

FRESHFIELDS BRUCKHAUS DERINGER¹SUBMISSION TO BILLS COMMITTEE FOR THE
FINANCIAL INSTITUTIONS (RESOLUTION) BILL
18 JANUARY 2015

Financial institutions (*FIs*) provide services that are critical to the smooth operation of the global economy and every national economy. Banks look after their customers' money and provide money transmission services so that customers can be paid their salaries, pay their bills and withdraw cash through ATMs. They provide credit to individuals and businesses. They also provide infrastructure and services that corporate treasuries, pension funds, other investment funds, institutional investors and governments use to hold their cash and securities, facilitate cross-border transfers, and access central counterparties, clearing systems and other financial market infrastructures. Insurers among other things provide risk transfer mechanisms under which insurers take the risks of large and potentially uncertain losses and in return provide a sense of security for individuals and businesses. Most FIs are commercial entities that aim to generate profits for their shareholders, and like any other commercial company they may fail if they are badly run or have a flawed business model. If a large FI does fail, it is likely to cause significant disruption unless there is a way in which critical services can continue.

In the financial crisis at the end of the past decade a number of the world's biggest FIs reached the brink of failure. Regulators did not have a mechanism for dealing with an FI that allowed it to fail while continuing to provide critical services and so reduce disruption. Normal insolvency proceedings are not sufficient because they do not provide for continuation of critical services and instead focus on maximizing returns for creditors. The crisis showed that some FIs are 'too big to fail'. They are so big and so inter-connected with other parts of the financial system and the economy that their disorderly failure would have broad effects around the world that could cripple the financial system. These FIs had to be bailed out by governments, and Western economies in particular are still feeling the effects of this.

¹ Freshfields Bruckhaus Deringer is a global law firm with a long-standing track record of successfully supporting the world's leading national and multinational corporations, financial institutions and governments on ground-breaking and business-critical mandates. Our 2,500 plus lawyers deliver results worldwide through our own offices and alongside leading local firms. We recently celebrated our 30th anniversary in Hong Kong.

We are the only law firm to have 'held the pen' on a Recovery and Resolution Plan (*RRP*) for a UK-based global systemically important bank, and we have supported RRP submissions to the FSA, BaFin, FMA, FINMA and the Federal Reserve Board and recovery plan submissions to the Hong Kong Monetary Authority. We regularly advise clients around the world, including in Hong Kong and Asia, on their planning around RRP issues. The points raised in this submission are ours, and do not necessarily reflect the views of all of our clients.

Royce Miller, a Hong Kong-based Partner of Freshfields Bruckhaus Deringer and head of the firm's financial services regulatory practice in Asia, published an article in late 2014 in the Capital Markets Law Journal (Oxford University Press) entitled Ending 'Too Big to Fail – why Asia Pacific countries should embrace the Key Attributes (the *Article*). Several of the points raised in this submission are copied or summarized from the Article, and a copy of the Article is attached to this submission.

The Article is also available at: <http://cmlj.oxfordjournals.org/content/10/1/23.extract>

In 2011 the Financial Stability Board (**FSB**) issued its Key Attributes of Effective Resolution Regimes for Financial Institutions (the **KAs**) that is a blueprint of 12 essential attributes under which in the future when a systemically important FI does fail, the institution can be dealt with (or resolved) in ways that permit systemically important and critical functions to continue in an orderly way even though other businesses may be allowed to fail.

Global systemically important FIs (**G-SIFIs**) by their nature operate in multiple jurisdictions, and the KAs recognize that authorities in the headquarters jurisdiction of a G-SIFI (the home jurisdiction) and the authorities in the other jurisdictions where a G-SIFI operates (host jurisdictions) each have key roles to play in resolution planning and in resolving a G-SIFI that fails.

The FSB to date has designated 39 of the world's largest FIs as G-SIFIs because their failure would threaten the stability of the global financial system. Hong Kong currently is host jurisdiction to 38 of these G-SIFIs. The FSB updates its list of G-SIFIs periodically and, although currently there are no G-SIFIs where Hong Kong is the headquarters jurisdiction, it is certainly possible that in the future and entity headquartered in Hong Kong could be designated as a G-SIFI.

The KAs do not have mandatory legal effect in any jurisdiction, including FSB member jurisdictions like Hong Kong SAR, and thus each jurisdiction needs to ensure that its local laws give effect to the KAs. Unless home and host state resolution authorities have the resolution powers set forth in the KAs, and also follow the KAs' requirements on information sharing, allocation of responsibilities, co-operation, adequate resolution powers and compulsion to coordinate resolution steps, there is a greatly increased risk that it will not be possible to resolve a G-SIFI in an orderly way.

In particular, unless Hong Kong authorities have the resolution powers set forth in the Bill (which follows the KAs in most respects, and which also contains protections for Hong Kong), if a key FI in Hong Kong were to fail the locally critical and systemically important functions of the FI likely would cease – and the only alternative available under current laws that enable these locally critical and systemically important functions to continue likely would be a bail-out from the Hong Kong government.

Thus the Bill is extremely important for addressing and managing local risks, as well as being important in connection with Hong Kong playing its part as a key financial centre in addressing and managing global and cross-border risks.

The Bill is also essential for preserving the ongoing stature of Hong Kong as a key global financial centre, as if Hong Kong does not adopt the KAs through the Bill (or if adoption is delayed inordinately) we expect the consequences to Hong Kong as a financial centre will be material – in particular, as Hong Kong would no longer be seen as a place for large FIs to be headquartered or to locate key functions. To illustrate this point, below are hypothetical scenarios involving hypothetical Hong Kong FIs. The scenarios are intended to portray events that realistically could arise. After each scenario, two hypothetical outcomes are set forth. The first outcome (the Insufficient KA Outcome) assumes the Bill is not adopted and that there is no, or incomplete, implementation of the KAs into local law in Hong Kong. The second outcome (the Full KA Outcome) assumes that Hong Kong law (i.e., through the Bill becoming law in Hong Kong) reflects the KAs.

Scenario 1

Key resolution strategies of the European home authority of a G-SIFI will be to bail-in liabilities and transfer a large bank in the group temporarily into a bridge bank so that critical functions can continue to operate pending transfers to other institutions or orderly wind-downs.

The G-SIFI operates in several Asia Pacific host jurisdictions, including Hong Kong, through branches and subsidiaries of this large European bank.

Insufficient KA Outcome- Bill is not adopted

The Bill has not been adopted so laws in Hong Kong have not been revised to take into account KA 3 (Resolution Powers) and do not provide for recognition of the home jurisdiction's bail-in or transfer to a bridge bank, and the Hong Kong authorities do not have powers to implement local actions that would give local effect to the home jurisdiction's actions.

The home authority from resolvability assessments (KA 10) and RRP planning (KA 11) is aware of these limitations in Hong Kong. The home authority determines that the G-SIFI group is not resolvable while there are key operations in Hong Kong, and requires the G-SIFI to divest itself of all critical businesses from Hong Kong or to shut down those businesses in Hong Kong and move them to another Asia Pacific host jurisdiction that has revised its laws to reflect the KAs.

Full KA Outcome- Bill has been adopted

As the Bill has been adopted, Hong Kong's laws will not be a barrier to bail-in or transfer to a bridge institution and thus will not be a barrier to resolvability of the European bank. The home authority does not require the G-SIFI to divest itself of critical businesses in Hong Kong or to move those businesses to another jurisdiction.

Scenario 2

An FI headquartered in Hong Kong has (or in the future plans to have) an international network of branches and subsidiaries in other countries (host jurisdictions). A branch in a particular host jurisdiction provides services that are domestically critical in the host jurisdiction.

Insufficient KA Outcome- Bill is not adopted

Although the host authority has no particular concerns about the viability of the local branch businesses on their own, the host authority is concerned that, as Hong Kong has not implemented the KAs (i) the Hong Kong authorities lack powers to put the institution into resolution so that key functions can continue to operate in the event that the institution becomes non-viable, and (ii) in the event of non-viability the institution would be subject to a Hong Kong insolvency procedure (absent a bail-out from the Hong Kong government) under which critical functions in the host jurisdiction would cease to continue. As a result, the host authority requires the institution to incorporate a local subsidiary in the host jurisdiction and to move the branch business into the local subsidiary. Further, notwithstanding that the institution's management believe the local subsidiary through its substantial retail deposits has no local funding needs, the host authority requires the local subsidiary locally to have large amounts of equity and debt subject to bail-in under the host jurisdiction's laws. The host authority restricts the ability of the local subsidiary to transfer liquidity to other parts of the group. Particularly if multiple host jurisdictions take similar steps, this disrupts operational synergies within the Hong Kong institution's group, hugely increases capital and funding costs for the group as a whole and could render the group less viable.

Management considers moving the headquarters of the FI from Hong Kong to another jurisdiction in which the KAs have been fully implemented.

Full KA Outcome – Bill has been adopted

As the bill has been adopted and the KAs are reflected in Hong Kong law (with substantial protections of Hong Kong interests), the host authority is aware of how Hong Kong authorities have planned that bail-in and other resolution actions would be implemented in the event that the FI becomes non-viable, and is of the view that the bail-in and other actions if implemented in accordance with the resolution plan would treat the host country fairly.

Accordingly, the host authority does not require the institution to move its local operations into a separately capitalized local subsidiary with sufficient equity and debt subject to bail-in. Alternatively, even if the host authority determines that local subsidiarization is still needed, this may be limited to the parts of the business that are locally critical and the institution may retain more flexibility with respect to business and funds flows between the host country and the rest of its group.

The group does not consider moving its headquarters from Hong Kong to another jurisdiction.

These scenarios illustrate possible very negative consequences for Hong Kong, its financial institutions, and its standing as a global financial centre if Hong Kong does not implement the KAs through passage of the Bill. These scenarios also illustrate benefits to Hong Kong and its FIs from the Bill, including being seen as a jurisdiction in which G-SIFIs and local institutions can have critical operations and where institutions headquartered in Hong Kong have fewer barriers in operating in other jurisdictions.

We note that some of our G-SIFI clients already are conducting analyses of resolution powers in the jurisdictions where they have material operations, including Hong Kong and other Asia Pacific jurisdictions, and are already assessing whether and how they may need to reorganise their groups based on resolution issues.

We thank you for the opportunity to submit these comments.

Ending ‘Too Big to Fail’—why Asia Pacific countries should embrace the *Key Attributes*

Royce Miller*

Key points

- When financial institutions became non-viable during the global financial crisis, there was no way to let them fail while keeping their systemically important and critical functions running, so governments had to bail them out.
- Since 2011 the Financial Stability Board’s *Key Attributes* have been an international blueprint for resolution regimes under which systemically important and critical functions can continue when a financial institution fails, with no government bailout being needed.
- The *Key Attributes* do not have force of law, so each country needs to ensure that its local laws reflect the *Key Attributes*.
- Some countries in the Asia Pacific region are taking urgent steps to embrace the *Key Attributes*, but others are not. Countries that do not embrace the *Key Attributes* are likely to be marginalized as financial centres in the medium to long term, as large international financial institutions will restrict their critical businesses in, and key support services they receive from, those countries.

1. Introduction

Financial institutions (FIs) provide services that are critical to the smooth operation of the global economy and every national economy. Banks look after their customers’ money and provide money transmission services so that customers can be paid their salaries, pay their bills and withdraw cash through ATMs. They provide credit to individuals and businesses. They also provide infrastructure and services that corporate treasuries, pension funds, other investment funds, institutional investors and governments use to hold their cash and securities, facilitate cross-border transfers, and access central counterparties (CCPs), clearing systems and other financial market infrastructures (FMIs). Insurers among other things provide risk transfer mechanism under which insurers take the risks of large and potentially uncertain losses and in return provide a sense of security for individuals and businesses. Most FIs are commercial entities that aim to generate profits for their shareholders, and like any other commercial company they may fail if they are badly run or have a flawed business model. If a large FI does fail, it is likely to cause significant disruption unless there is a way in which critical services can continue.

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In 2011 the Financial Stability Board (FSB)¹ issued its *Key Attributes of Effective Resolution Regimes for Financial Institutions* (the KAs)² that is a blueprint of 12 essential attributes under which in the future when a systemically important FI does fail, the institution can be dealt with (or resolved) in ways that permit systemically important and critical functions³ to continue in an orderly way even though other businesses may be allowed to fail.

Global systemically important FIs (G-SIFIs) by their nature operate in multiple jurisdictions, and the KAs recognize that authorities in the headquarters jurisdiction of a G-SIFI (the home state) and the authorities in the other jurisdictions where a G-SIFI operates (host states) each have key roles to play in resolution planning⁴ and in resolving a G-SIFI that fails.

The FSB to date has designated 38 of the world's largest FIs as G-SIFIs⁵ because their failure would threaten the stability of the global financial

1 The FSB was established in April 2009 to develop and promote the implementation of effective regulatory, supervisory and other financial sector policies among national financial authorities and international standard setting bodies. A list of FSB members can be found here: <<http://www.financialstabilityboard.org/members/links.htm>> accessed 5 November 2014.

2 FSB, *Key Attributes of Effective Resolutions Regimes for Financial Institutions* (October 2011), available at <http://www.financialstabilityboard.org/publications/r_111104cc.pdf> accessed 5 November 2014. On 15 October 2014, the FSB reissued the KAs. The wording of the 12 KAs is unchanged from the 2011 version, but the reissued 2014 version incorporates guidance on application of the KAs to non-bank financial institutions and on arrangements for information sharing that support the effective resolution of cross-border financial institutions. The reissued KAs also include four new Annexes that set out guidance covering: (i) resolution of FMIs, including CCPs, and resolution of systemically important FMI participants; (ii) resolution of insurers, (iii) client asset protection in resolution, and (iv) information sharing for resolution purposes. The reissued KAs are available at <http://www.financialstabilityboard.org/publications/r_141015.pdf> accessed 5 November 2014.

3 In guidance published by the FSB in 2013, the FSB stated that a critical function has two elements: (i) it is provided by the FI to third parties not affiliated to the FI; and (ii) the sudden failure to provide that function would be likely to have a material impact on the third parties, give rise to contagion or undermine the general confidence of market participants due to the systemic relevance of the function for the third parties and the systemic relevance of the FI in providing the function. See FSB, *Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Identification of Critical Functions and Critical Shared Services* (16 July 2013), available at <http://www.financialstabilityboard.org/publications/r_130716a.pdf> accessed 5 November 2014.

4 See Section 2 below for an overview of resolution planning.

5 As of 5 November 2014, the 38 G-SIFIs comprise 29 Global Systemically Important Banks (G-SIBs) and 9 Global Systemically Important Insurers (G-SIIs). The current list of G-SIBs is available at FSB, *2013 update of group of global systemically important banks (G-SIBs)* (11 November 2013) <http://www.financialstabilityboard.org/publications/r_131111.pdf> accessed 5 November 2014. The current list of G-SIIs is available at FSB, *Global systemically important insurers (G-SIIs) and the policy measures that will apply to them, Annex I (G-SIIs in alphabetical order as of July 2013)* (18 July 2013), available at <http://www.financialstabilityboard.org/publications/r_130718.pdf> accessed 5 November 2014. In addition, the FSB published a consultation paper on 8 January 2014 setting out assessment methodologies for identifying non-bank non-insurer global systemically important financial institutions. Industry participants were requested to provide comments by 7 April 2014 but as of 5 November 2014 the initial list of non-bank non-insurer global systemically important financial institutions had not yet been published. FSB in consultation with the

system. As illustrated below, Asia Pacific jurisdictions are primarily host states for G-SIFIs:⁶

Jurisdiction	Number of G-SIFIs	
	Home state	Host state
Japan*	3	32
China*	3	35
Singapore*	-	35
Hong Kong*	-	37
South Korea*	-	34
Australia*	-	31
India*	-	33
Malaysia	-	25
Taiwan	-	26
Indonesia*	-	27
Philippines	-	23
New Zealand	-	11

* FSB member jurisdiction⁷

The KAs do not have mandatory legal effect in any country, including FSB member countries, and thus each country needs to ensure that its local laws give effect to the KAs. Unless home and host state resolution authorities have the resolution powers set forth in the KAs, and also follow the KAs' requirements on information sharing, allocation of responsibilities, co-operation, adequate resolution powers and compulsion to coordinate resolution steps, there is a greatly increased risk that it will not be possible to resolve a G-SIFI in an orderly way. In addition, there are significant risks that a home or host state authority will feel compelled to take steps prior or during resolution to protect legitimate local interests that could disrupt financial stability in other jurisdictions and increase the risk of a G-SIFI's critical operations in other jurisdictions becoming non-viable.

Section 2 provides a high-level overview of the KAs. Section 3 considers four hypothetical scenarios involving G-SIFIs' Asia Pacific operations to illustrate, with reference to specific KAs, the possible consequences of a home or host country not adopting and following the KAs. Section 4 discusses the FSB's end-2015 deadline for

International Organization of Securities Commissions, *Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions* (8 January 2014), available at <http://www.financialstabilityboard.org/publications/r_140108.pdf> accessed 5 November 2014.

⁶ This table is based on information from G-SIFIs' main websites that set out the jurisdictions where the G-SIFIs' operations are located. Jurisdictions where a G-SIFI provides services but does not have a physical presence may not be reflected in this table.

⁷ Some jurisdictions are referred to in this article as separate countries or states even where legally they may not be separate countries or states. For example, Hong Kong legally is a special administrative region of the People's Republic of China, but it sometimes is referred to as a separate country or state in this article as Hong Kong and the People's Republic of China have and are developing separate and distinct regulatory and resolution regimes, and each is a member of the FSB.

countries to ensure that their local laws reflect the KAs, and the FSB's concerns that this deadline will not be met in many countries. Section 5 concludes with thoughts on why countries that are not taking urgent steps to comply with the KAs ought to do so and ways that their non-compliance could hurt them in the medium to long term.

2. The FSB's Key Attributes

As described more in Section 4, the FSB expects member countries to change their local laws by the end of 2015 to give effect to the KAs. The KAs are twelve essential features that the FSB indicates should be part of the resolution regimes of all jurisdictions. In addition to setting out the resolution powers that should be available in each country, several KAs also deal in whole or in part with the responsibilities that are allocated between home state and host state authorities and the mechanisms that need to be in place to ensure that home and host states coordinate appropriately in resolution planning and in implementing resolution actions.

Below is a list of the KAs, with a high-level summary of each KA that emphasizes the provisions most relevant to host state responsibilities and how home and host states should work together.⁸

KA 1. Scope

The resolution regime should be transparent as to the FIs that are within its scope, and it should extend to holding companies, significant non-regulated operational entities that are in the same group, and branches of foreign FIs.⁹ For host states, KA 1 requires that the resolution regime should require all domestically incorporated G-SIFIs to have in place a recovery and resolution plan (RRP), including a group resolution plan (see KA 11), be subject to regulatory resolvability assessments (see KA 10) and be subject to institution-specific cross-border cooperation agreements (see KA 9).

KA 2. Resolution authority

There must be a designated administrative authority or authorities responsible for exercising resolution powers within the regime, and it/they must have authority to enter into agreements with resolution authorities of other jurisdictions.

KA 3. Resolution powers

Resolution should be initiated when an FI is no longer viable or likely to be no longer viable, and has no reasonable prospect of becoming so. The resolution regime should provide for timely and early entry into resolution before an FI is balance-sheet insolvent and before all equity has been fully wiped out.

⁸ Where the original KA language is succinct and very relevant to interactions between home and host jurisdictions I have repeated KA language rather than summarizing it.

⁹ KA 1 also indicates that the scope should include FMIs, including certain depositories, trade repositories, CCPs and clearing, payment and settlement systems.

Resolution authorities should have at their disposal a broad range of resolution powers, that can be used individually, in combination and sequentially as deemed appropriate. These should include powers to do the following:

- (i) remove and replace the senior management and directors and recover monies from them;
- (ii) appoint an administrator to take control of and manage the FI with the objective of restoring the FI, or parts of its business, to ongoing and sustainable viability;
- (iii) operate and resolve the FI, including powers to terminate contracts, continue or assign contracts, purchase or sell assets, write down debt and take any other action necessary to restructure or wind down the FI's operations;
- (iv) ensure continuity of essential services and functions by requiring other companies in the same group to continue to provide essential services to the entity in resolution, any successor or an acquiring entity; ensuring that the residual entity in resolution can temporarily provide such services to a successor or an acquiring entity; or procuring necessary services from unaffiliated third parties;
- (v) override rights of shareholders of the FI in resolution (including requirements for approval by shareholders of particular transactions) in order to permit a merger, acquisition, sale of substantial business operations, recapitalization or other measures to restructure and dispose of the FI's business or its liabilities and assets;
- (vi) transfer or sell selected assets and liabilities, legal rights and obligations, including deposit liabilities and ownership in shares, to a solvent third party or to a newly established bridge institution,¹⁰ notwithstanding any requirements for consent or novation that would otherwise apply and without triggering a default or termination event;
- (vii) establish one or more temporary bridge institutions to take over and continue operating certain critical functions and viable operations of a failed FI;
- (viii) establish a separate asset management vehicle (for example, as a subsidiary of the distressed FI, an entity with a separate charter, or a trust or asset management company) and transfer to the vehicle for management and rundown non-performing loans or difficult-to-value assets;
- (ix) carry out bail-in within resolution¹¹ as a means to achieve or help to achieve continuity of essential functions either (a) by recapitalizing the entity that previously provided these functions but that is no longer viable, or, alternatively,

10 FSB, *Thematic Review on Resolution Regimes – Peer Review Report* (11 April 2013) defines 'bridge institution' as an 'an entity, authorised or licensed in accordance with any applicable requirements under national law, that is established to temporarily take over and maintain certain assets, liabilities and operations of a failed firm as part of the resolution process', available at <http://www.financialstabilityboard.org/publications/r_130411a.pdf> accessed 5 November 2014.

11 *ibid* defines 'bail-in within resolution' as 'restructuring mechanisms to recapitalise a firm in resolution or effectively capitalise a bridge institution, under specified conditions, through the write-down, conversion or exchange of debt instruments and other senior or subordinated unsecured liabilities of the firm in resolution into, or for, equity or other instruments in that firm, the parent company of that firm or a newly formed bridge institution, as appropriate to legal frameworks and market capacity'.

- (b) by capitalizing a newly established entity or bridge institution to which these functions have been transferred following closure of the non-viable FI (the residual business of which would then be wound up and the FI liquidated); bail-in powers should enable the resolution authority to (a) write down (in a manner that respects the hierarchy of claims in a liquidation) equity and unsecured and uninsured creditor claims to the extent necessary to absorb losses, (b) convert into equity all or parts of unsecured and uninsured creditor claims, and (c) convert or write-down any contingent convertible or contractual bail-in instruments whose terms had not been triggered prior to resolution;
- (x) temporarily stay the exercise of early termination rights that may otherwise be triggered upon entry of an FI into resolution or in connection with the use of resolution powers (see RA 4);
 - (xi) impose a moratorium with a suspension of payments to unsecured creditors and customers (central counterparties and clearing and settlement systems excepted) and a stay on creditor actions to attach assets or otherwise collect money or property from the FI, while protecting the enforcement of eligible netting and collateral agreements;
 - (xii) effect the closure and orderly wind-down (liquidation) of the whole or part of a failing FI with timely pay-out or transfer of insured deposits and prompt (for example, within seven days) access to transaction accounts and to segregated client funds; and
 - (xiii) in the case of insurance firms, (a) undertake a portfolio transfer moving all or part of the insurance business to another insurer without the consent of each and every policyholder; and (b) discontinue the writing of new business by an insurance firm in resolution while continuing to administer existing contractual policy obligations for in-force business (run-off).

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

KA 4. Set-off, netting, collateralization, segregation of client assets

The entry into resolution and the exercise of any resolution powers should not trigger statutory or contractual set-off rights, or constitute an event that entitles any counterparty of the FI in resolution to exercise contractual acceleration or early termination rights provided the substantive obligations under the contract continue to be performed. Resolution authorities should have the power to stay temporarily acceleration or early termination rights that remain exercisable.

KA 5. Safeguards

Resolution powers should be exercised in a way that respects the hierarchy of claims in liquidation while providing flexibility to depart for the general *pari passu* treatment of creditors of the same class if necessary to contain the potential systemic impact of an FI's failure or to maximize the value for the benefit of creditors as a whole. Creditors should have a right to compensation where they do not receive at a minimum what they would have received in a liquidation. The law should not permit parties to sue to constrain the implementation of, or reverse, resolution actions taken by resolution authorities in good faith within their legal powers, but compensation can be awarded if justified. There should be flexibility for temporary exemptions or postponement of market disclosure requirements under market reporting, takeover provisions and listing rules where the disclosure by the FI could affect the successful implementation of resolution measures.

KA 6. Funding of firms in resolution

Authorities should not be constrained to rely on public ownership or public bailout as a means of resolving FIs, although some countries may include this power in their resolution regimes as a last resort. Where temporary sources of funding are needed to maintain essential functions to accomplish orderly resolution, strict conditions should apply to minimize the risk of moral hazard and the authority extending the funding should recover any losses from shareholders and unsecured creditors. Jurisdictions should have in place privately-financed deposit insurance or resolution funds, or a funding mechanism for *ex post* recovery from the industry of the costs of providing temporary financing to facilitate the resolution of an FI.

KA 7. Legal framework conditions for cross-border cooperation

The statutory mandate of a resolution authority should empower and strongly encourage the authority wherever possible to act to achieve a cooperative solution with foreign resolution authorities. Legislation and regulations should not contain provisions that trigger automatic action as a result of official intervention or the initiation of resolution or insolvency proceedings in another jurisdiction, but there can be a right to take discretionary national action if necessary to achieve domestic stability in the absence of effective international cooperation and information sharing. Where a resolution authority takes discretionary national action it should consider the impact on financial stability in other jurisdictions.

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

host authority takes discretionary national action, it should give prior notification and consult the foreign home authority.

National laws and regulations should not discriminate against creditors on the basis of their nationality, the location of their claim or the jurisdiction where it is payable.

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

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

KA 8. Crisis Management Groups

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

CMGs should keep under active review, and report as appropriate to the FSB, on: (i) progress in coordination and information sharing within the CMGs and with host authorities that are not represented in the CMGs; (ii) the recovery and resolution planning process for G-SIFIs under institution-specific cooperation agreements (see KA 9); and (iii) the resolvability of G-SIFIs.

KA 9. Institution-specific cross-border cooperation agreements

For all G-SIFIs, there should be cooperation agreements (COAGs) in place between the home state authority and the key host state authorities that need to be involved in the planning and crisis resolution stages. COAGs should among other things:

- (i) establish the objectives and processes for cooperation through CMGs;
- (ii) define the roles and responsibilities of the authorities pre-crisis (that is, in the recovery and resolution planning phases) and during a crisis;

- (iii) set out the process for information sharing before and during a crisis, including sharing with any host authorities that are not represented in the CMG, with clear reference to the legal bases for information sharing in the respective national laws and to the arrangements that protect the confidentiality of the shared information;
- (iv) set out the processes for coordination in the development of the RRP for the FI, including parent or holding company and significant subsidiaries, branches and affiliates that are within the scope of the agreement, and for engagement with the FI as part of this process;
- (v) set out the processes for coordination among home and host authorities in the conduct of resolvability assessments (see KA 10);
- (vi) include agreed procedures for the home authority to inform and consult host authorities in a timely manner when there are material adverse developments affecting the FI and before taking any significant action or crisis measures;
- (vii) include agreed procedures for the host authority to inform and consult the home authority in a timely manner when there are material adverse developments affecting the FI and before taking any discretionary action or crisis measure;
- (viii) provide an appropriate level of detail with regard to the cross-border implementation of specific resolution measures, including with respect to the use of bridge institution and bail-in powers;
- (ix) provide for meetings to be held at least annually, involving top officials of the home and relevant host authorities, to review the robustness of the overall resolution strategy for G-SIFIs; and
- (x) provide for regular (at least annual) reviews by appropriate senior officials of the operational plans implementing the resolution strategies.

KA 10. Resolvability assessments

Resolution authorities should regularly undertake, at least for G-SIFIs, resolvability assessments that evaluate the feasibility of resolution strategies and their credibility in light of the likely impact of the FI's failure on the financial system and the overall economy.

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

- (i) the extent to which critical financial services, and payment, clearing and settlement functions can continue to be performed;
- (ii) the nature and extent of intra-group exposures and their impact on resolution if they need to be unwound;
- (iii) the capacity of the FI to deliver sufficiently detailed accurate and timely information to support resolution; and
- (iv) the robustness of cross-border cooperation and information sharing arrangements.

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

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

To improve an FI's resolvability, supervisory authorities or resolution authorities should have powers to require, where necessary, the adoption of appropriate measures, such as changes to an FI's business practices, structure or organization, to reduce the complexity and costliness of resolution, duly taking into account the effect on the soundness and stability of ongoing business. To enable the continued operations of systemically important functions, authorities should evaluate whether to require that these functions be segregated in legally and operationally independent entities that are shielded from group problems.

KA 11. Recovery and resolution planning

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

Jurisdictions should require that robust and credible RRP are in place for all G-SIFIs and for any other FI that its home authority assesses could have an impact on financial stability in the event of its failure, and that these RRP are updated regularly. RRP are comprised of a recovery plan and a separate (but related) resolution plan.

The recovery plan must identify options to restore financial strength and viability when the FI comes under severe stress. Recovery plans should include:

- (i) credible options to cope with a range of scenarios including both idiosyncratic and market wide stress;
- (ii) scenarios that address capital shortfalls and liquidity pressures; and
- (iii) processes to ensure timely implementation of recovery options in a range of stress situations.

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

- (i) financial and economic functions for which continuity is critical;
- (ii) suitable resolution options to preserve those functions or wind them down in an orderly manner;
- (iii) data requirements on the FI's business operations, structures and systemically important functions;

- (iv) potential barriers to effective resolution and actions to mitigate those barriers;
- (v) actions to protect insured depositors and insurance policy holders and ensure the rapid return of segregated client assets; and
- (vi) clear options or principles for the exit from the resolution process.

FIs must ensure that key service level agreements can be maintained in crisis situations and in resolution, and that the underlying contracts include provisions that prevent termination triggered by recovery or resolution events and facilitate transfer of the contract to a bridge institution or a third-party acquirer.

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

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

KA 12. Access to information and information sharing

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

- (i) the sharing of all information relevant for recovery and resolution planning and for resolution should be possible in normal times and during a crisis at a domestic and a cross-border level;
- (ii) the procedures for the sharing of information relating to G-SIFIs should be set out in COAGs (see KA 8); and
- (iii) where appropriate and necessary to respect the sensitive nature of information, information sharing may be restricted, but information sharing should be possible among the top officials of the relevant home and host authorities.

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

General themes throughout the KAs with respect to home states and host states include that (i) there is a suite of resolution powers that resolution authorities need to have, and host state authorities need to have the same powers that home state authorities have so that, where appropriate, resolution actions taken by the home authority are given effect at branches and subsidiaries in the host state, (ii) for G-SIFIs, home state

authorities take the leading role with respect to many KAs (eg CMGs, resolvability assessments and RRP) but they must coordinate closely with key host state authorities, (iii) resolution authorities must consider the impact their local actions have on financial stability in other jurisdictions, (iv) national laws and regulations should not discriminate against creditors on the basis of their nationality, the location of a claim or the jurisdiction where it is payable, (v) host state authorities must have powers that enable them to give local effect to resolution actions taken by home state authorities, provisional on the equitable treatment of creditors in the home state resolution proceeding, and (vi) host states can impose local requirements on an entity that is in a G-SIFI group if the entity is domestically systemically important, but there should be cooperation with the home state authority for the G-SIFI group.

These themes all point towards finding a sensible and workable balance between home and host states in connection with resolution planning and resolution actions for G-SIFIs. Section 3 illustrates how the KAs could work in practice.

3. Hypothetical scenarios involving Asia Pacific operations of G-SIFIs

Below are four hypothetical scenarios involving Asia Pacific operations of G-SIFIs. The scenarios are intended to portray events that realistically could arise with a G-SIFI. After each scenario, two hypothetical outcomes are set forth. The first outcome (the Insufficient KA Outcome) assumes that there is no, or incomplete, implementation of the KAs into local law in the home and host states. The second outcome (the Full KA Outcome) assumes that local law in the home and host states fully reflects the KAs.

Scenario 1

Key resolution strategies of the European home authority of a G-SIFI will be to bail-in liabilities and transfer a large bank in the group temporarily into a bridge bank so that critical functions can continue to operate pending transfers to other institutions or orderly wind-downs. The G-SIFI operates in several Asia Pacific host countries through branches and subsidiaries of this large European bank.

Insufficient KA Outcome

The laws in an Asia Pacific host jurisdiction in which the European bank has critical operations have not been revised to take into account KA 3 and do not provide for recognition of the home country bail-in or transfer to a bridge bank, and the host jurisdiction resolution authority does not have powers to implement local actions that would give local effect to the home country actions.

The home authority from resolvability assessments (KA 10) and RRP planning (KA 11) is aware of these limitations in host country law. The home authority determines that the G-SIFI group is not resolvable while there are key operations in this host country, and requires the G-SIFI to divest itself of all critical businesses from this host country or to shut down those businesses in this host country and move them to another host country that has revised its laws to reflect the KAs.

Full KA Outcome

The Asia Pacific host jurisdiction's laws will not be a barrier to bail-in or transfer to a bridge institution and thus will not be a barrier to resolvability of the European bank. The home authority does not require the G-SIFI to divest itself of critical businesses in the host country or to move those businesses to another jurisdiction.

Scenario 2

A G-SIFI's home state is the United States, and it operates through local branches and subsidiaries in several Asia Pacific jurisdictions. There are market rumours that the G-SIFI is on the brink of failure. The home state authorities and the G-SIFI have planned recovery actions on the following Monday that will imminently provide a liquidity facility to the G-SIFI and under which the G-SIFI will sell a substantial non-core business.

Insufficient KA Outcome

The home state authority has not told Asia Pacific host state authorities of these imminent steps and has made no announcement to the market, but it plans to do so before business opens in New York on a Monday. Business opens on Monday in Asia Pacific host jurisdictions (but this is still Sunday in New York), and in some Asia Pacific host jurisdictions the market rumours lead to bank runs, margin and collateral requirements are increased to such an extent that the G-SIFI's Asia Pacific operations effectively have no access to liquidity, counterparties refuse to enter into new business with the G-SIFI and cancel or refuse to roll/renew existing transactions and the stock market crashes. The global press widely reports on these effects in Asia Pacific jurisdictions and speculates about the G-SIFI's imminent failure. These effects in the Asia Pacific region damage perceptions of the G-SIFI globally so materially that the home state authorities' planned recovery actions on their own are no longer sufficient to keep the G-SIFI viable.

Full KA Outcome

Through participation in the CMG (KA 8), coordination in connection with RRP (KA 11), coordination in connection with resolvability assessments (KA 10), information sharing pursuant to a COAG (KA 9) or otherwise (KA 12), key Asia Pacific host state authorities are aware well in advance of the home state authority's concerns and the planned recovery actions. Asia Pacific authorities alert the home state authority in advance of their concerns about rumours in their markets and the particular timing risks that apply in Asia Pacific and other markets that will open prior to New York opening on Monday. The G-SIFI and the home state authorities publicly disclose the imminent recovery steps prior to Asia Pacific Monday market opening. Host state authorities, in coordination with the home state authorities, may make local announcements or take other local steps (eg ensuring local liquidity facilities are in place). The press reports accurately on the announced recovery steps, and negative Asia Pacific market effects are averted.

Scenario 3

A G-SIFI's home state is a country that experienced huge taxpayer bailout costs during the recent financial crisis, as well as huge numbers of families losing their homes due to residential mortgage foreclosures, high levels of unemployment and business closures. The home state authority and home state regulators are subject to constant substantial public scrutiny and criticism from politicians and the press about this.

The G-SIFI remains financially strong and the home state authority has no particular concerns about any imminent risk of the G-SIFI becoming non-viable or needing to take any recovery steps.

During the financial crisis, a large financial institution unrelated to the G-SIFI but headquartered in the G-SIFI's home country transferred substantial amounts of money from host state operations into the home country shortly before that financial institution failed. There have been allegations that this caused clients, creditors and counterparties outside of the home country to be treated unfairly when the institution failed.

The G-SIFI has operated through a branch in an Asia Pacific host country for many years. The branch operations in the host country are systemically important for the host country.

Insufficient KA Outcome

Although the host authority has no particular concerns about the viability of the local branch businesses on their own, the host authority is concerned that it does not have sufficient regular information about the health of the G-SIFI in its home country and the other key host countries where the G-SIFI operates. The host authority is also concerned, in part because it is aware of the public pressure the home authority is under and that a large home state institution in the past transferred large amounts of money to the home country shortly before its failure, that the home authority may unfairly favour home interests in the event that the G-SIFI approaches non-viability. The host authority requires the G-SIFI to incorporate a local subsidiary in the host country and to move the branch business into the local subsidiary. Notwithstanding that G-SIFI management believe the local subsidiary through its substantial retail deposits has no local funding needs, the host authority requires the local subsidiary locally to have large amounts of equity and debt subject to bail-in. The host authority restricts the ability of the local subsidiary to transfer liquidity to other parts of the G-SIFI group. Particularly if multiple host states take similar steps, this disrupts operational synergies within the G-SIFI group, hugely increases capital and funding costs for the G-SIFI group as a whole and could render the G-SIFI less viable.

Full KA Outcome

Through participation in the CMG for the G-SIFI (KA 8), coordination in connection with RRP (KA 11), coordination in connection with resolvability assessments (KA 10), information sharing pursuant to a COAG (KA 9) or otherwise (KA 12), the Asia Pacific host authority is confident that it will receive sufficient regular information about the

health of the G-SIFI in its home country and the other key host countries where the G-SIFI operates. Laws in the home country do not discriminate against creditors on the basis of their nationality, the location of a claim or the jurisdiction where it is payable (KA 7). The host authority also is aware of how it is planned that bail-in and other resolution actions would be implemented in various scenarios, and is of the view that the bail-in and other actions if implemented in accordance with the resolution plan would treat the host country fairly.

Accordingly, the host authority does not require the G-SIFI to move its local operations into a separately capitalized local subsidiary with sufficient equity and debt subject to bail-in. Alternatively, even if the host authority determines that local subsidiarization is still needed, this may be limited to the parts of the business that are locally critical and the G-SIFI may retain more flexibility with respect to business and funds flows between the host country and the rest of the G-SIFI's group.

Scenario 4

A G-SIFI operates in an Asia Pacific host country through a locally incorporated subsidiary whose businesses are systemically important and critical domestically in the host country. Various technology and operations functions are outsourced to another group company (Opco) in another Asia Pacific host country (the 2nd host country). Opco is owned by a large bank in the home jurisdiction, but Opco is not directly regulated by the authorities in the home jurisdiction or the 2nd host country. Opco does not provide any services to the G-SIFI's critical operations in the home jurisdiction.

Insufficient KA Outcome

The host authority is concerned that in the event that the home authority commences resolution of the G-SIFI, the home authority and the second host country authority will allow Opco to fail. If that were to occur, the subsidiary in the host jurisdiction would not have access to the technology and operations support that it needs to run its business and there would be huge disruption to systemically important and critical services in the host country and potentially even failure of the subsidiary in the host jurisdiction.

Due to this concern, the host authority requires the local subsidiary to build new technology and operations support capabilities in the host country at great expense, and to sever its relationship with Opco. Opco is no longer viable and the G-SIFI closes it, causing thousands of employees in the second host country to lose their jobs.

Full KA Outcome

The host state subsidiary's dependency on Opco is identified in the RRP process (KA 10) and steps are taken in advance to ensure that Opco will continue to support the host state critical operations in the event of the resolution of the G-SIFI. There are various steps that could be planned for, including moving Opco into an insolvency-remote structure and providing it with a funding buffer, so that it will not be affected by the resolution of the home state bank. Opco remains in operation in the second host country.

These scenarios illustrate possible very negative consequences where host states do not embrace the KAs into their laws that potentially include G-SIFIs shutting down any critical operations in those host states and even moving support and service operations from those host states. These scenarios also illustrate the possible benefits for a host jurisdiction in ensuring that its local laws reflect the KAs, including being seen as a jurisdiction in which G-SIFIs can have critical operations. Section 4 describes the status of reflecting the KAs in host state laws in the Asia Pacific region.

4. Progress on Key Attributes in the Asia Pacific

As demonstrated in Section 2, the KAs provide an international blueprint for resolving systemically important institutions in a way that critical functions can continue with no public bailouts being needed. However, as illustrated in Section 3, the effectiveness of this international framework will be highly dependent on jurisdictions ensuring that their local laws reflect the KAs.

In April 2013, the FSB published a *Thematic Review on Resolution Regimes—Peer Review Report* (the Thematic Review)¹² that set forth the status of FSB member countries' compliance with the KAs, and the findings were not good. Although authorities in some FSB jurisdictions had some of the resolution powers in KA 3, at that time no jurisdictions had any bail-in powers and in some jurisdictions the limited resolution powers available could not be implemented by a resolution authority directly and instead required court action or appointment of an administrator that would neither share the KA objectives nor be subject to direction of a resolution authority. Only one¹³ (of eight) Asia Pacific FSB member jurisdictions had powers to take action in connection with a parent of a failed financial institution, and no Asia Pacific FSB member jurisdiction had powers to take action in connection with non-regulated group entities. Very few jurisdictions had clear statutory provisions that would allow resolution authorities to share information with foreign resolution authorities. Only one¹⁴ FSB Asia Pacific member jurisdiction had any requirement to consider the impact of resolution actions on financial stability in other jurisdictions. Only two¹⁵ FSB Asia Pacific member jurisdictions had any mechanisms through which resolution actions by a foreign resolution authority can promptly be given legal effect.¹⁶

In September 2013, the FSB issued *Progress in implementing the G20 Recommendations on Financial Regulatory Reform—Status report by the FSB Secretariat* (the Status

12 See n 10.

13 South Korea.

14 Even the one is very limited: Australia is required to consider the impact on New Zealand.

15 The two are Singapore and Japan (Japan's Act on Recognition of and Assistance for Foreign Insolvency Proceedings makes foreign insolvency actions effective in Japan).

16 In fairness to Asia Pacific countries, FSB countries outside of the Asia Pacific region also did not fare well in the Thematic Review. However, since the time of the Thematic Review substantial progress has been made in the United States (for example, the Dodd–Frank Wall Street Reform and Consumer Protection Act 2010) and the EU (eg the EU Bank Recovery and Resolution Directive 2014).

Report),¹⁷ which set forth in tabular format a status report of progress made on implementing G20 recommendations, and the status of KA implementation remained very concerning. The Status Report coded KA national implementation¹⁸ as Red¹⁹ because '[a]lthough substantive progress has been made, many home and host jurisdictions of G-SIFI's need to take further legislative measures to implement the Key Attributes fully in substance and scope—in particular, the adoption of bail-in powers, powers for cross-border cooperation and the recognition of foreign resolution actions'.

Some Asia Pacific jurisdictions are taking steps towards enhancing their resolution regimes.²⁰ As an example, in January 2014 the Financial Services and Treasury Bureau of the Hong Kong Government, in conjunction with the main sectoral regulators in Hong Kong, issued a Consultation Paper on An Effective Resolution Regime for Financial Institutions in Hong Kong²¹ (the HK Consultation). The HK Consultation tracks the KAs very closely, identifies where there are gaps between KA requirements and current Hong Kong law and regulatory powers, and seeks feedback on 34 questions, including the following question that particularly relates to the main themes of this article:

Do you agree that it is important that the resolution regime in Hong Kong supports, and is seen to support, co-operative and co-ordinated approaches to the resolution of cross-border groups given Hong Kong's status as a major financial centre playing host to a significant number of global financial services groups?

Responses were due in April 2014, a second stage consultation on a Hong Kong resolution regime will be issued later, and after consideration of the consultation responses the Hong Kong government will introduce a bill to the Legislative Council in 2015 that should put into place a new resolution regime in Hong Kong prior to the end-2015 FSB deadline.

However, some other Asia Pacific countries do not appear to be taking steps for implementation of the KAs with any sense of urgency.²²

17 FSB, *Progress in implementing the G20 Recommendations on Financial Regulatory Reform—Status report by the FSB Secretariat* (5 September 2013), available at <http://www.financialstabilityboard.org/publications/r_130905b.pdf> accessed 5 November 2014.

18 The terms used in the Status Report for KA national implementation were '... Countries to establish a legal framework for crisis intervention, recovery and resolution plans, and crisis management groups for major cross-border firms.' See *ibid*, p 5.

19 Red signifies 'Implementation of agreed policy is not making adequate progress across G20 jurisdictions. Serious problems exist either in meeting its objective or timelines in a significant segment of member jurisdictions. Remedial action is warranted'. See n 17, p 2.

20 See Freshfields Bruckhaus Deringer, *Living wills regulatory reform in Asia Pacific* (June 2014), available at <http://www.freshfields.com/uploadedFiles/SiteWide/News_Room/Insight/RRP/Living%20wills%20regulatory%20reform%20in%20Asia%20Pacific.pdf> accessed 5 November 2014.

21 The Financial Services and the Treasury Bureau (in conjunction with the Hong Kong Monetary Authority, the Securities and Futures Commission and the Insurance Authority), *An effective resolution regime for financial institutions in Hong Kong—Consultation Paper* (January 2014), available at <http://www.fstb.gov.hk/fsb/ppr/consult/resolution_e.pdf> accessed 5 November 2014.

22 For example, the FSB issued a peer review of Indonesia in February 2014 indicating that the Indonesian authority lacks several of the required powers from the KAs and resolution options currently prioritized are government assistance or nationalization. FSB, *Peer Review of Indonesia* (28 February 2014), available at <http://www.financialstabilityboard.org/publications/r_140228.htm> accessed 5 November 2014.

5. Conclusion

When FIs failed during the financial crisis, governments and regulators found that there was no way to keep the critically important functions continuing in an orderly way without resorting to government bailouts. The FSB has provided in the KAs an international framework under which in the future it should be possible to resolve FIs in ways that critically important functions can continue, without requiring long-term government ownership or bailouts. However, national laws in many cases do not currently provide for most of the resolution powers that are needed under the KAs, and national laws also do not require authorities to consider how their actions could affect financial stability in other jurisdictions or even to cooperate or share information with each other in the resolution context. If national laws do not change to reflect the KAs in all key home and host jurisdictions, the orderly resolution of a G-SIFI will remain illusory notwithstanding the KAs.

The FSB's deadline for national implementation of the KA is the end of 2015 and, although some countries will surely meet that deadline, the FSB itself thinks a significant number of countries may not.

It is a big process for any country to change its laws substantially, and in Asia Pacific jurisdictions it may be particularly difficult as a local political matter to prioritize these changes, as in the latest financial crisis no Asia Pacific-headquartered FIs failed and local politicians and populations may view this as a North American and European problem. I disagree, as the latest financial crisis had huge effects across the Asia Pacific region even though the effects were not as bad as they were in some other regions. Asia Pacific countries should also think to the future when more of their institutions will become globally significant, and Asia Pacific home authorities will need host jurisdictions to embrace the KAs so that Asia Pacific G-SIFIs are resolvable without public bailout being needed. In addition, Asia Pacific host jurisdictions are likely to be marginalized as financial centres if they do not embrace the KAs, as home state authorities necessarily will need to restrict the ability of G-SIFIs to conduct any critical businesses or have critical support operations in host jurisdictions that do not reflect the KAs in their laws because home states will not tolerate the risk that a host jurisdiction could render a G-SIFI unresolvable without bailout, and through the resolvability assessment and the RRP planning process home authorities will require G-SIFIs to limit their operations in those host jurisdictions.