Bank Recovery and Resolution Directive

AFME comments in view of the trilogues

9 September 2013

Introduction

The Association for Financial Markets in Europe (AFME) represents a broad array of European and global participants in the wholesale financial markets. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME welcomes the progress made in both the Parliament and the Council in relation to the Bank Recovery and Resolution Directive (RRD), an essential component of a financial sector reform programme.

AFME has been very active on crisis management and resolution issues for a number of years and has played a leading role in the industry efforts aimed at achieving effective resolution frameworks. We have been constructively and strongly supportive of current efforts to develop a strong and effective EU framework for recovery and resolution for some time and are pleased to see the progress that is being made in establishing a credible framework in which shareholders and creditors bear losses upon the failure of a bank so that no costs will be imposed on taxpayers in the future.

We are grateful for the consideration given, both in the Council and in the European Parliament, to a number of comments expressed by AFME on behalf of its pan-European membership. In the same constructive spirit, and while acknowledging the important progress achieved in several key areas, we respectfully highlight below some specific issues where the ongoing trilogues will focus and where AFME recommends possible solutions.

These important issues include:

- The bail-in tool and the use of resolution funds: we are very concerned about the use of resolution funds to absorb losses, which creates moral hazard and undermines the key objectives of shareholders and creditors bearing losses and instilling market discipline. Discretion to use resolution funds rather than impose losses on creditors also risks different approaches being taken in different Member States resulting in an unlevel playing field. Such use should not be permitted in the directive to reinforce the principal aims of the RRD. Should agreement on this not be possible, the constraints on using the resolution fund should be tightened as much as possible to reduce the resulting moral hazard. We have provided some suggestions below that reflect our thinking in this area; and
- The application of the minimum requirement for eligible liabilities (MREL) within groups: we believe that proposals for every entity in a group to comply with an individual MREL requirement and for all groups to comply with a consolidated requirement are not appropriate. Flexibility is necessary to reflect the different resolution strategies that are appropriate to different groups. We propose that MREL should be tailored to the relevant group resolution plan and agreed in the resolution college or Crisis Management Group.

We also address a number of other issues which are likely to be discussed in trilogues.

Finally, we also set out in Annex A some technical points that would improve the clarity of the text and some proposed drafting amendments in Annex B.

Bail-in

AFME was involved in developing the early thinking on bail-in and regards it as an important resolution tool. We are pleased to see the acceptance of the importance of reflecting the insolvency creditor hierarchy in resolution and of the principle that no creditor shall be worse off than they would have been in liquidation (NCWOL).

Flexibility*:* We accept that a degree of flexibility may be required to ensure that the bail-in tool can be used but it is vital that any flexibility is clearly framed to minimise uncertainty, unpredictability and the potential for an unlevel playing field. We note the degree of discretion in the Council General Approach which enables resolution authorities to exclude any liabilities from bail-in. If such discretion is to be provided, the constraints on its use currently envisaged in the General Approach, aimed at ensuring that it would only be permitted under 'exceptional circumstances', should not be weakened. Moreover, to ensure a level playing field, we support the Council's proposal of a Commission's delegated act specifying the circumstances when exclusion is necessary, and the Commission's oversight of decisions to exclude liabilities.

Treatment of derivatives*:* While we remain concerned about the practicality of bailing in derivatives, we are particularly concerned by the Parliament's proposal for prioritising derivatives that are centrally cleared and those exempted from the CVA charge over those that are not. We understand the desire to encourage the central clearing of derivatives, but this issue was addressed in EMIR and causes significant issues in the context of the RRD:

- It would be a material departure from the creditor hierarchy and give rise to claims for breach of the NCWOL principle;
- It is likely to encourage the premature close-out of non-cleared derivatives, exacerbating liquidity issues and precipitating the entry into resolution and impacting upon financial stability;
- Counterparties cannot necessarily choose whether a derivative is cleared or not as CCPs do not offer clearing for all derivatives. In particular, SMEs would be penalised as they might not have access to central clearing systems due to the costs and collateralisation requirements involved;
- It is unclear how the subordination of non-cleared derivatives would work in practice. For example, netting agreements may operate across both cleared and non-cleared derivatives and it is unclear how the net liability following such netting would be treated.

Moreover, the Council text also discriminates between cleared and non-cleared derivatives in the application of the stay powers. Article 63(1b) excludes cleared derivatives from the stay power, limiting the ability of the authorities to forestall a close out from this increasingly large sector. We suggest that Article 63(1b) is amended so that the stay power in Article 63 applies to central counterparties provided that the substantive obligations under the contract, including payment and delivery obligations and provision of collateral, continue to be performed. This would avoid the potentially very significant costs of an unnecessary CCP unwind, be consistent with the application of Article 60a and international approaches and avoid the difficulties discussed above with differential treatment of cleared and non-cleared derivatives.

Use of resolution funds

Concerns over use to absorb losses*:* The key problem that the RRD seeks to address is the need to enable the orderly resolution of banks through which shareholders and creditors bear the losses of the failed institutions in which they invested, without the provision of taxpayer support. The problems in the recent crises which have led to numerous institutions being bailed out and a forbearance of resolving them, as vividly demonstrated by a recent study on creditor participation in the Eurozone banking crisis,[1] must be addressed. The study concluded that the deep fiscal crisis "could have been almost entirely avoided through bailing in senior bank bondholders."[2] This highlights the importance of ensuring that creditors bear losses rather than being bailed out by the taxpayer or other well-run banks.

[1] Dübel, Creditor Participation in Banking Crisis in the Eurozone – A Corner Turned? 28 June 2013

[2] Above, page 7

The RRD provides the opportunity to address these issues. The proposed texts provide the authorities with the necessary tools but fail to ensure the necessary creditor participation. In particular, any use of resolution funds to absorb losses in place of creditors creates moral hazard in the same way as an implicit state guarantee and undermines the key objectives of shareholders and creditors bearing losses and instilling market discipline. Accordingly the Council's proposed use of resolution funds to absorb the losses of creditors excluded from bail-in raises serious concerns.

Constraints on use*:* While we support the proposed constraints on this use of the resolution fund, including the need for 8% of total liabilities to have been bailed in before the fund can be used, we note that this envisages a very material degree of losses, which would only have been exceeded in one instance during the current financial crisis. Thus, bearing in mind the moral hazard created by bailing out creditors of failing banks, accumulation and such use of resolution funds is inappropriate and unnecessary.

Further, this question needs to be considered in the context of the regulatory reform programme which requires banks to be better capitalised, better supervised, and better able to recover from stressed situations; authorities can take preventative action at an earlier stage and where necessary have the tools to conduct a resolution where losses are imposed on shareholders and creditors. When combined with significantly increased capital requirements and requirements to hold a minimum amount of loss absorbing capacity, this should be sufficient to enable the resolution of all institutions in all reasonably conceivable circumstances, without any need for further resort to any resolution fund or taxpayer support.

All banks should have the capacity to absorb sufficient losses to enable the protection of insured depositors and critical functions which could be transferred to a purchaser or bridge bank and for the remainder to be wound down in an orderly manner. This is the approach required to deal with failed banks rather than using resolution funds or government support to keep gone concern banks going.

Suggestions on Council and Parliament amendments: The positions of the Commission and the Parliament, which do not provide for resolution funds to be used to absorb losses in place of creditors (see Article 92(2)) are therefore to be preferred, although the drafting should be clarified. If, despite these concerns, such use is permitted, it should be constrained as tightly as possible to minimise moral hazard and in no circumstances should the constraints agreed in the General Approach be weakened.

An additional constraint should be added to ensure that before the resolution fund could be used to absorb losses (in addition to the minimum level of loss contribution), all creditors which are not excluded have been bailed in to the level of losses that they would have suffered in a liquidation.

Moreover, a temporal constraint should be considered: if legislators are concerned that a resolution fund is required – in limited cases and under the stringent constraints discussed above - to absorb losses in order to maintain financial stability, then this should be subject to a temporal restriction, such as being limited to a few years, rather than embedding it in the permanent resolution architecture. Otherwise, we are concerned that the market will come to expect the industry to absorb each other's losses to trading counterparties or uninsured depositors when they fail. The mutualisation of any losses other than those of insured depositors in the form of deposit insurance - whether funded by the taxpayer or the industry - fosters moral hazard and is likely to increase systemic risk of the sort that sows the seeds of future crises.

Ex ante funding: In any event, given the constraints on the use of resolution funds, the ability for the funds to raise financing and to recover any losses ex post from the industry should mean that it is unnecessary for large ex ante resolution funds to be established.

Moreover such large ex ante funds would be invested in low risk investments such as sovereign bonds and the need to draw on the fund would require a large liquidation of such assets in a very short space of time, which could itself be destabilising.

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Minimum requirement for eligible liabilities (MREL)

Need for MREL to take account of the resolution strategy – flexibility required: The objective behind the proposed MREL is to ensure that there is an appropriate level of loss absorbing capacity for the relevant group to be resolvable. This requires that the quantum and location of MREL within a group reflects the group resolution plan. Accordingly MREL should be set as part of the group resolution planning process, with the quantum and application of MREL tailored to the group resolution plan.

Different requirements will be appropriate for different group resolution strategies. This is recognised by the recent FSB guidance which states that loss absorbing capacity "needs to be available ... at the right location to facilitate a recapitalisation or orderly wind down"[3].

- For groups with a multiple point of entry (MPE) resolution strategy, this implies sufficient loss absorbing capacity at each point of entry since resolution would be conducted at a local level, albeit coordinated by the home resolution authority. This approach would minimise the risk of contagion between entities of the group. However, requiring such groups to comply with a consolidated MREL would not be appropriate.
- For groups with a single point of entry (SPE) strategy, different considerations are relevant such as ensuring sufficient MREL at the holding company and the mechanism for recapitalising subsidiaries. A consolidated MREL requirement is likely to be more appropriate for such groups.
- Therefore the proposals requiring all groups to have MREL applied at a consolidated and an individual level are inappropriate and additional flexibility is required.

Home/host concerns: We recognise the desire of host resolution authorities for assurance that a group resolution plan will be implemented and the subsidiary recapitalised. This could lead them to require MREL to be held at each subsidiary. However, any requirements for entities which would not be placed into resolution under the group resolution plan to hold MREL must be balanced with the benefits of flexibility in the use of capital and minimising national fragmentation and ring-fencing within the Single Market.

As Andrea Enria, chair of the EBA, has stated, "it is our duty in the EU and at the global level, to strive to find institutional solutions, cooperation arrangements and practical mechanisms which provide sufficient reassurance to home and host authorities that cross-border groups could be smoothly resolved, *without imposing organisational structures that unduly constrain the most efficient use of capital and liquidity*" (our emphasis).[4]

For centrally funded banks, ring-fencing additional loss absorbing capacity at each subsidiary will constrain the ability of the group to take recovery actions by deploying its resources where they are most needed. This could reduce the ability of the group to recover during periods of stress and make the group less resilient. Flexible and efficient use of capital also supports greater cross-border lending, supporting growth in the real economy.

Accordingly a balance needs to be struck when assessing requirements for the location and quantum of MREL which is focused on resolvability of the specific group. The RRD should therefore provide sufficient flexibility to enable this and not impose fixed requirements for a consolidated and individual level of MREL.

A suggested way forward: The total amount of MREL for a group should therefore be set in the Crisis Management Group (CMG) or Resolution College (as appropriate), as part of the group resolution planning process. The CMG or resolution college should also agree amongst itself how such total amount should be split between the entities in the group.

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[3] See FSB Guidance on Developing Effective Resolution Strategies, 16 July 2013, para 1.1 Paul Tucker has also recently emphasised that "where and how a group maintains its [loss absorbing capacity] will vary somewhat according to whether the preferred resolution strategy is SPE or MPE." See Resolution and the Future of Finance, 20 May 2013, available at: http://www.bankofengland.co.uk/publications/Documents/speeches/2013/speech658.pdf

[4] Speech, "Progress in banking sector and institutional repair in the European Union", 21 April 2013

For centrally funded groups, a balance could be struck by MREL for subsidiaries being made up of two parts, one part down-streamed to the subsidiary and one which could be provided as required, for example through intra-group commitments that would enable the subsidiary to call for additional MREL in certain circumstances, but which could be held by or returned to the parent to enable more flexible use of capital throughout the group. This would benefit each subsidiary by knowing that it would be able to call on a larger pool of flexible capital when required, but give comfort that a minimum level would be held in the subsidiary, enable losses to be transferred to the parent and providing a balance that should increase the overall resilience of the group. This would not have to be set out in the RRD, but could be agreed within the CMG/resolution college provided that the RRD contains sufficient flexibility to permit it.

Consistency of assessment: Consistent criteria should be applied to assess the quantum of MREL to ensure a level playing field within the EU. We therefore support a role for the EBA in establishing harmonised criteria and in reviewing the application of MREL. However, the approach should also be consistent with the guidance of the Financial Stability Board (FSB) and resolution planning conducted in Crisis Management Groups. As required by the FSB guidance, authorities should take into account "the potential impact of such requirements on the firms' financing cost and business operations".[5] Global requirements for loss absorbing capacity are still under development, with the FSB due to prepare proposals next year[6], which is a further reason for the RRD to provide flexibility to ensure that MREL is implemented in line with global standards. MREL will have a significant impact on European banks and therefore it is necessary to ensure that MREL does not put them at a competitive disadvantage globally.

Basis of assessment: If MREL is to be set in relation to total liabilities, it will be important to have greater clarity on the definition of total liabilities (including where relevant the accounting treatment) to ensure consistency. We agree with the proposal to exclude liabilities arising from derivatives for this purpose, to avoid distortions from matched book positions. However, this issue also applies to other securities financing transactions such as repos, reverse repos, security lending and borrowing and margin lending transactions, where including the gross liabilities without taking any account of collateral or netting arrangements can give rise to large distortions.

Therefore in addition to excluding derivatives, liabilities arising from securities financing transactions should be included on a <u>net</u> basis, taking into account the value of cash and high quality collateral to reflect the true exposure. This would provide another means that the denominator could be adjusted to better reflect the true liabilities of the institution. A gross measure would also create disincentives for banks to engage in low risk/ low margin securities financing transactions, which are typically secured with government debt, and which are important for market liquidity in government securities. Alternatively, if a simpler approach is required, liabilities arising from securities financing transactions could be haircut significantly or excluded.

Level of assessment: We understand that some authorities have assumed that the 8% of total liabilities contribution before resolution funds can be used to absorb losses under the General Approach means that MREL should be set at 8% of total liabilities. This approach misconstrues the role of MREL.

MREL should not be an additional capital requirement that aims to ensure that no other liabilities of the entity ever bear losses. If this were the case, there would be no need for policymakers to have spent so long debating the scope of exclusions from bail-in, as the assumption would be that only MREL would be bailed in and all other liabilities protected. The proposed restrictions on what liabilities can form MREL go beyond the exclusions from bail-in and significant additional liabilities that are not excluded would also be available to absorb losses. The two percentages are also not comparable because the bases of calculation in Article 38 and Article 39 are different: liabilities arising from derivatives are excluded from the latter but not the former. It is also unclear how setting MREL at 8% of total liabilities is consistent with the requirements of Article 39(3) to take into account institution-specific criteria.

[5] See FSB Guidance on Developing Effective Resolution Strategies, 16 July 2013, para. 1.1.
[6] See FSB, Progress and Next Steps Towards Ending "Too-Big-To-Fail", 2 September 2013.

Cross-border/third country issues

Cross-border cooperation is a key element of effective resolution regimes. Clarity is required as to how requirements under the RRD, such as recovery and resolution planning, EBA mediation, resolvability assessments and MREL fit within the global regulatory regime, especially for global institutions (both those headquartered in the EU and in Third Countries). We support the involvement of third country authorities in the group resolution planning process provided for in Article 12(2), but greater clarity could be provided in this regard. Greater clarity is also required as to the relationship between Crisis Management Groups and resolution colleges.

We strongly support the Council amendment to Article 83 and the proposed Article 79a including an obligation on resolution authorities to cooperate closely with a view to achieving a coordinated resolution strategy for all group entities.

We support the Council amendments to Article 85 to include the enforcement of third country resolution proceedings and greater flexibility to recognise proceedings despite the matters in Article 86. However, we do not support expanding the exceptions in Article 86 to include a general public policy exception, which materially dilutes the recognition requirement.

The provisions in Article 85 currently only apply to "third country institutions", which are defined as institutions with their head office established in a third country. This is too limited and should apply to all banks and investment firms, and their holding companies, established in third countries.

We also support the Council and Parliament amendments to enable the use of the powers in Articles 61 to 63 to support third country proceedings and the inclusion of Article 60a(1a) in the Council text to cover third country resolution proceedings which are recognised under Article 85. Ideally, the proposed Article 60a(1a) text should be strengthened to put beyond doubt the capacity of EU regulators to nullify purported cross default against EU affiliates of third country groups placed in resolution by their home authorities. The issue of preventing the exercise of cross-default clauses in contracts with EU entities upon the resolution of a third country institution is particularly important to facilitate cross-border resolution.

Government stabilisation tools and public support powers

We remain concerned by the message conveyed by incorporating taxpayer bailout powers in the RRD. As required in the FSB Key Attributes, effective resolution regimes should "not rely on public solvency support and not create an expectation that such support will be available". While we recognise the restrictions placed upon the government stabilisation tools in the Parliament proposal and the ability to use public support under the General Approach, any implicit state guarantee should be removed and any sovereign/bank links broken. If however legislators do decide to include public support powers in the RRD, strong and clear constraints and safeguards are crucial. In this respect, the Council's proposed requirement for all unsecured, non-preferred liabilities other than eligible deposits to have been written down or converted in full before public funds can be used is preferable to the Parliament's proposed government stabilisation powers.

Contractual bail-in provisions

The proposed requirement in Article 50 for institutions to include contractual bail-in provisions for any existing eligible liability governed by third country law creates an onerous and often impractical burden. Institutions would be required to amend the terms of all eligible liabilities governed by the law of third countries, which cannot generally be done unilaterally and might also be opposed by third country authorities. The concern around enforcement of bail-in of liabilities governed by third country law is adequately addressed by the proposed Article 39(2a) under the Council General Approach and the power to remove impediments to resolvability and Article 50 should therefore be deleted. This issue should also be addressed through cross-border cooperation and implementation globally of the FSB Key Attributes.

Write-up mechanism

We are pleased to see the inclusion of a write-up mechanism in both the Parliament and Council texts. This is important to establish confidence in investors that they will not suffer as a result of overly conservative preliminary valuations, reducing the prospect of litigation over preliminary valuations which need to be carried out quickly. In order to provide this confidence, it is necessary for the write-up mechanism to apply on a mandatory (as proposed by the Parliament) rather than a discretionary basis.

Special manager

We support the Parliament's proposal to move the special manager power to the resolution phase. This tool would not be workable prior to resolution. The market perception of the appointment of a special manager is likely to lead to greater instability for the institution. While the Council amendments increase flexibility, numerous issues remain such as how it would interact with directors' duties and powers, shareholders' rights etc.

Recovery plans

In order for recovery plans to be effective, groups should be able to produce a plan appropriate to their legal and operational structure, whether that is at group or entity level. We welcome the Council's amendments which require any individual recovery plans to be agreed as a joint decision between home and host authorities. This should be subject to EBA binding mediation. We also welcome the Parliament's limitation on requirements for individual recovery plans to where the subsidiary's operations constitute a significant share of the host state's financial system. Where recovery would be conducted at the group level, any individual recovery plans should be a sub-set of the group plan rather than an entirely separate plan.

We support the amendments limiting the need to address deficiencies and impediments in recovery plans to those that are material and for measures to address them to be limited to those that are necessary and proportionate. We also support the inclusion of rights of appeal and review.

The proposed requirement in the General Approach for recovery plans to include a framework of indicators (Article 8a) should be clearly drafted to ensure that it does not reduce the flexibility of recovery plans and avoid any perception that indicators should form triggers for particular recovery measures being taken. Any "hard-wiring" of actions to be taken when indicators are met could lead to ineffective and/or inappropriate responses to a particular situation. The FSB's guidance confirms that indicators should be used for escalation within the firm rather than as requiring a particular action to be taken.[7]

Early intervention

The trigger for early intervention should be clear in light of the extensive powers available in this phase. The Council proposal would potentially allow early intervention measures to be taken upon any (however minor) breach or anticipatory breach of the directives cross-referred to in Article 23(1). This should be narrowed and balanced by a requirement for any measures taken to be necessary and proportionate, as per the powers to address impediments to resolution.

[7] Financial Stability Board, Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Recovery Triggers and Stress Scenarios, 16 July 2013.

Resolution powers

We welcome the Council's amended drafting on the restrictions on the termination of contracts and the stay provisions. These amendments provide greater clarity which is a key requirement in this area.

Use of Deposit Guarantee Schemes (DGS) in resolution

Prioritising insured depositors in the creditor hierarchy will greatly reduce the risk of the DGS having to contribute in resolution or a winding up (and should result in much lower funding requirements for DGSs). However, in the unlikely event that losses are so great that insured depositors would (but for the DGS) suffer losses, the DGS should contribute in their place. Resolution should result in lower costs to the DGS than the alternative of a winding-up by protecting insured depositors. The DGS therefore benefits and should be able to use its resources to assist with such a resolution by contributing under Article 99(1). In some circumstances the inability of the DGS to contribute could mean that the institution is wound up instead, resulting in greater losses for the DGS. We therefore support the Council position providing that the DGS should contribute the amount of losses that insured depositors would have suffered in the resolution, subject to the no creditor worse off than liquidation principle and oppose the Parliament's removal of this.

We very much hope that you find this analysis helpful and we would be very pleased to provide you and your staff with any additional information you might require. Please do not hesitate to contact any of us via the details listed below.

Yours sincerely,

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Annex A

Technical issues

We set out in this annex some additional more technical issues where we consider that the RRD could be improved to increase its clarity and improve the practical application of the text.

Recovery plans and resolvability assessments

We see practical difficulties with meeting the requirement under Article 6(2) for recovery plans to take into account the impact of other firms implementing their recovery plans, as firms would not have the details of other firms' recovery plans. This has been deleted in the Parliament text but remains in the Council.

We also include in Annex B some proposed amendments to annexes A to C of the directive to make these more workable in practice.

We welcome the amendments in the Parliament and the Council requiring measures to address impediments to resolution to be necessary and proportionate and for an express right of review.

Exclusion of pension liabilities from bail-in

The proposed Article 38(2)(f)(i) which excludes liabilities to employees in relation to, amongst other things, pension benefits, should be clarified to cover liabilities in respect of accrued pension benefits for past and present employees.

Intra-group financial support agreements

We are concerned that the breadth of the chapter on intra-group financial support could restrict business as usual activities as an unintentional consequence. We therefore suggest that definitions of 'intra group financial support' and 'group financial support agreement' should refer only to agreements concluded under the chapter.

Resolution trigger

The Parliament text amends the resolution trigger in Article 27(2)(c) by adding a requirement that the inability to pay debts cannot be remedied within a reasonable timeframe. No such qualification applies (at least expressly) to the insolvency test under national law, at least in some jurisdictions, so an institution could be insolvent for the purposes of insolvency law but which could not be placed into resolution. We regard this as undesirable as it would restrict the powers of the authorities to commence resolution in circumstances where the directors of the company could be obliged to commence insolvency proceedings.

General principles governing resolution

The Council amendments to Article 29 are to be preferred. In practice it may not always be in the interests of stakeholders to automatically replace the entire management of the institution in resolution. For example it may be beneficial to retain some senior managers with the necessary experience and knowledge of the firm. Requirements to consult with employees, as introduced by the Parliament, may also hinder the speed at which resolution can be conducted.

Resolution powers

We are generally supportive of the Council amendments on the powers to exclude termination rights and the stay provisions, which are clearer than the Parliament text. Clarity in this area is particularly important. However, thought needs to be given to how Article 58 sits with insolvency law as the existing objectives of an entity in insolvency proceedings might conflict with providing such services. Article 58 has also been extended to cover entities outside the EU and we query whether this is enforceable.

Write down of capital instruments

The Council's proposed Article 51(1)(1d) which limits the amount of write-down or conversion of capital instruments of a subsidiary to that equivalent to write down or conversion of liabilities of its parent should be removed. This provision would constrain the ability of resolution authorities to take action in relation to a subsidiary without putting the parent in resolution, potentially preventing the implementation of resolution plans. It could also cause problems where a subsidiary has reached the point of non-viability but its parent has not and therefore the capital instruments of the parent cannot be written down or converted to equity.

Article 45(1) which sets the rate of conversion of debt to equity should apply to the write-down of capital instruments, which has been deleted from Article 56(f) in the Council text and therefore would no longer apply.

Business reorganisation plans

A longer period of time should be allowed to prepare Business Reorganisation Plans. We regard two to three months as more realistic for an effective plan to be formalised. The plan should be written jointly with the firm's management.

Third country regulatory approvals

Where regulatory approvals may be required in third countries upon a resolution of a group, exceptions to these in resolution should be dealt with in the cross-border cooperation agreements provided for in Article 84 to ensure that the requirements do not create a barrier to effective group resolution.

Group resolution financing

The requirements under Article 83 and 83a under the Council text for a financing plan should only apply where the resolution action requires external financing. Where no resolution financing is required, this is unnecessary.

Minimum requirement for eligible liabilities

In addition to the comments in the body of the paper, we note the inclusion in the General Approach for the EBA to review the application of MREL by 31 October 2016, but we are unsure how this fits with the Council position that bail-in and MREL does not have to be implemented before 2018.

References to time periods

Where references are made to time periods, these should be adequately defined to ensure that it is clear whether, for example, a reference is made to calendar days or Business Days. For example the reference in Article 38 to exclusions for short-term liabilities should be clarified that they refer to calendar days.

Annex B
Drafting suggestions

We set out in this annex some suggested drafting amendments.

ANNEX

SECTION A

INFORMATION TO BE INCLUDED IN RECOVERY PLANS

The recovery plan shall include the following information:

...

(7) ~~identification of critical functions;~~ ***[Comment: this is relevant to resolution planning rather than recovery planning.]***

(8) **<u>where applicable,</u>** a detailed description of the processes for determining the value and marketability of the core business lines, operations and assets of the institution **<u>which are relevant for recovery purposes</u>**;

...

<u>Recovery options should include at least some of the following, where relevant and as appropriate for the relevant institution:</u>

(10) arrangements and measures to conserve or restore the institution's own funds;

(11) arrangements and measures to ensure that the institution has adequate access to contingency funding sources, including potential liquidity sources, an assessment of available collateral and an assessment of the possibility to transfer liquidity across group entities and business lines, to ensure that it can carry on its operations and meet its obligations as they fall due;

(12) arrangements and measures to reduce risk and leverage;

(13) arrangements and measures to restructure liabilities;

(14) arrangements and measures to restructure business lines;

(15) arrangements and measures necessary to maintain continuous access to financial markets infrastructures;

(16) arrangements and measures necessary to maintain the continuous functioning of the institution's operational processes, including infrastructure and IT services;

(17) preparatory arrangements to facilitate the sale of assets or business lines in a timeframe appropriate for the restoration of financial soundness;

(18) other management actions or strategies to restore financial soundness and the anticipated financial effect of those actions or strategies; **and**

(19) preparatory measures that the institution has taken or plans to take in order to facilitate the implementation of the recovery plan, including those necessary to enable the timely recapitalisation of the institution;

(20) a framework of indicators which identifies the points at which **an internal escalation process may be activated for recovery purposes**.

SECTION B

INFORMATION THAT RESOLUTION AUTHORITIES MAY REQUEST INSTITUTIONS TO PROVIDE FOR THE PURPOSES OF DRAWING UP AND MAINTAINING RESOLUTION PLANS

Resolution authorities may request institutions to provide, **where necessary** for the purposes of drawing up and maintaining resolution plans **and based on an assessment of materiality,** at least the following information:

.....

SECTION C

MATTERS THAT THE RESOLUTION AUTHORITY MUST ASSESS WHEN ASSESSING THE RESOLVABILITY OF AN INSTITUTION

When assessing the resolvability of an institution, the resolution authority shall consider the following**, where relevant to the group resolution plan**:

....