial industry has mixed views with general reluctance to grant exceptions to normal rank order. Some argue that a priority ranking is useful where resolution funds and DGS are merged. This would protect depositors, put the major burden on the resolved entities and protect others. Once they are protected, the fund should rank *pari passu* with senior creditors. Some argue that such priority ranking should be exceptional and at any rate should not only be granted to a resolution fund but also to other tools for temporary funding.

8. DISCUSSION OF POSSIBLE APPROACHES TO THE DESIGN OF DEBT WRITE-DOWN (OR 'BAIL-IN') AS A RESOLUTION TOOL

8.1. Comprehensive approach

Most respondents agree that certain senior debt categories should be excluded from the bail-in regime. Some consider that wholesale deposits and short term

debt should not be excluded. In addition, the non covered part of covered debts (residual) should also be bail-in-able in the opinion of certain respondents. One respondent mentioned that if some derivative transactions are too big, there might be a need for write off, too (see AIG case).

A minor number of banks and associations were against that senior debt could be written down at all. In their opinions only subordinated debt and maybe some special new debt instruments (coco) could be written off.

Regarding the different treatment of creditors, the majority of respondents disagree, as this could create uncertainty, decrease transparency, breach fundamental rights, give opportunity for abuse, and unfair arbitrary treatment. In addition guidelines on how to discriminate creditors would be difficult to design. On the other hand, many respondents admit that in the case of excluding certain debt classes from the bail-in regime, such differentiated treatment might be unavoidable to reach the objectives of resolution. Some argue that the bail-in regime would work only if a new ranking among senior creditors is established, in view of the exclusions of certain debt types. A compensation scheme could be put in place to settle discrimination of creditors.

Respondents have a range of ideas on how to avoid regulatory arbitrage and restructuring of debt: the power and circumstances under which authorities could write down debt and the classes of bail-inable debt should be clearly defined to prevent regulatory arbitrage; the consistency at global level to avoid geographical relocation of debt; the interaction with the new capital rules, buffers and capital surcharges for SIFIs should be further considered.

8.2. Targeted approach

Some respondents oppose any minimum level of bail-in debt, as they believe it is impossible to estimate the appropriate level of bail-in debt ex ante because of the idiosyncratic nature of any future crisis. Others argue that a minimum requirement for bail-in debt will be equivalent to increasing minimum capital requirement (so they suggest leaving it to the banks' discretion).

Many respondents are concerned that allowing the credit institution to insert a write down term in any debt instrument will dramatically increase complexity because all banks can shape BID the way they like. Therefore many call for standardization. On the other hand, others see as advantage what some call complexity. Concerns are raised on the following matters:

- Banks may issue too many BID or BID on too many types of debt which may spoil purpose of BID;
- Inserting a write down clause into a contract should not arbitrarily and retrospectively impede rights of creditors. Which instrument "is deemed appropriate" is not a predictable standard;
- Unclear where incentive to insert write down clause should come from.

8.3. Market capacity for such instruments

The general view across the board is that the triggers should be clear, transparent and predictable; they should also be the same as the resolution ones. Respondents do not, however, present views as to which should be the elements that the trigger should incorporate. Although a trigger point far from insolvency would facilitate the possible restructuring and recuperation of the bank, it is also considered by most respondents that it will make the bail in debt difficult to market. In this respect it seems to be preferable (at least from the investor point of view) that the trigger is the closer possible to insolvency. Some respondents argue that it would not be good to have a trigger based on market data because this could lead to market manipulation.

Big banks are confident that there will be a market for such instruments. In order to reinforce it (i) triggers must be clear, (ii) creditors ranking must provide legal certainty, (iii) these mechanisms apply only to new debt and (iv) an adequate transition phase is foreseen. Small banks and insurers consider that, if there is such a market, small entities will be disadvantaged.

8.4. Compensation mechanisms

A number of respondents point out that the overarching principle for bail-in (and resolution generally) must be that no creditor is worse off than they would be in liquidation, and the level of any compensation should be benchmarked against recovery in liquidation. Compensation would be needed if certain creditors are left worse off as a result of the use of (statutory) bail-in (or resolution generally). One law firm notes, however, that this principle is hard to prove (especially where compensation takes the form of conversion to shares) because of the difficult questions about the timing of the assessment of the quantum of recovery in liquidation.

On the matter of conversion as a form of compensation, a majority took the view that conversion to equity would be generally sufficient compensation for the interference to property that statutory write down entails. A number pointed out that conversion would not be possible in all cases. Several suggested other forms of compensation, such as write up clauses, schemes that purchase the converted shares from the bondholders, or later repayment from retained earnings (in order of priority – senior debt before capital holders). However, a few argued that conversion may not be sufficient, particularly if the converted equity is wiped out in a subsequent resolution or winding up.

A majority take the view that (provided priority is respected, write down is accompanied by conversion to equity and the principle of 'no creditor worse off' is respected) no additional compensation mechanisms would be required. Others go further and argued that it is not self-evident that compensation is needed if the terms of the write down is transparent from the outset (although not clear whether this means only contractual). A couple note that any compensation would undermine the purposes of the proposal. One banking association notes that mechanisms would be needed to ensure that creditors that cannot hold equity could share in the recovery, while a major bank suggests that claims should be restored on recovery (and offered

to provide a model to achieve this). A couple of banks state that compensation would be needed if debt is written down (and not converted) and the bank subsequently recovers, or if the ranking is subverted. However, the bank would be unlikely to have sufficient resources to pay compensation. One bank and a couple of banking associations point out that if bail-in is subsequently followed by a winding up or further resolution measures, compensation may be needed to address the greater loss suffered by senior debt-holders that had been subject to bail-in compared with those that were not. However, that could only work as a subordinated claim against the bank in resolution.

8.5. Group treatment

Responses are split on the question of flexibility as to the level at which bail-in debt should be issued. Most industry responses and one Member State generally suggest that flexibility would be preferable (with the exception of one body representing in investors, which saw no reason for flexibility), while several Member States who favour flexibility also note that that the college of supervisors should play a role in deciding where the debt should be issued.

Respondents are divided as to whether the debt should be issued at parent level only, or at the level of subsidiaries. One industry respondent suggests that issue by subsidiaries would give rise to unnecessary complexity, while others are concerned about the effect of conversion at the level of subsidiaries on the structure of the group. A number of MS respondents express concerns about the ability of hosts to intervene if the debt is only issued at parent level.

Views are split on the question of the trigger and its relation with the level at which the debt is issued. One MS respondent notes that bail-in could not be triggered at parent level if only subsidiaries met the conditions for resolution, while another argues that group bail-in would be possible if the trigger for group bail-in debt (at parent level) were linked to the capital adequacy of the subsidiaries. A number of MS and industry respondents note that the question of level is intimately linked to the extent to which liquidity and capital could be freely transferred within the group; if transfer is possible and national ring-fencing of capital restricted, it might not be necessary to require issuance at solo level, but in that case it must be transparent to investors that they are exposed to the risk of the whole group.

Several MS argued that the power to require and trigger bail-in debt should be invested in solo supervisors, with joint agreement or cooperation. One academic respondent notes that in theory bail-in should be at group level, but in practice it would probably not be achievable for the group-level authority to take the lead. An investor notes that bail-in should not be applied at parent level simply because it is easier to apply it at the level of subsidiaries

A couple of respondents make reference to the need for consistent implementation of bail-in in all major jurisdictions (EU, US, Japan) to avoid geographical and legal arbitrage, and recommends that a regime should

require debt instruments issued in or governed by the law of a jurisdiction without a bail-in regime to contain bail-in terms.

8.6. Ensuring creditor confidence and adequate liquidity

The majority of supervisors welcome the proposal for a "super senior" status granted to some creditors of the newly bailed in institution, but they call for further considerations to be provided in the legislative proposal:

- the definition of the categories of claims eligible for such status;
- the degree of discretional recognition conferred to the resolution authority.

Banks and federations also agree that such priority right could set an incentive to potential lenders to provide the bailed-in bank with urgently needed liquidity. However, the industry proposes various requirements:

- the consent of all remaining senior creditors;
- the status should be limited in time;
- the senior debt should be *pari passu*;
- the super senior status should be restricted to new funds injected after the bail-in event

The respondents are divided on the question of opting for a discretionary / statutory rule.

Supervisory authorities in Member States believe that a bail in mechanism should also be applicable to non-joint stocks companies, provided that the principles of the bail-in are applicable proportionally without regard to the legal form of the institution; the special features of mutuals are taken into account; all equity holders and other subordinated capital providers have been fully wiped out before creditors must absorb the losses. Three MS consider that non-joint stock companies should be excluded from the bail-in requirement.
As a general principle, banks and federations believe that bail-in should be applicable to both joint-stock and non-joint stock companies to ensure a level playing field for recovery and resolution measures. With respect to cooperative banks, however, the specificities of their governance and internal financial relations should be taken into account so as to restrict bail-in to write-down and avoid any measures of conversion into capital.
Regarding the fact that co-operative banks are governed by public law, several federations propose as a solution the conversion into silent contributions which do not give any rights of active involvement.

9. POSSIBLE CHANGES TO COMPANY LAW

Most respondents agree with the Commission that derogations from Company Law Directives are needed in order to allow Member States to effectively implement the crisis management framework. However, a considerable number of public authorities point out to the following issues when dealing with the use of resolution powers:

- derogations should be allowed only if necessary for the financial stability;

- the Cross-border Mergers Directive should also be included I this package;

- the derogation from the Shareholders' Rights Directive seems excessive;
- further analysis of the Takeover Bids Directive (and possible formulation of an exception in connection with “poison pills”).

The industry respondents remind of the fundamental nature of shareholders' rights, but agree, however, that derogations are necessary so that the framework can function. Some banks suggest to address the problem of large creditors who, as part of a debt restructuring, agree to convert debt for stock, and who may be faced with the obligation to make a mandatory public bid on the remaining stock (which would operate as an unintended bail-out mechanism for the remaining shareholders). Some federations point out to the fact that derogations are also needed from the Market Abuse Directive insider information reporting requirements and to the fact that shareholders should have swift and simple access to court in order to have the decision to use a resolution tool reviewed in full.

One law firm, followed by a few other entities, requires that, in addition to the articles proposed for amendments by the Commission, the following should be considered:

(i) Articles 10 and 10(a) of the Second Company Directive (77/91/EEC, as amended) if it is possible that the failing institution may wish to issue shares for a non-cash consideration, because the requirement for an expert’s valuation is usually time-consuming;

(ii) Article 27(2) of the Second Company Directive (for the same reason as in (i));

(iii) Article 29(7) of the Second Company Directive, where shares are to be issued to banks or other financial institutions and offered to shareholders;

(iv) Article 32 of the Second Company Directive, because allowing creditors the right to obtain

security for claims or to apply to court could delay the proposed action;

(v) Article 33 of the Second Company Directive which relates to capital reductions to offset losses;

(vi) Directive 2005/56/EC – the Cross Border Mergers Directive – if it is proposed that the powers that could be taken could involve a cross-border merger of companies;

(vii) Directive 2003/6/EC – the Market Abuse Directive – Article 6 of which requires issuers to inform the public as soon as possible of inside information which directly concerns the issuer. It may be unhelpful for an issuer to have such an obligation where a supervisory authority proposes to take measures relating to it or is taking such measures; and

(viii) Directive 2004/109/EC – Transparency Directive – Articles 4, 5 and 6 place obligations on issuers to provide financial information within certain time periods. It would be useful to consider whether issuers should be

relieved of these obligations or if the time periods should be extended if the issuer is subject to measures by its supervisory authority.

In addition, the provisions of Article 1(3) of Directive 78/855/EEC (which are also applied to Directive 82/891/EEC) merely say that a Member State need not apply the Directive where the company which is being acquired or will cease to exist is the subject of bankruptcy proceedings etc. A Member State may therefore have allowed the Directives to apply in such cases – in which case presumably the provisions will need not to be applied.

Regarding the creation of a mechanism for rapid increase of capital for emergency situations in the early intervention phase, Member States respondents tend to favour the proposed Option 2 (an ex-ante mandate to the management body to take a decision on capital increase) or a combination of Option 1 (an ex-ante decision on a shortened convocation period to convene the general meeting to decide on an increase of capital) and Option 2. The private sector mostly opts for Option 2.