



December 1, 2014

The Financial Stability Board  
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**The Associations' submission re.:**

- **FSB Consultative Document on Cross-border Recognition of Resolution Action**
- **FSB Consultative Document on Guidance on Cooperation and Information Sharing with Host Authorities of Jurisdictions not Represented on CMGs where a G-SIFI has a Systemic Presence**

Dear Sirs and Mesdames:

The Institute of International Finance (IIF) and Global Financial Markets Association (GFMA) (collectively, “the Associations”) welcome the publication of the two captioned consultative documents as important contributions to achieving the FSB’s goals of finalizing the vision of globally consistent resolution procedures for major banks by the end of 2015. The Associations have consistently supported the approach to resolution established by the FSB under the *Key Attributes of Effective Resolution Regimes for Financial Institutions*. The *Key Attributes* already provide a sound basis for the resolution of a major bank in the jurisdictions where consistent regulations have been adopted. Managing cross-border recognition of resolution actions efficiently and effectively will create market confidence that orderly resolution of a major bank can be carried out in accordance with the *Key Attributes*. This is essential to assure investors that value destruction in the resolution of institutions in which they may invest will be minimized; to assure markets that the disruption caused by a bank failure can be contained; and to assure the public that orderly resolution will work without resort to bail-out using public funds.

The comments given here are intended to help further the purposes of creating that confidence in the new regime created under the *Key Attributes*. Debate about specifics should not obscure the industry’s fundamental commitment to the G20’s financial reform program and its vision of ending too-big-to-fail.

This letter addresses both the captioned consultative documents.

**I. Cross-border Recognition of Resolution Action**

**Overview**

- The Associations see this consultation as a very positive development and reiterate the private sector’s appreciation for the FSB’s leadership on ending TBTF by disseminating strong resolution practices under the *Key Attributes*.
- Cross-border recognition is essential to that end, as the FSB and G20 recognize. The private sector will do all it can to facilitate adjustments it needs to make and to support the steps the

public sector needs to take. Gov. Carney's September 12 speech provides an excellent statement of the direction that should be taken.

- The associations particularly want to join the FSB in stressing (per paragraph 2 of the Executive Summary) that, while an ideal cross-border recognition regime can be imagined, contractual arrangements – and less-formal understandings across jurisdictions based on the incentives of good outcomes possible under *Key-Attributes* type resolution – can provide workable interim solutions to assure effective and orderly cross-border resolution.
- The industry is committed to the rapid implementation of contractual solutions in regard to temporary stays and bail-in (per paragraph 4).
- The Associations also urge the FSB to adopt a concerted program focused on wide and early adoption of further regulatory and, where needed, statutory measures. While advancing such measures is clearly part of the G20/FSB plan for 2015, an even higher priority could be assigned to this essential process, to create greater assurances that the program will be an equally high priority for national jurisdictions. To this end, we urge the FSB to take a stronger stand on promoting the provisions that are necessary. While it is well understood the FSB has no mandatory powers over member states, it could adopt a higher standard than “jurisdictions should consider”.
- It is striking that the role of Cross-Border Cooperation Agreements (COAGs) and Crisis Management Groups (CMGs) has not been given more stress in the consultative document. CMGs could use COAGs to facilitate meeting the goals of cooperation set out in the *Key Attributes* and the consultation document.
- While the Associations are supportive of using all appropriate means to obtain the goals of consistent cross-border outcomes in resolution, there is a strong preference for cross-border *recognition* of relevant proceedings in order to obtain consistent results across a firm in resolution, rather than relying on *domestic supportive measures* that may result in technical differences or procedural divergences that would get in the way of a single, consistent outcome for all claimants on a failing cross-border firm.
- By the same token that it is important to get to reasonably consistent and uniform understandings of cross-border recognition of bank resolution, it is important to achieve the same commonality and consistency with respect to FMI resolution issues, almost all of which would have cross-border implications.

### **Specific Questions Posed in the Consultative Document**

- 1. Are the elements of cross-border recognition frameworks identified in the report appropriate? What additional elements, if any, should jurisdictions consider including in their legal frameworks?**

As noted in the general comments, high priority should be given to enactment of the provisions the FSB urges that jurisdictions “should consider”, on an internationally consistent basis.

Furthermore, there needs to be stronger attention to both the facilitation of sharing of information among relevant authorities (including courts) and to the assurances that home and host jurisdictions can give each other as to protection of confidentiality when information needs to be shared for these purposes. This is

part of a larger problem of information sharing for many regulatory and resolution purposes that the FSB needs to resolve over time.

We note that the parallel proposal on *Guidance on Cooperation and Information Sharing with Host Authorities of Jurisdictions Not Represented on CMGs where a G-SIFI has a Systemic Presence* has good language on information sharing and protection of confidential information that could be picked up for these purposes.

**2. Do you agree that foreign resolution actions can be given effect in different ways, either through recognition procedures or by way of supportive measures taken by domestic authority under its domestic resolution regime? Do you agree with the report’s analysis of these approaches?**

Yes, the different approaches outlined for recognition are appropriate and can both be effective. If anything the FSB’s analysis of certain elements is too cautious and, as a broad generalization, we are convinced that reliably effective resolution can be achieved via the means described.

As stated in the general points above, however, there is a strong preference for recognition procedures over supportive measures. While both can be effective, recognition is more likely to produce fair and consistent results across a firm than domestic supportive measures in each jurisdiction.

Recognition should be guided by the principle that the scope of the powers under the home resolution jurisdictions should govern the scope of the effect of resolution. As the *Key Attributes* have been implemented in various jurisdictions, different approaches have been taken to the scope, timing, and application of default stays and overrides, among other resolution powers. In the process of recognizing a foreign resolution proceeding, the presumption should be that the scope of the powers exercised under the foreign regime should govern the scope of the effect of the powers in the host, recognizing jurisdiction.<sup>1</sup>

Depending on the scenario, counterparties to the failed group would have different outcomes depending on the governing law of their contract. The goal of recognition should be to put all such counterparties on an equal footing—that is, all stayed to the same extent.

There are possible exceptions to this principle, for instance where recognizing the full scope of the foreign power would violate a core public policy, or would give rise to systemic risk in the host,

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<sup>1</sup> For example:

- The US Federal Deposit Insurance Act, which addresses the failure of deposit-taking institutions in the US, does not stay the exercise of cross defaults. If an FDIA proceeding were recognized under the BRRD, and Article 68 were applied automatically (as the BRRD provides upon recognition), cross defaults under contracts governed by the law of the recognizing EU member would be overridden (because Article 68 overrides any direct or cross default that arises based upon the exercise of resolution powers, including recognized resolutions), while cross defaults under contracts governed by US law would not be overridden.
- Under OLA, cross defaults may be overridden if certain conditions are met. The override extends not just to cross defaults that arise directly because of the application of OLA, but also that arise indirectly, including, e.g. cross defaults based on the subsequent downgrade of an affiliate of the entity in OLA (but that is not itself in OLA proceedings). However, the scope of defaults overridden under the BRRD stay provisions is narrower, as such default must be “directly linked” to the application of resolution powers. Therefore, use of BRRD powers in support of the foreign resolution could lead to different results from a full recognition of the effect of the foreign resolution proceeding.

recognizing jurisdiction. But the assumption should be that, absent very narrow exceptions, the effect of recognition would be to give full effect (and no more) to the scope of the foreign action.

Another issue is that there might be situations in which recognition is not feasible to generate the intended effect (e. g. an asset transfer can only be performed using specific instruments of the domestic corporate law). Although it would of course be preferable to correct domestic law to permit such outcomes, if that has not happened, then in such a case there should be a (subsidiary) requirement for the host authority to take supportive measures (presumably to use domestic instruments in order to fulfill the tasks of the home resolution authority).

Finally, as a separate, fundamental, point is important, as the consultative document does, to recognize that there are many ways to overcome potential impediments to resolution, but it should be noted that the exploration of issues and possible reservations or questions in the consultative document does not necessarily indicate the existence of fundamental or material impediments to resolution.

- 3. Do you agree that achieving cross-border enforceability of (i) temporary restrictions or stays on early termination rights in financial contracts and (ii) ‘bail-in’ of debt instruments that are governed by the laws of a jurisdiction other than that of the issuing entity is a critical prerequisite for the effective implementation of resolution strategies for global systemically important financial institutions (G-SIFIs)? Is the effective cross-border implementation of any other resolution actions sufficiently relevant for the resolvability of firms that the FSB should specifically consider ways of achieving their cross-border enforceability?**

The industry agrees that achieving cross-border enforceability of (i) stays and (ii) bail-in across jurisdictions is highly important, and believes that a good deal of progress toward those goals has already been made.

Regarding bail-in in clause (ii) in the question above, it should be noted that cross-border enforceability of bail-in (including write-down as well as conversion) may not be necessary for debt instruments issued under foreign law by G-SIFI entities where the legal framework allows de facto or de jure segregation in the receivership process, so that the affected instruments would be treated entirely at the level of the entity in resolution and not at the level of other subsidiaries in other jurisdictions, where recognition would become a question (e.g. under Title I or II of the US Dodd-Frank Act). As an example, if a US bank holding company had instruments issued under English law, the issues would be disposed of entirely at the level of the holding company, without requiring enforcement involving any UK subsidiaries of the company. In addition, where formal cross-border recognition of resolution exists, such as within the EU under the Bank Recovery and Resolution Directive (BRRD) and potential future formal cross-border agreements between the EU and third countries, such contractual clauses are not necessary.

With respect to the last sentence of the question regarding other resolution actions, provision should be made for a presumption of recognition of asset transfers made under the principal governing law of a resolution where the assets in question are (or arguably might be) located in or governed by the law of another jurisdiction.

See the detailed comments, particularly on Paragraph 2.2.2.

- 4. Do you agree that contractual approaches can both fill the gap where no statutory recognition framework is in place and reinforce the legal certainty and predictability of recognition under the statutory frameworks once adopted?**

Yes, while we agree that statutory frameworks for recognition should be the preferred option in many cases because clearly updated statutory supports would preclude threat of inefficiency of litigation of new questions under traditional legal or procedural doctrine even though the correct answer on the basis of general principles (in addition to the *Key Attributes*) would be enforcement of resolution (although there are exceptions where further statutory change appears less necessary under local law), contractual measures can narrow the gap where there is no statutory recognition framework in place and strengthen legal certainty and predictability.

The consultative document is perhaps too cautious on the cross-border recognition of contractual provisions: a vast amount of cross-border business is conducted purely on contractual bases, including reorganizations outside of bankruptcy, and we believe the FSB can have more confidence in the outcomes of contractual arrangements than sometimes appears from the current text.

It should not, however, be assumed that contractual provisions would be needed to “reinforce” legal certainty and predictability once statutory frameworks are adopted. Where there is a clear statutory basis for bail-in (e.g. of instruments accepted as providing loss-absorbing capacity), one-off contractual provisions to the same effect would be surplusage and could complicate rather than facilitate good results.

Finally, it should be noted that statutory changes, if consistent with FSB guidance, can help the complexities and costs that result from differences across regimes, and thus would have medium-to-long-term benefits for both firms and the system overall, which provides another reason to pursue consistent statutory solutions as the preferred overall goal.

See also comments on Paragraph 2.2.2.

**5. Are the key principles for recognition clauses in debt instruments set out in the report appropriate? What other principles or provisions do you consider necessary to support the exercise of ‘bail-in’ powers in a cross-border context?**

See comments on Paragraph 2.2, particularly with respect to the care required in defining the requirement for the contractual recognition clause (which should generally be required for TLAC eligible instruments only).

**Specific Comments on provisions of the Consultative Document**

**Section 1: Statutory frameworks for cross-border recognition**

The Associations have long supported “transparent and expedited processes” for giving cross-border effect to resolution, on a non-discriminatory basis assuring that all claimants on a failing firms, domestic or foreign, will be treated equally.<sup>2</sup>

The Bank of England’s recent paper explaining its approach to resolution<sup>3</sup> usefully stresses the importance of cross-border cooperation as a prerequisite to effective resolution of a major firm.

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<sup>2</sup> See IIF, “*Making Resolution Robust – Completing the Legal and Institutional Frameworks for Effective Cross-border Resolution of Financial Institutions*”, June 2012, available at: <http://www.iif.com/press/press+259.php>.

<sup>3</sup> See Bank of England, “*Bank of England’s approach to resolution*”, October 2014, available at: <http://www.bankofengland.co.uk/financialstability/Documents/resolution/apr231014.pdf>.

This underscores the need for authorities to focus on making arrangements – which may be informal or interim arrangements in some cases – recognizing the better outcomes that cooperative solutions can deliver – and hence the opportunity build on those incentives. Such incentives should help overcome the fact that no jurisdiction has experience with the kind of complex cross-border resolution now envisioned, as discussed at the end of page 6.

Outlining the powerful incentives for effective cooperation in a *Key Attributes*-type resolution should be included in the argumentation here, and, in the associations’ view, should help overcome some of the agnosticism as to issues and outcomes shown in the present draft.

This section reviews a number of doctrinal or procedural complexities that need to be overcome to assure the achievement of this goal, which, however, are not fundamentally at odds with the goal. Therefore, it is important for the FSB to continue to take all possible measures to induce G20 member states to establish measures for recognition in line with KA 7.5, as discussed.

The fundamental goal of fair, effective resolution can be achieved with the tools available today but, as all recognize, those tools can and should be improved over time by regulatory and statutory means.

**Paragraph 1.2.3: The legal framework should clearly identify the grounds for granting recognition of foreign resolution proceedings or adopting measures to support foreign resolution actions.**

The approach to recognition taken here is very positive in that:

- It stresses that recognition of foreign resolution actions should normally be granted, by setting out rules for refusal rather than for granting recognition; and
- It makes clear that recognition should not be contingent on reciprocity;

That said, the recommendations here could be stronger in that supportive measures should be made possible even where domestic resolution actions have not been taken.

The associations would be happy to consider with the theoretical question about support measures set out at the bottom of page 9, perhaps via a colloquium or other discussion among experts.

**Paragraph 1.2.4: The process for giving effect to foreign resolution measures should be guided by the principle of equitable treatment of creditors.**

The discussion of “equitable” treatment here is very important. While the present text does a good job of exploring the issues, it could be more helpful by steering more clearly toward restatement of a clear international interpretation based on the *Key Attributes*.

A point of vocabulary may make a difference here: it would be better to refer to “equal” treatment of creditors to seize the goal of fair and consistent results, rather than “equitable”. The term “equitable” carries too much freight generally and may suggest too many additional, essentially subjective, issues that would need to be or could be permitted to be addressed under local law. The term “equal” more clearly expresses the goal of fair, consistent treatment of all similarly situated creditors across jurisdictions.

The industry has always focused on non-discrimination and comparable outcomes across claimants to the estate of a given firm. As is recognized, the interpretation requiring equivalent treatment with domestic (host) standards would defeat an internationally fair outcome. The text clearly recognizes this problem,

but there could be a clearer bottom line emphasizing the avoidance of internationally unfair or inconsistent outcomes, no matter what their doctrinal basis.

From this point of view, where a resolution is conducted under home-country law, equal treatment of all claimants under that law should be recognized, even if host-country law would provide different procedures or yield somewhat differently determined or even substantively different results.

The issue about NCWOL raised in footnote 12 is very important: although the footnote rightly points out possible discrepancies, the principle should be firmly established that one liquidation standard should be the point of reference throughout a legal entity, and, perhaps in the future, entire groups. It should not be difficult to establish that, if the resolution standards of country X apply, then the alternative would be the liquidation standards of the same country, and NCWOL should be calculated on that basis.

The question of whether equal treatment should be limited to creditors of the same legal entity or extended to other entities of the same group (last paragraph of 1.2.4) is a complex one, and worthy of study and discussion. The analysis will become clearer as work proceeds on TLAC and other related concepts. For the moment, most resolution literature has looked at legal entities on a legal entity basis and that should be sufficient for all present purposes. There is no reason, why the important debate about legal entities should delay or call into question cross-border recognition as currently understood.

**Paragraph 1.2.7: Authorities should require firms, or provide incentives for firms, to adopt contractual approaches, where appropriate, to reinforce the legal certainty and predictability of recognition under the statutory frameworks already in place and to fill the gap for statutory approaches until these have been fully implemented.**

Regulatory requirements or incentives to adopt contractual approaches where appropriate offer good means of assuring a level playing field, efficient markets, and equal and fair treatment of all contracting parties.

It is especially important to assure that all similar financial contracts would be treated the same way when a firm enters into resolution. Without appropriate regulatory support to assure consistency of treatment of financial contracts in resolution, unpredictable or inconsistent results across counterparties would undermine the FSB's financial stability goals, both before resolution (because of the clashing incentives that could be created) and at the time of resolution; furthermore, inconsistent treatment of similar financial contracts would likely make the critical period immediately after the "resolution weekend" much more difficult to manage effectively, further undermining the FSB's financial stability goals.

The incentives suggested here would be appropriate, but should be carefully stated in order to make clear the scope of the need being met. Where the statutory regime already makes contractual requirements unnecessary, it should be understood that no further requirement is intended (unless there are cross-border enforcement issues as discussed elsewhere). Similarly, there should be a reasonable phase-in time, particularly where pending or proposed statutory changes would affect the analysis. Finally, the requirement should be drafted in such a manner as not to undermine firms' reliance on existing instruments that could be grandfathered in or where there is at least a colorable argument for efficacy in a resolution situation.

## **Section 2: Contractual approaches to cross-border recognition**

As stated above, this is a very important discussion and the industry is broadly supportive of making contractual approaches work.

One broad observation is that the discussion may be somewhat too pessimistic about recognition of contractual approaches, for example at the end of the introductory part of section 2 of the Consultative Document (p. 11). While the contractual enforceability of certain provisions may not have been tested, many contracts are enforced internationally and practice should, informed by the *Key Attributes* and the widely adopted policies behind them, evolve toward favorable conventions for dealing with the issues mentioned. Therefore, it should be possible to make a more confident statement about the reliability of contracts than is in the present text.

### **Paragraphs 2.1.1, 2.1.2**

The discussion of these two paragraphs is based on information provided by colleagues at ISDA. The FSB consultation document summarizes certain aspects of the ISDA Protocol and its adherence process in Paragraphs 2.1.1 and 2.1.2. We understand that the summary is not intended to be comprehensive and is instead merely identifying an example of a contractual “opt-in” approach to cross-border recognition. Given that the consultation document was published prior to the publication of the ISDA Protocol, the following points update certain features of the ISDA Protocol that should be noted:

- The ISDA Protocol was published on November 4<sup>th</sup>, 2014 and has 115 adhering parties as of November 25<sup>th</sup>, 2014.
- The ISDA Protocol is not generic, but has been tailored for ISDA documentation. In particular, its operative provisions use terminology and concepts which may not be as relevant in other markets (including provisions relating to credit support arrangements commonly used in the context of ISDA Master Agreements). ISDA anticipates that it would need to be amended for use with other industry standard master agreements. The mechanics of this are still to be discussed, and although an expansion of the ISDA Protocol to other agreements is one possibility, it is not ISDA’s favored approach. It may be that the ISDA Protocol could be “ported” across to other agreements, with the cooperation of the relevant trade associations. The industry also needs to consider with regulators the approach to financial contracts that do not use standardized documentation. ISDA would therefore prefer if the response did not imply that the ISDA Protocol will be used to amend other agreements.
- The ISDA Protocol affects counterparties’ rights beyond stays and potentially involves the recognition of other resolution measures (e.g. bail-in).

### **Paragraph 2.1.3: Official measures to support adoption of contractual stay provisions**

The last paragraph implies that the FSB would not make a recommendation on whether regulators should make prudentially regulated firms impose a contractual stay provision on their non-prudentially regulated counterparties. From the level-playing field and more efficient recovery and resolution process perspectives, the Associations recommend the FSB encourage regulators implement such requirement, at least with respect to future transactions. In order to avoid any discrimination, the requirement should as far as possible be dependent on the kind of transaction and not on the identity of the firms involved.

### **Paragraph 2.2: Contractual recognition of bail-in**

Careful consideration should be given to the scope of any requirements for contractual recognition of bail-in. The associations support the proposal to apply such requirements only to newly issued debt. However, consideration should also be given to how broad the definition of “debt instruments” for these purposes should be. We suggest that the target for contractual recognition requirements should be debt instruments that are eligible for Total Loss-Absorbing Capacity (TLAC, or equivalent local provisions)



and that the scope of “debt instruments” should not encompass contracts of an operational nature. This is an issue that has arisen in respect of the requirements under Article 55 of the BRRD, which we hope will be resolved.

Additionally, the scope of any contractual requirements should not extend to contingent facilities, including those that are connected to the financing of international trade, such as such as letters of credit, bank guarantees, and performance bonds. Because trade finance products are dependent upon the outcome of a future event (i.e., performance and payment under the terms of the documentary instrument), their inclusion as a bail-in liability in the event of resolution would not contribute to loss absorption. Difficulties would also arise in including contractually compliant bail-in terms, which would not be consistent with industry practice in a business where language is highly standardized, and would raise doubts in counterparties’ minds as to the commitments being made. This could in turn cause disruption in the financing of cross-border trade transactions, as delays or terminations of trade deals could arise. It should be made clear, for avoidance of any doubt, that such agreements fall within the scope of operational agreements that should not be within the scope of TLAC (or subject to bail-in).

#### **Paragraph 2.2.1.1**

The associations strongly support the approach taken in Paragraph 2.2; however, some of the qualifications seem excessive or unnecessary. For example, the “Although there cannot be complete certainty ...” clause at the end of 2.2.1.1, though not untrue, seems unduly negative and could cause problems as well as flagging potential problems. Here again, normal international contractual practice should be allowed to be used without undue qualifications.

#### **Paragraph 2.2.1.2**

While disclosure of bail-in consequences is of course highly important for market acceptance and predictability, and it is well to note that disclosure would be in accordance with applicable law, which would normally be the law of the place of distribution of a given, possibly supplemented by requirements of the home country of the issuer, the associations do not consider it useful to discuss in this context the consequences of non-disclosure or potential litigation about disclosure, in part because the issues posed will vary considerably depending on the relevant law. Those issues are very important but beyond the scope of this document and discursive discussion of the consequences of inadequate disclosure could have negative effects by unintendedly giving arguments to litigants.

Presumably, all such issues will be taken up by the Basel Committee in its deliberations on appropriate disclosure as envisioned by the TLAC term sheet.

For purposes of cross-border recognition, disclosure that is adequate under otherwise-applicable law and regulatory practice should be sufficient (which should of course be applied in a consistent manner pursuant to the TLAC disclosure that Basel will define in order to avoid conflicting requirements, redundancy, or unnecessary complexity). *Recognition*, however, should not depend on an analysis of disclosure questions that would normally be addressed under other regulatory structures.

#### **Paragraph 2.2.2**

While contractual language explicitly supporting statutory bail-in may be useful under many circumstances, it is questionable whether it should be required for those cases where the statutory basis for the recognition of bail-in is well established under applicable law. Similarly contractual recognition requirements should only be required where necessary for the resolution to be effective and not, for example, where liabilities would not be written down or converted in a resolution but left behind in a pre-

resolution entity following a partial transfer (structural subordination). Where a well-established basis for bail-in exists, it should not be required that such language be a condition of recognition of applicable instruments, especially where disclosure is otherwise made under applicable law.

In any case, it should be made very clear that previously existing instruments that otherwise qualify are “grandfathered” for these purposes. This point is included in the text but needs to be strengthened.

Likewise, a clarification is needed whether “new issuances” mean new issuances under new contracts or include new transactions under existing contracts.

### **Section 3: Next steps and timelines for implementation**

It would be very helpful to have a target timeline for implementation of statutory recognition frameworks, as well as for the FSB guidance thereon.

## II. FSB Consultative Document on Cooperation and Information Sharing with Host Authorities of Jurisdictions not Represented on CMGs where a G-SIFI has a Systemic Presence

### Overview

The consultation document is generally helpful and the industry welcomes the initiative of the FSB to assure appropriate inclusion of non-CMG authorities. .

The associations support the focus on jurisdictions where operations of a GSIFI are systemic locally but not material to the resolution of the group as a whole and support the proposal to use BCBS DSIB principles to identify them. Of course, home regulators always have the discretion to enter into cooperation and information sharing arrangements with non-CMG host jurisdictions even where a firm's presence has not been deemed systemic; and in such circumstances the document will also provide a useful point of reference.

One caveat, however, is that consideration should be given to giving more express consideration to how the principles set out here relate to the question of “resolution entities” and “material entities” under the FSB’s proposals on TLAC.<sup>4</sup> For example, could it be assumed that a group’s CMG would extend to all of its “resolution entities”? If not, guidance in this document could be supplied. Similarly, should it be assumed that the “extended” CMG under Paragraph 4.3 would include all “material entities”? Perhaps the document could offer more explicit guidance on that point. It would seem logical that full cooperation and mutual support ought to be extended to all “resolution entities” and all “material entities” a matter of course, absent some good reason to the contrary. The definitions of “material entities” and “resolution entities” should of course follow those established in the final version of the TLAC requirements, as they may be revised against the current term sheet.

In addition, higher expectations should be set for host country compliance with the group plan as to “material entities” (assuming “resolution entities” would be included in any group plan).

An essential point that cannot be over-stressed is that, while the associations appreciate the attention to confidentiality already incorporated in the consultation document, much of the information covered is highly sensitive, and should be shared with the relevant jurisdictions only when and insofar as necessary and appropriate. In particular, the details of recovery and resolution plans are highly sensitive and should not be shared in full, except where necessary and appropriate.

The industry cannot accept that the responsibility of sharing confidential information might be transferred to firms in case authorities are limited in what they are able to disclose or share with non-CMG host authorities. Needless to say, it should be made clear that a firm must be able to refuse to provide information if doing so would violate otherwise-applicable laws or regulations of its home or other host jurisdictions. Also, a firm must have the right to contest any requirement to provide information if its confidentiality may not be adequately protected under local law of the transferee jurisdiction.

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<sup>4</sup> See FSB, *Adequacy of loss-absorbing capacity of global systemically important banks in resolution – Consultative Document*, November 2014, available at: <http://www.financialstabilityboard.org/wp-content/uploads/TLAC-Condoc-6-Nov-2014-FINAL.pdf>.

## Specific questions

- 1. Is the process for identifying non-CMG host jurisdictions where a firm has a systemic presence and the respective roles of home and host jurisdictions in that process clear and appropriate?**

As stated above, the associations support the proposal to use common criteria and principles to identify a relevant systemic premise.

The associations are however, not in favor of the proposal on how disagreements between home and host authorities should be settled, in particular the presumption in favor of the host authorities' assessment. Rather, there should be a presumption of negotiation rather than an automatic presumption. Perhaps mediation by the CMG should be considered where time permits.

In the event of such disputes, the firm should be consulted if possible and its view of the appropriate disposition of the issue should also be taken into account.

As noted above, it would also be helpful to note that home authorities can decide to enter into cooperation and information sharing arrangements with non-CMG host jurisdictions at their own discretion, as some may currently do already, even if it is deemed that a firm does not have a systemic presence in a host jurisdiction.

- 2. Are the suggested criteria for assessing the systemic presence of G-SIFI in a non-CMG host jurisdiction appropriate? What additional considerations, if any, should be taken into account?**

See the answer to question 1.

- 3. Are there additional possible forms of arrangement with non-CMG host jurisdictions that should be described in the draft Guidance note?**

The associations generally agree with the proposed forms of arrangement. However, as outlined above, any type of agreement needs to ensure that the other points on sharing information discussed in this letter are respected.

- 4. Will the classes of information described in the draft Guidance note enable non-CMG host authorities to assess the potential systemic impact of resolution measures on the local operations of a G-SIFI? What additional types of information, if any, might non-CMG host jurisdictions require for that purpose?**

As noted above, information should only be shared once appropriate confidentiality arrangements are in place and only to the extent necessary for the non-CMG host to perform the objective set in 5.1.

- 5. Are there any additional elements that should be covered or elaborated in more detail in the draft Guidance note?**

Although KA 11.8<sup>5</sup> suggests non-CMG countries should have access to (firms' entire?) RRP, it would be appropriate that they should only have access to information relevant to their countries, including information in RRP.

## **Comments on the Consultative Document**

### **Section 2: Process for identifying non-CMG host jurisdiction**

#### **Paragraph 2.1**

Information sharing requirements about the formation of CMGs between home jurisdiction authorities and non-CMG host jurisdiction should be established if not in place already, because it is likely that non-CMG host jurisdictions may not be made aware on a timely basis of CMGs that have been organized.

#### **Paragraph 2.3**

The paragraph asks G-SIFIs for information to support a non-CMG host authority's assessment that the G-SIFI is systemic in its country. The intent of this paragraph is unclear because, of course, local authorities may ask subsidiaries for all sorts of information about subsidiary operations. It should be up to the local authority, ideally in consultation with the CMG, to perform the analysis. Any information supplied would, of course, have to be subject to normal confidentiality and data-transfer restrictions. In many cases it might make more sense for the local authorities to inquire of the home regulator rather than the group.

### **Section 3: Criteria for assessing a systemic G-SIFI presence**

The FSB's efforts to promote a consistent approach across jurisdictions are welcome.

#### **Paragraph 3.1**

We welcome the principle that the criteria ought to be in line with BCBS criteria, but this paragraph also says home and non-CMG host authorities may need to consider other criteria, especially for branches, without giving guidance as to what such criteria might be. While local law will establish requirements for host-country branches, international guidance would be helpful as to what criteria may be appropriate and what would be overreaching from the point of achieving the G20 goal of fostering an efficient global financial system and consistent results from resolutions across borders. The current discussion in Paragraphs 3.1 and 3.2 is somewhat open-ended, with references to "other" criteria. In the interest of international consistency, more guidance would be helpful and it should be made clear that this guidance is illustrative and not intended to expand agreed-upon critical functions of the group, or any other substantive aspect of recovery and resolution planning.

#### **Paragraph 3.2**

The associations support the use of common assessment criteria that include the BCBS D-SIB Framework<sup>6</sup> and the FSB guidance paper on assessing critical functions,<sup>7</sup> but the paragraph states that

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<sup>5</sup> "[...] Host authorities that are involved in the CMG or are the authorities of jurisdictions where the firm has a systemic presence should be given access to RRP and the information and measures that would have an impact on their jurisdiction."

<sup>6</sup> See <http://www.bis.org/publ/bcbs233.pdf>

<sup>7</sup> See [http://www.financialstabilityboard.org/publications/r\\_130716a.pdf](http://www.financialstabilityboard.org/publications/r_130716a.pdf)

criteria are not limited to these. If there are other assessment criteria that are broadly needed, the guidance should be extended to make them specific, as discussed above.

#### **Section 4: Cooperation and information sharing arrangements**

##### **Paragraph 4.5: Cooperation and mutual support in resolution**

As noted in the general comments, full cooperation and mutual support ought to be extended to all “resolution entities” and all “material entities” as a matter of course, absent some good reason to the contrary.

##### **Paragraph 4.6: Prerequisites for information sharing**

The associations stress the importance of hosts’ having adequate regimes for protection of confidential information in place as a prerequisite for effective information sharing.

##### **Paragraph 4.8**

The paragraph states that where non-CMG host regimes for protection of confidential information are not adequate, non-CMG host jurisdictions may obtain certain information directly from firms; however, a firm must have the right to contest any requirement to provide information if its confidentiality may not be adequately protected under local law. It should also be noted that firms may not have the information the non-CMG host needs (e.g. details in the group operational resolution plan; see Paragraph 5.1). Similarly, the local office of a firm may not possess, and should not be required to possess, many details about group recovery and resolution issues. A firm should certainly be able to refuse to provide such information if it would violate otherwise-applicable laws or regulations of its home or other host jurisdictions.

#### **Section 5: Classes of information to be shared**

##### **Paragraph 5.1**

Paragraph 5.1 appropriately would allow non-CMG host jurisdictions “to obtain information that is *necessary* for them to assess the potential systemic impact of a resolution strategy and resolution measures set out in the operational resolution plans on the local operations of the GSIFI” (with reference to KA 11.8; emphasis added). Paragraph 5.1 could, however, be reinforced to state that other information that is not relevant to the local systemic impacts should normally not be shared, for example recovery or resolution plan details not applicable to the host jurisdiction.

##### **Paragraph 5.2**

For purposes of this guidance, information requested by non-CMG host jurisdictions should be limited to what they need to understand the direct impact of the resolution strategy or at any given measure on their countries.

##### **Paragraph 5.4**

The classes of information that may help the non-CMG host jurisdictions listed in the paragraph look sensible, other than Paragraph 5.4 (b), which appears to call for broad information about the group beyond group structure per se (global solvency, financial interdependencies, etc.). Such sensitive and confidential information may be overreaching in some cases and home authorities may object to

disseminating it as well. The last clause of 5.4(b) may have been intended to qualify the entire paragraph; however, as written, it may seem to cover continuity of operations only.<sup>8</sup> It is important that any confidential or sensitive information be made available to a non-CMG host jurisdiction on the basis of relevance to operations in the jurisdiction only. This principle is clear in other parts of the proposal (for example in Paragraphs 5.1 or 5.4(d)) and therefore should apply throughout the document, as was probably the intent.

### **Paragraph 5.8**

The Associations support Paragraph 5.8 (d), which allows the home authority or CMG to ask non-CMG authorities about the circumstances in which they would not take local action in a crisis and would rely on the group strategy and plan. Reliance by non-CMG authorities on group recovery or resolution processes should be encouraged as much as possible.

### **Conclusion**

The associations appreciate the FSB's consultation of stakeholders on these important matters and stand ready to provide any additional information that may be required from the industry.

Should you have any questions about these comments, or wish to organize a broader discussion, please contact David Schraa ([dschraa@iif.com](mailto:dschraa@iif.com); + 1 202 857 3312) or Oliver Moullin ([oliver.moullin@afme.eu](mailto:oliver.moullin@afme.eu); +44 20 7743 9366).

Very truly yours,



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<sup>8</sup> "... and arrangements for the intra-group provision of critical shared services *to the extent relevant to the continuity of operations in the non-CMG host jurisdiction.*"