FSB FINANCIAL STABILITY BOARD

Key Attributes Assessment Methodology for the Banking Sector

Methodology for Assessing the Implementation of the Key Attributes of Effective Resolution Regimes for Financial Institutions in the Banking Sector

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Contents

Abbreviations

BCBS	Basel Committee on Banking Supervision
CCP	central counterparty
CMG	Crisis Management Group
COAG	Institution-specific Cooperation Agreement
EC	Essential Criterion
EN	Explanatory Note
EU	European Union
FMI	Financial Market Infrastructure
FSAP	Financial Sector Assessment Program
FSB	Financial Stability Board
G-SIB	Global Systemically Important Bank
G-SIFI	Global Systemically Important Financial Institution
IADI	International Association of Deposit Insurers
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
KA	Key Attribute
PFMI	CPSS-IOSCO Principles for Financial Market Infrastructure
RAP	Resolvability Assessment Process
ROSC	Report on the Observance of Standards and Codes
RRP	Recovery and Resolution Plan
WB	World Bank

Introduction

The FSB *Key Attributes of Effective Resolution Regimes for Financial Institutions* (*Key Attributes*) were adopted in October 2011 and endorsed as a new international standard for resolution regimes by the G20 Leaders at the Cannes Summit. The original *Key Attributes* were supplemented in October 2014 with new Annexes containing sector-specific guidance that sets out how the *Key Attributes* should be applied for insurers, FMIs and the protection of client assets in resolution and implementation guidance that elaborates on specific Key Attributes (KAs) relating to information sharing for resolution purposes.[1]

The *Key Attributes* apply to resolution regimes for any type of financial institution that could be systemically significant or critical if it fails. Financial institutions include banks, insurers, investment and securities firms and FMIs. The *Key Attributes* also cover the resolution of financial groups and conglomerates and therefore extend to both holding companies of and non-regulated operational entities within a financial group or conglomerate.

The *Key Attributes* constitute an 'umbrella' standard for resolution regimes for all types of financial institutions. However, not all attributes are equally relevant for all sectors. Some KAs require adaptation and sector-specific interpretation of individual KAs. This document sets out a methodology to guide the assessment of a jurisdiction's compliance with the *Key Attributes* **with respect to the banking sector**.

[1] See http://www.fsb.org/wp-content/uploads/r_141015.pdf.

I. Definitions of key terms used in the methodology for the banking sector

"Action Plan" – a formal plan that recommends and prioritises improvements of a general or sector-specific nature to a jurisdiction's resolution regime that is developed following an assessment using this methodology and designed to achieve the regime's compliance with the *Key Attributes*.

"Administrator" includes receivers, trustees, conservators, liquidators or other officers appointed by a resolution authority or court, pursuant to a resolution regime, to manage and carry out the resolution of a bank.

"Agents of a resolution authority" include any person, other than an employee, who carries out actions on behalf of the resolution authority in the ordinary course of its agency agreement or under a contract for services.

"Bail-in within resolution" – restructuring mechanisms (howsoever labelled) that enable loss absorption and the recapitalisation of a bank in resolution or the effective capitalisation of a bridge institution through the cancellation, write-down or termination of equity, debt instruments and other senior or subordinated unsecured liabilities of the bank in resolution, and the conversion or exchange of all or part of such instruments or liabilities (or claims thereon) into or for equity in or other instruments issued by that bank, a successor (including a bridge institution) or a parent company of that bank.

"Bail-out" – any transfer of funds from public sources to a failed bank or a commitment by a public authority to provide funds with a view to sustaining a failed bank (for example, by way of guarantees) that results in benefit to the shareholders or uninsured creditors of that bank, or the assumption of risks by the public authority that would otherwise be borne by the firm itself, where the value of the funds transferred is not recouped from the bank, its shareholders and creditors or, if necessary, the financial system more widely, or where the public authority is not fully compensated for the risks assumed.

"Bank" – any financial institution that takes deposits or repayable funds from the public and is classified under the jurisdiction's legal framework as a deposit-taking institution, or the holding company of such a financial institution.

"Bank in resolution" – a bank in relation to which resolution powers are being exercised. Where resolution powers have been or are being exercised in relation to a bank, that bank is considered to be "in resolution" for as long as it remains subject to measures taken by or otherwise under the control of a resolution authority or remains in insolvency proceedings initiated in conjunction with resolution.

"Bridge institution" – an entity that is established to temporarily take over and maintain certain assets, liabilities and operations of a failed bank as part of the resolution process.

"Client assets" – assets that are treated as client assets and subject to protection as such under the applicable laws or regulations. Typically, they are assets held by a bank (whether or not through a custodian) for or on behalf of a client in the course of or in connection with services provided by the bank to the client and where the client has a proprietary or similar right to the return of the asset or its substitute. (See paragraph 3.1 of II-Annex 3 to the *Key Attributes* on Client Asset Protection Resolution for typical examples of client assets.) Client assets do not include: deposits held by banks unless the deposits constitute customer funds under the

applicable legal framework and are labelled as such; or assets delivered in a full title transfer transaction, such as securities lending transactions, repurchase or reverse repurchase agreements, where neither the client nor clients collectively retain proprietary or similar rights to the asset.

"Conditions for entry into resolution" are met when a bank is no longer viable or likely to be no longer viable, and has no reasonable prospect of becoming so in the absence of resolution measures.

"Critical functions" – activities performed by a bank for third parties, where failure would lead to disruption of services critical to the functioning of the real economy and for preserving financial stability.[2]

"Early intervention" – any actions, including formal corrective action, taken by supervisory or resolution authorities in response to weaknesses in a bank prior to entry into resolution.

"Early termination rights" – contractual acceleration, termination or other close-out rights (for example, under financial contracts), including cross-default rights, held by counterparties of a bank that may be triggered on the occurrence of an enforcement or credit event set out in the contract.[3]

"Entry into resolution" – the determination by the relevant authority that a bank meets the conditions under the applicable resolution regime for the exercise of resolution powers and that it will be subject to the exercise of such powers.

"Financial conglomerate" – any group of companies under common control or dominant influence, including any financial holding company that conducts material financial activities in at least two of the regulated banking, securities or insurance sectors.[4]

"Financial contract" – any contract that is explicitly identified under the legal framework of the jurisdiction as subject to defined treatment in resolution and insolvency for the purposes of termination and netting. Typically, financial contracts include contracts for the purchase or sale of securities; derivatives contracts; commodities contracts; repurchase agreements; and similar contracts or agreements.

"Financial group" – a group composed of entities the primary activities of which are financial in nature. For the purposes of this Banking Sector Module, a financial group is relevant only if it includes banks (whether or not it includes other financial institutions).

"Financial institution" – any entity the principal business of which is the provision of financial services or the conduct of financial activities, including, but not limited to, banks, insurers, securities or investment firms and financial market infrastructure firms.

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[2] See FSB's "Guidance on Identification of Critical Functions and Critical Shared Services" (http://www.fsb.org/wp-content/uploads/r_130716a.pdf?page_moved=1), July 2013.

[3] For example, see §§ 5(a) (vii) and 6 of 2002 ISDA Master Agreement; section 10 of Global Master Repurchase Agreement 2000.

[4] As defined in the Joint Forum's "Principles for the supervision of financial conglomerates" (http://www.bis.org/publ/joint29.pdf), September 2012.

"Financial market infrastructure (FMI)" – a multilateral system among participating financial institutions, including the operator of the system, used for the purposes of, clearing, settling or recording payments, securities, derivatives or other financial transactions. It includes payment systems, central securities depositories, securities settlement systems, CCPs and trade repositories.[5]

"Group" – a parent company (which may be a holding company) and its direct and indirect subsidiaries, both domestic and foreign**.**

"G-SIB" and "G-SIFI" – respectively, a bank or a financial institution designated by the FSB as globally systemically important.[6]

"Holding company" – an operating or non-operating company that owns and controls one or more banks. This concept covers direct, intermediate and ultimate control.

"Home jurisdiction" – the jurisdiction where the operations of a bank or financial group are supervised on a consolidated basis.

"Legal framework" – the comprehensive legal system for a jurisdiction established by any combination of the following: a constitution; primary legislation enacted by a legislative body that has authority in respect of that jurisdiction; subsidiary legislation (including legally binding regulations or rules) adopted under the primary legislation of that jurisdiction; or legal precedent and legal procedures of that jurisdiction.

"Legal gateways" means provisions set out in statute or other instruments with the force of law that enable the disclosure of non-public information to specified recipients or for specified purposes. Legal gateways may be contingent on, or supported by, memoranda of understanding or other forms of agreement between the authorities providing the information and those receiving it.

"Mandate", in relation to a resolution authority, means the assignment to it of responsibilities by the legal framework.

"Protection scheme" – any scheme or fund that protects depositors or other clients, as the case may be, from specified losses that they might otherwise incur as a result of the failure of a bank.

"Public ownership" – full or majority ownership of an entity by the State or an emanation of the State.

"Resolution" – the exercise of resolution powers, including in particular the exercise of a resolution power specified in KA 3, by a resolution authority in respect of a bank that meets the conditions for entry into resolution, with or without private sector involvement, with the aim of achieving the statutory objectives of resolution set out in KA 2.3. The exercise of resolution powers may include or be accompanied by an insolvency proceeding with respect to the bank in resolution (for example, to wind up parts of that bank).

"Resolution authority" – a public authority that, either alone or together with other authorities, is responsible for the resolution of banks established in its jurisdiction (including resolution

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5 As defined in the PFMI (http://www.bis.org/cpmi/publ/d101a.pdf), April 2012.

6 The list of G-SIBs was first published by the FSB in November 2011 and is updated on a yearly basis.

planning functions). References in this document to a "resolution authority" should be read as "resolution authorities" in appropriate cases.

"Resolution powers" – powers available to resolution authorities under the legal framework for the purposes of resolution and exercisable without the consent of shareholders, creditors, debtors or the bank in resolution, including in particular those set out in KA 3.

"Resolution regime" – the elements of the legal framework and the policies governing resolution planning and preparing for, carrying out and coordinating resolution, including the application of resolution powers.

"Safety net" – the functions of the resolution authority, the lender of last resort and the authorities responsible for prudential regulation and supervision and for financial sector policy, and relevant insurance schemes and arrangements for the protection of depositors and other protected clients.

"Supervisor" or "supervisory authority" – the authority responsible for the supervision or oversight of a bank. References include, as relevant, prudential and business or market conduct supervisors.

"Systemically significant or critical" – a bank is systemically significant or critical if its failure could lead to a disruption of services critical for the functioning of the financial system or real economy.

II. Purpose and use of the methodology

The purpose of the methodology is to guide the assessment of a jurisdiction's compliance with the *Key Attributes* and promote consistent assessments across jurisdictions.

The methodology is intended primarily for use in the following:

(i) assessments performed by authorities of existing resolution regimes of their jurisdiction and of any reforms to those regimes that implement the *Key Attributes*;

(ii) peer reviews of resolution regimes conducted within the FSB framework for implementation monitoring by member jurisdictions; and

(iii) IMF and WB assessments of resolution regimes, for example in the context of FSAPs and ROSCs.

The methodology may also be a useful tool for a jurisdiction that is adopting new resolution regimes or reviewing, reforming or making improvements to its existing regimes. The primary audience for this methodology is assessors, resolution authorities and authorities responsible for developing legislation related to resolution regimes.

III. Conduct of compliance assessment

The primary objective of an assessment is to evaluate compliance of a jurisdiction's resolution regime with the *Key Attributes*. The assessment report should include a short summary view of whether the resolution regime has the required scope and broadly reflects the attributes set out in the *Key Attributes*.

Where relevant, the assessment should also address practical implementation of the requirements of the *Key Attributes* to establish whether the jurisdiction achieves the intended outcome of the relevant KA or, in the absence of practical experience, whether there are potential obstacles to its effective implementation. Implementation is deemed to be effective when the objective of a specific KA has been met or could reasonably be expected to be met. The assessment should not focus solely on deficiencies, but should also highlight specific achievements and provide concrete recommendations for addressing any weaknesses highlighted.

An assessment of a jurisdiction's resolution regime must recognise that its resolution regime should be proportionate to the complexity and systemic importance of the banks to which the resolution regime applies. This principle should underpin the assessment of all KAs even if it is not explicitly referred to in the EC.

The assessment must be comprehensive enough to allow a judgment on whether a KA is met in practice, not just in theory. The legal framework needs to be sufficient in scope and depth and be effectively enforced and complied with. Assessors should assess whether all powers exercisable by a public authority have a sufficient legal basis. Such powers should not be assessed solely by comparing the wording in the legal framework with that of the *Key Attributes* because legal terminology can differ across jurisdictions. Where those powers are not clearly set out in the legal framework, the onus is on the assessed jurisdiction to demonstrate that it has met the KA in theory and practice with a sufficient legal basis.

The assessment is a means to an end: it should assess a jurisdiction's resolution regime against the *Key Attributes* and recommend the measures that need to be taken in order to address any shortcomings identified. The key goal of the assessment is therefore not the assignment of the compliance grade (although this is a necessary part of the exercise), but rather to focus authorities' attention on areas that need improvement and to suggest the development of a specific Action Plan.

A. Essential criteria

The methodology proposes a set of essential criteria (ECs) that should be used to assess compliance with the relevant KA. The ECs are the only elements on which assessors should assess and grade compliance with a KA. They should not be interpreted in a manner that is inconsistent with the KA on which they are based. The methodology does not include "additional criteria" (which are used in some assessment methodologies and are based on best practices that might go beyond the core elements required by the standards in question).

B. Explanatory notes

The methodology includes explanatory notes (ENs) that provide examples, explanations and cross-references to other relevant KAs, and specific definitions not included in the Definitions

of key terms (see Section I). The ENs do not contain assessment criteria, but are intended to guide the interpretation of the KAs and the ECs.

C. Four-grade assessment scale

For assessments, the following four-grade scale will be used:

- **Compliant:** A jurisdiction will be considered compliant with a KA when all applicable ECs are met without any significant deficiencies.
- **Largely compliant:** A jurisdiction will be considered largely compliant with a KA whenever only limited shortcomings are observed which do not raise any concerns about the jurisdiction's ability and clear intent to achieve full compliance with the KA within a prescribed period. The grade "largely compliant" can, in particular, be used when the regime does not meet all applicable ECs, but overall the regime is sufficiently robust and comprehensive and no material risks are left unaddressed.
- **Materially non-compliant:** A jurisdiction will be considered materially non-compliant with a KA whenever there are severe shortcomings in the jurisdiction's compliance with the relevant KA, including in instances where formal rules, regulations and procedures exist but practical implementation of the KA has been weak. It is acknowledged that the gap between "largely compliant" and "materially non-compliant" is wide and that a choice between the two grades may be difficult. The intention is to require assessors to make a clear statement.
- **Non-compliant:** A jurisdiction will be considered non-compliant with a KA when there is no substantive implementation of the KA, several ECs are not complied with or the resolution regime is manifestly ineffective. If there is only one EC for a KA and the jurisdiction does not meet that criterion, then the jurisdiction will be considered non-compliant with respect to that KA.

Grading is not an exact science and the EC should not be seen as a checklist: instead, assessors should apply a qualitative approach in their assessments. Depending upon the structure of the financial sector and the circumstances in a given jurisdiction, compliance with certain ECs for a specific KA may be more critical for the completeness or effectiveness of the resolution regime than compliance with others. As a consequence, the number of individual EC complied with is not always an indication of the overall grading for any given KA.

D. Grading taking into account proportionality

The overall assessment should take into account the structure and complexity of the financial sector, such as the presence of G-SIBs and other SIBs, the relative systemic importance of different sectors and the market environment of the jurisdiction that is being assessed. An assessment must recognise that a jurisdiction's resolution regime should be proportionate to the size, structure and complexity of the jurisdiction's banking system. An individual KA or EC (or certain elements of a KA or an EC) will be considered "not applicable" when, in the assessors' view, the KA or EC (or relevant elements) does not apply to a jurisdiction because of structural, legal and/or institutional features of the financial system that are not likely to change in the foreseeable future. For example:

- if a KA applies only to a jurisdiction that is home to a G-SIB, that KA may be considered "not applicable" with respect to a jurisdiction that is not home to a G-SIB;
- if the KA or EC presupposes the existence of branches of foreign banks in the jurisdiction under review and, by law, foreign banks are prohibited from operating in the jurisdiction under review through branches, the KA or EC may be considered "not applicable"; and
- if a jurisdiction does not have bank holding companies, or the banks of such jurisdiction do not rely on group entities for critical shared services, criteria that apply to such entities should be deemed "not applicable". Moreover, resolution powers would not be applicable to non-financial firms that are part of conglomerates, if they do not provide services to financial firms in the group and their failure would not impede resolution.

An assessment may also need to accommodate the interdependence of particular ECs. In such cases, it is important to identify the unique elements of each of the interrelated ECs, and to assess these elements separately to avoid duplicative assessments. At the same time, a determination of "not applicable" may be necessary with respect to components of interdependent KAs, the absence of which may not be material since the preconditions for the KA may not be present in the jurisdiction. Specifically, this would be the case with respect to the relationship between KA 3 and the safeguards in KA 5, where certain ECs related to safeguards under KA 5 will be considered as not applicable if they assume the existence of the resolution powers under KA 3 and the jurisdiction under review has been assessed as non-compliant, or a "not applicable" assessment has been made, with respect to such powers.

The onus is on the assessed jurisdiction to demonstrate that certain KA or ECs are "not applicable"; however, the ultimate judgment rests with the assessors. If assessors determine that certain ECs are "not applicable", grading for the KA should be based on level of compliance with the applicable ECs only. If all ECs for a KA are determined to be "not applicable", then that KA will be considered "not applicable" for the purposes of the assessment of that jurisdiction. The ECs assessed must allow for a determination of whether the resolution regime can achieve the ultimate objectives of the KA, and a "not applicable" determination should not be used if it would impede such a judgment.

The use of a "not applicable" should be strictly limited, and the reasoning for or determining a particular KA or EC (or certain elements of a KA or EC) is "not applicable", must be documented and clearly explained to allow a future review to reconsider the grading if the situation changes. In making such determinations, assessors should bear in mind that features of the financial system that render a KA or an EC not applicable at the time of the assessment may evolve, and that these criteria may become relevant in future. The authorities should be aware of, and prepare for, such developments. "Not applicable" would be an appropriate assessment if the resolution authority is aware of the circumstances in which the criterion could eventually apply in their jurisdiction, but there is realistically no chance that the circumstance will arise and represent an obstacle to effective resolution.

E. Need for access to a range of information and stakeholders

The assessors must have access to a range of information, individuals and organisations in order to evaluate fully a jurisdiction's compliance with the *Key Attributes*. These may include the

resolution and supervisory authorities, the market regulator, the central bank, relevant protection schemes, relevant government ministries and other authorities, financial institutions and industry associations, auditors, insolvency practitioners and other financial sector participants.

Some of the information required will already be public, such as the relevant laws, regulations and certain policies. Other information required by the assessors may not be publicly available, for example any self-assessments, operational guidelines for resolution authorities and the overall results of resolvability assessments of and recovery and resolution planning for financial institutions, and institution specific cooperation agreements.[7] If the need for such information for the purposes of the assessment is demonstrated, it should be provided to assessors unless doing so would breach secrecy or confidentiality requirements that bind the relevant public authorities. Experience has shown that some concerns related to confidentiality may be solved through *ad hoc* arrangements between the public authorities of the jurisdiction being assessed, the assessors and the banks to which the information relates.[8]

Assessors should note any instances where required information is not provided or where requested meetings could not be held, and indicate the reasons why the information was not provided or the meeting not held and the impact this had on the completeness and accuracy of the assessment. In the absence of valid reasons for the failure of the assessed jurisdiction to provide requested information or arrange requested meetings, assessors should be entitled to conclude that the jurisdiction has not implemented the specific KA for which that information or those meetings were relevant and reflect this in their rating.

F. Cross-border aspects

In assessing compliance with the KAs relating to cross-border cooperation (in particular KAs 7, 8, 9 and 12), the assessors will need to determine whether a framework and processes for cooperation and information sharing are in place and whether such cooperation and information sharing actually takes place to the extent needed during normal times and (if applicable for the jurisdiction under review) during a crisis. The grading of a jurisdiction should not be reduced as a result of problems in cooperation and information sharing if those problems arise exclusively from the unwillingness or inability of authorities of other jurisdictions to cooperate or enter into appropriate cooperation agreements.

The cross-border application of resolution powers is not dealt with in the criteria for the KAs describing those powers - for example, KA 3 and KA 4 - although it is highly relevant for the effective application of those provisions. Rather, the cross-border elements of an authority's resolution powers are covered in the provisions of KA 7, which sets out standards for cross-border cooperation and processes to give effect to resolution actions taken in other jurisdictions. Assessors should therefore be satisfied that the legal and practical implementation of KA 7 is

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[7] As the objective of the methodology is not to assess the resolvability of individual institutions, access to individual results of supervisory and resolvability assessments of and recovery and resolution planning for individual financial institutions is not necessary.

[8] Some organisations and agencies involved in an assessment provide comfort letters on their policies on the treatment of confidential information rather than signing confidentiality agreements.

sufficient to support the cross-border effectiveness of the resolution powers contemplated in the *Key Attributes.*[9]

G. Recommended actions ("Action Plan")

Assessors should make appropriate recommendations for the jurisdiction assessed. It is the responsibility of the jurisdiction to develop an action plan that includes specific actions and measures to improve the resolution regime.

The desired outcome of an assessment is a shared view between assessors and the authorities on recommended actions needed to improve a jurisdiction's resolution regime. However, the actions to be recommended are ultimately a decision for the assessors. Undue emphasis should not be placed on the specific grade that is given; rather, attention should focus on the commentary that accompanies the assessment of each KA and on the measures recommended in the Action Plan. This may be particularly important where the ECs for certain KAs (and therefore the grading) are interconnected.

Recommendations relating to the preconditions (see section V below) will not be part of the Action Plan, but may be included in general recommendations for strengthening the resolution regime.

[9] KA 7.6 and 7.7 on information sharing with foreign authorities and protection of confidentiality of information received from foreign authorities are assessed under KA 12 (Access to information and information sharing).

IV. Assessments of policy measures for G-SIBs

While most of the KAs apply generally to resolution regimes for financial institutions that could be systemically significant or critical if they fail, KAs 8 and 9, which require home and key host authorities of G-SIFIs to maintain a Crisis Management Group (CMG) and institution-specific cooperation agreements (COAGs), are aimed specifically at G-SIFIs. KA 10 provides that resolvability assessments that evaluate the feasibility of resolution strategies and their credibility in light of the likely impact of the firm's failure on the financial system and the overall economy should be undertaken "at least for G-SIFIs."

Assessments under this methodology should focus on whether a resolution regime provides the framework, powers and requirements necessary to implement the G-SIB-specific KAs in the jurisdiction under review, rather than examining how the regime has been applied to individual firms.[10] The assessment would not require confidential firm-specific information to be shared with assessors where this is not possible under the applicable legal framework.

It should be noted that the recovery and resolution planning requirement set out in KA 11, applies more broadly to any financial institution that could be systemically significant or critical in the event of failure. Effective recovery and resolution planning in accordance with KA 11 may also require arrangements for cooperation and coordination between home and relevant host authorities to the extent that a financial institution that could be systemically significant or critical if it were to fail has cross-border operations that are material to the financial institution. Accordingly, EC 11.2 also assesses the existence of appropriate arrangements for cross-border cooperation and coordination in relation to firms with cross-border operations that are not G-SIBs (and for which, therefore, the *Key Attributes* do not require a CMG and COAG to be maintained in accordance with KAs 8 and 9).

[10] Other FSB monitoring processes, including the Resolvability Assessment Process or 'RAP', focus on how the requirements are met in relation to individual G-SIBs.

V. Preconditions for effective resolution regimes

A number of preconditions have a direct impact on the effectiveness of resolution regimes. These include:

A. a well-established framework for financial stability, surveillance and policy formulation (Precondition A);

B. an effective system of supervision, regulation and oversight of banks (Precondition B);

C. effective protection schemes for depositors and other protected clients or customers, and clear rules on the treatment of client assets (Precondition C);

D. a robust accounting, auditing and disclosure regime (Precondition D); and

E. a well-developed legal framework and judicial system (Precondition E).

Some or all of these preconditions are likely to be outside the direct responsibility and/or competencies of resolution authorities.

Insufficient implementation of the preconditions can seriously undermine the quality and effectiveness of resolution. The presence of the preconditions will have a positive, and weaknesses in those areas may have a negative, impact on the effectiveness of resolution regimes. Where assessors have concerns about weaknesses in the preconditions, their assessment should note any actual or potential negative impact.

Assessors should not assess the preconditions themselves, as this is beyond the scope of an assessment of the *Key Attributes*. Instead, assessors should rely on IMF and WB assessments[11] having regard to any actions taken by authorities and any changes of preconditions that may have occurred after the conduct of those assessments. When relevant, the assessors should include in their analysis the links between the implementation of individual preconditions and the effectiveness of resolution regimes. To the extent that shortcomings in preconditions are material to the effectiveness of resolution, they may affect the grading of the affected KAs.

Precondition A: A well-established framework for financial stability, surveillance and policy formulation

In view of the interplay between the real economy and the financial system, it is important that jurisdictions have a robust framework for macro-prudential surveillance and the formulation and implementation of financial stability policy.[12] Such a framework should specify the authorities responsible for the following functions:

- identifying systemic risk in the financial system;
- monitoring and analysing market and other financial and economic factors that may lead to the accumulation of systemic risks;

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[11] The main sources of information on the extent to which the preconditions are present in a jurisdiction will be reports of country assessments carried out by the IMF and WB under the FSAPs and ROSCs relating to relevant supervisory standards. For the FSB's compendium of standards, see http://www.fsb.org/what-we-do/about-the-compendium-of-standards/?page_moved=1.

[12] The results of a FSAP or ROSC carried out by the IMF and/or WB may be used to assess the existence and effectiveness of such a framework.

- formulating and implementing appropriate policies; and
- assessing how such policies may affect individual financial institutions and the financial system more broadly.

Precondition B: An effective system of supervision, regulation and oversight of banks

Jurisdictions should have a system of supervision, regulation and oversight that meets the relevant regulatory and supervisory standards (BCBS[13] and IOSCO[14]) and that:

- develops and maintains a forward-looking assessment of the risk profile of individual banks, thereby enabling supervisors to identify, assess and take action with respect to risks arising from individual banks or the financial system as a whole;
- provides for increased intensity of supervision of a bank that is encountering difficulties that, if not addressed, could jeopardise its continued viability and ensures that such heightened supervisory attention will support early intervention and orderly resolution in those cases where serious problems cannot be remedied by other measures and the insolvency of the firm would pose a threat to financial stability; and
- provides the supervisor with an adequate range of enforcement tools to bring about timely corrective action and address unsafe and unsound practices or activities that could pose risks to firms or to the financial system.

Precondition C: Effective protection schemes for depositors and other protected clients or customers

Jurisdictions should have one or more effective protection schemes for depositors[15] that implement the relevant international standards. Jurisdictions should also maintain arrangements to promote a high level of coordination and cooperation between protection schemes and other agencies that constitute the 'safety net' to support clear allocation of responsibilities and accountability and effective crisis management.[16]

Jurisdictions should have in place clear rules on how losses are shared between clients in the event of shortfalls in any pool of client assets.

Precondition D: A robust accounting, auditing and disclosure regime

There should be a robust accounting, auditing and disclosure regime that includes the following elements:

- comprehensive and well defined accounting principles and rules that command wide international acceptance;

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13 See "Core Principles for Effective Banking Supervision" (http://www.bis.org/publ/bcbs230.pdf), September 2012.

14 See "Objectives and Principles of Securities Regulation" (https://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf), June 2010.

15 Standards for deposit insurance schemes are set out in the "IADI Core Principles for Effective Deposit Insurance Systems" (http://www.iadi.org/en/assets/File/Core%20Principles/cprevised2014nov.pdf), November 2014.

16 Specific expectations for the governance of the resolution authority or authorities are specified in the KAs, and are also set out in the relevant supervisory standards developed by the BCBS, IOSCO, and BCBS-IADI (see footnotes 13 to 15).

- a system of independent external audits designed to provide a true and fair view of the financial position of banks, with auditors held accountable for their work; and
- sound arrangements for transparency and disclosure of information.

Precondition E: A well-developed legal framework and judicial system

There should be a well-developed legal framework and judicial system that includes the following elements:

- a corpus of laws, including corporate, bankruptcy, contract, consumer protection, private property laws and conflict of laws rules, that is clear and consistently enforced;
- effective creditor rights systems consistent with the WB principles;[17]
- an independent judiciary; and
- availability of independent and qualified professionals (for example, accountants, auditors, lawyers and insolvency practitioners), who are subject to appropriate accreditation and oversight and whose work is required to comply with technical and ethical standards that are set and enforced by official or professional bodies and consistent with international standards.

[17] See "Principles for Effective Insolvency and Creditor/Debtor Regimes" (http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf), 2016.

VI. Assessment methodology[18]

The methodology proposes a set of essential criteria (ECs) that the assessors should use to assess and grade compliance with a KA. The explanatory notes (ENs) provide examples, explanations and cross-references to other relevant KAs, and specific definitions not included in the Definitions of key terms (see Section I). The ENs do not contain assessment criteria, but are intended to guide the interpretation of the KAs and the ECs.

KA 1 Scope

1.1 Any financial institution that could be systemically significant or critical if it fails should be subject to a resolution regime that has the attributes set out in this document ("Key Attributes"). The regime should be clear and transparent as to the financial institutions (hereinafter "firms") within its scope. It should extend to:

(i) holding companies of a firm;

(ii) non-regulated operational entities within a financial group or conglomerate that are significant to the business of the group or conglomerate; and

(iii) branches of foreign firms.[19]

1.2 *Financial market infrastructure ("FMIs") should be subject to resolution regimes that apply the objectives and provisions of the Key Attributes in a manner appropriate to FMIs and their critical role in financial markets. The choice of resolution powers should be guided by the need to maintain continuity of critical FMI functions.*

1.3 The resolution regime should require that at least all domestically incorporated global SIFIs ("G-SIFIs"):

(i) have in place a recovery and resolution plan ("RRP"), including a group resolution plan, containing all elements set out in I-Annex 4 (see Key Attribute 11);

(ii) are subject to regular resolvability assessments (see Key Attribute 10); and

(iii) are the subject of institution-specific cross-border cooperation agreements (see Key Attribute 9).

[18] Original text of the *Key Attributes* is provided in boxes in assessment methodology for each KA. KAs which are not related to the assessment of a jurisdiction's compliance with the *Key Attributes* with respect to the banking sector are in grey italics.

[19] This should not apply where jurisdictions are required by the applicable legal framework to recognise resolution of financial institutions under the law of, and carried out by the authorities of their home jurisdiction (for example, the EU Directives on the Winding up and Reorganisation of credit institutions and of insurance undertakings).

Essential criteria for KA 1

EC 1.1 The scope of application of the resolution regime and the circumstances in which it applies are clearly defined in the legal framework. The resolution regime covers any bank that could be systemically significant or critical in the event of failure.

EC 1.2 The scope of the resolution regime covers the following entities located within the jurisdiction:

(i) holding companies of banks;

(ii) non-regulated operational entities within a financial group or conglomerate that are significant to the business or continuity of the bank's critical operations; and

(iii) domestic branches of foreign banks.

Explanatory notes for KA 1

EN 1 (a) Scope – The purpose of the assessment of KA 1 is to determine whether the jurisdiction has in place a resolution regime, with the required scope, that broadly reflects the attributes set out in the *Key Attributes*. However, a detailed assessment of the components of the resolution regime will be carried out in accordance with other KAs (including KAs 9, 10 and 11). Accordingly, a resolution regime could be compliant with KA 1, even when there are shortcomings in the implementation of other KAs. If such shortcomings are severe—for example, the resolution regime is not distinct from ordinary corporate insolvency, relies exclusively on supervisory powers or lacks most of the resolution powers—it would not be compliant with KA 1.

EN 1 (b) Form of resolution regime – KA 1 is neutral as to the form of the regime, provided that all banks that could be systemically significant or critical in the event of failure are subject to a resolution regime that broadly reflects the attributes set out in the *Key Attributes*. Jurisdictions may have separate regimes, or a single regime including the banking sector. The resolution regime may adapt, modify or be distinct from the ordinary corporate insolvency regime, but the relationship between the resolution regime and the ordinary corporate insolvency regime (if aspects of the latter remain applicable to banks) and the circumstances in which the resolution regime will apply or supersede the ordinary corporate insolvency regime should be clear in the legal framework.

EN 1 (c) Determination of systemic significance – The resolution regime should be transparent as to the banks within its scope. Resolution regimes may apply more broadly than to systemically significant or critical banks. Where the scope of application of some or all resolution powers is limited to banks determined to be systemically significant or critical in failure, the regime may provide for that determination to be made in advance of any failure or at the point when intervention is being considered. However, where the regime provides for determinations in advance, there should also be procedures to allow the regime to apply to banks that are shown to be systemically significant or critical at the point of failure, given the prevailing circumstances. Depending on the circumstances at the time of their failure, even

small banks could prove systemic as a result of contagion or a loss of confidence in the banking system.

As a practical matter, assessors are not expected to make a factual determination as to which banks in the jurisdiction under assessment could be systemically significant or critical at failure. Instead, assessors may examine whether existing guidelines, criteria or procedures for assessing whether a bank could be systemically significant or critical if it fails have enabled or would enable the authorities in the relevant jurisdiction to apply the resolution regime or resolution powers to a bank when necessary to meet the resolution objectives.

EN 1 (d) Holding companies – The resolution regime should extend to holding companies insofar as that is necessary to resolve a bank or a financial group as a whole. The powers should be exercisable irrespective of whether a holding company itself carries on regulated financial activities (a parent operating company), and irrespective of whether holding companies are licensed or authorised under the jurisdiction's legal framework. See EN 3 (b) on the conditions for the exercise of resolution powers in respect of holding companies.

EN 1 (e) Domestic branches of foreign banks – Resolution authorities should have resolution powers with regard to local branch operations of foreign banks. Such powers should be assessed in relation to the relevant powers under KA 3. A regime is not required to apply to domestic branches of foreign banks in cases where resolution of such branches falls within a regime[20] that gives exclusive competence in the resolution of a financial institution to the home resolution authority (including European Single Resolution Board), and requires the host resolution authorities to recognise or grant automatic mutual recognition of a resolution of the financial institution and all its branches carried out by the home resolution authority.

EN 1 (f) Non-regulated operational entities within a financial group or conglomerate – Non-regulated operational entities may provide services (for example, treasury services, risk management and valuation, accounting, human resources support, IT, transaction processing or legal services and compliance) that are necessary for the continuity of critical functions carried out within the group. The abrupt withdrawal of those services could jeopardise the resolution objective of maintaining those functions. The resolution regime should extend to non-regulated operational entities within a financial group or conglomerate, so that measures can be taken in relation to such entities insofar as that is necessary to support the resolution of an affiliated financial institution or the group as a whole. The resolution authority should therefore be able to exercise appropriate powers to achieve that objective. Such powers should be assessed in relation to the relevant powers under KA 3.2 (iv).

[20] Such as regimes established under the EU Directive establishing a framework for the recovery and resolution of credit institutions and investment firms, EU Directive on the reorganisation and winding up of credit institutions and EU Regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund.

KA 2 Resolution Authority

2.1 Each jurisdiction should have a designated administrative authority or authorities responsible for exercising the resolution powers over firms within the scope of the resolution regime ("resolution authority"). Where there are multiple resolution authorities within a jurisdiction their respective mandates, roles and responsibilities should be clearly defined and coordinated.

2.2 Where different resolution authorities are in charge of resolving entities of the same group within a single jurisdiction, the resolution regime of that jurisdiction should identify a lead authority that coordinates the resolution of the legal entities within that jurisdiction.

2.3 As part of its statutory objectives and functions, and where appropriate in coordination with other authorities, the resolution authority should:

(i) pursue financial stability and ensure continuity of systemically important financial services, and payment, clearing and settlement functions;

(ii) protect, where applicable and in coordination with the relevant insurance schemes and arrangements, such depositors, insurance policy holders and investors as are covered by such schemes and arrangements;

(iii) avoid unnecessary destruction of value and seek to minimise the overall costs of resolution in home and host jurisdictions and losses to creditors, where that is consistent with the other statutory objectives; and

(iv) duly consider the potential impact of its resolution actions on financial stability in other jurisdictions.

2.4 The resolution authority should have the authority to enter into agreements with resolution authorities of other jurisdictions.

2.5 The resolution authority should have operational independence consistent with its statutory responsibilities, transparent processes, sound governance and adequate resources and be subject to rigorous evaluation and accountability mechanisms to assess the effectiveness of any resolution measures. It should have the expertise, resources and the operational capacity to implement resolution measures with respect to large and complex firms.

2.6 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.

2.7 The resolution authority should have unimpeded access to firms where that is material for the purposes of resolution planning and the preparation and implementation of resolution measures.

Essential criteria for KA 2

EC 2.1 The legal framework clearly identifies one or more resolution authorities and provides it or them with a clear mandate. Where there are multiple resolution authorities or where multiple authorities are involved in a resolution process, the

resolution regime provides for the identification of a lead authority; sets out clear arrangements to coordinate the resolution of affiliated legal entities, or the resolution of a single bank, within that jurisdiction; and provides for a clear allocation of objectives, functions and powers of those authorities.

EC 2.2 The statutory objectives and functions of the resolution authority include those set out in KA 2.3, as applicable to the sectoral responsibilities of the authority. Where the exercise of resolution powers requires court involvement, the objectives of that involvement are aligned with the statutory objectives and functions set out in KA 2.3.

EC 2.3 The resolution authority is, by law and in practice, operationally independent in the performance of its statutory responsibilities. There are arrangements, procedures and safeguards against undue political or industry influence, which include:

(i) internal governance arrangements which promote sound and independent decision-making;

(ii) rules and procedures for the appointment and dismissal of the head of the authority, members of the governing body (where relevant) and senior management; and

(iii) rules on conflicts of interest.

EC 2.4 The resolution authority is accountable through a transparent framework for the discharge of its duties in relation to its statutory responsibilities. This framework includes procedures for reviewing and evaluating actions that the resolution authority takes in carrying out its statutory responsibilities, and the periodic publication of reports on its resolution actions and policies, as necessary.

EC 2.5 The resolution authority has adequate human and budgetary resources or access to such resources, sufficient to enable it to carry out its resolution functions effectively without undermining its independence, both before and during a crisis.

EC 2.6 The legal framework provides legal protection through statute for the resolution authority, its head, members of the governing body and its staff and any agents against liability for actions taken or omissions made while discharging their duties in good faith and acting within the scope of their powers, including actions taken in support of foreign resolution proceedings; including indemnification against any costs of defending any such actions.

EC 2.7 Under the legal framework, the resolution authority has unimpeded access to the domestic premises of banks where necessary for the purposes of resolution planning and the preparation and implementation of resolution measures.

Explanatory notes for KA 2

EN 2 (a) Designated administrative authority or authorities – KA 2 requires jurisdictions to confer resolution powers on administrative authorities to ensure that the objectives of the framework can be delivered in a timely manner. Jurisdictions may designate as their resolution

authorities one or more authorities, including, for example, central banks, financial supervisors, protection schemes, ministries of finance or dedicated administrative authorities**.**

EN 2 (b) Lead authority – KA 2 requires the resolution regime to identify a lead resolution authority in cases where the resolution of affiliated entities falls within the statutory responsibilities of more than one resolution authority. This might be the case, for example, where there are separate resolution authorities and resolution action is required in relation to affiliated domestic entities of different financial sectors. The lead authorities for financial groups within a jurisdiction may vary according to the nature of the group structure and the entities within the group. A regime complies with EC 2.1 if it contains provision for a lead authority to be identified on a case-by-case basis: advance identification is not necessary.

EN 2 (c) Arrangements to coordinate the resolution of affiliated legal entities – While coordination does not require that the lead authority has powers to direct or issue binding instructions to the other authorities, the arrangements for coordination should provide a process for a single decision to be made in the case of any disagreement between the authorities. Evidence of compliance with this requirement might include specific statutory provision for coordination by an identified lead authority, memoranda of understanding or other documented arrangements between authorities that provide for the type of information to be exchanged, confidential channels for communication and contact persons, etc.

KA 2 requires coordination arrangements with respect to the resolution of a single bank and/or the resolution of multiple regulated financial institutions within a group. Where certain entities in the group could be subject to ordinary corporate insolvency proceedings, coordination with insolvency administrators for other group entities may also be important for effective resolution and should be considered as part of overall resolution planning under KA 11.

EN 2 (d) Operational independence – The requirement that the resolution authority be operationally independent does not mean it can have no functions other than resolution. An authority that carries out resolution functions may also carry out other functions, such as supervision or deposit insurance, provided that adequate governance arrangements are in place to manage any conflicts of interests that may arise from combining those functions within a single authority.

It is not inconsistent with the operational independence of the resolution authority if some aspects of resolution are not under its exclusive discretion. This may be the case, in particular, where temporary public funding is provided to support a resolution. A requirement to obtain governmental approval for certain resolution actions, for example those which have implications for public funds, does not in itself mean that the resolution authority is not operationally independent. The requirement for operational independence should also not prevent the resolution authority from coordinating and sharing information with finance ministries and other governmental authorities where necessary for the exercise of resolution functions and achieving the statutory objectives of resolution.

When assessing compliance with KA 2 the assessors should reach a judgement as to whether the rules and procedures for the appointment and dismissal of the head of the authority, members of the governing body (where relevant) and senior management limit the potential for undue political interference. Appropriate safeguards could include transparent appointment procedures; statutory constraints that would prevent the head of the resolution authority being

removed during his or her term of office for reasons other than those specified in law; and public disclosure of the reason(s) for that early dismissal.

EN 2 (e) Accountability – The requirement for procedures for reviewing and evaluating actions that the resolution authority takes in carrying out its statutory responsibilities may be satisfied by procedures for internal review by management or a function within the resolution authority. Provision for review of the effectiveness of the resolution authority in meeting its statutory objectives by an appropriate external body would strengthen accountability. The resolution authority should also publish periodic reports on its resolution actions and policies relating to its mandate and its statutory objectives at sufficiently frequent intervals to keep stakeholders and the public adequately informed about the authority's resolution activities. Public reports may include case-specific reports that are released once the resolution of a bank has concluded, assessing the outcome of the resolution and the effectiveness with which the resolution was carried out by reference to the statutory objectives. The resolution authority should however not be required to disclose publicly the operational resolution plans or results of resolvability assessments of individual banks.

EN 2 (f) Human and financial resources – The assessment of the adequacy of human and budgetary resources should take into account the size and complexity of the banks under the responsibility of the respective resolution authority. Budgetary resources refer to the resources necessary to finance the administrative costs of the authority as they pertain to resolution, including costs of training, onsite work and coordination work with other resolution authorities, IT and other equipment needed to carry out resolution functions. (Requirements relating to funding of resolution are set out in KA 6). Human resources refers to the ability of the authority to attract and retain staff with sufficient expertise and in sufficient numbers to carry out its resolution functions, and to commission outside experts with the necessary professional skills and independence where necessary to support those functions, including where the resolution authority is separate from the supervisory authorities, the ability to draw upon the expertise of the latter. The resolution authority should also have an adequate training budget and programme for its personnel to ensure that their knowledge and skills remain current and that they have the expertise to deal with the resolution of large and complex banks operating in its jurisdiction.

EN 2 (g) Protection from liability – Protection from liability should not prevent judicial review of the actions of the resolution authority (cf. KA 5.4).

EN 2 (h) Access to premises – The right to seek access to premises may be subject to applicable privileges or constitutional protections, legal remedies or due process requirements that are consistent with KA 5.4.

KA 3 Resolution powers

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

3.2 Resolution authorities should have at their disposal a broad range of resolution powers, which should include powers to do the following:

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

(ii) Appoint an administrator to take control of and manage the affected firm with the objective of restoring the firm, or parts of its business, to on-going and sustainable viability;

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

(iv) Ensure continuity of essential services and functions by requiring other companies in the same group to continue to provide essential services to the entity in resolution, any successor or an acquiring entity; ensuring that the residual entity in resolution can temporarily provide such services to a successor or an acquiring entity; or procuring necessary services from unaffiliated third parties;

(v) Override rights of shareholders of the firm 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;

(vi) Transfer or sell assets and liabilities, legal rights and obligations, including deposit liabilities and ownership in shares, to a solvent third party, notwithstanding any requirements for consent or novation that would otherwise apply (see Key Attribute 3.3);

(vii) Establish a temporary bridge institution to take over and continue operating certain critical functions and viable operations of a failed firm (see Key Attribute 3.4);

(viii) Establish a separate asset management vehicle (for example, as a subsidiary of the distressed firm, an entity with a separate charter, or as a trust or asset management company) and transfer to the vehicle for management and run-down non-performing loans or difficult-to-value assets;

(ix) Carry out bail-in within resolution as a means to achieve or help achieve continuity of essential functions either (i) by recapitalising the entity hitherto providing these functions that is no longer viable, or, alternatively, (ii) by capitalising a newly established entity or bridge institution to which these functions have been transferred following closure of the non-viable firm (the residual business of which would then be wound up and the firm liquidated) (see Key Attribute 3.5);

(x) Temporarily stay the exercise of early termination rights that may otherwise be triggered upon entry of a firm into resolution or in connection with the use of resolution powers (see Key Attribute 4.3 and Annex IV);

(xi) Impose a moratorium with a suspension of payments to unsecured creditors and customers (except for payments and property transfers to central counterparties (CCPs) and those entered into the payment, clearing and settlements systems) and a stay on creditor actions to attach assets or otherwise collect money or property from the firm, while protecting the enforcement of eligible netting and collateral agreements; and

(xii) Effect the closure and orderly wind-down (liquidation) of the whole or part of a failing firm with timely pay-out or transfer of insured deposits and prompt (for example, within seven days) access to transaction accounts and to segregated client funds).

3.3 Resolution authorities should have the power to transfer selected assets and liabilities of the failed firm to a third party institution or to a newly established bridge institution. Any transfer of assets or liabilities should not:

(i) require the consent of any interested party or creditor to be valid; and

(ii) constitute a default or termination event in relation to any obligation relating to such assets or liabilities or under any contract to which the failed firm is a party (see Key Attribute 4.2).

3.4 Resolution authorities should have the power to establish one or more bridge institutions to take over and continue operating certain critical functions and viable operations of a failed firm, including:

(i) the power to enter into legally enforceable agreements by which the authority transfers, and the bridge institution receives, assets and liabilities of the failed firm as selected by the authority;

(ii) the power to establish the terms and conditions under which the bridge institution has the capacity to operate as a going concern, including the manner under which the bridge institution obtains capital or operational financing and other liquidity support; the prudential and other regulatory requirements that apply to the operations of the bridge institution; the selection of management and the manner by which the corporate governance of the bridge institution may be conducted; and the performance by the bridge institution of such other temporary functions as the authority may from time to time prescribe;

(iii) the power to reverse, if necessary, asset and liability transfers to a bridge institution subject to appropriate safeguards, such as time restrictions; and

(iv) the power to arrange the sale or wind-down of the bridge institution, or the sale of some or all of its assets and liabilities to a purchasing institution, so as best to effect the objectives of the resolution authority.

3.5 Powers to carry out bail-in within resolution should enable resolution authorities to:

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

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

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

3.6 The resolution regime should make it possible to apply bail-in within resolution in conjunction with other resolution powers (for example, removal of problem assets, replacement of senior management and adoption of a new business plan) to ensure the viability of the firm or newly established entity following the implementation of bail-in.

3.7 *In the case of insurance firms, resolution authorities should also have powers to:*

(i) undertake a portfolio transfer moving all or part of the insurance business to another insurer without the consent of each and every policy holder; and

(ii) discontinue the writing of new business by an insurance firm in resolution while continuing to administer existing contractual policy obligations for in-force business (run-off).

3.8 Resolution authorities should have the legal and operational capacity to:

(i) apply one or a combination of resolution powers, with resolution actions being either combined or applied sequentially;

(ii) apply different types of resolution powers to different parts of the firm's business (for example, retail and commercial banking, trading operations, insurance); and

(iii) initiate a wind-down for those operations that, in the particular circumstances, are judged by the authorities to be not critical to the financial system or the economy (see Key Attribute 3.2 xii).

3.9 In applying resolution powers to individual components of a financial group located in its jurisdiction, the resolution authority should take into account the impact on the group as a whole and on financial stability in other affected jurisdictions, and undertake best efforts to avoid taking actions that could reasonably be expected to trigger instability elsewhere in the group or in the financial system.

Essential criteria for KA 3

EC 3.1 The legal framework includes clear criteria that provide for timely and early entry into resolution before a bank is balance sheet insolvent, when a bank is no longer viable or when it is likely to be no longer viable and, in either case, has no reasonable prospect of return to viability.

EC 3.2 Effective and adequate arrangements including evaluation and decision-making processes are in place to support the timely determination of non-viability or likely non-viability and entry into resolution.

EC 3.3 The resolution authority, either directly or through the supervisory authority, has powers to remove and replace senior management and directors of the bank in resolution.

EC 3.4 The resolution authority or another relevant authority has the power to pursue claims and recover monies, including variable remuneration, from persons whose actions or omissions have caused or materially contributed to the failure of the bank.

EC 3.5 The resolution authority has powers, directly or indirectly through an administrator, to temporarily take control and operate a bank in order to achieve its orderly resolution. This includes powers to restructure or wind down the bank's operations; terminate, continue or assign contracts; enter into contracts and service agreements to ensure the continuity of essential services and functions; and purchase or sell assets.

EC 3.6 The resolution authority has powers to ensure continuity of essential services and functions by:

(i) requiring that the bank in resolution temporarily provides, to any successor or acquiring entity to which assets and liabilities of the bank have been transferred, services that are necessary to support continuity of essential services and functions related to those assets and liabilities;

(ii) requiring companies in the same group (whether or not they are regulated) to continue to provide services that are necessary to support such continuity to the bank in resolution or to any successor or acquiring entity at a reasonable rate of reimbursement; or

(iii) procuring necessary services from unaffiliated third parties on behalf of the bank in resolution.

EC 3.7 The resolution authority has the power to effect the sale of the bank or its merger with another institution, or the transfer of assets or liabilities to a third party, asset management vehicle or bridge institution without requiring prior notification or the consent of any interested private party such as the shareholders, depositors, or other creditors and clients of the bank in resolution.

EC 3.8 The resolution authority has the power to transfer assets or liabilities back from the bridge institution to the bank in resolution, the estate of the bank or to an asset management vehicle. The exercise of that reverse transfer power is subject to appropriate safeguards, such as time restrictions.

EC 3.9 The resolution authority has the powers set out in KA 3.4 to establish one or more bridge institutions. The legal framework specifies, or gives the resolution authority the power to specify, the terms and conditions under which a bridge institution will be set up and operate as a going concern, including:

(i) its ownership structure;

(ii) the sources of capital, its operational financing and liquidity support;

(iii) the applicable regulatory requirements, including regulatory capital;

(iv) the applicable corporate governance framework; and

(v) the process for appointing the management of the bridge institution and its responsibilities.

EC 3.10 The resolution authority has the power, either directly or indirectly, to establish a separate asset management vehicle for the purposes of managing and winding down assets transferred to it from a bank in resolution.

EC 3.11 The resolution authority has powers that would allow it to give effect to the following actions if necessary to absorb losses:

(i) cancel or write down equity or other instruments of ownership of the bank;

(ii) terminate or write down unsecured and uninsured creditor claims;

(iii) exchange or convert into equity or other instruments of ownership of the bank, any successor in resolution (such as a bridge institution to which part or all of the business of the failed bank is transferred) or the parent company within that jurisdiction, all or parts of unsecured and uninsured creditor claims;

(iv) override pre-emption rights of existing shareholders of the bank;

(v) issue new equity or other instruments of ownership;

(vi) issue warrants to equity holders or subordinated (and if appropriate senior) debt holders whose claims have been subject to bail-in (to enable adjustment of the distribution of shares based on a further valuation at a later stage); and

(vii) suspend (or to seek suspension of) shares and other relevant securities from listing and trading for a temporary period, if necessary to effect the bail-in.

EC 3.12 The legal framework provides clarity as regards the scope of the bail-in power set out in KA 3.5, that is, the range of liabilities covered and provides for its application in a manner that respects the hierarchy of claims as established in KA 5.1.

EC 3.13 The legal framework enables contingent convertible instruments not triggered prior to entry into resolution to be terminated, written down or converted in accordance with the particular contractual terms immediately on entry into resolution, and enables bail-in powers to be applied to those instruments, or claims resulting from their termination, contractual write-down or conversion, pari passu with instruments of the same type , except if necessary to contain the potential systemic impact of a bank's failure or to maximise the value for the benefit of all creditors as a whole (see KA 5.1).

EC 3.14 The resolution authority has the power to (i) impose a moratorium with a suspension of payments and (ii) issue or obtain a stay of creditor actions to attach assets or otherwise collect money or property from the bank.

EC 3. 15 The resolution authority has the power to effect the closure and orderly wind-down and liquidation of the whole or part of a failing bank, and in such event, has the capacity and practical ability to effect or secure both of the following:

(i) the timely pay-out to insured depositors or the prompt transfer of insured deposits to a third party or bridge institution; and

(ii) the timely transfer or return of client assets.

EC 3.16 The legal framework does not restrict the resolution authority from combining resolution actions and does not require it to apply such actions in a particular order (subject to EC 3.13).

Explanatory notes for KA 3

EN 3 (a) Non-viability – The concept of non-viability should permit exercise of resolution powers before a bank is insolvent (meaning balance-sheet insolvent, cash-flow insolvent, or any other definition of insolvency used for the purposes of the applicable insolvency regime) and before all equity has been fully absorbed. The assessment of non-viability should not therefore require proof that the bank is insolvent.

'No reasonable prospect of return to viability' means that there are no measures that could reasonably be taken by the bank, including recovery measures identified in the its recovery plan or supervisory early intervention measures, that are likely to restore the bank to viability in a timeframe that is reasonable having regard to the circumstances and the risks to financial stability and to insured depositors and other protected clients that are associated with the non-viability of the bank.

EN 3 (b) Non-viability in respect of holding companies – The legal framework should permit the exercise of resolution powers in respect of a holding company of a bank sufficiently early to allow resolution authorities, in appropriate cases, to take action at the level of the holding company to manage the failure of all or parts of the financial group. This objective can be met if resolution powers can be exercised in respect of a holding company when one or more subsidiary banks meet the conditions of non-viability specified in the legal framework and their failure would threaten the viability of the holding company or the group as a whole.

EN 3 (c) Quantitative or qualitative criteria to assess non-viability – The conditions for entry into resolution or exercise of resolution powers should be clear and transparent and set out in law: the standards or suitable indicators of non-viability may be set out in guidance or other policy documents. The requirement for clear and transparent criteria specifying when resolution can be initiated may be satisfied by the identification of quantitative or qualitative factors that are used by the relevant public authority to guide its decisions as to whether a bank meets the conditions for entry into resolution. General examples of non-viability could include:

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

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

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

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

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

Exclusive reliance on criteria for non-viability that are closely aligned with insolvency or likely insolvency would not meet the test for timely and early entry into resolution (although it should always be possible to apply resolution measures to an insolvent bank).

EN 3 (d) Timely entry into resolution – A determination of non-viability and entry into resolution must be capable of being made sufficiently quickly to preserve financial stability and support the statutory objectives of resolution. For example, where there is a risk of depositor contagion, a bank may need to be placed into resolution in a matter of hours to preserve financial stability. Timely entry into resolution does not imply that all aspects of the resolution must be completed immediately. The resolution authority should, however, have the means to immediately stabilize the firm and ensure that essential services and systemic functions remain open and operating to avoid the disruption and contagion that would otherwise accompany their closure. (See also EN 5 (d)).

EN 3 (e) Powers of the resolution authority – Where the EC refer to powers of the resolution authority to take specific resolution actions, those powers should be clearly set out in the legal framework applicable to the authority. Where those powers are not clearly set out in the legal framework, the onus is on the assessed jurisdiction to demonstrate that the resolution authority has such powers with a sufficient legal basis.

EN 3 (f) Characteristics of resolution powers – The powers should be assessed on the basis of the ability to achieve the outcome specified in the relevant EC, rather than the terminology used in the legal framework, which may differ between jurisdictions. Powers that achieve the outcomes specified in KA 3.2 may not necessarily be labelled as 'resolution powers'. Nevertheless, in order to comply with KA 3.2 and to enable authorities to deliver their statutory resolution objectives and achieve the necessary outcomes, the powers should have certain features that distinguish them from powers used for ordinary supervisory purposes, and from ordinary corporate insolvency regimes.

(i) **Ability to interfere with third party rights** – Resolution powers enable the resolution authority to interfere with third party rights (for example, by imposing a moratorium on the enforcement of claims and imposing a temporary stay on early termination rights) and to allocate losses to creditors and shareholders.

(ii) **Exercisable by an administrative authority** – Resolution powers should be exercisable by an administrative resolution authority (either directly or through an appointed administrator with appropriate objectives (see EN 3 (i)). While it is not necessarily inconsistent with the *Key Attributes* if the resolution regime makes provision for a court order or confirmation for the exercise of resolution powers to be effective, it is important to ensure that any requirement for court approval does not impede rapid intervention and the ability to achieve the specified objectives of resolution. (See KA 5.4, which requires authorities to take account of the time needed for court processes in resolution planning so as not to compromise effective implementation of resolution measures, and EN 5 (d), which indicates how provision for court involvement might be consistent with the speed and flexibility necessary for effective resolution powers.)

(See also KA 5.5 and EN 5 (e), which provide that resolution regimes should not provide for judicial actions that could constrain the implementation, or result in the reversal of, measures taken by a resolution authority acting within its legal powers.)

(iii) **Exercisable without shareholder or creditor consent** – Resolution powers must not require or be contingent on the cooperation of the failing bank or its shareholders, and should be exercisable without the consent of the bank, its shareholders or its creditors. It is critical for effective resolution that all resolution powers be exercisable by authorities without any need for shareholder consent or triggering any other third party rights that prevent, impede or interfere with resolution (subject to the safeguards described in KAs 4 and 5). In order to ensure legal certainty and transparency to shareholders and creditors, the powers to override any requirement for consent should be clear. A requirement for the consent of the entity receiving transferred assets and liabilities (including the consent of its shareholders) is not inconsistent with effective resolution powers.

EN 3 (g) Powers to remove and replace management – It is not inconsistent with KA 3.2 (i) if the powers to remove and replace management are subject to the employee protection regime of the jurisdiction. However, the power to remove and replace senior management and directors specified in KA 3.2 (i) should not be conditional on proof of responsibility for the failure of the bank on the part of individuals that are removed. EC 3.3 will be satisfied if the resolution authority or the supervisor has powers to remove an existing director or senior management and any new appointment is subject to its assessment or approval. Further, when a resolution authority exercises its powers to assume, or appoint a manager to assume, control of the failed bank, this also in effect replaces the directors and senior management.

EN 3 (h) Recovery of monies and claw-back – The power of the resolution authority to "claw-back" variable remuneration specified in KA 3.2 (i) should include:

(i) the power to reduce or prevent the payment of deferred elements of variable remuneration that have been awarded but not yet paid out; and

(ii) the power to recover variable remuneration that has already been paid.

The power to recover monies may include the imposition of fines or other administrative penalties or the investigation and pursuit of claims against a responsible person by any of the following:

(i) the resolution authority;

(ii) another agency or authority (for example, the supervisor or regulatory authority);

(iii) judicial authorities; or

(iv) other governmental disciplinary or enforcement bodies.

Monies may be recovered directly from the individual or from any available professional liability insurance. Claims might include claims for damages in civil or criminal proceedings. The responsibility of a person for the failure of the bank should be determined in accordance with the jurisdiction's legal framework.

The need for a court order to recover the sums or benefits paid to persons responsible for failure of the bank does not prevent the regime from being compliant with KA 3.2 (i).

EN 3 (i) Appointment of administrator to take control and operate a bank in resolution – Where the resolution authority can take control of a firm by appointing a special administrator, the legal framework authorises the special administrator to enter, modify, assign or terminate contracts as a statutory power. If the legal framework authorises the resolution authority itself to carry out the resolution of a bank, a power for the resolution authority to appoint or secure the appointment of an administrator is not necessary for compliance with KA 3.2 (ii).

Where an administrator is appointed by the resolution authority, the administrator should be subject to oversight by the resolution authority. Factors relevant to that oversight may include a requirement (either set out in the resolution regime or the administrator's terms of appointment) for the administrator to:

(i) be subject to instructions of the resolution authority, report regularly to the resolution authority and provide any information the resolution authority requires;

(ii) provide periodic budgets or forecasts to the resolution authority for review or approval;

(iii) notify or obtain the consent or approval of the resolution authority or supervisory authority before taking or prohibiting certain major actions (including sale of major assets or parts of the business; encumbrances placed on assets; hiring and dismissal of senior or key employees and managers; payment of bonuses to employees; pay-out to creditors, commencing litigation and approving settlements); or

(iv) provide all necessary cooperation and information with all relevant authorities (for example, a supervisory authority or deposit insurance authority) to fulfil their mandates.

Where an administrator has been appointed and is subject to oversight by the resolution authority, that authority should also have the power to replace or dismiss the administrator, or to recommend the removal of the administrator to the court if the administrator fails to pursue the statutory objectives of resolution.

EN 3 (j) Powers to ensure continuity of services provided by companies in the same group – Services that are necessary for the continuity of critical functions carried out within a financial group may be provided by non-regulated subsidiary or affiliated entities. To ensure the continuity of services provided by companies in the same group, a jurisdiction should provide for the powers of the resolution authority to (i) directly require companies in the same group located within the jurisdiction to continue to provide such services (whether or not they are

regulated) in the resolution regime; or (ii) require the bank in resolution to ensure the continuity of services through its contractual agreements with (see EC 11.7) or its corporate control over such companies combined with powers to require changes to ensure resolvability as provided in ENs 10 (b) and 11 (d).

An evaluation of the effectiveness of such arrangements, in light of the structure of financial groups in the jurisdiction under review as well as the overall resolution regime, should be incorporated into an assessment under EC 3.6 (ii). If relying on corporate control, the potential for, and impact on, resolvability of the bank, were the group entity to enter insolvency separate from the resolution should be considered by assessors.

'Reasonable rate of reimbursement' means a rate that covers the costs to the affiliated entity of providing the service. This may be different from the 'commercial rate of consideration' for services provided by entities at arms-length, which reflects the market price for such services.

It should be noted that non-regulated subsidiaries or affiliated entities may not provide services that are necessary for the continuity of critical functions carried out within a financial group. Such entities can be considered out of scope of the resolution regime. However, certain conditions would have to be met, including among others that the failure or prospective entry into insolvency of such entities could not trigger the initiation of resolution proceedings with respect to a bank (or banks) in the group, and that corporate insolvency proceedings of such entities linked through common ownership would not impede resolution of the bank.

EN 3 (k) Powers to establish a bridge institution or asset management vehicle – The legal framework of a jurisdiction can comply with KA 3 if another agency or body has the power (either through explicit statutory provision or through its general powers) to establish a legal entity to function as a bridge institution or asset management vehicle, provided that the resolution authority has the power to transfer selected assets, liabilities, legal rights or obligations to, and to operate or manage, or provide for the operation or management of that institution or vehicle.

EN 3 (l) Asset management vehicle – A "separate asset management vehicle" means a separate legal entity to which assets are transferred from a bank in resolution. The relevant statute may not use the term 'asset management vehicle', and a jurisdiction should be treated as compliant provided there is a mechanism by which assets of a bank in resolution that are impaired (such as non-performing loans) or difficult to value can be separated (that is, removed from the balance sheet) and managed. The vehicle may be used to receive, manage or sell the assets of more than one financial institution, or may be established for use in the resolution of a specific bank. The resolution authority or other public authority may either manage the assets in the asset management vehicle itself or through an agent, or it may appoint an independent asset manager to manage the assets in accordance with a mandate set by the resolution authority.

EN 3 (m) Insured deposits – The legal framework should provide for both pay-out to insured depositors and transfer of insured deposits to a solvent third party in any resolution action or insolvency procedure carried out in connection with resolution. Different actions will be appropriate in different cases. The decision to use resources of the deposit protection scheme may be the responsibility of the management of the protection scheme (if different from the resolution authority). Practical arrangements to support timely transfer or pay-out of insured deposits include, for example:

(i) ongoing access for the deposit protection scheme or other relevant authority or body to detailed information about the deposit base;

(ii) the capacity for a single customer view, advanced information on deposits or other arrangements designed to ensure that depositors have immediate access to the amounts of their deposits that are covered by the relevant deposit insurance scheme (this is not necessary for any uninsured amounts that exceed the coverage level);

(iii) early notification of the deposit protection scheme of circumstances that might result in transfer or pay-out of insured deposits and arrangements for involvement of the deposit protection scheme in the preparation of any resolution action that might draw on deposit protection funds.

If timely pay-out is not possible, assessors should consider other circumstances: for example, a longer period for full pay-out may be treated as largely complying with KA 3.2 (xii) if the legal framework permits the resolution authority or deposit insurer to give depositors access to a substantial proportion of their insured deposit within a timely period. A jurisdiction should be treated as complying with the requirement for timely pay-out if a pay-out can be made within the timelines set out in the IADI *Core Principles for Effective Deposit Insurance Systems*.[21]

EN 3 (n) Choice of assets and liabilities to be transferred – The resolution authority should be able to select which assets, rights or liabilities will be transferred so as to best achieve the statutory objectives of resolution, subject to certain limited constraints which include the following:

(i) the restriction on 'cherry-picking' individual financial contracts with a given counterparty;

(ii) where liabilities are secured by collateral, the liabilities and associated collateral (including guarantees that provide credit support under a governing credit support or similar type of agreement) should be either transferred or left behind together. The legal framework may provide for exemptions from this constraint where that is necessary to effect an orderly resolution, and the regime otherwise provides adequate protection for counterparties of the contractual benefits. For this purpose, examples of adequate protection might include substituting collateral, the provision of a credit support agreement or financial compensation to counterparties.

The legal framework may set out additional considerations to guide the exercise of the authorities' discretion when selecting which liabilities to transfer so as to ensure that creditors are treated in accordance with the principles set out in KA 5.1 and that the objectives of resolution are met. For example**,** the resolution regime may stipulate that a transfer using the power set out in KA 3.3 can only be made to an entity that has the expertise, capacity and resources to effectively assume the shares, assets and liabilities transferred, so as to engender sufficient confidence in creditors and counterparties that the public policy objectives of financial stability and continuity can be met.

EN 3 (o) Requirements for notice of a transfer – Requirements to notify shareholders, creditors, clients or other interested parties of transfers are not inconsistent with KA 3.3 (i),

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[21] See http://www.iadi.org/en/assets/File/Core%20Principles/cprevised2014nov.pdf, November 2014.

provided that there is no right of veto or requirement for consent by shareholders, creditors or other stakeholders of the bank in resolution, nor a requirement for a minimum period of notification prior to resolution.

EN 3 (p) Establishment of bridge institutions – Legal frameworks may either empower the resolution authority (or another authority – see EN 3 (k)) to establish one or more bridge institutions each time this resolution tool is needed (so that the institution is either sold or wound up at the end of the arrangement); or to maintain one or more permanent legal entities (shell companies) that are used as a 'bridge' on each occasion the tool is used (so that the business transferred on each occasion is ultimately sold on or wound up, but the legal entity remains in existence). If an authority is able to establish a bridge institution using existing powers to incorporate entities, this can be sufficient to comply with this element of EC 3.8, provided that the resolution authority can exercise all of the powers set out in points (i) to (iv) of KA 3.4. Where the establishment and operation of a bridge institution has potential implications for public funds, a requirement for the resolution authority to obtain governmental approval for use of a bridge institution does not, by itself, mean that a jurisdiction does not comply with KA 3.4.

EN 3 (q) Term of bridge institutions – It is not necessary that the resolution regime prescribes an express and binding term for the existence of a bridge institution. However, in the absence of a time limit for bridge institutions, the resolution regime should contain principles or guidelines to the effect that a bridge arrangement should not be permanent (except as a shell company) and that involvement by public authorities in the ownership and control of the bridge institution should end as soon as is reasonably practicable. The objective of a bridge institution is the sale or transfer of some or all of the transferred business to one or more private sector entities. If this proves not to be possible, the bridge institution should be wound down in an orderly manner.

EN 3 (r) Regulatory requirements for bridge institutions – The legal framework should be transparent as to what capital and other regulatory requirements, if any, will apply to bridge institutions.

EN 3 (s) Reverse transfers and appropriate safeguards – The ability to transfer assets or liabilities back from the bridge institution to the bank in resolution may be established either in the legal framework or as a matter of contract. Appropriate safeguards for the exercise of a power to transfer assets or liabilities back from a bridge institution might include the following:

(i) an exemption from the scope of those reverse transfer powers of deposits and any other liabilities that might provoke a creditor run and undermine the operations of the bridge institution and continuity of the business transferred to it;

(ii) appropriate transparency about the assets and liabilities that may be subject to the reverse transfer power, either by positive identification in the transfer instrument or expressly excluded categories in legislation; and

(iii) clear and binding limitations on the period during which liabilities may be returned.

As an alternative to a reverse transfer as a means for dealing with non-performing assets that have been transferred to a bridge institution, resolution authorities may instead transfer such assets to an asset management vehicle that has been set up to run-down non-performing loans or difficult to value assets.

EN 3 (t) Power to carry out bail-in within resolution – The powers to (i) write down equity and unsecured creditor claims of the bank in resolution, and (ii) to convert unsecured claims into equity or other instruments of ownership in the bank in resolution, a parent company or a newly established entity or bridge institution may either be explicit statutory powers, or a facet of a general power of the resolution authority to value claims and assign losses to creditors provided that any such general power enables the authority to carry out all the actions set out in KA 3.5. Bail-in may also be achieved, for example, by way of a claims payment process whereby former equity and unsecured debt holders bear losses and receive payment for remaining value in the form of equity and debt securities of a newly established company.

The jurisdiction's legal framework does not need to use the term 'bail-in' in order to be assessed as compliant with EC 3.11 and EC 3.13, provided that the resolution powers available under the legal framework allow the resolution authority both to effectively write down equity and unsecured creditor claims and to effectively convert such claims into equity or other instruments of ownership, in order to achieve continuity of essential functions by at least one of the methods set out in KA 3.2 (ix). Where bail-in is executed through capitalising a newly established entity or bridge institution (KA 3.2 (ix) (ii)) it would not be necessary for the resolution authority to have the power to suspend shares and other relevant securities of the failed bank from listing and trading in accordance with EC 3.11.

In determining whether all of the actions referred to in EC 3.11 are necessary to achieve the objectives of the KAs, due consideration should be given to the structure and complexity of the financial sector of the jurisdiction under review, including the extent to which such factors may be reflected in the jurisdiction's policy approach to bail-in.

EN 3 (u) Scope – The requirement for clarity and certainty as regards the scope of the bail-in power does not preclude discretion for authorities as to the unsecured liabilities that are subject to bail-in powers in each individual case, subject to the safeguards under KA 5.2. The exercise of the bail-in power should respect the statutory hierarchy of claims while providing flexibility to depart from the general principle of *pari passu* treatment of creditors of the same class, in a way that is consistent with KA 5.1. Some degree of flexibility may be necessary for authorities to take full account of the circumstances of each individual case and prevailing market conditions, recognising that counterparties need a similar degree of advance certainty about the treatment of their claims and the levels of loss to which they are exposed in the event of a bail-in, as applies with use of any other resolution tool. However, the range or amount of liabilities subject to bail-in should be sufficiently broad to ensure effective resolution.

EN 3 (v) Power to impose a payment moratorium or stay creditor actions – A payment moratorium could be used by suspending payments to unsecured creditors and customers for some time in advance of, or in connection with, a liquidation or a resolution. The duration and scope of the power should be sufficiently flexible to achieve this objective, without endangering financial stability, and may depend upon the resolution strategies in the jurisdiction under review. The power to impose a moratorium should not apply to payments and property transfers to CCPs and those entered into payment, clearing and settlements systems, and eligible netting and collateral agreements. The power to stay creditor actions aims to avoid distribution of the bank's assets in a manner inconsistent with the resolution strategy and the priority of payments. Resolution powers generally should be exercisable by administrative authorities (see EN 3 (f) (ii)).

KA 4 Set-off, netting, collateralisation, segregation of client assets

4.1 The legal framework governing set-off rights, contractual netting and collateralisation agreements and the segregation of client assets should be clear, transparent and enforceable during a crisis or resolution of firms, and should not hamper the effective implementation of resolution measures.

4.2 Subject to adequate safeguards, entry into resolution and the exercise of any resolution powers should not trigger statutory or contractual set-off rights, or constitute an event that entitles any counterparty of the firm in resolution to exercise contractual acceleration or early termination rights provided the substantive obligations under the contract continue to be performed.

4.3 Should contractual acceleration or early termination rights nevertheless be exercisable, the resolution authority should have the power to stay temporarily such rights where they arise by reason only of entry into resolution or in connection with the exercise of any resolution powers. The stay should:

(i) be strictly limited in time (for example, for a period not exceeding 2 business days);

(ii) be subject to adequate safeguards that protect the integrity of financial contracts and provide certainty to counterparties (see I-Annex 5 on Conditions for a temporary stay); and

(iii) not affect the exercise of early termination rights of a counterparty against the firm being resolved in the case of any event of default not related to entry into resolution or the exercise of the relevant resolution power occurring before, during or after the period of the stay (for example, failure to make a payment, deliver or return collateral on a due date).

The stay may be discretionary (imposed by the resolution authority) or automatic in its operation. In either case, jurisdictions should ensure that there is clarity as to the beginning and the end of the stay.

4.4 Resolution authorities should apply the temporary stay on early termination rights in accordance with the guidance set out in I-Annex 5 to ensure that it does not compromise the safe and orderly operations of regulated exchanges and FMIs.

Essential criteria for KA 4

EC 4.1 The legal framework does not allow the exercise by counterparties of early termination rights that arise by reason only of the entry into resolution of, or the exercise of any resolution power against a bank, provided the substantive obligations (for example, payment, collateral, and delivery obligations) under the contract continue to be performed.

EC 4.2 Where financial contracts are not subject to the prohibition referred to in EC 4.1, the legal framework provides, in relation to such contracts, for a temporary stay on the exercise of early termination rights that arise by reason only of entry into

resolution or in connection with the exercise of any resolution powers, subject to the following conditions:

(i) the stay is limited in time (for example, not exceeding 2 business days);

(ii) if the stay is used in connection with a transfer power, the resolution authority is not permitted to select for transfer some, but not all, contracts with the same counterparty that are subject to the same netting agreement;

(iii) where the contracts to which the early termination right relates are transferred to another entity or remain with a bank that has been recapitalised in resolution, early termination rights can be exercised after the expiry of the stay period only in the event of a separate default under the terms of the contract that is not based on the entry into resolution or the exercise of resolution powers; and

(iv) where those contracts remain with the failing bank that has not been recapitalised, any early termination rights that were subject to the stay may be exercised immediately on the expiry of the stay or, if earlier, a notification by the resolution authority that the contracts will remain with that bank.

Explanatory notes for KA 4

EN 4 (a) Prohibition or Temporary stay of early termination rights – Under the legal framework, the exercise of any contractual provision providing for early termination as a result of entry into resolution or the exercise of resolution powers in any contract with a domestically incorporated bank should be subject to either a prohibition in accordance with KA 4.2 or a temporary stay in accordance with KA 4.3 as applicable. Where the legal framework includes both kinds of provision, it should be clear in advance, for any type of such contract, which provision would apply to those early termination rights in a resolution of the financial institution under the domestic regime.

The purpose of the temporary stay is to allow a short period of time for the resolution authority to make a determination on the treatment of the contracts that are subject to the stay, during which counterparties are not able to accelerate or terminate those contracts or exercise any other applicable remedies. To this end, regimes which do not allow termination before the end of the stay even if the contract terms are not met by the resolution authority during the period of the stay could be regarded as compliant for the purpose of EC 4.2 (iii). Where a stay on early termination rights has been imposed, only those counterparties whose contracts remain with the failing bank, which will cease to operate and will be wound down and liquidated, will be able to exercise termination rights for reason of the resolution action on the expiry of the stay. Where a counterparty's contracts are either transferred to an entity that will be responsible for performing the obligations under the contract (such as a third party purchaser or bridge institution) or remain with the bank that has been recapitalised as a result of the resolution action (for example, through bail-in), that counterparty should only be able to terminate if there is a separate breach, such as a failure to meet payment or delivery obligations, that constitutes an event of default under the contract.

KA 5 Safeguards

5.1 Resolution powers should be exercised in a way that respects the hierarchy of claims while providing flexibility to depart from the general principle of equal (*pari passu*) treatment of creditors of the same class, with transparency about the reasons for such departures, if necessary to contain the potential systemic impact of a firm's failure or to maximise the value for the benefit of all creditors as a whole. In particular, equity should absorb losses first, and no loss should be imposed on senior debt holders until subordinated debt (including all regulatory capital instruments) has been written-off entirely (whether or not that loss-absorption through write-down is accompanied by conversion to equity).

5.2 Creditors should have a right to compensation where they do not receive at a minimum what they would have received in a liquidation of the firm under the applicable insolvency regime ("no creditor worse off than in liquidation" safeguard).

5.3 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.

5.4 The resolution authority should have the capacity to exercise the resolution powers with the necessary speed and flexibility, subject to constitutionally protected legal remedies and due process. In those jurisdictions where a court order is still required to apply resolution measures, resolution authorities should take this into account in the resolution planning process so as to ensure that the time required for court proceedings will not compromise the effective implementation of resolution measures.

5.5 The legislation establishing resolution regimes should not provide for judicial actions that could constrain the implementation of, or result in a reversal of, measures taken by resolution authorities acting within their legal powers and in good faith. Instead, it should provide for redress by awarding compensation, if justified.

5.6 In order to preserve market confidence, jurisdictions should provide for flexibility to allow temporary exemptions from disclosure requirements or a postponement of disclosures required by the firm, for example, under market reporting, takeover provisions and listing rules, where the disclosure by the firm could affect the successful implementation of resolution measures.

Essential criteria for KA 5

EC 5.1 The resolution authority is required to exercise resolution powers in a way that respects the applicable hierarchy of creditor claims.

EC 5.2 The legal framework requires the resolution authority, as a general principle, to observe the principle of equal (*pari passu*) treatment of creditors of the same class while permitting departure from that principle where it is necessary for either of the following purposes: (i) to protect financial stability by containing the potential

systemic impact of the bank's failure; or (ii) to maximise the value of the bank for the benefit of all creditors.

EC 5.3 The resolution regime provides that creditors that receive less as a result of resolution than they would have received in liquidation have a right to compensation. The legal framework specifies how the right to compensation can be exercised.

EC 5.4 The legal framework protects the directors and officers of a bank in resolution against liability, including to shareholders and creditors of the bank, arising from actions taken when acting in compliance with decisions and instructions of domestic resolution authorities.

EC 5.5 The legal framework enables the resolution authority to exercise the powers in KA 3 in a timely manner and without any delay that could compromise the achievement of the objectives mentioned in KA 2.3. Where prior court approval is required, the timelines required for completing court proceedings are consistent with KA 5.4 and are incorporated into resolution planning.

EC 5.6 The legal framework provides that the only remedy that can be obtained from a court or tribunal through judicial review of measures taken by resolution authorities acting within their legal powers and in good faith is compensation, to the exclusion of any remedy that could constrain the implementation of, or reverse, any such measure taken by the resolution authority.

EC 5.7 The legal framework allows for temporary exemptions from disclosure requirements, for example, under market reporting and listing rules, or the postponement of a disclosure, by a bank to be granted in circumstances where that disclosure could affect the successful implementation of resolution measures.

Explanatory notes for KA 5

EN 5 (a) Departure from the pari passu principle – The circumstances in which, or purposes for which, departure from the principle of equal treatment of creditors is permitted should be specified in the legal framework. If, as a result of a resolution action that entails a departure from the principle of equal treatment of creditors of the same class, no creditors are worse off than they would have been in liquidation and some creditors are better off than they would have been in liquidation, the creditors as a whole should be deemed to benefit from that departure.

EN 5 (b) Exercise of rights to compensation – Elements that would satisfy the requirement in EC 5.3 for provision as to how creditors' right to compensation can be exercised and quantified might include some or all of the following: specification of the body or authority responsible for administering the compensation and financially responsible for paying it; procedures for application for compensation; a transparent process by which the amount of compensation payable and point in time for purposes of valuation are determined; and procedures for review and challenge of that determination. The purpose of the requirement is to establish to a reasonable level of satisfaction that the right to compensation is substantive.

EN 5 (c) Scope of the legal protection – The scope of legal protection for directors, officers and staff of the bank in resolution should extend to civil actions relating to all actions taken in good faith when acting in accordance with, or giving effect to, decisions and instructions of the domestic resolution authorities and of foreign resolution authorities where such decisions and instructions have effect in the jurisdiction under review (see KA 7.5). Legal protection may be conferred through either immunity or indemnification.

EN 5 (d) Court involvement in the resolution process – KAs 2.1, 2.3, 3.1 and 5.4 should be read in conjunction. KA 2.1 requires jurisdictions to confer resolution powers on administrative authorities to ensure that resolution can proceed in a timely manner in order to achieve the objectives of financial stability set out in KA 2.3. KA 3.1 requires timely and early entry into resolution before a firm is balance-sheet insolvent. To the extent that court approvals are required, timely exercise of resolution powers, consistent with KA 5.4, could be facilitated by a legal framework that provides for:

(i) expedited procedures (for example, with shortened notice, filing and decision deadlines for appeals);

(ii) applications by the resolution authority without notice to the bank or other affected parties; and

(iii) standing of the resolution authority in any resolution-related court proceedings.

Consistent with KA 3.1, in order to achieve timely entry into resolution, the resolution authority, should have means to immediately stabilize the firm and ensure that essential services and systemic functions remain open and operating to avoid the disruption and contagion that would otherwise accompany their closure. For example, in the context of a bail-in strategy this could entail staying liabilities which are to be bailed-in, pending final application of the write down and conversion powers, which would occur in due course following a final valuation. (See also EN 3 (d)).

EN 5 (e) Powers of the court – KA 5.5 is directed at statutory remedies provided under the resolution regime in connection with resolution measures that are within the legal powers of the resolution authority and taken in good faith, which should be limited to the award of monetary compensation. It does not limit statutory judicial remedies that may be available in relation to actions by the resolution authority that are unlawful because they have been taken in bad faith or are otherwise outside its legal powers, and does not constrain the general or inherent powers of the court to award remedies.

EN 5 (f) Regulatory disclosure requirements – Regulatory disclosure requirements refer to disclosures to the public (for example, regular and ad hoc disclosures under market reporting, takeover and listing rules), and not to disclosures that are required to be made to supervisors or any other public authority. The legal framework should provide that any such waiver or postponement will be temporary and short term, and that the grant of a waiver or postponement is disclosed after the relevant information is disclosed.

EN 5 (g) Exemptions from disclosure in a cross-border context – The power to grant temporary exemptions from domestic disclosure requirements should also be exercisable where resolution measures are taken by a foreign resolution authority, if disclosure of those measures under domestic requirements could affect the successful implementation of those foreign measures. Cooperation in accordance with KA 7.1 and processes to support foreign resolution

measures under KA 7.5 should include the use of the power to grant exemptions from domestic disclosure requirements in appropriate cases.

KA 6 Funding of firms in resolution

6.1 Jurisdictions should have statutory or other policies in place so that authorities are not constrained to rely on public ownership or bail-out funds as a means of resolving firms.

6.2 Where temporary sources of funding to maintain essential functions are needed to accomplish orderly resolution, the resolution authority or authority extending the temporary funding should make provision to impose any losses incurred on (i) shareholders and unsecured creditors subject to the "no creditor worse off than in liquidation" safeguard (see Key Attribute 5.2); and recover them (ii) if necessary, from the financial system more widely.

6.3 Jurisdictions should have in place privately-financed deposit insurance or resolution funds, or a funding mechanism with ex post recovery from the industry of the costs of providing temporary financing to facilitate the resolution of the firm.

6.4 Any provision by the authorities of temporary funding should be subject to strict conditions that minimise the risk of moral hazard, and should include the following:

(i) a determination that the provision of temporary funding is necessary to foster financial stability and will permit implementation of a resolution option that is best able to achieve the objectives of an orderly resolution, and that private sources of funding have been exhausted or cannot achieve these objectives; and

(ii) the allocation of losses to equity holders and residual costs, as appropriate, to unsecured and uninsured creditors and the industry through ex-post assessments, insurance premium or other mechanisms.

6.5 As a last resort and for the overarching purpose of maintaining financial stability, some countries may decide to have a power to place the firm under temporary public ownership and control in order to continue critical operations, while seeking to arrange a permanent solution such as a sale or merger with a commercial private sector purchaser. Where countries do equip themselves with such powers, they should make provision to recover any losses incurred by the state from unsecured creditors or, if necessary, the financial system more widely.

Essential criteria for KA 6

EC 6.1 The legal framework establishes credible arrangements to provide temporary financing (including both temporary liquidity support and temporary solvency support) in terms of nature, availability, and sufficiency of the funding to support the use of the resolution powers set out in KA 3 and achieve the resolution objectives, which include one or a combination of the following:

(i) a privately funded resolution fund;

(ii) a privately funded deposit protection scheme;

(iii) a privately funded fund with combined deposit protection and resolution functions;

(iv) recourse to public funds, coupled with a mechanism for recovery from the industry of any losses incurred in the provision of public funds.

EC 6.2 If the resolution regime provides for the provision of temporary recourse to public funds under point (iv) of EC 6.1, it also ensures that such financing is made available only if:

(i) it has been assessed as necessary for financial stability by supporting the implementation of a resolution option that best achieves the statutory objectives of resolution (see KA 2.3);

(ii) private sources of funding have been exhausted or would not achieve those objectives; and

(iii) losses are allocated to shareholders and, as appropriate, to unsecured and uninsured creditors (in accordance with the hierarchy of claims) and, if necessary, public funds are recovered from the banking sector or financial industry through assessments or other mechanisms.

EC 6.3 If the resolution regime includes the option of placing a bank under temporary public ownership as part of a resolution action, such an option is subject to the following conditions:

(i) the failure of the bank, or its resolution through all other options, would cause financial instability; and

(ii) there are clear rules regarding the allocation of losses to shareholders and creditors or, if necessary, recovery from financial system participants more widely.

Explanatory notes for KA 6

EN 6 (a) Funding arrangements – Funding arrangements should provide for adequate resources in a resolution so that the resolution authority can use whichever of the powers listed in KA 3.2 is or are most likely to achieve the statutory objectives of resolution. This should include, but not be limited to, the resources and legal powers to provide funds to support a deposit transfer, to capitalise or fund a bridge institution, and to provide temporary guarantees to facilitate the implementation of the resolution and maintain the provision of essential services. Funding for resolution should be raised from the bank, its creditors and, if necessary, other banking sector or financial industry participants. However, this does not prevent initial funding by the government provided that those public funds are recovered in due course from assets of the bank, its unsecured and uninsured creditors or, if necessary, banking or financial system participants. The resolution fund or other funds for resolution purposes may be either privately or publicly administered, provided that the source of the funding is private.

Where there is more than one fund or funding mechanism in a jurisdiction that may apply, there are rules in place that determine the contribution of each in any particular case.

EN 6 (b) Use of deposit insurance funds for resolution – Where a deposit insurance fund can be used in resolution, there should be transparent rules and policies on the use of such funds, including clarity on the extent of the contribution that may be made. Where the deposit insurance fund has borrowed public funds in the exercise of its functions, explicit provision is made for repayment via industry contributions. Assessors are referred in this context to the Assessment Methodology for the IADI *Core Principles for Effective Deposit Insurance Systems* (CP 9).

EN 6 (c) Mechanism for recovery of public funding – Where jurisdictions rely on public funds for the provision of temporary financing to support the use of resolution powers, the mechanism for recovery from the industry of losses arising from that funding should be based on explicit provision in the legal framework.

EN 6 (d) Temporary public ownership not a required resolution tool – It is not necessary for a resolution regime to include the power to place a failing bank into temporary public ownership. Temporary public ownership refers to nationalisation of the bank (through acquisition by the government or a public authority of its shares or other instruments of ownership) and is distinct from resolution measures that involve the transfer of assets and liabilities from a bank to an entity owned or controlled by the state or a public authority, such as a bridge institution.

EN 6 (e) Conditions for temporary public ownership – EC 6.3 may be complied with if the conditions set out in points (i) and (ii) are met by policies and guidance. These conditions are not required if the resolution regime of a jurisdiction does not provide for or prohibits temporary public ownership as a resolution tool.

KA 7 Legal framework conditions for cross-border cooperation

7.1 The statutory mandate of a resolution authority should empower and strongly encourage the authority wherever possible to act to achieve a cooperative solution with foreign resolution authorities.

7.2 Legislation and regulations in jurisdictions should not contain provisions that trigger automatic action in that jurisdiction as a result of official intervention or the initiation of resolution or insolvency proceedings in another jurisdiction, while reserving the right of discretionary national action if necessary to achieve domestic stability in the absence of effective international cooperation and information sharing. Where a resolution authority takes discretionary national action it should consider the impact on financial stability in other jurisdictions.

7.3 The resolution authority should have resolution powers over local branches of foreign firms and the capacity to use its powers either to support a resolution carried out by a foreign home authority (for example, by ordering a transfer of property located in its jurisdiction to a bridge institution established by the foreign home authority) or, in exceptional cases, to take measures on its own initiative where the home jurisdiction is not taking action or acts in a manner that does not take sufficient account of the need to preserve the local jurisdiction's financial stability.[*] Where a resolution authority acting as host authority takes discretionary national action, it should give prior notification and consult the foreign home authority.

7.4 National laws and regulations should not discriminate against creditors on the basis of their nationality, the location of their claim or the jurisdiction where it is payable. The treatment of creditors and ranking in insolvency should be transparent and properly disclosed to depositors, insurance policy holders and other creditors.

7.5 Jurisdictions should provide for transparent and expedited processes to give effect to foreign resolution measures, either by way of a mutual recognition process or by taking measures under the domestic resolution regime that support and are consistent with the resolution measures taken by the foreign home resolution authority. Such recognition or support measures would enable a foreign home resolution authority to gain rapid control over the firm (branch or shares in a subsidiary) or its assets that are located in the host jurisdiction, as appropriate, in cases where the firm is being resolved under the law of the foreign home jurisdiction. Recognition or support of foreign measures should be provisional on the equitable treatment of creditors in the foreign resolution proceeding.

7.6 The resolution authority should have the capacity in law, subject to adequate confidentiality requirements and protections for sensitive data, to share information, including recovery and resolution plans (RRPs), pertaining to the group as a whole or to individual subsidiaries or branches, with relevant foreign authorities (for example, members of a CMG), where sharing is necessary for recovery and resolution planning or for implementing a coordinated resolution.

7.7 Jurisdictions should provide for confidentiality requirements and statutory safeguards for the protection of information received from foreign authorities.

* This should not apply where jurisdictions are subject to a binding obligation to respect resolution of financial institutions under the authority of the home jurisdiction (for example, the EU Winding up and Reorganisation Directives).

Essential criteria for KA 7

EC 7.1 The legal framework empowers and strongly encourages the resolution authority, wherever possible, to act to achieve a cooperative solution with foreign resolution authorities, and contains no material barriers to cooperation.

EC 7.2 The legal framework does not provide for automatic action as a result of official intervention or the initiation of resolution or insolvency proceedings in other jurisdictions.

EC 7.3 The legal framework (as applicable to the resolution or insolvency of a bank) does not discriminate between creditors of the same class on the basis of their nationality, the location of their claim or the jurisdiction where their claim is payable.

EC 7.4 The legal framework of the jurisdiction under review establishes a transparent and expedited process through which the resolution measures taken in the exercise of the resolution powers under KA 3 and KA 4 by a foreign resolution authority can be given effect in the jurisdiction under review. The process applies with respect to a branch, subsidiary, or assets of a foreign bank located in, or a liability governed by the law of, the jurisdiction under review. [22] The process provides for recognition or the taking of measures under the domestic resolution or supervisory legal framework that support and are consistent with the resolution measures taken by the foreign resolution authority, as necessary to give effect to the foreign resolution measure. Recognition or support of foreign resolution measures is provisional on the equitable treatment of domestic creditors in the foreign resolution proceeding.

EC 7.5 The resolution regime enables the resolution authority to take resolution action with respect to the local branch of a foreign bank (i) to support a foreign resolution and (ii) on its own initiative where the home authority is not taking action or is acting in a manner that does not take sufficient account of the need to preserve financial stability in the local jurisdiction.

EC 7.6 The resolution regime requires that, prior to exercising resolution powers in relation to a branch of a foreign bank on its own initiative and independently of action taken

[22] This does not apply to the extent that jurisdictions are required by the applicable legal framework to recognise resolution of financial institutions (including automatic mutual recognition) under the law of their home jurisdiction (for example, the EU Directive establishing a framework for the recovery and resolution of credit institutions and investment firms, EU Directive on the reorganisation and winding up of credit institutions and EU Regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund) and carried out by the authorities of their home jurisdiction (including European Single Resolution Board). However, EC 7.4 applies in an assessment of such jurisdictions in relation to a branch, subsidiary, or assets of a foreign bank located in, or a liability governed by the law of, the jurisdiction under review that are not covered by such an obligation to recognise resolution actions by the home jurisdiction of that firm.

by the home authority, the resolution authority give prior notice of the intended measure to, and consult the home resolution authority.

Explanatory notes for KA 7

EN 7 (a) Assessment of KA 7 – The assessment methodology is designed to enable assessors to examine compliance with each KA and the KAs overall. To avoid duplication in the assessment, and to simplify the process, the availability of resolution powers with respect to a subsidiary or a branch of a foreign bank (including those that could be used to provide support to a foreign resolution or to take discretionary national action in accordance with KAs 7.3 and 7.5) is assessed under KA 3 and KA 4. The assessment under KA 7 would therefore focus on whether the resolution and other related powers can be applied in a manner that facilitates cross-border cooperation. For similar reasons, access to information and information sharing requirements under the *Key Attributes*, including those under KA 7.6 and KA 7.7, are assessed under KA 12.

EN 7 (b) Empowerment/encouragement to achieve cooperative solutions (EC 7.1) – Jurisdictions may demonstrate that a resolution authority is empowered and encouraged to achieve a cooperative solution by observing the other ECs specified for KA 7 and, in particular, by having in place cross-border enforcement frameworks of the type described in KA 7.5. Material barriers to cooperation may include, for example, requirements that prevent recognition in the absence of reciprocity even where recognition would be in the best interest of the jurisdiction under review, and provisions that provide for automatic action as a result of official intervention or the initiation of resolution or insolvency proceedings in foreign jurisdictions.

EN 7 (c) "Automatic action" (EC 7.2) – The types of "automatic action" that are relevant under KA 7.2 include any form of resolution action provided for in KA 3.2 or other liquidation or winding-up procedures or acts by public authorities that have the same effect, including the withdrawal of the institution's license. The reference to "automatic action" does not cover actions or events that may be triggered by an official intervention (e.g., taking supervisory corrective action, imposing a sanction or placing the bank under public ownership or control) or the initiation of resolution or insolvency proceedings in other jurisdictions, so long as the relevant authority in the jurisdiction under review retains discretion to act or to refrain from acting (e.g., with respect to the withdrawal of a banking license). Nor does "automatic action" refer to any action as a result of contractual provisions; these issues are addressed separately in KA 4. Similarly, it does not cover any automatic effects of recognition (for example, the imposition of a temporary stay on creditor actions) that are intended to facilitate giving effect to foreign resolution actions in accordance with KA 7.5. The ability of a host authority to refrain from taking action may be considered as evidence that the jurisdiction's legal framework does not provide for "automatic action".

EN 7 (d) Non-discriminatory treatment of creditors (EC 7.3) – The principle of non-discrimination applies regardless of the type of presence that the bank subject to resolution or insolvency proceedings has in the jurisdiction under review (i.e., a branch, subsidiary, or assets located in, or a liability governed by the law of the jurisdiction under review). In particular, the principle applies in the resolution of a parent bank in the home jurisdiction or in the resolution

of a branch or subsidiary in a host jurisdiction. In either case the applicable legal framework should not discriminate between creditors of the same class on the basis of their nationality, their residence, the location of their claim, or the jurisdiction where their claim is payable. In particular, under the applicable creditor hierarchy, claims of foreign creditors (that is, creditors that are foreign nationals or non-residents) of the entity under resolution must be entitled to the same treatment as the claims of local creditors of the same class. Moreover, in a home resolution proceeding respecting a bank, claims of creditors of a foreign branch must be accorded the same priority and be entitled to the same treatment as claims of the same class against the bank. Laws and regulations should not be explicitly discriminatory or discriminatory in their effect. For instance, differences in procedures (for example, subjecting certain claims to expedited treatment) may have discriminatory effects.

EN 7 (e) Statutory approaches to give effect to foreign resolution measures (EC 7.4) – KA 7.5 and EC 7.4 pertain to "statutory" (i.e., as opposed to "contractual") approaches for giving effect to foreign resolution measures, which—in addition to primary legislation—may comprise other components of the legal framework such as legal precedent. Statutory approaches encompass recognition and the taking of measures under the domestic resolution or supervisory legal framework that support and are consistent with the resolution measures taken by the foreign resolution authority. Recognition and supportive measures complement each other and in practice, both may be required to achieve the desired outcome. Legal and procedural differences may mean that a recognition process is more suitable for certain resolution actions or certain situations, while supportive measures may be the preferred approach for others. The combination of recognition and support measures available in a jurisdiction should enable the resolution authority, supervisory authority, or court in the jurisdiction under review to give effect to resolution measures (e.g., change of control, transfer of assets and liabilities, bail-in, and stays of contractual rights) taken in the exercise of any of the resolution powers set forth under KA 3 and KA 4 by a foreign resolution authority against a bank in that jurisdiction, with respect to a branch, subsidiary, or assets of a foreign bank located in, or a liability governed by the law of, the jurisdiction under review.

- **Recognition of the foreign resolution measure** – Recognition implies that, at the request of a foreign authority, a jurisdiction would accept the commencement of a foreign resolution proceeding domestically and thereby empower the relevant domestic authority (either a court or an administrative agency) to enforce the foreign resolution measure or grant other forms of domestic relief, for example, a stay on domestic creditor proceedings. Recognition is not dependent on the exercise of resolution powers in the local jurisdiction. Once recognition is granted, the measure adopted by the foreign resolution authority can be given effect in accordance with the domestic law, even if there are no grounds for commencement of domestic resolution proceedings.
- **Supporting the foreign resolution measure** – Supportive measures may involve the taking of resolution measures or supervisory measures under the relevant domestic law (for example, resolution law, banking law or securities law) to produce the effect of, or otherwise support, the resolution measure taken by the foreign resolution authority. (Consequently, the concept of support applies only where a foreign bank has a branch, subsidiary or some other regulated presence (e.g., listed securities) in the jurisdiction under review.) The ability to take supportive measures would be limited both by the

availability of powers under the domestic regime and the legal authority to use those powers in a manner that facilitates cross-border cooperation.

- **Use of resolution powers to support a foreign resolution** – An assessment under KA 7 would determine whether available resolution powers could be used to produce the effect of resolution measures taken by a foreign resolution authority against the foreign bank. In making that determination, assessors should examine whether the statutory objectives of the resolution authority, or other aspects of the legal framework, permit the resolution authority to use resolution powers to provide assistance to, or cooperate with a foreign resolution authority. The use of resolution powers to provide support to a foreign resolution would entail the commencement of resolution proceedings against a domestic branch or subsidiary of a foreign bank.
- **Use of supervisory powers to support foreign resolutions** – Examples of supervisory powers that can be taken to support a foreign resolution include, but are not limited to, circumstances where: (i) approvals are required for changes in ownership/control of the bank or its subsidiaries; (ii) a waiver of regulatory requirements may be needed (e.g., capital requirements of a bridge institution; market disclosure requirements); (iii) approvals are required for the appointment of local branch managers and officers of the bank; or (iv) directions to regulated entities are needed to ensure the continuity of essential services. Where reference is made to supervisory approvals, there can be reliance on, where appropriate, an assessment conducted under the BCBS *Core Principles for Effective Banking Supervision*[23] and the IOSCO *Objectives and Principles of Securities Regulation*[24]. Where the resolution and supervisory authorities are not the same entity, there would be issues of coordination (and timing) amongst the authorities on obtaining the necessary supervisory approvals to support a resolution action that should be assessed.
- **Exercise of discretion not to take domestic action** – In some cases, the jurisdiction under review may be able to support a foreign resolution measure simply by not taking domestic action. However, it may be the case that forbearance by the domestic resolution or supervisory authority is by itself insufficient to give effect to a foreign resolution measure, for example, where a stay on local creditor actions is needed, or a banking license for a new owner of the local operations needs to be issued on an expedited basis.

EN 7 (f) Processes for recognition and support (EC 7.4) – Jurisdictions may achieve the objectives of KA 7.5 through an administrative or judicial process or a combination of administrative and judicial processes. Having a transparent process implies that the process should be established ex ante. Jurisdictions should endeavour to assist relevant stakeholders in understanding how the process works and how their interests may be affected by, at a minimum, providing a short written summary of the relevant process(es) by which effect can be given to foreign resolution measures. For processes to be expedited, the processes should allow the

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[23] See http://www.bis.org/publ/bcbs230.pdf, September 2012.

[24] See https://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf, June 2010.

jurisdiction to give effect to the foreign resolution measure in a timely manner, bearing in mind that the necessary timeline will depend on the specific measure in question. The processes in the jurisdiction under review should occur on a basis that is sufficiently timely so as to not undermine the home resolution authorities' exercise of resolution powers. In practice, certain resolution measures will require effect to be given immediately upon the commencement of resolution (e.g., a stay on creditor actions), while others may take longer for example, a bail-in involving a valuation process before claims are written down. Where the process requires involvement of judicial authorities, such involvement should be consistent with the requirements under KA 5.4. To the extent that supervisory approvals are required to give effect to a foreign resolution measure under the legal framework of the jurisdiction under review, there should be an expedited process for the foreign resolution authority to obtain the relevant approvals. Such processes shall include coordination arrangements between supervisory and resolution authorities, where they are not the same entity.

EN 7 (g) Conditions for giving effect to foreign resolution measures (EC 7.4) – EC 7.4 provides that recognition or support of foreign measures should be provisional on the equitable treatment of creditors in the foreign resolution proceeding. In the context of recognition where the creditor hierarchy of the foreign jurisdiction may apply, it would be consistent with the standard to condition recognition on, at minimum, creditors in the host jurisdiction receiving treatment equal to that of home-country creditors with similar legal rights (i.e., a non-discrimination requirement). However, since 'equitable' treatment of creditors is not tantamount to 'equal' treatment, jurisdictions should have flexibility to take into consideration public policy to determine what is 'equitable' on a case-by-case basis. Resolution authorities should endeavour to assess ex ante whether the proposed treatment of creditors under a particular resolution strategy would be considered as "equitable" by the relevant host jurisdictions.

The jurisdiction under review may impose additional conditions on a decision to give effect to foreign resolution measures, either through recognition or support. In general, a decision not to give effect to a foreign resolution measure should be limited to cases where, in substance, the implementation of the measure would:

(i) have adverse effects on domestic financial stability (for example, they would affect the continuity of economic functions that are critical to the domestic financial system; or would be inconsistent with or undermine the implementation of domestic resolution action that has already been undertaken by the host authority before it becomes aware of the resolution measure of the home authority);

(ii) contravene public policy; or

(iii) have material fiscal implications (for example, by exposing public authorities or taxpayers to loss).

EN 7 (h) Prior notification and consultation (EC 7.6) – The provision that a resolution authority (acting as host authority) should give prior notice of measures taken on its own initiative to, and consult, a foreign home resolution authority does not require consent from the home authority to any of the decisions taken by the host authority, but rather that the host authority makes good faith efforts to communicate with the home authority the nature of its concerns and the actions it proposes to take.

KA 8 Crisis Management Groups (CMGs)

8.1 Home and key host authorities of all G-SIFIs should maintain CMGs with the objective of enhancing preparedness for, and facilitating the management and resolution of, a cross-border financial crisis affecting the firm. CMGs should include the supervisory authorities, central banks, resolution authorities, finance ministries and the public authorities responsible for guarantee schemes of jurisdictions that are home or host to entities of the group that are material to its resolution, and should cooperate closely with authorities in other jurisdictions where firms have a systemic presence.

8.2 CMGs should keep under active review, and report as appropriate to the FSB and the FSB Peer Review Council on:

(i) progress in coordination and information sharing within the CMGs and with host authorities that are not represented in the CMGs;

(ii) the recovery and resolution planning process for G-SIFIs under institution-specific cooperation agreements; and

(iii) the resolvability of G-SIFIs.

Essential criteria for KA 8

EC 8.1 If the jurisdiction under review is home jurisdiction of one or more G-SIBs, a CMG is established and maintained for each such G-SIB which includes the relevant authorities that would be involved in the resolution of the G-SIB (including supervisory authorities, central banks, resolution authorities, finance ministries and the public authorities responsible for guarantee schemes of jurisdictions that are home or host to entities of the group that are material to its resolution) and a policy, process and criteria are maintained for determining which jurisdictions are host to entities that are material for a group-wide resolution of the firm and should be represented in the CMG.

EC 8.2 If the jurisdiction under review is the home jurisdiction of one or more G-SIBs, it has processes to ascertain which jurisdictions that are not represented in the CMG assess the local operations of the G-SIB as systemically important to the local financial system. There is a documented process for cooperation, or other evidence of efforts to cooperate with relevant authorities in those jurisdictions that have been identified through this process.

EC 8.3 The jurisdiction under review (if it is not itself the home jurisdiction) participates in the CMG for one or more G-SIBs when invited.

Explanatory notes for KA 8

EN 8 (a) Jurisdictions material for resolution of G-SIBs – For operational reasons, the membership of CMGs may be restricted to the relevant authorities of those jurisdictions that are material for the resolution of the bank in question. A jurisdiction is material for resolution

when the authorities in that jurisdiction have responsibilities relating to significant or critical operations for the G-SIB, including its material operating entities or the holding company.

In making that determination, the home authority may take into account multiple factors, including:

(i) the size as a whole of the activities (including presence of assets, funding, etc.) conducted in the host jurisdiction and their significance for the group;

(ii) the extent to which those activities are likely to have an impact on the continuity of the global operations of the firm;

(iii) the extent to which information on the firm held in the host jurisdiction, for example, presence of significant data centres under the control of host authorities, is critical for resolution;

(iv) the capacity of the host authorities to cooperate and to support a group-wide solution, including the legal authority to share information and safeguard confidential information; and

(v) the role of the host authorities in implementing a group-wide resolution strategy.

An assessment of the capacity of host authorities to cooperate and support a group-wide solution might take into account the authority's powers under the applicable legal framework to share information and support resolution actions taken by other jurisdictions, and any relevant experience of cooperation with that authority.

EN 8 (b) Jurisdictions not represented on the CMG – The processes in place to ascertain which host jurisdictions that are not represented in the CMG assess the local operations of the firm as systemically important to the local financial system should be sufficiently systematic to enable the home authority to be aware of the relevant jurisdictions.

EN 8 (c) Cooperation with host jurisdictions not represented in the CMG – The level of cooperation with relevant authorities in host jurisdictions where the firm has a systemic presence that are not represented in the CMG is not necessarily the same as that required between members of a CMG. But, as a minimum, cooperation with such non-CMG host jurisdictions should inform the authorities in those jurisdictions about how resolution strategies and the measures set out in recovery and resolution plans affect the parts of the firm that are systemic in their jurisdiction (see EC 11.11), if at all.

EN 8 (d) Host Participation in CMGs – If the jurisdiction under review is a host country to G-SIBs, and there are no legal or policy impediments to its participation in CMGs/ COAGs/ cross-border aspects of resolvability assessment, but has not been asked to participate, the EC 8.3 should be considered "not applicable".

KA 9 Institution-specific cross-border cooperation agreements

9.1 For all G-SIFIs, at a minimum, institution-specific cooperation agreements, containing the essential elements set out in Annex I, should be in place between the home and relevant host authorities that need to be involved in the planning and crisis resolution stages. These agreements should, inter alia:

(i) establish the objectives and processes for cooperation through CMGs;

(ii) define the roles and responsibilities of the authorities pre-crisis (that is, in the recovery and resolution planning phases) and during a crisis;

(iii) set out the process for information sharing before and during a crisis, including sharing with any host authorities that are not represented in the CMG, with clear reference to the legal bases for information sharing in the respective national laws and to the arrangements that protect the confidentiality of the shared information;

(iv) set out the processes for coordination in the development of the RRPs for the firm, including parent or holding company and significant subsidiaries, branches and affiliates that are within the scope of the agreement, and for engagement with the firm as part of this process;

(v) set out the processes for coordination among home and host authorities in the conduct of resolvability assessments;

(vi) include agreed procedures for the home authority to inform and consult host authorities in a timely manner when there are material adverse developments affecting the firm and before taking any significant action or crisis measures;

(vii) include agreed procedures for the host authority to inform and consult the home authority in a timely manner when there are material adverse developments affecting the firm and before taking any discretionary action or crisis measure;

(viii) provide an appropriate level of detail with regard to the cross-border implementation of specific resolution measures, including with respect to the use of bridge institution and bail-in powers;

(ix) provide for meetings to be held at least annually, involving top officials of the home and relevant host authorities, to review the robustness of the overall resolution strategy for G-SIFIs; and

(x) provide for regular (at least annual) reviews by appropriate senior officials of the operational plans implementing the resolution strategies.

9.2 The existence of agreements should be made public. The home authorities may publish the broad structure of the agreements, if agreed by the authorities that are party to the agreement.

Essential criteria for KA 9

EC 9.1 If the jurisdiction under review is home to a G-SIB it maintains a COAG with all members of the CMG and publicly discloses the existence of those agreements.

EC 9.2 If the jurisdiction under review is invited by the home jurisdiction to be party to a COAG for a G-SIB, it has concluded or can demonstrate that it is engaging in good faith negotiations towards the conclusion of an agreement with other members of the CMG.

Explanatory notes for KA 9

EN 9 (a) Separate terms on information sharing – The terms on information sharing may be standard and documented separately from the firm-specific elements of agreements and procedures for the operation of CMGs and the development of recovery and resolution plans. However, agreements on information sharing set out in supervisory MoUs may only be used to meet the requirements of EC 9.1 if they refer explicitly to information sharing for the purposes of planning or carrying out resolution: provision for the exchange of information for supervisory or oversight purposes only is not sufficient.

EN 9 (b) Nature of COAGs – Jurisdictions should strive towards multi-lateral institution-specific cooperation agreements so as to promote consistency and transparency of policy commitments across all relevant jurisdictions. Bilateral forms of COAGs are not conducive to effective cross-border coordination among multiple jurisdictions as they may generate a complex and opaque web of agreements that pose significant implementation challenges, due to lack of transparency and the potential for misalignment.

EN 9 (c) Good faith negotiations towards the conclusion of an agreement – The onus is on the assessed jurisdiction to demonstrate that it is engaging in good faith negotiations towards the conclusion of an agreement.

KA 10 Resolvability assessments

10.1 Resolution authorities should regularly undertake, at least for G-SIFIs, resolvability assessments that evaluate the feasibility of resolution strategies and their credibility in light of the likely impact of the firm's failure on the financial system and the overall economy. Those assessments should be conducted in accordance with the guidance set out in I-Annex 3.

10.2 In undertaking resolvability assessments, resolution authorities should in coordination with other relevant authorities assess, in particular:

(i) the extent to which critical financial services, and payment, clearing and settlement functions can continue to be performed;

(ii) the nature and extent of intra-group exposures and their impact on resolution if they need to be unwound;

(iii) the capacity of the firm to deliver sufficiently detailed accurate and timely information to support resolution; and

(iv) the robustness of cross-border cooperation and information sharing arrangements.

10.3 Group resolvability assessments should be conducted by the home authority of the G-SIFI and coordinated within the firm's CMG taking into account national assessments by host authorities.

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

10.5 To improve a firm's resolvability, supervisory authorities or resolution 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, duly taking into account the effect on the soundness and stability of on-going business. To enable the continued operations of systemically important functions, authorities should evaluate whether to require that these functions be segregated in legally and operationally independent entities that are shielded from group problems.

Essential criteria for KA 10

EC 10.1 If the jurisdiction under review is home to one or more G-SIBs or domestically incorporated banks that are subject to a requirement for resolution plans under KA 11, arrangements and processes are in place whereby the resolution authorities undertake, in cooperation with relevant host authorities, group resolvability assessments regularly, including when there are material changes to the bank's business or structure.

EC 10.2 If the jurisdiction under review is host to one or more G-SIBs or domestically incorporated banks that are subject to a requirement for resolution plans under KA 11, it has in place arrangements and processes whereby the resolution authorities cooperate with the home jurisdiction and contribute to the development of the

resolvability assessments where invited to do so by the home jurisdiction, including by sharing results of local resolvability assessments with the home authority.

EC 10.3 The supervisory authorities or resolution authorities have the power to require changes to a bank's business practices, legal, operational or financial structures or organisation that are necessary to improve the resolvability of the bank.

Explanatory notes for KA 10

EN 10 (a) Relationship between KA 10 resolvability assessment and RAP – The technical resolvability assessments to be carried out in accordance with KA 10 are distinct from the FSB Resolvability Assessment Process (RAP), which is carried out annually for G-SIBs. The former are carried out at a technical level by staff of the home resolution authority, in cooperation with staff of the host authorities that participate in the CMG, and inform and iterate with resolution planning. The RAP is carried out at the level of the FSB, and involves a high level overview of the resolvability of G-SIBs and common obstacles to resolvability. The results of the detailed technical KA 10 resolvability assessments are used as the basis of the RAP. Participation of jurisdictions in the RAP is not assessed under this methodology.

EN 10 (b) Action to improve resolvability – The power for supervisory or resolution authorities to require banks to make changes to improve their resolvability should be sufficiently broad so as to include a range of possible requirements of the following kind: changes to legal structure or operational organisation to facilitate the legal and economic separation of critical functions from other functions; the divestment of specific assets; issuance of loss absorbing capacity by particular parts of the group to support a specific resolution strategy; limiting maximum individual and aggregate exposures; the establishment of a financial holding company in a mixed-activity group; limiting or ceasing existing activities; restricting the development of new business lines or sale of new products, or imposing structural or organisational requirements on the way such business lines or products are provided; ensuring effective segregation of client assets; and drawing up service agreements (either intra-group or with third parties) to support the continued provision of critical functions in resolution.

Powers to require changes to improve resolvability should be exercisable in advance of any financial problems in the bank that could lead to non-viability, and should not be contingent on the existence of such problems. Their use should take due account of the effect on the soundness and stability of the on-going domestic and foreign operations of the bank.

The assessors should evaluate whether the authorities are able to compel such changes, the range of measures that can be required and the circumstances in which the powers can be exercised, including by assessing any experience of the use of such powers. It is not inconsistent with EC 10.3 if the legal framework includes safeguards for banks, such as a right of appeal.

KA 11 Recovery and resolution planning

11.1 Jurisdictions should put in place an on-going process for recovery and resolution planning, covering at a minimum domestically incorporated firms that could be systemically significant or critical if they fail.

11.2 Jurisdictions should require that robust and credible RRPs, containing the essential elements of Recovery and Resolution Plans set out in I-Annex 4, are in place for all G-SIFIs and for any other firm that its home authority assesses could have an impact on financial stability in the event of its failure.

11.3 The RRP should be informed by resolvability assessments (see Key Attribute 10) and take account of the specific circumstances of the firm and reflect its nature, complexity, interconnectedness, level of substitutability and size.

11.4 Jurisdictions should require that the firm's senior management be responsible for providing the necessary input to the resolution authorities for (i) the assessment of the recovery plans; and (ii) the preparation by the resolution authority of resolution plans.

11.5 Supervisory and resolution authorities should ensure that the firms for which a RRP is required maintain a recovery plan that identifies options to restore financial strength and viability when the firm comes under severe stress. Recovery plans should include:

(i) credible options to cope with a range of scenarios including both idiosyncratic and market wide stress;

(ii) scenarios that address capital shortfalls and liquidity pressures; and

(iii) processes to ensure timely implementation of recovery options in a range of stress situations.

11.6 The resolution plan is intended to facilitate the effective use of resolution powers to protect systemically important functions, with the aim of making the resolution of any firm feasible without severe disruption and without exposing taxpayers to loss. It should include a substantive resolution strategy agreed by top officials and an operational plan for its implementation and identify, in particular:

(i) financial and economic functions for which continuity is critical;

(ii) suitable resolution options to preserve those functions or wind them down in an orderly manner;

(iii) data requirements on the firm's business operations, structures, and systemically important functions;

(iv) potential barriers to effective resolution and actions to mitigate those barriers;

(v) actions to protect insured depositors and insurance policy holders and ensure the rapid return of segregated client assets; and

(vi) clear options or principles for the exit from the resolution process.

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

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

11.9 Host resolution authorities may maintain their own resolution plans for the firm's operations in their jurisdictions cooperating with the home authority to ensure that the plan is as consistent as possible with the group plan.

11.10 Supervisory and resolution authorities should ensure that RRPs are updated regularly, at least annually or when there are material changes to a firm's business or structure, and subject to regular reviews within the firm's CMG.

11.11 The substantive resolution strategy for each G-SIFI should be subject, at least annually, to a review by top officials of home and relevant host authorities and, where appropriate, the review should involve the firm's CEO. The operational plans for implementing each resolution strategy should be, at least annually, reviewed by appropriate senior officials of the home and relevant host authorities.

11.12 If resolution authorities are not satisfied with a firm's RRP, the authorities should require appropriate measures to address the deficiencies. Relevant home and host authorities should provide for prior consultation on the actions contemplated.

Essential criteria for KA 11

EC 11.1 The resolution regime requires the development and maintenance of RRPs for all G-SIBs for which the jurisdiction is the home country and for any other bank that could have an impact on financial stability in the event of its failure.

EC 11.2 The development and maintenance of RRPs for banks covered by EC 11.1 that are not G-SIBs-takes into account the specific circumstances of the individual banks, including their nature, complexity, interconnectedness, level of substitutability and size and the extent of cross-border operations.

EC 11.3 The legal framework imposes the responsibility for the development and maintenance of banks' recovery planning process on the board and senior management, subject to regular review by supervisory or resolution authorities. Maintenance includes reviewing and updating the recovery plan at least annually, and sooner in the event of material changes to the bank's business or structure.

EC 11.4 The legal framework requires recovery plans to:

(i) include measures for addressing capital shortfalls and liquidity pressures;

(ii) set out credible recovery options to deal with a range of stress scenarios covering both idiosyncratic and market wide stress; and

(iii) define clear backstops and escalation procedures, identifying the quantitative and qualitative criteria that would trigger implementation of the plan by the bank.

EC 11.5 The resolution regime sets out the requirements for the content of resolution plans which, at a minimum, include a substantive resolution strategy and an operational plan that meets the requirements set out in points (i) to (vi) of KA 11.6 (for all banks).

EC 11.6 If the jurisdiction is home to a G-SIB, the home resolution authority has a process in place for the authorities represented on the CMG or equivalent arrangement to review the substantive resolution strategy for the bank and for the agreement of that strategy by top officials of those authorities.

EC 11.7 In order to support operational continuity of the critical functions of a bank in resolution, the resolution regime should:

(i) require banks to ensure that their Service Level Agreements that are required to maintain continuity of critical functions or critical shared services can be maintained in crisis situations and in resolution, and that the underlying contracts include provisions that prevent termination from being triggered by recovery or resolution events and facilitate transfer of the contract to a bridge institution or a third party acquirer; and

(ii) ensure that, as part of resolution planning for banks that are FMI participants, resolution authorities consider how the bank in resolution or a successor would maintain access to the FMI services that are necessary to support the critical functions of the bank.

EC 11.8 The resolution regime requires authorities to review and, to the extent necessary, update resolution plans at least annually, and sooner upon the occurrence of an event that materially changes the bank's business or structure, including its operations, strategy or risk exposure. That review includes assessment of the feasibility and credibility of the resolution plans in the light of the likely impact of the firm's failure on the financial system and the overall economy.

EC 11.9 If the jurisdiction is home to a bank with material cross-border operations that is subject to a resolution planning requirement in the home jurisdiction, the home resolution authority has a process in place including appropriate and proportionate arrangements for cross-border cooperation and information sharing with host authorities to support the development and maintenance of recovery and resolution plans.

EC 11.10 If the jurisdiction is home to a G-SIB, the home resolution authority has a process in place to develop a group-wide resolution strategy and plan for the G-SIB in coordination with all members of the bank's CMG, and gives all members of the

CMG access to the bank's RRP and information on measures that would have an impact on their jurisdiction.

EC 11.11 If the jurisdiction is home to a G-SIB, the home resolution authority has a process in place to cooperate with authorities of jurisdictions where the G-SIB has a systemic presence that are not members of the CMG, and provide authorities in those jurisdictions with access to relevant material from the RRPs and information on resolution strategies or measures that the home resolution authority judges would have an impact on their jurisdiction.

EC 11.12 If the jurisdiction under review is a host to a bank that is subject to a resolution planning requirement in the host jurisdiction and maintains its own resolution plans for the bank's local operations in its jurisdiction, there is a clear process for coordination with the home authority to ensure that the plan is as consistent as possible with the group plan.

EC 11.13 If the jurisdiction under review is home to a G-SIB, it has in place a process for coordination with authorities participating in the CMG for the review, at least annually, of:

(i) the resolution strategy by top officials of home and relevant host authorities, involving the bank's CEO where appropriate; and

(ii) the operational plans for the implementation of the resolution strategy by senior officials of the relevant (home and host) authorities.

EC11.14 The supervisory or resolution authority has the power to require a bank to take measures to address deficiencies in its recovery plan or inputs to their resolution plan, and in cases where authorities require firms to prepare a resolution plan, its resolution plan.

Explanatory notes for KA 11

EN 11 (a) Proportionality of the RRP requirement – Requirements for RRPs should be implemented in a way that reflects the nature, complexity, interconnectedness, level of substitutability, size and extent of cross-border operations of banks in the jurisdiction under review. Accordingly, the requirements for development and maintenance of RRPs for G-SIBs are more detailed and more extensive than for other banks, particularly with respect to cross-border cooperation as reflected in KAs 8 to 10.

EN 11 (b) Continuity of access to FMIs – Continuity of access to FMIs in resolution is necessary for the preservation of a bank's critical functions and should, in particular, be considered in resolution planning for banks that perform critical payment, clearing and settlement functions. Implementation guidance on resolution planning and resolvability assessments for banks that are FMI participants is set out in paragraph 2.1 of Part II of II-Annex 1 to the *Key Attributes*. The extent to which that guidance should be taken into account will be an element of the principle of proportionality set out in EN 11 (a).

EN 11 (c) Appropriate and proportionate arrangements for cross-border cooperation and coordination with key host authorities – If the jurisdiction is home to a G-SIB, the home

authority should have appropriate and proportionate arrangements for cross-border cooperation and coordination with the relevant host authorities set out under KAs 8 and 9 relating to the establishment of the CMG and the adoption of COAGs.

Processes for cooperation with authorities that are not members of a CMG should provide those authorities, at a minimum, with sufficient information on the resolution strategy and plan for banks that are systemically significant in their jurisdiction so that those authorities understand the impact, if any, that the strategy and measures set out in the plan would have on the bank's operations in their jurisdiction. However, a jurisdiction may limit or refuse access to information in the RRP on the basis that the recipient authority is unable to provide necessary assurances that the information will be kept confidential.

If the jurisdiction is home to a bank that is not a G-SIB but which is required to undertake recovery and resolution planning and has operations in foreign jurisdictions that are material to the group, the home authority should have established or have undertaken reasonable efforts to establish appropriate and proportionate arrangements for cross-border cooperation and coordination with the relevant host authorities to support the process of recovery and resolution planning. The home authority should seek to establish a cross-border coordinating forum (e.g., an extended supervisory college) with a mandate to cover cross border recovery and resolution planning for the bank. Reasonable efforts include inviting foreign jurisdictions which are material to the group to participate in such a coordinating forum (whether or not they participate) and demonstrable progress on coordination and cooperation e.g., documented arrangements for coordination and information sharing between members of the forum, including for sharing RRPs etc.

EN 11 (d) Action to improve resolvability – The power for supervisory or resolution authorities to require banks to make changes to improve their resolvability should be sufficiently broad so as to include a range of possible requirements of the following kind: changes to legal structure or operational organisation to facilitate the legal and economic separation of critical functions from other functions; the divestment of specific assets; issuance of loss absorbing capacity by particular parts of the group to support a specific resolution strategy; limiting maximum individual and aggregate exposures; the establishment of a financial holding company in a mixed-activity group; limiting or ceasing existing activities; restricting the development of new business lines or sale of new products, or imposing structural or organisational requirements on the way such business lines or products are provided; ensuring effective segregation of client assets; and drawing up service agreements (either intra-group or with third parties) to support the continued provision of critical functions in resolution.

Powers to require changes to improve resolvability should be exercisable in advance of any financial problems in the bank that could lead to non-viability, and should not be contingent on the existence of such problems. Their use should take due account of the effect on the soundness and stability of the on-going domestic and foreign operations of the bank.

The assessors should evaluate whether the authorities are able to compel such changes, the range of measures that can be required and the circumstances in which the powers can be exercised, including by assessing any experience of the use of such powers.

KA 12 Access to information and information sharing

12.1 Jurisdictions should ensure that no legal, regulatory or policy impediments exist that hinder the appropriate exchange of information, including firm-specific information, between supervisory authorities, central banks, resolution authorities, finance ministries and the public authorities responsible for guarantee schemes. In particular:

(i) the sharing of all information relevant for recovery and resolution planning and for resolution should be possible in normal times and during a crisis at a domestic and a cross-border level;

(ii) the procedures for the sharing of information relating to G-SIFIs should be set out in institution-specific cooperation agreements (see Annex I); and

(iii) where appropriate and necessary to respect the sensitive nature of information, information sharing may be restricted, but should be possible among the top officials of the relevant home and host authorities.

12.2 Jurisdictions should require firms to maintain Management Information Systems (MIS) that are able to produce information on a timely basis, both in normal times for recovery and resolution planning and in resolution. Information should be available at the group level and the legal entity level (taking into account information needs under different resolution scenarios, including the separation of individual entities from the group). Firms should be required, in particular, to:

(i) maintain a detailed inventory, including a description and the location of the key MIS used in their material legal entities, mapped to their core services and critical functions;

(ii) identify and address exogenous legal constraints on the exchange of management information among the constituent entities of a financial group (for example, as regards the information flow from individual entities of the group to the parent);

(iii) demonstrate, as part of the recovery and resolution planning process, that they are able to produce the essential information needed to implement such plans within a short period of time (for example, 24 hours); and

(iv) maintain specific information at a legal entity level, including, for example, information on intra-group guarantees and intra-group trades booked on a back-to-back basis.

Essential criteria for KA 12

EC 12.1 The resolution authority has the power under the legal framework to access any information from banks that is material for the planning, preparation and implementation of resolution measures in a timely manner.

EC 12.2 The legal framework permits and contains adequate legal gateways for the disclosure, in normal times and during a crisis, of non-public information (including bank-specific information) necessary for recovery and resolution planning and for carrying out resolution to domestic and foreign authorities that could have a role in

resolution, including as appropriate supervisory authorities, central banks, resolution authorities, finance ministries and the public authorities responsible for guarantee schemes. Disclosure under those legal gateways is conditional on the recipient authority being subject to adequate confidentiality requirements and safeguards that are appropriate to the nature and sensitivity of the information to be disclosed.

EC 12.3 The legal framework or resolution regime incorporates adequate safeguards to protect the confidentiality of non-public information received from other domestic or foreign authorities. Such safeguards:

(i) require authorities to keep such information confidential and to use it only in accordance with the terms on which the information was provided;

(ii) prohibit domestic authorities from disclosing such information to other domestic or foreign authorities or other third parties without the prior express consent of the authority that provided it, unless such disclosure is compelled by law; and

(iii) exclude information received from foreign authorities from mandatory disclosure pursuant to freedom of information or similar legislation that may exist in that jurisdiction, or treat such information as falling under an exemption from disclosure requirements.

EC 12.4 The resolution authority has policies and procedures in place to control and monitor the dissemination within the authority of non-public information received from a foreign home or host authority.

EC 12.5 Banks subject to a recovery and resolution planning requirement are required to maintain management information systems that are capable of producing information necessary for recovery and resolution planning, assessing resolvability and the conduct of resolution, including the items specified in KA 12.2, and delivering that information to authorities on a timely basis.

EC 12.6 The jurisdiction has in place processes (for example, through regular examinations) to test banks' ability to produce information for recovery and resolution planning and in resolution on a timely basis.

Explanatory notes for KA 12

EN 12 (a) Access to Information and Information Sharing – To avoid duplication in the assessment, access to information and information sharing requirements under the *Key Attributes,* including those under KA 7.6 and KA 7.7, are assessed under KA 12.

Access by the resolution authority to information may take the form of direct access to the bank established in the jurisdiction or indirect access through a supervisory authority or other relevant authority. However, if the resolution authority requires additional information to prepare for resolution it should not be denied direct access to the bank.

EN 12 (b) "Adequate Legal gateways" – A jurisdiction that relies on legal gateways to share information for supervisory purposes cannot be compliant or largely compliant with EC 12.1 if

those gateways are not sufficiently broad to encompass necessary information sharing with non-supervisory authorities, potentially including central banks, resolution authorities, public bodies administering resolution and protection funds, and Ministries of Finance; or if it is not explicitly clear that the purposes for which information can be shared encompass the full range of activities and functions related to recovery and resolution planning, and preparing for and carrying out resolution. (See paragraphs 1.1 to 1.8 of I-Annex 1 to the *Key Attributes* on Information Sharing for Resolution Purposes.) Similarly, a jurisdiction would not be compliant or largely compliant with KA 12 if there were legal, regulatory or other policy impediments that materially hinder the ability of the relevant authorities to share information.

EN 12 (c) Limitations or refusals to exchange confidential information – A jurisdiction should not be considered as non-compliant or materially non-compliant with EC 12.1 if it requires requesting authorities to enter into such confidentiality or similar agreement as may be necessary under its law to preserve privilege or confidentiality protections as a condition for sharing information; or if it reasonably limits or refuses the exchange of non-public information on the grounds that the authorities requesting the information are unable to provide assurances that are satisfactory to the jurisdiction under review that the confidentiality of the information will be protected. However, the assurances required should not be so extensive as to undermine the objectives of effective information sharing for resolution-related purposes.

When considering a request for non-public information, the authority that is requested to provide non-public information may take into account whether the requesting authority has a legitimate interest in the non-public information for recovery and resolution planning or resolution purposes, and may require the requesting authority to provide information about that interest and assurances regarding the purposes for which the information will be used.

EN 12 (d) Adequate safeguards to protect confidentiality of non-public information – An authority that receives confidential information, and its staff and agents, should be subject to adequate confidentiality requirements that continue to apply to former staff and agents, the breach of which gives rise to legal sanctions (which might include criminal penalties). Paragraphs 1.10 to 1.14 of I-Annex 1 to the *Key Attributes* on Information Sharing for Resolution Purposes provide further guidance on adequate standards of confidentiality to support information sharing.

EN 12 (e) Situations in which disclosure of confidential information is compelled by law – The legal framework should authorise domestic authorities to refuse any demand to disclose confidential information in their possession or control that they have received from a foreign authority for the purposes of resolution, unless they are compelled under national law to disclose in the restricted cases mentioned below.

Situations in which an authority can be compelled to disclose confidential information should be of an exceptional nature (for example, a request for information by a court or tribunal with powers of subpoena, legislative bodies or an investigative commission established by a legislative body). In the event that the authority is compelled to disclose such confidential information, it should be required to promptly notify the originating authority (unless legally prohibited from doing so), indicating what information it is compelled to release and, to the extent appropriate, the circumstances surrounding the release, and to take all reasonable steps to resist disclosure of the confidential information to the extent appropriate and permitted by applicable laws and legal process. The disclosing authority should also take all reasonable steps

to ensure that confidential information is disclosed under seal or made subject to a protective order limiting any further disclosure.