The Answers by
the Swedish Ministry of Finance,
the Swedish Ministry of Justice and
Sveriges Riksbank
to the Public consultation
on the reorganisation and winding-up of credit institutions
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Public consultation on the reorganisation and winding-up of credit institutions

OBJECTIVES OF THE CONSULTATION

1. This public consultation on the reorganisation and winding-up of credit institutions takes place in the context of the current review of EU supervisory arrangements which focuses on liquidity, lender of last resort, winding up and reorganisation, crisis management, deposit guarantee schemes. The results will be taken into the European Commission's report to the European Parliament and the Council on the implementation of Directive 2006/48/EC (Capital Requirements Directive) due by end 2011. This public questionnaire forms part of the review of Directive 2001/24/EC on the reorganisation and winding up of credit institutions.

2. The issues under examination are specific and technical. The primary targeted audience of this consultation is the following:

   - Ministries of Justice,
   - Ministries of Finance,
   - Supervisory authorities,
   - Central banks,
   - Cross-border banks,
   - Legal firms,
   - Insolvency specialists, experts, associations.

   In addition to the primary audience, comments of any interested party to all or part of the questions are welcomed and encouraged.

   Issues that are not included in the questionnaire, but are of sufficient importance to be dealt with, should also be raised as part of this consultation.

3. In the first part of this questionnaire, clarification is sought as to whether Directive 2001/24/EC on the reorganisation and winding up of credit institutions leaves gaps and ambiguities which need to be removed.

4. The second part of the questionnaire looks at issues raised in the context of crisis management and reorganisation of banking groups (i.e. parent credit institutions with subsidiaries in other Member States). Directive 2001/24/EC is limited to credit institutions with branches in other Member States and does not cater for banking groups. Each Member State where a legal entity is authorised and supervised (including a subsidiary from a parent EU credit institution) is responsible for the reorganisation and winding up of this entity. The purpose of this second part is to take stock of legal frameworks across Member States relating to the reorganisation of banking groups, and to identify possible problems preventing a smooth crisis resolution process, which may involve asset transfers across banking groups.

I OVERVIEW OF ISSUES RELATED TO DIRECTIVE 2001/24/EC

About the Directive

5. The Directive on the reorganisation and winding-up of credit institutions was first proposed in 1985, but was finally adopted on 12 March 2001. The Directive was aimed at filling the gap caused by the exclusion of credit institutions from Council Regulation EC 1346/2000 on Insolvency Proceedings.

6. The purpose of the Directive is to ensure that a credit institution and its branches in other Member States are reorganised or wound up according to the principles of unity and universality, ensuring that there is only one set of insolvency proceedings in which the credit institution is treated as one entity. In this situation, the Directive ensures that the assets of the institution, no matter where they are located, will be included in a single winding-up process, ruling out any possibility of secondary proceedings. In other words, ring fencing (separation of assets) is not permitted, which would have allowed discrimination of creditors. The claims of any creditor that has its domicile, normal place of residence or head office in a Member State other than the home Member State of the credit institution is treated in the same way and accorded the same ranking as the equivalent claims of creditors in the home Member State.

7. The Directive did not aim to harmonise national legislation but to ensure mutual recognition of Member States' reorganisation measures and winding up proceedings as well as the necessary cooperation. In particular, national law determines the nature (administrative or judicial) of reorganisation measures.

8. National implementation of the Directive ensures that the insolvency laws of the home Member State where an EU credit institution is incorporated will apply if it is subject to winding-up or reorganisation measures. As a matter of principle, the proceedings will be governed in accordance with the law of the home Member State, but the effects of such proceedings/measures on certain contracts and rights, for example the rights of third parties (rights "in rem"), set off claims, netting and repurchase agreements may be determined in accordance with the law which governs the contract or the law of the Member State where the assets are held or located. The Directive makes a distinction between two categories of exceptions to the general conflict of laws rule, which are different in scope. For certain contracts and rights (employment contract, netting, repurchase agreement, transactions carried out in the context of a regulated market), the Directive requires the application of another law in particular to protect employees having a contract of employment with a credit institution, to ensure the security of transactions in respect of certain types of property. Other contracts and rights are protected from the effects of insolvency proceedings. In particular, the adoption of reorganisation measures or the opening of winding-up proceedings do not affect the creditor's rights "in rem" (his property rights) in respect of assets located in a Member State other than the one where the measures are adopted or the proceedings are opened.

9. The Directive also aims to ensure that home and host Member State administrative, judicial and supervisory authorities cooperate in the reorganisation and winding up-of a credit institution and its branches. In that respect, the Directive envisages a consultation between authorities involved in insolvency proceedings, using supervisors as a channel for transmitting information.

Problems identified in the Directive

10. A survey carried out in 2006 among members of the European Banking Committee (representatives of EU Finance Ministries) identified the following gaps and ambiguities in the Directive, for which confirmation and possible ways forward are sought.

<u>Problems regarding the scope of the Directive</u>

a) Investment firms and collective investment undertakings are not covered by EU Insolvency Regulation or the Directive. This may be seen as a gap in the EU legislation.

Do you think that investment firms and collective investment undertakings should be covered by this or a separate directive? **The fact that Investment firms are not covered by the EU insolvency Regulation or the Directive is a clear gap in EU Legislation. This implies a potential problem in terms of level-playing field. We believe that the best approach would be to include investment firms in a new directive.** **The difference in Member States regarding the organisation of collective investment undertaking makes the question more difficult to answer. We recommend that an analysis is made of the need to incorporate those entities in the scope of future revision of the Insolvency legislation in the EU.**

b) The Directive does not clearly state if it applies to electronic money institutions irrespective of whether or not they have been waived from some or all provisions of the E-money Directive. Approaches seem to vary from one Member State to another.

Are electronic money institutions covered by the legislation implementing the Directive in your country? **Electronic money institutions (e-money institutions) that has been granted authorisation are covered by Swedish legislation. However, in terms of waived e-money institutions, Swedish legislation suffers from the same ambiguity as EU-law since national provisions in this matter closely follow the Directive.** Do you think that more clarity is needed for e-money institutions? **Directive 2001/24/EC seems to be applicable to both authorised e-money institutions and waived e-money institutions. However, a clarification is necessary, especially concerning the waived e-money institutions. For example the definition of home country in Directive 2001/24/EC does not suit very well for waived undertakings. The provisions on freedom of establishment or the freedom to provide services in Directive 2006/48/EC does not apply to a waived e-money institution, which probably means that their cross border activity is quite limited.**

Yes / No - Comments and suggestions: **During the future review of Directive 2001/24/EC it is appropriate to consider if and why that directive should be applicable to institutions that are exempted from the scope of a another relevant directive (for example institutions exempted according Article 2 in Directive 2006/48/EC) and institutions that may be exempted from a relevant directive (as waived e-money institutions).**

Identified gaps and ambiguities

c) Article 5 requires host Member States' competent authorities to inform home competent authorities about the necessity of reorganisation measures for branches within their territory. This Article only confers upon the host Member State a warning role and does not entrust the host authorities with additional responsibilities in terms of reorganisation measures, which lie with the home Member State.

Do you think that the wording of Article 5 may be unclear and that more clarity along the above lines is needed? **We have not found or met any problems with the interpretation of Article 5, and have accordingly not found the provision unclear.**

Yes / No - Comments and suggestions: **If Member States understands the Article differently, there seems to be a need for clarification of the fact that the host Member State only has a warning role.**

How is this provision transposed into domestic law in your country? **There is an explicit provision in Section 3 of the Regulation on International Relations concerning Insolvency of Insurance Companies and Credit Institutions (SFS 2005:1047) transforming article 5 which oblige the Supervisory Authority, Finansinspektionen, to inform other competent authorities.**

d) The exchange of information under the Directive (Articles 4 and 5) between supervisors and administrative or judicial authorities is an implicit exception to the duty of professional secrecy as laid down in Article 44 and seq. of Directive 2006/48/EC, but is not explicitly dealt with.

Do you think that more clarity is needed regarding professional secrecy? **No. No further clarity is needed. Answering this we have disregarded that information concerning a decision on re-organisation or winding-up of an undertaking (Articles 5 and 9) would scarcely be deemed confidential (compare Article 33 in Directive 2001/24/EC and Article 44 in Directive 2006/48/EC).**

Yes / No - Comments and suggestions: **The provisions in question should be placed in Directive 2001/24/EC together with the other rules on reorganisation and winding up. However, we wouldn't mind a reference from Directive 2006/48/EC to Directive 2001/24/EC (compare Article 44.4 in the latter directive).**

How is this provision transposed into your country's law? **There are explicit provisions requiring the Supervisory Authority to inform supervisory authorities in other countries about the circumstances described in Articles 5 and 9. Since reorganisation measures cannot be applied regarding credit institutions according to Swedish law, there is no provision corresponding to Article 4.**

e) Under Article 16(2), the claims of all creditors in different Member States shall be treated in the same way and accorded the same ranking as claims of an equivalent nature. It has been observed that the provision can give rise to problems in its application when there is no correspondence between claims in different Member States. For instance, in the field of

taxes, the host Member State may have different types of taxes with different ranking according to their type. If the tax claim of the host Member State which has to be regarded as equivalent, does not correspond to any of these types, the directive does not give any indication as to its ranking.

Do you think that more clarity is needed regarding the equivalence of the nature of claims?

Yes / No - **Comments and suggestions: It is understandable that problems will occur. However it seems very tricky to find a solution to this problem. From a national (Swedish) view this problem does not seem to cause much trouble, since the present Swedish law on priority rights treats almost all unsecured claims (including tax claims, foreign or national) equally, i.e. without priority.**

f) The issue is raised as to whether the conflict of law rules and the carve out of Article 23-26 dealing with set-off, proprietary rights, netting and repos, may give rise to implementation issues given current differences in wording between different Directives like the Financial Collateral Arrangements Directive (2002/47/EC) and the Directive 2001/24/EC on the winding-up and reorganisation of credit institutions.

Do you think that there are problems in the implementation of these provisions? Is there a need to insert harmonised definitions for these transactions in the Directive? **Yes.**

Yes / No - Comments and suggestions: **The rules in the referenced Articles are of greatest importance for the financial sector. The rules regarding set-off and netting are usually very complex and the difference of wording in national legislations as well as in European legislation could create problems, especially in time of turbulence. If there is a collapse of a large financial institution, the absence of legally binding netting arrangements could send chock waves throughout the financial world. The legal effectiveness of netting systems and netting legislation in the EU should be clear without ambiguity. These important Articles and definitions should in our view be identical to the equivalent rules in the Finality Directive and the Collateral Directive.**

g) The Directive makes a distinction between two categories of exceptions to the general conflict of laws rule, which are different in scope. For certain contracts and rights, under article 20, the Directive requires the application of another law in the context of the proceeding. On the other hand, under article 21, creditor's rights "in rem" (his property rights) in respect of assets located in a Member State other than the one where the measures are adopted are protected from the effect of insolvency proceedings. One possible ambiguity arises in the field of covered bonds. It is not clear which is the applicable insolvency law in the case of a covered bond issued in a Member state (A), backed by mortgages on immovable property located in the same Member state (A), by a credit institution authorized in another Member state (B).

Do you think that more clarity is needed regarding the conflict of laws rule to be applied in this case (general rule, article 20.c or article 21)?

Yes / No - Comments and suggestions: I**t is of great importance that any ambiguities that are identified also are dealt with in some way. This is not at least the case when it comes to covered bonds. In this context, it should be considered that rules on Conflict of law are special. The rules are aiming at drawing lines between issues that should be treated according to this or that national law. There will always be certain particular issues that don't fit no matter how the lines are drawn. Consequently, rules on conflict**

of laws are traditionally based on principles rather than legislation. Our general view is that careful considerations should be made before introducing any new rules on conflict of laws. It is very easy to plead for a special provision for "your" product but it is hard not to cause new difficulties.

Problems related to exchange of information and proceedings

h) For information purposes, the specific measures and procedures (such as name, competent authority, scope, content and effects) on the reorganisation measures and winding-up procedures covered by each national implementation of the Directive could be compiled in an informal manner. This could ease the communication between authorities and liquidators in different Member States.

Do you think that such a list will helpfully improve the communication between authorities?

Yes / No - Comments and suggestions: **Yes, probably.**

i) There is no standardised form (like to the one used in Directive 2001/17/EC on reorganisation and winding-up of insurance undertakings) competent authorities may use for the publication in the Official Journal of the European Communities. A unified form might also be developed with a view to helping the communication between competent authorities in different Member States and facilitating the information provided to known creditors.

Do you think that such a standardised form would be necessary to improve information provision? **It is not necessary, but it will be helpful.**

The differences between the Directive 2001/17/EC and Directive 2001/24/EC concerning provisions on standardised forms for the publication in the Official Journal are not motivated.

Yes / No - Comments and suggestions:

j) The submission of an extract from the administrative or judicial authorities' decision for publication (articles 6 and 13) in order to facilitate the exercise of the appeal in good time is not subject to a specific deadline, but must be carried out at the earliest opportunity, which may lead to legal uncertainty.

Do you think that a precise deadline for publication is needed to avoid legal uncertainty?

Yes / No - Comments and suggestions: **We don't think it's necessary but it can be helpful for the authorities.**

k) There is no centralized system in place for the provision of information on opening reorganisation measures and winding-up proceedings. In order to achieve a greater degree of transparency across the EU, a contact point responsible for the publication of relevant information could be designated.

Do you think that a centralized contact point is needed to ensure a greater degree of transparency?

Yes / No - Comments and suggestions: **Yes, if it is easy accessible. However, questions regarding the responsibility for any mistakes or incomplete information in the system would have to be considered.**

l) The Directive applies to the branches of a third country credit institution when the latter has branches within at least two Member States. However, the Directive does not provide in such cases for a single proceeding. In accordance with Articles 8 and 19, the authorities of the Member State hosting the branch should inform the competent authorities of the other host Member States about their decision to adopt any reorganisation measure or to open the winding-up proceedings regarding the branch they host. The Directive further provides that the administrative and judicial authorities and the competent authorities as well as the administrators and liquidators must "endeavour" to coordinate their actions.

Do you think that there is benefit for improvement and concretisation of the provisions of the Directive regarding third countries' branches? Is there a need to have only one proceeding for all third country branches of the same credit institutions?

Yes / No - Comments and suggestions: **One alternative seems to be all branches would be included in one single insolvency procedure (probably most useful to use the first to be opened in a Member State).**

11. The Commission Communication on Deposit Guarantee Schemes[1] identified two potential obstacles for the functioning of Deposit Guarantee Schemes.

a) Currently, the information obligations under the Directive (Articles 4, 5 and 9) do not refer to Deposit Guarantee Schemes. A winding-up or reorganisation of a credit institution usually triggers the payment of compensation to depositors under Directive 1994/19/EEC. The Deposit Guarantee Scheme would then subrogate to the rights of depositors against the credit institution. Consequently, the work of Deposit Guarantee Schemes would be facilitated if they were informed to the same extent as the competent authorities under the articles referred to above.

Do you think that it would be useful to extend the scope of 'competent authorities' to Deposit Guarantee Schemes? **Yes, it would be useful (compare Article 47 in Directive 2006/48/EC). A more formalised cooperation between the different Deposit Guarantee Schemes would be useful as well.**

However, it has to be considered whether the information should be given only to the DGS in the home Member State or also to DGS in host Member States where branches are located (or if these should receive the information through DGS in the home Member State in cases of topping up).

Yes / No - Comments and suggestions:

b) In some Member States, claims of the national Deposit Guarantee Scheme seem to have priority over claims of other creditors. This may lead to

[1] Commission Communication on the Review of Directive 1994/19/EEC on Deposit Guarantee Schemes of 27 November 2006, (COM/2006/729) final, p. 10.

problems when a Deposit Guarantee Scheme from another Member State has to bear a part of the compensation and does not enjoy such a priority right.

Does the legislation of your Member State provide such priority rights? Would it be useful to harmonise such rights throughout the EU? **No, Swedish legislation does not provide such priority right. With regard to compensation payments made under de deposit guarantee scheme, the DGS will take over the depositor's right against the institution up to the amount paid. The DGS takes over the depositor's right against the institution, but have not a better right to priority satisfaction of its claim than the depositor would have had.**

There are several advantages in harmonising DGS:s in this respect. However, since the rules on priority rights for DGS are an integrated part of the wider national rules on priority rights – which differs between member states and affects many areas – there might be difficulties to find a common solution. It should also be clear that the differences across countries in the powers of the DGS:s to act, when to intervene as well as the scope, level of reimbursements, funding etc are issues that may complicate the efficient winding up.

Further questions

12. Are there any further gaps, ambiguities or conflicts in the Directive on the reorganisation and winding up of credit institutions? Please provide detailed description of the relevant issues.

Comments and suggestions: **It should be considered if Directive 2001/24/EC should be applicable to payment institutions.**

II OVERVIEW OF ISSUES RELATED TO THE TREATMENT OF FINANCIAL GROUPS IN CRISIS SITUATION / UNDER REORGANISATION

13. This part of the questionnaire focuses on areas that are relevant for the Commission service's wider work on crisis management. Some Member States indicated, in the survey referred to in the first part of this questionnaire that the present provisions in the Winding-up Directive for credit institutions do not take into consideration the existence of financial groups and financial conglomerates. Market developments such as an increase in the number of cross-border banking groups together with the tendency for firms to centralise risk management processes, means that banking groups are being increasingly run as single entities. As a result we would like to find out whether and how Member States' laws take into account these developments.

Is the scope of the Directive 2001/24/EC too narrow? Should extension of the scope to banking groups be considered in order to keep pace with market developments?

Yes, we would welcome if the directive could be extended to take into account the winding-up also of banking groups, while we at the same time recognise that such an extension is littered with hard solved problems. It therefore requires an analysis of the feasibility of amending present EU-legislation on the reorganisation and winding-up for

banks and enable joint reorganisation measures and insolvency proceedings for the parent and subsidiaries of cross-border banks.

It could be taken into account that market developments, such as an increasing number of cross-border banking groups combined with the tendency to centralise different tasks, such as risk management, to certain centres of competence means that banking groups are being increasingly run as single entities although they have a subsidiary structure. The operational distinction between a bank with foreign branches and a group with foreign subsidiaries is increasingly blurred. A failure of a cross-border banking group will cause problems and the differences across winding-up rules for such a group may actually enlarge the crisis. To tackle this and similar problems, an in-depth analysis of how to ensure sufficient legal protection for all the creditors of the different parts of the group is required, while still allowing for a further financial integration.

Note that, at the present, in Sweden reorganisation measures cannot be applied to credit institutions.

14. In a crisis situation the ability to transfer assets (from, and potentially to, subsidiaries) across borders will be critical for the orderly resolution of a crisis. Asset (collateral) transfers from one entity to another of the same banking group are usually used to avoid any deterioration of situations. From a legal point of view, such transfers may be impeded and "ring fenced" due to provisions in banking, company and insolvency laws. The following questions aim to take stock of the situation in different Member States in order for the Commission services to better ascertain the scope of legal and practical obstacles to the transfer of assets from subsidiaries to the parent or vice-versa.

Is the ability to transfer assets from the parent to the subsidiary or vice-versa necessary in crisis situations? Should it be facilitated and if so how? **Yes, in our view, an orderly and successful resolution of a crisis situation may rest on the ability to transfer assets.**

Asset transfers are especially important in avoiding any deterioration of financial crisis situations. In a case where a group is solvent on a group level but where some part of the group is insolvent, a crisis may actually be avoided if the group is allowed to transfer assets. However, in some countries such transfers may be impeded and "ring fenced" based on provisions in banking, company and insolvency laws.

Also, subsidiaries are becoming less self-contained and more like branches. Consequently, it is getting more and more unlikely that they can continue their business as usual if the parent bank defaults. For this reason it is becoming increasingly important that assets can be transported from one entity to another without unnecessary impediments.

However a whole range of issues needs to be analysed thoroughly before the Directive can be revised to facilitate the transfers of assets. One aspect that needs to be analysed is if the transfers of assets could be complemented with some form of legally valid guarantee from the entity on the receiving side of the transfer.

A more comprehensive way to facilitate intra group transfers would probably be through a thorough harmonisation on EU-level.

A. Banking law and regulatory responsibilities of the competent authorities

15. Supervisors are required to safeguard the financial "health" of their domestic financial entities (parent credit institution, subsidiaries…) in terms of stability, solvency and liquidity. This may include controlling asset transferability in the context of crisis management. In some jurisdictions, banking law may prohibit credit institutions (including subsidiaries) from entering into transactions that might be "disadvantageous" to them.

a. Do banking laws pose limits on transactions that might be considered disadvantageous or detrimental for a credit institution, with the result that they will either be considered null and void or capable of triggering supervisory action?

Yes / No - Comments: **There is no such explicit provision in Swedish banking law. However, the rules in company law are also applicable to banks.**

b. Are competent authorities empowered or obliged to prevent or prohibit intra-group transactions:

i) in going concern situations?

ii) in crisis situations?

iii) in crisis situations if transactions are deemed detrimental to the subsidiary/parent?

Yes / No - Comments: **No, there is no specific provision empowering the Supervisory Authority to do anything of the above. However, see the answers to question 15 f.**

c. Even if competent authorities of the home and the host Member States agree to the asset transfer in the context of a crisis, can competent authorities according to national rules be held liable for any deterioration of the situation?

Yes / No - Comments: **Competent authorities may be held liable for any fault or negligence according to general rules on tort.**

d. Is it for judicial authorities or competent authorities to deem whether a transaction is detrimental to a credit institution? Are the detrimental transactions precisely defined by law (or case law)?

Yes / No - Comments**:------**

e. Does national law require intra-group transfers to take place on an arms' length basis (i.e. under market conditions)?

Yes / No - Comments: **No, not in Swedish banking law.**

f. Are there other legal impediments in national financial legislation/regulation or specific requirements preventing subsidiaries transferring assets to the parent (or vice versa)?

Yes / No - Comments: **For an individual credit institution, the national provisions transposing Article 22 and 123 in Directive 2006/48/EC may pose an indirect impediment for intra group transfers. The credit institution and the Supervisory Authority may deem that a transfer would come in conflict with any of these provisions.**

B. Company law

16. Company laws of Member States regulate in different ways the extent to which parent companies can instruct their subsidiaries to engage in transactions in the interest of the group, and subsidiaries may not validly consent to transactions which are not in their interest.

a. Do provisions of company law prohibit intra group transactions that might be disadvantageous or detrimental for a parent or subsidiary? To what extent is a banking group's interest a lawful objective (i.e. the group interest for a particular transaction may outweigh the interest of the parent or subsidiary)?

Yes / No - Comments: **There is no explicit provision that prohibit intra group transactions that might be disadvantageous or detrimental for a parent or subsidiary.**

However, a central feature of our company law is the rules governing the way and extent to which assets can be transferred from the company to shareholders or other parties. In the Act, the rules on this have been brought together under the concept of "value transfer". Value transfer refers to inter alia dividends and other business transactions of a non-commercial nature that entail a reduction in the company's assets. This includes group contributions.

The law prohibits value transfers for sums so large as to leave the company's restricted equity without full coverage after the transfer (the "monetary barrier"). When the scope of the value transfer is decided, an examination must also be made of whether the planned value transfer is justifiable bearing in mind the amount of equity required by the type and size of the business and the risks it involves (the prudence rule).

Value transfers shall be decided by the general shareholder meeting. Such a decision may also be made by an extraordinary general meeting. The shareholders decision must be unanimous.

b. Could the conclusion of a contract or the adoption of a decision which may prove detrimental to the subsidiary be challenged and reversed? By whom? Under what circumstances?

Yes / No - Comments: **No, since it is not forbidden as such. However, if a value transfer has taken place in violation of the provision on value transfers, the recipient shall return what he or she has received, where the company proves that he or she knew or should have realised that the value transfer was in violation of the Companies Act.**

It is the board of directors that plead the companies cause.

c. In which circumstances, where asset transfers take place with the parent undertaking or other related parties, may the management body of a subsidiary be held responsible?

Comments: **Where any deficiency arises in conjunction with restitution, any persons who participated in the decision regarding the value transfer is liable therefore. The aforesaid does also apply to persons who participated in the execution of the decision or in the preparation or adoption of an incorrect balance sheet which constituted the basis for the decision regarding value transfer. Such liability requires intent or negligence on the part of a board member, managing director, auditor, general examiner and special examiner and, with respect to a shareholder or other party, intent or gross negligence.**

d. In the case of asset transfers in the interest of the group, is the parent undertaking required, under national law, to guarantee obligations of the subsidiaries vis-à-vis creditors?

Yes / No - Comments: **No. A guarantee may also be a value transfer, see above.**

C. Insolvency law

17. Under Insolvency laws, intra-group transactions may be retroactively considered void or ineffective when carried out during a "suspect period", which varies from one Member State to another and according to the transaction concerned. This may include transfer of assets free of charge or for a markedly undervalued compensation, payment of a debt that had existed before the suspect period, collateralising an obligation that has already existed before the suspect period. Such legal uncertainty may make crisis management difficult and could lead to a suboptimal result of the reorganisation. In some Member States' law or case law however, some solutions are already available to treat groups in insolvency differently from single entities. These might range from joint insolvency proceedings, the appointment of special administrators to ensure proper co-ordination and exchange of information, to consolidation of assets and liabilities of different group members. Views are sought on how groups are treated in EU Member States.

a. According to national law, is it presently possible to initiate a joint insolvency (reorganisation or winding-up) proceeding that includes all or a part of a financial group? When:

(i) both the parent and subsidiary are insolvent?

(ii) the parent is solvent and the subsidiary is insolvent?

(iii) the parent is insolvent and the subsidiary is solvent?

Yes/No Comments: **From a strictly legal point "joint insolvency" does not exist. If both the parent and the subsidiary are insolvent, the administration is usually the same for both entities. However legally there are two insolvency procedures. The possibility to recover payments from a parent or a subsidiary is not dependent on whether there is insolvency or not.**

b. What are the conditions for these situations? Do they imply fully-fledged insolvency proceedings or merely procedural steps to ensure e.g. proper exchange of information?

Comments:

c. Do your answers differ if the subsidiary is situated in a different jurisdiction to the parent?

Yes / No - Comments: **In that case and under the present rules, it would be hard to have the same administration.**

d. Who or which organization/authority may decide to treat financial group members jointly in insolvency or crisis management in your country?

Comments: **Anyone concerned can propose that the administration shall be the same for all companies in a group. The court decides.**

e. Is it presently possible in your Member State to appoint one insolvency representative, administrator to all members of a financial group involved into the proceedings? What are the conditions for this? Does this differ depending on whether the group is domestically located or cross-border?

Yes / No - Comments: **Yes, one administrator can be appointed for all members, see above. If there is a foreign subsidiary (in EU) it would follow from that jurisdiction whether the administrator can be appointed also in that procedure. Jurisdictions outside EU normally do not recognise national insolvency procedures. Even if according to Swedish law a third country subsidiary would fall into Swedish jurisdiction, the Swedish administrator would not be able to act in that foreign state.**

f. Can a single reorganization plan be implemented in your Member State for:

(i) the whole financial group if it is domestic?

(ii) the whole financial group if it has cross-border subsidiaries?

Yes / No - Comments: **Legally, it would have to be one decision for each legal entity in the group. A cross-border subsidiary (within the EU) would fall into another jurisdiction.**

g. Are intra group transactions (e.g. asset transfers) taking place before the commencement of insolvency proceedings treated differently from

transactions with unrelated parties in the Member States' insolvency legislation, in particular with regard to provisions for the avoidance of transactions?

Yes / No - Comments: **Yes.**

h. For a successful reorganisation, further financing of the insolvent entity is crucial. Questions arise on the possibility of using funds raised by e.g. the parent in one jurisdiction to finance the reorganisation operation of a subsidiary in another. This kind of financing is more likely to happen if the priority of post commencement financing is assured ahead of unsecured claims under both reorganisation and winding-up proceedings. What are the present rules for intra group financing after the commencement of reorganisation and winding-up proceedings? Under what circumstances can the assets of the solvent financial group member be used to finance the operation of the insolvent member?

Comments: **In principle a solvent member in a group is free to decide whether it will finance a reconstruction or not. The Business Reorganisation Act provides for a priority right for credits financing a reorganisation.**

i. Is it presently possible in your Member State to extend liability[2] to other members of the group that are not included in the insolvency proceedings? Under which conditions?

Yes / No - Comments:

j. Is consolidation or pooling[3] of assets of group members under reorganisation or winding-up proceedings possible in your Member State? What are the conditions for consolidation or pooling of assets for:

(i) Financial groups operating domestically?

(ii) Financial groups operating cross-border?

Yes / No - Comments: **No every legal entity should be treated separately.**

D. Crisis management and reorganisation of banking groups

18. According to national law, to what extent are competent authorities involved in the reorganisation process (e.g. consultation from judicial authorities before

[2] Laws may recognize circumstances in which exceptions to limited liability are available and related companies and relevant office holders could be found liable for the debts and actions of a group member.

[3] Unlike to joint administration where the assets and liabilities of the debtor remain separate, consolidation or pooling permits the court to disregard the separate identity of companies and consolidate assets and liabilities, or in other words treat them as single entity.

deciding on the implementation of reorganisation measures). Under which circumstances (e.g. suspension of payments)?

Comments: **Reorganisation measures cannot be applied towards credit institutions.**

19. In addition to the problems raised above, are there other issues relating to crisis management and reorganisation of financial groups in the EU which require particular attention?

Yes / No - Comments: **An alternative which hasn't been raised above is to consider a European pre-bankruptcy crisis administration for banks. Such administration could have administrative powers and be active before any declaration of bankruptcy in order to mitigate the potential systemic effects of a bank insolvency situation. An analysis of the need of such procedure could be a candidate for future work.**

DATA OF RESPONDENTS

20. For reference and in order to be able to contact the respondent in case of a need for clarification or further discussion, please provide the following data for the Commission.

Name of person completing the questionnaire	Eva Forssell, Fredrik Ludwigs and Jonas Niemeyer
Country	Sweden
Name of organisation	Ministry of Finance, Ministry of Justice and Sveriges Riksbank
Type of organisation (e.g. government, representative organisation, financial supervisor, financial institutions etc.)	Se above
Address	To the Ministries: 103 33 STOCKHOLM, SWEDEN Sveriges Riksbank: 103 37 STOCKHOLM, SWEDEN
Telephone	Ministries: 00 46 8 405 1000 Sveriges Riksbank: 00 46 8 787 0000
Email address	

21. Do you agree to have your responses published on the Commission's websites?

Yes / No Yes

22. Please send the completed questionnaire by the 30th of September 2007 in English via email to the following address:

markt-winding-up-consultation@ec.europa.eu

If you have any questions please send them to the same address.