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**How to resolve a cooperative
group? The French case**

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HOW TO RESOLVE A COOPERATIVE GROUP? THE FRENCH CASE

ABSTRACT

In this paper¹ we present how French authorities have addressed key legal challenges and obstacles related to the resolution of cooperative groups, in particular the implementation of the bail-in tool (“individual bail-in” and “coordinated bail-in”).

In the **first part**, we present key features of French cooperative groups and the legal framework establishing a solidarity mechanism and central bodies. We also explain how we took into account the lessons learnt from previous crises, where it appears that French cooperative groups were resilient.

In the **second part**, we identify key challenges related to the implementation of the bail-in tool for cooperative groups and describe amendments made to the French legal framework on the occasion of the transposition of BRRD2, in order to clarify the legislation and facilitate the implementation of resolution strategies suited to cooperative groups.

In the **last part**, we point out progresses that should be made in order to achieve (i) a smooth operationalisation of the bail-in tool and (ii) the resolvability of French cooperative groups. Those elements and expectations are not specific to French cooperative groups, but should be considered as expectations to achieve a full resolvability of French cooperatives groups and are more generally in line with the FSB roadmap to make specific banks and large banks fully resolvable.

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Introduction

Financial actors deemed “**too-big-to-fail**” experienced major shocks (Laeven, L, and Valencia, F, 2020) during the 2008 Global Financial Crisis, paving the way for a global risk to financial stability (Nier et. al. 2007). In the absence of a clear common framework, the main responses for US, European and Euro-area banks were bail-outs (Acharya V. et. al. 2020 for EU bail outs, D. Lucas 2019 for US bail outs). A key objective of resolution frameworks adopted since then has been to shift costs from taxpayers (“*bail-outs*”) to banks’ shareholders and creditors (“*bail-in*”), to avoid moral hazard (recital 45 of the BRRD), to preserve financial stability as well as critical functions and to protect depositors and public funds (« break the bank sovereign doom loop » by ending Too Big To Fail and implicit guarantees), by resolving banks in an orderly manner. The Financial Stability Board (FSB) evaluation of the effects of too-big-to-fail (TBTF), published in March 2021 highlighted that TBTF reforms have effectively made banks more resilient and resolvable but that some remaining gaps needed to be addressed, in particular for banks with **specific structures**.

Objectives put forth in the FSB Key Attributes have mostly been achieved in Europe, which is considered as a well-advanced jurisdiction in terms of the implementation of the FSB resolution framework, through the implementation of the **Banking Recovery and Resolution Directive (BRRD)**². This Directive was transposed by France in 2015. It was amended in 2019 (by the so-called BRRD2³) and France took the opportunity of the transposition of those amendments, finalised at end 2020, to tackle key issues related to the resolution of cooperative groups.

Indeed, if both legislators and the academic community⁴ have recognised the economic and social utility of the cooperative banking model, they also consider that, due to their balance sheet features

² Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

³ Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC

⁴ Kalmi Panu, 2007

as well as their special legal structure, the implementation of the bail-in tool or of other resolution tools to **cooperative groups** has turned out to raise different questions than those arising in the case of capitalistic banks. The specificities of these banks raise critical questions in the case of resolution such as i) what are the consequences of depreciation and conversion of capital and debt instruments on the inverted ownership structure of cooperative banks? ii) Which resolution perimeter should be considered for the point-of-entry? iii) How to resolve a cooperative group using the resolution toolbox provided by the BRRD to authorities? iv) How to implement the No Creditor Worse Off (NCWO) safeguard and protect investors? (v) How to ensure a level playing field with the resolution of other banks?

In addition to those questions, it is important to highlight that the world of cooperative banking is very broad and heterogeneous in terms of balance sheet size, governance structure, solidarity mechanism, prudential requirements and supervision, which implies that a “one size fits all solution” to deal with the resolution of cooperative groups or similar banks is not possible. The French banking market, for instance, is structured around five key players, of which three have a cooperative nature and are domestic or global systemically important institutions. This constitutes a specificity in comparison to other Member States where cooperative groups usually have regional importance only.

In this paper, we provide an overview of the specific French legal framework that applies to cooperative banks. We also describe how French authorities have managed to address challenges raised by the resolution of cooperative groups on the occasion of the transposition of BRRD2. Then, we highlight remaining work which needs to be done in order to make French cooperative banks fully resolvable.

1. A specific framework applies to French cooperative banks

In this section, we provide an analysis regarding the French cooperative banking landscape as well as an analysis as to how resilient it was during the Great Recession and the Great Lockdown.

1.1. The landscape of French cooperative groups

The French model of cooperative banking can be traced back to the nineteenth century and was inspired by the necessity of giving early access to credit for low-income populations during the industrial revolution (Egarius D. 2014). Their model has changed, however, from local branches offering standard products to the so called “**hybrid model**” of large universal groups offering a broad range of financial products to both individuals and firms (Groeneveld H. 2014; Ayadi R. et. al. 2010). As regards the governance of those groups, these French institutions are linked by a ‘solidarity mechanism’ that is enshrined in law, implemented by agreements and/or regulations, and recognised by the supervisor (see subsection 2). This model is notably different from Institutional protection schemes used elsewhere.

Because of their strong footprint at national level, of their specificity and of their history, specific provisions are dedicated to cooperative groups in French law. A specific chapter of the French Monetary and Financial Code (MFC), namely Chapter II of Title I of Book V of the legislative section, is dedicated to them. Apart from general provisions on applicable legal and regulatory obligations in Article L 511-30 to L 511-32 and Articles L.512-1 and L 512-1-1, it deals separately with each of the three French cooperative groups (Crédit Mutuel, Crédit Agricole and BPCE). It regulates among others aspects, the conditions for membership of the cooperative networks, the missions of regional banks, the composition of their capital, the governance and organisation of each network and of the regional banks, the mission and, for some groups, the legal form and respective powers of the central body and even the use of the brand name of each cooperative branch. It also contains a few provisions on mutual shares, which CRR recognises as equity and therefore counting towards meeting the prudential requirements of the European supervisors, as well as on financing arrangements within each network.

One of the main purpose of the French legal framework is to assimilate cooperative networks to banking groups, allowing for the application of the prudential, supervisory and resolution framework on a consolidated basis.

Regarding the prudential and supervisory framework, French cooperative are, as explained below, recognised as (domestic or global) systemically important banks. As such, they are supervised by the European Central Bank and subject to specific international and European standards strengthening their loss absorbing capacity⁵ and governance, such as institution specific systemic buffers, TLAC standards and/or MREL requirements.

1.2. Solidarity mechanism relying on a strong central body

Besides the hybrid nature of the business model of French cooperative groups (cooperative network, universal banking groups with an international and domestic footprint), the **solidarity mechanism** enshrined by law constitutes a second set of distinctive features of French cooperative banks. The French system is notable for the legal nature of the solidarity mechanism and the broad powers of central bodies.

1.2.1. Principles of the solidarity mechanism

The solidarity principle is **usually implemented through liquidity and capital transfer mechanisms and through loss mutualisation** (in some cases, via contributions to guarantee funds paid by affiliates). Those elements can be implemented through different forms of financial and contractual arrangements. In particular, internal regulations, internal agreements, guarantee funds and joint contractual guarantees are used in this context.

The scope of cooperative networks covered by a solidarity mechanism is wide. It usually includes the central body and the different layers of regional or local banks which own it, but a legal “opt-in”

mechanism has also allowed some entities which are commercial subsidiaries of the central body or of regional banks to become an institution affiliated to the central body and benefit from the solidarity mechanism.

1.2.2. Strength of the central body

Under French law (Art. L. 511-31 of the CMF), **central bodies have statutory extraordinary rights and obligations provided by law** with respect to the institutions affiliated to them, even though they do not hold (or only partially hold) the share capital of some of them. This distinguishes them from the parent companies of capitalistic groups, whose powers over their subsidiaries almost exclusively derive from their equity stake in these subsidiaries. The powers of central bodies in cooperative banking networks, which encompass a broad range of measures, allow them to fulfill a public service mission. They have the legal responsibility and the strict obligation to ensure the proper functioning of all their affiliated institutions and their compliance with the applicable laws and regulations, which contribute to preserving the stability of the financial system and protecting customers

In a nutshell, the missions and powers of central bodies can be described as twofold.

- The first mission is a financial mission, which consists of taking *“all necessary measures to ensure the liquidity and solvency of each said institution (affiliated entity) and of the entire network”*, for instance by limiting dividend distributions. This liquidity and solvency support obligation represents a statutory/legal and non-contractual obligation for central bodies. The *“measures”* that are specifically listed in Article L.511-31 CMF include a total or partial sale of the business of affiliates, the dissolution of affiliates and the merger of several affiliates. Those specific tools are applicable *“notwithstanding any statutory or contractual provision to the contrary”*. **It is important to note that, as a consequence of those provisions, central bodies are free to implement all necessary measures** to reach the goal set in law- i.e. ensuring the liquidity and solvency of all affiliated institutions to them and of their network as a whole. Central bodies have therefore **a strict obligation, with no limits as to the means** (merger or

sale of business being only examples) and may take decisions that are binding on their affiliates. In practice, central bodies may anticipate possible incidents, take measures (specific financing, repurchase or sale of assets, etc.) to provide resources to an affiliated institution under more flexible conditions than those that would exist in the case of the implementation of a contractual guarantee by creditors after a payment incident, and it may also transfer cash or excess regulatory capital of affiliated institutions for the benefit of any other affiliated institution experiencing financial difficulties.

- The second mission of central bodies is a supervisory mission in respect of the affiliated institutions. Under Article L.511-31 of the MFC, central bodies “*oversee the application of the laws and regulations specific to those institutions and companies and exercise administrative, technical and financial control over the organisation and management thereof*”. Other articles of the MFC detail specific aspects of this supervisory mission, which appears thorough. For instance Article L.512-51 MFC states that regional or local banks of the Crédit Agricole network are “*under the control*” of their central body and are required to provide it with every documentation necessary to allow it to exercise its administrative technical and financial control over their organisation and management. Article L.512-108 MFC empowers the central body of BPCE to dismiss members of the management body of an affiliated institution in case the institution has taken decisions infringing French or EU legislation relating to banking and financial activities, or instructions of the central body. As a result of this strong framework, in joint cases C-152/18P and C-153/18P *Crédit Mutuel Arkéa / BCE* of 2 October 2019, the European Court of Justice confirmed the unconditional and unlimited obligation of the central body to support any affiliated institution facing difficulties. In this case, the Court ruled that the obligation for central bodies to take all necessary measures to ensure the solvency and the liquidity of each affiliated institution and company as well as of the network as a whole under Article L.511-31 MFC implied the possibility of establishing at any time binding solidarity mechanisms such as the imposition on members of the network of capital and liquidity transfer

obligations as well as the merger of two or more “*caisses*” affiliated to the network. The merger of a member of the network with another affiliate in financial crisis is equivalent to imposing the absorption of the liabilities of the financial institution in difficulties. Such a transaction is therefore likely to have more serious financial implications than those resulting from the imposition of a simple obligation to transfer own funds and liquidity.

1.3. This framework has demonstrated its resiliency

As mentioned by the European Economic and Social Committee, 2015, “*Cooperative banks escaped quite lightly from the financial crisis, proving more resistant and stable than other types of institution, while developing new business initiatives*” (Castello T. et. al. 2015). Indeed, their cooperative nature fits well with the model known as “social banking”, which is based on strong core values and local credit supply. This suits a clear need of EU banking customers.

In France, cooperative banks have demonstrated their resiliency and their capacity to manage stress situation and crises over the last 30 years. In the 1990s, CASA took over the control of the Corsica Regional Bank, due to its inability to comply with applicable requirements. In the 2000s, French cooperatives continued to foster mergers between regional banks in order to help them reach a critical size. During the 2008 financial crisis and 2011 financial stress situation, the three central bodies of cooperative groups have played a key role by taking quick decisions to manage risks, to stop and contain losses, to adjust their liquidity needs and develop new sources of funding. During the COVID crisis, the overall situation of the three French cooperative groups has not deteriorated, their business model has been resilient. Accordingly, none of the French cooperative groups was put in recovery or resolution.

2. This framework has been amended to facilitate suitable resolution strategies

In this section we highlight key challenges concerning the implementation of the bail-in tool for cooperative groups and describe the recent amendments made to the French legal framework in the wake of the transposition of BRRD2 in order to clarify and facilitate the application of bail-in to cooperative groups.

2.1. Implementation of the bail-in tool and potential resolution challenges for cooperative banks.

2.1.1. The extension of the point of entry

As mentioned earlier, the **preferred resolution strategy (PRS)** for most large and systemic banks is the bail-in which applies at the level of the point of entry. The “point of entry” or “resolution entity” is defined as the entity where a resolution tool will be applied and, consequently, where loss absorbing capacity and other financial resources should be concentrated.

Determining the **resolution strategy (SPE or MPE)** and the **point of entry** for cooperative groups is the first important issue. In consideration of this, BRRD2 has recognised the specific nature of cooperative groups, by including an explicit option for extension of the concept of Single Point of Entry to all legal entities covered by a solidarity mechanism -- concretely, by granting the possibility for all affiliates, subject to certain conditions relating to the strength of the solidarity mechanism and the foreseen resolution strategy, to issue liabilities counting towards meeting a common external MREL requirement applying to the network as a whole⁶. The term “extended single point of entry” is used to refer to this situation. In this context, two options, described further below, have been developed by French Authorities, in close cooperation with the SRB, in case of bail in tool implementation: a bail in accompanied by a merger of some network members (so called here “individual bail in”) and a simultaneous application of the bail-in to all network members, which would all qualify therefore as

⁶ Article 45e (3) of BRRD as amended and Article 12f(3) of SRMR as amended

resolution entities (so called “coordinated bail-in”). Both “individual bail-in” and “coordinated bail-in” mechanically create complexity for authorities, which will therefore have to apply resolution tools and powers to more than just one single point of entry legal entity.

2.1.2. The implementation of the bail in and coordinated bail-in step by step analysis

In this section we provide a non-exhaustive list of key challenges related to the implementation of the “bail in tool”. Both individual bail in and coordinated bail-in also raise specific questions regarding the capability to ensure that the cooperative nature of the group would be preserved. Indeed, the conversion of senior debt may lead to the central body being the main shareholder of the affiliates, thereby creating an «*inversion of the inverted ownership structure*». However, it should be here noted that, even if the preservation of the cooperative nature is a desirable outcome, it should be considered as an option and not as an absolute goal to achieve by Resolution Authorities, as long as the long-term viability of the bank can be restored. The work on post bail-in structure is one of the key priority of Resolution authorities (see section 3).

Other issues deal with the execution risk due to operational challenges. Those mostly stem from the need for resolution authorities to apply resolution tools and powers to more than just one legal entity in a resolution context which, by definition, already implies a constrained timeframe. Examples of those challenges are the prompt write down of existing shareholders; the prompt conversion of creditors to shareholders; the timely merger of affiliated entities in the run-up to resolution or in resolution, prior to the application of the bail-in tool.

Dealing with the “individual bail-in” does not require to focus on a step by step analysis as the process of application of bail-in to a single entity is well known and detailed in the FSB reports⁷ and SRB Bail-in guidance⁸. The main point is to prepare and address the operational complexity of a merger of affiliated entities when the cooperative group is facing a “near FOLTF” situation. To this end, in addition

⁷ FSB guidance on bail in execution: <https://www.fsb.org/2018/06/principles-on-bail-in-execution-2/>

⁸ SRB Operational guidance on Bail-in implementation: <https://www.srb.europa.eu/en/content/operational-guidance-bail-implementation>

to the power of the central body to execute the merger of affiliated entities, the following crucial elements have been taken into consideration when assessing the robustness of the merger strategy: the existence of clear triggers for the merger, the automaticity of the merger, the binding nature of the merger, the timely entry into force of the merger, and the absence of right to unilaterally withdraw from the network.

An alternative to this individual bail-in approach is the “coordinated Bail-in” which implies a simultaneous application of the Bail-in tool to all the legal entities of the network and enables to implement the Bail-in tool promptly. As it is a variant of the individual bail in tool developed jointly with the SRB, we provide here the key high level steps of the implementation of the coordinated bail-in, for illustrative purpose.

A stylised version of a cooperative group can be seen in Fig.1. It is composed of a central body held by local banks, which owns subsidiaries that are both inside and outside the perimeter of the solidarity mechanism. This perimeter is shown in red on Fig. 1.

Fig 1: Loss transfer mechanism applied by the solidarity mechanism

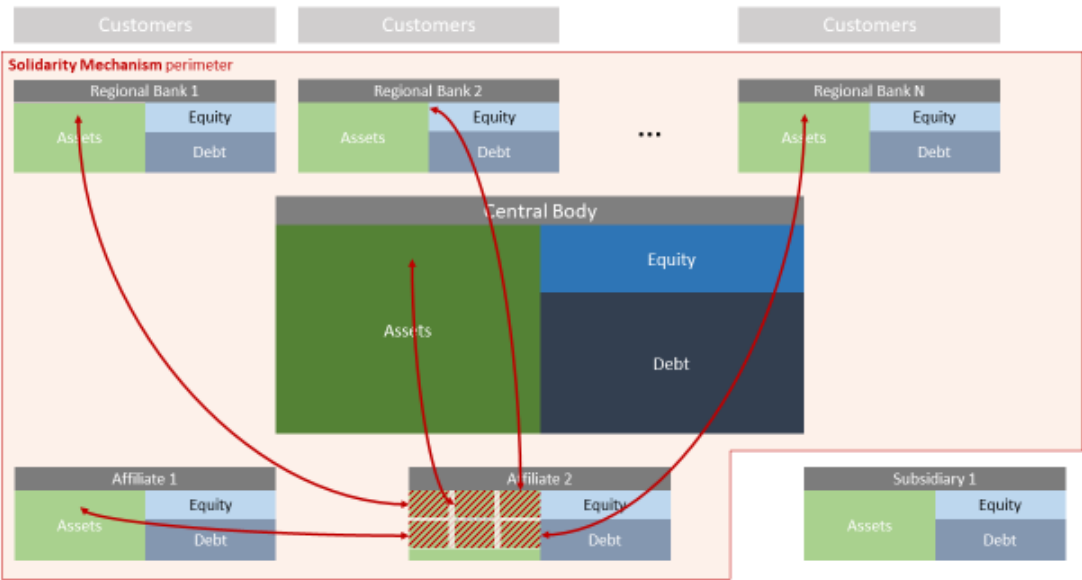
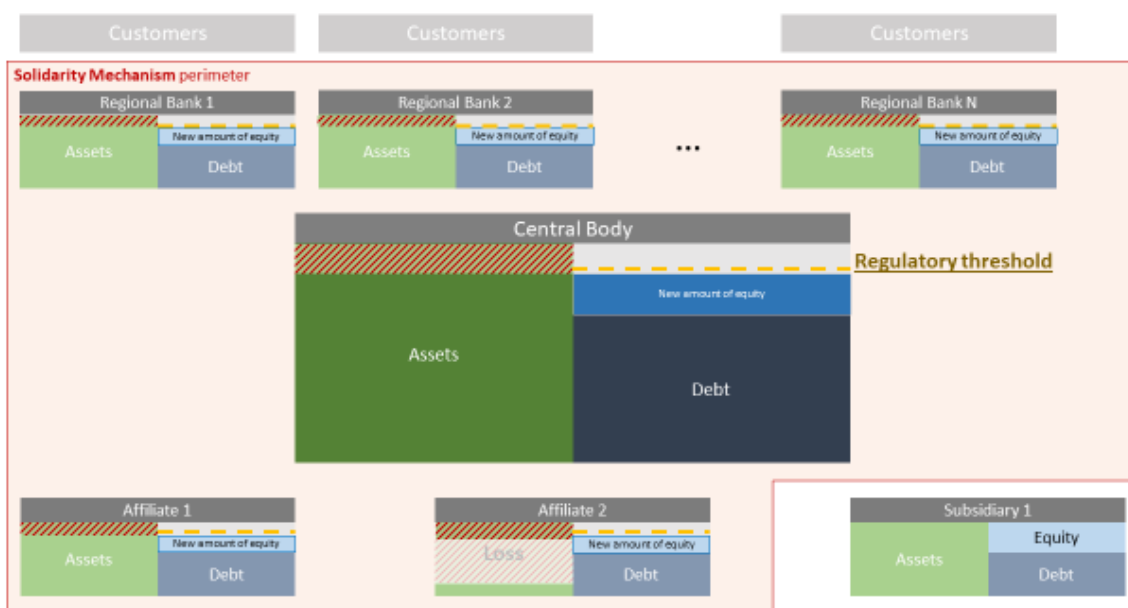


Fig 2: Capital ratios (same for all entities) are below regulatory threshold, net asset value is negative



We assume a sudden loss that would materialise at the level of an affiliate. The intervention of the central body would lead to a material degradation of its solvency situation, which in turn would trigger the implementation of the solidarity mechanism. Through the latter, the sudden loss would be distributed proportionally among the network members so that their capital position would be equal as expressed in percentage of risk-weighted assets (RWAs) (Fig. 1).

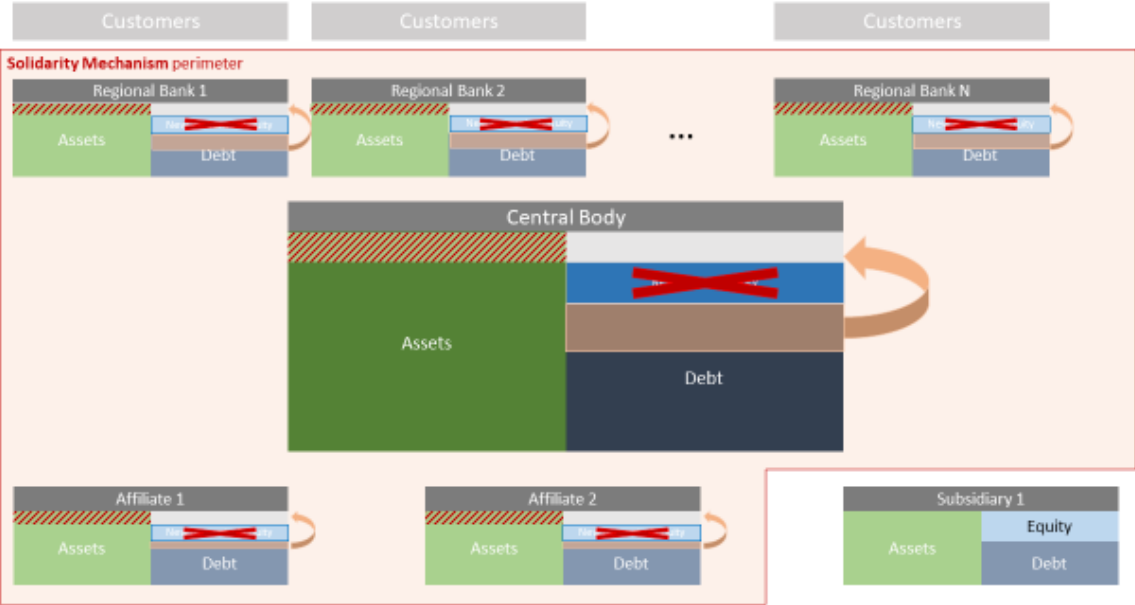
It is assumed for the sake of simplicity that the capital position following capital injections and loss transfer mechanisms would be below regulatory thresholds (Fig.2)⁹ for each entity of the network as a result of capital injections and loss transfers. The resolution group would then be declared failing or likely to fail (FOLTF) which would finally lead to the use of the bail-in tool simultaneously on all affiliates. This allows first to absorb all losses in the network then to recapitalise it in 2 steps (firstly the full recapitalisation of the central body¹⁰ where a vast majority of MREL-eligible debt is, typically,

⁹ This operation relates to the power of the CB as related to the SM that would be put in place (see 1.2)

¹⁰ and simultaneously the partial recapitalization of affiliates owning remaining own fund instruments (Tier 2 for instance)

located, secondly the full recapitalization of affiliates by down streaming capital from the central body¹¹ to affiliates).

Fig 3: Recapitalisation in 2 steps (central body and regional banks)



2.1.3. The NCWO risk

In spite of the strong legal basis of the solidarity mechanism, a doubt still remained about the legal possibility to carry out an individual bail-in or a coordinated bail-in and to comply with the **No Creditor Worse Off principle**. This situation came mainly from:

- The absence of full certainty that the provisions governing the solidarity mechanism would not be overruled in liquidation, resulting in the risk to require a liquidation entity- by-entity. That could immediately create NCWO issues, creditors of the sounder network entities subject to a bail-in claiming that they would have been better off in an entity-by-entity liquidation.
- The absence of a group insolvency regime in French law, implying that there was no guarantee that a single liquidator or even a single court would deal with the whole network. Indeed,

¹¹ and entities owning MREL-eligible debt

liquidation process could start only for legal entities complying with the criteria of cessation of payments, which differs from the FOLTF criteria in resolution.

2.2. How The French transposition of BRRD2 addressed those challenges

In this context, it¹² was decided to clarify the existing legal corpus in order to strengthen the legal basis for the implementation of the bail-in tool for French cooperative groups (either with the “coordinated bail-in” or the “individual bail-in” associated to a merger).

The Treasury used the need to transpose Article 32a BRRD as a legal basis to introduce a set of targeted amendments into the MFC, aimed at clarifying the points identified as potentially problematic. This Article, introduced by BRRD2, referred to the specific situation of the failing or likely to fail declaration in cooperative groups by stating that *“Member States shall ensure that resolution authorities may take a resolution action in relation to a central body and all credit institutions permanently affiliated to it that are part of the same resolution group when that resolution group complies **as a whole** with the conditions established in Article 32(1) [conditions for being declared failing or likely to fail]. It was mirrored for the Banking Union by the new paragraph 1 (a) of Article 18 SRMR, introduced at the same time by the amendments made in 2019¹³: *“The Board may adopt a resolution scheme in accordance with paragraph 1 in relation to a central body and all credit institutions permanently affiliated to it that are part of the same resolution group when that resolution group complies **as a whole** with the conditions provided in the first subparagraph of paragraph 1”*. Those amendments can be grouped into four main blocks : amendments ensuring a coordinated start of the resolution and liquidation process; amendments setting out explicitly the transfer of powers from the central body to the temporary administrator, the resolution authority or the liquidators, as the case may be; amendments explicitly enshrining coordinated resolution and coordinated liquidation of members of cooperative networks in*

¹² The French Treasury was advised and supported by the ACPR, which also interacted closely with the SRB. Discussions were also closely followed by the French Ministry of Justice.

¹³ Regulation (EU) 2019/877 of the European parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms (“SRMR2”)

French law; and amendments protecting the powers necessary to implement the solidarity mechanism, be they exercised by the central body, the liquidators or the resolution authority.

2.2.1. First block: introduction of a Joint FOLTF in order to make resolution safer and feasible by considering at the starting point all entities of the network and group

The first block comprises amendments to Articles L.613-26, L.613-48 and L.613-49-1 MFC that deal, respectively, with the definition of cash flow insolvency for credit institutions, the criteria for an entity to be considered failing or likely to fail and the conditions for entry into resolution as well as the resolution process. Those amendments introduced a coordinated start of the resolution and the liquidation procedure for all members of the network. The objective was to ensure that the triggers for the failing or likely to fail determination, the entry into resolution and the entry into liquidation could not be evaluated at in isolation for all affiliated institutions without taking into account the situation of each affiliated institution. Absent those clarifications, it could conceivably be the case that some members would be failing or likely to fail, or resolved, or liquidated, as the case may be, while others would not.

Article 32a BRRD went some way to establishing the sort of safeguard which was necessary, as explained above, but it was too limited in scope to achieve the level of certainty sought by the authorities. First, it merely established a discretion for the resolution authority, which had to become an obligation in order to create certainty that the desired outcome would take place in every situation. In addition, its sole focus on failing or likely to fail triggers was insufficient since entry into resolution is a distinct step from the FOLTF determination, with different triggers¹⁴. It was thus necessary to create a mechanism for a joint entry into resolution in addition to a joint failing or likely to fail, and to amend Article L.613-49-I MFC in addition to Article L.613-48 CMF. As a result, when a joint FOLTF is pronounced and resolution triggers are jointly met, the bail in tool (either individual or coordinated bail in) can be applied to the central body and all its affiliated entities. Finally, it was necessary to allow

¹⁴ According to Article 32(1) BRRD, a failing or likely to fail determination is only one of the triggers for entry into resolution (point (a)), the two others being the absence of alternative private sector solution (point (b)) and the positive public interest assessment of a resolution (point (c))

for the same “joint” trigger in liquidation as in resolution in order to make sure that an individual liquidation would not be the counterfactual to a coordinated bail-in or individual bail in, and make sure that the NCWO principle will be respected. **In France, the only trigger for judicial liquidation is the cash flow insolvency or “cessation of payments”, so it was necessary to create a possibility to assess this criterion for a central body and all its affiliated entities as a whole by amending Article L.613-26 MFC.**

Once the scope of amendments within this block was identified, a last challenge was to find the right drafting for such joint assessments. Since there is from a legal and accounting point of view no such concept as “on a consolidated basis at the level of the network”, it would not have been accurate to provide for an assessment of the consolidated situation of the network. This is why the final drafting retained for the new provisions was as close as possible to the reality experienced in cooperative networks: the amended version of the MFC now states that **one entity within a cooperative group shall be declared failing or likely to fail if the central body and all affiliates are also failing or likely to fail, shall be put into resolution if the central body and all affiliates also meet the criteria for entering resolution and shall be declared cash flow insolvent if the central body and all affiliates are in this situation.**

Those amendments have done away with the possibility of individual treatment of a member of a cooperative network and eliminated the most obvious source of NCWO risk ensuring a symmetric analysis in liquidation and resolution for the assessment of cash flow insolvency or entry into resolution by authorities.

2.2.2. Second block: transfers of central body powers to Resolution Authority

The second block concerns the transfers of powers from the central body. They were necessary since, although it had always been understood that “individual bail in” or “coordinated bail-in” would be implemented by the resolution authority using the broad powers it would take over from the central body, the possibility of such takeover was not explicitly stated in law. This is why Article L.613-49-1

MFC that deals with entry into resolution and the resolution process was amended to specify that, if the resolution of a cooperative group was decided, the resolution authority was able to exercise all the powers of the central body in addition to its resolution powers (new point V). This provision also had the effect of confirming the persistence of the powers of the central body in a resolution. To ensure a symmetric outcome in liquidation and avoid the NCWO risk, a similar provision was inserted in Article L.613-29 MFC that deals with the judicial liquidation of credit institutions. In order to address uncertainties about the relationships between the powers of the central body and the applicable law in liquidation, its wording was geared towards setting out the permanence of those powers in that context: *“the provisions of Book VI of the commercial code [dealing with insolvency] shall be no obstacle to the exercise by the liquidators, at any point of the procedure, of the powers of the central body”*. This addressed the strongest legal concern identified.

Finally, those provisions were completed by a clarification of Article L.612-34-1 MFC that deals with early intervention measures in order to make sure that the potential temporary administrator foreseen by BRRD in this context was also allowed to exercise the powers of the central body.

2.2.3. Third block: enshrining coordinated liquidation and resolution in law

The third block concerns the description in law of the principle of coordinated resolution and coordinated liquidation, respectively. An amendment to Article L.613-55-5 MFC that deals with the order of write-down and conversion specified that the resolution authority might take coordinated resolution measures when all the members of the cooperative group meet the criteria for entering resolution. It further stated that in this case the resolution authority had to make sure that all creditors and shareholders ranking equally or having the same rights were treated equally, in proportion of their admitted claims and notwithstanding the exact entity on which they have a claim. This was mirrored by a similar provision applying to the liquidators in Article L.613-29 MFC that deals with the liquidation of credit institutions. With those additions, the concepts of coordinated resolution and coordinated liquidation have become enshrined in law for the first time and the legislation has gone as far as

possible towards commingling the assets and liabilities of the members of cooperative groups, regardless of the structure of the group at the date of entry into resolution or liquidation, without erasing their legal personalities.

Those changes were also completed by small amendments to Article L.613-29 MFC motivated by practical concerns. In order to ensure in practice a coordinated liquidation while formally retaining multiple procedures, it was specified that the same judicial liquidator, the same banking liquidator and the same commercial Court would be dealing with all the members of a cooperative network in case of their (simultaneous) insolvency.

2.2.4. Fourth block: Protection of powers related to the solidarity mechanism in pre resolution phase

The fourth block of amendments covers safeguards for the powers of the central body when exercised in resolution or liquidation. Besides the explicit mention of the primacy of those powers over insolvency law, it was also specified in Article L.613-50-1 MFC that the resolution authority could not be opposed any legal or contractual provision, except provisions related to resolution itself or to the EU State aid framework, that would be an obstacle to the exercise of the powers of the central body by the resolution authority in resolution. This provision extended to those powers which have been taken over from the central body an already-existing provision which safeguards resolution powers.

Finally, a risk had been identified that some actions taken by the central body in order to safeguard the soundness of the network during a deterioration of its situation could be annulled in case a liquidation procedure started subsequently. The issue was that French law provides for the existence of a claw back period (“period suspecte”), between the commencement of the judicial liquidation proceedings and the date of cash flow insolvency (which can be set by the judge prior to the commencement of the proceedings), during which some actions may be annulled. There was therefore a risk that actions taken either to safeguard the liquidity or solvency of the cooperative network,

typically financial transfers with no counterparty or the exercise of the merger power¹⁵, could fall within this case. This is also why Article L.613-26 MFC was amended to provide that an action performed by the central body within the exercise of its legal/statutory missions since the cash flow insolvency could not be annulled.

The recently introduced provisions **hence fully secure legally the implementation of bail-in by making it clear that it can be executed through a failing or likely to fail assessment on the whole solidarity perimeter, followed by an assessment of the conditions for entry into resolution on the same perimeter, in turn followed by a coordinated Bail-in.**

¹⁵ The merger decided by the resolution authority inheriting the powers of the CB would be immediately effective on the basis of the new art. L.613-50-1 CMF, according to which no statutory provisions can be opposed to SM measures adopted for the purposes of finalising the resolution tool.

3. Next steps to strengthen the resolvability of cooperative groups

Even though French cooperative groups have demonstrated their resiliency under stress and the amendments to the French legal framework have strengthened the credibility and the feasibility of the bail in strategy for cooperative banks, this section gives prospective elements regarding the necessity to continue strengthening their resolvability, the same way it is requested for commercial banks. In this context this section will focus on the operationalisation of the bail in strategy, the Minimum Requirement for Own Funds and Eligible Liabilities (MREL) and on the other dimensions of resolvability.

3.1. Operationalising bail-in

Steps described in section 2.1 remain theoretical unless operational aspects are established to implement them. To this end, the Single Resolution Board (SRB) together with national resolution authorities (NRA) have put in place “playbooks” which are operational documents written by the bank that support both internal and external bail in execution (write-down and conversion mechanisms). This document should take into account the national legal framework when describing processes.

In this regard, bail-in playbooks for cooperative structures constitute a key element in the operationalisation of the preferred resolution strategy, by identifying (i) the perimeter of bail-inable instruments (ii) the management information systems (MIS) supporting different processes, (iii) governance and (iv) the sequence of procedural steps for internal and external execution of the bail-in.

For cooperative groups, specific issues have been identified regarding playbooks. The main issue is that, due to the nature of their capital instruments (see footnote 2) which are mostly not publicly traded and not safe kept in central securities depositaries (CSDs), cooperative banks will have, compared with other banks, to develop much more their description of internal bail-in execution. In the case of capitalistic banks, stakeholders such as market authorities, resolution authorities, CSDs and agents will be responsible, during the bail-in phase, for actions such as to suspending trading in debt

of the institution under resolution, setting a record date, possibly suspending settlement, writing down instruments and issuing new shares. However, in the case of unlisted instruments issued by cooperative banks and not safe kept in CSDs, all those actions have to be performed in-house or intra-group, which require a clear description within the bail-in playbook, as well as MIS capabilities to perform the entire bail-in sequence. As Fig.1 has highlighted, the capital advance and the subsequent write-down of capital instruments will need to be implemented at a group wide level, adding this complexity at a structural level.

As a complement to playbooks, dry runs and bail-in simulations help to evaluate concretely the operational readiness of the bank. They constitute an opportunity for the bank to demonstrate full capacity to absorb losses and recapitalise in a consistent manner with regulatory constraints. Dry-runs have not yet taken place at French cooperative banks but they will be organised as of 2022 on the basis of a dialogue between IRTs and individual banks with the aim to provide sufficient preparation time while avoiding any potential disruption to the normal course of business.

In order to evaluate the opportunity of retaining the post bail-in cooperative structure and to identify, assess and address the related challenges, the work of resolution authorities with cooperative groups has focused on i) simulations of the losses incurred under different scenarios ii) sequence of steps to go into resolution (including the use of the solidarity mechanism) iii) key challenges raised by the implementation of resolution tools. The aim of these exercises, which will have to be continued in the future in order to address the different issues, is to simulate the actions and processes to be followed by the groups and the resolution authority in order to: a) better identify the different options related to the post Bail-in corporate structure and cooperative structure preservation b) better identify the legal challenges to a change (or no change) of legal form arising from French financial and corporate law.

Finally, in a globalised market, it is crucial to address specific issues arising from cross-border resolution. Bail-in playbooks intend to take into account this dimension by describing specific

processes in certain key geographical areas. Going beyond this, it is crucial for resolution authorities to work together in order to strengthen their understanding of the resolution of cooperative banks resolution from a cross-border angle since this could become over the next decade a major topic with the development of the Banking union. It should however be recalled that approximately between 83% and 91% of the assets of French cooperative banks are located in France.

3.2. Minimum Requirement for Own Funds and Eligible Liabilities (MREL) at individual level

Article 45f(1) BRRD/12g(1) SRMR requires institutions that are not resolution entities to maintain at all times a minimum level of own funds and eligible liabilities at individual level in order to ensure the upstream of the losses they would incur to their resolution entity and the downstream of capital to recapitalise them.

In a cooperative group, two possibilities may arise under the current French and EU legal framework:

- Capitalistic subsidiaries of the central body that have become affiliates as a result of the exercise of an “opt-in” (see part 1.2.1) are treated as affiliates and contribute to meeting the common external MREL target of the consolidated point of entry in accordance with Article 45e(3) BRRD/12f(3) SRMR(see part 2.1.1.), provided the **strength of their solidarity mechanism is considered adequate by the resolution authority. This has been the case for all subsidiaries-affiliates of French cooperative groups¹⁶**. They may also, like other subsidiaries, be waived from the individual MREL provided specific requirements laid down in Article 45i BRRD/12h SRMR are met, but the case has not yet arisen.
- Capitalistic subsidiaries of the central body or of affiliates that have remained outside the cooperative network are subject to MREL at individual level in order to ensure loss upstream and capital downstream to the resolution entity, unless they are waived in accordance with Article 45f(3) or 45f(4) BRRD/12h(1) or 12h(2) SRMR, like subsidiaries in any classic capitalistic

¹⁶ 2022 and 2024 are respectively the intermediate targets and the final targets set for those entities.

group. French cooperative groups are well engaged in the process of building up MREL capacity at the level of their subsidiaries subject to MREL.

3.3. Other dimensions of resolvability

It is important to highlight, first, that external loss absorption capacities is not an issue for French cooperative banks, which can leverage on their important own funds and efficient management of their capital structure. Beyond this, and beyond the operationalisation of the Bail-in tool, which constitute key steps for resolvability, it is also important to consider other dimensions of resolvability. The smooth implementation of a resolution strategy depends indeed on a list of key legal and procedural steps for which the present section tries to provide key considerations. The following areas covered should be considered as a non-exhaustive list based on the SRB's document Expectation for banks¹⁷, broken down between, on the one hand, topics related to operational continuity and, on the other hand, topics related to MIS capabilities.

3.3.1. Ensuring the operational continuity

In order to carry out resolution efficiently, banks need to identify key services, the continuity of which should be ensured with a sufficient degree of certainty, as their interruption would put at risk the provision of services by the bank the discontinuance of which would, in turn, create risks to the financial system or the real economy. The SRB has developed a typology which distinguishes **critical** and **essential services** (together referred to as “**relevant services**”), as well as **operational assets** and **roles/staff**, necessary for the continuity of those critical functions and core business lines that, as an objective of resolution, must be preserved through resolution and any subsequent restructuring. A mapping of legal entities as well as a set of contractual arrangements (i.e. insertion of so-called

¹⁷ https://www.srb.europa.eu/system/files/media/document/efb_main_doc_final_web_0_0.pdf. Operational guidance published by the SRB should be also considered.

“resolution-proof clauses” ensuring continuity of contracts during the resolution period) are expected deliverables that should ensure operational continuity for the group should it enter resolution.

In the case of cooperative groups, two specific points can be highlighted. Firstly, the complex structure that results from a cooperative business model reinforces the necessity for authorities to have an exhaustive and searchable database where all the necessary information, mapped to critical services and core business lines (“service catalogue”) is gathered and can be accessed reliably, including in a stressed situation, for resolution planning or execution purposes. This service catalogue provides the information necessary during resolution on specific business areas that need to be closely followed by authorities. Secondly, because of their strong local footprint, cooperative structures tend to be less concerned by expectations concerning third-party contracts outside the European Union. For instance, although some French cooperative banks do have material activities located, for instance, in the United States, the majority of revenues are generated by French retail banking. Thus, arrangements regarding contractual agreements are usually covered by amendments to European legislation.

3.3.2. Access to financial market infrastructures (FMIs)

Like other banks, cooperative structures rely on FMIs for clearing, funding, asset servicing or payments. Like the elements mentioned in the previous point, there is a particular need for a continuity of access to those services in resolution, which results in the necessity for banks to be adequately prepared to keep meeting the expectations of those infrastructures even in (pre)-resolution. This implies that, most notably, banks need to have a clear overview of their use of such services to and develop contingency plans as well as other measures (e.g: providing adequate liquidity resources for certain areas, establishing legal arrangements) to ensure continuity of access to services provided by FMI. French cooperative groups continue to make progress on this topic.

3.3.3. Management Information Systems (MIS) Capabilities

Overall MIS capabilities encompass several aspects related to resolution that have a direct impact on individual and coordinated bail-in. As a reminder, a key expectation for banks is to have in place

adequate valuation capabilities and technological infrastructure in order to provide the information necessary for (i) the development and maintenance of resolution plans, (ii) the execution of a fair, prudent and realistic valuation and (iii) the effective application of resolution actions, also under rapidly changing conditions.

It has to be recalled that individual bail in and coordinated bail-in involve treating the **cooperative network** as if it were a single (resolution) entity. However, there is typically no such thing as consolidation at the network level since the accounting and prudential consolidation perimeters typically include capitalistic subsidiaries of the central body in addition to cooperative affiliates. French cooperative banks have therefore had to establish specific MIS capabilities for resolution reporting in order to summarize financial information regarding the balance sheet structure of the cooperative network in addition to individual legal entities and to the whole prudential group. Due to their complex nature, cooperative banks also face specific challenges to aggregate data because of the large number of entities involved. Authorities thus work to automatise as much as possible the possibility to extract data under stress conditions and within short timeframes.

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