Dubai Financial Services Authority

CONSULTATION PAPER NO. 131

EARLY INTERVENTION, RECOVERY AND RESOLUTION IN THE DIFC

29 JANUARY 2020

PREFACE

Why are we issuing this Consultation Paper (CP)?

1. This Consultation Paper seeks public comment on the DFSA's proposals to enhance our early intervention powers and to introduce a framework on recovery and resolution in the DIFC.

2. The CP comes as a follow up to the Discussion Paper No 3 published in December 2017 where we discussed our potential regime on recovery and resolution[1].

3. The changes require amendments to the Regulatory Law (DIFC Law No. 1 of 2004, "the Law") and a new module of the Rulebook called Recovery and Resolution (RAR). Some changes are also made to the GLO and MKT Modules of the Rulebook.

Who should read this CP?

4. The proposals will be of interest to Persons who:

   (a) can carry on the Financial Service of Accepting Deposits (PIB prudential Category 1)

   (b) can carry on the Financial Service of Providing Credit or Dealing in Investments as Principal (PIB prudential Category 2);

   (c) can Manage a Profit-Sharing Investment Account where that account is received on an unrestricted basis (PSIAu) (PIB prudential category 5);

   (d) intend to conduct the Financial Services referred to above;

   (e) use, or propose to use, the services of the Persons referred to above;

   (f) are investors in capital instruments of the Persons above; and

   (g) are advisors to the Persons above.

Terminology

5. In this CP, defined terms have the initial letter of the word capitalised, or of each word in a phrase. Definitions are set out in the Glossary Module (GLO). Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning.

What are the next steps?

6. Please send any comments using the online response form here. You will need to identify the organisation you represent when providing your comments. The

[1] https://dfsa.ae/getattachment/Your-Resources/Discussion-Papers/DP-3-Recovery-and-Resolution-for-the-DIFC.pdf.aspx

DFSA reserves the right to publish, including on its website, any comments you provide. However, if you wish your comments to remain confidential, you must expressly request, so at the time of making comments, and give your reasons for so requesting. The deadline for providing comments on this consultation is **13 April 2020**.

7. Following public consultation, we will decide which changes to the proposed regime are relevant and amend the proposed draft legislation as appropriate. The amended Regulatory Law will be submitted to His Highness the President of the DIFC for his consent and then for assent to His Highness the Ruler of Dubai. The final version of the Law and the Rulebook modules will be published on our website and we will issue a notice telling you when this happens.

Structure of this CP

Introduction

8. The lessons from the global financial crisis over a decade ago generated broad international consensus at the G20 level on the importance of enhancing existing supervisory frameworks and, crucially, establishing recovery and resolution regimes for some financial institutions (FIs) carrying out activities raising substantial systemic risks. This has fed down into to the work of the key international standard setters, notably the Financial Stability Board (FSB), the Basel Committee on Banking Supervision (BCBS), International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS), some of which have since developed standards to address the issues uncovered in the crisis.

9. Among the most prominent standards, which underpin the DFSA's proposals set out in this CP and which will be discussed at length below, are:

   (a) the FSB's *Key Attributes on Effective Resolution Regimes for Financial Institutions*[2] (KAs) published in 2014; and

   (b) the BCBS *Guidelines for identifying and dealing with weak banks*[3] (the BCBS Guidelines), published in 2015.

10. While the work on the FSB and the BCBS standards cited above is completed, the IAIS and the Islamic Financial Services Board (IFSB) continue developing their standards on recovery and resolution for their respective sectors. The DFSA participates in the work of both organisations on this subject. We may decide that the proposed regime should be updated as a result of this work.

Background

11. The DFSA objectives, set out in the Regulatory Law (DIFC No 1 of 2004, the Law), include promoting confidence and fostering financial stability in the financial industry in the DIFC, protecting the users of financial services and preventing damage to the reputation of the DIFC.

12. This CP presents proposals which seek to establish a comprehensive framework to allow us to deliver on these objectives by reducing the risk of an Authorised Firm's (AF's) failure and, in case it is inevitable, by providing for an orderly management of such a situation.

13. The proposed framework covers a number of tools allowing the DFSA to improve on the measures employed in heightened supervision of firms considered as 'weak' coupled with robust recovery and resolution planning, for AFs that the DFSA considers should be subject to this exercise in line with our objectives. Lastly, it covers a comprehensive framework for a resolution of firms which are failing or are likely to fail.

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2 https://www.fsb.org/wp-content/uploads/r_141015.pdf
3 https://www.bis.org/bcbs/publ/d330.pdf

14. The proposed framework is entirely based on international standards in this field. We have also carried out an extensive benchmarking exercise against a set of select comparable jurisdictions such as Singapore, Hong Kong, the European Union, the United Kingdom, and Jersey to identify how these standards have been implemented.

15. The standards, which underpin the proposals in this CP, include:

    (a) the **BCBS Guidelines** published in 2015 (being a revised version of the 2002 Guidelines) following supervisory lessons learnt in the financial crisis. The Guidelines recommend changes to the supervisory review processes to facilitate timely identification of weaknesses at banks and propose a range of enhanced supervisory powers to address problems at weak ones to prevent potential failures. The Guidelines reflect the BCBS view of early intervention expressed in Principle 11 of the Core Principles for Effective Banking Supervision, which see it as a key component of supervision[4].

    (b) the **FSB's KAs**, which constitute an overarching international standard on the model framework on recovery and resolution of financial institutions (FIs) including banks, insurers and financial market infrastructures (FMIs). It provides for resolution powers and tools that the resolution authority may employ in the worst case scenario, when despite activating early intervention and recovery tools, an Authorised Firm has no reasonable prospects of recovery.

16. Specifically, the KAs contain a number of detailed principles and recommendations on elements, which should feature in domestic recovery and resolution regimes. They are complemented by around 20 additional documents containing implementation guidance[5]. Due to their size, a detailed summary of the KAs is provided at Annex 1 to this CP. In addition, when considering the granular proposals, we have also taken into account the recommendations and parameters contained in the Methodology for Assessing the Implementation of the KAs in the Banking Sector[6] developed by the FSB to assist the International Monetary Fund when carrying out the Financial Sector Assessment Programmes.

17. For ease of reference, the twelve KAs cover the following aspects:
    1. Recommended scope of domestic resolution regimes;
    2. The objectives, governance and organisation of the resolution authority;
    3. Resolution powers and tools available to the resolution authority;
    4. Set-off, netting, collateralisation and segregation of client assets;
    5. Safeguards to the use of resolution powers;
    6. Funding of firms in resolution and resolution actions;

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4 The BCBS *Frameworks for early supervisory intervention* (published in 2018) supports the Guidelines, while providing a wider context and guidance on potential typical escalation actions https://www.bis.org/bcbs/publ/d439.pdf

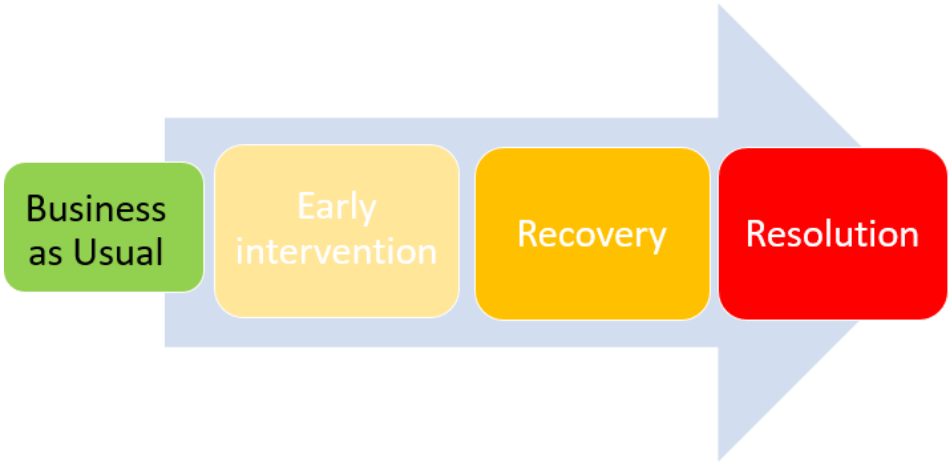
5 The implementation guidance is contained in Appendices I and II to the KAs (e.g. on the content of recovery and resolution plans; resolvability assessments; and temporary stays on early termination rights, resolution of FMIs and insurers as well as on client asset protection in resolution) and over ten additional guidance papers (a full list with links is attached as Annex 2 to this CP).

6 http://www.fsb.org/wp-content/uploads/Key-Attributes-Assessment-Methodology-for-the-Banking-Sector.pdf

7. Legal framework conditions for cross-border co-operation;
8. Crisis Management Groups (CMGs);
9. Institution specific cross-border co-operation agreements (COAGs);
10. Resolvability assessments;
11. Recovery and resolution planning; and
12. Access to information and information sharing.

18. In a nutshell, the proposed framework can be seen in the context of a continuum in line with a progress scale depicted graphically below. During the 'Business as Usual' phase an Authorised Firm subject to the proposed framework will need to undertake crisis preparedness, including its own recovery planning, and co-operate with the DFSA on resolution planning and resolvability assessments. If, based on a number of early warning indicators, the DFSA considers that a firm experiences weakness, a number of Early Intervention tools might need to be used by the AF or instigated by the DFSA including, in more severe circumstances, activation of a recovery plan.

19. If the Recovery phase does not resolve the firm's problems but instead the AF would be facing failure, the DFSA will be able to decide, in co-operation with other relevant authorities, that the AF, bearing in mind the DFSA objectives, might need be put into Resolution. The decision will be guided by, among other things, the resolution strategy chosen for the AF in its resolution plan and practical likelihood of it succeeding in the circumstances of the case. The resolution process, which is linked to a number of conditions and safeguards, would not be a suitable option for any failing AF. In such circumstances, a liquidation procedure under the DIFC Insolvency Law will apply.



I Crisis preparedness

20. In light of the international standards described above and our experiences to date, we have reviewed the DFSA's existing powers, which would be applicable at every stage of the continuum of an AF's lifecycle all the way until the actual 'Resolution' stage, with a view to enhancing the AFs' and our own crisis preparedness. This section will discuss three groups of proposals to achieve this objective.

Application

21. While the power to appoint a Manager (Article 77A) applies horizontally to all AFs, the remaining proposals in sub-sections A to C cover provisions which apply to AFs which are intended to be subject to the resolution regime.

22. This includes primarily AFs which carry out the Financial Services of Accepting Deposits (PIB prudential Category 1) and Islamic Financial Institutions which Manage PSIAu (PIB prudential Category 5) and, to a lesser extent, Providing Credit and Dealing in Investments as Principal (PIB prudential Category 2). DIFC holding companies of Authorised Firms are also in the scope as per KA 1.1. As will be explained below, the application of certain powers is subject to the DFSA's discretion considering our objectives and proportionality.

A. Enhanced early intervention framework

Background

23. Our review included the existing powers that can be used by the DFSA in the context of supervisory early intervention to address a deterioration in the situation of a DIFC bank. In particular, we compared our existing powers against a range of measures recommended in the BCBS Guidelines and how this has been addressed in the benchmarked jurisdictions[7]. This sub-section addresses the availability of such additional powers to the DFSA.

24. It should be noted at the onset that, at an early stage of a bank's difficulties, the bank's board and senior management remain responsible for addressing the bank's problems. The DFSA expects that they should on their own initiative take appropriate remedial actions. If we are satisfied that the remedial actions adequately address the identified problems, the DFSA would generally refrain from taking formal supervisory actions, especially of a more invasive nature. However, if there is no or insufficient action on the part of the AF to address the situation, the DFSA is not precluded from using a range of powers available to compel the bank or the persons responsible within it to put in place appropriate remedial measures.

25. The BCBS Guidelines emphasise that supervisory early intervention is critical. They describe and recommend a wide range of powers and tools that should be at the supervisor's disposal. To be effective, the type of measures and supervisory actions need to be tailored to a bank's individual circumstances and the type of weaknesses identified, as well as the stage and severity of the problem.

Early intervention indicators

26. The BCBS Guidelines define a weak bank as one whose liquidity or solvency are, or soon will be, impaired unless there is a major improvement in its financial resources, risk profile, business model, risk management systems and controls

[7] For example, the early intervention powers set out in the EU's Capital Requirements Directive IV and the Bank Recovery and Resolution Directive.

and/or quality of its governance and management. Whether a bank is 'weak' or not is identified by its supervisor through a supervisory review process including on- and off-site forward-looking supervision, macroprudential surveillance and other information sources.

27. Taking this into account, we have considered whether there is a need for hard and defined intervention triggers. It is recognised that our existing supervisory intervention powers regime is simple, broad and discretionary, without any specific hard triggers for our supervisory action[8]. One reason for this is that, because the DIFC bank population is predominantly composed of branches, the typical hard triggers related to capital, in particular, are difficult to apply. Despite that, it is considered that the regime has worked well to date allowing us to address adequately various situations. The safeguards built into the Regulatory Law, such as - where appropriate - the decision making procedures in Schedule 3, remain applicable.

28. On this basis, the DFSA maintains its view that, instead of hard triggers, which are being used in few benchmarked jurisdictions, a mix of supervisory early intervention indicators would typically be more appropriate and would allow us to remain flexible and reactive as the situation requires.

29. It follows that, in the context of the additional powers set out below, we are not proposing any hard triggers and, instead, the conditions for the use of the powers are generally set to allow us to react to the signals resulting from the supervisory indicators. This would leave to the DFSA a discretion to orchestrate an appropriate reaction in response to the circumstances of the case.

30. The conditions for early intervention actions are set out in Article 84I. Typically, similar indicators would be used by banks in their own recovery plans (see sub-section B below).

New and clarified early intervention powers

31. We propose to complement our existing supervisory powers with additional powers to be used primarily in the context of early intervention, based on the evidence emanating from the early intervention indicators. The powers include the requirements set out in Article 84J of the Law. We are proposing that the DFSA may direct an AF to:

    (a) submit a corrective action plan to the DFSA, following prior approval of its board, with the plan requiring formal DFSA approval where the Rulebook requirements have been breached or where we have commenced formal supervisory action;

    (b) call a general meeting of shareholders, set an agenda and propose resolutions, should the management fail to do so;

[8] The existing powers, which could be used in the context of early intervention, for example, Articles 73 to 75 and 76 of the Regulatory Law do not provide for conditions. Article 75A also leaves the DFSA discretion, simply stating the use is 'for prudential purposes'.

(c) search for, and communicate with, potential purchasers of the Authorised Firm's business or part thereof;

(d) remove directors or senior management who have failed to meet their obligations, including fiduciary duties;

(e) limit or, where appropriate, clawback compensation of directors and senior management;

(f) obtain the DFSA's written approval prior to any major capital expenditure, material commitment or contingent liability; and

(g) implement one or more elements of the AF's recovery plan (described in more detail in sub-section B below).

32. We also propose (new Article 77 A of the Law) to clarify and enhance our power to appoint a Manager (currently in Article 88 of the Law) in the following way:

(a) to move this power to the chapter related to the powers of supervision;

(b) to add a requirement that the Manager be sufficiently qualified, with experience, fitness and propriety to act as a Manager;

(c) to clarify the nature of the legal relationship of the Manager and the AF, including the requirement for the firm to remunerate and reimburse the costs of the Manager;

(d) to clarify that the manager is appointed to replace the directors and senior management of the AF, in whole or in part, but that the Manager shall not be treated as a director of the AF (formally or *de facto*); and

(e) to clarify that the manager is not liable for anything done in good faith under the appointment.

B. Recovery planning

33. Recovery planning, and a well-designed, robust and credible recovery plan (RCP), is a crucial pre-emptive element of crisis management. The recovery plan is prepared by the AF taking into account its business organisation, model and a variety of other aspects, known to the firm. The objective of the planning process is to ensure that recovery actions can be undertaken in an orderly and timely manner, as and when the need arises.

34. The recommendation to require AFs to carry out recovery planning is set out in KA 11 (please refer to Annex I for details). It is complemented by KA I-Annex 4, which covers Essential Elements of Recovery and Resolution Plans[9] and the FSB Guidance on Recovery Triggers and Stress Scenarios. All of the benchmarked jurisdictions have implemented these provisions. The DFSA

[9] http://www.fsb.org/wp-content/uploads/I-Annex-4-Essential-elements-of-recovery-and-resolution-plans.pdf.

proposals remain in the mainstream, while taking into account the profile of the DIFC AFs.

Proposals

Application

35. The proposed provisions are contained in Article 84D of the Law and RAR 2.1.

36. We are proposing a new supervisory power to require the following DIFC AFs to prepare and provide their RCPs to the DFSA:

    (a) all DIFC banks (conventional and Islamic); and

    (b) certain AFs Providing Credit or Dealing in Investments as Principal, which we deem potentially important to financial stability in the DIFC.

37. Regarding (a), the DFSA shall notify the AFs individually regarding the extent of the RCP that is expected of them and the timeline for their submission and reviews. This is to allow for the necessary proportionality in our regulatory expectations.

38. In particular, this means that while some AFs, which are potentially systemic, critical or important for financial stability in the DIFC, will be expected to provide comprehensive RCPs, the DFSA will allow other AFs, which do not meet these characteristics, to provide an abbreviated version of the RCP; produce the RCP focusing only on a select number of areas; or be exempted altogether. In the latter case, the DFSA may still engage with the AF on one or more specific areas such as business continuity or contingency funding plans. Regarding (b), only individually notified firms will be obliged to produce and submit their RCP to the DFSA.

39. We recognise that a co-ordinated and consistent approach to recovery planning across a corporate group is essential for credibility and effectiveness of the RCP recovery measures and stabilisation of the entire group. All of the global banking groups, some of which are identified as global systemically important banks (G-SIBs) have, by now, prepared RCPs for their entire groups. A RCP of the DIFC AF, which forms part of a group, needs to be considered in the group context while adequately reflecting the DIFC entity's operations. On this basis, the RCPs prepared by the AFs, which are:

    (a) **Headquartered** in the DIFC – should cover the recovery of the entire group including all of its downstream operations;

    (b) **Subsidiaries** of foreign FIs – should specifically address stress scenarios and triggers for the DIFC entity and adequately cover any downstream operations, as well as include DIFC entity specific recovery options; and

    (c) **Branches** of foreign FIs – may generally be part of the group plan, provided the RCP adequately covers the DIFC operations. For branches with significant DIFC operations, the RCP must be tailored to the local operations and contain all relevant information. For branches with limited

operations, the DFSA may accept considerable reliance on a group plan, provided the branch can demonstrate how the recovery plan options can be effectively applied to address stress events that pose a risk to the branch's viability.

Responsibility

40. The responsibility for recovery planning, maintaining, submitting and, where necessary, implementing the RCP, lies entirely with the AFs. In all cases, the senior management of the DIFC AF, as well as - where relevant - its Board, Head or Regional Office and executive officers, is responsible for providing the necessary input to the DFSA for the assessment of its RCP.

41. The AFs should designate a senior management person in the DIFC who will be responsible for leading, formulation and oversight of the recovery planning process. This includes responsibility for providing to the DFSA any information relevant for the review of the recovery plans.

Review and updates of RCPs

42. The DFSA shall review the RCPs as part of its overall supervisory process, assess their credibility and ability to be effectively implemented. We will also assess the willingness of the AFs to implement corrective measures.

43. While the stress scenarios do not need to be the same across all AFs, they should be realistic and specific to their business models. We will seek to achieve a reasonable degree of consistency. We will check the assumptions used in the scenarios and may require additional scenarios.

44. If we are not satisfied with the AF's RCP, we may require, in writing and within a prescribed period, which can be extended, appropriate measures to be taken by the AF to rectify the deficiencies.

45. The RCPs should be updated regularly, at least annually, or when there are material changes to the AF's business or structure, or when the DFSA deems it appropriate, based on the circumstances of the case. In line with the principle of proportionality, certain entities may be allowed longer periods than annually to review their RCPs. The updated RCP should indicate where any changes have been introduced compared to the previous plan.

Power to require implementation of the RCP

46. As mentioned above, we are also proposing that the DFSA should have a power, used as part of our early intervention toolbox, to require AFs to implement the recovery measures set out in the RCP when one or more of the conditions for recovery materialise and, in the DFSA's opinion, early intervention is needed.

Content of the RCP

47. In terms of the proposed requirement on the content of the RCP, including structure, stress scenarios, strategic analysis, recovery indicators and recovery measures, please see Rule RAR 2.1.7 - 2.1.9 and the associated Guidance. The

requirements are based on the FSB's Key Attribute 11, I-Annex 4 on *Essential Elements of Recovery and Resolution Plans and the FSB Guidance on Recovery Triggers and Stress Scenarios*.

C. Resolution planning and resolvability assessments

48. KA 11 recommends that resolution planning and resolvability assessments for firms covered by the resolution regime are done by a resolution authority in the jurisdiction. Although the powers of the DFSA as the resolution authority and the resolution framework are contained in the following section, we include matters related to resolution planning and resolvability assessments in this section on crisis preparedness, given that they fall under a general umbrella of preparatory measures for the event or to prevent a crisis, as opposed to dealing with the actual crisis.

49. In general, the objective of resolution planning is to prepare for, and provide for, the resolution actions that the resolution authority may decide to take in case the AF is considered to be likely to reach, or has reached, the point of non-viability (PONV). Resolution planning aims to support orderly resolution of an institution while ensuring the continuation of critical functions, if such are identified, and avoiding detrimental effects to the financial system, financial stability, depositors or the reputation of the DIFC.

50. In this context many DIFC AFs covered by the regime play an important role. This, in practice, translates into the DFSA's need to consider crisis preparedness of many DIFC banks, whether or not they pose systemic risks or need to maintain essential functions. In the case of G-SIBs present in the DIFC, resolution planning is also necessary since we might need to use certain resolution powers or, at a minimum, be requested to consider recognising and supporting resolution proceedings commenced elsewhere. Many, if not all of the AFs, already have resolution plans (RSPs) in place prepared, or approved, by their home resolution authorities.

Proposals

Application

51. It is proposed that the DFSA may, as far as practicable, and to the extent it deems necessary, develop preferred resolution strategies and prepare RSPs, including their operational implementation plans, for DIFC banks, irrespective of their legal form in the DIFC, i.e., a domestic firm or a branch (Article 84E of the Law and RAR 2.2).

52. The DFSA may also undertake, in exceptional cases, to carry out some aspects of resolution planning for AFs who are Providing Credit or Dealing as Principal, which are deemed important due to financial stability or their impact in the DIFC.

53. For AFs, being DIFC entities, with downstream operations in other jurisdictions, the RSP will cover the entire sub-group.

54. The DFSA will inform AFs individually regarding its intention to carry out resolution planning and developing a RSP for the entity.

Resolution planning

55. As a matter of policy, we will consider all potential, credible and feasible options for a resolution strategy for the DIFC AFs set out above. This will include, where possible, the position of the AF in its group RSP prepared by its home resolution authority. If such RSP exists and is known to us (e.g. through our participation in the Crisis Management group for the entity), we will consider the RSP prepared by other resolution authorities in light of our objectives and whether the position of the DIFC entity has been sufficiently taken into account.

56. If the DFSA considers that the preferred resolution strategy, as set out in the group RSP, and the outcome for the DIFC are indeed consistent with its objectives, and the position of the DIFC entity has been sufficiently taken into account, we may limit our planning to anticipating actions expressing acceptance of the group RSP. This would often imply that, in the event of resolution, the DFSA would aim to take measures in the DIFC to recognise the home resolution authority's actions.

57. However, if we are not satisfied that the group RSP meets or is consistent with our resolution objectives, we should consider whether it is necessary to pursue alternative or independent strategies as the preferred resolution strategy in the DIFC. In keeping with KA 11.9, we will attempt to ensure that the DIFC RSPs would be as consistent as possible with the group RSP.

58. As a result of the resolution planning exercise, we may also, taking into account the resolution objectives (set out in Article 8 of the Law), come to a conclusion that, if the circumstances so require, an entity should be, wound up in ordinary insolvency proceedings under the DIFC Insolvency Law and not using the resolution powers discussed in this paper. We would expect this to be the norm and the use of the invasive resolution powers to be relatively rare.

59. We shall endeavour to review regularly the RSPs, at least after material changes to the AF's business model, strategy or structure which affect the effectiveness of the RSP.

60. As far as disclosure is concerned, we will generally not disclose the RSPs to the public. We may decide, at our discretion, to share some elements with the AF concerned or other resolution authorities, subject to other rules applicable (Article 84E of the Law).

Obligation to co-operate and provide information to DFSA for resolution planning

61. Since the resolution planning process is expected to be carried out by the DFSA, in close cooperation with the relevant DIFC AFs, and based predominantly on information provided by them, the AFs shall be obliged to assist the DFSA in the resolution planning exercise and provide all information required for this purpose. It must be stressed that without this the resolution planning might not realistically be accomplished.

62. In this light, we are proposing, in line with KA 11.4, that the AF should be responsible for providing any information relevant for resolution planning and resolvability assessments, as reasonably requested by the DFSA. The proposals are contained in Articles 84F and 84G of the Law and RAR 2.3.

63. To facilitate the operational aspects of this requirement, similar to the recovery planning, we propose that the AFs appoint a dedicated person accountable to the DFSA to act as a contact point responsible for providing the information required for resolution planning and resolvability assessments. Such dedicated contact persons have been mandated in other benchmarked jurisdictions and contribute to ensuring consistency and efficiency of information flow to the DFSA.

64. The AFs, which have been informed individually by the DFSA, must provide appropriate assistance to the DFSA, in respect of any facts, data and information, which are necessary for the DFSA for the purpose of preparing, implementing and updating the respective RSPs and resolution strategies as well as carrying out of the resolvability assessments.

65. The proposed rules set out the complete data set and information necessary for the resolution planning. It mirrors the standards in a number of the benchmarked jurisdictions (e.g. the EU, UK, Jersey). However, in order to alleviate the operational burden on AFs and in line with the principle of proportionality, the DFSA intends to be guided by the following:

    (a) the actual scope of information requested would depend on the preferred resolution strategy chosen for the AF, in our discretion, and the existing, and available, RSPs for the AF;

    (b) not all data would need to be provided at once and/or from all AFs. The DFSA would consider the information required in terms of scope and granularity. As the AFs would be individually approached by the DFSA, a large majority can expect to be asked to provide, first, high level core data and only some would be asked for supplementary information; and

    (c) the DFSA will make use of the information already available to us.

Management Information Systems

66. The AFs must maintain appropriate information and systems and keep them up to date in order to be able to satisfy the above requirement. Although the GEN module of the DFSA Rulebook currently contains some provisions on appropriate management information systems and data provision to the DFSA, bearing in mind the purpose for, and the extent of, the MIS required by KA 12.2, these provisions do not appear sufficient for the purpose of recovery and resolution.

67. In particular, KA 12.2 requires that the bank's MIS should be able to provide timely, up-to-date, accurate and reconcilable accounting, financial and prudential information. Such information should be available in normal times and, in particular, for recovery and resolution planning and in the process of resolution. In the latter case, the firm's MIS must be able to provide, at short notice,

information necessary for valuation, which is essential for decisions regarding the resolution strategy.

68. In this light, it is proposed that the AFs are required to (see Rule RAR 4.1):

(a) maintain a detailed inventory of appropriate and available MIS including those related to accounting, financial and prudential information;

(b) demonstrate to the DFSA that they are able to provide the information derived from their MIS to produce information in normal times, for the purpose of recovery and resolution planning, resolvability assessments and, if the need arises, in order to implement the recovery or resolution plans or in the course of resolution at short notice (for example, within 12 hours from the DFSA's request);

(c) maintain, at the DIFC entity level, any information which is essential and specific to the DIFC entity and its vital business relationships and which are essential to access by the DFSA for the above purposes; and

(d) identify and address any legal constraints related to the flow of management information from other parts of the group to the DIFC entity in normal times and in crisis situations.

Requesting information by the DFSA

69. Regarding the process for request for, and submission of, the information, it should be borne in mind that it may require several exchanges between the DFSA and the AFs and, in many instances, a continual dialogue before the DFSA is satisfied with the information. The process is set out in the Guidance to RAR 2.2.1.

Resolvability assessments

70. In line with KA 10, the resolution authorities should regularly undertake resolvability assessments, which aim at identifying whether it is feasible and credible for an AF to be either liquidated in an ordinary insolvency proceeding or be resolved by applying tools and powers in line with the resolution objectives. The resolvability assessments are typically done concurrently with resolution planning or when updating the RSPs.

71. The objective of the assessment is to achieve a situation whereby an assessed entity is resolvable and operates in a way which would not impede the execution of the resolution powers, both short and long term. This necessitates that the assessment includes an analysis of whether there are legal, organisational, financial, business or other impediments or barriers, which would frustrate efforts to carry out the necessary resolution strategy. The resolvability assessments must be carried out in the context of the group RSPs, where these exist.

72. On this basis, it is necessary that the DFSA can carry out such resolvability assessments, which will aim to identify the aspects set out in the preceding paragraphs.

73. To assist the DFSA and the AFs in identifying the potential scope of such assessment, we propose to rely on list of matters for consideration mirroring those adopted in a number of benchmarked jurisdictions (e.g. the EU and Jersey) (see RAR section 2.3).

74. As a matter of policy, similarly to our position in relation to resolution planning, we would expect that only a select number of DIFC AFs subject to the proposed regime would be expected to be assessed taking into account all of these aspects.

Removing impediments to resolvability

75. KA 11.12 requires that, when impediments or barriers to resolvability are identified as a result of the resolvability assessment, remediation measures are necessary and the resolution authorities should have appropriately broad powers to enforce these. The powers should be exercisable in advance of any financial problems in the entity that could lead to non-viability, and should not be contingent on the existence of such problems. Their use should take due account of the effect on the soundness and stability of the ongoing domestic and foreign operations of the bank.

76. In line with the KA and as implemented in all benchmarked jurisdictions, in Article 84G of the Law we propose that the DFSA should have the power to give a direction to an AF to take measures for the purpose of removing impediments to resolvability including in relation to its:

    (a) structure (including group structure);

    (b) operations (including intra-group dependencies and relationships with third parties);

    (c) activities and practices;

    (d) assets, rights and liabilities; or

    (e) any other change as is required by the circumstances;

77. In line with KA 11.12, which states that the resolution authorities should provide for prior consultation on the actions contemplated in the area of removing of barriers to resolvability, we propose a process for using this power.

Question 1:

Do you have any comments about any of the crisis preparedness proposals and the proposed new and supplementary powers or the ways in which they are proposed to be exercised?

II Resolution framework

78. The proposals below constitute the DFSA's resolution framework. Given the size and complexity of the framework, the proposals are kept to the minimum, while

referring the reader to the draft Regulatory Law and the new Rulebook Module, RAR.

79. In a nutshell, the framework covers matters related to resolution, the resolution powers and tools suitable in the DIFC and in the cross-border context, as well as the power to require DIFC AFs to hold additional loss absorbing capacity to increase their resolvability. The proposed powers are subject to certain safeguards. Enhanced provisions on protection of client assets in resolution are also proposed.

A. DFSA's function as the resolution authority for the DIFC

80. Article 7 of Dubai Law No. 9 of 2004 gives the DFSA the sole responsibility for the regulation of financial services in the DIFC and for any matter, which falls under its jurisdiction pursuant to the DIFC Laws and Regulations. Under the same article, the DFSA Board of Directors may adopt strategies, policies and objectives relating to the regulation of financial services, which will allow the realisation of the DFSA objectives. The latter are specified in Article 8 of the Regulatory Law and include protecting and maintaining confidence in financial services in the DIFC and financial stability, as well as protecting direct and indirect users of financial services.

81. At present, the DIFC legal framework does not provide for a designated resolution authority with specific resolution objectives and powers assigned to it. The DFSA, as a single integrated regulator and supervisory authority, has managed insolvencies and liquidations of DFSA Authorised Firms relying on the powers set out in the Regulatory Law.

82. KA 2 states that each jurisdiction should have a designated administrative authority with clearly a defined mandate, which is responsible for exercising the resolution powers for the firms within the scope of the resolution regime. KA 2.3 sets out a list of statutory objectives and functions, which should guide the resolution authority's actions. Other parameters are set out in KAs 2.4 and 2.5 and pertain to internal organisation. KA 2.6 and KA 2.7 respectively recommend that the resolution authority have provisions on immunity from liability in the context of exercising resolution powers and have unimpeded access to firms.

83. On this basis, Articles 8, 12, 38, 39 and Part 5 of the Law as well as RAR 3.2 to 3.5 address the requirements in KA 2, including the new powers required for the DFSA to act as the resolution authority for the DIFC firms covered by the proposed regime. Please note that the powers cover a wider scope of firms, and include insurers and FMIs, to pave the way for detailed provisions on these coming at a later stage.

84. Attention is, in particular, drawn to new provisions in new Articles:

    (a) 8(3B) of the Law on resolution objectives which the DFSA shall be guided by when making decisions in relation to resolution matters; and

    (b) 8(3C) of the Law which incorporates recommendations in relation to the resolution authority objectives when it comes to the treatment of Client

Assets in resolution, which stem from KA 4.1 and in particular Part II - Annex 3 on Client Asset Protection in Resolution (2.1).

Question 2:

Do you have any comments in relation to the DFSA's role as the resolution authority in the DIFC?

B. Resolution matters

85. This section covers a number of essential matters, which surround the proposed DFSA powers of resolution.

Scope of the resolution regime

86. In line with KA 1.1., it is proposed that the DIFC banks, notwithstanding their legal form in the DIFC, will be covered by the resolution regime. AFs Providing Credit or Dealing as Principal may also be covered, in particular as regards crisis preparedness. The provisions related to Islamic banks may be updated in the future to reflect any differences resulting from the final standards on recovery and resolution of Islamic financial institutions developed by the IFSB.

87. To prevent the situation where an AF can fall out of scope of the resolution regime as a result of the use of a resolution power, which would effectively frustrate the effectiveness of the regime, an AF does not cease to be an AF, if it no longer holds a licence as a result of a resolution action.

88. We also propose to include domestic holding companies in the scope, irrespective of whether they are regulated or not. This is specifically needed to cover situations when a resolution action, in order to be effective for the firm as a whole, must be used at the parent/holding level.

89. Please see Article 84A of the Law and RAR 1.1.

Resolution conditions

90. Resolution conditions are a list of defined circumstances that should make the resolution authority consider triggering the use of their resolution powers.

91. KA 3.1 states that resolution should be initiated when a firm is no longer viable or likely to be no longer viable and has no reasonable prospect of becoming so. The resolution regime should provide for timely and early entry into resolution before a firm is balance-sheet insolvent and before all equity has been fully wiped out. There should be clear standards or suitable indicators of non-viability to help guide decisions on whether firms meet the conditions for entry into resolution.

92. The benchmarked jurisdictions have implemented the standard in various ways, usually leaving to themselves a sufficient degree of discretion. This reflects the inherent difficulty of assessing the severity of financial circumstances of complex cross-border financial entities operating in complex, interconnected markets.

93. Having considered these, we propose (see Article 84K of the Law) that the DFSA may consider using its resolution powers when the following Resolution Conditions are satisfied:

(a) the DIFC AF is failing or likely to fail;

(b) having regard to timing and other relevant circumstances, it is not reasonably likely that any action - except the exercise of the resolution powers by the DFSA - will or can be taken by or in respect of the AF that will prevent the failure or likely failure of the AF within a reasonable timeframe; and

(c) the DFSA is of the view that taking resolution action is in the public interest.

Condition (a) – 'failing or likely to fail'

94. Regarding condition (a), the notion of 'failing or likely to fail', KA 3.1 and the KA Assessment Methodology for the Banking Sector[10] (p.29) state that the entry into resolution should happen before a firm is insolvent. This includes balance-sheet or cash-flow insolvency, or any other definition of insolvency. There should be clear standards or suitable indicators of non-viability to help guide decisions on whether firms meet conditions for entry into resolution. The concept of non-viability should not require proof that the bank is insolvent. In fact, exclusive reliance on criteria for non-viability that are closely aligned with insolvency or likely insolvency would not meet the test for timely and early entry into resolution, although it should always be possible to apply resolution measures to an insolvent bank.

95. The conditions for entry into resolution or exercise of resolution powers are recommended to be clear and transparent and set out in law (while underlying indicators of non-viability may be set out in guidance or other policy documents). The requirement for clear and transparent criteria specifying when resolution can be initiated may be satisfied by the identification of quantitative or qualitative factors that are used by the relevant authority to guide its decisions as to whether a bank meets the conditions for entry into resolution. Examples of non-viability can include:

(a) regulatory capital or required liquidity falls below specified minimum levels;

(b) a serious impairment of the bank's access to market-based funding sources;

(c) the bank depends on official sector financial assistance to sustain operations or would be dependent in the absence of resolution;

(d) there is a significant deterioration in the value of the bank's assets; or

[10] http://www.fsb.org/wp-content/uploads/Key-Attributes-Assessment-Methodology-for-the-Banking-Sector.pdf

(e) the bank is expected in the near future to be unable to pay liabilities as they fall due.

96. It is worth noting that the benchmarked jurisdictions tend to define the provisions on 'failing or likely to fail' more or less precisely, often leaving a wide margin of discretion to the resolution authorities.

97. In this light, we propose that the DFSA framework provides that the DFSA would, in its discretion, deem a DIFC AF to be failing or likely to fail when one or more of the conditions set out in Article 84K (2) of the Law pointing to a deteriorating viability of an AF are present or are likely to be present in the near future

98. Although the mere exercise of early intervention measures in relation to the bank is not an indicator that the bank is failing or likely to fail, actual or likely failure to implement such early intervention or recovery measures in a timely and effective manner can point to an impeding failure or likelihood of failure.

99. Please note that, in line with the KA requirements, the proposals are not linked and are not intended to be linked to the DIFC Insolvency Law definition of insolvency applicable to DIFC companies and constitute a self-standing metric.

Condition (b)

100. Condition (b) would be deemed to be satisfied in a situation where there are no measures that could reasonably be taken by the bank, including recovery measures identified in the recovery plan or supervisory early intervention measures that are likely to restore the bank to viability in a timeframe that is reasonable.

Condition (c)

101. The condition related to public interest would be met if taking a resolution action is necessary for the achievement of, and is proportionate to, one or more of the DFSA resolution objectives (as set out in Article 8 of the Law) and ordinary insolvency proceedings would not meet the Resolution Objectives.

Cross-border aspects

102. Specific circumstances would be taken into account depending if the entity in question is a group entity and whether it is a branch or a domestic company. In deciding whether the Resolution Conditions have been met, the DFSA will consider the likely impact on the AF of the failure or likely failure of another entity in the AF's Group.

103. Furthermore, and in relation to the preceding paragraphs, we propose introducing an obligation that an AF must notify the DFSA (see Article 84K (5) of the Law when:

(a) the AF is failing or likely to fail;

(b) another group entity in the AF group is failing or likely to fail;

(c) a relevant authority in a jurisdiction where a group entity is present has taken or is likely to take a resolution action towards that entity; or

(d) a resolution authority of the head office of the DIFC AF is considering or has initiated a resolution action in relation to the head office.

Impact of resolution on other insolvency proceedings

104. The resolution process constitutes an exception to the ordinary insolvency proceedings. The actions of the resolution authority override the insolvency proceedings by either pre-empting and thwarting their commencement or being able to carry out resolution actions on a firm in insolvency. In addition, in the absence of the necessity to meet the Resolution Objectives by using the resolution powers, the resolution authority may decide that winding up proceedings is a preferred strategy. It should be accompanied by a swift return of Client Assets and, where applicable, take due account of depositor priority set out in COB 4.4.

105. On this basis, the proposed resolution framework contains exceptions to the DIFC Insolvency Law and Regulations in relation to the AFs subject to the resolution regime as set out in Article 84V of the Law.

Liability and its limitation for those involved in resolution

106. The regime provides for a number of clarifications and protection from liability for those involved in resolution in various resolution functions as well as sanctioning provision.

107. First, the DFSA when performing resolution or other functions has general protection from liability under Article 12 of the Law.

108. A Temporary Administrator appointed by the DFSA to carry out functions relating to the management of a firm could however incur liability for its actions. These persons need to be protected from liability where they are acting in that capacity. Equally, the liability may also arise for directors and other staff of the AF in resolution for actions which are taken or omissions to comply with and implement the directions of the resolution authority. The limitation of liability for these persons needs to be addressed in the regime as per KA 5.3. This is addressed in Article 84W of the Law.

109. Lastly, although no new rules are needed to this end, it should be noted that the management of the firm in resolution, which negligently or intentionally acts in contravention of the DFSA resolution authority's directions is subject to the DFSA enforcement powers. Such provisions have been included in the laws of several benchmarked jurisdictions.

Pre-Resolution Valuation

110. The concept of valuation, although not spelled out specifically, underlies various KAs (in particular, KA 3 and KA 5). It constitutes a crucial element of decision-making in the context of resolution, not least because the outcome of the valuation will heavily impact on the decisions to enter the resolution, to use a

chosen resolution tool and the rights of persons, who may be negatively affected by the outcome of these decisions.

111. Broadly speaking, valuation in the context of the resolution process is used in at least two situations:

(a) the basis for the resolution authority's decision on entering into resolution and the choice of resolution tool(s) (Pre-Resolution Valuation); and

(b) for the purpose of resolution safeguards and protecting the rights of shareholders and creditors (Difference of Treatment valuation).

112. Recognising the importance of this area, all of the benchmarked jurisdictions have included the two types of valuation in their regimes in broadly similar fashion, with differences as to the prescriptive, or not, character of the parameters of the pre-resolution valuation. In some jurisdictions, and in the FSB's Principles on Bail-in Execution, pre-resolution valuation is distinguished from a more specific valuation for the purpose of applying specific resolution tools.

113. Our proposals applicable in the DIFC take account of these models and are contained in Articles 84M and 84R as well as RAR 3.1.3 - 3.1.6 and 3.6.2. While the proposals on Pre-Resolution Valuation are described in this sub-section, the parameters of the Difference of Treatment valuation are contained in sub-section on Resolution Safeguards below.

114. The proposals set out the DFSA's power to cause a valuation of the assets and liabilities of the entity in distress to be made for the purpose of resolution, i.e. before taking a resolution action and before deciding on applying a specific resolution tool.

115. The DFSA may also cause a valuation to be made before taking an action in response to the request for the recognition of third country resolution action, to the extent it is relevant to the DIFC entity

116. The purpose of the valuation should be set in the DIFC context and be consistent with the resolution tools and powers, and aim:

(a) to inform the decision of whether the resolution conditions are met, and if they are met, which resolution tool should be applied;

(b) if the Sale of Business Tool is to be applied, to inform the decision on the assets, rights, liabilities or shares to be transferred and to inform the DFSA's understanding of what constitutes commercial terms for the purpose of the application of the tool;

(c) if the Bail-in Tool is to be applied, to inform the decision on the extent of the write down or conversion of eligible liabilities or dilution of shares; and

(d) in all cases, so that any losses on the assets of the bank are fully recognised at the moment a resolution tool is applied or the write down or conversion power is exercised.

117. The valuation should be commissioned by the DFSA from a suitably qualified person able to carry out such valuation. The DFSA may also rely on a valuation carried out by the home or other relevant resolution authority. The valuer shall be an independent person, free of conflicts of interest in respect of the valuation, with appropriate skills and competences to carry out the valuation.

118. The carrying out of the function by the independent valuer shall be facilitated by the DFSA. We may, therefore, confer on the valuer an ancillary power to do anything necessary for the purposes of, or in connection with, the performance of the independent valuer's functions in the context of the pre-resolution valuation. This may cover the power to request any documents and information necessary, access to the premises and persons.

119. The AF in question shall be obliged to provide access to any information and documentation necessary for the purpose of the valuation, irrespective of whether the information is in the DIFC or elsewhere. Where information is held by a third party, the AF shall facilitate its obtaining.

120. The valuation can already commence in the early intervention phase. If, for reasons of urgency, there is not enough time to conduct a full and complete valuation before the circumstances require taking a decision as to the resolution action, including the application of the resolution tool, a provisional valuation can be made by the DFSA.

121. In this case, the definitive valuation should follow as soon as possible until which time the provisional valuation would apply. The definitive valuation should lead to the full extent of any losses on the assets of the AF being recognised in the accounting records of the entity. It should also provide information to the DFSA as to whether:

    (a) any additional consideration is required from the purchaser (under the Sale of Business Tool); or

    (b) whether any of the liabilities which were subject to write-down or conversion (under the Bail-in Tool) should be increased in value or reinstated.

122. The valuation should be based on certain principles and valuation standards. The DFSA shall set out the valuation methodology and assumptions to the valuer. The DFSA shall endeavour to use the methodology and assumptions in a consistent manner across each type of valuation. These may include elements such as:

    (a) assessment to be made on prudent, realistic and credible assumptions of the real value of the assets and liabilities of the entity (i.e. 'market value'), including the rates of default and severity of losses, recognised as of the date of entry into resolution, relevant market conditions and expected stakeholder reactions;

    (b) disregard for any potential future provision of extraordinary public financial support, wherever available; and

(c) including any sums that may be recovered by the DFSA.

123. RAR 3.1.3 specifies information that a pre-resolution valuation shall contain as appearing in the accounting books and records of the AF (for the DIFC branches, the documents are to refer to the business of the branch). The DFSA may require other information, in addition to the one in the list.

124. Although the DFSA may need to cover the costs of the valuation in the interest of speed and efficiency, it should be possible to require that the entity that the valuation pertains to covers the valuation costs. If this is not possible immediately, then the costs of commissioning the valuation(s) should be recovered from the entity, in respect of which the valuation is made, as soon as possible (see Articles 84R and 84S of the Law).

Recovery of resolution costs

125. As per the philosophy of the KAs, as set more specifically in KA 6, the cost of resolution should be borne by the firm (i.e., its shareholders) and its creditors, and, depending on circumstances, any costs borne by the resolution authority should be recovered from the firm in resolution.

126. This issue has been addressed in a large majority of the benchmarked jurisdictions by setting up industry funded resolution funds to finance the costs of resolution. These are complemented by including the resolution authority as a preferred creditor. Some jurisdictions, whose funds are unlikely to be significant or which do not have a resolution fund, have also put in place specific recovery provisions for the resolution authority.

127. While the DFSA considers that setting up a resolution fund is not a suitable option in the DIFC, we propose to include provisions which allow the DFSA to recover from the AF, in respect of which we needed to carry out the resolution actions, any reasonable expenses properly incurred in connection with the exercise of any resolution power or use of a resolution tool. Please see Article 84S of the Law.

128. Circumstances when it can be expected that the DFSA incurs certain costs as a result of the use of the resolution powers include, for example, the costs of the Pre-Resolution and Difference in Treatment valuations as well as remuneration for the special administrator, if we chose to appoint one in a specific case. Other incidental costs may also arise, as per the specific circumstances.

129. The recovery can take place:

(a) through a deduction from any consideration paid by a transferee to the AF in resolution (in the case of business sale), or as the case may be, to the owners of the shares (in the case of share sale); or

(b) from the AF in resolution, as a preferred creditor.

Questions:

3. Do you have any comments in relation to the Resolution Matters?

4. Are there any other considerations that should be taken into account? If so what are they, and how should they be addressed?

C. Cross-border aspects of resolution

130. The cross border aspects of resolution are crucial to consider given that most, if not all, of the DIFC AFs that would be subject to the proposed resolution regime are cross-border operating entities. These aspects cover not least the following stages and areas:

(a) crisis preparedness cooperation in business as usual times when the authorities are primarily involved in recovery and resolution planning and resolvability assessments, which require exchange of information and appropriate co-ordination;

(b) cooperation among resolution authorities, in particular home and host, in respect of resolution actions during the resolution process, which includes statutory approaches to recognising third-country resolution actions including, where necessary, taking appropriate measures in the jurisdiction supportive of, or giving effect to, foreign resolution; and

(c) statutory or contractual arrangements supporting resolution actions.

131. KAs emphasise extensively the cross-border aspects of resolution (KA 7, 8, 9, and also 10 to 12 regarding recovery and resolution planning). In addition, the FSB published a number of guidelines on various aspects of cross-border co-operation among the CMG and non-CMG participating jurisdictions and Principles for Cross-border Effectiveness of Resolution Actions.[11]

132. In this light, while many aspects of co-operation set out under point (a) are already possible under our existing framework, we are proposing to amend the provisions of Article 38 of the Law to facilitate information sharing with the non-DIFC resolution authorities.

133. In addition, as per (b) situations may arise with respect to a firm undergoing resolution in its home jurisdiction that operates a branch or controls a subsidiary in the DIFC. Also, foreign firms may hold assets, liabilities or contracts located or booked in, or subject to the law of the DIFC, without being established in the DIFC. Without provisions that facilitate giving effect to resolution actions undertaken by non-DIFC resolution authorities, effective carrying out of resolution of AFs operating cross-borders could be severely undermined.

134. As a matter of background, it is important to bear in mind that resolution is an administrative process and is an exception to the traditional way of liquidating

[11] Principles for Cross-border Effectiveness of Resolution Actions

companies through a court-driven ordinary insolvency proceedings governed by insolvency laws. The resolution happens outside the insolvency proceedings and court proceedings, where cross-border cooperation exists among the judicial authorities in enforcing court decisions (e.g. under the UNCITRAL Model Law, which is now incorporated in the DIFC Insolvency Law 2019). However, in resolution, the decision of the DFSA as the resolution authority in the DIFC to recognise a resolution action of an authority from another jurisdiction, can have a significant impact on the DIFC entity and its creditors, including depositors and client assets.[12]

135. The resolution actions of third country resolution authorities do not have automatic application in the DIFC in relation to the AFs subject to our jurisdiction. For this reason, recognition of these actions is necessary by the DFSA, as the resolution authority in the DIFC, for the enforcement in the DIFC to be possible in relation to the AF, which is subject to resolution in another jurisdiction.

136. Based on the standards set out in the KAs and extensive benchmarking, we propose a balanced framework for recognising third-country resolution actions, which is set out in detail in Article 84T of the Law.

Questions:

5. Do you have any comments in relation to the proposals on cross-border resolution?

6. Are there any other considerations that should be taken into account?

D. Resolution powers and tools

137. This section covers proposals on resolution powers and resolution tools, which should be included in the DFSA regime. The proposals are based on KAs 3.2 to 3.9, which include a comprehensive list of twelve resolution powers (KA 3.2) to be used in the context of a number of potential resolution tools (please refer to the catalogue of powers at Annex I). The powers and tools can be applied in any combination and sequence to the entire entity or its parts, while other parts of the troubled entity, which are not deemed critical to the financial system or the economy, can be wound-up (KA 3.8). The KA tools include:

(a) asset sale, transfer or purchase with assumption to/by a purchaser or a bridge institution (KA 3.3.);

(b) creation of one or more bridge institutions (KA 3.4); and

(c) carrying out a bail-in (KA 3.5 – 3.6).

[12] For example, in relation to the recognised and foreign companies (i.e. branches, as per the DIFC Companies Law), the insolvency proceeding in the jurisdiction of incorporation, the gathering and remitting of assets within the DIFC is subject to judicial approval and cross-border judicial cooperation (Art. 177 of the Insolvency Law 2019).

138. The resolution powers under the KAs assume their use in jurisdictions that are fully fledged economies with a full range of safety net institutions such as central banks, governments, deposit guarantee schemes and resolution funds.

139. As none of these institutions is part of the DIFC landscape, the proposed resolution powers and tools have been appropriately adapted. For this reason, the DFSA powers and tools comprise a more limited catalogue compared to the KA standard and the benchmarked jurisdictions.

140. In particular, the proposed catalogue of DFSA powers (see Article 84N to 84Q and RAR 3.2 to 3.5) includes all the powers set out in KA 3.2, which can be exercised individually or in any combination, for the purpose of enabling the DFSA to achieve the Resolution Objectives. We have not included powers under KA 3.2 (vii), (viii), (ix) as it refers to recapitalising new or bridge entity and (xii) in relation to insured deposits. Regarding the latter, this is to account for the fact that DIFC deposits are not insured. Since the 7-day timeline to return client assets may not be workable, instead a phrase on 'prompt and without unnecessary delay' is proposed.

141. Based on the benchmarking exercise, in particular against the EU Bank Recovery and Resolution Directive, we also propose some additional powers assisting the carrying out of the resolution, which include:

    (a) to require any person to provide any information required for the resolution authority to decide upon and prepare a resolution action, including updates and supplements of information provided in the resolution plans and including requiring information to be provided through on-site inspections;

    (b) to take a resolution action without taking control over the AF in resolution;

    (c) to remove rights to acquire further shares (e.g. pre-emption rights in the case of new share issue);

    (d) to cancel or modify the terms of a contract to which the AF in resolution is a party or substitute a purchaser under the Sale of Business Tool as a party;

    (e) the power, in respect of debt instruments and other eligible liabilities issued by an AF in resolution, to amend or alter their maturity, or amend the amount of interest payable, or the date on which the interest becomes payable, including by suspending payment for a temporary period;

    (f) to close out and terminate financial contracts or derivative contracts for the purposes of bail-in; and

    (g) to request that a relevant authority discontinue or suspend the admission to trading on a regulated market of financial instruments relating to the AF in resolution.

142. Please note also that:

    (a) while the power to appoint a Manager (Article 77A of the Law) applies at the supervisory stage, the power to appoint a Temporary Administrator

applies in resolution only. The modalities of the power are set out in Article 84Q of the Law and RAR 3.5. We would intend to make use of this power where carrying out resolution by ourselves would exceed our internal capacity, and we would need to seek assistance from a third party; and

(b) the conditions for the use of power on temporary stay of early termination rights, are underpinned by conditions set out in KA 4.3 and Appendix I Annex 5 to KAs on Temporary stay of early termination rights.

143. As far as the resolution tools are concerned, the DFSA considers that only two resolution tools are relevant in the DIFC context (see Articles 84O and 84P of the Law and RAR 3.3 and 3.4):

(a) the Sale of Business tool (which can be employed as a share sale or as a sale of assets, rights and liabilities), and

(b) the Bail-in tool (specifically, only open-bank bail-in, where the actual entity in resolution is recapitalised through this method).

144. Under the KAs, given their invasive nature, the resolution tools require a number of conditions and parameters to be set out upfront in the domestic framework. This is to provide legal certainty to those affected by their exercise. While the conditions are detailed and lengthy (and for this reason are not reproduced in this Consultation Paper), their precise description is necessary to satisfy the requirements of the KAs. Please refer to the proposed rules for detailed parameters of the use of the proposed resolution tools, which due to their size are not reproduced in this CP.

145. In relation to the Bail-in Tool, the proposals follow bail-in provisions as implemented in the prevailing majority of the benchmarked jurisdictions. This pertains to elements of the Bail-in Tool such as the provisions on excluded liabilities for the purpose of bail-in (see RAR 3.4.1), sequence of write down and rate of conversion, treatment of shareholders, and rates of conversion (see RAR 3.4.2 to 3.4.6).

146. Given the complexity of the area related to the use of resolution powers and tools from a legal point of view, and in the international context of the DIFC firms, we may provide further rules, guidance or policy statements in this area.

Questions:

7. Do you have any comments in relation to the proposed resolution powers or the conditions and modalities of their use by the DFSA?

8. Do you have any comments in relation to any aspect of the proposed resolution tools?

9. Are there any other considerations that should be taken into account?

E. Requirement to hold Loss Absorbing Capacity

147. The Bail-in Tool can only be applied and be effective in resolving the failing AF provided there is a sufficient amount of eligible equity and other instruments and liabilities, referred to in the FSB terminology as TLAC – Total Loss Absorbing Capacity. For the purpose of this CP, when discussing the DFSA requirement, the term Loss Absorbing Capacity (LAC) is used, to distinguish from the FSB requirements.

148. TLAC includes additional securities (including common equity and subordinated and other debt) that G-SIBs must hold as a minimum in order to increase their resolvability, in addition to the Basel III minimum capital. These securities serve a purpose of providing additional cushion and can be written down to absorb losses and converted to equity in order to recapitalise the failing entity before it is done in respect of capital instruments.

149. For the purpose of the proposals in this regime, we have considered the FSB standards on TLAC, developed jointly with the BCBS: Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution and TLAC Term Sheet.[13] We have also carried out benchmarking on how the TLAC standard has been implemented. It is fair to say that the TLAC implementation is diverse across the benchmarked jurisdictions, with various degrees of specific detail and convergence.

150. It appears that for the completeness and future-proofing of our regime and to address the limited number of resolution tools available, a general provision allowing the DFSA to direct an AF to raise additional capital in the form of LAC is necessary. The proposed provisions remain high level at this stage and may be subject to more detailed rules or change, as the situation may require in the future. Considering that at present the majority of G-SIBs are present in the DIFC as branches, the rules would effectively apply to a small fraction of the DIFC banks.

151. In particular, it is proposed that, the DFSA may prescribe, on an individual basis, a minimum requirement for LAC, which should include own funds and eligible liabilities, whether issued externally or internally within the corporate group of the AF. The LAC requirement shall be based on the TLAC standard or any relevant standard by an international standard setting body. The detailed parameters of this power are set out in Article 84H of the Law and RAR 2.4.

Question 10:

Do you have any comments in relation to the proposed power?

F. Resolution safeguards

152. The FSB recognises that the resolution powers have an invasive character, able to affect rights and interests of a range of parties, such as creditors and

[13] http://www.fsb.org/wp-content/uploads/TLAC-Principles-and-Term-Sheet-for-publication-final.pdf

shareholders, when a failure of a financial firm occurs. Such rights and interests are protected in the ordinary insolvency proceedings, which does not apply in the resolution model set out in the KAs.

153. The KAs provide for their own system of safeguards to address this. In particular, KA 5 contains a full catalogue of safeguards, which relate to the exercise of resolution powers.

154. Our proposals discussed in the preceding sections incorporate the safeguards mandated by KA 5.1 in the context of the Bail-in Tool. These are:

(a) the respect for the hierarchy of creditors principle;

(b) pari passu treatment of creditors of the same class;

(c) transparency for departures from this principle; and

(d) that equity holders should absorb losses first ahead of other unsecured and unsubordinated creditors before any senior debt holders can be affected.

155. The safeguard under KA 5.3 granting protection for directors and officers of the AF acting under the directions of the resolution authority is addressed in Article 84W of the Law.

156. The remaining safeguards foreseen in the KAs are addressed in our proposals in Article 84R of the Law, RAR 3.6 and MKT 4.2.2A. These include the following:

(a) the 'No Creditor Worse-Off than in Liquidation' (NCWOL) principle underpinned by the 'Difference of Treatment; valuation (KA 5.2);

(b) no judicial challenge possibilities for stakeholders other than means of redress by awarding compensation (KA 5.5); and

(c) delayed disclosure of information relating to the resolution for the AF under the market rules (KA 5.6); and

(d) miscellaneous safeguards related to title transfer collateral arrangements, set-off and security arrangements and orderly operation of financial market infrastructures such as clearing, payment and settlement systems as well as central banks (KA 4.1 and 4.4).

A. The NCWOL principle

157. The NCWOL safeguard under KA 5.2 requires that creditors should have a right to compensation where they do not receive, at a minimum, what they would have received in a liquidation of the firm under the applicable insolvency regime. This is by far the most prominent safeguard. It has been implemented in all of the benchmarked jurisdictions. The safeguard consists of two elements: the Difference of Treatment Valuation, which underpins the assessment of damage and the principles on compensation.

Valuation

158. The prerequisite for the NCWOL safeguard, as mentioned previously, is the 'Difference of Treatment' (DOT) valuation mentioned previously. The valuation is distinct from the Pre-Resolution Valuation, since it serves a specific purpose of establishing whether creditors should receive any compensation under the NCWOL principle on the basis of a counterfactual assessment by the resolution authority.

159. The proposal in Article 84R of the Law and RAR 3.6.1 - 3.6.3 specify the principles and modalities of the DOT valuation. The valuation is carried out by the resolution authority, and is usually commissioned from the valuer who undertook the Pre-Resolution Valuation. The DOT valuation may be carried out at the same time as the Pre-Resolution Valuation.

160. The objective of the DOT valuation is to establish, usually from an ex post perspective, the difference, if any, between the treatment that shareholders and creditors of the entity in resolution have actually been afforded (or are likely to be afforded) as a result of the use of resolution powers, and the treatment they would have received under the ordinary insolvency proceedings.

161. The valuation may be carried out in line with the same principles as the Pre-Resolution Valuation plus additional assumptions as follows:

    (a) that relevant insolvency proceedings in respect of the AF in resolution would have commenced on the date on which the decision was taken to stabilise it;

    (b) that the AF in resolution would have been liquidated in full on that date;

    (c) the stabilisation/resolution action has not been effected; and

    (d) there was no provision of extraordinary public financial support provided.

162. The costs of commissioning the valuation(s), if covered by the DFSA resolution authority, may be claimed back from the AF in question.

Compensation

163. In line with KA 5.6 the only legal remedy contemplated under the KAs is redress by awarding compensation. This effectively implies that creditors are only entitled to bring their claims to the court on an ex post basis and the claims can only be of a compensatory nature, without being able to challenge or reverse the resolution actions themselves.

164. On this basis, the rules provide that if, as a result of the DOT valuation, it is determined that the shareholders and creditors have received, in payment of, or compensation for their claims, the equivalent of less than the amount that they would have received under ordinary insolvency proceedings, they should be entitled to the payment of the difference. To this end, the valuation should also establish the monetary difference of the treatment down to the individual creditor or shareholder.

B. No other judicial remedies available

165. KA 5.6 mandates that the resolution regime should not provide for judicial actions that could constrain the implementation of, or result in a reversal of, measures taken by the resolution authority acting within its legal powers and in good faith. Instead, the regime should provide for redress by awarding compensation, if justified.

166. This means that apart from the safeguards discussed above no other judicial actions are available, that could constrain the implementation of, or result in a reversal of, measures taken by the DFSA as the resolution authority acting within our legal powers and in good faith.

167. Having said that, this provision is not intended to limit the existing statutory judicial remedies that may be available in relation to the DFSA actions.

C. Disclosures of inside information

168. Lastly under KA 5.6, in order to preserve market confidence, some flexibility should be built into the legal framework to allow temporary exemptions from disclosures or delaying them to the public, which would ordinarily be required under respective laws (markets, takeover, and listings) where the disclosure could affect successful implementation of resolution measures. MKT 4.2.2 requires such disclosures of inside information. This does not include regulatory reporting to the DFSA.

169. At present, this aspect has little practical bearing since there are no AFs in the DIFC, which would be subject to the proposed regime and listed on the DIFC exchanges. If needs arises, the DFSA proposes an exception in MKT 4.2.2A to deal with the delayed disclosure, for a limited time, subject to our consent and when the delay is justified in specific circumstances.

D. Miscellaneous protections

170. There are also two additional areas where we propose protection in line with the KAs. Please see RAR 3.6.5 - 3.6.8.

171. The first concerns KA 4.1 regarding protection for title transfer collateral arrangements, set-off arrangements, security arrangements. The protection means essentially that the following are not permitted through the use of resolution powers:

    (a) partial transfers of assets, rights and liabilities that are protected under any such single arrangement; and

    (b) the modification or termination of rights, assets and liabilities that are protected under any such arrangement.

172. The second is set out in KA 4.4, which advocates for safe and orderly operations of the financial market infrastructures to prevent them from becoming conduits for transmission of financial contagion. The protection means, essentially, that the application of the DFSA resolution tools should not affect the operation of

these entities, whether authorised in the DIFC or recognised under the REC regime.

Question 11:

Do you have any comments in relation to the proposed safeguards?

Annex 1

Summary of Key Attributes

Key Attribute
1. Scope KA 1 requires that the KAs should apply to FIs which could be systemically significant or critical if they fail. These entities would largely include the G-SIFIs[14] but home authorities may also decide that firms whose failure would be systemically significant or critical in domestic context would also be covered. The resolution regime should apply to entire G-SIFI group including the holding company, non-regulated operational entities and branches of foreign firms. As a minimum, G-SIFIs should prepare a recovery and resolution plan (as per KAs Appendix I, Annex 4), be subject to regular resolvability assessments and conclude institution-specific cross-border agreements. Specially adapted resolution regimes are proposed for FMIs and insurance companies (KA Appendix II, Annexes 1 & 2).
2. Resolution authority Each jurisdiction should have a designated administrative authority (or authorities) with clearly defined mandate(s) responsible for exercising the resolution powers under the resolution framework. In its dealings, the resolution authority should be particularly mindful of the need to ensure continuity of essential services, protect depositors and avoid unnecessary destruction of value whilst considering the impact of resolution actions on financial stability in other jurisdictions. In terms of institutional set-up, the resolution authority should have operational independence consistent with its statutory responsibilities; transparent processes; sound governance; adequate resources and be subject to rigorous evaluation and accountability mechanisms to assess the effectiveness of any resolution measures. In its dealings, it should: • Possess the expertise, resources and operational capacity to implement resolution measures; • Have unimpeded access to firms where it is material for resolution planning and implementation of resolution measures; • Be able to enter into agreements with foreign resolution authorities; • Enjoy protection against liability for actions or omissions made while discharging their duties in the exercise of resolution powers, in good faith, including actions in support of foreign resolution proceedings.
3. Resolution powers Resolution should be initiated when a firm is no longer viable, is likely to be no longer viable and has no reasonable prospect of becoming so. This 'point of non-viability' (PONV) which should be

[14] G-SIFIs comprises entities, which have been identified based on an objective methodology developed by the FSB, such as banks (G-SIBs), insurance companies (G-SIIs) and financial markets infrastructures as well as, possibly, asset managers, investment funds, finance companies and securities broker-dealers (aka NBNI SIFIs). Some jurisdictions extended their resolution regime based on KAs to all banks and not only those which are considered systemically important (e.g. the EU in the Bank Recovery and Resolution Directive).

clearly defined (through standards or suitable indicators) to help the resolution authority decide when the firm should enter into resolution.

This should allow for timely and early entry into resolution, before a FI is balance sheet-insolvent and before all equity has been wiped out.

The resolution authority should have at their disposal a wide range of resolution powers, which can be used in any combination, to any part of the group at any point in time during resolution[15]:

The powers include the resolution authority ability to:

a) **Remove and replace the senior management and directors** and recover monies from responsible persons, including **claw-back** of variable remuneration;

b) **Appoint an administrator** to take control of and manage the affected firm with in order to restore the firm, or parts of its business, to ongoing and sustainable viability;

c) **Operate and resolve the firm**, including powers to terminate contracts, continue or assign contracts, purchase or sell assets, write down debt and take any other action necessary to restructure or wind down the firm's operations;

d) Ensure continuity of essential services and functions by **requiring other companies in the group to continue providing essential services to the entity in resolution (**any successor or acquirer) or procuring necessary services from unaffiliated third parties;

e) **Override rights of shareholders of the firm in resolution**, including requirements for shareholder approval of particular transactions, e.g. to approve a merger, acquisition, sale of business operations, recapitalisation or other measures to restructure and dispose of the firm's business or its liabilities and assets;

f) **Transfer or sell assets, rights and liabilities to a solvent third party (or a bridge institution)** notwithstanding any existing requirements for consent or novation and without this constituting termination event or event of default;

g) **Establish a temporary bridge institution** to take over operating certain critical functions and viable operations of a failed firm including the power to transfer and to reverse the transfers (subject to safeguards) to and from the bridge institution, to establish terms and conditions relating to its operation and termination;

h) **Establish a separate asset management vehicle** for closing or management of non-performing loans or difficult-to-value assets;

i) **Carry out bail-in** within resolution to achieve continuity of essential functions by recapitalising the entity providing these functions, or by capitalising a newly established entity or bridge institution to which these functions have been transferred;

j) **Temporarily stay the exercise of early termination rights** that may otherwise be triggered upon entry of a firm into resolution or in connection with the use of resolution powers;

k) **Impose a moratorium with a suspension of payments to unsecured creditors and customers** (except to clearing houses and settlements systems) and **a stay on creditor actions**, while protecting the eligible netting and collateral agreements; and

[15] In principle, there are two aims in the resolution process: achieving stabilisation through ensuring the continuity of systemically important functions and liquidation through orchestrating an orderly closure and wind-down of all parts of the firm's business while protecting insured depositors, insurance policy holders and other retail customers. In instances of public funding, exit will also be an objective.

l) **Effect the closure and orderly wind-down (liquidation) of the whole or part of a failing firm** with timely pay-out or transfer of insured deposits and prompt (e.g. within 7 days) access to transaction accounts and to segregated client funds.

The resolution authority should be able to use the following resolution tools:

- **Transfer** of assets and liabilities – without any prior consents normally required and without triggering early termination rights;
- Establish and operate **bridge institution**
- Carry out **bail-in** within institution through

i. writing down in a manner that respects the hierarchy of claims in liquidation (see KA 5.1) equity or other instruments of ownership of the firm, unsecured and uninsured creditor claims to the extent necessary to absorb the losses; and

ii. converting into equity or other instruments of ownership of the firm under resolution (or any successor in resolution or the parent company within the same jurisdiction), all or parts of unsecured and uninsured creditor claims in a manner that respects the hierarchy of claims in liquidation;

iii. upon entry into resolution, converting or writing-down any contingent convertible or contractual bail-in instruments whose terms had not been triggered prior to entry into resolution and treat the resulting instruments in line with (i) or (ii).

4. Set-off, netting, collateralisation, segregation and client assets

The legal framework on set-off, netting, collateralisation, and segregation of client assets should be clear, transparent and enforceable in resolution.

The KAs advocate that the entry into resolution should not normally trigger the early termination rights and the right to conduct set-off and netting. However, since it legally does (e.g. the events of default as defined in the ISDA or collateral documentation), the resolution authority should have the power to impose, on a discretionary basis, a stay on early termination rights where they arise be reason of entry into resolution. The stay, which can also be automatic, should be enforceable under a number of conditions and safeguards (Appendix I Annex 5) such as that the stay should apply to a defined group of contracts, be limited in time (e.g. not exceeding two days) and 'cherry picking' of only some contracts should be prevented.

Effective resolution regime should also allow for a rapid return of segregated client assets or the transfer of the client holdings to either a performing third party or a bridge institution.

KAs contain several principles related to client assets including definitions, rules on identification, segregation, record-keeping and safeguarding, resolution planning, transfer in resolution, shortfalls, cross-border issues as well as securities financing transactions, re-hypothecation and use of client assets (Appendix II, Annex 3). The principles build upon IOSCO's Recommendations Regarding the Protection of Client Assets (of January 2014).

5. Safeguards

The resolution authority should:

- respect hierarchy of claims in resolution but have flexibility to depart from it provided it is under transparent conditions;
- be capable to act flexibly and speedily (even if court orders are needed).

The resolution regime should:

- Provide for equity to absorb losses first, and cause no senior creditor to pay before subordinated debt (including capital) was written down;
- Respect the principle that a creditor should be 'no worse off in resolution than in liquidation' and foresee compensation if it is not the case;
- Provide protections for company directors and officers for actions taken under the resolution authority directions;
- Not provide for judicial actions which could constrain the implementation of, or result in a reversal of, measures taken by resolution authorities acting
- Instead provide for appropriate avenues to seek redress by awarding compensation *ex post*;
- Provide for flexibility to allow delaying market reporting, takeover or listings, if it affected successful resolution strategy.

6. Funding of firms in resolution

Resolution authorities should be unconstrained to resort to the public ownership or funding options.

Jurisdictions should have in place privately-financed deposit insurance mechanisms or resolution funds on an *ex ante* or *ex post* basis.

Conditions of public funding or public ownership should be clearly set out.

Temporary public funding should be used only if needed to accomplish orderly resolution and should be recovered from the FI firm or, if necessary, the industry as a whole. It should be subject to strict conditions to avoid moral hazard.

The authorities can allow temporary public ownership and/or control only as a last resort in order to continue critical operations while looking for permanent solutions, and for the overarching purpose of maintaining financial stability.

7. Legal framework conditions for cross-border cooperation

The mandate of a resolution authority should empower it to achieve co-operation with foreign resolution authorities. It should provide for the capacity, subject to adequate confidentiality requirements, to share information, including recovery and resolution plans (RRPs) with relevant foreign authorities (for example, members of a crisis management group (CMG)), where sharing is necessary for recovery and resolution planning or for implementing a coordinated resolution.

Resolution actions taken by another jurisdiction should not automatically trigger resolution action but the resolution authority should have discretion.

The resolution authority should have resolution powers over local branches of foreign firms and the capacity to use its powers either to support a resolution carried out by a foreign home authority (e.g. by ordering a transfer of property located in its jurisdiction to a bridge institution established by the foreign home authority) or, in exceptional cases, to take measures on its own initiative (ring-fencing). The later power can be used where the home jurisdiction is not taking action or acts in a manner that does not take sufficient account of the need to preserve the local jurisdiction's financial stability. The local resolution authority should notify and consult the foreign home authority before acting.

There should be transparent and expedited processes to give effect to foreign resolution measures, either by way of a mutual recognition process or by taking measures under the domestic resolution regime that support and are consistent with the resolution measures taken by the foreign home resolution authority. The recognition or support should be provisional on the equitable treatment of creditors in the foreign resolution proceeding.

8. Crisis Management Groups (CMGs)

Home and key host authorities of all G-SIFIs should maintain CMGs with the objective of enhancing preparedness for, and facilitating the management and resolution of, a cross-border financial crisis affecting the firm.

CMGs should include the supervisory authorities, central banks, resolution authorities, finance ministries and the public authorities responsible for guarantee schemes of jurisdictions that are home or host to entities of the group that are material to its resolution. CMGs should cooperate closely with authorities in other jurisdictions where firms have a systemic presence.

9. Institution specific cross-border cooperation agreements (COAGs)

Home and relevant host authorities that need to be involved in the planning and crisis resolution stages should conclude, at a minimum, institution-specific cooperation agreements for all G-SIFIs (COAGs). The existence of the agreement should be made public. The essential elements of these COAGs are set out in KA 9.1 and Appendix I - Annex 1.

10. Resolvability assessments

Home resolution authorities, in coordination with CMG host authorities, should regularly undertake, at least for G-SIFIs at a group level, resolvability assessments that evaluate the feasibility of resolution strategies and their credibility in light of the likely impact of the firm's failure on the financial system and the overall economy.

Host resolution authorities that conduct resolvability assessments of subsidiaries located in their jurisdiction should coordinate as far as possible with the home authority that conducts resolvability assessment for the group as a whole.

The assessments should be conducted in accordance with KA 10.2 and guidance set out in Appendix I, Annex 3.

To improve a firm's resolvability, supervisory authorities or resolution authorities should have appropriate powers, e.g. to require changes to a firm's business practices, structure or organisation with a view to reducing the complexity and costliness of resolution, duly taking into account the effect on the soundness and stability of ongoing business. To enable the continued operations of systemically important functions, authorities should evaluate whether to require legal and operational segregation of functions.

11. Recovery and resolution planning

Jurisdictions should put in place an ongoing, annually reviewable, process for recovery and resolution planning, covering, at a minimum, domestically incorporated G-SIFIs.

Robust and credible recovery and resolution plans (RRPs) (their essential elements set out in KA 11.5 and 11.6 and Appendix I, Annex 4) should be in place for all G-SIFIs and for any other firm that its home authority assesses could have an impact on financial stability in the event of its failure.

The RRP should be informed by resolvability assessments and take account of the specific circumstances of the firm and reflect its nature, complexity, interconnectedness, level of substitutability and size.

The firm's senior management should be responsible for providing the necessary input to the resolution authorities for:

(i) the assessment of the recovery plans – which should be prepared and maintained by the firm ; and

(ii) the preparation of resolution plans - by the resolution authority.

Firms should be required to ensure that key Service Level Agreements can be maintained in crisis situations and in resolution, and that the underlying contracts include provisions that prevent termination triggered by recovery or resolution events and facilitate transfer of the contract to a bridge institution or a third party acquirer.

At least for G-SIFIs, the home resolution authority should lead the development of the group resolution plan in coordination with all members of the firm's CMG. CMG host authorities or authorities of jurisdictions where the firm has a systemic presence should be given access to RRPs and the information and measures that would have an impact on their jurisdiction.

Host resolution authorities may maintain their own resolution plans for the firm's operations in their jurisdictions while ensuring that the plan is as consistent as possible with the group plan.

RRPs should be regularly updated, at least annually or where there are material changes to a firm business or structure, and subject to regular reviews by the firm's CMG. if the resolution authorities are not happy with the RRP, they (in consultation with one another) should require appropriate measures to address deficiencies.

The substantive resolution strategy for each G-SIFI should be subject to a review (at least annually or where appropriate) by top officials and involve a CEO. The operational plans for implementing each resolution strategy should be reviewed at least annually by top officials of the resolution authority.

12. Access to information and information sharing

There should be no legal, regulatory or policy impediments that hinder the appropriate exchange of information, including firm-specific information, between supervisory authorities, central banks, resolution authorities, finance ministries and the public authorities responsible for guarantee schemes, both at domestic and cross-border level. There can be restrictions in terms of who in the organisation obtains access to sensitive data (e.g. depending on seniority).

Firms should maintain Management Information Systems (MIS) containing a range of information, specified in KA 12.2, necessary for recovery and resolution planning, both in normal times and in resolution. Information should be available on a timely basis at the group level and the legal entity level (taking into account information needs under different resolution scenarios).

Annex II

List of the FSB Guidance to the Key Attributes

1. Guiding Principles on the Internal Total Loss-Absorbing Capacity of G-SIBs ('Internal TLAC')
2. Total Loss-Absorbing Capacity (TLAC) Principles and Term Sheet
3. Guidance on Arrangements to Support Operational Continuity in Resolution
4. Guiding principles on the temporary funding needed to support the orderly resolution of a global systemically important bank ("G-SIB")
5. Funding Strategy Elements of an Implementable Resolution Plan
6. Guidance on Continuity of Access to Financial Market Infrastructures (FMIs) for a Firm in Resolution
7. Principles on Bail-in Execution
8. Principles for Cross-border Effectiveness of Resolution Actions
9. Guidance on Cooperation and Information Sharing with Host Authorities of Jurisdictions where a G-SIFI has a Systemic Presence that are Not Represented on its CMG
10. Guidance on Recovery Triggers and Stress Scenarios
11. Guidance on Identification of Critical Functions and Critical Shared Services
12. Guidance on Developing Effective Resolution Strategies

Appendix 7: Questions in this Consultation Paper

1. Do you have any comments about any of the crisis preparedness proposals and the proposed new and supplementary powers or the ways in which they are proposed to be exercised?
2. Do you have any comments in relation to the DFSA's role as the resolution authority in the DIFC?
3. Do you have any comments in relation to the Resolution Matters?
4. Are there any other considerations that should be taken into account? If so what are they, and how should they be addressed?
5. Do you have any comments in relation to the proposals on cross-border resolution?
6. Are there any other considerations that should be taken into account?
7. Do you have any comments in relation to the proposed resolution powers or the conditions and modalities of their use by the DFSA?
8. Do you have any comments in relation to any aspect of the proposed resolution tools?
9. Are there any other considerations that should be taken into account?
10. Do you have any comments in relation to the proposed power?
11. Do you have any comments in relation to the proposed safeguards?