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# GERMANY

## FINANCIAL SECTOR ASSESSMENT PROGRAM

June 2016

### CRISIS PREPAREDNESS, BANK RESOLUTION AND CRISIS MANAGEMENT FRAMEWORKS—TECHNICAL NOTE

This Technical Note on Crisis Preparedness, Bank Resolution and Crisis Management Frameworks on Germany was prepared by a staff team of the International Monetary Fund. It is based on the information available at the time it was completed in June 2016.

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INTERNATIONAL MONETARY FUND

# GERMANY

FINANCIAL SECTOR ASSESSMENT PROGRAM

June 2016

## TECHNICAL NOTE

CRISIS PREPAREDNESS, BANK RESOLUTION AND CRISIS  
MANAGEMENT FRAMEWORKS

Prepared By  
**Monetary and Capital  
Markets Department**

This Technical Note was prepared by IMF staff in the context of an IMF Financial Sector Assessment Program (FSAP) in Germany during February–March 2016 led by Ms. Michaela Erbenova. It contains technical analysis and detailed information underpinning the FSAP’ findings and recommendations. Further information on the FSAP program can be found at <http://www.imf.org/external/np/fsap/fssa.aspx>

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## Glossary

AbwMechG	“Abwicklungsmechanismusgesetz”; Act on the Resolution Mechanism
BaFin Authority	“Bundesanstalt für Finanzdienstleistungsaufsicht”; Federal Financial Supervisory Authority
BRRD	Bank Recovery and Resolution Directive
CCP	Central Counterparty
CMG	Crisis Management Group
CMT	Crisis Management Team
DGSD	Deposit Guarantee Scheme Directive
EBA	European Banking Authority
ECB	European Central Bank
EinSiG	“Einlagensicherungsgesetz”; Act on Deposit Protection Schemes
ELA	Emergency Liquidity Assistance
ESM	European Stability Mechanism
ESCB	European System Central Banks
FSB	Financial Stability Board
FSC	Financial Stability Committee
FMSA	“Bundesanstalt für Finanzmarktstabilisierung”; Federal Agency for Financial Market Stabilization
IPS	Institutional Protection Schemes
IRT	Internal Resolution Team
JST	Joint Supervisory Team
KA	Key Attributes of Effective Resolution Regimes
KWG	“Kreditwesengesetz”; Banking Act
LSI	Less Significant Institution
MOF	Ministry of Finance
MoU	Memorandum of Understanding
MREL	Minimum requirement of eligible liabilities
NCA	National Competent Authority
NRA	National resolution Authority
RC	Resolution Colleges
SAG	“Sanierungs- und Abwicklungsgesetz”; Act on the Recovery and Resolution of Institutions and Financial Groups
SB	Supervisory Board
SI	Significant Institution
SoFFin	Financial Market Stabilization Fund
SSM	Single Supervisory Mechanism
SRB	Single Resolution Board
SREP	Supervisory Review and Evaluation Process
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
TLAC	Total Loss Absorbing Capacity

## EXECUTIVE SUMMARY

**The transposition of the Bank Recovery and Resolution Directive (BRRD) into German law has significantly strengthened the resolution regime in Germany.** The preexisting broad German resolution powers and tools were thus further enhanced. The BRRD establishes uniform rules within the European Union (EU) for recovery and resolution of banks and investment firms that are closely aligned with the FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions (KAs). The BRRD and the implementing German legislation contain a broad set of resolution tools and establishes a framework for improved recovery and resolution planning as well as coordination across the EU.

**Significant progress is being made on the first two pillars of the Banking Union.** The first pillar, the Single Supervisory Mechanism (SSM), allocated prudential supervision, early intervention and recovery planning for banks in the euro area to the European Central Bank (ECB), and has completed its first full year of operation. The second pillar—the Single Resolution Mechanism (SRM)—is newly operational. In January 2016, the Single Resolution Board (SRB) assumed direct responsibility for resolution planning and implementation (in conjunction with the European Commission) for banks directly supervised by the ECB as well as other pan-European banks, and for managing the Single Resolution Fund (SRF). Unlike the ECB which has assumed responsibilities related to long-standing bank supervision activities, the SRB has assumed responsibility for the relatively new task of resolution planning.

**There remain important challenges relating to these two pillars.** Routine decision making by the SSM's Supervisory Board (SB) could be simplified; allowing some decisions at the level of the Supervisory Board would enhance its efficiency. Similarly, it remains to be seen whether the complex decision-making processes for triggering resolution within the SRM enable timely and efficient resolution decisions in specific cases. This should be reviewed once experience has been built up using this procedure. This review could also assess the scope for simplifying or accelerating the decision making process taking into account the applicable legal framework. Now the legal framework must be operationalized. Numerous substantive challenges have been identified for implementing all aspects of a resolution decision in a timely manner (e.g., identifying specific parties to be bailed-in, ensuring access to FMIs, ensuring adequate liquidity in resolution, implementing potential structural changes such as asset separation), while the solutions remain untested. Euro area jurisdictions have not yet agreed on a euro area wide deposit insurance scheme.

**There is currently no agreement on a common, permanent fiscal backstop funding arrangement for the SRF, such as access to the European Stability Mechanism (ESM).** The amount of funds accumulated in the SRF is limited, and may well not be sufficient for covering liquidity needs of a systemic bank or in a systemic crisis. For the transitional period, Germany and the other euro area Member States will provide, as a last resort, bridge financing to their respective national compartments in the SRF that must be repaid by banks through ex post contributions. ECOFIN ministers have committed to agreeing on a common backstop to the SRF, which is fiscally

neutral over the medium term, at the latest by the end of the transitional period for mutualizing the SRF.

**The German authorities are making significant progress on recovery and resolution planning.**

Their leadership for over five years of the Crisis Management Group (CMG) for one of the FSB-designated G-SIBs laid the groundwork for the early adoption of a legal requirement that large domestic banks undertake recovery planning. Resolution planning by the domestic resolution authority continues to be rolled-out to a larger number of banks despite the transfer of competence for the largest German banks to the ECB for recovery planning and the SRB for resolution planning. The requirement for recovery plans is being implemented in additional banks, including in less significant institutions supervised by the domestic authorities, and in small banks by 2017. Similarly, resolution planning is well advanced for the largest bank and is being implemented in all SIs and will eventually be rolled-out to small banks. The German authorities have established procedures for cooperation and the exchange of information between the supervisory and resolution authorities.

**Work is progressing on resolution approaches for systemic banks with cross-border operations, and steps are being taken to support implementation.**

Banks will need to build adequate loss absorbency buffers—the so-called minimum requirement for own funds and eligible liabilities (MREL)—that can be bailed-in. Building adequate buffers and restructuring bank funding and group structures to facilitate bail-in may take years in some banks. The BRRD, SRM Regulation and German legislation require that at least 8 percent of total liabilities of the bank have to be written down or converted into equity before the SRF could be used to contribute to loss absorption and recapitalization. The exclusion of government stabilization tools as a potential tool might constrain the authorities in the event of systemic crises. In addition, the flexibility to use other BRRD resolution tools (namely, the transfer powers) may be constrained by restrictions on departing from the *pari passu* treatment of creditors, outside of bail-in. With respect to bail-in, the German authorities believe that sufficient buffers for the most part are already in place such that bail-in is already a practical resolution tool, particularly as of January 1, 2017, when certain unsecured debt will become statutorily subordinate to general senior unsecured liabilities and uncovered deposits. The authorities should continue to monitor the build-up of adequate bail-inable liabilities in large banks.

**A likely greater challenge is presented by the need to ensure the temporary liquidity of a bank in resolution, which most likely will face substantial funding needs until it restores access to adequate market sources.** Such liquidity needs should preferably be covered by private sector funds. To the extent that market access to liquidity is insufficient, the availability of public backstop facilities and access to standard central bank facilities should be assessed during resolution planning and the preparation of resolution decisions. The legal framework explicitly precludes assuming access to emergency liquidity assistance (ELA) as part of resolution planning. With the caveat of the discretionary nature of ELA, the legal framework should not prevent the Bundesbank and the resolution authorities from assessing potential post resolution liquidity needs, and available collateral.



**The authorities should continue efforts to foster cooperation with non-EU countries.** Under the BRRD, non-EU countries may be invited to participate in resolution colleges as observers, but have no voting rights. Furthermore, the BRRD and German legislation do not require the authorities to take into account the effects of resolution measures in non-EU countries when making resolution decisions. Coordination with such countries is expected to largely occur through bilateral memoranda of understanding (MoU), unless and until a European-level agreement has been reached with that country. It is recognized, however, that in practice the German authorities have developed a good track record of coordination with countries outside of the EU, have entered into MoUs with most relevant authorities for supervisory and resolution purposes, and one would not expect the lack of explicit requirements for strong coordination in the BRRD and German law to impede such coordination going forward. In the longer term, the authorities are encouraged to pursue legislative changes at the European level that would allow them to take the effects of resolution measures in third countries into account when adopting such measures.

**While the deposit guarantee scheme (DGS) in Germany continues to follow the three-pillar model of the German banking sector, steps have been taken to enhance funding and transparency.** The two statutory DGS have voluntary schemes in place, which allow them to finance restructuring by their members and/or reimburse deposits in excess of the legal minimum of € 100,000. These discretionary restructuring measures are broadly similar to those at the disposal of the two Institutional Protection Schemes (IPS). DGS can only in limited situations be used to finance resolution measures.

**In addition to resolution measures along the lines prescribed in the BRRD the German resolution framework also provides for court approved reorganization measures.** They do not fit into the general BRRD framework, which has been fully implemented in Germany. These measures do not have added value as they are public, will take time and involve creditor approval. In view of this, it could be considered to remove these measures from the resolution tool box.

**Arrangements for system-wide crisis management remain unclear.** The institutional architecture for the Banking Union is designed with supervision and resolution of individual banks and banking groups in mind. Consideration should be given to specifying the role of the SRB and ECB towards the German authorities, mostly notably the Ministry of Finance (MOF), in managing a hypothetical systemic banking crisis that involves system-wide distress and the potential simultaneous failure of multiple banks.

<b>Table 1. Main Recommendations for the Crisis Prevention and Crisis Management Framework</b>		
<b>Crisis Preparedness</b>	<b>Priority</b>	<b>Authority</b>
Define a coordination mechanism including the SRB, ECB and MOF in a system-wide crisis	Immediate	German authorities/SRB/ECB
Develop contingency plans for a systemic wide crisis and test plans via a simulation exercise	Short term	German authorities/SRB
Streamline and simplify SSM decision making procedures	Immediate	German authorities/SSM
Review efficiency of SRM decision making on SRB resolution decisions	Medium term	German authorities/SRB
<b>Resolution Planning</b>	<b>Priority</b>	
Deepen planning to ensure temporary liquidity funding needed to support the orderly resolution of banks (i.e., private funds and public backstops)	Immediate	German authorities
Continue efforts to identify and remedy operational impediments to expeditious implementation of resolution tools and ensure ability to maintain control during this implementation period	Immediate	German authorities
<b>Resolution Funding</b>	<b>Priority</b>	
Lead EU level discussion to establish a common permanent backstop for SRF	Medium term	German authorities/SRM

## INTRODUCTION<sup>1</sup>

1. **This Technical Note analyzes the crisis preparedness and crisis management frameworks for German banks.** The separate Technical Note on Insurance Sector Supervision prepared by the FSAP addresses recovery and resolution planning in the insurance sector.
2. **Banks dominate the German financial system and represent one of the largest small- and medium-sized banking segments in the EU.**<sup>2</sup> The banking sector is a three-pillar system with a total of almost 1,800 institutions. There are approximately 300 private and specialized banks (€ 4.4 billion in total assets or 56 percent of the system), 450 savings and publicly owned banks (€ 2.4 billion or 30 percent) and 1,000 cooperative banks (€ 1.1 billion or 14 percent). Over the last five years there has been considerable consolidation, mainly among local savings and cooperative banks. Twenty-two of the largest German banks/banking groups are under the direct supervision of the ECB. These banks, in addition to six other German banks with cross-border operations in the EU, fall under the authority of the SRB.<sup>3</sup> The largest German bank, Deutsche Bank, has been designated as a G-SIB by the FSB.
3. **Both at the EU level and at the domestic German level a range of legal instruments have been adopted that collectively establish a complex framework for bank resolution and crisis preparedness and management in the financial sector.** The SSM Regulation has conferred specific tasks on the ECB concerning the prudential supervision of banks including the adoption of early intervention measures and a requirement that banks prepare recovery plans. The EU legislator has also adopted the BRRD, which contains rules for the recovery and resolution of banks and investment firms, as well as the SRM Regulation, with uniform rules and procedures for the resolution of euro area banks and certain investment firms. Finally, the Deposit Guarantee Scheme Directive (DGSD) has been updated. While various BRRD provisions such as recovery planning, resolution planning, bank and group resolvability assessments and certain resolution powers had already been introduced in 2013 in German law, the BRRD has been transposed into German law effective January 2015.<sup>4</sup> The major new element concerned the bail-in requirement. A German law

<sup>1</sup> This Technical Note was prepared by Hans Weenink, Legal Department, IMF and David Scott, IMF External Expert as part of the 2016 FSAP of Germany. The mission would like to thank the German authorities, EU authorities and market participants for their excellent cooperation and open dialogue.

<sup>2</sup> More details on the banking sector are provided in the Basel Core Principles Detailed Assessment Report, and the Technical Note on stress testing, while Eurex Clearing AG, which also holds a banking license, has been assessed against the CPSS-IOSCO Principles for Financial Market Infrastructures.

<sup>3</sup> To be noted that at the time of the self-assessment by the German authorities the number was 21 banks; The ECB's published list (dated April 5, 2016) of banks directly falling under its remit mentions 22 German banks. The list of other cross-border groups falling under the remit of the SRB has been published in the SRB's website on March 1, 2016.

<sup>4</sup> The BRRD Transposition Act of December 10, 2014. The substantive recovery and resolution provisions are contained in the Act on the Recovery and Resolution of Institutions and Financial Groups ("Sanierungs- und Abwicklungsgesetz"; SAG). Various provisions have also been amended in the Banking Act ("Kreditwesengesetz"; KWG), last amended on November 2, 2015.

approving the mechanism for transferring much of the national resolution fund to the SRF, as well as the Act on Deposit Protection Schemes, which transposes the DGSD into German law, have also been adopted.<sup>5</sup> More recently a law entered into force which aligns the German framework to the SRM, clarifies the status of claims in resolution and introduces a new category of bail-in-able debt.<sup>6</sup>

## INSTITUTIONAL ARRANGEMENTS

### A. Institutional Architecture and Coordination Mechanisms for Crisis Prevention

#### European level

**4. The SSM consists of the ECB and the national competent authorities (NCAs) of the participating Member States.** The ECB has adopted a Regulation establishing a framework for cooperation within the SSM between the ECB and NCAs.<sup>7</sup> In order to ensure the consistent application of supervision in the euro area, the ECB can issue regulations, guidelines, or general instructions to the NCAs. Additional detailed descriptions on cooperation within the SSM in a crisis management context are set out in the SSM Supervisory Manual.

**5. The ECB is tasked with the direct supervision of significant banks (SI),<sup>8</sup> financial holding companies, mixed financial holding companies, and branches in participating Member States of banks established in non-participating Member States.** The ECB conducts supervision on a consolidated basis over banks' parents established in a participating Member State and it participates in supervision on a consolidated basis with respect to parent undertakings not established in a participating Member State. The ECB participates in supplementary supervision of financial conglomerates in relation to banks included in the conglomerates, and is also involved in the supervision of cross-border banks and groups, either as a home supervisor or a host supervisor in Supervisory Colleges. The NCAs perform supervision on a consolidated basis of banks, financial holding companies or mixed financial holding companies that are less significant (LSIs) on a consolidated basis.<sup>9</sup>

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<sup>5</sup> The Act on the Agreement on the Transfer and Mutualization of Contributions to the Single Resolution Fund of December 17, 2014 and the Act on Deposit Protection Schemes ("Einlagensicherungsgesetz"; EinSiG) of May 28, 2015 that establishes the statutory schemes and provides for the recognition of institutional protection schemes.

<sup>6</sup> The Act on the Resolution Mechanism of November 2, 2015 ("Abwicklungsmechanismusgesetz"; AbwMechG). See paragraph 73 for more details.

<sup>7</sup> Regulation (EU) No. 468/2014 of the European Central Bank.

<sup>8</sup> An institution is classified as significant on the basis of its size, economic importance, cross-border activities, or in the event of it having received direct public financial assistance from the ESM.

<sup>9</sup> The degree of the ECB's oversight of NCAs, the reporting by NCAs, as well as supervisory standards and policies varies according the ECB's ranking of LSIs (high, medium or low priority).

**6. The ECB’s day-to-day supervision of each significant bank or banking group, including recovery planning and early intervention, is carried out by Joint Supervisory Teams (JSTs).**

JSTs are established for each banking group or bank. They comprise staff both from the ECB and NCAs and are led by an ECB coordinator along with national sub-coordinators. The ECB is developing an IT platform that will contain detailed bank and supervisory information that will be available to the NCAs and to the resolution authorities, albeit only via the SRB.

**7. The ECB can adopt early intervention measures stipulated in Union law where a bank does not meet, or is likely to breach, applicable prudential requirements.**

In exercising these powers the ECB coordinates with the NCAs concerned. In cases where EU law explicitly provides for this, the ECB can require structural changes by banks to prevent financial stress or failure. The early intervention powers are analyzed in more detail in paragraph 49 et seq. German legislation defines the ECB—in addition to the Federal Financial Supervisory Authority (“Bundesanstalt für Finanzdienstleistungsaufsicht” or BaFin)—as the competent supervisor, which means that it has the same powers as BaFin under German legislation.

**8. The ECB cooperates with resolution authorities including in the preparation of resolution plans.**

In addition, the ECB communicates to resolution authorities any material changes to a bank’s legal or organizational changes, its business or financial position.

### Domestic level

**9. In Germany the BaFin is the NCA which exercises direct supervision over the less significant banks in cooperation with the Bundesbank.**

Both BaFin and the Bundesbank provide national sub-coordinators, as well as other members, to the JSTs for significant German banks. In addition, they cooperate closely on all supervisory matters and jointly conduct the Supervisory Review and Evaluation Process (SREP). The two institutions have agreed a Supervision Guideline which specifies how they will cooperate with respect to, in practice, the less significant banks.

**10. BaFin is a federal institution with legal personality.**

It is governed by public law. As a federal institution it is subject to the legal and technical oversight by the Federal Ministry of Finance (MOF). In practice this means that the MOF ensures that BaFin adheres to its mandate. The MOF may at any time require BaFin to report and submit documents, subject to existing legal provisions regarding the obligation of confidentiality. BaFin’s regulations, circulars on individual regulatory issues and changes to its administrative practices are approved by the MOF. MOF also clears political statements in BaFin’s annual reports and press releases.

**11. The BaFin can require banks and investment firms to prepare recovery plans and it can decide early intervention measures.**

BaFin assesses the recovery plan in agreement with the Bundesbank. Similarly, the agreement of the Bundesbank is needed for granting simplified obligations and exemptions from the requirement to prepare recovery plans.

**12. The ECB and BaFin must inform the SRB and the Federal Agency for Financial Market Stabilization (“Bundesanstalt für Finanzmarktstabilisierung” or FMSA) of any early intervention measure they require a bank to take.** The SRB informs the Commission and can start preparing for the resolution of the bank concerned if this is indicated.

## **B. Institutional Architecture and Coordination Mechanisms for Crisis Management**

### **European level**

**13. The SRM consists of the SRB and national resolution authorities (NRAs). It applies to:**

- Banks established in participating Member States;
- Parent undertakings, including financial holding companies and mixed financial holding companies that are established in participating Member States and are subject to consolidated supervision; and
- Investment firms and financial institutions established in participating Member States and that are covered by consolidated supervision.

**14. The SRB is a Union agency with legal personality.** It is mandated to adopt decisions on the use of the SRF and is responsible for drawing up resolution plans, assessing resolvability, adopting all resolution plans and decisions, as well as addressing any obstacles to resolution with respect to the abovementioned entities that are not part of a group and for groups that are considered significant, or subject to the ECB’s direct supervision, and other groups operating cross-border within the EU. The decision-making procedure for SRB resolution measures is detailed in Box 1. The SRB is accountable to the Council and the European Parliament. It must act independently and in the general interest.

**15. The SRB formally became operational on January 1, 2016 and is still in an early start-up phase.** One of the SRB’s key priorities in 2016 is to implement a harmonized framework for the Minimum Requirement for Own Funds and Eligible Liabilities (MREL). In addition, the SRB is currently developing a framework for cooperation with the NRAs which will organize the practical arrangements for the implementation of the SRM. In 2016 it also will i) develop manuals on resolution planning as well as policy orientations for the use of resolution tools; develop BRRD-compliant resolution plans for institutions under its remit and ii) define funding and financing requirements for the SRF. The SRB will also operationalize MoUs and Cooperation Agreements with third countries. So far the SRB has rehearsed the decision-making procedure for resolution decisions, but a crisis management exercise is only planned for 2017. In addition to its substantive and preparatory work, the SRB is also hiring staff (approximately 110 during 2016, nearly doubling its staff complement from January 2016 when it commenced operations).

### Box 1. Decision Making Procedures for Resolution at the European Level

The decision-making structure consists of the following steps:

- The ECB, after consultation with the SRB, determines that a SI is failing or likely to fail, and informs the Commission and the SRB. The SRB may make that determination if the ECB, within 3 days of having been informed by the SRB of its intention to make that determination, does not do so.
- The SRB, in close cooperation with the ECB, determines that there is no reasonable prospect of alternative private sector solutions, or supervisory actions taken that would prevent failure with a reasonable period of time. The ECB may also inform the SRB that this condition is met.
- The SRB adopts a resolution scheme when it assesses that resolution action is necessary in the public interest, and, immediately after adoption, submits it to the Commission.
- The resolution scheme may enter into force only if no objection has been expressed by the Council, or by the Commission, within 24 hours after submission. Within this period, the Commission either endorses the resolution scheme, or objects to it, with regard to the discretionary aspects of the resolution scheme in the cases not covered below (i.e., Council decisions).
- Also, within 12 hours after submission, the Commission can propose to the Council to object to the resolution scheme on the ground that it does not fulfill the public interest criterion. If the Council objects to the resolution scheme on this ground, the entity is orderly wound up in accordance with national insolvency law. The Council provides reasons for its decision.
- Within 12 hours after submission, the Commission can also propose that the Council approves or objects to a material modification of the amount of the SRF provided for in the resolution scheme. The Council provides reasons for its decision.
- Within 8 hours, the SRB modifies the resolution scheme in accordance with the reasons expressed by the Commission, in its aforementioned objection, or by the Council, in its approval of the modification proposed by the Commission.
- Where State aid or the SRF are used to finance resolution measures, the Commission must approve this aid. This State aid decision will be prepared in advance and approved before the resolution scheme is approved by the SRB and submitted to the Commission for final approval.<sup>1</sup>

<sup>1</sup> The European Commission's State Aid rules on support measures in favor of banks in the context are set out in the Banking Communication of July 30, 2013, 2013/C 216/01.

**16 The SRB is responsible for the effective and consistent functioning of the SRM.** In this respect the NRAs have to inform the SRB of their resolution decisions with respect to LSIs and closely coordinate with the SRB when they take such measures. In addition, they are required to submit (updated) resolution plans for the less significant banks to the SRB, accompanied by a reasoned assessment of the bank or group's resolvability. In exercising its mandate to ensure a consistent application of resolution measures in the SRM, the SRB has established Internal

Resolution Teams (IRTs) that consist of SRB and NRA staff. IRTs will prepare resolution plans and submit them to Resolution Colleges (RCs) involving NRA staff from other EU Member States outside the euro area. The RCs still need to be established. The SRB can issue a warning to a NRA if a draft decision is not in line with the SRM, or with the SRB's general instructions. In specific cases the SRB can decide to directly exercise the NRA's resolution powers and order a bank under resolution to i) transfer specified rights, assets or liabilities to another person, ii) require the conversion of any debt instruments which contain a contractual term for conversion and iii) adopt any other necessary action to comply with the decision in question with respect to banks within the scope of NRA's mandates.

**17. As is the case for all EU institutions and agencies, SRB decisions are subject to review by the European Court of Justice.**<sup>10</sup> In reviewing such decisions, the Court will only review the legality of the decision taken and not the substance of the decision. The Court may declare the decisions of the SRB void, which will have implications for resolution actions taken at the national level. The authorities are strongly encouraged to explore the potential implications of Court decisions for the domestic implementation of resolution decisions, as well as ways to mitigate such implications.

**18. The SRB and ECB have concluded a MoU to enable necessary cooperation.** This MoU provides for the representation of each authority as an observer in each other's meetings,<sup>11</sup> and cooperation and exchange of information in early intervention, recovery and resolution planning and in resolution actions. In addition, the MoU provides that when a CMG<sup>12</sup> is established for a bank, the SRB and ECB will cooperate with respect to the distribution of tasks between them. The SRB chairs CMGs, but the ECB will chair CMG topics related to recovery planning. The SRB is also in the process of concluding a cooperation agreement with the Commission, which has established a permanent task force for crisis management issues. The cooperation agreement will contain practical information to streamline the decision making process on resolution decisions.

**19. The SRB decision making structure involves various actors and very tight deadlines.** Three conditions/determinations are needed for resolution: (1) that a bank is failing or likely to fail, (2) that there are no alternative private solutions, nor supervisory actions (including early intervention measures) or the write down or conversion of relevant capital instruments that could prevent the failure of a bank within a within period of time, and (3) that a resolution action is necessary in the public interest.

<sup>10</sup> Article 86 of the SRM Regulation and Articles 263 and 264 TFEU.

<sup>11</sup> The Supervisory Board will invite the Chair of the SRB to participate as an observer in meetings addressing inter alia recovery plans, banks facing rapidly deteriorating financial conditions and deliberations on whether a bank is failing or likely to fail. SRB representatives can participate in SSM substructures. In turn a representative of the Supervisory Board can attend SRB committees or working groups as an observer.

<sup>12</sup> The term CMG is used to refer to a resolution college involving resolution (and potentially supervisory) authorities from outside the EU.



## Domestic level

**20. FMSA, the German NRA, is responsible for the entities and groups other than those falling within the SRB's jurisdiction.** These include both "high-priority" LSIs, and other LSIs, including banks, parent undertakings of a group, financial holding groups, mixed financial holding groups, subsidiaries domiciled in Germany, branches of undertakings domiciled abroad and stand-alone investment firms. While the FMSA's mandate applies to all these LSIs, the proportionality principle will influence how the FMSA exercises its powers. The FMSA began assuming its resolution functions only in 2014.

**21. FMSA is a Federal public-law agency.** Similar to BaFin, FMSA is subject to the legal and technical oversight by the MOF. This means that FMSA performs its functions independently, albeit without prejudice to the MOF's scrutiny of the legality of FMSA's measures and their fitness for purpose. The MOF may at any time require FMSA to report on the information available to it or its actions and be required to submit documentation to the MOF (with due observation of existing confidentiality obligations). The MOF is responsible for responding to queries from the German Parliament regarding ongoing legislative projects or general policy issues, while FMSA addresses queries on the application and interpretation of existing resolution planning and resolvability assessment issues, and, if necessary, individual cases. Moreover, the operational independence of FMSA is limited as the MOF's consent is required for resolution measures with immediate financial effects, or that have systemic implications. Finally, German legislation limits the liability of FMSA's senior managers and staff to the consequences of deliberate breaches of their obligations.

**22. German legislation requires FMSA to prepare for its incorporation into the BaFin.** Work has commenced on a law organizing this incorporation. This incorporation will be completed by early 2018.<sup>13</sup> In line with the FSB's KA 2.5 the authorities should ensure that after this incorporation the NRA maintains the necessary operational independence consistent with its statutory obligations.

**23. FMSA is in charge of drawing up resolution plans, assessing resolvability of a bank not falling within the scope of the SRB, as well as identifying and remedying material impediments to resolvability.** FMSA's resolution powers include the power to transfer shares in, or assets, rights or liabilities, of a failing bank to another institution or a bridge bank, the power to cancel or write down shares, or write down, respectively convert liabilities of a failing bank, the power to replace the management, the power to require a bank to amend the maturity of bonds issued by it, the amendment of any contractual term agreed by the bank under resolution and the power to impose a temporary moratorium (i.e., up to the next business day following a notification) on termination rights, rights on the realization of collateral and contractual payment or delivery obligations. The SRB has an oversight role over FMSA's resolution decisions.

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<sup>13</sup> Ministry of Finance press release No. 45 of December 14, 2015. Also, FMSA has other tasks (e.g., oversight of the wind-down agencies). It is planned that these tasks will be transferred to the German Finance Agency ("Finanzagentur").

**24. Close cooperation between FMSA and BaFin is key.** In this respect, they have concluded a Cooperation Agreement. As specified in this Agreement these two authorities consult with and inform one another in particular with respect to early intervention, recovery planning, resolvability assessments, resolution planning and resolution measures.

**25. FMSA is also tasked with implementing resolution decisions adopted by the SRB.** The SRB will closely monitor the implementation of resolution schemes by FMSA. FMSA will submit a final report to the SRB on the execution of a resolution scheme. German law provides that FMSA shall adopt all the necessary measures to implement the SRB's resolution decisions and guidelines. In addition, the FMSA shall abide by the SRB's guidelines and instructions.

**26. The MOF is mandated to adopt various secondary legal acts with more detailed specifications.** Specifically, the MOF is authorized to issue further provisions with respect to the details of recovery plans, the substance of simplified obligations for recovery plans, the criteria for the exemption of institutions belonging to IPS, criteria for assessing the negative effects of an institution's failure on the financial markets and the details of recovery plans to be developed by IPS, the requirements for approval of internal group financing and the triggers for the use of early intervention measures.<sup>14</sup> The authorities confirmed that any such secondary legal acts will be prepared in line with EBA guidelines and RTS. In practice BaFin will prepare these secondary legal acts. In addition, the MOF can delegate such specifications to BaFin that shall adopt such measures in consultation, or agreement with the Bundesbank. These delegations have not yet taken place.

**27. Overall domestic financial stability is the responsibility of the Financial Stability Committee (FSC), which comprises the MOF, BaFin and Bundesbank as voting members and FMSA as a non-voting member.** The Secretary of State of the MOF chairs the FSC. The FSC meets on a quarterly basis—or more often, if needed—and its main focus is on macro-prudential policy. In addition, its tasks include strengthening the cooperation between the authorities represented in the event of a crisis situation. The Act establishing the FSC does not envisage a formal role for the FSC in the operational-decision-making process for specific bank resolution decisions but the communication channels between the FSC members, as well as their respective secretariat functions have been strengthened.<sup>15</sup> It is understood that the MOF will be informed about any bank failing, or likely to fail. As has been the practice in the past, the authorities envisage close cooperation in the event of a financial crisis. Finally, the FSC has developed an internal Handbook that lists and elaborates on all the crisis prevention and management measures that can be taken by the various authorities involved.

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<sup>14</sup> IPS are analyzed in Section C of Safety Nets and Resolution Funding.

<sup>15</sup> Financial Stability Act.

## Assessment and recommendations

**28. The SSM Regulation has put an EU level and domestic institutional framework in place for the supervision of, inter alia, German banks.** This framework covers recovery planning, crisis prevention and early intervention. It has been in place slightly over a year and is operational.

**29. It will be important to review the efficiency of the SSM's decision-making processes in due course.** The SSM's SB prepares a large number of draft decisions. While these drafts currently mostly address licensing and fit and proper decisions, they can also comprise decisions on early intervention, recovery and the determination whether a bank is failing, or likely to fail. Under the current framework only the ECB's Governing Council can adopt binding supervisory decisions. In order to strengthen the SB, a non-objection procedure has been introduced in line with which the SB's proposals will be deemed to have been accepted by the Governing Council if they are not objected to within a maximum period of ten working days. Even so, this might not be sufficient to ensure timely decision-making. The current review of the SSM Regulation could be used to evaluate and enhance the efficiency of this decision-making framework.

**30. While the German (FMSA) and euro area (SRB) resolution authorities have clear resolution powers, both are still in the process of becoming fully operational.** Whereas the SRB is already able to coordinate and adopt resolution decisions in the event of an individual bank that is failing or likely to fail, consideration should be given to developing further the coordination mechanism for complex cross-border and systemic crises. Specifically, a crisis management exercise focused on such complex scenarios would be useful.

**31. The efficiency of the SRM's decision making procedure should be reviewed in due course.** This is important as the current decision-making structure is very intricate and an effective resolution framework requires an efficient and timely decision making procedure. Once the SRB is fully up and running attention should be devoted to reviewing and simplifying this procedure.

**32. The BaFin and Bundesbank undertook the initial work in Germany in the relatively new field of resolution planning and have acquired relevant institutional knowledge and capacity.** Given their knowledge of individual banks and groups derived from their ongoing supervisory activities, in the context of their participation in JSTs and independently, they will be heavily relied upon in the immediate run-up to a possible resolution. The supervisory and resolution frameworks that have now been put in place allocate clearly defined roles to the supervisory and resolution authorities with respect to recovery planning, resolution planning, early intervention and resolution decisions. In addition, cooperation agreements have been established to ensure cooperation by these authorities and the exchange of information between them.

**33. There are as yet no established arrangements in place for coordination and cooperation between SRB, ECB and the German authorities in the event of a system-wide crisis in Germany.** While communication channels exist between the various domestic authorities, both the SRB and ECB would—as has been noted—play significant roles with respect to the

resolution of significant banks. A coordination mechanism is needed to ensure cooperation in systemic crises between these European and domestic authorities.

## CRISIS PREVENTION

### A. Recovery Planning

#### Powers

**34. The crisis prevention framework has expanded the earlier recovery plan obligations to include all banks, regardless of size, and elaborated on related powers and procedures.**

Requirements for recovery plans are adequate and in line with EBA standards and guidelines. LSIs' recovery plans must be submitted for review to BaFin and the Bundesbank, whereas SIs' recovery plans are submitted to the ECB. FMSA also reviews LSIs' recovery plans in the context of its resolution planning while SIs' recovery plans submitted to the ECB are shared with the SRB.

**35. The supervisory authority can grant banks simplified obligations for recovery plans.**

BaFin performs this role for LSIs, in consultation with the Bundesbank, while the ECB does so with respect to SIs. Simplified obligations can apply with respect to the contents and level of detail of recovery plans, the time limit for preparing or updating plans, and/or the contents and level of detail of the information to be provided for recovery and resolution planning. Upon request by banks belonging to an IPS, subject to Bundesbank's consent BaFin can exempt banks from the requirement to prepare a recovery plan except where the bank poses a systemic risk, is supervised by the ECB, or has assets exceeding € 30 billion.

**36. A group recovery plan is subject to additional requirements.** It must include i) courses of action which may be implemented both at the level of the superordinated entity and at the level of subordinate entities, ii) provisions ensuring the compatibility of the courses of action to be implemented by the superordinated entity and any subordinate holding company, subsidiary or significant branch, and iii) provisions providing for possible intra-group support in case of a group financial support agreement.<sup>16</sup>

**37. The ECB and BaFin have a range of powers to rectify deficiencies in a SI's or LSI's recovery plan.** If it determines that a plan does not meet the statutory requirements or that significant impediments to its implementation exist, the ECB can request an SI to provide a revised plan. If the revised plan does not adequately address the deficiencies they can require specific changes to the plan, and if these are not sufficient they can require changes to the bank's business activities. Should these not be implemented or prove sufficient, they can require that more specific measures be taken, including reducing the bank's risk profile or strengthening its governance

<sup>16</sup> These are provided for under law at the discretion of the group but do not currently exist in German banking groups.

arrangements. BaFin has similar powers with respect to recovery plans prepared by LSIs and the two recognized IPSs with respect to their members.

**38. Within their relevant mandates, the ECB and BaFin have the power to require a SI, or LSI, to implement recovery measures specified in its recovery plan.** The competent authorities have the power to instruct a bank to take recovery measures as early intervention measures.

**39. When the supervisory authority is the consolidating group supervisor it must seek to agree the group recovery plan with members of the group's supervisory college.** Under the SAG BaFin is required to submit an LSI's group recovery plan to NCAs in Member States in which subsidiaries and significant branches are located and to NRAs of Member States in which subsidiaries are located, as well as to FMSA. The SAG does not require BaFin to submit the plan to supervisors or resolution authorities in third countries, but this reportedly is done in practice. BaFin must try to reach a joint decision with the NCAs of subsidiaries on the assessment of the adequacy of the group recovery plan and any measures to rectify deficiencies. BaFin can request the support of EBA in order to reach these agreements. In the end, BaFin can take the decisions alone or with a subset of the NCAs. The same approach applies when the ECB is the consolidating supervisor of an SI based in Germany.

**40. When the supervising authority is the host supervisory authority it must seek to agree the adequacy of a group recovery plan with the consolidating (home) supervisor.** This also applies to any measures to rectify deficiencies. Here again, for LSIs, BaFin may request the support of EBA in order to reach these agreements, but in the end it can take independent decisions with respect to the need to prepare an individual recovery plan by a German bank and the application of measures to rectify deficiencies in the plan by the German bank. The same is true for the ECB with respect to SIs.

**41. BaFin and Bundesbank are preparing an Ordinance, in consultation with the ECB, that will further specify recovery planning requirements.** BaFin had earlier, with Bundesbank's input, published Minimum Requirements for the Design of Recovery Plans (Ma-San: Mindestanforderungen an Sanierungspläne). The Ordinance will elaborate further on the requirements for full-scope recovery plans, including inter alia by specifying in more detail governance and reporting requirements, and the nature of and minimum requirements for stress scenarios and indicators to be used in recovery plans. It will also elaborate on requirements for and the nature of simplified obligations. Insofar as this Ordinance exercises options provided for in Union law, the competent authority will be empowered to apply it to LSIs (BaFin and Bundesbank) and to SIs (the ECB).

## Practices

**42. The submission of recovery plans by banks designated as systemic institutions has been phased-in over the last three years.** In addition, by early 2016 banks must prepare full scope

plans.<sup>17</sup> This includes the 22 banks/groups supervised by the ECB and twelve supervised by BaFin/Bundesbank. By early 2016 revised plans had been submitted (in most cases), or as initial plans (in a few cases). Feedback is provided by the authorities within 6 months. In case material deficiencies are identified, the banks have 2 months (which can be extended with an additional month) in which to revise and resubmit their plans. This annual procedure is expected to result in continuous iteration, improvement, and deepening of plans. Reportedly recovery plans are increasingly embedded into banks' strategic and risk management functions, which is a key medium term objective.

**43. Recovery plans from other banks will be required once the Ordinance is adopted, likely within the next few months.** In accordance with a dedicated methodology, banks will be identified (inter alia with assets of less than € 30 billion) and will be able to submit plans under simplified obligations, though the bank's supervisors can propose to require full scope plans. Most savings banks and cooperative banks are expected not to have to prepare recovery plans, and will instead be covered under recovery plans developed by their respective IPS. BaFin and Bundesbank have been meeting with the IPSs to agree requirements and procedures for doing so. Savings and cooperative banks will retain the option to prepare their own plans, for example where the bank's supervisory board requests that management do so.

**44. For ECB supervised German banks and groups, recovery plans are assessed by the ECB jointly with BaFin and Bundesbank within the JSTs.** The JST is formally responsible for reviewing recovery plans, and in practice the BaFin and Bundesbank sub-coordinators/JST members are involved in the analysis, supported by horizontal (i.e., technical experts) units in BaFin, Bundesbank and ECB. Plans are assessed using a structured evaluation framework developed by the ECB. The initial results of the assessment are presented during a meeting with the bank which provides feedback. In general, JST members then prepare a draft feedback letter to the bank summarizing the assessment and indicating required improvements. The letter is finalized by the ECB JST coordinator in consultation with the JST sub-coordinators and members and sent by the ECB to the banks. The JST transmits its assessment of the recovery plan to the group's supervisory college when one exists, and has to take into consideration the views of college members in assessing the plan. The SRB (for SI) and FMSA (for LSI) also review the recovery plans with a view to identifying any actions that may adversely impact the resolvability of the bank/group.

**45. BaFin and Bundesbank review the recovery plans of banks and groups not supervised by the ECB.** These will include plans that have or will be submitted by 12 banks/groups that are designated as high priority LSIs and thus must prepare full scope plans. BaFin shares the recovery plans with FMSA so that it can identify any measures within the plan that might adversely affect the resolvability of the bank.

**46. For ECB supervised banks/groups, the JST communicates to the relevant entity any recommendations or required changes in the plans.** Where the JST determines that there are

<sup>17</sup> As an exception, if a German bank is part of a significant banking group supervised by the ECB it does not have to submit a recovery plan if it is adequately covered by a group recovery plan.

material deficiencies in the plan or material impediments to its implementation it has to notify the bank/group and require it to submit a revised plan demonstrating how those deficiencies or impediments will be addressed. Material deficiencies in recovery plans are reported to the ECB SB which can take enforcement action subject to no-objection by the ECB Governing Council. To date, this has not been required for any German bank. Draft internal SSM guidelines will provide clarity for defining and dealing with material deficiencies.

**47. For banks/groups supervised by BaFin/Bundesbank, BaFin issues instructions to banks for improving plans.** In the annual review of plans by BaFin and Bundesbank scope for improvements in plans are identified, communicated to banks, and must be addressed in banks' subsequent annual plan.

**48. Practices for cross-border cooperation with respect to recovery planning are generally well established.** For over five years the German authorities have led a CMG that has, inter alia, coordinated the oversight of the recovery plan developed by a G-SIB involving EU and non-EU authorities. Coordination within the EU adheres to explicit guidance set out in a number of EU directives, regulations and guidelines. BaFin has entered MoUs with relevant national supervisory authorities globally. An element of most MoUs is a description about how the supervisors will interact in the event of a recovery situation. However, information can only be shared with third country authorities to the extent that they are subject to confidentiality requirements comparable to those set out in SAG and KWG.

## B. Early Intervention

### Intervention powers and recovery plan triggers

**49. The supervisory authorities' powers include early intervention powers specified in SAG, as well as the supervisory powers according to the KWG. BaFin and the ECB in principle have the same range of powers vis-à-vis German banks.** In line with the division of competences between the ECB and BaFin, the latter is responsible for applying early intervention measures for LSI whereas the ECB is responsible for early intervention measures for banks falling under its direct supervision (SI).

**50. BaFin and the ECB also have comprehensive early intervention powers, including by requiring implementation of courses of action set out in recovery plans.** The ECB and BaFin can, inter alia, require a bank to present a plan to restore compliance with supervisory requirements and set a deadline for implementation, restrict the business of the bank, request the divestment of activities, impose specific liquidity requirements, remove members from the management body, and implement recovery plans measures. It is to be noted that recovery plan triggers and early intervention do not necessarily comply with each other, as recovery triggers are set by the banks for themselves whereas early intervention triggers initiate supervisory actions. In the case of actual or potential significant deterioration in a bank's financial condition, including—according to a draft under discussion - when its actual capital falls below its required capital plus 1.5 percentage points, BaFin may require the bank to take measures to improve its financial situation. It can prohibit the



payment of dividends and bonuses and restrict new lending. It can order the management body of the bank to examine its situation, and identify measures to overcome any problems identified in accordance with a specified timetable. Finally, it can require regular reporting on its implementation.

**51. In more problematic situations BaFin and the ECB have wide powers to intervene in a LSI's or SI's operations.** This includes prohibiting taking new deposits and granting new loans, and prohibiting or limiting payments to affiliates or payments of dividends. It can prohibit managers from carrying out certain activities, impose a temporary ban on payments, and order that the institution be closed for business with customers. The supervisory authorities have the power to appoint temporary administrators and to specify their tasks and powers, including replacing some or all managers. BaFin and ECB can appoint a Special Representative with the power to manage and govern the bank. The Special Representative can assume the duties of managers and governing bodies. Finally, BaFin and ECB can require a bank to draw up a plan for negotiating the restructuring of its debt vis-à-vis some or all creditors.

**52. BaFin and ECB can intervene in the voting rights of entities controlling a LSI or SI in the context of its supervision of financial groups.** Under certain circumstances, including if it deems a person managing such an entity is not trustworthy or does not have the professional qualifications necessary to manage the entity, it can prevent such entities from exercising their voting rights.

### Cross-border Cooperation

**53. Where BaFin, or the ECB, is the consolidating (home) supervisor for a LSI or SI it must consult with other supervisors in the supervisory college before deciding on early intervention measures, including temporary administration.** It must also notify EBA prior to taking any decision. It is bound to consider the potential impact of intervention measures on group entities in other Member States (but not third countries). BaFin (or the ECB in case of a SI), must notify the other supervisory college members and the EBA of such measures. If another supervisory authority intends to impose similar measures, BaFin (or ECB) must participate in a joint assessment as to whether the application of the measures is to be coordinated. Its assessment is to be documented in writing and forward to the parent entity. BaFin (or ECB) may request EBA support in arriving at a joint assessment. If the relevant supervisors have not agreed a joint decision within five days, BaFin (or ECB) can decide as to whether to enact the measures.

**54. Where BaFin, or the ECB, is a host supervisor, it must consult with the consolidating (home) supervisor prior to taking early intervention measures or imposing temporary administration.** It must also notify the EBA prior to acting. BaFin (or ECB) must consider the assessment of the consolidating supervisor prior to taking action, but can act independently if this is not received within three days. BaFin (or ECB) must notify the consolidating supervisor and the other supervisors within the supervisory college and EBA of its actions. If the home or other host supervisory authority intends to impose similar measures, BaFin (or ECB) should seek to coordinate the measures. If the supervisors have not agreed a joint decision within five days, BaFin (or ECB) can decide to enact the measures.



**55. If BaFin, or the ECB, is notified of a decision made by a home or host supervisor in a Member State regarding the imposition of certain early intervention measures and does not agree to this decision, it may refer the decision to EBA.** The relevant measures are those requiring an institution to implement recovery measures affecting capital or liquidity, to prepare a plan for restructuring of debt, or to change its legal or operational structures.

**56. Where a decision proposed by BaFin, or the ECB, has been objected to and referred to EBA by another supervisory authority, BaFin (or ECB) is bound by the decision of EBA.** However, if EBA does not issue a decision within three days, BaFin (or ECB) can decide as to whether to enact the measure.

### C. Assessment and Recommendations

**57. Implementation of requirements for preparation of recovery plans by banks is proceeding well.** A structured supervisory assessment framework is in place, and guidelines for identifying and remedying material deficiencies have come into force this year. While the quality of plans reportedly varies considerably, the supervisory assessment process is expected to yield higher quality and more consistent plans over the next couple years.

**58. The ECB and German authorities have an adequate range of early intervention powers.** These have been expanded to include the power to require implementation of recovery plan measures.

## CRISIS MANAGEMENT REGIME

### A. Resolution Planning and Resolvability Assessments

**59. The SRB and FMSA are responsible for drawing up and adopting resolution plans for the institutions and groups falling within their respective mandates (see paragraphs 13 and 20).** The SRB draws up resolution plans after consulting the ECB or the relevant NCAs and NRAs, including the group-level resolution authority and the NRAs of non-participating member states where subsidiaries or significant branches are located. German legislation mirrors the requirement for FMSA to consult the supervisor in the preparation of the resolution plan. The SRB will issue guidelines and instructions addressed to NRAs for the preparation of (group) resolution plans relating to specific institutions or groups.

**60. The SRM Regulation and German legislation specify in detail the requirements for resolution plans. The use of public funds can at no point of resolution planning be assumed, including ELA from the Bundesbank.** These plans must contain options for the application of resolution tools and include details on the bank's business analysis, operational continuity, funding in resolution, MREL, information and communication issues and an assessment of the institution's resolvability.

**61. The SRM and German resolution frameworks allow resolution plans to involve simplified obligations in specified situations.** The EBA has finalized guidelines on the application of such simplified obligations. The applicable legislation provides details on the criteria to be taken into account in allowing the application of simplified obligations. These criteria include interconnectedness and membership of IPS. Where simplified obligations are applied the SRB and FMSA can determine i) the contents and details of the resolution plans; ii) the date by which the first resolution plans need to be drawn up; iii) the contents and details of the information to be provided; and iv) the level of detail of the resolvability assessment.

**62. When drafting a resolution plan the SRB and FMSA must assess the extent to which a bank/group is resolvable.** A bank or group is deemed resolvable if it is feasible and credible for the resolution authority to either liquidate it under normal insolvency proceedings or to resolve it by applying the available resolution instruments while avoiding significant adverse effects for financial systems in the affected Member States.

**63. Should the SRB or FMSA decide that there are significant impediments to the resolvability of a bank or group it will be notified and can propose remedial measures.** If such measures are deemed acceptable by the resolution authority, the bank/group must implement them. In the event that the proposed measures are not acceptable, the resolution authority will instruct the bank/group to take necessary measures.

## B. Resolution Objectives and General Principles

**64. The SRM and German resolution frameworks contain clear resolution objectives.** These include: i) ensuring the continuity of critical functions; ii) avoiding significant adverse effects on financial stability, i.e., by preventing contagion, including to market infrastructures and by maintaining market discipline; iii) protecting public funds by avoiding reliance on extraordinary public financial support and iv) protecting client funds and client assets. The resolution frameworks provide certainty by requiring that the resolution authority can take resolution measures only if it considers all the following conditions have been met: i) that the bank is failing or is likely to fail; ii) there is no reasonable prospect that any alternative private sector measures, or supervisory measures, would prevent its failure within a reasonable time; iii) resolution action must be necessary in the public interest, be proportionate to one or more of the resolution objectives, and the use of normal insolvency proceedings would not meet those resolution objectives to the same extent. The previous adoption of an early intervention measure is not a condition for taking a resolution action. In the event that these conditions are not fulfilled a failing bank must be liquidated in accordance with the normal insolvency proceedings.<sup>18</sup>

**65. German law allows for the implementation of a voluntary court approved reorganization plan.** Specifically, a court can decide on a reorganization plan with respect to an institution in difficulties when the preconditions for a resolution exist.<sup>19</sup> Such a decision could be

<sup>18</sup> The BRRD's hierarchy of creditors has been implemented in German insolvency legislation.

<sup>19</sup> Credit Reorganization Act (Kreditinstitutereorganisationsgesetz; "KredReorgG").

initiated by BaFin for a LSI—and the ECB for a SI—following a request by the relevant institution. The legislation requires also the approval of the reorganization plan by all the institution’s creditors and shareholders. This differs from the BRRD approach with respect to resolution measures. These measures will be public, take time and involve creditor approval prior to court approval of reorganization measures.

**66. According to the SRM and German resolution frameworks, a bank shall be deemed to be failing or likely to fail in one or more of the following circumstances:<sup>20</sup>**

- the bank infringes, or there are objective elements to support a determination that the bank will in the near future infringe, the requirements for continuing authorization in a way that would justify the withdrawal of the authorization by the competent authority;
- the assets of the bank are, or following a determination based on objective elements that the assets of the bank will, in the near future, amount to less than its liabilities;
- the bank is, or there are objective elements to support a determination that the bank will in the near future, be unable to pay its debts or other liabilities as they fall due;
- extraordinary public financial support is required except when it is provided to solvent banks in order to remedy a serious disturbance in the economy of a Member State, preserve financial stability and takes the form of State guarantees (i) to back central banks’ liquidity facilities, (ii) of newly issued liabilities, or (iii) an injection of own funds or the purchase of capital on terms that do not confer an advantage on the bank and is limited to addressing SSM-wide stress tests, asset quality reviews or equivalent exercises. (This support is conditional on final approval by the Commission under its State Aid framework.)

**67. The SRM and German resolution frameworks contain a number of safeguards.** They provide for the power to write down or convert relevant capital instruments in clearly defined situations to prevent the failure of a bank. In line with the safeguard principles, as a general rule shareholders and creditors shall first bear losses and to the same extent as they would have done in case of insolvency proceedings. Creditors in the same class are treated in an equitable manner and covered deposits are fully protected. The SRM and German resolution frameworks explicitly contain the “no creditor worse off” (NCWO) principle on the basis of which creditors can receive compensation in case they suffer losses as a result of resolution measures that are higher than the losses they would have incurred in a normal insolvency procedure. Also, these frameworks provide for legal due process.

**68. The SRM and German resolution frameworks require both an ex ante and ex-post valuations that must be undertaken by an independent expert.** The SRB/FMSA must ensure that an independent expert assesses the bank’s or group’s assets and liabilities before a resolution

<sup>20</sup> EBA guidelines will be implemented to provide certainty regarding the interpretation of the different circumstances when an institution shall be considered to be failing or likely to fail.

measure is adopted. In case it is not possible to carry out a full assessment in time for a resolution measure to be taken, a provisional assessment must at least be undertaken. Resolution measures are informed by the valuation. In addition, following implementation of resolution tools, SRB/FMSA must obtain an assessment by an independent expert auditor determining whether and to what extent shareholders and/or creditors have been disadvantaged by the resolution decisions taken.

### C. Resolution Instruments and Bail-in

**69. The German resolution framework allocates a range of powers to FMSA (and SRB) to facilitate the implementation of its resolution decisions.** In particular, FMSA's powers extend to requiring a bank or group entity to amend the maturity or amount of interest payable under debt instruments and other eligible liabilities, and to require an bank under resolution, or any of its group entities, to provide services or facilities necessary to enable a recipient to operate the business transferred to it, including where the bank has entered into insolvency proceedings.<sup>21</sup> The resolution authority can amend or cancel contractual obligations (e.g., the maturity, the amount of interest payable, or temporarily suspend payments). It may temporarily (for up to 48 hours) suspend: i) termination rights, ii) some or all payment or delivery obligations and iii) the enforcement of security interests. With respect to contracts entered into by a bank or banking group, FMSA also has the power to amend the contract's provisions and to decline its fulfillment.

**70. As regards the temporary suspension of contractual termination rights, Deutsche Bank is one of the G-SIBs that has signed the ISDA 2015 Universal Protocol on Resolution Stays.**<sup>22</sup> This acceptance by Deutsche Bank and its counterparties will support the cross-border enforcement of a temporary stay of contractual cross-default clauses and termination rights in relation to the adoption of resolution measures. In addition, a number of German subsidiaries of G-SIBs have also adhered to the Universal Protocol.

**71. German legislation requires institutions to include in financial contracts governed by third country law provisions recognizing the power of the resolution authorities to bail-in debt and suspend contractual termination rights.** The principle of universality in Germany insolvency law applies, which means that German insolvency proceedings generally extend to all assets of the insolvent institution, including those outside Germany and/or that are subject to foreign laws. For all EU jurisdictions the national implementation of the BRRD ensures that the activation of bail-in of debt issued in those jurisdictions by a German bank by way of these

<sup>21</sup> The EBA has issued guidelines to specify a minimum list of services and facilities that are necessary to enable a recipient to effectively operate a business transferred to it.

<sup>22</sup> The Universal Resolution Stay Protocol represents a significant update of the 2014 Resolution Stay Protocol. The 2014 Protocol was designed to address the issue of cross-border recognition of resolution action (in particular, temporary stays). The new Protocol extends the scope of the agreements amended by the 2014 Protocol to include the GMSLA and GMRA in addition to the ISDA Master Agreement. The new Protocol also includes the new concepts of Other Agreement Annexes and Country Annexes – both designed to permit ISDA to issue additional annexes in the future in order to further extend the types of agreements and jurisdictions covered by the new Universal Resolution Stay Protocol.

contractual clauses will be valid and recognized by local courts. The contractual bail-in of debt issued in other jurisdictions may be subject to legal and/or judicial uncertainty and generally cannot be relied upon in the context of resolution planning.<sup>23</sup>

**72. The SRM and German resolution frameworks contain a comprehensive range of resolution tools which can be used to resolve an institution or group entity.** These resolution tools consist of: i) the sale of business/sale of shares of the bank; ii) the establishment of a bridge institution; iii) asset separation/transfer and iv) in any case a bail-in. The frameworks provide for the power to write down and convert relevant capital instruments immediately before resolution action. Write down and conversion can be exercised independently of resolution action, or together with the use of the resolution tool(s). The resolution scheme adopted by the SRB or FMSA has to specify which resolution instruments are to be used. The power to sell a business, or sell the shares of the bank, transfer assets and liabilities to a bridge institution, and transfer assets to an asset management company, may be exercised more than once in the context of the resolution of a single institution. The BBRD's Government financial stabilization tools (i.e., temporary public ownership and public equity support) are not included in the SRM Regulation, nor the SAG.

**73. The SRM and German resolution frameworks provide clarity as regards the scope of the bail-in power.** Specifically, the SAG ensures that FMSA (and SRB) has the powers necessary to apply the bail-in tool. Bail-in can be applied: i) to recapitalize a bank to restore its ability to comply with the conditions for authorization and to sustain market confidence in the institution, and ii) to convert to equity or reduce the principal amount of claims or debt instruments that are transferred to a bridge institution with a view to providing capital for that bridge institution; or iii) serve as a complement to the sale of business or asset separation tools.<sup>24</sup>

**74. The SRM and German resolution frameworks allow the exclusion of specific eligible liabilities, or specific categories of liabilities, from the scope of bail-in.** Such exemptions are limited to those cases where they are necessary and proportionate to ensure the continuation of critical functions and key business activities, or in order to avoid the risk of contagion in the financial markets.<sup>25</sup> Exemptions are also possible in case: i) the application of bail-in would lead to the losses borne by other creditors to be higher than if the liabilities were excluded from bail-in, or ii) if the application of bail-in is not possible for the relevant liability within a reasonable period of time. The

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<sup>23</sup> It is noted that the Directive 2001/24/EC on the Reorganization and Winding-Up of credit institutions, together with the BRRD, provides for the automatic recognition within the EU of resolution decisions adopted by other EU member states' authorities.

<sup>24</sup> In the resolution of a public bank the German authorities envisage changing its legal structure to a shareholding company to enable the necessary debt conversion.

<sup>25</sup> A Commission Delegated Regulation of February 4, 2016 provides clarity as to how these exemptions will be interpreted. For example, the exemption to avoid (in) direct contagion requires an assessment of the interconnectedness of the bank, and the importance of the counterparties at risk of default as a result of bail-in. Exemptions need to be justified.

Commission must be notified before an envisaged exclusion is decided and it can prohibit or modify such a decision if the exclusion could require a contribution from the SRF.

**75. The SRM and German resolution frameworks provide that use of the bail-in tool must respect the hierarchy of claims.** The bail-in tool will potentially apply to all unsecured liabilities of the bank, albeit with some exceptions.<sup>26</sup> Creditors of a bank under resolution bear losses after the shareholders in accordance with the priority of claims under normal insolvency proceedings, save as expressly provided otherwise in the SRM. Thus, the write down will follow the ordinary allocation of losses and ranking in insolvency. A delegated Commission Regulation specifies the circumstances when the resolution authority can totally or partially exclude certain liabilities from the application of the bail-in tool.

**76. A recent new German law clarifies the hierarchy of claims and introduces mandatory subordination of certain unsecured debt instruments.** This provision stipulates that if a bank becomes insolvent claims under certain unsecured debt instruments will be subordinated to general senior unsecured liabilities. The instruments that are subordinated are bearer bonds, order bonds, and similar rights which by their nature are tradeable in capital markets. Promissory note loans and registered bonds are also subordinated. This mandatory subordination means that these instruments will bear losses prior to other creditors, most notably all uncovered depositors. In essence, the previous heterogeneous class of senior unsecured debt is split and a new layer of tradeable senior unsecured debt is created which will serve as a reliable source of loss-absorbing liabilities. This provision on the hierarchy of bonds becomes applicable on January 1, 2017.

**77. The SRM and German resolution frameworks provide that the resolution authority will set institution-specific MREL.** This requirement applies formally from 2016, with a transition period of up to 48 months. It will require banks to have sufficient own funds and eligible liabilities to ensure that the bank's or parent undertaking's losses can be absorbed and it can be recapitalized. MREL will be calculated as the amount of own funds and eligible liabilities expressed as a percentage of the total liabilities and own funds of the bank. In order to ensure that an entity can be resolved by the application of resolution tools, including the bail-in tool, the determination of the MREL will be made on the basis of the following criteria: i) the business model, funding model and the risk profile of the bank and parent undertaking; ii) the extent to which deposit guarantee schemes could contribute to the financing of resolution measures (see below); and iii) the extent to which the failure of a bank and parent undertaking would have significant adverse consequences for the

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<sup>26</sup> It will not apply to the following liabilities, whether they are governed by the law of a member state or of a third country: i) deposits protected by a deposit guarantee scheme; ii) short-term inter-bank lending or claims of clearing houses and payment and settlement systems, iii) any liability as a result of the institution or entity holding client assets or client money; iv) any liability that arises by virtue of a fiduciary relationship between the institution or entity and another person provided that such a beneficiary is protected under the applicable insolvency or civil law; v) liabilities to employees in relation to accrued salary, pension benefits or other fixed remuneration; vi) liabilities to a commercial or trade creditor arising from the provision of goods or services that are critical to the daily functioning of the institution or entity's operations; vii) liabilities to tax and social security authorities; and viii) liabilities to deposit guarantee schemes arising from contributions due in accordance with the DGSD.

financial system or would present a threat to financial stability due to its interconnectedness with other banks or the rest of the financial system. FMSA has ultimate discretion but must explain to the supervisor when it departs from the prudential requirements in setting MREL.

**78. FMSA is in the process of developing additional criteria for MREL.** These criteria will follow the EBA draft RTS on MREL, which has recently been adopted by the Commission, as well as guidelines to be issued by the SRB. The RTS specify in particular resolvability, risk profile and systemic importance as relevant criteria. For G-SIBs the RTS provides that MREL will be implemented consistent with the FSB's TLAC requirement.<sup>27</sup> Pending the adoption of the RTS on MREL by the Commission, FMSA has not finally determined additional criteria. In 2016 the European Commission also issued a discussion paper on reducing overlap between MREL and TLAC. This discussion is ongoing.

**79. The German authorities should closely monitor whether German banks have sufficient eligible liabilities to enable a sufficient level of bail-in.** Based on a range of surveys the authorities are of the opinion that, in general, German banks have sufficient eligible liabilities including much issued under German law.<sup>28</sup> This opinion is also informed by the fact that, reportedly, German banks have mostly issued debt instruments which provide for cross-border effects to the exercise of German bail-in powers in European jurisdictions; i.e., jurisdictions which in general recognize such effects. Also, the statutory subordination of certain unsecured debt instruments, as noted above, is applicable from January 2017.

## D. Cross Border Resolution

**80. Provisions for considering resolution effects in third countries are lacking in the resolution framework.** The SRM and German legislation provide that resolution measures which may have consequences in one or more other EU Member States should be informed by an appropriate balance of the interest of the various Member States. However, there is no explicit provision requiring resolution authorities to formally take into account the effects of such resolution measures in third countries.

**81. Strict preconditions exist with regard to the exchange of confidential information with third country authorities, which can be mitigated by cooperation agreements.** These preconditions ensure that the exchange of confidential information with relevant third country authorities is not automatic. They limit exchanges to: i) third country authorities subject to confidentiality provisions at least equivalent to those set out in German legislation, as assessed by the resolution or supervision authority, ii) a determination that the information is necessary for relevant third country authority resolution measures comparable to those of the German authorities, and iii) personal data can only be forwarded insofar as the third country's data protection legislation is of an appropriate level within the meaning of German legislation. The German resolution

<sup>27</sup> FSB Principles on Loss-absorbing and Recapitalization capacity of G-SIBs in Resolution; Final TLAC Term Sheet, November 9, 2015.

<sup>28</sup> IMF staff did not have access to these surveys.



framework allows for the exchange of confidential information between relevant authorities in EU Member States. Cooperation agreements are being put in place with third country authorities, which will in practice, allow the exchange of confidential information with relevant third country authorities.

**82. While the effectiveness of crisis prevention and management measures adopted by other EU Member States is assured, third country resolution measures are not automatically recognized or effective in Germany.** The German resolution framework contains the right to refuse the recognition or enforcement of third country resolution proceedings. This right of refusal can be exercised in case the third country proceedings would: i) have adverse effects on German financial stability (or that in another EU Member State); ii) have significant fiscal implications; iii) conflict with German law, or where independent resolution action is necessary with respect to a German Union branch.

**83. The SRM and German resolution frameworks contain provisions on (cross-border) group-level resolution.** Resolution Colleges (RCs) have yet to be established. They will consist of the national resolution authority, the resolution authorities of other relevant EU Member States, the Bundesbank, the ECB if it is the direct supervisor, BaFin, other relevant EU Member States supervisors, MOF, other relevant EU Member States' Ministries, and relevant supervisors of DGS.<sup>29</sup> As regards the composition of resolution colleges, the effect of the application of the SRM Regulation is that the NRAs of subsidiaries and significant branches are replaced by the SRB for groups which fall under the remit of the SRB. Hence, all respective national authorities are not members of such colleges. However, the draft SRB Cooperation Framework foresees that the respective resolution authorities participate in the resolution colleges as observers. Third country resolution authorities in which an EU parent undertaking has a subsidiary or significant branch may be invited to participate only as observers. In the event a third country institution or parent undertaking has subsidiaries or at least two significant Union branches established in Germany and at least one other EU Member State, the resolution authority will establish a RC together with the other relevant EU member state resolution authorities. The framework contemplates CMGs that would also involve non-EU authorities. CMGs will closely involve the relevant third country authorities similar to the manner in which they have been put in place for the G-SIB, Deutsche Bank, and other German banks. It is understood that the SRB currently envisages the co-existence of RCs and CMGs.

**84. Resolution colleges are to address certain matters.** These include: i) the exchange information relevant for the development of a group resolution plan, ii) assessing group resolvability, iii) exercising powers to address impediments to resolvability, iv) deciding on the need to establish a group resolution scheme, v) specifying MREL at group level, and vi) coordinating the use of financing schemes.

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<sup>29</sup> The EBA has drafted a technical standard on the operational functioning of resolution colleges. According to the draft the group-level resolution authority must conduct the mapping of group entities, taking into account the mapping of those groups performed by the consolidating supervisor. This mapping includes relevant authorities which may not be already be represented in the FSB CMGs.



**85. Work is progressing on resolution approaches for cross-border firms.** For example, according to public information the SRB, global CMG, and FMSA are working under the assumption of bail-in under a Single Point of Entry approach as the preferred resolution strategy for a G-SIB.

**86. The EBA is in charge of concluding framework cooperation agreements with third countries.** Within that framework the SRB shall conclude on behalf of national resolution authorities MoU with the resolution authorities of other EU Member States, as well as MoUs and cooperation agreements with third country authorities. The Cooperation Agreement between the SRB and ECB specifies that these authorities will keep each other duly informed of any non-binding cooperation agreements with third country authorities. The EBA has commenced work to establish framework cooperation agreements (FCA). In 2015, the draft FCA was shared with selected third country authorities in the US (FRB, FDIC, OCC, SEC, NYSDFS), Switzerland (FINMA), Hong Kong (HKMA) and Japan (FSA). These discussions are ongoing.

## E. Systemic Crisis Management Arrangements

**87. BaFin has established a Crisis Management Center, as well as a Crisis Management Handbook.** BaFin's crisis management center supports the communication and coordination between its internal departments and central support functions, as well as aggregating information for its Board. The BaFin Crisis Management Handbook details its internal procedures. Similarly, the other German authorities have also established crisis management centers. Procedures have been developed for the coordination of these centers.

## F. Assessment and Recommendations

**88. The SRM and German resolution frameworks contain a clear set of resolution objectives.** In addition, the SRM and German resolution frameworks contain a comprehensive range of resolution instruments which can be used to resolve a bank or banking group. Both the competent authority and the resolution authority can make a determination that an institution is failing or likely to fail, and the legislation provides for the authorities to closely consult each other in this respect. These arrangements should help ensure that resolution decisions are prepared in a timely manner.

**89. German legislation provides an ample range of resolution powers.** The resolution tools set out in the BRRD and envisioned in the FSB Key Attributes are in place, with the exception of provisions for temporary public ownership and public equity support which were intentionally not transposed. The SRM regulation also does not contain these tools. This might constrain the authorities in the event of systemic crises. In addition to these resolution tools German law also provides for voluntary court approved reorganization plans. This additional instrument differs from the BRRD approach and would be of little practical value next to the resolution measures at the disposal of the FMSA and SRB. It is not used in practice. Consideration could be given to removing this from the available options for addressing institutions in difficulty.

**90. The shareholder and creditor safeguards in the German legal framework are adequate.**

However, while the framework allows for exemptions from the pari passu principle in specific cases in the application of the bail-in provision, contrary to the FSB's KA 5.1, the SRM and German frameworks do not explicitly allow for departures from this principle for the other resolution powers. This may limit the authorities' flexibility to use other BRRD resolution tools (namely, the transfer powers), outside of bail-in.

**91. The authorities face a range of challenges to implement a resolution, especially in a short time-frame, and work is ongoing to overcome them.** These include: i) ensuring that sufficient loss-absorbing capacity is appropriately positioned within banking groups; ii) being able to undertake timely valuation of assets and liabilities; iii) giving operational effect to the bail-in of potentially multiple classes of liabilities; iv) ensuring continued access to FMIs in resolution; v) implementing any necessary structural changes (e.g., asset transfers) in a bank; and vi) ensuring adequate liquidity funding in resolution. FMSA is sponsoring working groups involving other authorities and the industry that are addressing these and other issues.

**92. Resolution planning needs to take into consideration the implications of these and other challenges on the speed within which all necessary resolution actions can be implemented, and thus on the time needed to give full effect to resolution actions.** German legislation provides that FMSA (and SRB) can impose a temporary stay on actions by certain counterparties for up to 48 hours to facilitate resolution. This may prove insufficient, and may need to be complemented by the use of BaFin's authority to impose a more general moratorium in the event of a LSI, as set out in the KWG. The same power applies mutatis mutandis to the ECB with respect to a SI. Of course this would have to be limited as much as possible in time so as to avoid as much as possible any negative effects on market sentiment vis-à-vis the bank in question.

**93. The German authorities should closely monitor whether German banks have sufficient eligible liabilities to enable a sufficient level of bail-in.** They have conducted a number of surveys that support their conclusion. In most cases the banks have reportedly issued sufficient debt under German or other EU jurisdictions' law. The authorities should monitor and encourage banks to ensure the adequacy of available bail-inable liabilities of large banks.

**94. The scope to bail-in uncovered depositors is potentially greater in Germany due to the commitments of the private commercial banks voluntary protection scheme.** The scheme publicly commits to fully protect all deposits in all private commercial banks.<sup>30</sup> While the voluntary protection scheme does not create a legal right, as a last resort the authorities could bail-in uncovered deposits with the knowledge that those depositor likely would be compensated by the voluntary schemed funded collectively by the private banks. The mechanisms by which compensation of depositors whose deposits have been converted to some form of equity would need to be established. (See more below under Safety Nets and Resolution Funding.)

<sup>30</sup> From English language marketing materials: "Complete security for the general public: For virtually all depositors, this deposit guarantee scheme means that all deposits at the private commercial banks are in effect fully protected."

**95. Consideration should be given to providing guidance on minimizing rollover risk in the debt component when setting institution-specific MREL requirements.** Policies might be developed under the guidance of the SRB, for example, on the target duration of eligible debt instruments so as to minimize the MREL refinancing risks that banks might face. A bank's refinancing risk will be higher the lower the equity component of MREL is in the bank.

**96. German legislation requires banks to include in their financial contracts governed by third country laws provisions recognizing the power of the resolution authorities to suspend termination rights.** While this is welcome, it remains to be determined if third country jurisdictions will recognize such contractual clauses.

**97. Arrangements for system-wide crisis management involving the MOF, the SRB and the ECB are not in place.** Consideration should be given to clarifying cooperation and coordination mechanisms to efficiently and effectively resolve a system-wide crisis involving the potential failure and resolution of multiple banks/groups simultaneously.

**98. The SRM and German resolution frameworks provide that resolution measures should minimize the negative effects in other EU Member States but does not provide the same for third countries.** It is recognized that cooperation agreements are being put in place with third country authorities. This will, in practice, allow the exchange of confidential information with those authorities. In this context, it is understood that the SRB currently envisages the co-existence of resolution colleges (involving non-euro area authorities) and CMGs (which include third country authorities). While third country resolution authorities in which an EU parent undertaking has a subsidiary or significant branch can be invited to participate as observers in resolution colleges, this does not seem to be an adequate way to ensure that the effects of resolution measures in a third country are properly taken into account. Going forward the authorities should pro-actively ensure that third country authorities are fully involved in the preparation and adoption of resolution measures. However, there is no explicit provision requiring resolution authorities to take into account the effects of such resolution measures in third countries. In the longer term, the authorities are encouraged to pursue legislative changes at the European level that would allow them to take such effects into account when adopting resolution measures.

## SAFETY NETS AND RESOLUTION FUNDING

### A. Emergency Liquidity Assistance

**99. In the euro area, the provision of ELA is not currently a task of the Eurosystem, but of the national central banks albeit that the ECB's Governing Council can object to the provision by national central banks, including the Bundesbank, of ELA.**<sup>31</sup> The Eurosystem's single

<sup>31</sup> ELA Procedures; [ww.ecb.europa.eu/pub/pdf/other/201402\\_elaprocedures.en.pdf](http://www.ecb.europa.eu/pub/pdf/other/201402_elaprocedures.en.pdf). It is understood that the Eurosystem is currently discussing whether the provision of ELA can, and, if so, be qualified as a Eurosystem task in the future.

monetary policy credit operations include an overnight marginal lending facility and, at present, inter alia, full allotment tenders for one week and three month funds.<sup>32</sup> Collateral requirements are established under the Eurosystem framework, and are supported in Germany by a well-developed and efficient mechanism for pledging non-tradable collateral such as commercial loans. A bank's eligibility for single monetary policy credit is decided by the ECB's Governing Council according to criteria that include the financial soundness of the bank, which requires compliance with minimum regulatory capital requirements (excluding buffers) as a necessary but not a sufficient condition. As opposed to the provision of liquidity under the single monetary policy, the provision of ELA to German banks is a discretionary decision for the Bundesbank. In practice ELA would involve either lending to a solvent bank whose eligibility for MP credit has been suspended by the Governing Council, and/or lending against collateral falling outside the established Eurosystem framework, subject to certain conditions, including that the bank must be solvent and that all lending must be sufficiently collateralized. The Bundesbank would judge the solvency based on input from the supervisory authorities (BaFin, Bundesbank, ECB), though this judgment could be overridden by the Governing Council. Compared to lending under MP operations, the ELA interest rate has to contain a penalty rate. The ECB's Governing Council can object to the provision of ELA by Eurosystem national central banks, including the Bundesbank, if it finds that the actual or proposed ELA conflicts with the objectives and tasks of the ESCB, and there are established procedures for ex post and ex ante notification of ELA to the Governing Council by national central banks. Any ELA outstanding is reviewed by the Governing Council regularly.

## B. Resolution Funding

**100. The SRM Regulation establishes the SRF.** This fund will be built up to a target amount of at least 1 percent of covered deposits of all credit institutions within the member states participating in the SRM (ca. € 55 billion over eight years). Initially the Fund will consist of national compartments which will be used to fund resolution measures with respect to national banks.<sup>33</sup> This will be mutualized over a period of eight years. Germany has concluded a Loan Facility Agreement with the SRB, which provides a backstop of around € 15 billion for the national compartment in the SRF. This backstop is not automatic and a decision by the MOF is needed to activate it. The SRF is funded by regular ex ante and extraordinary ex post contributions. A Commission Delegated Regulation, with the addition of a Council Implementing Regulation, defines the formula for the calculation of banks' contributions to the SRF. The contributions will be risk based and there are special provisions for small banks and members of IPS. For German banks the SRF will replace the existing domestic fund ("Restrukturierungsfonds") which will remain in place for the entities not covered by the SRM. Annex

<sup>32</sup> The Eurosystem comprises the ECB and the national central banks of the EU Member States that have adopted the euro.

<sup>33</sup> In the way that if, in a first step, the used national compartment amount is—up to a specified threshold—not sufficient to cover the resolution costs, the available paid in means in the other SRM member states could be used up to a specified threshold (40 percent in year 1. 60 percent in year 2 and + 6.6 percent during the subsequent years).

I contains information on the previous domestic fund's ("SoFFin") outstanding commitments which was closed for new stabilization measures in 2015.

**101. The SRF is a key source of resolution funding subject to certain conditions.** Resolution funding may be needed to partially recapitalize a firm in resolution in the event the firm cannot be fully recapitalized via bail-in,<sup>34</sup> and to meet operational funding needs (i.e., liquidity) until it can regain access to sufficient market sources. The SRF can be used indirectly as a source of loss absorption and recapitalization subject to certain conditions.<sup>35</sup> The SRF can be used as a source of liquidity, either by means of a loan or guarantee of third party funding, subject only to the requirement that a resolution tool (e.g., bail-in) has been used. The SRF can make contributions to a bridge institution and an asset management vehicle, as well as pay compensation to shareholders or creditors who have suffered greater losses than they would have done if the bank had been wound up under the applicable insolvency regime (NCWO principle).

**102. The use of the SRF is decided by the SRB and subject to the control of the EU Council of Ministers upon the advice of the European Commission.** Among the potential bases for the Council/Commission to object to a resolution scheme is the use of the SRF and the amount of funds proposed to be used. The Commission must adopt a decision that the use of the SRF is compatible with the internal market, and may impose conditions, commitments or undertakings on the beneficiary of the fund. The SRM Regulation sets out a range of conditions for the use of the SRF, and procedures for decision-making on authorizing its use.

### C. Deposit Insurance and Institutional Protection Schemes

**103. In Germany a complex mixture of statutory DGS for commercial and public banks exist side by side with voluntary DGS for these categories of banks.** Voluntary schemes provide supplementary deposit protection to the statutory protection. In these cases, the statutory DGS cover claims of statutory compensation up to the amounts specified in the EinSiG whilst the voluntary schemes cover amounts exceeding said amounts. These schemes cover its members, who might not also be in the statutory DGS at the same time. In line with the DGSD, German legislation allows for the recognition of IPS. IPS are cooperative frameworks established by certain sectors of the banking sector. Box 2 contains details about the recognized German IPS. The members of IPS contribute premiums and the IPS can—in line with their statutes—provide financial support for the reorganization of their members; see paragraph 108 below for more details.

**104. The EinSiG, which entered into force on July 3, 2015, covers both statutory DGS and IPS that are recognized as deposit guarantee schemes in accordance with the EinSiG.** Statutory DGS and recognized IPS are subject to supervision by BaFin, which is also authorized to recognize an IPS. Statutory DGS and recognized IPS are required to carry out regular risk assessments in line

<sup>34</sup> Or to capitalize a bridge bank into which the firm in resolution's critical functions are transferred in the event the bridge bank cannot be fully capitalized as a result of bail-in in combination with asset and liability transfer.

<sup>35</sup> Including that losses equivalent to 8 percent of the total notional amount of liabilities including own funds of the firm in resolution are first absorbed by creditors by means either of write-down or conversion into equity.

with EBA guidelines that are still under development with respect to their member institutions so as to detect any issues at an early stage. The member institutions are required to inform the statutory DGS and recognized IPS of any changes to business models that could lead to an increase in covered deposits, or an increase in the probability of compensation to be paid in the future. The statutory DGS and recognized IPS, in turn, are required to inform the BaFin.

### Box 2. German Deposit Insurance Regime

**Commercial banks: statutory scheme**—The “Entschädigungseinrichtung deutscher Banken”, i.e., the Compensation Scheme of German Banks (EdB) was established in 1998. The EdB is 100 percent owned by the Association of German Banks and it is the DGS for commercial banks.

**Commercial banks: supplementary private scheme**<sup>1</sup>—In addition to the statutory DGS, German banks as well as subsidiaries and branches of foreign banks in Germany may participate in the voluntary Deposit Protection Fund (ESF). Deposits which are not compensated by the statutory DGS in Germany or—in the case of branches of foreign banks—deposits exceeding the coverage level of the statutory scheme are protected up to the coverage level of the voluntary ESF. However, claims are not legally enforceable by depositors. The ESF can also take over payment liabilities vis-à-vis third parties, guarantees and participate in the capital of member banks with a view to ensuring their continued operations. The Association of German Banks is establishing a bank with the objective of providing liquidity to the ESF. It will obtain a banking licence in 2016.

**Savings banks (Sparkassen) and Landesbanken:** The “Deutscher Sparkassen- und Giroverband” (DSGV) is an IPS approved by BaFin. It is composed of the following interlinked, individual guarantee funds: the guarantee funds of the 11 regional savings banks associations; the guarantee fund of the state building societies; and the guarantee fund of the Landesbanken and giro centers. The respective funds are used to ensure the stability of each fund’s members. In the event that one fund contains insufficient financing resources, the DSGV can decide to use the other funds as well. The DSGV has an elaborate risk monitoring mechanism in place and it can take over payment liabilities towards third parties, provide guarantees and recapitalize its member banks. DSGV is also recognized as a deposit guarantee scheme.

**Public banks (other than savings banks and Landesbanken) have their own statutory scheme**, namely the Compensation Scheme of German Public Banks (EdÖ). This scheme is 100 percent owned and administered by the Association of German Public Sector Banks. In addition to this statutory deposit guarantee scheme, the public banks have a supplementary scheme, which is voluntary for public banks.

**Cooperative banks (Volks- und Raiffeisenbanken)**—The National Association of German Cooperative Banks (BVR) has a recognized deposit protection scheme BVR-ISG and is complemented by the institutional protection scheme, BVR-SE. This recognized IPS is legally authorized to take measures to avert any threats posed to its affiliated institutions’ continued existence as a going concern and thereby ensure comprehensive protection for customers’ deposits.

<sup>1</sup> This voluntary scheme of the Association of commercial banks is engaged whenever one of its member banks experience financial difficulties. For example in 2015 the ESF took over the shares of a failing bank, Düsseldorf after the ESF decided that it was in the best interests of institutional depositors and the market for covered bonds to do so. More recently, in 2016 the ESF participated in deliberations with respect to failing a non-systemic bank, Maple Bank. It decided not to intervene and BaFin suspended the bank’s operations; the normal insolvency procedure will be applied to Maple Bank. The EdB and ESF reimbursed the depositors of Maple Bank in accordance with the legal provisions of the EinSiG.

**105. Each bank is a member of one statutory DGS or recognized IPS.** No bank is assigned to a statutory DGS and a recognized IPS at the same time. Deposits held in Euro or other currencies are eligible for this scheme. As well as German banks, domestic branches of foreign banks that conduct banking operations in Germany are subject to the German statutory DGS. The deposits in German branches in the EEA, but not those in third countries, are protected and statutory DGS need to agree with the relevant foreign DGS on the funding. The following box summarizes the various schemes.

**106. German legislation provides that the amount of the claim for compensation from the statutory DGS schemes/recognized IPS is set at € 100,000.** This amount can be increased up to € 500,000 in certain specified circumstances. Depositors have a statutory legal claim for reimbursement. Banks are legally required to inform their depositors of the applicable deposit guarantee provisions. Statutory DGS schemes, as well as recognized IPS, are obliged to pay out depositors after BaFin has determined that a compensation case exists. In the period up to May 31, 2016 this is required within 20 working days following a determination that a compensation case has occurred. As from June 1, 2016 it is welcome that claims for compensation shall be settled within seven working days, which is earlier than the deadline set in the DGSD (i.e., at the latest by the year 2024).

**107. The EinSiG's provisions on the funding of statutory DGS and IPS are broadly the same.** A recent Ordinance by the MOF specifies the calculation requirements for the two statutory DGS. The IPS' Articles of Association governs the collection of their members' contributions. All these schemes are funded ex ante and German law provides that, by the end of July 3, 2024, DGS' financial means shall as a minimum reach a target level of 0.8 percent of the amount of covered deposits of their member institutions. The ex-ante funding will be raised by contributions to be paid by member institutions; this will be based on the amount of the banks' covered deposits and the degree of risk incurred by the respective bank. Lower contributions may be provided for in the case of banks that belong to low risk sectors, or for members of recognized IPS. On average the new formula used to calculate the annual fees paid by the members of statutory DGS and recognized IPS has resulted in increased contributions by them. DGS and recognized IPS are required to have annual plans in place demonstrating how they will reach this target level. In addition, ex post contributions may be required under certain conditions, in particular if the available funds are not sufficient to cover the expenses for the compensation of depositors. Ex post contributions for one year must not exceed 0.5 percent of all covered deposits of the member institutions of the DGS. Each member institution's share of the ex post contribution corresponds to its share of the total regular ex ante contributions. In the event that these contributions are also insufficient statutory DGS/recognized IPS are required by law to take out loans to cover the costs.

**108. German legislation also provides for support measures by recognized IPS.** Specifically, in order to avoid that the viability of an IPS affiliated institution is jeopardized, a recognized IPS can implement measures to avert the going concern risk. Banks or depositors have no legal claim on such measures being taken. Specifically, the DSGV has harmonized preventive measures across all 13 guarantee funds (risk monitoring, transparency, and sanctions for non-compliance). It can decide on restructuring plans, early intervention measures and can provide recapitalization to affiliated



institutions, take over, or provide guarantees and liabilities vis-à-vis third parties in order to finance restructuring measures. Similarly, the BVR-SE has a risk monitoring system of its member banks in place and it takes the lead in restructuring its member institutions, typically through loans, guarantees, purchase-and- assumption transactions or mergers. Importantly, a recognized IPS is not allowed to take such measures if, after consulting FMSA, BaFin determines that the conditions for the adoption of resolution action have been met. The Articles of Agreement of recognized IPS prescribe further details for such measures, which must be linked to conditions imposed on the affiliated institution and must involve at least more stringent risk monitoring and greater inspection rights for the recognized IPS. BaFin needs to confirm that the recognized IPS's affiliated institutions are able to pay the extraordinary contributions needed to finance the pay-out. The costs of such measures must not exceed the costs needed to perform the IPS's functions. The following box provides information of financial support provided by IPS since 2011.

### Box 3. Financial Support by Institutional Protection Schemes since 2011

BVR provided support in two new cases in 2011. In 2011 the volume of support measures amounted to € 114 million.

In 2013 there was one new case in 2013 and the volume of support measures amounted to € 11 million.

Finally, one new support case in 2014 required support measures of € 11 million.

The type of support provided was a range of possible measures according to the BVR statute, i.e., guarantees and funds.

DSGV provided support to one new case in 2012 in which a guarantee of € 57 million was provided with no availment yet. In addition, the support entailed € 10 million funds, € 12 million participation rights and € 11 million silent participation.

In 2014 there was one new support case in which funds totaling € 35 million were provided; compensation across regions applied.

Source: BVR and DSGV.

**109. While the Federal government has not provided any financial support to banks since 2011, regional State governments owning public banks do, in addition to recognized IPS, intervene to support banks in financial difficulties.** Annex II provides an overview of all State aid decisions by the European Commission with respect to German banks since mid-2011; the cut-off for the previous FSAP.

**110. DGS can be used to finance resolution measures.** In the event that a resolution action is implemented for a bank or group entity and it is thus ensured that depositors of such an institution or entity will continue to be able to access their deposits, the DGS to which the bank belongs will be liable for those costs. Specifically, in case the bail-in instrument is applied, the scheme will be liable



for the amount by which the covered deposits would have been reduced in order to equalize the losses of the bank if the covered deposits had not been exempt from the scope of the bail-in. In the event of the application of one or more other resolution tools, the scheme will be liable for the amount of the losses which the holders of covered deposits would have suffered with the same level of priority in liquidation proceedings. In liquidation proceedings the DGS shall subrogate to the rights and obligations of covered depositors for an amount equal to its payment. The recognized IPS could be used as a private sector measure in order to support their members in order to prevent their failure and to avoid resolution measures.

## D. Assessment and Recommendations

**111. The planning to ensure the availability of adequate temporary liquidity needed subsequent to a resolution decision should be deepened.** To the extent that market access to liquidity is insufficient, the availability of public backstop facilities and access to standard central bank facilities should be assessed during resolution planning and the preparation of resolution decisions.<sup>36</sup> Also, by law, the resolution plans cannot assume the provision of ELA by the Bundesbank.<sup>37</sup> While recognizing this discretionary nature of ELA, the Bundesbank and the resolution authorities should nevertheless already in the resolution planning stage discuss relevant matters. For example, there needs to be a clear and shared understanding of how the solvency and financial soundness determinations (both relevant in the context of Bundesbank lending) will be made in the midst of implementing resolution actions. Similarly, there needs to a shared understanding as to the characteristics and potential amounts and utility of various collateral not eligible for normal monetary policy credit. And at the bank-specific level, the extent of possible liquidity needs following resolution could be discussed.

**112. The recommendations in the 2011 FSAP Technical Note on Crisis management arrangements for DGS have been addressed.** These recommendations advocated a reform focusing on increasing transparency and ensuring adequate ex ante funding of the DGS. It is recognized that the German legislation, which implements the DGSD, has increased statutory DGS and IPS ex ante funding. The introduction of a calculation formula that incorporates risk based factors has increased the annual contributions by the schemes' members. In addition, the period for the reimbursement of covered deposits in the event of a failing bank has been reduced and increased transparency is ensured with respect to the procedure for these claims. The existing deposit insurance framework in Germany continues to follow the three pillar model of the German banking sector and remains fragmented. Finally, euro area jurisdictions have not yet agreed on a euro area wide deposit insurance scheme, which will contribute to a level playing field for all euro area banks.

<sup>36</sup> FSB Consultative Document on Guiding Principles on the temporary funding needed to support the orderly resolution of a G-SIB; November 3, 2015.

<sup>37</sup> The SAG (and BRRD) explicitly precludes that resolution plans to contemplate access to ELA, so the plans are limited to contemplating reliance on SRF funding for this purpose.

**113. Conditions attached to the use of the SRF prescribe the authorities' flexibility to deal with a systemic scenario.** According to the SRM the SRF may be used to the extent necessary to ensure the effective application of resolution tools (guarantees, loans to an institution under resolution, purchase assets of institution under resolution, contributions to a bridge institution and asset management vehicle, compensation to shareholders or creditors in specified cases). The first line of defense is bail-in and the BRRD/SRM allow for the use of the SRF to cover the costs resulting from not bailing-in some creditors, only if (i) the shareholders and creditors have collectively first absorbed losses of at least 8 percent of total liabilities including own funds of a bank under resolution and (ii) the amount provided by the SRF does not exceed the lesser of 5 percent of the bank's total liabilities or the means available to the SRF plus any amounts that could be raised through ex post contributions in the following three years.<sup>38</sup> Approval from the European Commission's under the State Aid Framework is also required.

**114. A credible common permanent backstop is necessary for the SRF.** It is noted that ECOFIN Ministers have committed to agreeing on a common backstop for the SRF, which will be fiscally neutral over the medium term, at the latest by the end of the transitional period for mutualizing the SRF. For the transitional period, Germany and the other euro area Member States will provide, as a last resort, bridge financing to their respective national compartments in the SRF that must be repaid by banks through ex post contributions.<sup>39</sup> As has also been noted in the Five Presidents' Report Completing Europe's Economic and Monetary Union, of June 22, 2015, swift agreement is necessary on an adequate common backstop for the SRF, i.e., a credible financing mechanism to ensure that there is enough funding available if a bank needs to be unwound even if the financing in the SRF is insufficient at that time. This backstop should be fiscally neutral over the medium term by ensuring that public assistance is recouped by means of ex post levies on the financial industry.

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<sup>38</sup> SRM Regulation, Recital 78. Note that this is calculated on total liabilities including own funds, unlike regulatory capital, which is calculated on the basis of risk weighted assets.

<sup>39</sup> Reference is made to footnote 33 which describes the SRF's rules that allow for the limited use of other national compartments prior to the mutualization of the SRF. Also, the SRF framework allows for voluntary borrowings between the compartments.

## Annex I. SoFFin Measures

<b>Recapitalizations per December 31, 2015</b> (Entity in € billion)	
Commerzbank AG	5.1
Portigon (ex WestLB)	2
Hypo Real Estate Holding AG	8.8
Guarantees: nil	

<b>Cumulated payments to Winding-up institutions (Assumption of risks)</b> (In € billion)	
FMS Wertmanagement	9.3
Source: FMSA	

## Annex II. State Aid Approved by the EU Commission since Mid-2011

<p>March 20, 2011: Commission approved the prolongation of a deadline for divestments that were part of the restructuring plan accompanying the recapitalization of Sparkasse Köln Bonn for an amount of € 650 million. This had originally been approved in September 2010.</p>
<p>July 18, 2011: Commission approved state aid to Hypo Real Estate in the form of capital injections (€ 10 billion), an asset relief measure with an aid element of approx. € 20 billion, as well as liquidity guarantees amounting to € 145 billion. These aid measures were conditional upon a restructuring plan (i.e., impaired assets were transferred to HRE's winding-up institution, FMS Wertmanagement).</p>
<p>December 20, 2011: Commission approved the split-up of WestLB which will lead to a sale and winding down of its banking activities. The Commission ruled that the price for the transfer of impaired assets exceeded the economic value of the assets; as a result the Commission required a revised restructuring plan.</p>
<p>March 5, 2012: Commission approved the reactivation of the German aid scheme for financial institutions (SoFFin) until June 30, 2012. This covers guarantees, risk assumption and recapitalization measures in favor of financial institutions. The scheme had originally been approved in October 2008.</p>
<p>March 30, 2012: Commission approved an amendment to a restructuring plan for Commerzbank AG which had originally been approved in May 2009. The restructuring plan accompanied silent participations (€ 16.4 billion) and the purchase of common shares (€ 1.8 billion) by SoFFin. In line with the amended restructuring plan most of Eurohypo's activities on Commerzbank's balance sheet will be run-off as well as a prolonged acquisitions ban.</p>
<p>June 29, 2012: Commission approved the prolongation of the reactivated German aid scheme for financial institutions (SoFFin) until December 31, 2012. The scheme had originally been approved in October 2008.</p>
<p>July 25, 2012: Commission approved approx. € 3.3 billion of restructuring aid for Nord/LB. This is conditional on divestments by Nord/LB and an acquisition ban.</p>
<p>July 25, 2012: Commission approved restructuring aid for Bayern LB in the form of a capital injection of € 10 billion, a risk shield of € 4.8 billion and liquidity guarantees. The aid was subject to a restructuring plan and the repayment of € 5 billion of state aid over the next seven years.</p>
<p>December 12, 2012: Commission approved the prolongation of the German aid scheme for banks (SoFFin) until June 30, 2013. The scheme is in favor of German banks, while other financial institutions will no longer be eligible for support. The scheme had originally been approved in October 2008.</p>
<p>June 21, 2013: Commission provisionally approved an increase (in 2011 the Commission had already approved restructuring state aid) in a guarantee provided by the State governments of Hamburg and Schleswig-Holstein (the owners of the bank) to HSH Nordbank for an amount of € 3 billion to € 10 billion. At the same time it opened an in-depth investigation (see below decision in October 2015).</p>
<p>August 22, 2013: Commission approved amendments to the restructuring plan for Nord/LB, which had originally been approved in July 2012. The amendments concern the requirement for additional divestments by Nord/LB and a prolongation of an acquisition ban until end 2016.</p>
<p>October 19, 2015: Commission reached an agreement with the State Governments to approve an increase in guarantee provided by State governments to HSH Nordbank for an amount of € 3 billion to € 10 billion and the disposal of non-performing loans. Also, HSH Nordbank will be split into a holding company and an operating subsidiary which will continue the bank's current operations.</p>
<p>Source: European Commission Memo, January 1, 2016, State aid: Overview of decisions and on-going in-depth investigations of Financial Institutions in Difficulty.</p>