WORKERS' RIGHTS UNDER THE FSB RESOLUTION REGIME FOR TOO-BIG-TO-FAIL FINANCIAL INSTITUTIONS

ISSUES PAPER
PREPARED BY THE ITUC, THE TUAC AND UNI
PARIS, 10 OCTOBER 2012

Executive summary

At the Summit in Cannes in 2011 the G20 endorsed a list of 29 banks identified by the Financial Stability Board (FSB) as Global Systemically Important Financial Institutions (G-SIFIs), in other words financial groups that are at the risk of becoming or remaining "too-big-to-fail". G-SIFIs are to be subject to specific regulatory requirements coming on top of banking prudential and supervisory rules, including the design by authorities of firm-specific Resolution & Recovery Plans (RRPs) by the end-2012. This paper focuses on the FSB Framework for determining the RRPs, the governance of the resolution process and its impact on the established rights of workers to information and consultation.

It clearly is an "emergency rule" that would prevail should a resolution process be triggered, with all the powers being concentrated in the hands of supervisory authorities and with no or very limited stakeholder rights to redress (other than *ex post* compensation). The strict confidentiality rules surrounding the RRPs, the lack of adequate and secured funding of the resolution frameworks and the absence of a robust international supervisory framework are also great concerns. The paper concludes with a selection of recommendations.

Introduction

1 At the Summit in Cannes in 2011 the G20 endorsed a list of 29 banks[1] identified by the Financial Stability Board (FSB) as Global Systemically Important Financial Institutions (G-SIFIs), in other words financial groups that, because of their size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity in the event of their distress or "disorderly" failure. The FSB has developed a policy framework to address the systemic and moral hazard risks associated with such institutions and prevent them from becoming or remaining "too-big-to-fail". These G-SIFIs are to be subject to specific regulatory requirements coming on top of banking prudential and supervisory rules. These include:

- requirements for firms designated as G-SIFIs to have additional loss absorption capacity (that is, an extra capital cushion) tailored to the impact of their default;
- more intensive and effective supervision of all SIFIs;
- the adoption by G20 members of robust resolution regimes that allow national authorities to manage the failure of SIFIs in an "orderly" manner without severe systemic disruption, by maintaining vital economic functions, without exposing taxpayers to loss.

2 The international standards for resolution regimes set out in the FSB *Key Attributes of Effective Resolution Regimes*[2] (as endorsed by the G20 and published in November 2011) contain certain requirements that are aimed specifically at G-SIFIs. Specifically, G-SIFIs and their respective supervisory and resolution authorities need to develop firm-specific Resolution & Recovery Plans (RRPs) by end-2012, the terms of reference of which are laid down in the FSB Key Attributes (hereafter the "FSB Framework"). Each RRP should determine the range of recovery measures to be taken pre-emptively by G-SIFIs when encountering stress and by authorities in case of a serious failure by an individual G-SIFI. The activation of these plans would avoid a disorderly failure which would pose a systematic threat to financial stability and, potentially, put public money at risk if governments had no alternative option other than to 'bail-out' the failing firm, as was the case of Lehman Brothers in September 2008.

3 For the time being the FSB framework should apply to the 28 existing G-SIFIs that were designated in 2011[3], but its application potentially covers a much wider group as the FSB list is to be updated and expanded to the insurance sector and to "other financial institutions" and as the FSB is developing parallel work on "domestic" SIFIs.

The FSB framework

4 The FSB Framework should guide national authorities and the G-SIFIs in designing the RRPs. The broad features are outlined in the table below. The RRPs are to be determined by Crisis Management Groups (CMG) set up for each G-SIFI. A CMG is to be led by 'home' authorities (i.e. where the G-SIFI is seated) and to include all relevant domestic and foreign authorities. The role of the CMG is to plan for resolution and to coordinate resolution action in the event of the firm's failure. This involves maintaining and updating the firm's resolution plan and carrying out regular "resolvability assessments" and coordinating the cross-border implementation of resolution measures so that the resolution strategy agreed by the CMG can be put into operation coherently and effectively.

1 Bank of America, Bank of China, Bank of New York Mellon, Banque Populaire CdE, Barclays, BNP Paribas, Citigroup, Commerzbank, Credit Suisse, Deutsche Bank, Dexia, Goldman Sachs, Group Crédit Agricole, HSBC, ING Bank, JP Morgan Chase, Lloyds Banking Group, Mitsubishi UFJ FG, Mizuho FG, Morgan Stanley, Nordea, Royal Bank of Scotland, Santander, Société Générale, State Street, Sumitomo Mitsui FG, UBS, Unicredit Group & Wells Fargo. http://www.financialstabilityboard.org/publications/r_111104bb.pdf

2 http://www.financialstabilityboard.org/publications/r_111104cc.pdf

3 Dexia went bankrupt weeks before the G-SIFIs list was disclosed and has since been broken up into separate entities in France and in Belgium

FSB Framework:

Global Systemically Important Financial Institutions (G-SIFIs)	Resolution & Recovery Plans RRPs		Crisis Management Group (CMG)
CEO & senior management	Recovery Plans	Resolution Plan	Leadership by the 'Home' authority & participation of relevant 'host' authorities

Sequencing:

'Routine mode'	'Crisis mode'		
Resolvability assessment >	Recovery Plans>	Resolution Plan >	Group-wide or break-up scenarios

5 The FSB framework disclosed in November 2011 followed a public consultation round on a draft proposal[4] for public consultation which was met by more than 50 contributions, the majority of which coming from the banking sector[5]. The public consultation raised a number of controversial issues: the FSB proposal of "bail-in within resolution" (debt written down or converted into equity to help preserve the systemically critical functions of a failing institution once its shareownership has been wiped out), flexibility for resolution authorities to depart from the principle of equal treatment of creditors of the same class and the power for resolution authorities to impose a "temporary stay on early termination rights" (the right for a counterparty to exercise contractual rights to close all transactions with a failing institution) that would otherwise be triggered by resolution actions.

6 The consultation raised a number of other issues which are directly relevant to workers employed by the G-SIFIs and to their trade unions. This paper focuses on those aspects and more specifically on the governance and the transparency of the resolution process and he rights of workers to information and consultation as they are established by law across G20 economies.

7 Following a brief discussion on workers' rights to information and consultation and the use of international agreements, the paper describes the main features of the FSB Framework, including the extra-ordinary powers granted to resolution authorities during a resolution process and the governance and division of responsibilities between authorities and the G-SIFIs. It then outlines a list of key issues and concerns in light of workers' rights and of broader concerns about international cooperation between supervisors. The paper ends with a list of recommendations to the FSB for further dialogue and cooperation between trade unions, G-SIFIs and their authorities.

Workers' rights to information and consultation

8 There are legitimate trade union concerns about the potential implications and unintended consequence of the RRPs. For a first, the FSB Framework does not mention the right of workers once. In a sense, this sort of oversight is not too surprising – considering the mandate of the FSB to focus on financial regulation and supervision or the need for the FSB to remain at a fairly "high level" and hence account for national differences in labour laws and regulations. From a trade union perspective however, it still is a concern in its own and considering that G-SIFIs are undergoing a serious restructuring period as a result of the 2008 financial crisis.

9 Workers employed by the G-SIFIs constitute a stand-alone stakeholder group that has claims and rights like other key constituencies such as creditors and shareholders. Those claims and rights are established by law and are put into practice through collective bargaining and representation mechanisms within the firm, such as "works coun-

4 http://www.financialstabilityboard.org/publications/r_110719.pdf

5 http://www.financialstabilityboard.org/press/c_110909.htm

cils". These rights include collective bargaining over wages, other occupational benefits and working conditions. Importantly for the purpose of this paper, they usually encompass a right to information and to consultation on the firm's business plan and on any potential or realised restructuring plans. In some countries, workers are also represented at the highest governing body of the firm by way of board-level employee representation, or when works council representatives are allowed to attend board meetings as observers.

10 While much of the above rights and claims are established by law within national legislation, there are also so at regional level, such as the EU-wide directives on acquired rights and transfer of undertakings[6] and on European Works Councils[7], and at the international level through several ILO conventions and, as far as multinational enterprises are concerned, the OECD Guidelines for Multinational Enterprises[8]. They are also set in bilateral agreements between individual multinational enterprises and global trade union organisations in the form of international framework agreements (IFAs)[9].

The International Framework Agreements and the OECD Guidelines for Multinational Enterprises

11 There are several dozens of IFAs in place and the number is growing. IFAs most often include a commitment by management to comply with a number of standards for labour and human rights, including rights to collective bargaining and to join a union. They also set out the process and governance for consultation and information sharing between management and unions at the international level. As of today, only one G-SIFI (Nordea) has signed an IFA (with UNI). Barclays has a regional framework agreement for its African operations and BNP Paribas has signed on a regional agreement with its European Works Council. Outside the current list of G-SIFIs, Allianz and Danske bank also have signed on an IFA with UNI and its members.

12 The OECD Guidelines for Multinational Enterprises are government expectations about the responsible business conduct of multinational enterprises. The Guidelines also offer a government-centred mechanism for resolution and mediation of disputes between management and other stakeholders regarding the effective compliance with the Guidelines (the 'national contact points'[10]). By essence G-SIFIs are multinational enterprises, they employ tens of thousands of workers across OECD jurisdictions and beyond. They therefore are covered by the OECD Guidelines by their global nature. All G-SIFIs except one (Bank of China) are headquartered in a jurisdiction that has signed on the Guidelines.

13 The OECD Guidelines expect companies to "carry out risk-based due diligence" to "identify, prevent and mitigate actual and potential adverse impacts" and "account for how these impacts are addressed". These impacts include matters covered by the Guidelines themselves, including employment relations and the right to information and consultation. The latter require companies "considering changes in their operations which would have major employment effects" to "provide reasonable notice of such changes to representatives of the workers" prior to the final decision and to "co-operate [...] so as to mitigate to the maximum extent practicable adverse effects".

6 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0023:EN:HTML

7 Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:122:0028:0044:EN:PDF

8 http://www.oecd.org/investment/guidelinesformultinationalenterprises/

9 http://www.global-unions.org/framework-agreements.html

10 http://www.oecd.org/investment/guidelinesformultinationalenterprises/2012%20NCP%20Contact%20Details.pdf

14 Considering the above the issue is whether the process for designing and maintaining RRPs between G-SIFIs and their respective authorities could potentially affect the international social dialogue with unions, be it through works council, European works council, the signing of IFAs, or compliance with the OECD Guidelines requirement of risk-based due diligence.

Powers of resolution authorities

15 By far the most striking feature of the FSB framework is the exceptional powers granted to authorities in case a resolution process is being triggered. Authorities in charge of the resolution can either be or include altogether the central bank, the finance ministry, a dedicated resolution authority and/or a body responsible for any guarantee schemes benefiting depositors or other customers (such as investment clients or insurance policy holders). Authorities would have the right to take operational control of a G-SIFI that enters in a resolution process. In doing so it may be argued that authorities would take on indirect employer responsibilities vis-à-vis workers employed by the G-SIFI: the employment contract would remain between the employed worker and the employing G-SIFI, but employer-related decisions or some of them would in effect shift from the G-SIFI to the resolution authorities. These powers would also be concentrated in the hands of the home authorities, i.e. those authorities where the G-SIFI is seated and could have extra-territoriality reach over foreign subsidiaries. Such extraterritoriality powers raise a number of questions for trade unions as decisions taken abroad (i.e. by the home authority) could potentially have employment and social implications domestically.

Corporate governance and operational control over firms

16 The extraordinary powers granted to authorities are most evident regarding the corporate governance of a G-SIFI entering resolution. The FSB framework is quite explicit on the rights of public authorities to freely restructure without prior consent of the company's management and its stakeholders. Authorities would be able to "override rights of shareholders" of a firm entering in resolution, including "requirements for approval by shareholders of particular transactions, in order to permit a merger, acquisition, sale of substantial business operations, recapitalisation or other measures to restructure and dispose of the firm's business or its liabilities and assets". They would also have the power "to remove and replace" senior management and directors, appointing an administrator "to take control of and manage the affected firm", and to recover "monies from responsible persons, including claw-back of variable remuneration" (FSB Attribute 3.2, p7).

17 Restructuring decisions include establishing a "bridge bank" with full control over the terms and conditions for its creation, the selection of management, and its corporate governance regime. Resolution powers would naturally extend to creditor claims including ordering a "bail-in" (creditors' bond and loans transforming into equity to recapitalize the firm), opposing "early termination rights" by the firms counterparties (i.e. clauses that allow a trading party to terminate and settle all transactions with the firm that is failing) and imposing a moratorium on the payments to creditors and customers (with the notable exception of payments linked to of over-the-counter derivatives that are traded through central counter parties – CCPs).

Cross-border cooperation and extra-territoriality powers

18 By definition a resolution process of a G-SIFI will require extensive cooperation between national authorities. A key distinction is then made by the FSB between home authority and the host authorities (where the global firm has important subsidiaries or local branches). Home resolution authorities "should lead the development of the

group resolution plan" for G-SIFIs (11.8). Host authorities have resolution powers over the entities of a G-SIFI that are located in their jurisdiction; that is, locally incorporated subsidiaries and local branches. At the same time it is stated that – other than "exceptional cases" where independent action by host authorities is necessary to preserve national financial stability – the same host authorities should exercise their powers "to support" the resolution plan as carried out by the home authority (7.3). In the (non-binding) annex chapters of the FSB framework it is further stated that host authorities should not "pre-empt" resolution actions by home authorities. Their "right to act on their own initiative" should *de facto* be limited to the absence of effective action by the home authority (Annex I.5.1).

19 The precise distribution of roles between home and host authorities – and the balance of power between them – however will depend on the model of resolution that is applied: whether a group is resolved through a (top-down) "single point of entry approach" or whether a "multiple point of entry" resolution is adopted. In the former case home authorities will be leaders without a doubt, while in the latter the process might rely on a more collective process. Still, whatever the model it appears likely that home authorities are to play a decisive role in the design and if needed, the triggering of the resolution process, including its implementation in foreign jurisdictions. The pre-eminence given to home authorities has some bearing when considering that 17 out of the 28 currently listed G-SIFIs are hosted by three jurisdictions only – the US, the UK and France – and that 23 are hosted either by the US or by EU jurisdictions.

The Recovery and Resolution Plans

20 The RRPs consist of two separate documents: a Recovery Plan to be prepared by the G-SIFIs and reviewed by authorities, and a Resolution Plan, prepared by authorities with inputs, but not equal endorsement by the G-SIFIs. RRPs are to include a detailed "operational plan" including "concrete and practical options and measures" to be taken, the setting of "prerequisites" that would need to be met for triggering the plans, as well as "details" of any "potential" impediments to the execution of the plans (Annex III.2). In terms of sequencing a Recovery Plan would be triggered first – and the authority should have the power to require the firm to adopt recovery measures. Should the Recovery Plan fail to succeed, the G-SIFI would then enter into resolution, and in appropriate circumstances the Resolution Plan would be executed by the authority in part or fully – authorities would indeed retain a large degree of flexibility in implementing the RRPs.

The Crisis Management Groups

21 The design, maintenance and implementation of the resolution plans are the responsibility of firm-specific Crisis Management Groups (CMG). CMGs should include the home authorities as well as host authorities for which participation would be "material" to the effective resolution of the firm (8.1).

22 The principal objective of the CMGs is to design RRPs for each G-SIFI, keep these documents "under active review" and to develop "institution-specific cooperation agreements" including procedures and confidentiality rules for information sharing between authorities at each stage of the resolution process: both pre-crisis (monitoring the G-SIFIs) and during a crisis (8.2 & 9.1). The CMGs should engage reviews on an annual basis at the minimum. These reviews should involve the firm's CEO "where appropriate" (11.11).

23 In addition to the above, home authorities in coordination with the CMGs should conduct regular "group resolvability assessments" (10.1) which should consist of three stages: (i) feasibility of resolution strategies, (ii) assessment of the systemic impact assessment of the firm's potential for failure and resolution and (iii) "actions to improve resolvability" including "changes necessary to (…) the structure or operations of the firm" (Annex II). As discussed below, the latter is not neutral from a regulatory perspec-

tive because it can be interpreted – and it was so by the banking industry during the FSB public consultation phase – as an implicit restriction to banking models that allow to cumulate both retail and investment banking activities.

The Recovery Plans

24 The design of the Recovery Plan falls under the responsibility of the G-SIFIs. The FSB text does not clearly state who within the G-SIFIs should take ultimate responsibility and leadership in the design of the plan: whether it is the board of directors (or the supervisory board in two-tier board systems) or the executive management. It is assumed that such distinction would be left to the judgment of national authorities. Yet this distinction is not a minor one from a corporate governance perspective. There is a concern (shared by the OECD, the European Commission among others) that "imperial CEOs" and excessive concentration of power in the hands of a few senior managers is not a desirable situation. By opposition, there is consensus that the Board of directors should play its part in holding management to account. Unfortunately the FSB suggests that a central role should be played by "senior management" (1.6) and by the CEO in particular, who as noted above is to be considered as the main channel of communication for the CMGs (11.11). The FSB framework pays less attention to the role of the Board of directors. It is only mentioned in an annex chapter: G-SIFIs should have "robust governance structure", "clear responsibilities of business units, senior managers up to and including board members" to support the recovery and resolution planning process (Annex III.1.18).

25 On substance, the Recovery Plans prepared by the G-SIFIs should set out options "to restore financial strength and viability", based on "a range of scenarios" of market wide stress, capital shortfalls and liquidity pressures (11.5). The document should includes measures to "reduce the risk profile" of the firm. Measures and options listed by the FSB include "divestiture of business lines", "sales of subsidiaries and spin-off of business units", recapitalization, suspension of dividends and payments of variable remuneration. Plans should also develop "contingency" arrangements (including internal processes, IT systems, clearing and settlement facilities, supplier and employee contracts) to ensure the firm continues to operate during the recovery period (Annex III.3).

The Resolution Plans

26 The resolution plans are to be drawn by resolution authorities. They should include a sequencing of measures to be taken to ensure an orderly resolution of the firm and an operational plan for its implementation. The FSB understanding of an orderly resolution aims at two parallel and perhaps competing objectives: (i) to minimize the impact on financial stability (avoiding "severe systemic disruption" of financial markets) and (ii) to avoid "exposing taxpayers" to the losses incurred through resolution (Annex III.1.8).

27 Likewise the Recovery Plans, the Resolution Plans should include operational measures to be implemented in case of resolution. They should identify the critical financial and economic functions of the firms that would need to be preserved, all "potential barriers" – including legal ones – to the effective implementation of the resolution process and specific actions to protect insured depositors and insurance policy holders (11.6). Both the Recovery and the Resolution Plans will require firms to maintain Management Information Systems (MIS) on a timely basis and be made available "at the group level" (12.2).

Key issues

28 There remains a lot of uncertainty around the implications of the FSB Framework for workers' rights. At this early stage no precedents exist. Firms and authorities are learning through the experience of developing the first generation of RRPs. However, the FSB is developing guidance on key aspects of recovery and resolution planning, soon to be issued for public consultation.. In any event, access to the content RRPs might remain extremely limited given the strict confidentially rules that bind the parties involved. Accordingly we can only speculate on the requirements laid down in the FSB document and on the outcome of the FSB public consultation round. In doing so, the following key issues are identified:

- The lack of clarity around the objectives aimed at by the FSB resolution framework;
- The severe limitations to stakeholders' right to redress once resolution measures have been imposed;
- The strict confidentiality rules surrounding the RRPs;
- The potential implications of pre-emptive measures affecting the G-SIFIs' structure;
- The lack of adequate and secured funding of the resolution framework; and
- The uncertainty around the adequacy of the supervisory framework and level of cooperation between authorities.

29 As noted in introduction other issues such as "bail-in" instruments, temporary suspension of counterparties' right to exercise "early termination" rights triggered by entry into resolution and moratorium on the payments to creditors and customers would be equally important to address in a broader perspective. But they are less so within the specific perspective of workers' rights.

Objectives

30 At the outset a key question to ask is for whom and for what purpose the resolution measures are aiming at. The text provides with a general objective of "maintaining financial stability" while protecting taxpayers. However some parts of the FSB text suggest additional and perhaps competing objectives.

31 Firstly taxpayers are not the only constituency to be considered as strategically important. Depositors, insurance policyholders and "retail investors" are also listed as stakeholder groups for which protection in an objective *per se* (3.9 & Annex1.4). Workers by opposition are not mentioned throughout the document. Regarding creditors, who are most likely to be severely impacted by the resolution process, the FSB calls for the "respect of creditor hierarchy" and for the "no creditors worse off" principle to apply (5).

32 Secondly, it is not clear what financial stability would encompass and how such objective would relate to the real economy and to "non-financial" sectors. In assessing the feasibility of resolution strategies for example, authorities are instructed to identify critical financial functions, but also "economic functions" that the G-SIFIs perform for the global and national financial systems and for "the non-financial sector" (Annex II.4). These functions are not spelled out in the FSB framework[11]. In the same vein, the criteria listed for the resolvability assessment exercise include: the financial markets as whole, financial market infrastructure in particular, other banks' capitalization access to funding, but also "the economy" at large (Annex II.5).

11 They are however developed further in a separate FSB draft for public consultation and would include: deposit-taking; lending to non-financial companies and retail customers; payments, clearing and settlement; wholesale activities (i.e. lending and borrowing in wholesale markets between financial counterparties); and capital market activities (i.e. issuing and trading of securities and related services).

Stakeholders' right to redress

33 Once set in motion a resolution process will need "the necessary speed and flexibility" to be implemented effectively (5.4). And indeed resolution in all likelihood will take place in a very volatile market environment, and supervisors and bank management will need to take decisions in a very limited time – over a week-end or overnight. There still are essential safeguards and rights to redress by stakeholders that have to be taken account and weighted against that "necessary speed and flexibility" of implementation.

34 A closer reading of the FSB framework suggests that priority is granted to effectiveness of resolution over stakeholder rights. In fact, effective use of the framework may have to enforce legislative changes to remove legal safeguards that could interfere with the process *ex ante*. While resolution powers should be "subject to constitutionally protected legal remedies and due process" (5.4) in cases, for example, where a resolution authority has acted outside of its legal powers, the FSB framework makes clear that legislation "should not provide for judicial actions that could constrain the implementation" (including reversal of decisions by supervisors), and that stakeholders' rights to redress should be limited *ex-post* "by awarding compensation, if justified" (5.5). Importantly, changes in regulation may be needed as "any transfer of assets or liabilities should not require the consent of any interested party or creditor to be valid" (3.3).

35 The FSB framework further requires legal immunity for employees acting on behalf of authorities but also for senior management of the G-SIFIs within the scope of the implementation of resolution. The resolution authority and its staff should be "protected against liability for actions taken and omissions made while discharging their duties in the exercise of resolution powers in good faith, including actions in support of foreign resolution proceedings" (2.6). Directors and officers of the firm under resolution "should be protected in law (for example, from law suits by shareholders or creditors) for actions taken when complying with decisions of the resolution authority" (5.3). Finally, and as noted below, the triggering of a resolution process may also impact stakeholders' rights to information, since regulating financial reporting could be temporary suspended if needed.

Transparency and access to information

36 Whether the RRPs should be made public or not was a topic of much controversy at the time of the FSB public consultation. Public disclosure appeared as a proposition in the FSB consultation draft but was fiercely opposed by banks and industry groups. In the end only the "existence of agreements" should be made public and it is up to the home authority, and to foreign authorities that participate in the CMG, to decide if and how "the broad structure" of the plans can be made public (9.2). The confidentiality of the resolution process may also extend to the firms themselves. Authorities may indeed decide "not to disclose a resolution plan or parts of it to the firm" (Annex III.1.12).

37 Restrictions to public disclosure could also extend beyond the RRPs and affect the G-SIFIs' normal reporting process. According to the FSB framework, legislation should allow "temporary exemptions" or "postponement" of regulated reporting requirements by the firm, including financial reporting, takeover provisions and listing rules "where the disclosure by the firm could affect the successful implementation of resolution measures" (5.6). There are valid reasons for such exemptions however, including avoiding a "bank run" by ensuring that information about imminent resolution measures is communicated simultaneously with information about measures to stabilise the firm.

38 While confidentiality rules and restriction to public disclosure are numerous in the FSB framework, supervisors on the other hand are granted enhanced access to information from the firms and with their peers. There should be "no legal, regulatory or policy impediments" to access of information "including firm-specific information" and with

other supervisory authorities (12.1). Foreign authorities that are members of the CMG, and any foreign authority "where the firm has a systemic presence" should be given access to RRPs (11.8) provided that "adequate confidentiality requirements and protections" are respected (7.6, 7.7 & Annex I.6.6).

Right to enforce pre-emptive restructuring

39 A much contested FSB proposition during the public consultation was related to the powers of authority to enforce restructuring of a G-SIFI in a pre-emptive manner during the resolvability assessment exercise, and hence outside the scope of the resolution process. Despite strong opposition by banks, the proposal was maintained in the final version of the Framework document. "To improve a firm's resolvability" authorities "should have powers to require, where necessary, the adoption of appropriate measures, such as changes to a firm's business practices, structure or organisation, to reduce the complexity and costliness of resolution". More specifically, they should "evaluate whether to require that [key] functions be segregated in legally and operationally independent entities that are shielded from group problems" (10.5).

40 The reference to "complexity" and to "segregated in legally and operationally independent entities" did not pass unnoticed during the FSB public consultation phase. Banks and industry groups interpreted this wording – and for a cause – as an implicit bias in favour of separation retail and investment banking activities. The ITUC, the TUAC and their affiliates have supported separation in the past. In a recent statement to the FSB, trade unions called on the FSB regulatory package "to be broadened to include structural measures to limit the size and complexity of banks' balance sheets" and for "banking activities that serve the real economy (retail banking, long term project finance) need to be shielded from the risks associated with the trading and investment banking activities". However any such re-organisation, it is assumed, should take place in an employment-friendly way and in cooperation with banking and insurance trade unions.

Funding of resolution

41 Shielding "taxpayers" from the financial cost of resolution is a recurrent policy concern throughout the FSB Framework document. "Jurisdictions should have statutory or other policies in place so that authorities are not constrained to rely on public ownership (…) as a means of resolving firms" (6.1) and "have in place privately-financed deposit insurance or resolution funds" (…) "or a funding mechanism for ex post recovery from the industry of the costs of (…) resolution" (6.3). "The resolution plan should facilitate the effective use of the resolution authority's powers with the aim of making feasible the resolution of any firm without severe systemic disruption and without exposing taxpayers to loss while protecting systemically important functions" (Annex III.1.8). It is however conceded that "as a last resort and for the overarching purpose of maintaining financial stability (…) temporary public ownership and control" of the failing institution may be acceptable (6.5).

42 Protecting taxpayers is a desirable objective and the FSB is right to mark it as a central condition for funding resolution (although surely protection should be expanded to all citizens, including the poorer ones who do not pay taxes and who through measures taken to cut in public expenditures and/or public services would equally pay for bailing out the bankers). There is however a problem of coherence with the broader FSB Action Plan on financial reform. While the FSB Framework assumes that authorities will put in place industry-wide or general tax-funded financial mechanisms to cover the cost of a resolution process being triggered, the reality is somewhat different. Only a handful of OECD countries have introduced or enhanced existing financial sector contributions (or "bank levies") that would precisely aim at funding future resolution. As an alternative to pre-funding, the FSB framework suggests arrangements for recovering public

funds after failure (6.3, 6.4 and 6.5), but this alternative also makes a strong assumptions; that there will be *something left* to recover after failure to repay governments. In any event ,the FSB should address the issue of resolution funding, and accordingly financial sector taxation as part of its Action plan.

International regulatory cooperation

43 A central concern made by banks and industry groups during the consultation was the lack of attention paid to the adequacy of the international framework for cooperation between national authorities. Bankers argued that the FSB framework's requirements falling on the shoulders of G-SIFIs (and senior management) were not matched by appropriate reforms of resolution authorities themselves. This imbalance, it was argued, could in turn generate gaps in the way the framework would be implemented nationally. To resolve this problem, several banks and their advocacy group went as far as to call for the FSB framework to transform into a legally binding international treaty (or 'concordat') to ensure both level playing field and consistent application of the FSB framework across jurisdictions.

44 In the end however, the FSB framework does not say much about how authorities should structure themselves and collaborate internationally. At best the framework will rely on a web of bilateral agreements. "Bi-national agreements between the relevant authorities of the home and a host jurisdiction should set out how national legal and resolution regimes would interact" (Annex I). However the FSB implicitly acknowledges that weak cross-border cooperation is itself a potential source of bank failure. The above-mentioned resolvability assessments should indeed "identify factors and conditions affecting the effective implementation of resolution actions, both endogenous (firm structure) and exogenous (resolution regime and cross-border cooperation framework)" (Annex II.2). There is no doubt that the FSB, its national members and its international standard setters (BCBS, IAIS, CPSS and IOSCO) are actively working together to strengthen cross-border cooperation. The question is whether the speed at which that process is taking place is up to the task considering the complexity and ambition of the FSB resolution framework.

Recommendations

45 The FSB resolution framework is a very welcome initiative and the ITUC, the TUAC and UNI have in the past made clear their support for its effective implementation. However a closer look at the framework shows that more work needs to be done to ensure that the employment dimension of a G-SIFI entering in resolution is properly taken on board by authorities and by senior management of the G-SIFIs. It clearly is an "emergency rule" that would prevail should a resolution process be triggered, with key powers concentrated in the hands of authorities, and with limited stakeholder rights to redress (other than *ex post* compensation). Even in routine mode, authorities would have the right to impose structural measures on G-SIFIs as part of the resolvability assessments where that is necessary to ensure that a G-SIFI is capable of being resolved with the powers available under the applicable regimes (without risk of loss to public funds)..

46 From a financial stability and integrity point of view, there is surely little to add or to contest to such strong measures. But there are from a socio-economic point, and in particular from a workers' right point of view. The issue is not whether full employment should be maintained at all cost when a given bank is close to bankruptcy. The issue is whether the right of workers to consultation before a restructuring measure is taken seriously and can indeed be integrated in the FSB framework to make resolution process more efficient though mitigation of employment impact. As discussed in this paper, we are far from that situation as of today. The FSB framework should recognize the important role of employees within the G-SIFIs and their rights as established by law.

47 Moving forward, and considering the above, the following recommendations are submitted to the FSB:

- Regarding the lack of clarity around the objectives aimed at by the FSB resolution framework: **the FSB should recognise that a bank that enters into resolution is most likely to have severe employment impacts and that these impacts can be mitigated without weakening financial stability objectives.**
- Regarding the severe limitations to stakeholders' right to redress once a resolution process is triggered: **both the Recovery Plans and the Resolution Plans should include a specific chapter or annex on procedure and scenarios for consultation with representative trade unions of the G-SIFIs to mitigate the employment impact of measures contained in the RRPs.**
- Regarding the strict confidentiality rules surrounding the RRPs and in line with the above, **representative trade unions of the G-SIFIs should have access to broad features of the RRPs so as to better anticipate the employment impact of the resolution process.**
- Regarding the right for authorities to take pre-emptive structural measures against a G-SIFI as part of a resolvability assessment process: **any measure taken by authorities to force a restructuring of a G-SIFI during normal time, as legitimate as it may be from a financial stability point of view, should closely involve trade unions.**
- Regarding the funding of resolution frameworks: **the current resolution frameworks across G20 economies are not funded and are most likely to be paid for by taxpayers and citizens – the FSB and its members should engage a discussion on financial sector taxation at regional and global levels.**
- Regarding the international supervisory framework: there is an imbalance between the ambition of the FSB framework on substance and the weak requirements on process and cross-border supervision. **It would make sense to develop further the framework into a binding international treaty and to force national and regional regulators not only to cooperate, but to effectively consolidate internationally.**

International Trade Union Confederation (ITUC)
International Trade Union House
5 Boulevard
du Roi Albert II, Bte 1
1210 Brussels, Belgium
Tel : +32 (0)2 224 0111
info@ituc-csi.org
www.ituc-csi.org

UNI Global Union
Avenue Reverdi 8-10,
1260 Nyon, Switzerland
Tel: +41 22 365 21 00
contact@uniglobalunion.org
www.uniglobalunion.org

Trade Union Advisory Committee (TUAC) to the OECD
15, rue la Perouse
75016 Paris, France
Tel: +33 (0) 1 55 37 37 37
tuac@tuac.org
www.tuac.org