

Belgium: Technical Note on Crisis Management and Bank Resolution Framework

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FINANCIAL SECTOR ASSESSMENT PROGRAM UPDATE— TECHNICAL NOTE—CRISIS MANAGEMENT AND BANK RESOLUTION FRAMEWORK

EXECUTIVE SUMMARY

This note elaborates on the main recommendations made in the Financial Sector Assessment Program (FSAP) Update for Belgium in the areas of crisis management and bank resolution. It summarizes the findings of the FSAP Update mission undertaken during January 16–29, 2013 and is based upon the analysis of the relevant legal and policy documents and intensive discussions with the authorities and private sector representatives.

The safety net and crisis management arrangements have been significantly enhanced, based on the experiences during the crisis. The authorities demonstrated capacity to intervene decisively and restore the financial stability, albeit at high fiscal cost. The crisis revealed several weaknesses in the framework for crisis management and bank resolution. Some of those weaknesses were overcome by the passing of new legislation, but there remains room for further improvement.

The key findings and recommendations of this technical note include:

- **Formalize the institutional arrangements for resolution**—While the overarching financial stability mandate of the National Bank of Belgium (NBB) is appropriate, there are opportunities to make explicit and enhance its role as the resolution authority. Moreover, there is scope to formalize inter-institutional coordination, which at present largely occurs via informal channels and on an *ad hoc* basis. In particular, the authorities should consider establishing a cross-institutional Coordination Group, composed of top level officials. Moreover, the introduction of recurrent crisis management simulations would allow the authorities to test the coordination arrangements and potential application of the crisis management toolkit.
- **Require recovery and resolution plans**—The authorities are testing draft guidelines for recovery plans through pilot projects with selected firms that are of systemic importance, irrespective of the absence of a legal requirement for the preparation of recovery and resolution plans (RRP). As a near-term follow-up to the

pilots, the planned extension of the scope of the work toward the development of resolution plans should proceed, where relevant, in cooperation with home and host authorities. Going forward, recovery and resolution plans should be made mandatory for all Belgian firms that are of systemic importance, including financial market infrastructures (FMIs) and insurance companies.

- **Provide safeguards against moral hazard in the framework for official financial support**—The NBB’s ability to provide emergency liquidity assistance—against adequate collateral—to solvent but temporarily illiquid firms is well tested and generally satisfactory. Powers to grant state guarantee in exceptional circumstances have been introduced during the crisis, and were used repeatedly to support systemically important firms. While appropriate at the height of the crisis, the authorities should henceforth exercise restraint in granting new guarantees and ensure that any further support is subject to an appropriate allocation of losses to the private sector, *inter alia* through dilution of existing shareholders.
- **Enhance the framework for orderly and effective resolution**—The NBB can utilize a range of measures to intervene proportionally should a bank breach the law or regulations. A procedure to transfer assets and liabilities of, or shares in, firms considered systemically important subject to an *ex ante* judicial review, has been introduced. The procedural aspects of this tool should be revised to reduce the uncertainty and mitigate potential stability risks that the *ex ante* judicial review entails. In addition, consideration should be given to broadening the scope of such powers to holding companies and nonsystemic institutions, with the latter allowing for more cost-effective resolution strategies.
- **Enhance framework for bank liquidation and insolvency**—Under Belgian law, banks are subject to the general bankruptcy proceedings that are ill suited to address the specific features of credit institutions. The authorities are encouraged to enhance bank insolvency framework by allowing a rapid transfer of a credit institution’s critical functions (e.g., payment services, trade finance) to a third party, under the oversight of the resolution authority. Furthermore, the NBB should be empowered to directly initiate such procedure before court.
- **Redesign the Deposit Guarantee Scheme (DGS)**—Protection for up to EUR100.000 per depositor is provided by a two-tier system comprised of the Protection Fund for Deposits and Financial Instruments (PF) and the Special Protection Fund for Deposits, Life Insurance Policies, and Capital of Approved Cooperative Corporations (SF). The creation of a segregated fund, financed via *ex ante* industry contributions and with robust arrangements for back-up funding, would increase transparency and allow for prompt and cost-effective payouts. The remaining resources available in the PF and the contributions paid to date into the SF should be utilized to satisfy the initial needs of the fund. A sufficiently ambitious minimum target size for the fund should be set, eventually allowing the fund to absorb a simultaneous default of several midsize institutions. The

authorities should also consider the introduction of depositor preference, which would benefit the deposit guarantee scheme in case of a payout to depositors, through the subrogation of the rights of insured depositors that is already foreseen in the Belgian legal framework. The recalibrated deposit insurance scheme should be allowed to contribute funding to resolution actions, up to the amount of what its distributions would have been in case of a deposit payout. Finally, going forward, shares issued by cooperative corporations should be excluded from coverage.

Main recommendations of the mission are summarized in Table 1.

Table 1. Main Recommendations Crisis Management and Bank Resolution Framework

Policy Action	Priority
Domestic institutional framework	
Grant the NBB an explicit mandate as the resolution authority.	Medium
Formalize—and periodically test via crisis management simulations—domestic coordination agreements and establish a cross-institutional Coordination Group.	Medium
Crisis preparation	
Require the formulation of recovery and resolution plans for all firms that are of systemic importance.	High
Crisis management tools	
Improve crisis management toolkit through the introduction of greater options for burden sharing (e.g., bail-in); broaden the scope of asset transfers, including holding companies and nonsystemic firms, and mitigate potential financial stability risks originating from the <i>ex ante</i> judicial review; and strengthen powers of special inspectors.	High
Bank liquidation and insolvency	
Allow the rapid transfer of a credit institution’s critical operations to a third party, at the initiative and under the oversight of the resolution authority.	Medium
Deposit Guarantee Scheme	
Revamp the Deposit Guarantee Scheme, establishing a segregated fund, financed via <i>ex ante</i> industry contributions with a recalibrated target size and the ability to contribute funding to resolution actions; exclude shares issued by cooperative corporations from coverage.	Medium
Consider the introduction of depositor preference.	Medium

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GLOSSARY

Banking Law	Law of March 1993 on the Legal Status and Supervision of Credit Institutions
CBFA	Commission Bancaire, Financière et des Assurances
CBSG	Cross Border Stability Group
CMG	Crisis Management Group
CSRSFI	Committee for Systemic Risks and System-relevant Financial Institutions
DGS	Deposit Guarantee Scheme
D-SIB	Domestic Systemically Important Bank
ELA	Emergency Liquidity Assistance
EU	European Union
FMI	Financial Market Infrastructure
FSAP	Financial Sector Assessment Program
FSMA	Financial Services and Markets Authority
FSB	Financial Stability Board
G-SIFI	Global Systemically Important Financial Institution
IT	Information Technology
Key Attributes	Key Attributes of Effective Resolution Regimes for Financial Institutions
MOF	Ministry of Finance
MOU	Memorandum of Understanding
NBB	National Bank of Belgium
Organic Law	Law of 22 February 1998 establishing the organic statute of the NBB
PF	Protection Fund for Deposits and Financial Instruments
RF	Resolution Fund
RRP	Recovery and Resolution Plan
SF	Special Protection Fund for Deposits, Life Insurance Policies, and Capital of Approved Cooperative Corporations
SWIFT	Society for Worldwide Interbank Financial Telecommunication
VSCAs	Voluntary Specific Cooperation Agreement

INTRODUCTION¹

- 1. Belgium was hit hard by the crisis and the financial system remains fragile.** When the crisis erupted, Belgian banks faced liquidity constraints and a depletion of solvency buffers, which triggered a need for various banks to raise capital, shed assets, and seek capital support from the government. While the authorities' policy response was forceful and set the stage for a major restructuring of the Belgian financial sector, these interventions have resulted in large contingent liabilities for the government. Moreover, the banking system remains fragile as funding risks remain and bank profitability is depressed.
- 2. Significant execution risks continue to bear on the health of the Belgian financial sector, calling for a close examination of the effectiveness of measures to prevent, prepare for, and manage crisis.** In connection with the FSAP Update, this technical note discusses the Belgian framework for crisis management and bank resolution, as enhanced by the authorities on the basis of lessons learned from the crisis (Box 1), and makes a number of recommendations for further enhancements.
- 3. This note is structured as follows.** The next section, Institutional Framework, summarizes the existing institutional framework and coordination arrangements for crisis management. The following section, Prudential Supervision, provides reflections on prudential supervision and early intervention, which is the "first line of defense" against crises. The following section discusses crisis management tools, covering official financial support, orderly and effective resolution, and the Belgian Deposit Guarantee Scheme. The final section provides a number of considerations with regard to financial market infrastructures and covered bonds.

¹ Prepared by Mario Tamez (LEG) and Constant Verkoren (MCM).

Box 1. Lessons Learned from the Financial Crisis

The interventions of Belgian institutions during the height of the crisis highlight a number of key lessons that have a bearing on the crisis management and resolution framework (including cross border coordination).

- A deep understanding of the intricacies of complex groups, including critical functions that would have to be safeguarded in a crisis situation, is critical for sound decision-making. This warrants intrusive supervision and intensive information sharing via a framework that provides adequate safeguards to guarantee the confidentiality of sensitive data.
- A broad range of crisis management powers (ranging from powers that support early intervention to those that allow for swift and orderly resolution) is necessary to ensure the continuity of critical functions (including payment, clearing and settlement functions), to protect the interests of depositors, policy holders and investors, to avoid unnecessary destruction of value, and to minimize the overall cost of the resolution process.
- Close collaboration and coordination among stakeholders (i.e., between home and host authorities, and between the authorities and the firm itself) is essential. While the cross-border nature of financial groups makes the resolution process more complex and time consuming, joint support can prove effective in stabilizing the group.
- The crisis clearly illustrated the tension between the need to take immediate measures to maintain financial stability and the rights of several stakeholders. To be effective, crisis management strategies may require overriding shareholder rights and imposing a temporary stay on early termination rights.
- Despite a long-standing relationship in ongoing supervision and an established practice of information sharing, country authorities may assess crisis situations differently from each other. This underscores the importance of reaching *ex ante* agreement on resolution strategies that could guide an eventual intervention in order to minimize noncooperative behavior.

INSTITUTIONAL FRAMEWORK

A. Domestic Arrangements

4. The NBB, in the context of its financial stability mandate, is charged with both prudential supervision of financial institutions and oversight of clearing and settlement, and payment systems. The NBB's financial stability mandate is clearly enshrined in the Law of 22 February 1998 establishing the organic statute of the NBB (Organic Law). The NBB (i) is responsible for the oversight of the clearing and settlement, and payment systems; (ii) has been assigned a coordinating role in crisis management matters; and (iii) can be—together with the Federal Government (formally the King)—regarded as the resolution authority. Moreover, the Organic Law provides the NBB with various instruments that seek to safeguard financial stability, including the ability to oppose strategic decisions of systemically important institutions if these are deemed to go against sound and prudent management of the system-relevant institution or are likely to have a

significant effect on the stability of the financial system.² The responsibility for prudential supervision has been allocated to the NBB as part of the implementation of the new institutional arrangement that became effective on April 1, 2011.³

5. While the NBB’s overarching mandate is appropriate, there are opportunities to make explicit its role as the resolution authority. The objectives of the NBB should be consistent with developing international best practices for resolution authorities, as laid down in the Financial Stability Board’s (FSB’s) Key Attributes of Effective Resolution Regimes for Financial Institutions (Key Attributes) that envisage four distinct objectives and functions of a resolution authority:⁴

- pursue financial stability and ensure continuity of systemically important financial services, and payment and clearing settlement functions;
- protect, in coordination with the relevant insurance schemes, such depositors, insurance policy holders, and investors as are covered by such schemes;
- avoid unnecessary destruction of value and seek to minimize the overall costs of resolution and losses to creditors, where that is consistent with the other objectives; and
- duly consider the potential impact of its resolution actions on financial stability in other jurisdictions.⁵

6. The Financial Services and Markets Authority’s (FSMA) role in the area of crisis management is limited. While the FSMA lacks an explicit financial stability mandate, it is required to consider the potential impact that its decisions may have on the stability of the financial system.⁶ Moreover, the FSMA has various powers at its disposal to support financial stability, including the ability to suspend the trading of shares in the event of an exceptional market disruption⁷ and impose significant penalties on those who jeopardize financial stability by distributing false or misleading information on the solidity of financial institutions.⁸ The Belgian legal framework

² Article 36/3 of the Organic Law.

³ Under the Twin Peaks model, the NBB is responsible for: (i) macro-prudential supervision of the financial sector; (ii) supervision of systemically important financial institutions, de facto absorbing the tasks of the former Committee for Systemic Risks and System-relevant Financial Institutions (CSRSFI); and (iii) micro-prudential supervision of most of the Belgium financial institutions that were subject to supervision by the former Commission Bancaire, Financière et des Assurances (CBFA).

⁴ See www.financialstabilityboard.org/publications/r_111104cc.pdf.

⁵ Key Attribute 2.3.

⁶ Article 45 paragraph 5 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

⁷ Article 13 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

⁸ Article 41, 5 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

provides for information-sharing between the FSMA and the NBB,⁹ with further details on cooperation and information exchange provided by two Memoranda of Understanding (MOU)—the first one with regard to cooperation in the area of the surveillance of financial market infrastructures (finalized in October 2012) and a second that provides general cooperation arrangements, including an obligation to consult in crisis situations (finalized March 2013).¹⁰

7. Coordination between the NBB and the Ministry of Finance (MOF) may be hampered by barriers to information sharing. The MOF serves as the fiscal authority. In the event that public resources are needed—for example, to support bank resolution or provide backstop financing to the Belgian DGS—such funding would come from the MOF. Notwithstanding informal contacts between the NBB and the MOF, *inter alia*, regarding policy matters, some constraints exist with regard to the transmission of supervisory information. In particular, strict confidentiality requirements may prevent early information-sharing outside emergency situations.¹¹

8. The Belgian legal framework adequately supports coordination between the NBB and the DGS. The interests of Belgian depositors are safeguarded by a DGS that consists of two funds, that is the PF—an autonomous public institution which secretariat has been placed under the NBB—and the SF that has been established as an entity under the administration of the Treasury. Coordination between the NBB and the DGS is buttressed by the NBB’s ability to share confidential information requirement, irrespective of the confidentiality requirements embedded in the Organic Law, with the PF and SF.¹² Moreover, the NBB is required, under the Law of 22 March 1993 on the Legal Status and Supervision of Credit Institutions (Banking Law), to timely inform the PF and SF when it detects any problems that are likely to give rise to the intervention of the deposit protection schemes.¹³

9. Notwithstanding, there is scope to formalize inter-institutional coordination in the context of crisis management. Currently, coordination between the various safety net participants largely occurs via informal channels and on an *ad hoc* basis. To ensure effective coordination, informal arrangements should be supported by formal arrangements, similar to the MOUs that were

⁹ *Inter alia*, the FSMA is required to provide the NBB with all information in its possession that the latter may need to perform its financial stability mandate, see Article 36/3 paragraph 6 of the NBB Organic Law. The NBB, in turn, may share information with the FSMA under Article 36/14 paragraph 4 of the NBB Organic Law.

¹⁰ MOUs can be found at http://www.nbb.be/doc/cp/eng/vi/accord_collaboration/accord/pdf/protocole_NBB_FSMA.pdf and http://www.nbb.be/doc/cp/eng/vi/accord_collaboration/accord/pdf/nbb_fsma_2013_03_14.pdf.

¹¹ Article 36/14 paragraph 1, 1 of the NBB Organic Law solely provides for the exchange institution-specific information in the event of an emergency situation (e.g. developments that threaten market liquidity and the stability of the financial system).

¹² Article 36/14 paragraph 1, 5 of the NBB Organic Law.

¹³ Article 110bis² paragraph 1 of the Banking Law.

concluded between the NBB, the former Banking, Finance, and Insurance Commission and the MOF before the implementation of the Twin Peaks model.¹⁴ In particular, the authorities should:

- update the MOUs created prior to restructuring of regulation and supervision, clarifying the roles and responsibilities of the current safety net participants and establishing guidelines for consultation and information exchange in the context of crisis preparation and crisis management¹⁵; and
- establish a cross-institutional Coordination Group as a suitable platform for (i) assessing financial stability and systemic risks; (ii) enhanced policy coordination; (iii) scenario analyses that would allow for *ex ante* reflections on the appropriateness of various policy responses under different circumstances; (iv) discussions on potential improvements of the crisis management framework, taking into account emerging international best practices; and (v) the coordination of crisis management simulation exercises, aimed at testing, and subsequently strengthening, crisis preparedness.¹⁶
- Given the confidential nature of aspects discussed in the Coordination Group, group membership should be limited to top-level officials of the relevant authorities (i.e., NBB, FSMA and MOF), with the secretariat provided by the NBB.

10. The Belgian commercial courts have exclusive competence with regards to the liquidation of Belgian credit institutions.¹⁷ The provisions laid down for credit institutions provide for cooperation among the authorities, therefore, before any ruling is made the relevant court has to request the NBB's recommendation, in order to ensure that the court is correctly informed and to verify whether or not the bank could be subject to other process.¹⁸

¹⁴ I.e. the MOU between the NBB and the CBFA, signed in 2004, and the MOU between the NBB, CBFA and MOF, signed in 2005.

¹⁵ Following the implementation of the new regulatory structure, a new MOU between the NBB and the FSMA relating to cooperation and exchange of information (including a general obligation of consultation in crisis situations), an MOU focusing on co-operation regarding the surveillance of financial market infrastructures and an MOU on cooperation and information sharing for general supervision have been concluded.

¹⁶ Prior to the implementation of the new regulatory model, the CSRSFI *de facto* functioned as a similar Coordination Group, as it assumed the tasks of Belgium's Domestic Standing Group, which was to be established under the 2008 MoU on Cooperation between the Financial Supervisory Authorities, Central Banks and Finance Ministries of the European Union on Cross-Border Financial Stability. Since the merger between the NBB and the CBFA in April 2011, this Committee has ceased its activities.

¹⁷ Article 109/8 *et seq.* of the Banking Law.

¹⁸ Article 109/18 of the Banking Law..

B. Cross-Border Coordination and Exchange of Information

11. Effective cross-border coordination is an essential component of the Belgian financial sector safety net. The Belgian financial system is characterized by a relatively large (more than 50 percent) foreign ownership, including domestic operations of multiple global systemically important financial institutions (G-SIFIs) and large branches of European Union (EU) institutions. This makes the financial system susceptible to spillovers from other jurisdictions and thus sets the bar for effective cross-border coordination at a high level.

12. Progress has been made in strengthening cross-border coordination but further efforts remain necessary. Within the EU, the 2008 multilateral MOU on cooperation between the Financial Supervisory Authorities, Central Banks, and Finance Ministries of the EU on Cross-Border Financial Stability, provides a formal framework for crisis management.¹⁹ In practice, however, the MOU proved to be aspirational, as the envisaged creation of so-called Cross-Border Stability Groups (CBSG), the *de facto* EU equivalent of the FSB ‘sponsored’ Crisis Management Groups (CMG),²⁰ was delayed in many member states. In Belgium, inaugural meetings for the CBSGs for KBC and Dexia took place in 2011 and Voluntary Specific Cooperation Agreements (VSCAs) have not yet been concluded.^{21 22} While the aforementioned CBSGs have meanwhile become operational and the NBB is clearly strongly motivated to contribute to and participate in home-host relationships as fully and as effectively as possible, formalizing such agreements would entail an important enhancement of the framework for cross-border coordination.

C. Crisis Preparation

13. Crisis management simulations conducted before the onset of the financial crisis yielded important recommendations. During the last five years, the NBB, together with the former CBFA, the Treasury and—in one of the two exercises—an important information technology (IT) service provider, conducted two crisis simulation exercises, both prior to the crisis. The objective of the exercises was to test the participating banks’ crisis management procedures, the quality of information exchange, the speed and adequacy of the decision-making process, and communications with the press. The exercises underscored the importance of simulations to

¹⁹ http://www.bnb.be/doc/cp/eng/aboutcbfa/mou/pdf/mou_2008.pdf.

²⁰ See the Principles for Cross-border Cooperation on Crisis Management (http://www.financialstabilityboard.org/publications/r_0904c.pdf), published by FSB’s predecessor in April 2009, and Reducing the moral hazard posed by systemically important financial institutions (http://www.financialstabilityboard.org/publications/r_101111a.pdf), published in November 2010.

²¹ VSCAs seek to provide more specific and detailed procedures and arrangements for crisis management and resolution matters and are comparable with the Cross-Border Cooperation Agreements that are envisaged under the Key Attributes for, at a minimum, G-SIFIs.

²² It should be noted that due to ongoing orderly resolution process, Dexia was removed from the FSB’s list of global systemically important banks for which the establishment of cross-border coordination arrangements is considered mandatory. See http://www.financialstabilityboard.org/publications/r_121031ac.pdf. Belfius, the rebranded Dexia Bank Belgium, does not require a CBSG, given its domestic focus.

maintain a sufficient degree of familiarity with relevant procedures. Moreover, the exercise confirmed the need for frequently updated contact lists and consistent communication strategies. While crisis simulations have, understandably, not been considered a priority the last five years, including after the entry into force of the new regulatory structure, conducting another simulation in the foreseeable future, and subsequently on an annual basis, would allow the authorities to test coordination arrangements instituted since the new structure took effect, together with the potential application of the various tools that were introduced or enhanced in response to the crisis.

14. Recovery and Resolution Plans (RRPs) have evolved into a key component for addressing the “too-big-to-fail” problem associated with systemically important firms. In particular, the Key Attributes establish a comprehensive framework of RRP²³ (also known as ‘living wills’) that aim to guide the recovery of a distressed firm or, if this is no longer feasible, facilitate an orderly wind-down while minimizing the need for public money. A Recovery Plan is developed by the firm’s senior management and identifies options for restoring the firm’s financial strength and viability when faced with severe stress. A Resolution Plan is prepared by the resolution authorities, based on information provided by the firm, and is intended to facilitate the effective use of resolution powers to protect systemically important functions, without severe disruption or exposing taxpayers to loss. For G-SIFIs, the home resolution authority leads the development of a group resolution plan in coordination with all members of the firm’s CMG.²⁴

15. The NBB is in the process of developing a domestic framework for the preparation of RRP for domestic systemically important banks (D-SIBs). During 2012, the NBB has worked with some of the D-SIBs on a recovery plan, to be followed by the preparation of a resolution plan during the course of 2013. The work on recovery plans is seen as a pilot project, and the NBB intends to extend the exercise to all D-SIBs.²⁵ In this context, the creation of a legal requirement for the formulation of RRP for all Belgian firms that are of systemic importance, and the finalization of guidance on the contents thereof, would be highly beneficial. Given the relative importance of the Belgian insurance sector and the role insurers play in financial groups, the authorities are encouraged to broaden the framework of RRP to the insurance sector.

16. Active membership in CMGs is an essential component of the Belgian crisis management framework. The NBB participates as host authority in the CMGs of various G-SIFIs, including BNP Paribas, ING Bank and Bank of New York Mellon. To date, these CMGs have largely focused on recovery planning, with further progress being contingent on the development of clearly-articulated high-level resolution strategies, as well as the completion of in-depth reviews of

²³ Key Attribute 11.

²⁴ More recently, various authorities, including the U.K. Financial Services Authority and the U.S. Federal Deposit Insurance Corporation (FDIC), together with the U.S. Federal Reserve Board, have issued detailed requirements and guidance in this area.

²⁵ Also see the Interim report on Structural Banking Reforms in Belgium, http://www.nbb.be/doc/ts/publications/NBBReport/2012/StructureleHervormingen_En.pdf, published by the NBB in June 2012.

the firms' plans. Key challenges, as identified by the NBB, include the involvement of MOFs in the discussions, given confidentially arrangements in various jurisdictions, and the access of host authorities to the detailed information that is underpinning recovery plans, the latter despite efforts of home authorities to provide as much information as possible via secured datarooms *et cetera*.

17. Resolvability assessments could prove to be a beneficial addition to the domestic resolution framework. Resolvability assessments, as envisaged in the Key Attributes, are designed to evaluate the feasibility of resolution strategies for the institution and their credibility in light of the likely impact of the firm's failure on the financial system and overall economy.²⁶ Furthermore, to ensure that the authorities are able to effectively improve a firm's resolvability, the Belgian resolution legal framework should provide the resolution authority with clear powers to, where necessary, improve resolvability by requiring changes to firms' business practices, structures, or organization, taking into account the impact of such requirements on the soundness and stability of the firm's ongoing business.

PRUDENTIAL SUPERVISION

18. Intrusive supervisory practices and prompt supervisory intervention can help to minimize the need for the use of more drastic crisis management tools. In the run-up to the global financial crisis, supervision in some jurisdictions failed to recognize and/or address growing risks. This failure of supervision, including in Belgium, was reflected in various forms, including (i) not intruding sufficiently into the affairs of financial institutions, and instead relying on bank management to take appropriate actions and market discipline; (ii) not being sufficiently proactive in dealing with emerging risks and adapting to the changing environment; (iii) not being comprehensive in their scope; and (iv) not taking matters to their conclusion.²⁷ The detailed assessment of observance with the Basel Core Principles for Effective Banking Supervision confirms that the NBB deploys high-quality supervisory practices, but nonetheless highlights a remaining weakness that should be addressed. Of particular importance are steps to seek to further enhance the intensity and intrusiveness of prudential supervision, as domestic economic challenges remain a source of continued uncertainty for the relatively concentrated and interconnected financial system. The NBB has already instituted some enhancements to its risk oversight, such as an annual risk review, and is executing a focused but multi-faceted plan of improvements. These projects will

²⁶ In particular, the Key Attribute 10 suggest that authorities assess: (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 intragroup 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.

²⁷ IMF, "The Making of Good Supervision: Learning to Say 'No'" (2010). The strengths and weaknesses of prudential supervision in Belgium have been reviewed by the Parliamentary Commission that examined the banking crisis (report published in April 2009, see www.dekamer.be/FLWB/PDF/52/1643/52K1643002.pdf), as well as by the Parliamentary Commission that looked into the failure of Dexia (report published in March 2012, see www.dekamer.be/FLWB/PDF/53/1862/53K1862002.pdf).

integrate processes, create greater flexibility in data handling and strengthen analysis at firm specific and horizontal levels.²⁸

19. The Belgian authorities are reviewing the desirability and feasibility of introducing structural reforms.²⁹ In response to a request from the MOF, the NBB has presented its provisional views on potential measures that seek to improve the stability of the Belgian financial system. The report sets out policy measures that could help to further reduce the likelihood and impact of future crises and improve bank resolvability, that is measures that relate to (i) recovery and resolution planning, (ii) capital surcharges, (iii) intragroup exposures, and (iv) ring-fencing or prohibition of activities. While it is understood that the authorities wish to postpone final decisions on structural reforms until there is more clarity on the Banking Union proposal and the Liikanen recommendations,³⁰ domestic initiatives that seek to anticipate final decision-making by European policymakers, *inter alia* regarding RRP, remain welcome.

CRISIS MANAGEMENT TOOLS

A. Official Financial Support

20. The Belgian authorities are empowered to implement measures to avoid severe systemic disruptions. The Belgian legal framework provides that in the event of a sudden crisis on the financial markets or in the event of a serious threat of a systemic crisis, upon recommendation of the NBB, with the view to limiting the extent of or the consequences of the crisis, the Federal Government can grant a state guarantee for:

- commitments entered into by credit institutions;
- the reimbursement of associates who are natural persons of their share of the capital of cooperative societies;
- losses incurred on certain assets or financial instruments by banks; and
- commitments entered into by entities whose activity consists of acquiring and managing certain assets held by credit institutions.³¹

21. The framework for solvency support should consider an adequate allocation of losses to the private sector. While the provision of public support can raise moral hazard concerns, such support may prove unavoidable in systemic crises where the need for immediate action limits the

²⁸ Also see the Financial System Stability Assessment (FSSA) and the detailed assessment of compliance with the Basel Core Principles for Effective Banking Supervision (BCP).

²⁹ Structural reforms are defined as policies that limit, separate, or prohibit particular activities or legal structures within banks or financial groups.

³⁰ http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf.

³¹ Article 36/24 NBB Organic Law.

availability or effectiveness of other measures. But even under such circumstances, international best practice underscores the importance of strict conditionality, with the aim to ensure adequate allocation of losses to the private sector. This may entail, *inter alia*, a significant dilution of existing shareholders, strict limits on dividend payments, or the ability of the state to exercise control over the bank. While utilization of state guarantees was appropriate at the height of the crisis, the authorities should henceforth exercise restraint in granting new guarantees to avoid a further migration of (potential) private losses to the sovereign balance sheet.³²

Liquidity support

22. Emergency liquidity assistance (ELA) is an important tool of effective crisis management frameworks. ELA allows the central bank to provide liquidity in reaction an abnormal increase in the demand for liquidity that cannot be met from alternative sources. In the European context, the provision of ELA is a national competence, subject to control by the Governing Council—with the latter seeking to ensure that national central banks do not take actions that interfere with the objectives and tasks of the European System of Central Banks, and with monetary policy in particular.

23. Belgian legislation mandates the NBB to provide ELA at its sole discretion on a case by case basis.³³ Conditions or criteria for ELA have not been published, but internal guidance is available. In accordance with this guidance, (i) ELA can only be provided to illiquid but solvent counterparties for monetary policy operations; (ii) ELA shall be provided against collateral deemed eligible by the NBB; (iii) ELA is provided as a last resort measure and only on a temporary basis; (iv) standard documentation provides for the term and conditions of intraday and overnight credits; and (iv) the decision to grant ELA shall take into account the systemic risk in case of default of the illiquid financial institution. Belgium legislation foresees state guarantees for ELA granted and any potential losses incurred by the NBB.³⁴

24. The NBB's capabilities in providing ELA are well tested and generally satisfactory. During the crisis, ELA was provided by the NBB at multiple occasions, even though there was no ELA outstanding at the time of the mission. The integration of prudential supervision with the NBB facilitates the exchange of information between banking supervision and the central bank's department, which is essential for effective ELA. Notwithstanding, the NBB may wish to further formalize internal guidance on conditionality that may be imposed on recipient banks, including the potential installation of onsite inspectors, measures aimed at preventing excessive risk-taking and decreasing the likelihood of future liquidity problems or, in the case of subsidiaries of foreign banking groups, measures to prevent the withdrawal of the liquidity support provided by parent companies.

³² See Preamble of the Key Attributes.

³³ Article 5 NBB Organic Law.

³⁴ Article 9 NBB Organic Law.

B. Orderly and Effective Resolution

Restructuring under official control

25. The NBB enjoys a range of powers that allow for an appropriate degree of proportionality in its approach to breaches of laws and regulations. When a credit institution is not operating in accordance with legal or regulatory frameworks, its management policy or its financial position is likely to prevent it from honoring its commitments, it does not offer sufficient guarantees of its solvency, liquidity or profitability, or its policy management structure, administrative and accounting procedures or internal control systems present serious deficiencies, the NBB can require that such situation comes to an end within a determined period of time. In the case it continues by the time the deadline expires, the NBB may:

- appoint a special inspector (all acts and decisions taken by decision-making bodies within the credit institution would require a written authorization of the inspector);
- establish additional requirements in relation to solvency, liquidity, risk, and other limitations;
- require that the firm limits variable remuneration;
- suspend, partially or totally, the exercise of activities of the firm;
- replace the management; and
- revoke the firm's authorization.³⁵

26. The Belgian legal framework contains recently introduced powers to transfer selected assets and liabilities of banks that could impact financial stability.³⁶ The framework allows that in the case the financial situation of a credit institution is likely to affect the stability of the Belgian or international financial system due to the volume of deposits held, its importance on the capital markets or its role in the financial system, the Federal Government may, by means of a decree issued after deliberation in the Council of Ministers, either by request of the NBB or on his own initiative, after consultation with the NBB, order any transfer of:

- assets, liabilities, or one or more branches of activity and all or part of the rights and obligations of the credit institution; and
- any securities or shares.³⁷

³⁵ Article 57 of the Banking Law.

³⁶ This procedure has not been tested in practice.

³⁷ Article 57bis of the Banking Law.

27. An *ex ante* judicial review is required for the transfer of assets and liabilities to become effective. The courts must then determine if the relevant disposal complies with the legal framework and whether the compensation payment appears fair. The courts' ruling translates into the ownership of the transferred assets. The court makes an order setting the date for the hearing which must take place within seven days following the lodging of the application by the Belgian State. Notifications are published in the "*Moniteur Belge/Belgisch Staatsblad*" (Official Gazette) and the website of the credit institution. The court's ruling must be handed down within twenty days following the hearing. The judgment on the legality of the transfer is not subject to appeal, objection, or third-party proceedings, although the original owners may apply to the court for a revision of the compensation payment within two months from publication of the judgment.³⁸

28. This process features useful characteristics, albeit with room for improvement:

- **Special inspector**—The NBB appoints the special inspector and may also replace him if necessary. However, the special inspector exercises only limited control (mainly veto power) over the decision-making bodies. In addition, the legal framework is silent on the objectives of the special inspector and does not grant explicit and effective restructuring tools. In this regard, the powers of the special inspector should be strengthened to take control of the institution. The goal of the special inspector should be to either, restore the institution or prepare it for its orderly liquidation, should replace the management. In addition, the special inspector should be clearly accountable to NBB and key decisions should be subject to prior approval of NBB.
- **Scope** — A key component of the resolution regime is the ability to transfer assets and liabilities. To allow the authorities to resolve financial institutions in an orderly manner, without exposing taxpayers to losses and avoiding unnecessary destruction of value, it would be useful to broaden the scope of this measure to transfers in the context of holding companies and nonsystemic institutions.
- **Intervention of administrative and judicial authorities**—The participation of several authorities, including the judiciary, is designed to safeguard the interests of different stakeholders. The *ex ante* procedure could however hamper implementation of the resolution measure, as the envisaged transfer would face legal uncertainty during the court proceedings, which could take up to one month. Furthermore, the procedure could create market confusion and may have serious implications to the stability of the financial system, as it entails publicity about the institution's vulnerabilities. The framework should enable the resolution authority to effectively exercise transfer powers in a timely manner, if possible with an *ex post* court review that solely focuses on the adequacy of the monetary compensation awarded, subject to a "no creditor worse off than in liquidation" test (Box 2).³⁹

³⁸ Article 57ter paragraphs 9 and 11 of the Banking Law.

³⁹ It should be noted that the current draft of the EU Recovery and Resolution Directive foresees an *ex post* judicial review.

Box 2. Court Involvement in the Resolution Process

Certain resolution powers, including the exercise of mandatory transfers, can impede on property and shareholder rights, warranting judicious application. The Key Attributes for Effective Resolution Regimes seek to strike a delicate balance between the necessity, in circumstances of severe distress, for resolution authorities to intervene swiftly and decisively and the legitimate interests of owners and shareholders.

In particular, Key Attribute 5.4 states that “the resolution authority should have the capacity to exercise the resolution powers with the necessary speed and all 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 does not compromise the effective implementation of resolution measures.”

While indicating a preference for a “wholly administrative process” without court involvement, the draft assessment methodology for the Key Attributes indicates a number of factors that should be taken into account when assessing compliance with the aforementioned principle, that is:

- the availability of expedited procedures;
- the possibility of *ex parte* applications to be made by the resolution authority;
- standing of the resolution authority in any resolution-related court proceedings; and
- discovery to be limited only to matters directly related and immediately relevant to the appraisal of the financial compensation that might be payable as an outcome of any appeal or challenge.

The draft Recovery and Resolution Directive foresees, in accordance with Article 47 of the Charter of Fundamental Rights, that concerned parties have a right to due process and effective remedy against the measures affecting them. Therefore, the decisions taken by the resolution authority are subject to judicial review. Nevertheless, in order to protect third parties who have bought assets, rights, or liabilities of the distressed institution, by virtue of the resolution powers of the authorities to ensure the stability of the financial markets, the judicial review should not affect any administrative act and/or transaction concluded. Therefore, remedies for wrongful decisions should be limited to the award of compensation for damages suffered by the affected person.

In enhancing their resolution frameworks, certain EU member states have already in place legal frameworks in line with these developments.

- The Portuguese legal framework provides the Banco de Portugal with broad powers, including the ability to transfer assets and liabilities “when a credit institution does not meet, or is at risk of not meeting its licensing requirements,” and if the transfer is deemed imperative to (a) ensure the continuity of essential financial functions, (b) prevent systemic risk, (c) safeguard public funds and the interests of taxpayers, and (d) safeguard the confidence of depositors. Resolution measures are not subject to consent of the credit institution’s shareholders nor of the contractual parties involved in the assets and are considered to be urgent for the purposes of the Administrative Procedures Code, without being subject to a prior hearing of the interested parties. Moreover, resolution actions cannot be suspended or annulled and any *ex post* procedure before the competent court would solely relate to the amount of compensation due.
- In the U.K. when a bank is failing, or is likely to fail, the legal framework empowers the resolution authority to transfer shares, assets, and liabilities with the objective of protecting (a) the stability of the financial system; (b) public confidence in the stability of the banking system; (c) depositors; and (d) public funds. This measure takes effect by virtue of the order by the resolution authority, despite any restriction arising by virtue of contract or legislation. As soon as it is reasonably practicable, the resolution authority shall publish the property transfer instrument on its webpage and in two news papers. In addition, a comprehensive compensation scheme is established (including an independent valuer) in order to protect the financial interests of the transferors and other stakeholders. Determinations on the compensation can be appealed.

29. Additional powers to achieve prompt recapitalization and restructuring of distressed banks could mitigate systemic risks and preserve asset values. Resolution authorities should be granted greater flexibility in their response to financial institutions that are no longer viable or likely to be no longer viable. Therefore, consideration could be given to the introduction of powers to restructure the liabilities of a distressed financial institution (“bail-in”).⁴⁰ A regime for bail-in, however, should be carefully designed, taking account of the post-crisis structure of the Belgian financial sector, which includes subsidiaries from international G-SIFIs that are deemed to be systemic from a domestic perspective. Applying bail-in at different levels of a consolidated group (“multiple point of entry”) may warrant, *inter alia*, a degree of legal, financial and operational separation within a group, which in turn may require changes to the way groups are structured; and robust service level agreements to ensure the continuity of any critical shared services across entities subject to resolution at different points of entry.⁴¹

30. The Belgian legal framework provides for a Resolution Fund (RF) vested with powers to take preventive measures and facilitate the resolution procedure. The RF’s objective is to provide financing for measures (e.g., total or partial transfer of assets and liabilities) that seek to ease the impact of credit institutions default on the financial system and on the economic and social health of Belgium. The RF is funded *ex ante* through annual contributions of the industry, currently set at 3.5bps of the firm’s total liabilities net of deposits eligible for deposit guarantee and regulatory capital.⁴² The contributions are paid directly to the Treasury and go into the general revenue, meaning that utilization of the RF will impact public debt. The RF is managed by the so-called *Caisse de Dépôts et Consignations* of the Administration of the Belgium Treasury. Contrary to the DGS there is no legal obligation for the RF to participate in a crisis situation.

Bank liquidation and insolvency

31. The current framework comprises a judicial procedure to place banks into bankruptcy in which the involvement of the NBB is limited. When a bank has ceased to pay its debts and will likely remain unable to meet its liabilities, the tribunal of commerce declares the bankruptcy of the institution. Prior to any ruling, the Belgian Law provides that the court should request the NBB’s recommendation, in order to ensure that the court is correctly informed and to verify whether or not

⁴⁰ As per Key Attribute 3.5, such powers should enable the resolution authority to: (i) write down equity or other instruments of ownership, unsecured and uninsured debt, to the extent necessary to absorb losses; (ii) convert into equity or other instruments of ownership of the institution under resolution (or any successor in resolution or parent company within the same jurisdiction), all or parts of unsecured and uninsured creditor claims; and (iii) convert or write down any contingent convertible or contractual bail-in instruments whose terms had not been triggered prior to entry into resolution. Also see IMF, *From Bail-out to Bail-in: Mandatory Debt Restructuring of Systemic Financial Institutions*, April 2012 (SDN/12/03). The draft Recovery and Resolution Directive foresees a bail-in regime, to be applied as of January 1, 2018, but the modalities are still under discussion.

⁴¹ Consultative document Recovery and Resolution Planning: Making the Key Attributes Requirements Operational, FSB, issued in November 2012, http://www.financialstabilityboard.org/publications/r_121102.pdf.

⁴² In 2012, the year that the RF was established, contributions amounted to EUR238.3mn.

the bank could be subject to other process (i.e., governmental support).⁴³ In the case a bankruptcy proceeding is instituted against a bank the NBB shall withdraw its banking license.⁴⁴

32. The bankruptcy legal framework based on a corporate bankruptcy procedure does not fully address the unique features of banks that require special treatment. Banks are different from other companies given the structure of their balance sheets (which are subject to rapid deterioration when the bank is under stress) and special functions (e.g., credit intermediation, payment systems functions). Nevertheless, with the exception of the procedural issue mentioned above such specific features do not appear to be recognized by the legal framework. In this context, the insolvency test appears inappropriate for banks due to the nature of their business (i.e., the NBB should be empowered to initiate a bankruptcy procedure before the relevant court, when it has concerns of the viability of the institution). In addition, said proceeding could be enhanced by enabling, under the oversight of the resolution authority, the rapid unwinding of the relevant operations of the institution (transfer of insured deposits—possibly combined with good assets and critical banking functions such as payment services) while the remainder of the estate is dealt with under the applicable procedures.

C. Deposit Guarantee Scheme

33. The Belgian DGS is characterized by a two-tier system (Box 3). Protection is provided via the PF, as well as the SF that was created in the wake of the financial crisis in November 2008. Together, these funds provide protection up to EUR100.000 per depositor, a substantial increase from the previous ceiling of EUR20.000 that was provided by the PF upon its inception. In anticipation of the new DGS Directive, the Belgian authorities have not yet undertaken a (self-) assessment against the Core Principles for Effective Deposit Insurance Systems.

34. A comprehensive redesign of the Belgian DGS should be considered. As of 2010, the SF is the sole recipient of contributions from the banks. The design of the SF, however, results in a comingling of resources collected for (mandatory) deposit insurance with government funds, as the contributions to the SF are transferred to the general government budget. While such a design is not precluded by the Core Principles for Effective Deposit Insurance Systems,⁴⁵ ability of the DGS to ensure prompt payouts in case of a default is critically dependent on the government's ability to mobilize, without undue delay, necessary resources, including in distressed circumstances. An alternative DGS design, consisting of a segregated fund that is financed with *ex ante* industry contributions and with robust arrangements for backup funding—similar to the original PF—would increase transparency and better safeguard the interests of depositors.

⁴³ Article 109/18 of the Banking Law.

⁴⁴ Article 109/16 of the Banking Law.

⁴⁵ Published by Basel Committee on Banking Supervision and the International Association of Deposit Insurers in June 2009, <http://www.bis.org/publ/bcbs156.htm>.

Box 3. Belgian Deposit Guarantee Scheme

Protection Fund for Deposits and Financial Instruments (PF). Established in 1998, as an autonomous public institution with legal personality, protecting clients of credit institutions and investment firms in the event any such institution goes into default.

The Fund is managed by a twelve member committee comprising equal number of representatives of the government and the financial sector, and chaired by one representative of the government. The NBB is in charge of the day-to-day administration and a government commissioner supervises its operations.

Participation is mandatory for credit institutions and investment firms established in Belgium. The PF is pre-funded with a current level of EUR241mn and can be augmented on an *ex post* basis via industry commitments of EUR170mn. Resources of the PF are held at the NBB or the Administration of the Treasury and can, alternatively, be invested in government bonds or certificates.

Special Protection Fund for Deposits, Life Insurance Policies, and Capital of Approved Cooperative Corporations (SF). Created in 2008, to indemnify customers in respect of deposits, bank bonds, debentures, and similar products; cash deposits held on behalf of securities investors; life insurance contracts; and shares issued by cooperative corporations.

The SF is organized as part of the Administration of the Belgian Treasury and operates under the responsibility of the Minister of Finance.

Participation is mandatory for credit institutions and investment firms governed by Belgian Law and for Belgian branches of third country institutions if no similar protection is foreseen under the law of such third country. Belgian branches of member state institutions are not obliged to participate in the Belgian DGS.

The SF is mandated to process any payout for both funds, first using the contributions of the PF, second those of the SF and third—should a shortfall remain—additional resources from the *Caisse de Depots et de Consignations* of the Administration of the Belgian Treasury that will subsequently need to be reimbursed using 50% of the future contributions of the banking sector.

Payout history. The Belgian DGS has not been triggered during the last five years. Belgian depositors did face one default, that is the Belgian branch of a Luxemburg subsidiary of Kaupthing Bank hf. But the situation was ultimately addressed via a transfer of the branch's deposits to another Belgian institution without involvement from the Belgian DGS. Given the involvement of a Belgian branch of a Luxemburg institution, the Luxemburg DGS would have been responsible for an eventual pay-out.

35. The following principles could guide a redesign of the DGS.

- **Initial funding**—the remaining resources available in the PF and the contributions paid to date into the SF should be folded into the segregated fund;
- **Target level**—an appropriately ambitious minimum target level should be set, taking account of potential outlays in case of a default of multiple midsize institutions;⁴⁶

⁴⁶ At the time of the mission, the total reserves of the Belgian DGS represented approximately 0.64 percent of total eligible deposits, significantly below the 1.5 percent target level suggested in the European Commission proposal. Data on covered deposits was not readily available.

- **Annual contributions**—risk-based industry contributions, calculated in accordance with the approach currently used for the contributions to the SF, should allow the fund to reach its target level in the medium-term;
- **Funding Backstop**—resources from the Treasury should be available to immediately supplement the DGS' resources in case of a shortfall, with the supplementary resources to be repaid via (part of the) future contributions; and
- **Exclusions**—shares issued by cooperative corporations should be excluded from DGS coverage, in order to avoid moral hazard and reduce potential DGS outlays.

36. Prompt payout capabilities are essential for effective protection of depositors' interests. In line with prevailing EU legislation, any deposit payout has to be effected within 20 working days—with a potential extension of another 10 working days under exceptional circumstances—upon the occurrence of either a bankruptcy ruling by the court or a determination by the NBB that the credit institution has failed to repay deposits that are due and payable. To ensure that SF—who is responsible for handling the payout process on behalf of both DGS schemes—is able to accomplish the payouts within the prescribed timeframe, a new data transfer procedure that envisages a provision of relevant data within seven working days, is being tested with a subset of credit institutions. Even though in line with the current EU requirements, the 20-day payout limit is long when seen from a financial stability perspective. To minimize the impact of a bank default on depositors and to mitigate the risk of contagion in an event of bank insolvency, the authorities should consider a further acceleration of the payout period—as also suggested in the June 2010 European Commission proposal.⁴⁷

37. Allowing the DGS to contribute funding to resolution actions would facilitate the financing of resolution measures. Under current legislation and within the limits of its financial resources, the PF may support preventive resolution measures, subject to certain safeguards. The legislation, however, does not provide scope for preventive action by the SF. Granting the DGS with the ability to lend support on a least-cost basis to resolution actions, such as transfers of assets and liabilities to another bank as a more efficient alternative to deposit payouts, would avoid the interruption of banking services that are provided to depositors and typically reduces the deposit insurance outlays. In line with the approach envisaged in the draft Recovery and Resolution Directive,⁴⁸ safeguards for the DGS should be considered, including the requirement that such contribution should never exceed the distribution that the DGS would have to make in case of a liquidation. To foster early information sharing between the prudential supervisor and the DGS and avoid conflicts of interest, industry participants should not be included in its decision-making body, although an industry-led supervisory board could be envisaged to strengthen *ex post* accountability.

⁴⁷ http://ec.europa.eu/internal_market/bank/docs/guarantee/20100712_proposal_en.pdf.

⁴⁸ Article 99 of the draft Recovery and Resolution Directive.

38. Authorities should consider the introduction of depositor preference. The most common rationale for depositor preference—which, in its most simple form, provides insured depositors with preference rights vis-à-vis other unsecured creditors—is to reduce costs for the DGS (and therefore for the government as the ultimate back-stop for the DGS): by subrogating depositor rights to the DGS upon a payout of insured deposits, the DGS can maximize its recoveries on the assets of the failed bank, thus reducing its net outlays. Moreover, depositor preference can help reduce legal challenges from other unsecured creditors in case of a transfer of deposits as a bank resolution technique, as such creditors may argue that—in the absence of depositor preference—a deposit transfer to another institution constitutes unequal treatment among creditors.⁴⁹

39. Depositor preference must be seen as part of a comprehensive framework for bank resolution. While its design features must be tailored to local conditions, experiences in other jurisdictions highlight important considerations that need to be taken into account.

- **Scope**—the categories of claims eligible for depositor preference should be clearly defined in legislation: insured deposits, eligible deposits (i.e., insured deposits that exceed the DGS coverage limit), or all deposits. By opting for a broader coverage, deposit preference can seek to mitigate the risk of uninsured depositors instigating a run, and thus better preserve public confidence.⁵⁰
- **Position of other unsecured creditors**—depositor preference entails a trade-off between the interests of depositors and those of other unsecured creditors. As depositor preference inherently increases the potential loss exposure of creditors in the latter category, its establishment could result in unsecured creditors seeking a more extensive collateralization of their claims or a shortening of maturity terms. While the introduction of encumbrance limits can partly mitigate this, depositor preference may increase the funding costs of banks and could cause shifts in unsecured funding when a bank faces distress.⁵¹
- **Cross-border aspects**—international implications should be taken into account when designing a framework for depositor preference. Only providing preference rights to domestic depositors (i.e., excluding deposits held at foreign branches of domestically incorporated institutions) could produce uncoordinated actions, including ring-fencing by host country authorities.

⁴⁹ At end-2011, 11 of the G20 countries had a regime in place providing a priority ranking to depositors (or the deposit protection scheme) in liquidation—i.e., Argentina, Australia, China, France, India, Indonesia, Mexico, Russia, Switzerland, Turkey, and the U.S.—even though the features of depositor preference vary between countries. Moreover, Portugal has introduced depositor preference for insured deposits in 2011 and the U.K. Government has announced in December 2011 that on balance, it supports the recommendation from the Independent Commission on Banking to institute depositor preference for insured deposits, even though further analysis and consultation on the scope of such preference is deemed necessary (see http://hm-treasury.gov.uk/govt_response_to_icb_191211.pdf).

⁵⁰ As an alternative, a two-tiered approach could be considered, wherein a smaller (insured) portion enjoys a higher priority, followed by all other deposits, followed by general creditors.

⁵¹ See, for instance, Marino, J. A. and Rosalind L. Bennett, 1999, “The Consequences of National Depositor Preference,” FDIC Banking Review, Vol. 12, pp. 19-38.

OTHER ISSUES REGARDING THE BELGIUM RESOLUTION FRAMEWORK

A. Financial Market Infrastructures

40. Belgian's FMIs play an essential role in the global financial system.

- Euroclear Bank is one of the largest securities settlement systems worldwide with a daily average settlement value of around EUR1.1 trillion, providing settlement services for securities from 44 markets in 53 currencies. In particular, Euroclear Bank services the largest, global banks with tri-party repo arrangements to secure their interbank financing.
- The NBB is responsible for the supervision of Bank of New York Mellon SA, a material subsidiary of the Bank of New York Mellon group, an institution that has been designated as G-SIFI by the FSB. Through its worldwide network, Bank of New York provides, *inter alia*, clearing and collateral management, asset servicing, and treasury management to institutional clients, with the Belgian subsidiary acting as a processing center for the group's global custody activities outside the U.S.
- The NBB coordinates the oversight—conducted in cooperation with other central banks—of the Society for Worldwide Interbank Financial Telecommunication (SWIFT), which plays a vital role in the day-to-day operational conduct of financial transactions. Although SWIFT is neither a payment system nor a settlement system, a large number of systemically important firms depend on SWIFT for their daily messaging, so that SWIFT itself is of systemic importance.

41. The development of RRP for the Belgian FMIs, which seek to safeguard continuous uninterrupted continuity of systemically critical operations and services, is ongoing. Inherently, the disorderly failure of an FMI can cause markets to cease to operate effectively and thus trigger severe systemic disruptions. In addition to maintaining sufficient financial resources—including the ability to replenish these in case of severe stress—FMIs need to develop effective recovery measures strategies that may include clearly defined rules and procedures for managing a participant's default. Moreover, resolution authorities need to contemplate options for the orderly resolution of FMIs, taking account of the particularities of FMIs that warrant tailor-made approaches to resolution, as certain resolution tools cannot or should not be applied (e.g., bail-in tools and the power to apply a moratorium on payment obligations). While awaiting finalization of international best practices on recovery and resolution of FMIs,⁵² the NBB is already actively pursuing the preparation of recovery plans:

⁵² Consultative report on Recovery and Resolution of financial market infrastructures, CPSS-IOSCO, issued in July 2012, <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD388.pdf>.

- In the case of Euroclear, important progress has been made in the development of recovery plans. Both Euroclear Bank and Euroclear SA, the group's operational holding, have presented the NBB with potential shock scenarios and possible recovery options and are currently refining the plans, on the basis of NBB's feedback.⁵³
- Regarding Bank of New York Mellon, the NBB is awaiting the delivery of a recovery plan, pending the finalization of recovery strategies at group level. Meanwhile, a CMG has been established, comprising authorities from the U.S., U.K., and Belgium, that will seek to closely review the firm's recovery plan and subsequently develop resolution strategies.
- While SWIFT is not subject to a formal recovery planning process, the NBB is closely monitoring the firm's contingency planning and disaster recovery capabilities, with a particular focus on IT security and cyber defense,

B. Covered Bonds

42. A new framework for Belgian covered bonds became effective at end-2012.⁵⁴ The legislation grants investors with a claim on a segregated pool of assets that is bankruptcy remote and subject to strict eligibility criteria. Rating agencies and the markets have responded very positively to the Belgian legislation, with recent issuances from two large banks receiving strong investor demand and relatively favorable pricing.

43. In designing the covered bond framework, the Belgian authorities sought to strike a balance between the interests of covered bondholders and those of other creditors, including depositors. The issuance of covered bonds, while beneficial from a funding perspective, increases asset encumbrance, potentially compromising an issuer's ability to satisfy the claims from unsecured creditors, including depositors, in the event of failure. To ensure that sufficient high quality assets remain available to cover the claims of unsecured creditors, the Belgian authorities have introduced an encumbrance limit for covered bond issuances of 8 percent of the issuer's total assets, which is conservative in comparison to other jurisdictions.

⁵³ It is noted that while holding companies of financial institutions are, in principle, not subject to transfer powers laid down in the Organic Law, this power could effectively be applied to Euroclear SA, given its status as 'equivalent settlement institution.' Also see Article 36/27 of the Organic Law.

⁵⁴ Also see Appendix I of the Financial System Stability Assessment (FSSA).

Appendix I. Overview of Bank Interventions During the Financial Crisis

KBC— benefited from state support in the initial phase of the crisis. KBC remains a privately owned, Belgian financial conglomerate:

- In 2008 KBC received capital injections of EUR 3.5 billion by the federal government and EUR 3.5 billion by the Flemish regional government in 2009 as well as asset guarantees of EUR 15.1 billion (2009). At the end of 2012, the federal government and KBC have reached an agreement, which limit the asset guarantee to EUR 9.4 bn.
- The divestment plan proposed in 2009 entailed a withdrawal from noncore markets in Central and Eastern Europe and a sale of noncore activities in Belgium (Fidea and Centea). The structured product portfolio was also put in run-off. In 2010-2013, important asset disposals took place including the sale of the private banking subsidiary KBL, of the Polish subsidiaries (Kredyt Bank, Zagiel, and Warta), and of the Russian (Absolut Bank) and Slovenian (NBL) operations.
- Federal state capital injections were repaid in full with a first tranche of capital support of EUR 0.5 billion at the beginning of in 2012 and a second one of EUR 3.0 billion (besides a penalty of EUR 0.45 billion) at end of 2012. The group has also announced a first tranche of repayment of the Flemish government support in 2013. The group has successfully raised private capital in the form of new equity (EUR 1.2 billion) and contingent capital instruments (EUR 0.75 billion) in January 2013.

Dexia— was intervened successively since the crisis began. The restructuring resulted in a runoff group (headed by Dexia SA) and the sale of operational entities including the Belgian bank subsidiary (Belfius) to the Belgian State for EUR 4 billion):

- In 2008, Dexia Group had been recapitalized by the states of Belgium and France in total amount of EUR3 billion of which Belgian state and the three regions subscribed EUR 2 billion. The states of Belgium, France, and Luxembourg also issued a funding guarantee of EUR 150 billion, which has been used up to EUR 95 billion, and Belgium and France guaranteed an asset portfolio of US\$ 12.5 billion in the U.S. subsidiary FSA (sold in 2011 without invoking the guarantee).

- In 2011 further intervention was required when the group lost again market access. The restructuring plan entailed: 1) an orderly run off of the group's long-term assets supported by a funding guarantees provided by Belgium, France and Luxembourg (of up to EUR 90 billion); 2) the disposal of the international operations (Turkish, Canadian, and Luxembourg operations were all sold in 2012); and 3) the sale of Dexia Bank Belgium to the Belgian state for EUR 4 billion and rebranded in 2012 as Belfius.
- In 2012, additional state capital injections of EUR5.5 billion were made into Dexia SA by Belgium (EUR 2.9 billion) and France (EUR 2.6 billion), and the 2011 guarantee receives a final approval from the European Commission in amount of EUR 85 billion under a modified burden sharing key, more favorable for the Belgian state.
- Dexia's French lending operations (Dexia Municipal Agency) will be merged into a new entity with participations from the French state, *Caisse des Dépôts et Consignations* (CDC) and the postal bank.

Fortis—the former Belgian group was nationalized by Dutch and Belgian authorities, while subsequently the Belgian subsidiary was sold to BNP Paribas:

- In 2008, the Belgian and Dutch states acquired the majority of shares of Fortis for EUR 9.4 billion.
- In 2009, a 75 percent stake of the Belgian subsidiary was sold to BNP Paribas and the Belgian state also provided a second-loss guarantee on the structured credit portfolio retained by Fortis (EUR 2 billion), which has come to an end at the end of 2012 after an agreement between BNP Fortis and the Belgian state. As part of the sale to BNP EUR 11.4 billion assets were transferred to an asset management SPV (Royal Park Investments) co-owned by the Belgian state, BNP Paribas, and Fortis/Ageas and additional funding guarantees of EUR 4.9 billion were provided to RPI. The group's insurance arm was transferred a 10 percent stake to BNP Paribas, while the rest remained under the Belgian subsidiary Ageas.
- In 2011, the restructuring of the Turkish operations was finalized.

Ethias—a mutual insurance company with a balance sheet of 7 percent of GDP and a 5 percent stake in Dexia received state support and was required to restructure:

- In 2008, Ethias received capital injections of EUR 1.5 billion by the Belgian, Walloon and Flemish governments conditioned by the wind down of its retail life insurance business.

- In 2011, Ethias incurred heavy losses from its stake participation in Dexia and received further public sector support of EUR 180 million in a bond issue in January 2012. At the end of 2012, Ethias has sold all remaining shares in Dexia.

Appendix II. Observations on the Belgian Deposit Guarantee Scheme

In June 2009, the Basel Committee on Banking Supervision and the International Association of Deposit Insurers (IADI) issued the Core Principles for Effective Deposit Insurance Systems in June 2009.⁵⁵ Without conducting a formal assessment of observance, the mission has compared the Belgian DGS applicable laws, regulations, and information provided with the principles embedded in this international standard. The main observations of this analysis are set out in the table below.

IADI Principle	Protection Fund for Deposits and Financial Instruments (PF)	Special Protection Fund for Deposits and Life Insurance (SF)
<p>Public policy objectives should be formally specified. Principal objectives are to contribute to the stability of the financial system and protect depositors</p>	<ul style="list-style-type: none"> ✓ The Law on the PF states that the purpose of the PF is to manage the DGS. Nevertheless, the policy objective is not clearly defined. ✓ The objective is however specified in the public communication of the DGS (annual report). The stated objective is to compensate depositors, investors, or policy holders for losses in case of a default. 	<ul style="list-style-type: none"> ✓ The SF's objective is not explicitly stated in the Banking Law ✓ The objective is however specified in the public communication of the DGS (annual report). The stated objective is to compensate depositors, investors, or policy holders for losses in case of a default.
<p>Moral hazard should be mitigated through design features and other elements of the financial system safety net.</p>	<ul style="list-style-type: none"> ✓ Guarantee capped at EUR100,000 per depositor per bank. 	<ul style="list-style-type: none"> ✓ Guarantee capped at EUR100,000 per depositor per bank. ✓ Risk-based contributions and the exclusion of certain categories of depositors (including deposits from financial institutions and their managers) mitigate moral hazard. ✓ The inclusion of shares issued by cooperative corporations may increase moral hazard.

⁵⁵ See the Core Principles for Effective Deposit Insurance Systems, July 2009 and the Core Principles for Effective Deposit Insurance Systems: A Proposed Methodology for Compliance Assessment, December 8, 2010 at <http://www.bis.org>.

<p>The mandate should be clearly and formally specified and there should be consistency between the public policy objectives and insurer's powers and responsibilities.</p>	<ul style="list-style-type: none"> ✓ The PF has a broad mandate, allowing it to compensate depositors and policyholders, as well as—within the limits of its available financial resources—take preventive action and provide financial support to resolution actions. 	<ul style="list-style-type: none"> ✓ Mandate specified as a narrow pay-box. ✓ Except in cases in which bankruptcy has been ruled upon by a court, the NBB decides that the institution has defaulted within five working days after having established the failure to repay deposits that are due and payable.
<p>Powers should be formally specified and sufficient to achieve the mandate: to finance reimbursements, to enter into contracts, to set budgets and procedures, and to access timely and accurate information.</p>	<ul style="list-style-type: none"> ✓ The PF is authorized to—within the limits of its available financial resources—take preventive action and provide financial support to resolution actions. ✓ The PF lacks formal powers to conduct or request examinations of covered institutions. ✓ Annual contributions to the PF are suspended since 2010; conditions and modalities for payouts are assigned to the SF. 	<ul style="list-style-type: none"> ✓ Narrowly defined, in line with pay-box mandate. ✓ Annual contributions, as well as the conditions and modalities for payouts are decided by the King. ✓ The SF is unable to take direct action against institutions that are not able to report deposit information [on an annual basis], in line with the data transfer policy developed with the credit institutions. ✓ The entry of cooperative corporations into the SF requires prior approval from the King.
<p>Governance: the DGS should be operationally independent, transparent, accountable, and insulated from undue political and industry influence</p>	<ul style="list-style-type: none"> ✓ The PF is administered by a management committee comprising six persons, including the Chairman, appointed by the Minister of Finance and six representatives from the private sector. ✓ Specific confidentiality rules exist for the members of PF's management committee. ✓ Board members are prohibited from participating in the management committee's deliberations in case of conflicts of interest. ✓ Confidentiality rules exist for the members of the management committee. 	<ul style="list-style-type: none"> ✓ The SF is managed by representatives of the Treasury Department of the Federal Public Service Finance. ✓ The general administrator and the other persons involved in the management of the SF are the same persons as those appointed by the Minister of Finance as the public sector's representatives in the PF. ✓ Confidentiality rules exist for the agents of the Treasury involved in the DGS.

<p>Relationships with other safety net participants should be formalized for the close coordination and information sharing, on a routine basis, as well as in relation to particular banks (subject to confidentiality when required).</p>	<ul style="list-style-type: none"> ✓ The Banking Law requires the NBB to inform the bodies which manage the DGS when it detects any problems likely to give rise to the intervention of the DGS. ✓ NBB representation in the management committee facilitates <i>ad hoc</i> information sharing with the prudential supervisor. ✓ Representatives in the management committee of the Federal Public Service Finance facilitate communications with the SF. ✓ There is no MOU in place between the PF and other stakeholders. 	<ul style="list-style-type: none"> ✓ The Banking Law requires the NBB to inform the bodies which manage the DGS when it detects any problems likely to give rise to the intervention of the DGS. ✓ Communication with the PF is safeguarded via representatives of the Federal Public Service Finance facilitate in the PF's management committee. ✓ There is no MOU in place between the PF and other stakeholders.
<p>Cross-border issues: provided confidentiality is ensured, all relevant information should be exchanged between deposit insurers in different jurisdictions and possibly between deposit insurers and other foreign safety-net participants when appropriate. It is important to determine which deposit insurer or insurers will be responsible for the reimbursement process.</p>	<ul style="list-style-type: none"> ✓ The Banking Law allows branches of EU members to participate in the Belgian DGS. The law provides a mechanism of interaction with the prudential supervisor from the branch's home state if it does not pay its contributions. ✓ The experience with the Belgian branch of the Luxemburg subsidiary of Kaupthing Bank demonstrated the effective cooperation between the Belgian authorities and their European peers (even though could eventually be avoided). 	<ul style="list-style-type: none"> ✓ The Banking Law allows branches of EU members to participate in the Belgian DGS. The law provides a mechanism of interaction with the prudential supervisor from the branch's home state if it does not pay its contributions. ✓ The experience with the Belgian branch of the Luxemburg subsidiary of Kaupthing Bank demonstrated the effective cooperation between the Belgian authorities and their European peers (even though could eventually be avoided).
<p>Compulsory membership for all institutions accepting deposits from those most in need for protection.</p>	<ul style="list-style-type: none"> ✓ Membership is compulsory for all credit institutions, investment firms, and for insurance companies selling certain insurance products. ✓ Branches from institutions domiciled outside the EU are required to participate in the Belgian DGS if the protection offered by their home jurisdiction is not at least equivalent to the protection provided in Belgium. 	<ul style="list-style-type: none"> ✓ Membership is compulsory for all credit institutions, investment firms and for insurance companies selling certain insurance products. ✓ Branches from institutions domiciled outside the EU are required to participate in the Belgian DGS if the protection offered by their home jurisdiction is not at least equivalent to the protection provided in Belgium.

<p>Coverage: definition of insurable protection should be clear in the legal framework, should cover adequately the large majority of depositors to meet the public policy objectives of the system and be internally consistent with other DGS design features.</p>	<ul style="list-style-type: none"> ✓ Coverage is clearly defined in the law. It covers all deposits, minus certain exclusions, up to the cap of EUR100.000. ✓ Coverage includes accrued interest within the limit of EUR100.000. 	<ul style="list-style-type: none"> ✓ Coverage is clearly defined in the law. It covers all deposits, minus certain exclusions, up to the cap of EUR100.000. ✓ Coverage includes accrued interest within the limit of EUR100.000.
<p>Transitioning from a blanket guarantee should be as rapid as country circumstances permit.</p>	<ul style="list-style-type: none"> ✓ Not applicable 	<ul style="list-style-type: none"> ✓ Not applicable

<p>DGS should have all funding mechanisms necessary to permit swift reimbursement. Banks should have primary responsibility for paying insurance costs.</p> <ul style="list-style-type: none"> • back-up funding should be available; • costs of insurance should be borne by banks and enforceable; • size of the (ex ante) fund should be defined based on clear and consistent criteria; • risk-adjusted premia should be based on transparent criteria; and • sound investment procedures should exist and internal controls be set by governing body. 	<ul style="list-style-type: none"> ✓ Since 2010, industry contributions to the PF have been suspended. ✓ In case of a default for which insufficient funds are available, the PF can request an annual contribution of 1.75 percent of deposits [eligible for protection], as well as up to twice that amount in the form of complementary contributions. ✓ In case of depletion of the PF, resources from the SF will be used to meet DGS obligations. ✓ A target size has not been defined. At the time of the mission, the total reserves of the Belgian DGS represented approximately 0.64 percent of total eligible deposits (data on covered deposits was not readily available). ✓ Contributions to the PF are held in cash accounts with the NBB or the Administration of the Treasury. The funds can also be invested in government bonds or certificates. 	<ul style="list-style-type: none"> ✓ Every institution covered is required to pay an annual fee, based on the amount of eligible deposits. ✓ In case of depletion of the SF (after the resources of the PF have been utilized), advance payments will be made available by the <i>Caisse de Dépôts et de Consignations</i> of the Administration of the Treasury. This advance payment is to be reimbursed by using 50 percent of the industry's future contributions. ✓ A target size has not been defined. At the time of the mission, the total reserves of the Belgian DGS represented approximately 0.64 percent of total eligible deposits (data on covered deposits was not readily available). ✓ Contributions are risk-based, following the model proposed by the European Commission in its June 2010 Proposal. Over 2012, the average contribution was 0.26 percent. <i>Ex post</i> contributions are not foreseen in the law. ✓ Contributions paid to the SF are transferred to the Treasury and co-mingled with the general budget.
<p>Public awareness: the public should be informed on an ongoing basis about the benefits and limitations of the DGS.</p>	<ul style="list-style-type: none"> ✓ The PF maintains a website with detailed information in French, Dutch and English. (http://www.beschermingsfonds.be) △ 	<ul style="list-style-type: none"> ✓ The Treasury maintains a website with information in French, Dutch. (http://fondsspecialdeprotection.be/)
<p>Legal protection for staff's actions taken in good faith.</p>	<ul style="list-style-type: none"> ✓ The PF legal framework is silent in connection with the legal protection to employees. 	<ul style="list-style-type: none"> ✓ The SF legal framework is silent in connection with the legal protection to employees.
<p>Legal redress should be available against those at fault in a bank failure to deposit insurer or other bodies.</p>	<ul style="list-style-type: none"> ✓ This is not addressed in the DGS framework. 	<ul style="list-style-type: none"> ✓ This is not addressed in the DGS framework.

<p>Early detection, timely intervention and resolution on the basis of well-defined criteria is available. The determination and recognition of when a bank is or is expected to be in serious financial difficulty should be made early and on the basis of well-defined criteria by safety-net participants with the operational independence and power to act.</p>	<ul style="list-style-type: none"> ✓ These are functions of the NBB. ✓ The NBB is required to timely inform the PF when it detects any problems that are likely to give rise to the intervention of the deposit protection schemes. 	<ul style="list-style-type: none"> ✓ These are functions of the NBB. ✓ The NBB is required to timely inform the SF when it detects any problems that are likely to give rise to the intervention of the deposit protection schemes.
<p>Effective resolution to facilitate prompt, accurate, and equitable reimbursement; minimize resolution costs and market disruptions; maximize asset recoveries, reinforce discipline through legal actions in cases of negligence or other wrongdoings. Authority should exist for effective resolution of banks of all sizes and to help preserve critical banking functions while clearly ensuring that bank shareholders take first losses.</p>	<ul style="list-style-type: none"> ✓ The PF is allowed—within the limits of its available financial resources—to take preventive action and provide financial support to resolution actions. 	<ul style="list-style-type: none"> ✓ The SF has no role in bank resolution. Its mandate is to process any payment for both funds. ✓ The NBB holds a broad range of powers to intervene an institution, including the ability to appoint a special inspector or replace management. ✓ A mandatory transfer of assets and liabilities on the basis of a Royal Decree is subject to an <i>ex ante</i> procedure that could hamper the implementation of such measure.

<p>Reimbursement should be prompt and certain. The deposit insurer should be notified or informed sufficiently in advance of the conditions under which a reimbursement may be required and have access to depositor information in advance.</p>	<p>✓ Deposits shall be paid within 20 business days with effect from the default of the credit institution; the NBB may extend the period for 10 more days in exceptional circumstances.</p>	<p>✓ Deposits shall be paid within 20 business days with effect from the default of the credit institution; the NBB may extend the period for 10 more days in exceptional circumstances.</p> <p>✓ To ensure that SF (responsible for handling the payout process on behalf of both DGS schemes) is able to pay in such timeframe, a new data transfer procedure that envisages a provision of relevant data within seven working days, is being tested with a subset of credit institutions.</p>
<p>Recoveries: the deposit insurer should share in recoveries from the estate of the failed bank. The deposit insurer has at least the same or comparable creditor rights or status as a depositor in the conduct of the estate of the failed bank.</p>	<p>✓ The PF will be subrogated to the rights of the creditors.</p>	<p>✓ The SF will be subrogated to the claims of the customer.</p>