



Financial Stability Board

Comments to FSB Consultative Document: Effective Resolution of Systemically Important Financial Institutions

1. The various resolution proposals look at the alternatives derived from the banking and bankruptcy law angles. However, no specific consideration has been taken in respect of company law. Insofar, major challenges need to be tackled in more detail: For example in Switzerland, the notion of “faktischer Beistandszwang” (factual support commitment) within a group of companies is applicable since more than 20 years (BGE 116 I b 331, Credit Suisse); Germany knows a similar concept according to its group company law (“Konzernrecht”), in particular if the tax regime is based on an overall approach (“Gewinnabführungsvertrag”). Obviously, the question can be raised to what extent these concepts are enforceable in a cross-border context; nevertheless, the Consultative Document would gain if it would address issues of how to resolve group and in particular intra-group relations. Otherwise, if a TBTF institution is “purely” resolved in accordance with the proposals contained in the Consultative Document it is not sure whether the surviving entities could not be sued for debts of the resolved entities (making the whole exercise worthless). Of course, the legislator could change this legal situation; however, if this is intended then it should be made transparent and be clearly outspoken (with the consequence that the group company law would become different for TBTF financial institutions and all other companies).
2. From an even more general point of view some hesitations could be expressed as far as compliance with well-established legal principles such as stability and predictability of law are concerned. The Consultative Document wants to reserve “a broad range of options to resolve a financial institution” (p. 9) and have a “scope of liability as broad as possible” (p. 13). Based on this concept the risk exists that authorities could do whatever they consider to be adequate according to their discretion and the given political/economic circumstances. In the long run, such prospects have a negative impact on the legal framework in general (in particular regarding the “rule of law” notion) and most likely also on the capital markets since it might be questionable who would buy shares of or lend money to TBTF financial institutions knowing that shareholders and management are exposed to discretionary intervention by supervisory authorities.