EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

Bank, insurance and financial crime
Resolution and deposit insurance

Legend:
- **Black: Commission consultation text**
- **Blue: SRB replies and comments**

Single Resolution Board

TARGETED CONSULTATION DOCUMENT

REVIEW OF THE CRISIS MANAGEMENT AND DEPOSIT INSURANCE FRAMEWORK

Disclaimer

This document is a working document of the Commission services for consultation.

The statements reflected in this consultation paper do not prejudge a final policy position or a formal proposal by the European Commission.

The responses to this consultation paper will provide important guidance to the Commission when preparing, if considered appropriate, a formal Commission proposal.

SRB Disclaimer

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It shall not be considered as predetermining the position that the SRB may take in specific cases, where the circumstances of each case will also be considered. This document has not been formally adopted or endorsed by the SRB in its relevant governance bodies and may not in any circumstances be regarded as stating an official position of the SRB. It is intended solely to support ongoing discussions on the crisis management framework with the European institutions.

INTRODUCTION AND GENERAL CONTEXT

Background of this targeted consultation

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

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

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

- One of the cornerstones of the current framework is the objective of shielding public money from the effects of bank failures. Nevertheless, this has only been partially achieved. This has to do with the fact that the current framework creates incentives for national authorities to deal with failing or likely to fail (FOLF) banks through solutions that do not necessarily ensure an optimal outcome in terms of consistency and minimisation in the use of public funds. These incentives are partly generated by the misalignment between the conditions for accessing the resolution fund and certain (less stringent) conditions for accessing other forms of financial support under existing EU State aid rules, as well as the availability of tools in certain national insolvency proceedings (NIP), which are in practice similar to those available in resolution. Moreover, a reported difficulty for some small and medium-sized banks to issue certain financial instruments, that are relevant for the purpose of meeting their minimum requirement for own funds and eligible liabilities (MREL), may contribute to this misalignment of incentives.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Structure of this consultation and responding to this consultation

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

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

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

Views are welcome from all stakeholders.

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

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

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

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

The consultation will be open for 12 weeks.

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Please note: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact fisma-cmdi-consultation@ec.europa.eu.

CONSULTATION

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

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

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

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

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

Deposits[11] are protected up to EUR 100 000. This applies regardless of whether the bank is put into resolution or insolvency. In insolvency, the primary function of a DGS is to pay out depositors[12] within 7 days of a determination of unavailability of their deposits. In line with the DGSD, DGSs may also have functions other than the pay-out of depositors. As pay-out may not always be suitable in a crisis scenario due to the risk of

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

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

[11] If not excluded under Article 5 DGSD.

[12] Article 11(1) DGSD.

disrupting overall depositor confidence[13], some Member States allow the DGS funds to be used to prevent the failure of a bank (DGS preventive measures) or finance a transfer of assets and liabilities to a buyer in insolvency to preserve the access to covered depositors (DGS alternative measures).[14] The DGSD provides a limit as regards the costs of such preventive and alternative measures. Moreover, DGSs can contribute financially to a bank's resolution, under certain circumstances.

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

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

The main policy objectives of the CMDI framework are to:

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

PART 1 – GENERAL OBJECTIVES AND REVIEW FOCUS[15]

Question 1

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

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

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

If possible, please explain: [text box]

A much deeper analysis would be needed to assess which and to what extent objectives have been met. To that purpose, the SRB provided data to support the performance of an impact assessment by the Commission. As such, we prefer not to provide individual quantitative ratings, but rather a qualitative assessment.

a) General comment: as a resolution authority, we are best placed to comment on resolution objectives. Resolution objectives, as established under SRMR (Art. 14.2) and BRRD (Art. 31.2), seem an important reference for assessing the achievements of the CM framework. Turning to the objectives listed in the table:

b) Financial stability: the objective has been met across the crisis cases where the SRB has been called to decide upon (cf. SRB website “resolution cases”). There has been no negative impact on financial stability in the resolution of Banco Popular Espanol (BPE). Equally, there has been no significant negative effect or contagion following cases where the SRB found the PIA to be negative. This said, the extent to which this objective is achieved would need to be assessed on a case-by-case basis and holistically with the rest of the objectives.

c) Minimising recourse to public financing and taxpayers’ money: we concur with the Commission (as per the introduction to this consultation) that this objective has only been partially achieved. If we consider the cases mentioned by the Commission in its “Report on the application and review of BRRD/SRMR” (i.e. a broader scope than the above-mentioned cases) it appears that there has still been a significant use of solutions involving public support, e.g. in the form of liquidation aid, precautionary recapitalization, precautionary liquidity support. A deeper quantitative analysis (and counterfactuals) would be needed, and this is without prejudice to the merits of any specific case, yet it seems fair to state that more can be done to further minimize recourse to public financing (and avoiding diverging national solutions, cf. more below on this). Notably, this was not the case in the only resolution performed by the SRB, where no taxpayer money was used.

d) Protecting depositors: to note, BRRD/SRMR have the same scope in terms of protection of depositors as DSGD, insofar as resolution objectives require the protection of covered deposits and (only in broader terms) safeguard financial stability. This has been achieved so far. Having said this (and recalling the bail-in-ability of non-covered deposits), the SRB has reiterated already in the past that there may be challenges and potential negative impacts from the bail-in of deposits, particularly due to the loss of franchise value of the ailing bank.

e) Breaking the sovereign banks loop: overall, we would argue that also this objective has been met to some extent (also looking at the bonds’ pricing) and surely the SSM and SRM play a positive role. However, the incompletion of the Banking Union appears as significant hurdle to removing the negative loop. Literature seems to converge on this assessment, cf. for one example the FSB “Evaluation of the effects of too-big-to-fail reforms”. It should be noted that it is very challenging to prove the impact of reforms on the bank-sovereign nexus (it is close to impossible to isolate the effects of regulation from other market drivers and even harder to distinguish the impact of CM rules alone). This said, we would like to note that if the reform of BRRD/SRMR/DGSD were to lead to an increase of the role of national authorities and national solutions for banks crisis (rather than enhancing the supra-national toolkit and governance, and progressing towards EDIS), this would surely worsen the sovereign-bank nexus.

f) Level playing field: albeit it is hard to define what would be the parameters of level-playing field, we assess that the application of current framework ensured good progress on this yet more should be done. As positive elements, we consider the SRM to have significantly improved convergence in the application of the CM framework for banks under SRB direct remit, as well as for LSIs. The (comply or explain) SRB resolution planning manual, the alignment of all SRB banks to a uniform resolution planning cycle, and the Guidelines for LSIs are worth noting in this sense. On the one side, albeit some challenges remain, resolution and resolution planning are more and more harmonized (particularly within the Banking Union). On the other side, the wide discrepancy of national insolvency proceedings (NIPs) still represents a significant gap, and it becomes problematic for key concepts of the resolution framework such as the PIA and NCWO (cf. report by VVA, Grimaldi & Bruegel, of November 2019). The different firepower of the National DGSs and involvements of national treasuries, as well as the different implementations of DGSD is also a level playing field-concern: in this sense, the review of the CMDI should point towards better integration (rather than increasing national powers and room for cross-border divergence).

g) Legal certainty and predictability: we also deem this as partially achieved. This is confirmed by feedback we receive from interactions with investors, other authorities (particularly in third countries) and the broader public. In particular, the legal framework remains rather complex (with its recent review adding further complexity). Moreover, the interaction between different authorities and their respective powers of the "crisis continuum" is rather convoluted. In particular, the interaction between preventive, precautionary measures and resolution warrant some streamlining. Equally, the escalation from supervisory to early intervention measures and FOLTF could also be improved (e.g. by removing overlaps and ensuring earlier involvement of resolution authorities). Moreover, all pending questions of interpretation should be clarified, e.g. through EBA Q&As (e.g. around MREL, etc.) and stability on MREL framework would help. Finally, the mentioned discrepancy between NIPs, and among creditors hierarchies, is also an obstacle to predictability. We believe streamlining and harmonisation in these fields would increase the achievement of this objective and improve economic environment amongst others for making investments EU banks.

h) Cross-border: we deem this to be achieved to a good, yet not perfect extent. The two cases so far of crisis of cross-border banks provide for some lessons learned. In the case of Banco Popular Espanol (BPE), in line with SRMR Article 6(3)(a) of the SRMR (which foresees due consideration to the interests of Member States where a group operates), the resolution, through sale of business of BPE, did not imply any change to the business of Banco Popular Portugal. Notably, the SRB resolution decision protected the savings placed with it, ensuring the continuity of financial services provided in Portugal and the financing of the economy. A second cross-border case is ABLV: here, the SRB found the PIA to be negative for both the Latvian parent entity and the Luxembourgish subsidiary (on 24/02/2018); then, the Latvian parent entity was subject to voluntary liquidation following a decision by the shareholders of ABLV (on 26/02/2018). However, for its Luxembourgish subsidiary, the Luxembourg Commercial Court decided (on 09/03/2018) to refuse to place the subsidiary in liquidation and rather allowing a sale to new investors. This is often referred to as a "limbo-situation" and it highlights the challenges of having discrepant NIPs across Member States (MS) with different triggers for FOLTF and liquidation proceedings, different types of potential proceedings (within and outside NIPs), different authorities in charge, etc. and while this is challenge is not driven by the cross-border nature of a group, the latter makes the challenge all the more evident. The SRB tries to mitigate some of these challenges through national handbooks (setting out national steps following the PIA decision by the SRB). However, such legal differences as well as the discrepancies in creditor hierarchies, in uses of DGSs and in BRRD transpositions are pending challenges to cross-border crisis management. Importantly, the aforementioned cases refer to cases primarily contained within the EU. As regards resolution of banks with significant third country operations, the framework includes some helpful tools (e.g. BRRD rules on liabilities issued in third countries, stays on derivatives), and the SRB engages in ongoing planning (including through operational exercises) but we have not seen the failure of e.g. a G-SIB under the resolution framework.

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

In terms of objectives, we believe the resolution objectives are fit and appropriate for the CM framework. In addition, we note two objectives, which can be seen as supporting or ancillary to the resolution objectives. (i) Resolvability: here it is worth noting that, despite the terminology, BRRD and SRMR require to assess and achieve the resolvability for all banks, independently on whether they are earmarked for resolution or NIPs. This is a key priority for the SRB day-to-day work and should remain a key principle for the revised framework (as key enabler to achieve all other above-mentioned objectives). (ii) Preventing the destruction of value: clearly, the more remaining value a bank has at the point of failure (FOLTF), the more the CMDI objectives can be achieved. In addition, further facilitating the use of transfer strategies (with support from the SRF/DGS/EDIS where needed) at the European level could help in maximizing franchise value and thereby minimize the overall costs for the system. On the appropriateness of the toolset and funding available in the current framework for all banks (and particularly for so-called small to medium size banks), please refer to our replies to the following questions.

Question 2

Do you consider that the measures and procedures available in the current legislative framework have fulfilled the intended policy objectives[16] and contributed effectively to the management of banks' crises?
On a scale from 1 to 10 (1 being "have not fulfilled the intended policy objectives/have not contributed effectively to the management of banks' crises" and 10 being "have entirely fulfilled the intended policy objectives/have contributed effectively to the management of banks' crises"), please rate each of the following measures.

	1	2	3	4	5	6	7	8	9	10	Do not know / No opinion
Early intervention measures[17]				X							

Precautionary measures[18]				X							
DGS preventive measures					X						
Resolution[19]								X			
National insolvency proceedings, including DGS alternative measures where available[20]					X						

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

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

17 BRRD Articles 27 and following

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

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

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

Please refer to our reply to question 1 on the extent to which objectives have been achieved, and to the replies below on what could be improved in each of the different measures (precautionary recapitalization, EIM, DGS preventive and alternative measures, resolution, NIPs).

Question 3

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

Replying to the different questions:

- On the existence of tools and powers similar to resolution tools: tools similar to resolution's (transfer tools in particular) already exist in some NIPs; however, there are large differences remain among MS and some MS rely on judicial rather than administrative procedures (cf. VVA, Grimaldi, Bruegel), and the tools normally have different objectives, safeguards and powers as compared to resolution tools. While this is natural as there is no harmonized proceeding(s) or definition of NIPs, it can be problematic for the predictability of the framework and, more notably, the level playing field: if banks, depending on their Member States of establishment, are eligible to similar tools with different conditions (e.g. burden-sharing) this seems unhelpful for market discipline, moral hazard, and for the Banking Union integration more broadly. The ensuing lack of predictability implies more fragmentation across the Banking Union. Moreover, it poses challenges to the PIA assessment and NCWO: these tests and safeguards compare a single Banking Union resolution framework with 21+ insolvency proceedings and creditor hierarchies, making their application highly challenging, particularly for cross-border banks. Finally, the decision-making process (post-PIA) could be improved to heighten predictability;
- Extending the use of resolution: as stated by the SRB in 2020, the significant majority of banks under the SRB direct remit are earmarked for resolution (for nearly 95% of the banks by total assets). The BRRD/SRMR provisions on PIA already strike a good balance between the necessary level of discretion and allowing for broad use of the resolution tools. However, the SRB is reviewing its PIA policy with a view to expand it to allow for a more homogenous and fair treatment of banks failures and provide the SRB with the legal justification for using the extraordinary resolution powers. This should not come at the expense of improving the efficiency and consistency of managing bank liquidation, but as a complement to it (although better liquidation

procedures could lead to fewer positive PIA given that the alternative to resolution would be more efficient). If the revision of the CDMI enhances the resolution toolkit and aligns alternative routes (e.g. aligning 2013 Banking Communication to BRRD/SRMR, fixing the interaction with precautionary and preventive measures, etc.) this is also likely (together with the ongoing progress on MREL and other resolvability dimensions) to make more feasible a broader application of the resolution toolkit in the medium term;

- Harmonizing tools in NIPs: the full harmonisation of NIPs would be desirable and an optimal solution (together with EDIS) to address current challenges for the resolution framework (e.g. PIA and NCWO). This said, we acknowledge the political challenge of doing so in the short-term. On the other hand, introducing tools akin to resolution tools (e.g. sale of some assets and liabilities) by harmonising alternative measures in all MS NIPs (making them the norm) could create further occasions for arbitrage and an unhelpful "competition" between resolution and NIPs –even more so in presence of different triggers, creditors hierarchies, safeguards and conditionality (e.g. burden-sharing). Equally, the capacity of national banking sectors and funds is different and would create a more uneven playing field. Yet, some harmonisation and centralisation in the interim phase (until EDIS) could be beneficial to cater for all banks in a more consistent manner (see later replies);
- Eventually, raising alternative measures (to EDIS) to EU level would be preferable to the introduction in national systems in a number of ways. To mention some: it would ensure a common application, it would allow to seek for bidders (and possibly better bids) across borders in the Banking Union, it would not be constrained by the size of national funds and banking sectors, etc. Ultimately, it would increase the achievements of above-mentioned objectives such as predictability, value maximization, level-playing field across MS, sovereign-bank nexus, cross-border bank failure: whereas national solutions would mark a step backwards on all these objectives.

Question 4

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

- **Yes**
- No
- No opinion

Please elaborate [text box]

Yes. Enhancing the funding options available in resolution could be explored.

Using DGS funds is already foreseen under Article 79 SRMR and Article 109 BRRD, but their use is unlikely in practice: this could therefore be made more realistic. Policy-makers have already considered a number of options, including:

- A revision and harmonisation of the Least Cost Test (LCT), i.e. including some indirect costs when assessing costs to the DGS. If the use of indirect costs were to be introduced, it is recommended to frame it carefully in the legislation in order to obtain a consistent treatment, by looking only at costs that are quantifiable (e.g. fees, net-present-value of DGS intervention).

- This however should be done only as part of a broader reform that: (i) sets EDIS-SRF as the final steady state; (ii) has interim steps which see a combined use of DGS and SRF to support transfer tools and exit from the market for small and medium sized banks. NB: these interim steps should avoid reliance on more national solutions (amount to a "repatriation of resolution" through alternative measures) as this would be counter-productive, unlikely to ever lead to EDIS and rather resulting in a more fragmented Banking Union.
- To note, these options could still maintain the strong safeguards that protect the DGS funds and their credibility. Furthermore, these options would be in addition to the potential SRF support that already exists in SRMR, thereby providing for solid funding options for the sale of assets and liabilities, and subsequent exit of market of ailing small and medium-size banks.

Until EDIS is fully in place, access to the SRF and its combined use with DGS could be further explored, as funding to support those resolution tools other than bail-in, which ensure the exit of resolved entities from the market through transfer strategies.

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

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

Question 5

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

- **Yes**
- No
- No opinion

Please elaborate [text box]

Precautionary measures: it appears the measures of precautionary recapitalization and liquidity support could be maintained (in line with financial stability objective of the framework). Yet, their precautionary plus temporary nature and their conditionality need to be clear, and properly implemented. Please see our answer to question 8 for more detailed suggestions for amendments. With regard to the application of precautionary recapitalization, it seems timely and important to stress the following principles of the framework:

- The measure needs to be "confined to solvent entities" and "neither the circumstances referred to in points (a), (b) and (c) of Article 18(4) SRMR nor the circumstances referred to in Article 21(1) SRMR are present at the time the public support is granted": As regards the solvency of the entity, as it also follows from the EBA's final Q&A 2015_1777, the solvency assessment should be forward looking.

- The capital shortfall is "established in the national, Union or SSM-wide stress tests, asset quality reviews or equivalent exercise": EBA guidelines (EBA/GL/2014/09) further explain how such exercises should be devised.

- The measure shall not be used to offset losses that the entity has incurred or is likely to incur in the near future: so the measure applies for unlikely losses (which are established by the adverse scenario of a stress test) and should be temporary.

Early intervention measures: clearly, these are important recovery tools, and should be maintained. This being said, there is significant room for improvement in how EIM are provided for and applied. Looking at the escalation ladder from supervision to resolution in other jurisdictions could be helpful in this sense. We outline our suggestions for amendments in the reply to question 7.

DGS preventive measures: where such measures are available (i.e. the measures available under Article 11(3) DGSD), they should be harmonised (especially with regards to the least cost test, and ideally include at least the key principles in SRMR rather than in a Directive), and then, in connection with the progressive mutualisation of deposit funds centrally, decision making should also eventually move to the central level (with EDIS as steady state). Their interaction with the FOLTF conditions and with precautionary measures would also warrant some clarifications. This should ensure that there is a clear understanding of which measures might be applied by the relevant authorities at a given point.

In this respect, it should be clarified under which conditions these measures can be implemented without triggering FOLTF (e.g. they do not qualify as extraordinary public financial support). Moreover, it should be clarified under which circumstances the ECB and the SRB can take into account such measures when performing the FOLTF assessment in light of the forward-looking nature of this assessment.

Question 6

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

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

[22] If the preventive or alternative measures were eliminated in a future framework, the DGS could use the voluntary schemes to finance such measures.

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

Overall, DGS flexibility should be preserved, to strengthen the CM framework. Such flexibility could help to allow the resolution authority to act minimizing the impact of the failure on financial stability, and maximizing franchise value. Importantly, such measures should be harmonised to support the level playing field, and ensure a consistent, effective set of tools is available throughout the Banking Union.

Clarity should be provided on how the different measures, such as preventive and alternative measures for the use of DGS, and precautionary recapitalisation, interact with the resolution framework. This should be done in a way that avoids incentives for forbearance and ensure minimization of use public funds.

There should be a clear delineation between the criteria and conditions for use of preventive and precautionary tools versus the tools that are meant to support the transfer of some assets and liabilities of a bank and to facilitate its exit (e.g. through the use of the partial sale of business resolution tool or some national liquidation proceedings). The revised CMDI should not lead to a blurred competition in the use of DGS to support similar tools (preventive/alternative measures versus resolution/liquidation measures) as that would facilitate forbearance and arbitrage.

Potentially, one could consider devising a system whereby alternative measures in DGSD are gradually replaced by liquidation/resolution measures as the use of DGS becomes more realistic in resolution and as EDIS is gradually introduced (assuming EDIS will also have a role to finance alternative measure). As regards preventive measures, the question of how this interlinks to the new crisis management framework is of clear importance, and should be considered when assessing whether and how such tools could be clarified.

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

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

(i) Measures available before a bank's failure

Early intervention measures (EIMs)

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

Experience shows, however, that early intervention measures have hardly been used so far. Reasons for such limited use include the overlap between some early intervention measures and the supervisory actions available to supervisors as part of their prudential powers[25], the lack of a directly applicable legal basis at banking union level to activate early intervention measures[26], the conditions for their application and interactions with other

Union legislation (Market Abuse Regulation). It might be necessary to assess whether the use of EIMs could be facilitated, while remaining consistent with the need for a proportionate approach.

Question 7

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

[23] The least cost methodology requires a comparison between the cost of an alternative intervention and the loss that the DGS would have to bear in case of payout.

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

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

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

Please elaborate on what in your view the main potential improvements would be:

Our suggested amendments on EIM are:

- To transfer EI powers from the BRRD to the SRMR, so as to enable Competent Authorities (CAs) to exercise EI powers by directly applying a regulation (the SRMR) rather than by applying national transpositions of a Directive (the BRRD).
- To remove the overlap of BRRD with similar powers provided for in the SSM Regulation and CRD IV (so to avoid hurdles to their application).
- To ensure there is early involvement of the resolution authorities given the need to re-assess resolution plans and start crisis preparations. CAs should inform and involve RAs even before a formal decision is taken by their decision-making bodies that the conditions for EI and supervisory powers are met (since the escalation to decision-making and the assessment can take days). Thereafter, there should be strong cooperation in the follow-ups, with regard to joint monitoring of EI measures, with a view to ensuring adequate preparation and timing for potential FOLTF and resolution.
- When it comes to triggers, we believe that a degree of discretion is necessary for CAs to assess conditions and appropriate solutions. This being said, there could be room for improving the clarity and predictability of triggers, so to ensure the right incentives are there for early intervention.

Precautionary measures

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

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

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

[27] These measures are provided in Article 32(4)(d) BRRD.

[28] In particular, BRRD and SRMR require that the measure is limited to solvent banks and it does not cover incurred and likely losses. Also, the amount is limited to the shortfall identified in an asset quality review, stress test or equivalent exercise.

[29] The necessary conditions to allow the use of precautionary recapitalisation to support an impaired asset relief measure are outlined in detail in the Commission Asset Management Companies blueprint, page 36, see European Commission staff working document (March 2018), AMC Blueprint.

[30] European Commission (16 December 2020), Communication from the Commission to the European Parliament, the Council and the European Central Bank: Tackling non-performing loans in the aftermath of the COVID-19 pandemic (COM(2020) 822 final, p. 16).

Question 8

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

- **Yes**
- No
- No opinion

Please specify your reply [text box]

As stated in our reply to question 5, precautionary recapitalization might be – along with all other BRRD/SRMR tools – a helpful tool of the CMDI (in line with financial stability objective), as long as its precautionary and temporary nature and its conditionality is not diluted -but rather enhanced and further specified as the CMDI framework is revised. Hereafter are our suggested enhancements:

- Recent temporary adjustments to the conditionality for precautionary measures – such as the exclusion from burden-sharing introduced by the "Temporary Framework" (then extended until end-2021) – were justified by the specific circumstances of the COVID-19 outbreak; these should however elapse together with the Temporary Framework and be strictly limited to COVID-19 effects. This would be in line with the suggestions (from Eurogroup November Statement, ECA and others) to re-align the Banking Communication with BRRD/SRMR.

- Temporary nature: there should be a common understanding of the temporary nature of the aid -possibly to be made explicit through level 1 or level 2 legislation setting a time limit, eg. 3 years. Meanwhile, work should focus on how to operationalise the temporary nature, e.g. through instruments that incentivise the bank to repay the aid to the State within 3 years.

- Procedurally, the resolution authority (RA) should be informed (e.g. by the Competent Authority as soon as they are notified by the Commission of the requests for precautionary measures) and continuously thereafter, given the relevance for possible crisis preparations. This could be made explicit in the legislation, ensuring that the RA has the necessary information on a timely manner to prepare for any possible scenario.

DGS preventive measures (Article 11(3) DGSD)

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

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

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

Question 9

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

- **Yes**
- No
- No opinion

Please specify your reply [text box]

Two key elements must be clarified:

- For the safeguards, the LCT for preventive measures (under Article 11(3)) seems relatively vague. While there is a benefit to aligning the approach taken to the specific purpose of the measures, there remains a need for guidance to avoid an overly broad interpretation of the safeguard, which could also make it effectively weaker than the safeguard for alternative measures under Article 11(6) and for resolution.

- The link between the assessment made by the ECB/SRB of FOLTF with preventive measures should be clarified. In this respect, it should be clarified under which conditions these measures can be implemented without triggering FOLTF (e.g. in case they do not qualify as State aid). Moreover, it should be clarified under which circumstances the ECB and the SRB can take into account such measures when performing the FOLTF assessment in light of the forward-looking nature of this assessment. The SRB's general approach has been proportionate, and aligned to the forward-looking nature of the assessment, avoiding an unnecessary (and unhelpful) excess of decisions.

(ii) Measures available to manage the failure of banks

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

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

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

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

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

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

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

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

Resolution authorities can only apply resolution action to a failing institution when they consider that such action is necessary in the public interest. According to Article 32(5) BRRD, the public interest criterion is met when resolution action is necessary for the achievement of one or more of the resolution objectives and the winding up of the institution under normal insolvency proceedings would not meet those

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

resolution objectives to the same extent. The resolution objectives[33] are considered to be of equal importance and must be balanced as appropriate to the nature and circumstances of each case.

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

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

Question 10

What are your views on the public interest assessment?

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

Please explain [text box]

We consider that, overall, the existing legal provisions regarding the PIA are adequate. A preliminary PIA is conducted in resolution planning, and then updated at the moment of FOLTF declaration of the institution. Therefore, the PIA can take into account the present economic circumstances at the moment of FOLTF, hence allowing assessment of the potential impact from a broad range of factors.

As stated in our multi-annual work-programme and elsewhere, we plan further work on the PIA framework (in cooperation with NRAs). Reference to system-wide events is introduced as of the resolution planning cycle 2021 and we will afterwards work to further underpin analysis of and refine the assessment of critical functions at regional level and enhancing the assessment of the DGS operational and financial capacity.

The main challenges we face for a consistent PIA across the EU are: (1) differences between NIPs can lead to different outcomes for PIA, so harmonisation of NIPs would be very helpful in this regard, and (2) access to consistent data at regional level and on DGS capacity.

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

[34] See recital 29 BRRD.

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

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

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

Question 11

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

- **Yes**
- No
- No opinion

Please explain [text box]

We consider that this is an important point that needs to be addressed, i.e. to avoid falling into "limbo situations" (cf reply to question 1). Article 32b BRRD should be interpreted and implemented in the sense that an institution, which is not subject to resolution, shall enter a procedure involving the realisation of its assets, eventually leading to its liquidation and the exit from the market. However, based on a survey among NRAs, it seems that, even following transposition of Article 32b BRRD, in a number of MS a negative PIA decision does not trigger automatically the activation of a NIP in the sense that further actions need to be taken by the NRA, the NCA, the Central Bank or the Court; and in two countries the withdrawal of the bank's authorisation is a necessary precondition for initiating NIP. Finally, at least one MS did not exclude the possibility that, in case of negative PIA decision, the proceedings to be applied at national level would not consist in the realization of assets, but rather would resemble reorganization measures. It is also noted that a FOLTF assessment does not necessarily trigger the withdrawal of authorization, which might lead to limbo situations with possible detrimental effects to the respective creditors in future insolvency proceedings (e.g. possible risks of patrimonial depletion whilst operating with a limited authorisation after the FOLTF declaration). While we concur that a strict automaticity might not be warranted, the FOLTF determination of an institution, which is not put under resolution (i.e. in cases of a negative PIA), should be followed by a timely withdrawal of its authorisation without any other possibility being open.

It is suggested that the FOLTF declaration is introduced as a separate legal basis for the withdrawal of authorization. (Given it is possible that the authorisation cannot be withdrawn for a bank deemed FOLTF, simply because the grounds for withdrawal provided in Article 18 of the CRD, as implemented in national law, are not met). To address the issue, it is recommended that a FOLTF determination, when not followed by resolution for absence of public interest, should be added to the grounds for the withdrawal of authorisation provided in Article 18 of the CRD. We therefore propose to add the following wording in a new letter of Article 18 of the CRD:
"*The competent authorities may only withdraw the authorisation granted to a credit institution where such a credit institution:* ***(e) meets the conditions provided either in points (a) and (b) of Article 18(1) of Regulation No 806/2014 or in points (a) and (b) of Article 32(1) of Directive 2014/59/EU, but the resolution authority considers that a resolution action would not be in the public interest in accordance with either point (c) of Article 18(1) of Regulation No 806/2014 or point (c) of Article 32(1) of Directive 2014/59/EU;***

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

Question 12

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

- **Yes**
- No
- No opinion

Please explain [text box]

As stated in reply 11, it seems reasonable to support further clarification of the notion of "winding-up". Such definition would clarify that a FOLTF institution, which is not subject to resolution in the absence of public interest, shall be liquidated and exit the banking market. In particular, the "winding-up" definition provided in Article 2(1)(54) of the BRRD could be amended as follows:

*"'Winding up' means collective proceedings opened and monitored by the administrative or judicial authorities of a Member State with the aim of realising **all** assets of an institution or entity referred to in point (b), (c) or (d) of Article 1(1), **leading to its timely exit from the market**."*

Question 13

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

- **Yes**
- No
- No opinion

Please explain [text box]

We support the idea of granting the supervisor such power. There should be discretion for the supervisor and non-automaticity. We understand that the supervisor would need to balance the need for an early exit from the market with the need to avoid disruption for deposits and some procedural safeguards (e.g. right to be heard). Please see the reply to question 11 for a concrete drafting suggestion for Article 18 of the CRD.

Question 14

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

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

Please elaborate on your reply [text box]

For past cases, we refer to the documentation available on the website of the SRB and the ECB on FOLTF, explaining each decision.

Without prejudice to any specific case and from a more theoretical perspective, it is only natural that the later FOLTF is triggered, the more resources are likely to be depleted over time by an ailing bank. It is our view that the current FOLTF provisions allow for wide discretion as regards the timing in triggering of FOLTF. FOLTF is and needs to be guided by a supervisory assessment (given the need of granular and timely data, but also supervisory history of the firm etc.); hence, while we share the understanding of advantages of a system with checks and balances and the need to avoid forbearance, the role of resolution authorities as opposed to supervisory authorities needs to be carefully considered. Moreover, reform could have two objectives: (i) a simplification and streamlining of the run-up to FOLTF and various powers (early intervention, preventive measures etc.) as per our previous replies; (ii) a reduction of the litigation risks connected to triggering FOLTF without reducing the discretion for the supervisor, for instance by ensuring solid and clear legal grounds for forward-looking triggers. In both cases, looking at the practice of other jurisdictions could help: e.g. the US prompt corrective action (without reference to the low and automatic capital requirement triggers), and the concept of arbitrary and capricious review for some FDIC decisions –while noting this differs from the European judicial review.

Question 15

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

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

- **Yes**
- No
- No opinion

Please elaborate on your reply [text box]

Some degree of discretion seems necessary: automaticity from fixed triggers could be overly rigid and unable to cater for each individual case. So far, indicators, based on BRRD/SRMR and the EBA Guidelines on FOLTF, are used internally by the CA and RA to inform the decision-making on FOLTF determination. They are clearly not meant to promote forbearance: EBA guidelines are clear that any of the thereby contained indicators could lead to FOLTF[1]. This said, one could consider further refining conditions set under Article 18(4)(a) SRMR (and the corresponding conditions in BRRD), for instance to have a narrower but perhaps more easily implementable scope (reducing spectrum of causes), as the current scope might even overlap with the conditions set forth in subparagraphs (b) and (c) of said provision. Moreover, as indicated in previous replies, a strong and clear escalation ladder, with streamlined powers for CA and RA, and removing possibilities for arbitrage (i.e. by aligning to BRRD/SRMR the burden-sharing for liquidation aid under the 2013 Banking Communication) would overall facilitate the right incentives. In addition, as per previous reply, exploring ways to reduce litigation risk (where proportionate) could also be helpful.

[1] As additional background, we refer to the SRB reply to the ECA recommendation 4 on this matter, page 68: https://www.eca.europa.eu/Lists/ECADocuments/SR21_01/SR_Single_resolution_mechanism_EN.pdf

Adequacy of available tools in resolution and insolvency

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

Question 16

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

- **Yes**
- No
- No opinion

Please elaborate on your reply [text box]

Most of the banks under the SRB direct remit have bail-in as preferred resolution strategy. This is why the SRB has prioritised work in 2020 to further enhance the operationalization of the bail-in tool (with playbooks etc.).

This said, the other resolution tools, i.e. sale of business tool (or partial sale), potentially complemented with the asset separation tool, or the bridge bank tool, may offer the most suitable solutions for small to medium sized banks. Where a key driver of value for the main assets transferred are the client relations, any transfer strategy needs to reflect the need to maintain these client relations. In such cases, bailing in non-covered deposits would possibly damage client relationships and might thereby deplete the franchise value, suggesting a need for sufficient MREL. Without such MREL in place, banks may be unwilling to take on the risk of acquiring new clients who have been exposed to such losses (for reputational and financial reasons). Also for these reasons, one of the SRB priorities for 2021 is to operationalize the resolution tools other than bail-in.

Regarding tools when the PIA is negative, we do not comment on individual MS NIPs (rather, within the SRB we develop and regularly update National Handbooks to define how to implement resolution schemes in each country, as well as national implementation steps after negative PIA decisions). In terms of options for reform, we consider that the first best would be to have EDIS and full harmonisation of bank insolvency procedures. This would complete the Banking Union and solve the problems when dealing with smaller banks.

Assuming that this cannot be done in the short term, the reform could devise a path towards EDIS as follows:

- Starting with some level of mutualisation of DGS, for instance at 20% to avoid the challenges connected to separate compartments, and to design a clear progression towards full mutualisation within 5 years;

- In the transitional period, the use of DGS in resolution should be made more realistic, building on the existing provisions of Article 79 SRMR and Article 109 BRRD, harmonising the applicable least cost test and revising the creditor hierarchy in a way that enables the use of DGS in resolution. Options to combine the uses of DGS and SRF to support the transfer of assets and liabilities and exit of the market of smaller banks under SRB remit could be explored;

- In the transitional period, the use of DGS outside resolution could be harmonised and centralised. This, in addition to the previous point, would help to support the more efficient and consistent management of the failure of all banks. When using these tools within the Banking Union, there should be a robust governance arrangement ensuring joint work between the SRB (plus NRAs) and national DGS. This is key to enable a consistent application of the LCT and opening up to bidders across MS, thereby minimising the overall costs for the system (for banks under NRA remit). A stronger involvement of the SRB would reduce the likelihood of ending up with a myriad of national solutions that undermine the overall consistency of the framework (possibly at the expense of the public purse). National authorities would still benefit from: (i) the removal of DGS super-priority and therefore more flexible but also efficient use of DGS funds in NIPs (along with a review of the Banking Communication and alignment on the use of DGS); (ii) access to the DIF under the hybrid EDIS, and (iii) a fully mutualised EDIS as soon as possible. To further enhance this approach, consideration should also be given to a possible combination of the DIF and SRF in the interim period, which would provide a higher overall firepower;

- In the steady state, both resolution and liquidation powers would be centralised at BU level, with SRB (and SRM) having a powerful toolkit at disposal and a single fund (SRF+EDIS), leading to efficiency gains and a much more competitive Banking Union.

Question 17

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

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

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

The resolution framework has at its disposal a comprehensive set of tools. What is more needed at the moment seems to be the enhancement of those tools.

The SRB is already working in this direction, based on the existing framework. Over the last few months, the SRB published guidance regarding the bail-in instrument. An important SRB priority for 2021-2023 is the work on “resolution tools other than bail-in” (RTOB), which is aimed at enhancing the operational preparedness and readiness to implement transfer strategies. The focus for 2021 will be to develop the competencies and operational steps needed, from front to back office, for executing the sale of business tool (both share and asset deals). To support this work, the revised framework could consider technical improvements, for instance enabling the orderly wind down of banks after bail-in (i.e. providing for a structure which would enable such a wind-down in such a way that effectively preserved critical functions), clarifying the concept of bridge bank “viability” and the possibility of bridge bank without critical functions, considering the framework for exclusions from bail-in and others.

If we look instead at the more over-arching issues of the CMDI framework, and particularly the insolvency frameworks, it is necessary to at least aim at some harmonisation across MS, not least to enable a level playing field for NCWO, PIA.

As already stated in the answer to question 16, the (only) optimal solution and the steady state should be to equip the central authority with EDIS and the power to liquidate banks when the PIA is negative, as an EU-wide administrative liquidation. It is important that the review of the CMDI sets this clearly as the end-state. Until such steady state is achieved, an incremental approach could foresee enhancing the use of DGS (cf. replies to question 4 and 16). Such a revision to the use of national DGS funds should be geared towards supporting the implementation of EDIS. This would improve the overall firepower of the authorities - as stand-alone DGS funds may be insufficient-, the integration of the Banking Union (BU), and ultimately aligning incentives (given that funds would be both collected and used centrally as is done with the SRF currently and with EDIS in the steady-state).

Eventually, a combined use of EDIS and the SRF would clearly help partial sales of business, reduce fragmentation across the BU, and align decision-making and funding at the European level. Until EDIS is fully in place, access to the SRF and its combined use with DGS could be further explored, as funding to support those resolution tools other than bail-in, which ensure the exit of resolved entities from the market through transfer strategies. One option that has been voiced lately is the possibility to have DGS contributing to reach the 8% TLOF minimum bail-in that unlocks capital support from the SRF. The SRB has not analysed the pros and cons of this option or other options, yet such an analysis, coupled with an impact assessment of this and other options seem worth exploring in order to exploit at best the funding available to support the exit from the market of ailing banks (until EDIS is in place).

Question 18

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

- Yes
- **No**
- No opinion

Please explain [text box]

Please see replies to questions 16-17 on our preferred solution (EDIS + central administrative liquidation at steady state and interim enhancement of sale of business tool).

The power to sell business of a bank or parts of it exists in resolution and there is already a test for the use of DGS (the LCT) : this could be harmonised to determine when the DGS funds could be used to support partial sales of business.

These transfer strategies may require external funding to take place, and this would be through uses of EDIS in the steady state, and through SRF-DGS and hybrid model of EDIS in the short term –as interim steps. The current situation, in which similar (transfer) tools are available in some Member States in insolvency bears risks and makes the playing field uneven. The reform should aim towards some harmonisation and centralisation of such uses of DGS outside resolution (please see replies to question 16) rather than introducing a new tool.

To add, in case similar tools (to partial sale of business) to be applied in national insolvency were to be harmonised across the EU legal framework, it should be clarified how these tools would interact with the PIA and the NCWO assessment. PIA is the gateway for resolution as extraordinary powers are granted to the SRB where this is “in the public interest”; where this is not the case, one should consider if similar powers could potentially clatter with constitutional (property) rights. Therefore, their use must be proportionate and adequate, justified by a public good such as financial stability. Using them even in case of a negative PIA could be further challenged.

If the reply to the above is Yes:

[no reply as we reply NO and explain our view in the comment to question 18]

Question 18.1

How would you see the implementation of such a tool?

	Agree	Disagree	Do not know / No opinion
There would be benefits in introducing such a tool in all the insolvency laws of EU Member States			
There are legal challenges for the introduction of such a tool in insolvency			

Such a liquidation tool (and its dedicated source of financing) could be introduced in the resolution framework and be at the disposal of the resolution authority, while still applying to non-public interest banks			
Such a liquidation tool should be managed centrally (i.e. at supra-national level) in the banking union and at Member State level in the rest of the EU			

Please explain your answers further [text box]

[no reply as we reply no to question 18]

Question 18.2

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

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

[no reply as we reply no to question 18]

Resolution strategy

As part of resolution planning, resolution authorities are defining the preferred and variant resolution strategy and preparing the application of the relevant tools to ensure its execution. For large and complex institutions, open-bank bail-in is, in general, expected to be the preferred resolution tool. This comes hand in hand with the need for those institutions to hold sufficient loss absorbing and recapitalisation capacity (MREL).

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

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

Question 19

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

- Yes
- **No**
- No opinion

Please explain [text box]

In some resolution cases, external funding may prove necessary. If this is the case, there are two options: the SRF and DGS.

Access to the SRF in case its use indirectly results in part of the losses being passed on to the SRF (e.g. for capital support) requires meeting the 8% TLOF bail-in threshold. This does not seem to be an issue for most banks under SRB direct remit but it could be an issue for some banks. The SRB has carried out a quantitative analysis on the number of banks with a balance sheet of up to EUR 100bn that would face problems to meet the 8% threshold. The analysis proves that, in case of capital depletion (if the bank does not have capital buffers on top of the capital requirements at the moment of FOLTF – which seems a realistic assumption), a relevant number of such firms would not meet the 8% threshold without bailing-in non-covered deposits, which, as said, might prove risky in cases where this would affect franchise value and potentially have significant adverse effects on the financial stability. To note, the use of the SRF for liquidity support is not subject to the contribution of 8% TLOF (albeit there are other safeguards).

The threshold for access could also be further assessed for the case of those banks which resolution strategy amounts to exit from the market through the deployment of transfer tools.

The second option is the use of DGS. Under the current framework, the DGS super priority and the conditions in Article 79 SRMR and BRRD Article 109 BRRD make it almost impossible to use DGSs in resolution.

Because of the difficulties presented by the use of national DGS (fragmentation, uneven playing field, sovereign-bank feedback loop), this should occur at supra-national level and as an interim step towards a fully-fledged EDIS. It would support the effective use of transfer tools to deal with deposit-funded banks.

To conclude, a combined use of EDIS and the SRF is the optimal solution for many reasons and also helps partial sales of business (and transfer strategies more broadly), reduces fragmentation across the Banking Union, and aligns decision-making and funding at the European level. Until EDIS is fully in place, access to the SRF and its combined use with DGS could be further explored, as funding to support those resolution tools other than bail-in which ensure the exit of resolved entities from the market (through transfer strategies).

Funding sources in resolution

In order to carry out a resolution action, the resolution authority may decide to access the SRF/RF if certain conditions are met, in particular the need to first bail-in shareholders and creditors for no less than 8% of total liabilities, including own funds (TLOF)[36]. Article 109 BRRD also provides the possibility of using the DGS in resolution, however only for an amount that would not exceed the amount in losses that the DGS would have borne under an insolvency counterfactual. The availability of sufficient sources of funding and the provision of proportionate conditions to access them are central to ensure that the resolution framework is adequate to cater for potentially any bank's failure.

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

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

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

Question 20

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

[36] Article 44(5) BRRD requires a minimum bail-in of 8% TLOF and provides for a maximum RF contribution of 5% TLOF (unless all unsecured, non-preferred liabilities, other than eligible deposits, have been written down or converted in full) when a resolution authority decides to exclude or partially exclude an eligible liability or class of eligible liabilities, and the losses that would have been borne by those liabilities have not been passed on fully to other creditors, or when the use of the RF indirectly results in part of the losses being passed on to the RF (Article 101(2) BRRD).

[37] For solvency support

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

Please explain your responses [text box]

Please see previous replies. In addition, with regard to two fields of this table:

- On the use of DGS in resolution, this is foreseen in the legislation but is very unlikely in practice. Further measures should be taken to enhance the availability of such funds (cf. our reply to question 19 and elsewhere).
- EDIS should indeed be available to use independently from the use of the SRF and subject to the relevant conditions of the LCT (after the super-priority has been removed). We could also explore how the SRF can support, possibly together with DGS funds (if their use in resolution is made more realistic including through amendments to the conditions in BRRD/SRMR, LCT), the sale of assets and liabilities and the exit of the market of small and medium-size banks that become FOLTF. DGS are, when they subrogate to the rights of covered depositors, creditors of the failed bank and operate differently from the SRF, so we do not consider the 8% threshold should be extended to them.

Sources of funding available in insolvency

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

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

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

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

Question 21

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

- **Yes**
- No
- No opinion

Please explain [Text]

- Clarity on the different powers would help predictability and level-playing field. Clarity should be provided on how the different measures, such as preventive and alternative measures for the use of DGS, and precautionary recapitalisation, interact with the resolution framework. This should be done in a way that sets incentives that are aligned with the resolution objectives; where measures are different across Member States, this undermines the level playing field and possibly eventually results in the increased use of public funds. A clearer escalation ladder (e.g. on supervisory and early intervention measures, FOLTF) would also help predictability of crisis management.
- 2013 Banking Communication: The current misalignment between the Banking Communication and the BRRD/SRMR has provided the opportunity to provide public support with less onerous burden-sharing (e.g. sparing senior bondholders), thereby skewing incentives. As such, to avoid skewed incentives (e.g. for bidders), to ensure the minimisation of the use of public funds and to support the level playing field, the Commission should update and align (to the BRRD/SRMR conditionality with respect to liquidation aid) the 2013 Banking Communication as a matter of priority (giving a clear signal following the expiry of the Temporary Framework at end-2021). This would then align the incentives when managing the failure of these banks. We must avoid creating incentives to circumvent the resolution framework, which undermine its credibility.
- Preventive and alternative measures continue to have divergent interpretations nationally, and the approaches taken should be harmonised. At the same time, we should recall the different position of resolution funds and DGS funds under the current framework. DGS funds effectively stand in the shoes of a particular set of creditors already in the bank at the point of failure, whereas resolution funds are external to the bank and as such do not have a clear anchoring in the creditor hierarchy. Use of the 8% threshold should therefore not be extended to cover the use of DGS funds, given this would not align to the overall design of the DGS framework. As a consistent set of tools is developed, combining use of DGS funds and SRF, it could be considered that this tool would then replace alternative measures (assuming they would be among the powers of EDIS).

Governance and funding

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

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

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

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

Question 22

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

– Yes
– **No**
– No opinion

Please explain [text box]

It seems unnecessary and unhelpful to change SRB governance arrangements if the review of the CMDI enhances (rather than overhauls) the resolution toolkit, i.e. if the main funding change is to make more realistic the use of DGS (already formally foreseen in BRRD/SRMR) in combination with the SRF; even more so, if the aim is to progress towards EDIS.

The SRB governance (e.g. Extended Executive Session) was designed to ensure a balanced Banking Union decision-making but also, notably, the possibility to take decisions swiftly given the role of crisis manager. To note, all SRB decisions on crisis cases were so far adopted by consensus: this remains the objective of the SRB decision-making bodies. As such, one could strengthen coordination and cooperation provisions, and perhaps foresee Memoranda of Understanding (particularly between SRM and DGSs), but overhauling the governance seems to pose more risks than advantages at this stage, particularly if any intermediate step is geared towards EDIS. As we move towards a more European funding for the deposit guarantee pillar, we should also then have a European governance for such funding. In this regard, and in line with the original Commission proposal, the SRB should be the entity managing a future EDIS.

Question 23

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

– **Yes**
– No
– No opinion

Please explain [text box]

Please see reply to previous question 22. If the use of DGS in resolution is made more realistic, one could explore the following articulation of roles:

- The SRB could coordinate, jointly with DGS, the calculation of the LCT (and ultimately decide upon it), to ensure its homogenous application across BU Member States.
- The SRB could be supported by DGS and NRAs in the preparation for transfer of assets and liabilities (e.g. via partial sale of business).
- The use of the SRF in combination with the DGS could be explored where necessary.
- Decisions would be adopted by Extended Executive Session, joined by the relevant NRAs and/or DGS.

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

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

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

Question 24

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

	Agree	Disagree	Do not know / No opinion
While issuing MREL-eligible instruments remains a priority, certain banks may not be capable of closing the shortfall sustainably for lack of market access.	X		

Possible adverse market and economic circumstances can also affect the issuance capacity of certain banks.	X		
Transitional periods could be a tool to deal with MREL shortfalls, resolution authorities could consider prolonging these under the current framework.	X		

Please explain [text box]

Some medium-and-small-sized banks rely mostly on equity to meet MREL. This might have been depleted at the point of FOLTF, leaving little capacity to absorb losses and (where needed) recapitalize the bank. Of course, the majority of banks unable to access markets are more likely to be LSIs or to be located in MS with less developed financial markets, and as such less likely to meet the PIA. However, there is a class of banks for which equity financing is general more accessible, including due to the specific aspects of the business model, but which meet the PIA (particularly due to retail banking operations). The current regulations do not give the SRB the ability to require solely issuance of debt instruments to address this issue. If the bank does approach failure after relying on equity financing, it is then unlikely it will be able to issue MREL in the form of debt as it approaches failure, meaning remaining MREL resources may be limited. In any case, all SIs have to become resolvable pursuant to BRRD/SRMR and need to build the necessary MREL to allow execution of the resolution scheme (with loss absorption as a minimum). Additional transitional periods for MREL help in this regard. Significant build-up of equity to meet MREL requirements may also make debt financing cheaper (given a potentially lower risk premium) and could also organically make a more balanced funding profile more attractive. We refer to the replies above on key issues of use of DGS and SRF (as external funds), and FOLTF.

Question 25

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

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

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

Please explain [text box]

MREL, and more specifically the recapitalization amount (RCA) can be adjusted for transfer strategies compared to when bail-in is the preferred resolution strategy. The SRB has updated its MREL policy in light of the Banking Package and describes all possible adjustments[2].

As regards MREL setting for banks which do not meet the PIA carried out during resolution planning, the current approach as set out in the SRMR and BRRD differentiates those banks from banks which would meet the PIA pursuant to Article 12d(2) SRMR, which allows the SRB to top-upthe loss absorption amount (LAA) in case of financial stability and contagion risks. As such, the MREL policy will allow the SRB, where contagion and financial stability are present, to ask for higher MREL than LAA for NIP banks.

At the same time, the PIA enables and requires the SRB to take into account the macro-economic and market circumstances that surround a bank's failure, particularly when assessing against the objectives of preventing financial instability, and of preserving continuity of functions that are critical to the real economy. As such, and as noted under the SRB policy, the SRB assumes that, a priori and subject to any consideration specific to the bank in question, an adjustment of the LAA for liquidation entities will not be necessary. Of course, even given that the eventual decision will have to account for the circumstances at the time of failure, the careful assessment made during the resolution-planning phase is the foundation.

This approach is designed to ensures all banks become operationally resolvable, through either resolution or NIPs -despite the terminology, resolvability (pursuant to Article 10.3 of SRMR and the Delegated Regulation 2016/1075) requires the assessment of the feasibility and credibility of either resolution or NIP.

Treatment of retail clients under the bail-in tool

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

[2] Section 2.3 MREL Policy.

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

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

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

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

[42] Directive (EU) 2019/879.

[43] See Article 44a BRRD.

[44] Directive 2014/65/EU.

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

Question 26

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

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

Please explain [text box]

While acknowledging the benefits of diversification for funding purposes, large holdings of liabilities sold to retail investors could make banks more difficult to resolve for various reasons, including (i) the potential loss of a bank's customer base and the risk of withdrawals and (ii) potential litigation brought by retail investors upon or after resolution against the bank, which might endanger the bank's future viability.

Issues relating to financial instruments distribution, and investors (including retail) protection typically fall under the remit of the market conduct authority; additional protections should be considered in the respective legislation to ensure that they receive appropriate protections. But it is also clear that they may impact resolution, so a restrictive approach should be implemented, building on the BRRD2 enhancement, avoiding that such creditors rank pari passu with less sensitive liabilities. Where protections are introduced then, depending on the nature of such protections, revisions to the creditor hierarchy should be considered: if protections refer to reimbursement or investment protection schemes with subrogation, then no revision to position in the creditor hierarchy would be needed; whereas exclusion of such instruments from bail-in would mean that changes in the creditor hierarchy would then be needed to address NCWO risk.

One could assess the impact of rules introduced through the recent Banking Reform Package (Article 44a BRRD2) and whether there is a need to harmonise and enhance them. For instance, we suggest to consider the extension of protections currently applicable for senior-non-preferred instruments to senior preferred bonds, given the latter are also MREL-eligible.

Question 27

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

- **Yes**
- No
- No opinion

Please explain [text box]

As we move towards a Capital Markets Union, we may see the increased investment by investors across national boundaries. To the extent this occurs, this will reduce the logic for different minimum denomination amounts. Progress in this area could be linked to development of the CMU.

Question 28

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

- **Yes**
- No
- No opinion

Please explain [text box]

As above-mentioned, one could consider that senior eligible liabilities should also be subject to minimum denomination amount similar to senior-non-preferred (with the same rationale of protecting retail investors and improving resolvability).

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

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

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

[45] Namely, own funds items, senior non-preferred debt instruments, covered deposits and claims of DGSs subrogating to covered deposits, and the part of eligible deposits from natural persons and micro, small and medium-sized enterprises (SMEs) exceeding

the coverage level provided by the DGSD – see Articles 48(7) and 108 BRRD.

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

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

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

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

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

Question 29

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

- **Yes**
- No
- No opinion

Please explain [text box]

One of the objectives of harmonising creditor hierarchies would be to facilitate the implementation of the bail-in tool, by minimising the risk of NCWO claims based on the treatment that creditors would have received had the relevant entity been wound up under NIPs. Other objectives are increased predictability for creditors and investors, a more level playing field across MSs, and better risk pricing of debt within the BU. Targeted harmonisation could also have consequences on other parts of the framework, such as the least cost test and the use of DGSs in resolution.

We support the objective of reducing the misalignment between the resolution and insolvency hierarchy. Here we already see the benefits of the partial harmonisation in BRRD2, but clearly further work on the creditor hierarchy would still yield benefits. While the risk of NCWO cannot be reduced to zero, given the possibility of discretionary exclusions, it can be minimised through alignment of the application of losses in resolution and insolvency.

Question 30

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

	1	2	3	4	5	6	7	8	9	10	Do not know / No opinion

Granting of statutory preference to deposits currently not covered by Article 108(1) BRRD							X				
Introduction of a single-tiered ranking for all deposits								X			
Requiring preferred deposits to rank below all other preferred claims											X
Granting of statutory preference in insolvency for liabilities excluded from bail-in under Article 44(2) BRRD							X				

Looking to the mandatory exclusions is helpful. Overall, we would support harmonisation of pre-existing approaches and, to the extent possible, that the treatment of liabilities that are mandatorily excluded should also be preferred in insolvency, given this then aligns to the procedure in resolution. For such liabilities, it is important to be clear that where the bank enters resolution, the creditors will in any case be excluded from bail-in, so there is not in that sense any moral hazard. Furthermore, this creates an uneven level playing field for certain liabilities between small banks that would enter insolvency (and for which some liabilities would be exposed to enhanced risk) and large banks that would be resolved. The key risk here is that misalignment leads to NCWO risk. There may be cases where technical and legal reasons justify not providing a preference, but we should bear in mind that economically speaking these creditors, where they are creditors to a bank which meets the PIA, are excluded from bail-in and thus are protected. The risk is instead for the SRF.

As regards depositors, to the extent that such liabilities are sensitive, and legislators view such liabilities should be protected, then those creditors should receive a preferred status. This should also be considered in the context of the desired CM toolkit and the recommendation to make the use of DGS funds in resolution more credible (as per previous replies).

In order to facilitate resolution, a tiered/progressive hierarchy of claims is very relevant. A good example is the current approach to different types of deposits. There is still room to improve the system. One could, for instance, consider providing priority to corporate deposits vs other senior debt (i.e. bonds issued to investors pari passu with corporate deposits). This change to the hierarchy would improve the possibility to develop a bridge bank, now seriously hampered by both types of liabilities being pari passu.

C. Depositor insurance

Enhancing depositor protection in the EU[49]

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

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

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

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

Question 31

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

- **Yes**
- No
- No opinion

Please elaborate [text box]

The recent EBA opinion on Options and National Discretions (ONDs) on DGSD (EBA/OP/2020/02) sets out a number of areas in which there is a lack of harmonization. This will make the eventual implementation of a European framework more challenging. As such, it would be helpful to harmonise ONDs to the extent possible as part of the CMDI framework review.

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

Question 32

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

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

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

As regards the level of deposit protection, the full impact assessment seems a key basis to support any proposed change, as any increase could be viewed as requiring an increase in the overall size of DGS funds. This should be considered also in the context of the desired CMDI framework end-state, insofar as an enhanced level of deposit protection will most likely make use of alternative measures/use of DGS funds in resolution more feasible.

Difference in approach to protection of depositors should be harmonized to the extent possible.

To the extent there are different approaches to client funds, and insofar as those funds are effectively deposits, these should receive the same level of protection across all Member States.

Keeping depositors informed

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

Question 33

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

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

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

It is critical that depositors receive all relevant information. An important benefit of deposit insurance is that it reduces the risk of bank runs. This benefit will not be realised without adequate information.

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

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

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

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

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

Question 34

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

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

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

Regarding the first question, the current framework clearly improves the pre-crisis situation. We have not witnessed any major deposit run and, even with the increased uncertainty created by the Covid-19 outbreak in 2020, financial stability has not been undermined. However, we consider that there are still too many divergences between MS. Indeed, depositor confidence varies due to the existence of the national frameworks and DGSs. EDIS would clearly enhance financial stability and depositor confidence throughout the Banking Union and favour cross-border free movement of capital.

The 0.8% target seems reasonable and reachable in all MS (and indeed has already been reached in a number of MS[3]). We do not think it should be revisited (the flexibility provided for in the current DGSD for MS with concentrated banking sectors may anyway be sufficient to account for any concerns[4]). Some MS have mentioned that, due to the economies of scale surrounding EDIS, it could make sense to reduce the 0.8% target. We do not share this view. The additional funds at the central level should provide for the benefit of enhanced financial stability, and resilience of the DGS system, rather than focusing on reducing burdens to the banking sector.

In the future, the contributions will not be set per MS, but will instead consist of risk-based contributions calculated at the firm's level, set at the Banking Union level. We do not see the need to adapt the target level to the risks in a MS because we would consider that there should

[3] https://www.eba.europa.eu/regulation-and-policy/recovery-and-resolution/deposit-guarantee-schemes-data
[4] Directive 2014/49/EU Article 10(6)

be progress to get to a situation where the nationality of banks is not considered as a factor anymore for such contributions. Instead, the contribution for banks should be calculated based on the specific risk posed by the individual banks. This approach should effectively avoid cross-subsidisation across Member States assuming there is an effective calibration of the risk-based contributions methodology.

Question 35

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

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[51] Letter by the High-Level Working Group on a European Deposit Insurance Scheme (EDIS) Chair to the President of the Eurogroup, 3 December 2019.

[52] Various designs and parameters could be envisaged, pertaining to – among other things – (i) the allocation of the funds between the central fund and the national DGSs, as well as a cap on the central fund or on mandatory lending, (ii) the build-up phase of the fund and the mandatory lending component, (iii) interest rates, maturities and repayment of the loans, or (iv) the overall scope of the scheme.

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

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

When EDIS enters into force, risk-based contributions will need to be calculated at the firm level. Therefore, there will not be a 0.8% target per MS, but an overall 0.8% target for the Banking Union (similar to how the SRF is financed).

Question 36[57]

Which of the following statements regarding EDIS do you support?

	Agree	Disagree	Do not know / No opinion
It is preferable to maintain the national protection of deposits, even if this means that national budgets, and taxpayers, are exposed to financial risks in case of bank failure and may create obstacles to cross-border activity[58].		X	
From the depositors' perspective, a common scheme, in addition to the national DGSs, is essential for the protection of deposits and financial stability in the euro area.	X		

[53] Article 10 DGSD

[54] Article 10 DGSD

[55] Article 11 DGSD

[56] Article 11 DGSD

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

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

From the credit institutions' perspective, a common scheme is more cost-effective than the current national DGSs if the pooling effects of the increased firepower[59] are exploited.	X		
From the perspective of the EU Single Market, EDIS could exceptionally be used in the non-banking union Member States as an extraordinary lending facility in circumstances such as systemic crises and if justified for financial stability reasons.		X	

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

We strongly oppose maintaining national protection only. As noted here and in many other publications, the current situation creates several concerns in terms of fragmentation, level playing field, 'sovereign-bank feedback loop' and exposure of tax-payers funds to the costs of banks' crisis.

Our vision of the steady state is still a fully-fledged loss-sharing EDIS. It would be important to achieve a political agreement as soon as possible on it, although its deployment could be extended over time (e.g. after a 5 years transition period as suggested in previous replies). All the other solutions are second best, and are for the longer term detrimental to both the Banking Union and financial stability.

We support the third sentence. Maintaining the 0.8% target for the whole Banking Union would de facto increase the firepower of the protection of depositors thanks to the pooling effects. This argument should not be used to argue in favour of reducing the target level of DGS/EDIS.

We consider that EDIS should be used for Banking Union members (only those that contribute should benefit). Consideration could be given to possible lending to non-Banking Union members, in line with Article 12 DGSD, but this would be of a more discretionary, conditional nature rather than the support provided through membership in the Banking Union.

Question 37

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

	Agree	Disagree	Do not know / No opinion
As a first step, a common scheme provides only liquidity support subject to the agreed limits to increase a mutual trust among Member States.	X		
At least a part of the funds available in national DGSs is progressively transferred to a central fund.	X		

If the central fund is depleted, all banks within the banking union contribute to its replenishment over a certain period.	X		
Loss coverage is an essential part of a common scheme, at least in the long term.	X		

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

Our first best is an agreement on EDIS as soon as possible. Any other solution may be detrimental of the Banking Union for the longer term.

We understand that the political discussions are now aiming for the hybrid model for the initial phase (as mentioned in the December 2020 letter of the president of the Eurogroup). We support looking at the hybrid model as a compromise solution for the transitional period (with a degree, eg. 20%, of mutualisation from the beginning), without losing sight of the end-goal at the steady state: a fully-fledged loss-sharing EDIS (as suggested previously, this could come at the end of a 5 years transition period). It is now time to reach compromises. In December, the Euro Summit gave strong and clear political guidance to make progress on EDIS.

If and when EDIS is depleted, all BU banks should contribute in accordance with the risk-based methodology (similar to how the SRF works), which are based on the risk of the firm independently of its nationality.

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

Question 38

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

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

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

We can support the introduction of caps to access to the DIF, but such measures should only be transitional towards the eventual completion of the Banking Union. Furthemore, the need for such measures may be reduced the by the existence of a European authority, which would have responsibility to coordinate measures. We should ensure that the level of funding available to each MS is at least the equal to the level available prior to EDIS. We should also avoid that banks operating in larger banking markets are treated unfairly, if access is solely considered in terms of the available financial means of the DIF. In particular, there could be a scenario where a proportionately similar level of failures in a large banking market would reach a cap, whereas for a smaller banking market such a cap would not be met. Therefore, the design of (relative) caps should take into account the size of the national banking systems to support the level playing field.

Regarding the allocation of funds, we consider that the compromise solution could be in the middle ground. This implies splitting 50% of the funds between the DIF and the national DGS, and then progressively increasing the share of the DIF in line with a pre-agreed calendar. Under this approach, the national funds would be used prior to then accessing European funds.

The maturities should be carefully balanced to avoid a pro-cyclical impact on the banks, while allowing for a reasonable fast replenishment of the funds.

There should be agreement at the earliest (possibly in June 2021) on a time-bound step-wise plan (in line with the conclusions of the Euro Summit of 11 December 2020) to transition from an initial hybrid model with only liquidity support towards a fully-fledged loss-sharing EDIS. We understand that time is needed to build trust, and this is why transitional periods make sense (within a pre-agreed calendar with clear dates). However, this should not make us lose sight of the end-goal: a fully-fledged EDIS. We recommend having a degree of mutualisation of funds (eg. 20%) from the beginning of the transitional period towards EDIS, and then aiming to reach full mutualisation within 5 years.

Question 39

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

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

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

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

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

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

One could consider a system with a central authority for both resolution and liquidation, in charge of the funds required to support such actions. If the SRF and EDIS merged at some point (potentially in one fund with two compartments), this would increase effectiveness and firepower (as per previous replies).

Additional information

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