

Targeted consultation on the review of the crisis management and deposit insurance framework

Fields marked with * are mandatory.

Introduction and general context

Please note that the questionnaire provides for additional information through [hyperlinks \(light blue text\)](#) and [pop-up info boxes \(green text\)](#).

Background of this targeted consultation

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

In this context, the EU **bank crisis management and deposit insurance framework** lays out the rules for handling bank failures while protecting depositors. It consists of three EU legislative texts acting together with relevant national legislation: the [Bank Recovery and Resolution Directive \(BRRD – Directive 2014/59/EU\)](#), the [Single Resolution Mechanism Regulation \(SRMR – Regulation \(EU\) 806/2014\)](#), and the [Deposit Guarantee Schemes Directive \(DGSD – Directive 2014/49/EU\)](#). Provisions complementing the crisis management framework are also present in the [Capital Requirements Regulation \(CRR – Regulation \(EU\) 575/2013\)](#) and the [Capital Requirements Directive \(CRD – Directive 2013/36/EU\)](#). The [winding up Directive \(Directive 2001/24/EC\)](#) is also relevant to the framework. For the purpose of this consultation, reference will be made also to [insolvency proceedings applicable under national laws](#). For clarity, the consultation only concerns insolvency proceedings **applying to banks**. Other insolvency proceedings, notably those applying to other types of companies, are not the subject of this consultation.

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

- One of the cornerstones of the current framework is the objective of shielding public money from the effects of bank failures. Nevertheless, this has only been partially achieved. This has to do with the fact that the current framework creates incentives for national authorities to deal with failing or likely to fail (FOLF) banks through solutions that do not necessarily ensure an optimal outcome in terms of consistency and minimisation in the use of public funds. These incentives are partly generated by the misalignment between the conditions for accessing the resolution fund and certain (less stringent) conditions for accessing other forms of financial support under existing EU State aid rules, as well as the availability of tools in certain national insolvency proceedings (NIP), which are in practice similar to those available in resolution. Moreover, a reported difficulty for some small and medium-sized banks to issue certain financial instruments, that are relevant for the purpose of meeting their minimum requirement for own funds and eligible liabilities (MREL), may contribute to this misalignment of incentives.
- The procedures available in insolvency also differ widely across Member States, ranging from pure judicial procedures to administrative ones, which may entail tools and powers akin to those provided in BRRD/SRMR. These differences become relevant when solutions to manage failing banks are sought in insolvency, as they cannot ensure an overall consistent approach across Member States.
- The predictability of the current framework is impacted by various elements, such as divergence in the application of the [Public Interest Assessment \(PIA\)](#) by the Single Resolution Board (SRB) compared to National Resolution Authorities (NRA) outside the banking union. In addition, the existing differences among national insolvency frameworks (which have a bearing on the outcome of the PIA) and the fact that some of these national insolvency procedures are similar to those available in resolution, as well as the differences in the hierarchy of liabilities in insolvency across Member States, complicate the handling of banking crises in a cross-border context.
- Additional complexity comes from the fact that similar sources of funding may qualify as State aid or not and that this largely depends on the circumstances of the case. As a result, it may not be straightforward to predict *ex ante* if certain financial support is going to trigger a FOLF determination or not.
- The rules and decision-making processes for supervision and resolution, as well as the funding from the resolution fund, have been centralised in the banking union for a number of years, while deposit guarantee schemes are still national and depositors enjoy different levels and types of guarantees depending on their location. Similarly, differences in the functioning of national [deposit guarantee schemes \(DGSs\)](#) and their ability to handle adverse situations, as well as some practical difficulties (e.g., when a bank transfers its activities to another Member State and/or changes the affiliation to a DGS) are observed.
- Discrepancies in depositor protection across Member States in terms of scope of protection, such as [specific categories of depositors](#), and payout processes result in inconsistencies in access to financial safety nets for EU depositors (Study financed under the European Parliament pilot project 'creating a true banking union' on the options and national discretions under the [Deposit Guarantee Scheme Directive](#) and their treatment in the context of a European deposit insurance scheme and [EBA opinion of 8 August 2019](#), [EBA opinion of 30 October 2019](#), [EBA opinion of 23 January 2020](#) and [EBA opinion of 28 December 2020](#) issued under Article 19(6) DGSD in the context of DGSD review).

The possible revision of the resolution framework as well as a possible further harmonisation of insolvency law are also foreseen in the respective review clauses of the three legislative texts. (It is relevant in this respect to notice the European Commission's [report \(2019\) on the application and review of Directive 2014/59/EU \(BRRD\) and Regulation 806/2014 \(SRMR\)](#)). By reviewing the framework, the Commission aims to increase its efficiency, proportionality and overall coherence to manage bank crises in the EU, as well as to enhance the level of depositor protection, including through the creation of a common depositor protection mechanism in the banking union. Crisis management and deposit insurance, including a common funding scheme for the banking union, are strongly interlinked and inter-dependent, and present the potential for synergies if developed jointly. Additionally, in the context of the crisis management and deposit insurance framework review, the State aid framework for banks will also be reviewed with a view to ensuring consistency between the two frameworks, adequate burden-sharing of shareholders and creditors to protect taxpayers and preservation of financial stability.

Structure of this consultation and responding to this consultation

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

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

- Part 1 – General objectives and review focus (questions 1 to 6)
- Part 2 – Experience with the framework and lessons learned for the future framework
 - A. Resolution, liquidation and other available measures to handle banking crises (questions 7 to 28)
 - B. Level of harmonisation of creditor hierarchy in the EU and impact on 'no creditor worse off' principle (NCWO) (questions 29 to 30)
 - C. Depositor insurance (questions 31 to 39)

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

Views are welcome from all stakeholders.

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

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

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

The consultation will be open for 12 weeks.

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

More information on

- [this consultation](#)
- [the consultation document](#)
- [the consultation strategy](#)

- [the acronyms used in this consultation](#)
- [the public consultation launched in parallel](#)
- [banking union](#)
- [the protection of personal data regime for this consultation](#)

About you

* Language of my contribution

- ☐ Bulgarian
- ☐ Croatian
- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☒ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Irish
- ☐ Italian
- ☐ Latvian
- ☐ Lithuanian
- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian
- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

* I am giving my contribution as

- ☐ Academic/research institution
- ☐ Business association
- ☐ Company/business organisation
- ☐ Consumer organisation
- ☐ EU citizen
- ☐ Environmental organisation
- ☐ Non-EU citizen
- ☒ Non-governmental organisation (NGO)
- ☐ Public authority
- ☐ Trade union
- ☐ Other

* First name

Christian

* Surname

STIEFMUELLER

* Email (this won't be published)

christian.stiefmueller@finance-watch.org

* Organisation name

255 character(s) maximum

Finance Watch AISBL

* Organisation size

- ☐ Micro (1 to 9 employees)
- ☒ Small (10 to 49 employees)
- ☐ Medium (50 to 249 employees)
- ☐ Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

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* Country of origin

Please add your country of origin, or that of your organisation.

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Canada	India	Norway	Turkey
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● Cayman Islands	● Iran	● Pakistan	● Turks and Caicos Islands
● Central African Republic	● Iraq	● Palau	● Tuvalu
● Chad	● Ireland	● Palestine	● Uganda
● Chile	● Isle of Man	● Panama	● Ukraine
● China	● Israel	● Papua New Guinea	● United Arab Emirates
● Christmas Island	● Italy	● Paraguay	● United Kingdom
● Clipperton	● Jamaica	● Peru	● United States
● Cocos (Keeling) Islands	● Japan	● Philippines	● United States Minor Outlying Islands
● Colombia	● Jersey	● Pitcairn Islands	● Uruguay
● Comoros	● Jordan	● Poland	● US Virgin Islands
● Congo	● Kazakhstan	● Portugal	● Uzbekistan
● Cook Islands	● Kenya	● Puerto Rico	● Vanuatu
● Costa Rica	● Kiribati	● Qatar	● Vatican City
● Côte d'Ivoire	● Kosovo	● Réunion	● Venezuela
● Croatia	● Kuwait	● Romania	● Vietnam
● Cuba	● Kyrgyzstan	● Russia	● Wallis and Futuna
● Curaçao	● Laos	● Rwanda	● Western Sahara
● Cyprus	● Latvia	● Saint Barthélemy	● Yemen
● Czechia	● Lebanon	● Saint Helena Ascension and Tristan da Cunha	● Zambia
●	● Lesotho	●	● Zimbabwe

Democratic
Republic of the
Congo

Saint Kitts and
Nevis

☐ Denmark

☐ Liberia

☐ Saint Lucia

* Field of activity or sector (if applicable):

- ☐ Credit institution
- ☐ Payment and electronic money institution
- ☐ Financial infrastructure provider
- ☐ Investment firm
- ☐ Deposit guarantee scheme
- ☐ Non-financial company (incl. SME)
- ☐ Bank association
- ☒ Consumer association
- ☐ Supra-national authority
- ☐ Competent / resolution authorities
- ☐ Finance ministry
- ☐ Other national public authority.
- ☐ International organisation
- ☐ Retail investor
- ☐ Professional investor
- ☐ Consumer / user of financial services / (Private) depositor
- ☐ Independent research provider
- ☐ Other
- ☐ Not applicable

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association, 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* **Contribution publication privacy settings**

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.



Anonymous

Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

Public

Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

☒ I agree with the [personal data protection provisions](#)

What is the CMDI framework?

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

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

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

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

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

context of the banking union, these rules were further integrated by providing for the SRB as the single resolution authority and building a Single Resolution Fund (SRF) composed of contributions from credit institutions and certain investment firms in the participating Member States of the banking union.

Deposits (if not excluded under Article 5 DGSD) are protected up to EUR 100 000. This applies regardless of whether the bank is put into resolution or insolvency. In insolvency, the primary function of a DGS is to pay out depositors (Article 11(1) DGSD) within 7 days of a determination of unavailability of their deposits. In line with the DGSD, DGSs may also have functions other than the pay-out of depositors. As pay-out may not always be suitable in a crisis scenario due to the risk of [disrupting overall depositor confidence](#), some Member States allow the [DGS funds to be used to prevent the failure of a bank \(DGS preventive measures\) or finance a transfer of assets and liabilities to a buyer in insolvency to preserve the access to covered depositors \(DGS alternative measures\)](#). The DGSD provides a limit as regards the costs of such preventive and alternative measures. Moreover, DGSs can contribute financially to a bank's resolution, under certain circumstances.

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

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

The main policy objectives of the CMDI framework are to:

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

PART 1 – General objectives and review focus

Please note that **questions 1 to 6** of this targeted consultation **correspond to questions 1 to 6** of the [public consultation](#).

Question 1. In your view, has the current CMDI framework achieved the following objectives?

On a scale from 1 to 10 (1 being “achievement is very low” and 10 being “achievement is very high”), please rate each of the following objectives:

	1	2	3	4	5	6	7	8	9	10	Don know No opini
The framework achieved the objective of limiting the risk for financial stability stemming from bank failures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The framework achieved the objective of minimising recourse to public financing and taxpayers' money	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The framework achieved the objective of protecting depositors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The framework achieved the objective of breaking	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

the bank /sovereign loop											
The framework achieved the objective of fostering the level playing field among banks from different Member States											
The framework ensured legal certainty and predictability											
The framework achieved the objective of adequately addressing cross-border bank failures											
The scope of application of the framework beyond banks (which includes some investment firms but not, for											

example, payment service providers and e- money providers) is appropriate										
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Question 1.1 Please explain your answers to question 1:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Q.1.1.1. The current framework marks progress vis à vis the pre-2009 situation in that it provides a legal framework for addressing bank failures in the EU where there was none previously. So far, it has no been tested in a major crisis involving the potential failure of one, or several, global systemically important banks. The prevalent view among experts appears to be that the current framework could not cope with such a scenario without recourse to public financial support. That, in turn, would imply that progress since 2009 has been limited.

Q.1.1.2. Public financing and taxpayers' money continues to be used extensively in some member states to support failing banks. The 'precautionary recapitalisation' clause in Art. 32(4) BRRD, the lack of harmonisation of national insolvency frameworks, and the misalignment between the BRRD/SRM and the Commission's 2013 Banking Communication still provide a number of avenues for banks and national authorities to deploy public funds.

Q.1.1.3. The current framework provides protection for covered depositors while non-covered deposits remain exposed a priori to the risk of being bailed in in resolution. Whereas the existing rules exclude non-covered deposits from natural persons and micro-, small and medium-sized enterprises from eligible liabilities they are still at risk of being bailed in, pari passu with other unsecured creditors, if losses incurred by a failing bank exceed the available MREL.

Q.1.1.4. As demonstrated on multiple occasions, public financial support is still readily available to banks. Moral hazard, i.e. the tendency for bank management and owners to accept more risk in the knowledge that policymakers would rather support the bank with public funds than having to deal with its failure, therefore remains endemic, and Member States remain exposed to the attendant financial risk. Conversely, banks continue to hold substantial amounts of sovereign debt of their (home- and host-state) governments. In some Member States, nearly one-fifth of outstanding sovereign debt securities are held by domestic banks. At least in these Member States the bank-sovereign nexus appears to be unbroken.

Q.1.1.5. The lack of harmonisation of national insolvency frameworks, combined with big differences in the readiness - and/or ability - of national policymakers to lend public financial support to failing banks continues to cause material divergences between Member States and hence an un-level playing field for institutions.

Q.1.1.6. The introduction of the current framework has increased legal certainty and predictability compared to the pre-2009 situation. Supervisory and resolution structures and processes are complex, however, and rely on close coordination and cooperation between supervisory and resolution authorities, both at the national at EU level. In addition, differences between Member States' legal implementation and practical application of the framework increase the likelihood of divergent outcomes.

Q.1.1.7. So far there has not been a genuine test case to assess the cross-border effectiveness of the crisis management framework for a global systemically important bank. Other relevant precedents so far have not been encouraging, however: in the case of Banco Popular Español, the group's very small US subsidiary is understood to have caused significant complications that could, at some point, have jeopardised the successful outcome of the resolution process. In the case of ABLV, a Luxembourg court effectively rejected the ECB's FOLTF assessment, and the liquidation order of the bank's Latvian home-country authorities, resulting in a separate, entirely different outcome for the bank's local subsidiary.

Q.1.1.8. The extension of the framework to large, systemically important investment firms is justified and follows from the fact that most of them are designated, and regulated, as banking groups in their home jurisdiction(s) and, in some cases, listed as global systemically important banks by the FSB. In the light of recent events, in particular the Wirecard case, it would appear prudent to consider extending the framework to significant providers of payment and e-money services.

Question 1.2 Which additional objectives should the reform of the CMDI framework ensure?

Do you consider that the BRRD resolution toolbox already caters for all types of banks, depending on their resolution strategy?

In particular, are changes necessary to ensure that the measures available in the framework (including tools to manage the bank's crisis and external sources of funding) are used in a more proportionate manner, depending on the specificities of different banks, including the banks' different business models?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The existing framework already comprises a variety of instruments and measures that take into account proportionality. The remit of the SSM and SRB largely coincides in respect of larger banks, and both have issued guidance for "less significant institutions" that are outside of their direct supervision. These smaller institutions are unlikely to pose a risk to financial stability and therefore do not require resolution. Actual outcomes for such institutions vary considerably from one Member State to another, however, due to divergences between national insolvency frameworks. This fragmentation of the existing framework should be remedied as a matter of urgency. A harmonised, EU-wide insolvency framework would facilitate the liquidation of small and medium-sized institutions, in particular, and would be a major step towards ensuring consistent, and proportionate treatment across Member States.

We are aware that the current resolution framework poses difficulties for banks that rely mostly on funding from deposits and do not have ready access to the capital markets (see also Q.19). Finance Watch strongly believes that the diversity of business and funding models is an important asset that contributes to the resilience of European banking markets to systemic shocks and guarantees more choice and competitive offerings for bank customers. The crisis management framework should therefore not favour or disadvantage specific business models. It is worth noting, however, that this issue is likely to concern only a relatively small number of institutions. Most deposit-funded banks that do not routinely issue securities on the capital markets are small to medium-sized banks that will most probably not meet the public interest test,

and hence are not strictly required to issue bail-inable debt to recapitalise the business in resolution. It should be added, moreover, that the market for bail-inable, MREL-eligible securities is still developing and the current situation should be regarded as a transitional phase where banks and investors become more comfortable with structuring and pricing these new securities.

Question 2. Do you consider that the measures and procedures available in the current legislative framework have fulfilled the **intended policy objectives and contributed effectively to the management of banks' crises?**

On a scale from 1 to 10 (1 being “have not fulfilled the intended policy objectives/have not contributed effectively to the management of banks' crises” and 10 being “have entirely fulfilled the intended policy objectives /have contributed effectively to the management of banks' crises”), please rate each of the following measures:

	1	2	3	4	5	6	7	8	9	10	Do know or op
Early intervention measures	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Precautionary measures	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
DGS preventive measures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Resolution	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
National insolvency proceedings, including DGS alternative measures where available	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	

Question 2.1 If possible, please explain your replies to question 2, and in particular elaborate on which elements of the framework could in your view be improved:

2.1.1. Early intervention measures (EIM) should be the first line of defence against the potentially disorderly failure of a bank. We note, however, that a) CRD IV and BRRD II provide supervisory and resolution authorities with potentially overlapping EIM competencies; and b) authorities are still reluctant to make use of these competencies in practice. A forthcoming review of the framework should aim at removing overlaps and creating a clear, continuous escalation path where responsibilities are allocated unequivocally to either supervisory or resolution authorities.

2.1.2. Precautionary measures (item (d) of Art. 32(4) BRRD) typically involve public financial support. In general, their use should be discouraged and the conditions justifying their use should be further restricted in any forthcoming review of the framework (see Q.1. and Q.8).

2.1.3. Preventive measures funded by DGS (and IPS) are a useful additional component of the crisis management framework. It is important to point out, however, that the scope for DGS to intervene pre-emptively to support a bank in distress is determined largely by national legislation (within the limits of Art. 11 (3) DGSD); it differs significantly between Member States and so does the financial (and operational) capacity of individual DGS (and IPS). A forthcoming review of the framework should aim at gradually integrating these measures, which are currently set out in the DGSD, into the main recovery and resolution framework of the BRRD/SRMR and at harmonising them to an EU-wide standard.

2.1.4. Although there has only been this one precedent so far, the resolution of Banco Popular Español has demonstrated how the current framework could be applied in a way that maintains financial stability, avoids the use of public funds, ensures the continuous operation and preserves much of the institution's business. To encourage the use of the resolution tools and render bail-outs less frequent, the framework should further restrict the availability of alternative mechanisms, e.g. by aligning the 2013 Banking Communication with the BRRD/SRMR framework, and provide better legal protection for competent and resolution authorities, e.g. by reversing the burden of proof for the 'failing or likely to fail' (FOLTF) decision.

2.1.5. As mentioned previously (Q.1.), discrepancies between national bank insolvency frameworks, and the instruments available to national resolution authorities, result in a significant degree of fragmentation and competitive distortion in the Banking Union. Harmonisation of these frameworks, and the standardisation of insolvency tools, would be of paramount importance.

Question 3. Should the use of the tools and powers in the BRRD be exclusively made available in resolution or should similar tools and powers be also available for those banks for which it is considered that there is no public interest in resolution?

In this respect, would you see merit in extending the use of resolution, to apply it to a larger population of banks than it currently has been applied to? Or, conversely, would you see merit in introducing harmonised tools outside of resolution (i.e. integrated in national insolvency proceedings or in addition to those) and using them when the public interest test is not met? If such a tool is introduced, should it be handled centrally at the European (banking

union) level or by national authorities?

Please explain and provide arguments for your view:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We do not believe that resolution tools should be made available in cases when the public interest test is not met. If resolution authorities are granted powers, e.g. to interfere with the ownership rights of shareholders and to impose losses on investors, they have to be justified by the public interest (ECJ, Kotnik, C-526/14). The same applies if public funds are to be deployed to prevent the disorderly failure of a (privately-owned) institution. In the absence of a demonstrable public interest it is difficult to see how these powers could be justified.

Making an extended set of tools available for use outside resolution, i.e. under national insolvency frameworks, could also result in the emergence of parallel structures and processes at the EU and national level and further exacerbate the divergence between Member States. If similar tools were available to national authorities (under national insolvency laws) as they are at the EU level (under resolution) this parallelism would also create incentives for institutions to engage in regulatory arbitrage. In order to preserve the integrity of the Single Resolution Mechanism (SRM), and ensure their uniform application, the handling of resolution tools should be reserved to the Single Resolution Board (SRB).

We are mindful that there are valid arguments in favour of allowing for the sale of a failed bank in a way that preserves as much as possible of the value of its assets and franchise. It is worth pointing out, however, that the franchise value, or brand equity, of a failed bank is almost always likely to be tarnished and may be overestimated. For institutions that do not meet the public interest test, a 'closed bank' sale, with the option for interested parties to acquire the assets out of insolvency, would appear sufficient in most cases.

Question 4. Do you see merit in revising the conditions to access different sources of funding in resolution and in insolvency (i.e. resolution funds and DGS)?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 4.1 Would an alignment of those conditions be justified?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

If you think an alignment of those conditions would be justified, how should this be achieved and what would the impact of such a revision be on the incentives to use one procedure or the other?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.4.2. below

Question 4.2 Please explain and provide arguments for your views expresses in questions 4 and 4.1:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Access to the resolution fund is determined by Art. 44(5) BRRD, which requires a minimum of eight per cent. of total liabilities and own funds to be bailed in previously. This 'burden sharing' threshold is critical, in our view, to preserve the credibility of the framework and should not be diluted. We note that the recent agreement of Member States to create a backstop to the Single Resolution Fund (SRF), provided by the European Stability Mechanism (ESM), is a critical step to enhance the robustness and credibility of EU resolution funding arrangements.

Access to DGS funds in resolution is already provided for in Art. 109 BRRD but has been rarely used in practice, primarily as a result of the elevated ranking (super-priority) of DGS claims in insolvency (Art. 108(1) BRRD), combined with the least cost test (LCT) (Art. 109(1) BRRD). This legal hurdle could be addressed by removing the super-priority of DGS claims. There are, however, other, practical obstacles that complicate the implementation in the EU of a model akin to that practised in other jurisdictions, such as the US (FDIC).

As of today, the financial and operational capacity of national DGS varies significantly across Member States, and so do other relevant factors, such as the relative size of the banking sector vis à vis the host-state economy, banks' financial strength and asset quality, ownership structures, and the degree of market concentration. The proposed European Deposit Insurance Scheme (EDIS) is intended to address these divergences and could, in due course, become a potential source of resolution funding at the EU level. In the absence of an agreed, binding roadmap and timeline for the introduction of EDIS, however, fragmentation and heterogeneity at the Member State level are likely to pose formidable challenges to the consistent, and harmonised use of DGS in resolution. In the interest of promoting convergence rather than further fragmentation, it would appear preferable to maintain the structural separation of resolution and deposit guarantee funds, at least until EDIS has become operational.

Question 5. Bearing in mind the underlying principle of protection of taxpayers, should the future framework maintain the measures currently available when the conditions for resolution and insolvency are not met (i.e. precautionary measures, early intervention measures and DGS preventive measures)?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 5.1 Should these measures be amended?



Yes

☐ No

☐ Don't know / no opinion / not relevant

If you think these measures should be amended, please explain why and how?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.2. and Q.4. above.

Question 5.2 Please elaborate on your answers to questions 5 and 5.1:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.2. and Q.4. above

Question 6. Do you agree or disagree with the following statements regarding a potential reform of the use of DGS funds in the future framework?

	Agree	Disagree	Don't know / no opinion / not relevant
The DGSs should only be allowed to pay out depositors, when deposits are unavailable, or contribute to resolution (i.e. DGS preventive or alternative measures should be eliminated).	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
The possibility for DGSs to use their funds to prevent the failure of a bank, within pre-established safeguards (i.e. DGS preventive measures), should be preserved.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The possibility for a DGS to finance measures other than a payout, such as a sale of the bank or part of it to a buyer, in the context of insolvency proceedings (i.e. DGS alternative measures), if it is not more costly than payout, should be preserved.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

The conditions for preventive and alternative measures (particularly the least cost methodology) should be harmonised across Member States.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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Question 6.1 If none of the statements listed in Question 6 does reflect your views or you have additional considerations, please provide further details:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The involvement of DGS in preventive measures (Art. 11(3) DGSD), i.e. prior to an FOLTF decision, should be regarded as part of a continuum of crisis management tools and should be maintained. For consistency, these measures should be incorporated into the BRRD/SRMR framework. Criteria and conditions, in particular, for the LCT, should be further harmonised in order to improve convergence between Member States. A clear distinction should be drawn between these preventive measures, which should serve to stabilise the institution, and preserve it as a 'going concern', and measures that facilitate its exit from the market (alternative measures). The availability of DGS to support alternative measures should be handled restrictively and with caution to minimise potential overlap with the resolution framework and the risk of regulatory arbitrage (see Q.2.1 and Q.3).

PART 2 – Experience with the framework and lessons learned for the future framework – detailed section per topic

PART 2 of this questionnaire is divided into the following sections:

- A. Resolution, liquidation and other available measures to handle banking crises (Questions 7 to 28)
- B. Level of harmonisation of creditor hierarchy in the EU and impact on 'no creditor worse off' principle (NCWO) (Questions 29 to 30)
- C. Depositor insurance (Questions 31 to 39)

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

I. Measures available before a bank's failure

Early intervention measures (EIMs)

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

Experience shows, however, that early intervention measures have hardly been used so far. Reasons for such limited use include the overlap between some early intervention measures and the supervisory actions available to supervisors as part of their prudential powers ([EBA Discussion Paper on the Application of early intervention measures in the European Union according to Articles 27-29 of the BRRD \(EBA/DP/2020/02\)](#)), the lack of a directly applicable legal basis at banking union level to activate **early intervention measures**, the conditions for their application and interactions with other Union legislation (Market Abuse Regulation) ([see also EBA Discussion Paper on the Application of early intervention measures in the European Union according to Articles 27-29 of the BRRD \(EBA/DP/2020/02\)](#)). It might be necessary to assess whether the use of EIMs could be facilitated, while remaining consistent with the need for a proportionate approach.

Question 7. Please respond to the following questions by yes or no:

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

Question 7.1 Please elaborate on what in your view the main potential improvements would be:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Seamless coordination and cooperation between supervisory and resolution authorities is critical to ensure the proper functioning of the CMDI framework. There should be a clearly defined escalation path. Existing overlaps between supervisory measures (Art. 102-104 CRD V) and early intervention measures (Art. 27-29 BRRD II) should be removed.

In this context, we would support the proposal by the EBA in its recent discussion paper (EBA/DP/2020/02, pg. 32-33) to amend the conditions in Art. 27(1) BRRD so that early intervention measures may be taken by the resolution authority if a) the institution meets the conditions specified in Article 102 CRD); and (ii) the viability of the institution might be endangered and the results of the remedial actions taken by the entity, if any, or supervisory powers taken so far have been insufficient (EBA/DP/2020/02, option 1.1.b. on pg. 33). This would help define a clear escalation path and draw a line between supervision and crisis management

measures.

It is widely recognised that supervisors are hesitant to apply early intervention measures. Quantitative triggers, such as the own funds threshold (1.5%) in Art. 27(1) BRRD II, are useful as a backstop and should be maintained. For clarity, and to improve legal certainty the existing threshold could be amended, as suggested by the EBA in the above-mentioned discussion paper (EBA/DP/2020/02, option 6.2.b. on pg. 46).

Precautionary measures

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

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

Past cases show that this tool is a useful element of the crisis management framework, provided that the conditions for its application are met. Past work has also highlighted the possible use of precautionary recapitalisation as a means to provide relief measures through the transfer of impaired assets (see [European Commission staff working document \(March 2018\), AMC Blueprint](#)). Similar considerations have been extended to asset protection schemes (European Commission, 16 December 2020, [Communication from the Commission: Tackling non-performing loans in the aftermath of the COVID-19 pandemic \(COM\(2020\)822 final\)](#), p.16).

Question 8. Should the legislative provisions on precautionary measures be amended? What are, in your view, the main potential amendments?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 8.1 Please explain your answer to question 8:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Precautionary measures, in particular Art. 32(4) BRRD II, provide options to bypass the resolution process and are therefore particularly susceptible to regulatory arbitrage. The conditions for invoking precautionary measures in the current framework should be tightened as a matter of urgency.

To reduce incentives for regulatory arbitrage between the resolution framework and access to State Aid under national insolvency laws the 'burden sharing' requirements under the 2013 Banking Communication need to be aligned with the respective provisions of Art. 44(5) BRRD II, i.e. equity, junior and senior unsecured debtholders have to absorb losses equal to at least 8% of total liabilities and own funds before public financial support can be extended;

To ensure that precautionary measures are indeed temporary, as stipulated in Art. 32(4) BRRD II, any public financial support should be subject to strict time limits (max. 2-3 years), ie. guarantees should expire, and public funding extended to the institution should be repayable accordingly. Funding should be granted only

on the basis of a revised recovery plan (Art. 5 and 6 BRRD II), which incorporates the binding assumption that public funding is repaid in time and in full and Art. 5(3) BRRD II should be amended accordingly. Any renewal or extension of support should be submitted to the resolution authority for review and approval, which should only be granted for a maximum period of one year.

DGS preventive measures (Article 11(3) DGSD)

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

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

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

Question 9. In view of past experience with these types of measures, should the conditions for the application of DGS preventive measures be clarified in the future framework?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 9.1 Please explain your answer to question 9 specifying what are, in your view, the main potential clarifications:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As mentioned previously, preventive measures involving the use of DGS (Art. 11(3) DGSD) need to be further specified. In light of the Banca Tercas case (ECJ C-425/19 P), in particular, it appears necessary to clarify further under which conditions the use of DGS funds should be considered as extraordinary public financial support for the purposes of Art. 32 BRRD II, and thus as a determinant of a bank being failing or likely to fail.

Pending the introduction of an EU-wide deposit guarantee scheme (EDIS), DGS - and their use in resolution - are still largely governed by national law. Relevant national legislation should be harmonised accordingly to provide for a standardised, and limited, set of permitted scenarios. We would like to reiterate that national insolvency frameworks should avoid duplicating the toolset that is available in resolution under the BRRD.

II. Measures available to manage the failure of banks

The BRRD provides for a comprehensive and flexible set of tools, ranging from the power to sell the bank's business entirely or partially, to the transfer of critical functions to a bridge institution or the transfer of non-performing assets to

an asset management vehicle (AMV) and the bail-in of liabilities to absorb the losses and recapitalise the bank. The framework also provides for different sources of funding for such tools, including external funding, mainly through the resolution fund and the DGSs.

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

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

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

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

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

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

Resolution authorities can only apply resolution action to a failing institution when they consider that such action is necessary in the public interest. According to Article 32(5) BRRD, the public interest criterion is met when resolution action is necessary for the achievement of one or more of the resolution objectives and the winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent. The resolution objectives are considered to be of equal importance and must be balanced as appropriate to the nature and circumstances of each case.

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

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

Question 10. What are your views on the public interest assessment?

Please specify if you agree or disagree with the following statements:

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

Question 10.1 Please explain your answer to question 10:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The legal basis for the public interest test (Art. 32(5) BRRD II) provides resolution authorities with a significant level of discretion, which appears appropriate given the wide range of scenarios it is intended to cover. It has proven difficult, however, to ensure its consistent practical implementation. This is attributable primarily to divergences between national insolvency frameworks. In some instances, e.g. the case of Veneto Banca and Banca Popolare di Vicenza, national insolvency arrangements produce outcomes that are similar to those typically associated with resolution, even though the public interest test was negative. Such outcomes are detrimental to the credibility of the resolution framework as a whole and create an un-level playing field for financial institutions.

The mandate to EBA in Art. 32(6) BRRD II could be reissued, adding a more granular definition of the factors that should, or should not, be considered as part of the public interest test. The designation of an institution as (global or other) 'systemically important, or 'significant' should, arguably, be considered as a legal presumption of public interest. Other indicators of public interest, e.g. the provision of critical services and/or a lack of substitutability, should be specified and a methodology defined for their assessment. It would also seem appropriate to clarify, at which level public interest should be assessed. Viewed in the context of Art. 31 (2) and 32(4) (item d.) it would appear clear that the protection of public goods afforded through the public interest test is aimed primarily at the EU-wide and Member State level. A more granular frame of reference, e.g. focusing on the regional or local level, has not been ruled in or out explicitly. To improve convergence in the application of the public interest test further clarification may be required.

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

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

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

Question 11. Do you consider that the existing legal provisions should be further amended to ensure better alignment between the conditions required to declare a bank FOLF and the triggers to initiate insolvency proceedings?

How can further alignment be pursued while preserving the necessary features of the insolvency proceedings available at national level?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 11.1 Please explain your answer to question 11:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Whereas the BRRD/SRMR provide detailed rules for initiating resolution they are less prescriptive regarding the triggers for insolvency proceedings, which are governed by national law. Even with the recent insertion of Art. 32b BRRD II, Member States still appear to have a significant degree of discretion to determine, under national law, when insolvency proceedings are opened in respect of a bank, and how. It appears clear from Art. 32 and 32a BRRD II that a bank that is declared failing or likely to fail, but does meet the public interest test, and therefore does not enter resolution, is meant to exit the market. As long as national arrangements for triggering insolvency proceedings are not fully harmonised it is far from certain, however, if and how this result can be achieved, reliably and consistently, in all Member States. One potentially effective approach, which could be implemented in EU law as part of the forthcoming CDMI review, would be to ensure, by way of an amendment of Art. 18 CRD V, that the banking licence of an institution that has been declared 'failing or likely to fail', and has not been placed into resolution, can be withdrawn immediately.

Question 12. Do you think that the definition of winding-up should be further clarified in order to ensure that banks that have been declared FOLF and were not subject to resolution exit the banking market in a reasonable timeframe?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 12.1 Please explain your answer to question 12:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As mentioned previously (Q.12 above), the process of "winding up" is determined largely by Member State insolvency proceedings. The generic definition of the term in item 54 of Art. 2(1) BRRD II is too vague and does not sufficiently specify the intended outcome, which is to facilitate the exit of a failed institution from the market. The definition should be amended to clarify that a) the institution has to be wound up in its entirety, i. e. all assets must be realised; and b) the process has to result in its removal from the market. The text of Art. 2(1) BRRD II should be amended accordingly.

Question 13. Do you agree that the supervisor should be given the power to withdraw the licence in all FOLF cases?

Please explain whether this can improve the possibility of a bank effectively exiting the market within a short time frame, and whether further certainty is needed on the discretionary power of the competent authority to withdraw the authorisation of an institution in those conditions.

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 13.1 Please explain your answer to question 13:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.11.1 above.

Question 14. Do you consider that, based on past cases of application, FOLF has been triggered on time, too early or too late?

- ☐ On time
- ☐ Too early
- ☒ Too late
- ☐ Don't know / no opinion / not relevant

Question 14.1 Please elaborate on your answer to question 14:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

There is ample evidence from research conducted both inside and outside the EU that the capital position of distressed banks has often been severely eroded by the time that FOLTF (or its equivalent) is triggered. In many cases, FOLTF is precipitated by a 'silent run' that starves an institution of liquidity rather than by the proactive intervention of authorities responding to a visible, but gradual decline in its capital position. A review of the CMDI framework should aim at encouraging authorities to take a more proactive stance towards FOLTF to ensure that institutions' own capacity to absorb losses is maintained as much as possible and potential risks to the financial system and the general public are minimised. This could be achieved by a) reducing obstacles and risks for authorities to take regulatory action; and b) ensuring that institutions are resolvable.

Question 15. Do you consider that the current provisions ensure that the competent authorities can trigger FOLF sufficiently early in the process and have sufficient incentives to do so?

In other words, are the correct incentives for responsible authorities to trigger FOLF in place?

- ☐ Yes
- ☒ No
- ☐ Don't know / no opinion / not relevant

Question 15.1 If not, what possible amendments/additions can be provided in the legislation to improve this? Please elaborate:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See 14.1 above. Authorities may be reluctant to declare FOLTF for a number of reasons. Concerns about being exposed to litigation certainly play a major role in this context. Reversing the burden of proof regarding the FOLTF decision in favour of the authority, possibly coupled with the right to immediate judicial review, as is the case in other jurisdictions (e.g. the US), could be an effective way to reduce legal risk and encourage authorities to act in a more timely and proactive manner.

Another issue appears to be lingering doubts about resolvability. So far, successful cases of bank resolution in the EU have been few and far between. More often than not, authorities and policymakers have chosen to bypass the resolution regime. This reluctance to apply the current framework 'by the book' signals a profound lack of confidence in its effectiveness and has severely undermined its credibility. In the absence of

a track record of successful resolution cases it is not at all surprising that authorities lack both the experience and the trust to make use of the available resolution tools. In order to start building such a track record authorities have to be satisfied, first of all, that institutions under their purview are indeed resolvable. Whereas progress has been made in this respect we understand that there are still grave doubts, in particular concerning the resolvability of large (global and other) 'systemically important' institutions. Achieving resolvability for all institutions should not be a 'moving target' and it may be appropriate for legislators to set a firm, and ambitious, target date for authorities by which all EU institutions must be deemed safely and reliably resolvable.

Adequacy of available tools in resolution and insolvency

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

Question 16. Do you consider the set of tools available in resolution and insolvency (in your Member State) sufficient to cater for the potential failure of all banks?

- ☐ Yes
- ☐ No
- ☒ Don't know / no opinion / not relevant

Question 16.1 Please explain your answer to question 16:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We observe, on a general note, that divergences between national insolvency frameworks have a tendency to distort the level playing field within the Banking Union and reduce legal certainty as to the outcome of insolvency proceedings. Harmonisation is therefore of the utmost importance. A standardised set of insolvency tools for all Member States should be narrow, complementary to the resolution framework, and avoid duplication of the tools that are available in resolution.

Question 17. What further measures could be taken regarding the availability, effectiveness and fitness of tools in the framework?

	Agree	Disagree	Don't know / no opinion / not relevant
No additional tools are needed but the existing tools in the resolution framework should be improved	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Additional tools should be introduced in the EU resolution framework	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Additional harmonised tools should be introduced in the insolvency frameworks of all Member States	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Additional tools should be introduced in both resolution and insolvency frameworks of all Member States	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Question 17.1 Please explain your answer to question 17, specify what type of tool you would envisage and describe briefly its characteristics:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q. 16.1 above.

Question 18. Would you see merit in introducing an orderly liquidation tool, i.e. the power to sell the business of a bank or parts of it, possibly with funding from the DGS under Article 11(6) DGSD, also in cases where there is no public interest in putting the bank in resolution?

- ☐ Yes
- ☐ No
- ☒ Don't know / no opinion / not relevant

Question 18.1 Please explain your answer to question 18:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.16.1 and Q.17 above.

Resolution strategy

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

However, depending on the circumstances, it may be useful to consider the case of smaller and medium-sized institutions with predominantly equity and deposit-based funding, which may have a positive public interest to be resolved, but whose business model may not sustain an MREL calibration necessary to fully recapitalise the bank. For

such cases, other resolution strategies are available in the framework such as the sale of business or bridge bank which, depending on the circumstances, may allow lower MREL targets and may be financed from sources of financing other than the resolution fund (for example, DGS).

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

Question 19. Do the current legislative provisions provide an adequate framework and an adequate source of financing for resolution authorities to effectively implement a transfer strategy (i.e. sale of business or bridge bank) in resolution to small/medium sized banks with predominantly deposit-based funding that have a positive public interest assessment (PIA) implying that they should undergo resolution?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 19.1 Please explain your answer to question 19:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.2 above. We appreciate that banks that are predominantly funded by deposits and do not have ready access to the capital markets face challenges to build up the required levels of loss-absorbing capacity, in particular when it comes to issuing MREL-eligible debt instrument. It is important, however, to bear in mind that this challenge a) affects a finite number of such banks (which are of public interest and cannot safely be wound down); and b) is likely to be transitory (in that it can be addressed over time by these banks adapting their funding models).

Finance Watch strongly believes that the diversity of business and funding models is an important asset that contributes to the resilience of European banking markets to systemic shocks and guarantees more choice and competitive offerings for bank customers. We do not dismiss the challenge for larger deposit-funded banks to build up adequate levels of MREL. We note, however, that markets for MREL-eligible securities is relatively new and still developing. Uncertainty about the status of senior unsecured debt, and the eventual compromise that has seen the introduction of senior non-preferred debt, has not been helpful in this respect. It seems realistic, however, to expect that larger institutions whose resolution plans foresee outcomes other than orderly liquidation will be able to adapt their funding structures over time to meet their MREL requirements. We note also that such institutions are more likely to be part of sectoral IPSs, which offer alternative access to emergency funding and could mitigate the shortage of market-based debt funding, at least temporarily.

The discussion about access to the MREL market should be strictly separated from the related, but altogether different issue of capital strength and profitability. It is widely recognised that medium-sized banks with a predominantly retail-focused, deposit-funded business model are particularly exposed to intense competition, putting pressure on profitability. This, in turn, renders internal capital formation more difficult and access to external funding more expensive. These structural issues cannot, and should not, be addressed, however, through the CMDI framework. The objective of restoring competitive parity between banks of

different sizes and business models, and to maintain a healthy level of diversity in the EU banking market, should be pursued with other regulatory instruments (e.g. merger control, and the proposed 'output floor' for internal ratings-based risk models).

Funding sources in resolution

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

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

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

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

Question 20. What are your views on the access conditions to funding sources in resolution?

	Agree	Disagree	Don't know / no opinion / not relevant
The access conditions in BRRD/SRMR to allow for the use of the RF/SRF are adequate and proportionate to ensure that resolution can apply to potentially any bank, while taking into account the resolution strategy applied	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

There is merit in providing a clear distinction in the law between access conditions to the RF/SRF depending on whether its intervention is meant to absorb losses or to provide liquidity	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The access conditions provided for in BRRD/SRMR to allow the authorities to use the DGS funds in resolution are adequate and proportionate to ensure that resolution can apply to potentially any bank, while taking into account the resolution strategy applied	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
The access conditions to funding in resolution should be modified for certain banks (smaller/medium sized, with certain business models characterised by prevalence of deposit funding) for more proportionality	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
The DGS/EDIS funds should be available to be used in resolution independently from the use of the RF/SRF and under different conditions than those required to access RF/SRF. In particular, it should be clarified that the use of DGS does not require a minimum bail-in of 8% of total liabilities including own funds	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Additional sources of funding should be enabled.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Question 20.1 Please explain your answer to question 20:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.4 and Q.9 above.

Sources of funding available in insolvency

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

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

- DGS funds to finance alternative measures pursuant to Article 11(6) DGSD. In this case, the DGS can provide funding to support a transaction to the extent that this is necessary to preserve access to covered deposits and that it complies with the least cost test (i.e. the loss for the DGS is lower than the loss it would have borne in case of payout in insolvency) and State aid rules, as applicable
- Financial support from the public budget. Such financial support can be provided by Member States subject to compliance with the requirements enshrined in the State aid framework (this includes first and foremost the [2013 banking Communication](#)), which include among other things burden sharing by shareholders and subordinated debt and a requirement that the aid is granted in the amount necessary to facilitate an orderly exit of the bank from the market

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

Question 21. In view of past experience, do you consider that the future framework should promote further alignment in the conditions for accessing external funding in insolvency and in resolution?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 21.1 Please explain your answer to question 21:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We refer to our previous comments regarding the use of DGS in insolvency. Pending the introduction of an EU-wide DGS (EDIS), subject to a common legal framework governing its use, we are concerned that promoting the involvement of national DGS in insolvency would likely exacerbate existing divergences between national insolvency regimes, and further increase fragmentation. The availability of DGS funding in insolvency should be standardised as part of a broader initiative to harmonise national insolvency frameworks.

The alignment of the State Aid framework (2013 Banking Communication) with the 'burden sharing' rules under the BRRD is critical to reduce incentives for circumventing resolution and to restore the credibility of the resolution framework (see also Q.8.1 above).

Governance and funding

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

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

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

Question 22. Do you consider that governance arrangements should be revised to allow further alignment with the nature of the funding source (national/supra-national)?

- ☐ Yes
- ☐ No
- ☒ Don't know / no opinion / not relevant

Question 22.1 Please explain your answer to question 22:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

At the present time, with insolvency frameworks and DGSs still governed at the Member State level, the current arrangements appear appropriate. Going forward it appears logical that the completion of a seamless Banking Union should coincide with the introduction of a governance framework that is largely harmonised and coordinated at the EU level. Failing banks should be resolved/liquidated under the same rules, with access to the same sources of funding, and at the same conditions.

Against this background, the emphasis of the current review of the CMDI framework should be placed on promoting further harmonisation and strengthening European structures and institutions. This applies, in particular, for national insolvency and DGS frameworks, which should be aligned over time towards a common 'point of departure' from which the transition towards joint European structures and processes could be initiated. This would be the case, for instance, for EDIS, which could be built up gradually and in parallel with the development of national DGSs. Once fully funded and operational EDIS could conceivably play a role in the CMDI framework, alongside the SRF and administered by the SRB. Until then, however, dedicated funds, such as the SRF should be viewed as the principal source of resolution funding.

Question 23. Is there room to improve the articulation between the roles of SRB and national authorities when the DGS is used to finance the resolution of a bank in the SRB remit?

- ☐ Yes
- ☐ No
- ☒ Don't know / no opinion / not relevant

Question 23.1 Please explain your answer to question 23:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.22.1 above.

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

MREL rules are an essential part of the framework, as they aim to ensure that banks can count on sufficient amounts of easily bail-inable liabilities to increase their resilience, ensure resolvability according to the resolution strategy identified

and preserve the stability of the financial system in the eventual implementation of the resolution strategy. The bank-specific MREL calibration by the resolution authority reflects the chosen resolution strategy. In addition, the MREL capacity is key to ensure a sufficient burden sharing by the existing shareholders and creditors in case of failure.

At the same time, the ability to issue MREL, particularly through subordinated instruments, depends on several features of each bank and its business model. Certain banks (e.g. some banks with traditional funding models relying largely on deposits) may have more difficulties in accessing debt issuance markets than other, more complex, institutions. While significant progress has been achieved by banks in reducing MREL shortfalls over the past years, when it comes to reaching their MREL targets under the applicable resolution strategy (and complying, if needed, with the conditions for accessing the resolution fund), challenges remain for certain banks ([joint report by the services of the European Commission, the European Central Bank \(ECB\) and the Single Resolution Board \(SRB\) \(November 2020\), Monitoring report on risk reduction indicators](#), pg 33.). They relate to the sustainable build-up of MREL-eligible instruments, especially against the background of fragile profitability and capability to roll-over instruments in the short-term, in particular in times of economic crisis.

Question 24. What are your views on the prospect of MREL compliance by all banks, including in the particular case of smaller/medium sized banks with traditional business models?

	Agree	Disagree	Don't know / no opinion / not relevant
While issuing MREL-eligible instruments remains a priority, certain banks may not be capable of closing the shortfall sustainably for lack of market access.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Possible adverse market and economic circumstances can also affect the issuance capacity of certain banks.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Transitional periods could be a tool to deal with MREL shortfalls, resolution authorities could consider prolonging these under the current framework.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 24.1 Please explain your answer to question 24:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.19.1 and 2 above.

Question 25. In case of failure of banks, which may lack sufficient amounts of subordinate debt (see question above) and/or would not meet the PIA criteria, what are your views on possible adjustments to the MREL requirements?

	Agree	Disagree	Don't know / no opinion / not relevant
MREL adjustments for resolution strategies other than bail-in can help in this context	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Rules defining how the MREL is set for banks likely not to meet the PIA criteria should be clarified	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
In any case, for all banks, an adequate burden sharing by existing shareholders and creditors should be ensured	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 25.1 Please explain your answer to question 25:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The methodology for assessing MREL under the existing framework already provides for a certain amount of flexibility, notably in the determination of the recapitalisation amount (RCA), to account for different resolution strategies. It is worth bearing in mind, however, that the actual resolution process may not always develop as planned, in particular when it relies on a market-based outcome, such as a sale. It would appear appropriate, therefore, not to compromise on the minimum amount of financial resources that are available in resolution to stabilise and restructure the institution.

Treatment of retail clients under the bail-in tool

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

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

In order to ensure that retail investors do not hold excessive amounts of certain MREL instruments, [BRRD II \(Directive \(EU\) 2019/879\)](#) introduced a requirement to ensure a minimum denomination amount for such instruments or that the investment in such instruments does not represent an excessive share of the investor's portfolio (see Article 44a BRRD). [MiFID II \(Directive 2014/65/EU\)](#), which has been applicable since January 2018, also included a number of new provisions aimed at strengthening investor protection in respect of disclosure, distribution and assessment of suitability, among others.

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

Question 26. What are your views on the policy regarding retail clients' protection?

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

Question 26.1 Please explain your answer to question 26:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We acknowledge that progress has been made in improving the protection of retail customers and investors, and small businesses, e.g. by restricting the marketing and sale of bail-inable securities. Further strengthening of this protection is needed, however, i.e. by extending the preference of retail and small-business depositors in insolvency/resolution.

In the interest of ensuring that legal protections afforded to retail and small-business customers and investors are applied uniformly across Member States, and to guarantee a maximum of predictability and legal certainty, creditor hierarchies should be further harmonised.

Question 27. Do you consider that Article 44a BRRD should be amended and simplified so as to provide only for one single rule on the minimum denomination amount, to facilitate its implementation on a cross-border basis?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 27.1 Please explain your answer to question 27:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As mentioned previously, harmonised rules would contribute to improving predictability and legal certainty in resolution/insolvency, and to levelling the playing field across Member States. In addition, the ability for retail investors to invest in securities issued by banks from different Member States at the same terms, and subject to the same protections, could contribute significantly to the integration of capital markets and the advancement of the Capital Markets Union.

Question 28. Do you agree that the scope of the rule on the minimum denomination amount to other subordinated instruments than subordinated eligible liabilities (e.g. own funds instruments) and/or other MREL eligible liabilities (senior eligible liabilities) should be extended?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 28.1 Please explain your answer to question 28:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The minimum denomination threshold is designed, a priori, to ensure that inherently risky securities are held by investors who have the capacity to anticipate, and absorb a certain level of potential loss. This reasoning could usefully be extended to other MREL-eligible debt instruments.

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

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

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

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

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

Question 29. Do you consider that the differences in the bank creditor hierarchy across the EU complicate the application of resolution action, particularly on a cross-border basis?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 29.1 Please explain your answer to question 29:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Divergences in the order of creditor preference between Member States are likely to cause complications, in particular in the event of cross-border resolution, and give rise to compensation claims based on the 'no creditor worse off' (NCWO) principle (Art. 75 BRRD II). (Further) Harmonisation of the creditor hierarchy in resolution and liquidation, above and beyond the current Art. 108 BRRD II, should be a key objective of the proposed review of the CMDI framework.

Question 30. Please rate, from 1 (lowest) to 10 (highest), the importance of the following actions:

	1	2	3	4	5	6	7	8	9	10	Don know No opini

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

C. Depositor insurance

Enhancing depositor protection in the EU

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

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

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

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

Please note that **questions 31 to 32** of this targeted consultation **correspond to questions 7 to 8** of the [public consultation](#).

Question 31. Do you consider that there are any major issues relating to the depositor protection that would require clarification of the current rules and /or policy response?

- ☒ Yes
- ☐ No
- ☐ Don't know / no opinion / not relevant

Question 31.1 Please elaborate on your answer to question 31:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As mentioned previously (Q.26 to Q.28) the protection of depositors, in particular retail and small-business customers, should be further strengthened. Differences between Member States exist, in particular, in the treatment of certain types of deposits, e.g. temporary balances that exceed the statutory coverage level of Art. 6(1) DGSD (Art. 6(2) DGSD).

Question 32. Which of the following statements regarding the scope of depositor protection in the future framework would you support?

	Agree	Disagree	Don't know / no opinion / not relevant
The standard protection of EUR 100 000 per depositor, per bank across the EU is sufficient.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
The identified differences in the level of protection between Member States should be reduced, while taking into account national specificities.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Deposits of public and local authorities should also be protected by the DGS.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Client funds of e-money institutions, payment institutions and investment firms deposited in credit institutions should be protected by a DGS in all Member States to preserve clients' confidence and contribute to the developments in innovative financial services.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 32.1 Please elaborate on any of the statements in question 32, including any supporting documentation (where available), or add other suggestions concerning the depositor protection in the future framework:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We are aware that the introduction of standardised coverage of deposits at the level of EUR 100,000 is relatively recent and its adequacy has not been tested at scale across Member States. A thematic review by the EBA would appear useful and could provide empirical evidence to inform the review of the CMDI framework.

As mentioned previously, divergences between national frameworks, including the capacity of DGSs and the standards of protection afforded to customers over and above the common coverage level of Art. 6(1) DGSD, continue to affect the level playing field between Member States. Pending the proposed introduction of EDIS the harmonisation of national frameworks should be prioritised as part of the CDMI review.

Keeping depositors informed

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

Please note that **question 33** of this targeted consultation **correspond to questions 9** of the [public consultation](#).

Question 33. Which of the following statements regarding the regular information about the protection of deposits do you consider appropriate?

	Agree	Disagree	Don't know / no opinion /
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			not relevant
It is useful for depositors to receive information about the conditions of the protection of their deposits every year.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
It would be even more useful to regularly inform depositors when part of or all of their deposits are not covered.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The current rules on depositor information are sufficient for depositors to make informed decisions about their deposits.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
It is costly to mail such information, when electronic means of communication are available.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Digital communication could improve the information available to depositors and help them understand the risks related to their deposits.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Question 33.1 Please elaborate on any of the statements in question 33, including any supporting documentation (where available) or ideas to improve the information disclosure, or add other suggestions concerning the depositor information in the future framework:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Regular information should be made available to depositors informing them not only of the status of their deposits but also of their potential exposure to risks. Such information should be made available through suitable information channels. While digital channels are convenient for many customers, and cost-effective for institutions, customer groups that rely on other means of communication, e.g. those lacking access to electronic communication channels or digital skills, must not be excluded or disadvantaged.

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

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

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

Since 2015, discussions are ongoing on completing the [third pillar of the banking union \(i. e. a common deposit guarantee scheme\)](#) in the Council's Ad Hoc Working Party, High Level Working Group set up by the Eurogroup and in the European Parliament. Most recently, the set-up and features of a possible compromise on a first stage common deposit insurance scheme focusing on liquidity provision were discussed at political level ([Letter by the High-Level Working Group on a European Deposit Insurance Scheme \(EDIS\) Chair to the President of the Eurogroup](#), 3 December 2019). In a nutshell, on the basis of these discussions, a common scheme could rely on the existing national DGSs and be **complemented by a central fund to reinsure national systems**. This first stage of EDIS based on liquidity support could be followed by steps towards a fully-fledged EDIS with loss-sharing, which would ensure an alignment between control (supervision and resolution) and liability (deposit protection), and further reduce the nexus between banks and sovereigns.

Question 34. In terms of financing, does the current depositor protection framework achieve the objective of ensuring financial stability and depositor confidence, and is it appropriate in terms of cost-benefit for the national banking sectors?

	Agree	Disagree	Don't know / no opinion / not relevant
The current depositor framework achieves the objective of ensuring financial stability and depositor confidence.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The cost of financing of the DGS up to the current target level of 0.8 % of covered deposits is proportionate, taking into account the objective to ensure robust and credible depositor insurance.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
A target level in a Member State could be adapted to the level of risk of its banking system.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Question 34.1 Please elaborate any of the statements in question 34, including any supporting documentation (where available), or add other suggestions concerning the financing of the DGS in the future framework:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.32.1 above. We believe that the current DGS framework represents a marked improvement vis a vis the situation that existed prior to the financial crisis of 2009, and the subsequent crisis in the Euro area. We note, however, that the build-up of adequately funded DGSs is still work in progress in some Member States and the robustness of the system has not yet been severely tested at any level, national or European. The first priority, in our view, would be for all Member States to implement the existing framework and reach the statutory target level of 0.8% of covered deposits. We reiterate in this context our reservations against relying on 'risk-sensitive' approaches, based on modelling and historical data, as a basis for regulation, both at the micro- and macroprudential level. The concept of prudence implies that regulation has to provide

adequate safeguards not only against risks that are readily captured, and quantified, using probabilistic analysis, but also against risks that appear remote from a statistical point of view but whose potential cost to society would be unacceptable were they to materialise.

Question 35. Should any of the following provisions of the current framework be amended?

	Yes	No	Don't know / no opinion / not relevant
Financing of the DGS (Article 10 DGSD)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
The DGS's strategy for investing their financial means (Article 10 DGSD)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
The sequence of use of the different funding sources of a DGS (available financial means, extraordinary contributions, alternative funding arrangements) (Article 11 DGSD)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
The transfer of contributions in case a bank changes its affiliation to a DGS (Article 11 DGSD)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Question 35.1 Please elaborate any of the statements in question 35, including any supporting documentation (where available), or add other suggestions concerning the above or other elements of the future framework:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The principles of the current DGS framework (compulsory contributions from market participants, ex-ante funding, target level measures as a percentage of covered deposits) appear appropriate and fit for purpose. They would need to be adapted in due course, mutatis mutandis, with the proposed introduction of a pan-European framework (EDIS).

Please note that **question 36** of this targeted consultation **partly corresponds to question 10** of the [public consultation](#).

Question 36. Which of the following statements regarding EDIS do you support?

	Agree	Disagree	Don't know / no opinion / not relevant
It is preferable to maintain the national protection of deposits, even if this means that national budgets, and taxpayers, are exposed to financial risks in case of bank failure and may create obstacles to cross-border activity.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
From the depositors' perspective, a common scheme, in addition to the national DGSs, is essential for the protection of deposits and financial stability in the euro area.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
From the credit institutions' perspective, a common scheme is more cost-effective than the current national DGSs if the pooling effects of the increased firepower are exploited.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
From the perspective of the EU single market, EDIS could exceptionally be used in the non-banking union Member States as an extraordinary lending facility in circumstances such as systemic crises and if justified for financial stability reasons.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Question 36.1 Please elaborate on any of the statements in question 36, including any supporting documentation, or add suggestions on how to achieve the objective of financial stability in the European Union and the integrity of the single market:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As mentioned previously, the realisation of a seamless and stable Banking Union would ultimately require the introduction of uniform deposit guarantee arrangements at the EU level (EDIS). We acknowledge that this needs to be a gradual process, with national DGS schemes coexisting for some time.

Question 37. In relation to a possible design of EDIS, which of the following statements do you support?

	Agree	Disagree	Don't know / no opinion / not relevant
As a first step, a common scheme provides only liquidity support subject to the agreed limits to increase a mutual trust among Member States.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
At least a part of the funds available in national DGSs is progressively transferred to a central fund.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
If the central fund is depleted, all banks within the banking union contribute to its replenishment over a certain period.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Loss coverage is an essential part of a common scheme, at least in the long term.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 37.1 Please elaborate on any of the statements in question 37, including any supporting documentation, or add suggestions concerning a possible design, including benefits and disadvantages as well as potential costs thereof:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.35 and Q.36 above.

Question 38. Which of the following statements regarding the possible features of EDIS do you support?

	Agree	Disagree	Don't know / no opinion / not relevant

Setting a limit (cap) on the liquidity support from the central fund is appropriate to prevent the first mover advantage.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Any bank that is currently a member of a national DGS is also part of the common scheme.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The central fund should be allocated 50% or more and the national DGS 50% or less of the total resources.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Appropriate governance rules and interest rates provide the right incentive for the repayment of the liquidity support, while taking into account their procyclical impact.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The central fund also covers the options and national discretions currently applicable in the Member States.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
A common scheme provides for a transitional period from liquidity support towards the loss coverage with a view to breaking the sovereign-bank nexus.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 38.1 Please elaborate on any of the statements in question 38, including any supporting documentation, or add suggestions concerning possible features of such a common scheme:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.35 and Q.36 above.

Question 39. Under the current Commission's proposal on EDIS, a common scheme would co-exist with the Single Resolution Fund.

Against the background of the general macroeconomic and financial environment for banks and subject to the cost benefit analysis, do you think that synergies between the two funds should be explored to further strengthen the firepower of the crisis management framework and to reduce the costs for the banking sector?

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

	Agree	Disagree	Don't know / no opinion / not relevant
The Single Resolution Fund and EDIS should be separate.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
The Single Resolution Fund should support EDIS when the latter is depleted.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Synergies between the two funds should be exploited.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Synergies between the two funds should be used to reduce the costs of the crisis management framework for the banking sector.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Synergies between the two funds should be used to strengthen the firepower of the crisis management framework.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 39.1 Please elaborate on any of the statements in question 39, including any supporting documentation regarding the benefits and disadvantages of the above options as well as potential costs thereof:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See Q.35 and Q.36 above.

Additional information

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can

upload your additional document(s) below. **Please make sure you do not include any personal data in the file you upload if you want to remain anonymous.**

The maximum file size is 1 MB.

You can upload several files.

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

Useful links

[More on this consultation \(https://ec.europa.eu/info/publications/finance-consultations-2021-crisis-management-deposit-insurance-review-targeted_en\)](https://ec.europa.eu/info/publications/finance-consultations-2021-crisis-management-deposit-insurance-review-targeted_en)

[Consultation document \(https://ec.europa.eu/info/files/2021-crisis-management-deposit-insurance-review-targeted-consultation-document_en\)](https://ec.europa.eu/info/files/2021-crisis-management-deposit-insurance-review-targeted-consultation-document_en)

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[List of acronyms used in this consultation \(https://ec.europa.eu/info/files/2021-crisis-management-deposit-insurance-review-acronyms_en\)](https://ec.europa.eu/info/files/2021-crisis-management-deposit-insurance-review-acronyms_en)

[Public consultation launched in parallel \(https://ec.europa.eu/info/publications/finance-consultations-2021-crisis-management-deposit-insurance-review_en\)](https://ec.europa.eu/info/publications/finance-consultations-2021-crisis-management-deposit-insurance-review_en)

[More on banking union \(https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union_en\)](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union_en)

[Specific privacy statement \(https://ec.europa.eu/info/files/2021-crisis-management-deposit-insurance-review-targeted-specific-privacy-statement_en\)](https://ec.europa.eu/info/files/2021-crisis-management-deposit-insurance-review-targeted-specific-privacy-statement_en)

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