BAND 88 NOMMER 1 FEBRUARIE 2025

JOURNAL OF CONTEMPORARY ROMAN-DUTCH LAW ISSN 1682-4490

Tydskrif vir Hedendaagse Romeins-Hollandse Reg

FEBRUARIE 2025 • TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG • 1–160

88
1

Redakteur
Coenraad Visser B Com LLB LLM

Assistentredakteurs
Hermie Coetzee B Com LLB LLM LLD
Johann Knobel BLC LLD
Annelize Nienaber BHons LLM LLD

LexisNexis®

BAND 88 NOMMER 1 FEBRUARIE 2025

ARTIKELS

The extra-judicial ejectment of land intruders: An evaluation of the relation between the possession and home concepts – *by EJ Marais & G Muller* 1

Trade union recognition in the context of retrenchment consultation – *by Wilhelmina Germishuys-Burchell* 30

The *DZ* defences and the development of the once-and-for-all rule – *by André Mukheibir* 53

The implementation of the Basel D-SIB Framework assessment methodology for systemically important banks in South Africa – *by Mamofana Lichaba & Corlia van Heerden* 82

The case for plain language and written employment contracts in South Africa – *by Marthinus van Staden & Michele van Eck* 106

AANTEKENINGE

Medico-legal and ethical aspects of consent and the use, care, and return of human remains held by museums and similar institutions – *by David McQuoid-Mason* 129

Who is the "same employer" for the purpose of an equal pay claim under section 6(4) of the Employment Equity Act 55 of 1998? – *by Shamier Ebrahim* 134

VONNISSE

The law of personality, the "*iniuria* approach", and a "false positive" – *KAB v National Union of Metal Workers of South Africa (NUMSA)* 2023 ILJ 2554 (FSB) – *by Cornelius Visser* 139

The correct approach to the burden of proof in the crime of rape – recent case law – *Michael Jantjies v The State* (532/2022) [2023] ZASCA 3 (15 January 2024); *Ximba v The State* (957/2022) [2023] ZASCA 6 (19 January 2024); *Sekoala v The State* (579/2022) [2024] ZASCA 18 (21 February 2024) – *by Jolandi Le Roux-Bouwer* 148

The implementation of the Basel D-SIB Framework assessment methodology for systemically important banks in South Africa

Mamofana Lichaba
LLB LLM LLD
Postdoctoral fellow, University of Pretoria

Corlia van Heerden
BProc LLB LLM LLM LLD
Professor in Mercantile Law, Absa Chair in Banking Law in Africa, Faculty of Law, University of Pretoria

OPSOMMING

Die implementering van die Basel "D-SIB" Raamwerk assesseringsmetodologie vir sistemies belangrike banke in Suid-Afrika

Hierdie artikel bied ŉ oorsig van die Basel Komitee se raamwerk vir die assesseringsmetodologie om banke wat op ŉ globale vlak sistemies belangrik is te identifiseer. Die daaropvolgende raamwerk vir die assessering en identifisering van banke wat binnelands sistemies belangrik is, is grootliks op hierdie raamwerk vir globale sistemies belangrike banke geskoei. Die doel van hierdie raamwerke is om die voorstelle van die Internasionale Finansiële Stabiliteitsraad aan te spreek. Hierdie voorstelle het ten doel om ŉ situasie te vermy waar banke op finansiële hulp van regerings kan steun (wat belastingbetalersfondse gebruik om banke wat riskante praktyke inspan om wins te maak, maar weens hul grootte, kompleksiteit, en blootstelling, as "te belangrik om te misluk" geag word) om hulle van ondergang te red, soos wat tydens die 2008 Globale Finansiële Krisis die geval was. Die artikel fokus bepaald op Suid-Afrika, as G20-lidland, se implementering van die raamwerk vir binnelandse belangrike banke en maak voorstelle vir wysiging van die Suid-Afrikaanse benadering.

1 INTRODUCTION

The 2008 Global Financial Crisis, which had its epicentre in the United States of America,[1] was not only a devastating financial crisis but also a very important regulatory eye-opener that brought about various regulatory changes aimed at promoting financial stability in its aftermath. One of the main challenges financial

1 The global financial crisis is largely attributed to mortgage defaults triggered by sub-prime mortgage lending in the United States of America and financial institutions' substantial engagement in toxic financial assets: see Financial Crisis Inquiry Commission United States of America *The financial crisis inquiry report – final report of the National Commission on the causes of the financial and economic crisis in the United States* (January 2011) https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (accessed 10-11-2023); Bernanke "The real effects of disrupted credit – evidence from the global financial crisis" (2018) https://www.brookings.edu/wp-content/uploads/2018/09/BPEA_Fall2018_The-real-effects-of-the-financial-crisis.pdf (accessed 10-11-2023).

regulators experienced during the global financial crisis was occasioned by the rise over the past few decades before the crisis, of financial conglomerates, dubbed "Too Big To Fail" (TBTF) or "Systemically Important Financial Institutions" (SIFIs). These TBTF institutions were, generally, comprised of supersized entities that were opaque and complex, and operated a myriad of business lines that posed great challenges from a regulatory and supervisory perspective, especially regarding the systemic risk they yielded and the threats to systemic stability should they fail.[2] Over the course of several years, these entities assumed systemic importance of such a nature that their exit from the financial system could in many instances trigger the collapse of the financial system, hence their subsequent assumption that their size, complexity, and interconnectedness "entitled" them to bailouts with taxpayers' money if they encountered financial distress. This, of course, exacerbated moral hazard,[3] increased questionable risk-taking, and became such a big headache for regulators globally that the regulatory sentiment after the global financial crisis was strongly against bailouts as the "go-to measure" to address the problem that SIFIs posed.[4]

In pursuit of the G-20 post-crisis reforms that elevated financial stability as a core pursuit and that was, *inter alia*, decidedly aimed at ending the TBTF problem that SIFIs posed,[5] the Financial Stability Board (FSB), as the international standard-setting body tasked with promoting financial stability on a global level, issued a *SIFI framework* in October 2010. This framework recommended that jurisdictions put measures in place to address the systemic risk and negative externalities that SIFIs pose to the domestic economy as well as with respect to the global financial system.[6] As the global prudential standard setter for banks, the Basel Committee on Banking Supervision (Basel Committee) published a *G-SIB framework* in November 2011, establishing an assessment methodology for global systemically important banks (G-SIBs)[7] to facilitate the annual identification of

2 Bernanke "Causes of the recent financial and economic crisis", statement before the Financial Crisis Inquiry Commission, Washington DC (2 September 2010) https://www.federalreserve.gov/newsevents/testimony/bernanke20100902a.htm (accessed 10-11-2023).

3 Moral hazard is the provision of government safety nets to distressed banks that encourage excessive risk-taking and disruption of market discipline (Pernell & Jung "Rethinking moral hazard: Government protection and bank risk-taking" 2024 *Socio-Economic Review* 625).

4 Goodhart & Avgouleas "Critical reflections on bank bail-ins" 2015 https://www.bis.org/-bcbs/events/bartnf/avgouleasgoodhart.pdf (accessed 9-11-2023).

5 The G-20 is composed of the Finance Ministers and Central Bank Governors of advanced and emerging markets and economies. It has been holding meetings annually since the aftermath of the global financial crisis to discuss matters regarding financial regulatory reform for the pursuit of financial stability and economic growth: see *Declaration of the summit on the financial market and the world economy*, Washington DC (15 November 2008) http://www.g20.utoronto.ca/2008/2008declaration1115.html (accessed 10-11-2023); London Summit *Leaders' statement* (2 April 2009) https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf (accessed 11-04-2023). The G-20 website lists the following members of the G20: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudia Arabia, South Africa, Turkey, United Kingdom, United States, the European Union, and the African Union.

6 Reducing the moral hazard posed by SIFIs – FSB *Recommendations and timelines* (October 2010) https://www.fsb.org/wp-content/uploads/r_101111a.pdf (accessed 10-11-2023).

7 The *G-SIB framework* was originally published in 2011 and updated in 2013, 2018, and 2021: see *Global systemically important banks: Assessment methodology and the additional loss absorbency requirements* (November 2011) https://www.bis.org/publ/bcbs207.pdf (accessed

continued on next page

G-SIBs by the FSB, in consultation with the Basel Committee.[8] The objective of the *Framework* is the setting of a higher loss absorbency requirement (G-SIB surcharge), which is imposed on banks that are identified as G-SIBs and which aims to enhance their loss-absorbing capacity (thus creating a higher loss-absorbing capacity) and to incentivise them to reduce their systemic profile to keep them "safe and sound".[9]

On a practical level, the *Framework* applies the G-SIB surcharge in accordance with a "bucketing approach", which creates four equally sized buckets through which G-SIBs are ranked in terms of their systemic scores, with the ultimate goal of imposing a corresponding G-SIB surcharge.[10] A fifth bucket is added and is intended to be unpopulated, as it aims to encourage banks either to maintain or reduce their systemic importance so that they do not pose grave risks to the financial system.[11] This means that a specific significantly large, complex, and interconnected bank is assessed utilising a variety of indicators, as we shall show below. If such a bank scores a specific number of basis points, it will be classified as a G-SIB to which a G-SIB surcharge will be applied. The level of the G-SIB surcharge for G-SIBs that obtain between 130 and 229 basis points and thus occupy the lowest bucket, is one per cent of the bank's risk-weighted assets (RWAs). Bucket two contains G-SIBs with a systemic score between 230 and 329 basis points and attracts a G-SIB surcharge of one and a half per cent of the RWAs. Bucket three contains G-SIBs with a systemic score of 330 to 429 basis points and is subject to a G-SIB surcharge of two per cent of RWAs. Bucket four contains G-SIBs with a systemic score of 430 to 529 basis points and is subject to a G-SIB surcharge of two and a half per cent of RWAs.[12] Importantly, G-SIBs that populate the fifth bucket would attract a much higher G-SIB surcharge equal to three and a half per cent of RWAs.[13] If the top threshold of the fifth bucket becomes occupied, the Basel Committee comments that new buckets would be created which are equal in size in terms of the systemic importance of the initial buckets and have incremental G-SIB surcharges of one per cent of RWAs.[14] This means that G-SIBs that occupy the sixth bucket, should it be created, would be subject to a G-SIB surcharge of four and a half per cent of RWAs, which surcharge will increase with one per cent of RWAs for any subsequent bucket. Consequently, this would mean that to avoid such high surcharges, G-SIBs should try and limit their systemic importance, because high surcharges will leave them with less capital to finance their business operations and investments.

10-11-2023); *Global systemically important banks: Updated assessment methodology and the higher loss absorbency requirement* (July 2013) https://www.bis.org/publ/bcbs255.pdf (accessed 10-11-2023); *Global systemically important banks: Revised assessment methodology and the higher loss absorbency requirement* (July 2018) https://www.bis.org/bcbs/publ/d445.pdf (accessed 10-11-2023); *Scope and definitions – global systemically important banks* (November 2021) https://www.bis.org/basel_framework/chapter/SCO/40.htm?inforce=-20211109&published=20211109 (accessed 10-11-2023).

8 See the FSB 2023 *List of global systemically important banks* (G-SIBs) https://www.fsb.org/wp-content/uploads/P271123.pdf (accessed 30-11-2023).

9 *Ibid*.

10 Para 28 of the Basel *G-SIB framework* (July 2018).

11 *Idem* para 29.

12 *Idem* para 46.

13 *Idem* para 47.

14 *Ibid*.

However, the FSB was not only concerned about the risk that G-SIBs posed to the global financial system but also found it equally necessary to regulate domestic systemically important banks (D-SIBs) more stringently, and to create a "D-SIB buffer" for them to improve their safety and soundness to avert financial crises. Following the G-20 leaders' assignment to the FSB to consult the Basel Committee to review the modalities to extend the Basel *G-SIB framework* to D-SIBs, the Committee released a *D-SIB framework* in October 2012. This framework is aimed at identifying banks that are D-SIBs and guides national authorities in assessing the systemic importance of banks to the domestic economy of their countries. Once identified as a D-SIB, the D-SIB buffer as part of the higher loss-absorbing requirement, as well as more stringent prudential regulation elements, are then applied to such D-SIBs to enhance its loss-absorbing capacity and contribute to its "safety and soundness".[15]

Notably, South Africa, being a member of the G-20,[16] committed to overhauling its financial legislative frameworks, *inter alia*, to incorporate the FSB and the Basel Committee frameworks for addressing the systemic importance of domestic banks as part of the G-20 post-crisis reforms aimed at dealing with the TBTF conundrum posed by SIFIs. Notably, unlike most other G-20 members, South Africa is a developing country without any global systemically important banks. Thus, South African banks are assessed only in terms of whether or not they are systemic regarding the domestic South African economy, according to the Basel *D-SIB framework* that was implemented in 2019.

This article provides a high-level overview of the Basel *G-SIB framework* assessment methodology for the identification of G-SIBs. This is necessary because the Basel *D-SIB framework* was modelled on the *G-SIB framework* and an overview of the *G-SIB framework* contextualises the subsequent discussion of the Basel *D-SIB framework* as an international best practice standard for the identification and regulation of domestic systemically important banks. The *D-SIB framework* is then unpacked, followed by a critical analysis of the implementation of the Basel *D-SIB framework* in South Africa to assess its alignment with the Basel *D-SIB framework* and comment on any need for possible reform.

2 OVERVIEW OF THE BASEL *G-SIB FRAMEWORK*

The Basel *G-SIB framework* is a rules-based approach used to assess the global systemic importance of G-SIBs by applying an indicator-based measurement approach, supplemented by supervisory judgement.[17] The indicator-based measurement approach measures the systemic importance of these G-SIBs across five systemically scored categories, which are assigned specific measuring indicators, with each category being equally weighted at 20 per cent to indicate a

15 *A framework for dealing with domestic systemically important banks* (October 2012) https://www.bis.org/publ/bcbs233.pdf (accessed 10-11-2023); *Extending the G-SIFI framework to domestic systemically important banks: Progress report to G-20 ministers and governors* (April 2012) https://www.fsb.org/wp-content/uploads/r_120420b.pdf (accessed 10-11-2023).

16 South Africa was one of the G-20 leaders at the 2010 G-20 Summit in Seoul. It thus undertook to align itself with the post-crisis new international financial regulatory reforms. See the *Seoul summit leaders' declaration* (12 November 2010) http://www.g20.utoronto.ca/2010/g20seoul.pdf (accessed 10-11-2023).

17 Paras 11 and 30 of the Basel *G-SIB framework* (2018); paras 40.4 and 40.23 of the Basel *G-SIB framework* (2021).

bank's systemic score. These indicators are size, interconnectedness, substitutability, complexity, and global cross-jurisdictional activity.[18] The size category has only one indicator whereas the other categories have multiple indicators, as discussed below.[19] The Basel Committee believes that these categories reflect different aspects generating negative externalities, thereby rendering a bank systemically important and critical to the smooth functioning of a financial system.[20]

As explained in the Basel *G-SIB assessment methodology – score calculation*,[21] the systemic score for each indicator equals an individual bank's reported value for that indicator, divided by the corresponding sample total, which is derived by adding all the values for that indicator that are held by all banks that are included in the systemic assessment, and the resulting value is then expressed in basis points.[22] The final systemic score for each category is calculated by averaging the systemic scores for the indicators that fall within that category.[23] As we mentioned, the systemic score for the size category, which has only one indicator, will thus be the total systemic score for that indicator. A bank's overall systemic score is produced by averaging these systemic scores for all five categories mentioned above and rounding the resulting value to the nearest whole basis point.[24] Banks that obtain a systemic score equal to or exceeding 130 basis points are identified as G-SIBs.[25]

2.1 The indicator-based measurement approach

2.1.1 *Size*

The size category is used as a key measure of a G-SIB bank's systemic importance.[26] This is because the systemic impact of distress or failure of a bank with a significantly large market share of global activity would significantly endanger the global financial system. The financial services provided by such a bank could not be replaced quickly, potentially destabilising the global financial markets and leading to a loss of public confidence in the financial system as a whole.[27]

---

18 Size has one indicator weighted 20 per cent. The categories of interconnectedness and complexity have three indicators that are each equally weighted 6.67 per cent. The category of substitutability has four indicators, two of which are each weighted 6.67 per cent, and the other two indicators are weighted 3.33 per cent each. The category of cross-jurisdictional activity has two indicators, which are each weighted 10 per cent. A banks' systemic importance is assessed annually based on the most recently collected data. See paras 15, 16, and 38 of the Basel *G-SIB framework* (2018); para 40.7 of the Basel G-SIB Framework (2021).

19 Para 27 of the Basel *G-SIB framework* (2018).

20 *Ibid*.

21 The G-SIB assessment methodology – score calculation (November 2014) https://www.bis.org/bcbs/publ/d296.pdf (accessed 10 November 2023).

22 Cornell Law School Legal Information Institute https://www.law.cornell.edu/wex/basis_point (accessed 31 July 2020) defines a basis point as a unit of measure that denotes a change in the interest rate of a financial instrument. It expresses changes in percentage point. One basis point is equal to one hundredth of 1 per cent (0.01 per cent). This means that 130 basis points is equivalent to 1.3 per cent.

23 The G-SIB assessment methodology – score calculation (November 2014) https://www.bis.org/bcbs/publ/d296.pdf (accessed 10 November 2023).

24 *Ibid*.

25 *Ibid*.

26 Para 22 of the Basel *G-SIB framework* (2018); para 40.15 of the Basel *G-SIB framework* (2021).

27 *Ibid*.

Size is measured in terms of the total exposure of a bank, as defined in the Basel III leverage ratio.[28] According to the Basel III *Leverage ratio framework and* disclosure *requirements*, a bank's leverage ratio consists of a non-risk-based capital measure[29] relative to the bank's total exposure measure and is expressed as a percentage.[30] The capital measure thus constitutes the bank's leverage ratio numerator, while the total exposure measure forms its denominator. Total exposure incorporates the bank's on-balance sheet exposures, derivatives exposures, securities financing transactions, and off-balance sheet items.[31] On-balance sheet exposure encompasses all assets on a bank's balance sheet, including certain on-balance sheet derivative collaterals and collaterals for securities financing transactions.[32] Derivatives comprise exposure arising from the underlying derivative contract and counterparty credit risk exposure.[33] Securities financing transactions constitute secured lending and borrowing transactions, including repurchase agreements and reverse repurchase agreements.[34] Off-balance sheet items include acceptances, standby letters of credit, and unsettled securities.[35]

28 See para 32 of the instructions for the end of 2022 G-SIB assessment exercise (2023) https://www.bis.org/bcbs/gsib/instr_end22_gsib.pdf (accessed 15-11-2023).

29 *International convergence of capital measurements and capital standards* (June 2006) https://www.bis.org/publ/bcbs128.pdf (accessed 23-11-2023) sets out minimum risk-based capital as regulatory capital requirements, which regulators should impose on banks to ensure their safety and soundness. The amount of capital that banks hold is weighted according to the riskiness of an individual bank's financial activities. Basel III *Leverage ratio framework and disclosure requirements* (2014) https://www.bis.org/publ/bcbs270.pdf (accessed 15-11-2023) requires banks to hold capital, that is not risk-weighted, relative to their total exposure.

30 Basel III *Leverage ratio framework and disclosure requirements* (2014) https://www.bis.org/publ/bcbs270.pdf (accessed 15-11-2023).

31 *Idem* para 14.

32 *Idem* para 15. Collateral includes cash or securities pledged to mitigate credit risk exposures: see Basel Committee *Banking supervision standardised approach: Credit risk mitigation* (2023) https://www.bis.org/basel_framework/chapter/CRE/22.htm (accessed 15-11-2023).

33 Derivatives exposure includes the notional amount of derivatives traded on exchange, over the counter, and through central counterparty, as well as potential future exposure of derivatives contracts (para 18 of the Basel III *Leverage ratio framework and disclosure requirements* (2014); paras 34 to 38 of the *Instructions for the end-2022 G-SIB assessment exercise* (2023)). A derivative transaction is defined as a "financial contract whose value depends on the values of one or more underlying assets" (*Framework for supervisory information about derivatives and trading activities – joint report by the Basel Committee on Banking Supervision and the Technical Committee of the International Organization of Securities Commission* (IOSCO) (1998) https://www.bis.org/publ/bcbs39.pdf (accessed 15-11-2023)). Counterparty risk is defined as "the risk that the counterparty to a transaction could default before the final settlement of the transaction's cash flows" (para 50.1 of the Basel *Framework* (2019) https://www.bis.org/basel_framework/ (accessed 10-11-2023).

34 Para 32 of the Basel III *Leverage ratio framework and disclosure requirements* (2014); para 50.13 of the Basel *Framework* (December 2019). A repurchase agreement is defined as a financing transaction in which a holder of securities sells them to an investor and agrees to buy them at a future specified date with interest and the buyer of the securities enters into a reverse repurchase agreement by agreeing to buy such securities with the intention of selling them to the initial holder (Schultz & Bockian "Repurchase agreements" in Strumeyer & Swammy *The capital markets: Evolution of the financial ecosystem* (2017) 184.

35 Para 38 of the Basel III *Leverage ratio framework and disclosure requirements* (2014). In a standby letter of credit, a seller's bank guarantees the performance of the seller relating to a certain obligation to a buyer, such as the delivery of purchased goods. A bank's acceptances refer to an obligation undertaken by a bank to pay a draft drawn on it at the maturity date

continued on next page

2.1.2 *Interconnectedness*

Interconnectedness relates to the risk of contagion, where financial distress in one financial institution spreads to other interconnected financial institutions with which a bank is networked through its contractual obligations,[36] thus creating the potential for a "domino effect" systemic collapse.[37] A bank's interconnectedness is evaluated with reference to three indicators: intra-financial system assets, intra-financial system liabilities, and securities outstanding.[38] Intra-financial system assets encompass all funds that are deposits or balances of a bank in other financial institutions.[39] They include certificates of deposit,[40] the unused portion of committed lines extended to other financial institutions,[41] holdings of securities issued by other financial institutions,[42] net positive current exposure of securities financing transactions with other financial institutions,[43] and over-the-counter (OTC)

(Sandler & Ferantte "Primer on trade finance: Export drafts, letters of credit, and banker's acceptances" 1986 *North Carolina J of International Law and Commercial Regulation* 613 630, 635).

36 Financial institutions in this context refer to banks, bank holding companies, securities firms, insurance companies, mutual funds, hedge funds, pension funds, and central counterparties (para 23 of the Basel *G-SIB framework* (2018); para 40.16 of the Basel *G-SIB framework* (2021); para 63 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

37 Hasman "A critical review of contagion risk in banking" 2013 *J of Economic Surveys* 978.

38 Para 23 of the Basel *G-SIB framework* (2018); para 40.16 of the Basel *G-SIB framework* (2021).

39 Para 66 of the instructions for the end-2022 G-SIB assessment exercise (2023).

40 *Idem* para 67 defines certificates of deposit as time deposits that are issued by a bank with a specific date.

41 *Idem* para 68. Banks create committed lines facilities from which borrowers can draw credit for a specified fee (Huang "How committed are bank lines of credit? Experiences in the subprime mortgage crisis" Federal Reserve Bank of Philadelphia Working Paper (August 2010) https://pdfs.semanticscholar.org/1a31/f1eefe59b-0881b728c0ead0f23aa1af3a628.pdf (accessed 15-11-2023).

42 These securities comprise total holdings of secured debt securities, senior unsecured debt securities, subordinated debt securities, commercial paper, and equity securities (paras 69–75 of the instructions for the end-2022 G-SIB assessment exercise (2023)). Secured debt securities, such as covered bonds, are types of debt that are secured by collateral and entitle secured creditors to a priority claim over the proceeds of the sale of an asset in case a bank goes bankrupt (Stulz & Johnson "An analysis of a secured debt" 1985 *J of Financial Economics* 501; Schwartz "Security interests and bankruptcy priorities: A review of current theories" 1981 *J of Legal Studies* 1). Senior unsecured debt securities are debts that are unsecured by a collateral ranking lower than secured debt securities in bankruptcy proceedings (Badoer, Dudley & James "Priority spreading of corporate debt" (2017) http://www.fmaconferences.org/Boston/VolatilityPriority_20161223.pdf (accessed 15-11-2023). Subordinated debt is subordinate to senior creditors of a bank during bankruptcy (Lambert "Bank debt securities: The investor's viewpoint" 1996 *Financial Analysts J* 93 94; *Markets for bank subordinated debt and equity in Basel Committee member countries: Working paper* (2003) https://www.bis.org/publ/bcbs_wp12.pdf (accessed 15-11-2023)). Companies issue commercial paper as a short-term debt instrument to raise capital at short-term interests (Kacperczyk & Schnabl "When safe proved risky: Commercial paper during the financial crisis of 2007–2009" 2010 *J of Economic Perspectives* 50). Equity securities include common stock and preferred shares. Common stock offers equity ownership that entitles stockholders to voting rights regarding the matters of a company whereas preferred stockholders receive a regular dividend and have priority over common stockholders; they do not have voting rights (Simpson *Financial markets, banking, and monetary policy* (2014) 168).

43 Securities financing transactions comprise of the following: net positive reverse repurchase agreement exposure (the value of cash provided exceeds the fair value of securities received);

continued on next page

derivatives transactions with other financial institutions that have a net positive fair value.[44] Intra-financial system liabilities encompass the funds in a bank that constitute deposits or loans owed to depository and non-depository financial institutions.[45] These intra-financial system liabilities are the converse of intra-financial system assets, as they include the unused portion of committed lines obtained from other financial institutions, net negative current exposure from securities financing transactions with other financial institutions, and OTC derivatives with other financial institutions that have a net negative fair value.[46] The third indicator of interconnectedness – securities outstanding – covers all securities issued by a bank or on its behalf, as stipulated under intra-financial system assets, irrespective of whether they are held by other financial institutions.[47]

2.1.3 *Substitutability*

Substitutability refers to the extent to which a bank's financial services and products can be replaced by other participants in the financial market, particularly by financial institution infrastructures.[48] As highlighted in the Basel *G-SIB framework*, the systemic impact of distress or failure of a bank with a significant market share in certain essential financial services that are difficult to substitute is expected to be relatively greater than that of a bank with a smaller market share in this context.[49] The potential disruption caused by such a bank could be further exacerbated by the increased cost of securing these critical financial services from other financial institutions.[50] Notably, the Basel Committee capped the systemic score for the category of substitutability to mitigate the significant impact it had on dominant banks when measured against each of its four indicators – payment activity, assets under custody, underwritten transactions in debt and equity markets, and trading volume.[51]

The payment activity indicator calculates the gross value of all cash payments that a bank sends *via* a large-value payment system, or through an agent or correspondent bank.[52] The assets under custody indicator captures assets that "a custodian bank" manages for custody and safekeeping on behalf of customers and

---

net positive reverse repurchase exposure (the securities provided exceeds the fair value of cash received); net positive securities lending exposure (the fair value of securities lent exceeds the value of cash collateral received (or the fair value of non-cash collateral received)); and net positive securities borrowing exposure (the value of cash collateral (or the fair value of non-cash collateral provided) exceeds the fair value of securities lent) (para 77 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

44 These derivatives exposure captures positive fair value of OTC derivatives and potential future exposure for derivatives (paras 80 and 84 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

45 Paras 85–88 of the instructions for the end-2022 G-SIB assessment exercise (2023).

46 *Idem* paras 89, 90, 93.

47 This indicator captures the book value of all outstanding secured debt securities, senior unsecured debt securities, outstanding subordinated debt securities, outstanding commercial paper, outstanding certificates of deposit, and common equity shares (paras 97–106 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

48 Para 24 of the Basel *G-SIB framework* (2018); para 40.17 of the Basel *G-SIB framework* (2023).

49 *Ibid*.

50 *Ibid*.

51 *Ibid*.

52 Payment is reported, regardless of the location from and purpose for which it was made, together with the settlement method that was used (paras 109–110 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

other financial institutions, including those held by third parties as sub-custodians.[53] The indicator of underwritten transactions in debt and equity markets comprises underwritten debt transactions, including debt instruments such as covered bonds and asset-backed securities transactions,[54] as well as underwritten equity transactions, which encompass initial public offerings and additional offerings of common stock.[55] The trading volume indicator captures the trading volume of securities issued by other public sector entities, including money market instruments, bills' bonds, securities issued or guaranteed by government agencies, multilateral development banks, and state and local governments.[56] Furthermore, the underwritten transactions in debt and equity markets indicator also captures potential disruptions in the provision of liquidity in the primary market, while the trading volume indicator focuses on disruptions in the secondary markets.[57]

2.1.4 *Complexity*

The fourth category of the indicator-based measurement approach measures the extent to which a bank's business model along with its structural and operational complexity, is positively related to a time-consuming, costly, and complex resolution should the bank encounter failure.[58] In terms of the FSB *Key attributes of effective resolution regimes for financial institutions*,[59] issued by the FSB in 2011 (and updated in 2014) as best practice guidance for the design of orderly bank resolution frameworks, the complexity category thus establishes the systemic importance of a bank with respect to such a bank's ability to be resolved in an orderly fashion should it fail. The complexity of a bank is measured with regard

53 The indicator of assets under custody also includes assets under management or assets under administration, provided that they fulfil the criteria of being held for custody or safekeeping (para 114 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

54 Loan underwriting does not constitute the underwritten debt transactions, but the sovereign debt is included as underwritten debt instruments (para 119 of the instructions for the end-2022 G-SIB assessment exercise (2023)). Asset-backed securities are defined as securities that are collateralised by assets, while mortgage-backed securities are securities backed by residential assets (Byrne "Mortgage-backed securities" in Strumeyer & Swammy 239; Castro "Asset-backed securities" in Strumeyer & Swammy 312). Schwarcz "The conundrum of covered bonds" 2011 *The Business Lawyer* 561 562 states that covered bonds are debt securities that are collateralised by the assets of the issuer of a bond.

55 Para 117 of the instructions for the end-2022 G-SIB assessment exercise (2023). The initial public offering occurs when a privately owned company offers stock for the first time and thus "goes public". The additional equity that a company may issue subsequently is called an additional offering of common stock, also known as a secondary offering (Weisberger "Equities" in Strumeyer & Swammy (2017) 435 439).

56 *Idem* para 122.

57 While the other indicators falling under the category of substitutability are each weighted 6.67 per cent, the risk weight of 6.67 per cent is split into 3.33 per cent each for the indicators of underwritten transactions in debt and equity markets and that of trading volume. This split is intended to account for the disruptions that a bank would cause in the provision of liquidity in the primary and secondary liquidity markets (para 16 of the Basel *G-SIB framework*; para 40.7 of the Basel *G-SIB framework* (2023)).

58 Para 25 of the Basel *G-SIB framework* (2018); para 40.18 of the Basel *G-SIB framework* (2021).

59 The FSB *Key attributes of effective resolution regimes for financial institutions* (2011) https://www.fsb.org/wp-content/uploads/r_111104cc.pdf (accessed 15-11-2023). For an updated version, see FSB *Key attributes of effective resolution regimes for financial institutions* (2014) https://www.fsb.org/wp-content/uploads/r_141015.pdf (accessed 15-11-2023).

to the following indicators: the notional amount of OTC derivatives, level 3 assets, and trading and available-for-sale securities.[60]

The indicator of the notional amount of OTC derivatives captures the notional amount of over-the-counter derivatives transactions that are cleared through a central counterparty and bilaterally.[61] The indicator of trading and available-for-sale securities captures the value of securities that are prone to asset fire-sale discounts during financial distress.[62] It is measured by "held for trading" securities and "available for sale" securities that qualify as level 1 assets and level 2 assets.[63] Securities that are held to be sold soon are classified as "trading securities", and are actively and frequently bought and sold for short-term fluctuations in price.[64] They are not classified as "available for sale" securities.[65] The indicator of level 3 assets encompasses assets the fair value of which cannot, by reason of their illiquidity, be determined easily using observable measures such as market prices or models, and their fair value can only be calculated using estimates.[66] Hence, they may not be valued easily during market distress.

60 Para 25 of the Basel *G-SIB framework* (2018); para 40.18 of the Basel *G-SIB framework* (2021).

61 Paras 127 and 130 of the instructions for the end-2022 G-SIB assessment exercise (2023).

62 *Ibid*. Coval & Stafford "Asset fire sales (and purchases) in equity markets" 2007 *J of Financial Economics* 479 define asset fire sales as a forced and immediate sale of assets at prices that are below their fundamental values.

63 Level 1 assets include marketable securities representing claims on, or guaranteed by, sovereigns, central banks, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, and the European Community or multilateral development banks, which meet the following criteria: they are assigned a zero per cent risk weight under the *Basel II framework* standardised approach for credit risk; are traded in large, deep, and active repo or cash markets characterised by a low level of concentration; have a proven record as a reliable source of liquidity in the markets even during stressed market conditions; and are not an obligation of a financial institution or any of its affiliates. Level 2A assets include marketable securities representing claims on or guaranteed by sovereigns or central banks or multilateral development banks that have 20 per cent risk weight and 15 per cent haircut (the percentage deduction from the market value of collateral); corporate debt securities not issued by a financial institution or any of its affiliates; and covered bonds not issued by a bank or its affiliates, with a long-term credit rating from a recognised external credit assessment institution. Level 2B assets that may be included as level 2 assets comprise residential mortgage bonds that have a 25 per cent haircut; corporate debt securities with a 50 per cent haircut; and common equity shares with a 50 per cent haircut. See paras 131, 135 and 136 of the instructions for the end-2022 G-SIB assessment exercise (January 2023); Paras 50 to 54 of Basel III: The liquidity coverage ratio and liquidity risk monitoring tools https://www.bis.org/publ/bcbs238.pdf (accessed 15-11-2023).

64 Para 133 of the instructions for the end-2022 G-SIB assessment exercise (2023).

65 Paras 117, 118, 119, 120 of the instructions for the end-2022 G-SIB assessment exercise (2023); Barth *et al* "Bank earnings and regulatory capital management using available for sale securities" 2017 *Review of Accounting Studies* 1761 1764 outlines categories of securities. The first category is trading securities that a bank actively trades and intends to sell in the near term. The second category is held-to-maturity securities that a bank has the intention and ability to hold to maturity. The third category is available-for-sale securities other than securities that are classified as trading and held to maturity.

66 Paras 48 and 49 of the Basel *G-SIB framework* (November 2011); Milbradt "Level 3 assets: Booking profits and concealing losses" 2012 *The Review of Financial Studies* 55 notes that level 3 assets are illiquid and include collateralised debt obligations, asset-backed securities, and other structured credit products.

2.1.5 *Cross-jurisdictional activity*

Cross-jurisdictional activity is indicative of the global impact of a bank's distress or failure and will vary according to its share of cross-jurisdictional claims and liabilities.[67] A bank with a substantial global systemic footprint will generate extensive cross-border spill-over effects and complicate the resolution process if it experiences failure.[68] Cross-jurisdictional claims include deposits and balances of a parent bank, as well as loans and advances to foreign banks and financial institutions, including its holdings of securities.[69] Cross-jurisdictional liabilities include the liabilities of all the bank's offices – headquarters, branches, and subsidiaries – to entities outside its home jurisdiction.[70]

2.2 The supervisory judgement approach

As noted by the Basel Committee, no single approach can perfectly assess systemic importance across all banks, because the nature and degree of risks they pose depend, *inter alia*, on their structural differences and financial activities.[71] Consequently, in addition to the indicator-based measurement approach, supervisory judgement may be applied by national supervisory authorities to assess the systemic importance of certain banks that should be regarded as G-SIBs but are not identified as such when only the quantitative approach, based on the indicator-based measurement approach scoring methodology, is applied, as we showed above.[72] Thus, supervisory judgement may be used to identify banks that do not meet the identification criteria of the indicator-based measurement approach, allowing them to be added to the list of G-SIBs.[73] In practice, this means that when a bank is assessed to determine whether it should be regarded as a G-SIB and falls short of the required systemic score, in terms of basis points, under the indicator-based measurement approach, the next phase is to apply the supervisory judgement approach to determine whether the bank is nevertheless globally systemically important.[74]

To enable the proper exercise of supervisory judgement, the Basel *G-SIB framework* sets out principles that guide the exercise of supervisory discretion to support the outcome of the indicator-based measurement approach.[75] One of the guiding principles is that supervisory judgement should be exercised only under

67 Para 21 of the Basel *G-SIB framework* (2018); paras 40.13 and 40.14 of the Basel *G-SIB framework* (2021).

68 Paras 48 and 49 of the Basel *G-SIB framework* (2011). The complexity of the resolution process may be the result of host and home authorities, governed by different legal frameworks, being involved, which may create a conflict of interest (Krimminger "The resolution of cross-border banks: Issues for deposit insurers and proposals for cooperation" 2008 *J of Financial Stability* 376 379)). Allen *et al Cross-border banking in Europe: Implications for financial stability and macroeconomic policies* (2011) https://cadmus.eui.eu/handle/1814/20202 (accessed 15-11-2023) state that spill-over effects may arise in cases where negative externalities arising from banks with common exposures are imposed on the financial systems and economy of their home or host jurisdictions.

69 Paras 142 and 143 of the instructions for the end-2022 G-SIB assessment exercise (2023).

70 *Idem* paras 148, 149.

71 Para 13 of the Basel *G-SIB framework* (July 2018).

72 *Ibid*.

73 Para 27 of the Basel *G-SIB framework* (2018); para 40.20 of the Basel *G-SIB framework* (2021).

74 *Ibid*.

75 Para 30 of the Basel *G-SIB framework* (2018); para 40.23 of the Basel *G-SIB framework* (2021).

exceptional circumstances (which are expected to be rare).[76] Such circumstances may, for example, arise when there is a material impact on the treatment of a specific bank, resulting in the imposition of a loss absorbency requirement that does not align with the bank's systemic importance.[77] In this regard, the Committee indicates that the outcome of supervisory judgement should be well documented and include verifiable qualitative and quantitative information.[78] Thus, supervisory judgement relies on both quantitative and qualitative information, and given its subjectivity in evaluating a bank's systemic importance, must be conducted transparently and effectively.[79]

The quantitative component of the supervisory judgement overlay comprises ancillary indicators relating to specific aspects of a bank's systemic importance that, as mentioned above, may not be adequately captured by the indicator-based measurement approach.[80] Such ancillary indicators of supervisory judgement include: the total liabilities of a bank;[81] retail funding;[82] total gross revenue;[83] total net revenue; [84] foreign net revenue;[85] the cross value of cash and securities provided in securities financing transactions;[86] the cross value of cash and securities received in securities financing transactions;[87] the cross positive fair value of OTC derivatives transactions;[88] the cross negative fair value of OTC derivatives

76 *Ibid*.

77 The Basel Committee argues that if such a situation arises from a host jurisdiction, a host supervisor must incorporate the views of a bank's supervisory college, comprising the home and major host supervisers, before applying the higher loss-absorbing requirement. If a home supervisor recommends the application of a lower loss absorbency requirement, it will be subject to higher scrutiny, and the same rule will apply to a host supervisor's suggestion of a higher loss absorbency requirement (para 35 of the Basel *G-SIB framework* (2018)).

78 Para 30 of the Basel *G-SIB framework* (2018); para 40.23 of the Basel *G-SIB framework* (2021).

79 Para 35 of the Basel *G-SIB framework* (2018); para 40.23 of the Basel *G-SIB framework* (2021).

80 Para 31 of the Basel *G-SIB framework* (2018); para 40.24 of the Basel *G-SIB framework* (2021).

81 Excluded from the total liabilities of a bank are own funds, capital, and incurred costs such as income tax and wages payable (para 150 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

82 Retail deposits are deposits minus deposits from depository institutions, central bank deposits, and any other deposits that are not held by retail customers or small businesses para 151 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

83 Gross revenue is interest income plus non-interest income (para 152 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

84 Total net revenue is interest income plus non-interest income minus interest expense (para 153 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

85 Foreign net revenue is revenue from the subsidiaries or branches of a bank located in other jurisdictions (para 154 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

86 Cross value of cash and securities provided in securities financing transactions encompass outgoing repurchase and reverse repurchase agreements, and securities lending and borrowing (para 155 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

87 Cross value of cash and securities received in securities financing transactions cover incoming and reverse repurchase agreements, and securities lending and borrowing ((para 156 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

88 Para 157 of the instructions for the end-2022 G-SIB assessment exercise (2023)).

transactions;[89] the number of jurisdictions;[90] held-to-maturity securities;[91] and the total cross value of payment sent by a bank for the reporting year.[92]

In addition to these quantitative indicators, the supervisory judgement approach may use qualitative information to assess a bank's systemic importance in cases such as a major restructuring of its operations.[93]

The Basel Committee, in the Basel *G-SIB framework*, further outlines sequential steps for incorporating supervisory judgement into the systemic scores that the indicator-based measurement approach produces.[94] These sequential steps are: collecting data and supervisory commentary for all banks in the sample; mechanically applying the indicator-based measurement approach and corresponding bucketing; proposing adjustments to the scores of individual banks by relevant national authorities based on an agreed process; applying the recommendations that the Basel Committee develops for the FSB; and making the final decision, by the FSB and relevant national authorities, in consultation with the Basel Committee.[95]

3 BASEL *D-SIB FRAMEWORK*: EXTENDING THE BASEL *G-SIB FRAMEWORK* TO A DOMESTIC ECONOMY

The Basel *D-SIB framework* is a principles-based approach modelled on the rules-based approach of the Basel *G-SIB framework*. It focuses on the systemic impact that the distress or failure of domestic banks will have on the domestic financial system and economy, rather than on the global economy.[96] The FSB does not undertake the evaluation of the systemic impact of the failure of domestic banks on their domestic financial system and economy, because such evaluation falls within the purview of the relevant national authorities.[97] To this end, host national authorities are required to evaluate the systemic importance of parent banks in their jurisdiction on a consolidated basis, because the distress or failure of subsidiaries outside the home jurisdiction may have potential spill-over effects[98] on the domestic financial system of the host country.[99] Furthermore, host national authorities must measure the systemic importance of subsidiaries at the local or sub-consolidated level because of their potential adverse impact on the

89 *Idem* para 158.
90 This indicator includes the number of countries where a bank has branches or subsidiaries or the entity that is consolidated under the accounting standards (para 159 of the instructions for the end-2022 G-SIB assessment exercise (2023)).
91 Para 161 of the instructions for the end-2022 G-SIB assessment exercise (2023)).
92 These are payments that are sent by a bank *via* large value payment systems or agent banks over the reporting year in each indicated currency (para 162 of the instructions for the end-2022 G-SIB assessment exercise (2023)).
93 Para 33 of the Basel *G-SIB framework* (2018); para 40.26 of the Basel *G-SIB framework* (2021).
94 Para 34 of the Basel *G-SIB framework* (2018); para 40.26 of the Basel *G-SIB framework* (2021).
95 *Ibid*.
96 Paras 1, 3, 4, 5, 13, and 14 of the Basel *D-SIB framework*. The principles-based approach entails high-level rules or principles that are generally and flexibly applied to achieve targeted outcomes at the regulated firms whereas the rules-based approach engages detailed and prescriptive rules for financial services regulation (Black *et al* "Making a success of principles-based regulation" 2007 *Law and Financial Markets Review* 191).
97 Para 4 of the Basel *D-SIB framework*.
98 See para 2.1 for the definition of spill-over effects.
99 Para 18 of the Basel *D-SIB framework*.

local economy. This requirement is particularly important for host jurisdictions dominated by subsidiaries of internationally active banking groups.[100]

The *Basel D-SIB framework*'s principles-based approach is designed to allow an appropriate degree of national discretion in assessing the systemic importance of banks and to provide flexibility in applying the D-SIB buffer to D-SIBs, in line with their level of systemic profile, as well as other stringent prudential requirements.[101] As we mentioned,[102] the D-SIB buffer regime is applied to D-SIBs to enhance their loss-absorbing capacity to reduce their probability of default, in this way safeguarding the financial system at the domestic level and preserving their safety and soundness. As we further indicated, the G-SIB surcharge imposed on G-SIBs aims to increase the resilience of the global financial system.[103] Given that it also considers the cross-border implications of internationally active banks within a domestic jurisdiction, the Basel Committee comments that a *D-SIB framework* should complement the *G-SIB framework* to address cross-border externalities posed by D-SIBs and promote a level playing field internationally.[104]

The Basel Committee holds the view that, except for cross-jurisdictional activity, a high-level category of the factors – size, interconnectedness, substitutability, and complexity, as outlined in the Basel *G-SIB framework* – are similarly relevant to identifying D-SIBs in terms of the Basel *D-SIB framework*.[105] Although the category of cross-jurisdictional activity is directly relevant to the Basel *G-SIB framework* because it focuses on the systemic impact of the cross-border negative externalities of G-SIBs,[106] the Committee notes that it may still be relevant to measuring systemic importance at the domestic level in jurisdictions that are home to domestic banks that are globally active (though not globally systemic) and accordingly pose cross-border systemic implications. Unlike the rules-based prescriptive approach of the Basel *G-SIB framework*, which consists of the indicator-based approach and weighting system for mandatorily ranking G-SIBs according to their systemic footprint, the Basel *D-SIB framework* is principles-based, recognising the national specificities characterising the financial system structures of individual jurisdictions.[107]

The Basel Committee recommends the annual assessment of the systemic importance of D-SIBs to ensure consistency in the frequency of assessments between the *G-SIB* and the *D-SIB frameworks* (given that a bank identified as a G-SIB will, by necessary implication, also be a D-SIB in the same jurisdiction).[108]

---

100 The sub-consolidated assessment of the systemic importance of subsidiaries includes the downstream of their subsidiaries in other jurisdictions (paras 19 and 20 of the Basel *D-SIB framework*).

101 Paras 4, 5, and 6 of the Basel *D-SIB framework*.

102 See para 1 above.

103 *Ibid*.

104 Para 5 of the Basel *D-SIB framework*.

105 The relevant national authorities may include an additional criterion for measuring the systemic importance of D-SIBs – the size of a bank relative to the Gross Domestic Product (GDP). A bank that is greater in size compared to the GDP may be considered systemically important in one jurisdiction whereas a bank of the same size but which is smaller relative to the GDP may not be eligible for identification as a D-SIB in another jurisdiction (paras 21, 22 and 23 of the Basel *D-SIB framework*).

106 Para 22 of the Basel *D-SIB framework*.

107 National authorities are allowed to adjust the risk weights they place on the categories that establish the systemic importance of banks (paras 21 and 24 of the Basel *D-SIB framework*).

108 Para 27 of the Basel *D-SIB framework*.

Assessing the systemic importance of banks could also be conducted if there are structurally important changes to the banking system, such as a merger of major banks.[109] To encourage banks to take the necessary steps to minimise the systemic risk they pose to their domestic economy and the resultant required magnitude of the D-SIB buffer, national authorities are required to disclose publicly information outlining the methodology employed to assess the systemic importance of D-SIBs.[110]

4 IMPLEMENTATION OF BASEL *D-SIB FRAMEWORK* IN SOUTH AFRICA

The South African financial system is currently regulated under the Financial Sector Regulation Act,[111] which introduced the relatively new Twin Peaks model of financial regulation in South Africa. The Twin Peaks model places equal emphasis on the prudential and the market conduct regulation of financial institutions. It established the Prudential Authority (PA) as the prudential regulator of financial institutions, including banks,[112] and the Financial Sector Conduct Authority (FSCA) as the market conduct regulator of financial institutions, also overseeing banks.[113] The central bank, the South African Reserve Bank (SARB),[114] often referred to as the "third peak",[115] is the macroprudential supervisor responsible for the overall financial system stability in South Africa.[116] In discharging its macroprudential surveillance function, the SARB is primarily aided by the twin regulators (the PA and the FSCA),[117] and the Financial Stability Oversight Committee (FSOC).[118] The Banks Act,[119] read with the Regulations

109 *Idem* para 26.
110 *Idem* para 28.
111 Act 9 of 2017 (FSR Act).
112 S 33 of the FSR Act.
113 S 57 of the FSR Act.
114 The SARB was created in terms of s 9 of the Currency and Banking Act 31 of 1920 and is currently governed in terms of the South African Reserve Bank Act 90 of 1989.
115 Van Heerden & Van Niekerk "Twin Peaks in South Africa: A new role for the central bank" 2017 *Law and Financial Markets Review* 152–162.
116 S 11(1) of the FSR Act.
117 Ss 33 and 57 of the FSR Act.
118 Ss 21, 33(*d*), and 57(*c*) of the FSR Act. The SARB's financial stability oversight role is executed at the top level by the FSOC, an interagency institution and creature of statute, which consists of the Governor of the SARB, the Deputy Governor of the SARB, the Chief Executive Officer of the PA, the Commissioner of the FSCA, the Chief Executive Officer of the National Credit Regulator, the Director of the Financial Intelligence Centre, and a maximum of three additional persons appointed by the Governor of the SARB (ss 20(2)(*a*) and (*b*), 22(1)). The FSOC is established by s 20(1). The FSOC has the following functions: to serve as a forum for representatives of the SARB and each of the financial sector regulators to be informed; to exchange views about the activities of the SARB and the financial sector regulators regarding financial stability; to make recommendations to the Governor of the SARB on the designation of SIFIs; to advise the Minister of Finance and the SARB on steps to be taken to promote, protect, or maintain, or to manage or prevent, systemic risks to financial stability, and matters relating to crisis management and prevention; to make recommendations to other organs of state regarding steps that are priate for them to take to assist in maintaining, managing, or preventing risks to financial stability; and to perform any other function conferred on it in terms of applicable legislation (s 21).
119 The Banks Act 94 of 1990.

relating to Banks,[120] to constitutes the main legislative framework for the regulation of the South African banking sector.

5 INDICATOR-BASED MEASUREMENT APPROACH

South Africa implemented the Basel D-SIB regime pursuant to the Regulations relating to Banks, which became effective in 2013.[121] The regulations mandated the Registrar of Banks, under the (then) Bank Supervision Department (BSD) of the SARB[122] in the pre-Twin Peaks dispensation, to identify D-SIBs. This process had to consider factors such as size, interconnectedness, substitutability, and complexity, each of which was assigned equal weight, according to the Basel *D-SIB framework*. The BSD then had to impose the additional minimum required percentage as a D-SIB buffer (as determined by the Registrar of Banks) on the identified D-SIBs. This buffer was intended to strengthen their ability to absorb loss during financial distress to preserve the South African banking and financial system, in line with the Basel D-SIB regime.[123] The BSD subsequently published, in the second edition of the Financial Stability Review of September 2013,[124] its assessment methodology for identification of banks as D-SIBs, which is broadly based on the approach of the Basel *G-SIB framework.* It consists of the indicator-based measurement approach, supplemented by supervisory judgement, as discussed above.[125] Having assumed the role of the prudential regulator that was previously tasked to the BSD, the PA replaced the BSD as the bank supervisor under the new Twin Peaks model. The PA is now responsible for bank supervision and for identifying banks as D-SIBs.[126] Notably, the legislature authorised the PA to identify banks as D-SIBs when the changes introduced by the Twin Peaks model regulatory architecture were incorporated into the Regulations relating to Banks.[127] The regulations require the PA to subject the identified D-SIBs to a D-SIB buffer from time to time,[128] without specifying the timeframe within which the PA may identify such banks as D-SIBs.

In 2019, the SARB, in a policy document titled *A methodology to determine which banks are systemically important within the South African context* (SARB *D-SIB framework*), revised the BSD's assessment methodology for identifying D-SIBs for domestic use.[129] The SARB issued its *D-SIB framework* as part of its

120 GN R1029 in *GG* 35950 of 12 December 2012 (*Reg Gaz* 9872) as amended (Banks Regulations).
121 Reg 38(8)(*e*)(vi) of the Banks Regulations.
122 The Registrar was the SARB official who was the head of the Office of Banks in the (then) Bank Supervision Department.
123 Reg 38(8)(*e*)(vi)(A) and (B) of the Banks Regulations.
124 The Financial Stability Review (September 2013) https://www.resbank.co.za/en/home/publications/publication-detail-pages/reviews/finstab-review/2013/5961 (accessed 18-03-2024).
125 See para 2 above.
126 Reg 38(8)(*e*)(vi)(A) of the Banks Regulations.
127 This is so as it was necessary to substitute the Office of the Registrar of Banks (which was then responsible for this task) under the BSD with the PA wherever reference was made to the BSD in the Banks Regulations to give effect to the then newly established Twin Peaks model regulatory architecture under the FSR Act.
128 Reg 38(8)(*e*)(vi) of the Banks Regulations.
129 https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-stability/resolution-planning/A-methodology-to-determine-which-banks-are-systemically-important-within-the-South-African-context%20(2).pdf (accessed 18-03-2024). The publication of the

continued on next page

expressed financial stability mandate that the FSR Act conferred on it. In this context, section 29 of the FSR Act requires the Governor of the SARB to identify financial institutions (not just banks, although currently only SIFI-banks have been identified) as SIFIs based on factors including size, complexity, interconnectedness, substitutability, the recommendations of the FSOC,[130] submissions by or for the financial institution concerned, and any other matters that may be prescribed by regulation.[131] Other than requiring the Governor of the SARB further to identify a SIFI-bank if a systemic event has occurred or is imminent,[132] the FSR Act does not specify a period for the Governor of the SARB to designate banks as SIFIs. Consistent with section 29, the Governor has designated six banks as D-SIBs, also referred to as SIFI-banks in South Africa, as published in the *Financial Stability Review* of November 2019:[133] Absa Bank Limited, The Standard Bank of South Africa Limited, FirstRand Bank Limited, Nedbank Limited, Investec Bank Limited, and Capitec Bank Limited.[134]

Similar to the BSD's original framework and consistent with the Basel *G-SIB framework*, the *SARB D-SIB framework* adopts the indicator-based measurement

---

SARB *D-SIB framework* followed the release of a discussion paper on the SARB's proposed D-SIB framework earlier in February 2019, which is similarly titled *A methodology to determine which banks are systemically important within the South African context* (February 2019) https://www.resbank.co.za/en/home/publications/publication-detail-pages/media-releases/2019/9105 (accessed 18-03-2024).

130 For a discussion of the establishment and purpose of the FSOC, see para 4.

131 S 29(3) of the FSR Act. S 1 *sv* "systemically important financial institutions" of the FSR Act defines a SIFI as "a financial institution that is designated in terms of section 29 of the Act". Thus, the provision is intended to cover various types of financial institutions that could be systemically important in South Africa. However, to date, only banks have been identified as SIFIs. The Governor of the SARB has the discretion to designate, on a non-delegable basis, financial institutions (thus banks and non-banks) as SIFIs, by written notice to a financial institution concerned (s 29(1)(*a*)). The SARB must provide the FSOC with a written notice of a proposed designation (s 29(2)(*a*)). Such notice must be accompanied by the grounds upon which the designation is proposed, and then invite the FSOC to advise on the proposed designation within a reasonable period. If the Governor of the SARB decides to designate the relevant financial institution as a SIFI, after considering the FSOC's advice, such financial institution will be afforded a reasonable period to make submissions (s 29(2)(*b*)). The designation of an institution as a SIFI does not imply or entitle it to a guarantee or any form of credit or other support from any organ of state (s 29(5)).

132 S 14 of the FSR Act. After designation, the financial institution concerned may make submissions, and then the Governor of the SARB would make a final determination concerning the confirmation or revocation of the designation, and duly notify the financial institution of the outcome (s 29(4)(*a*) and (*b*)). S 1 defines the term "systemic event" as "an event or a circumstance, including one that occurs or arises outside the Republic, that may reasonably be expected to have a substantial adverse effect on the financial system or on economic activity in the Republic, including an event or circumstance that leads to a loss of confidence that operators of, or participants in, payment systems, settlement systems or financial markets, or financial institutions, are able to continue to provide financial products or financial services, or services provided by a market infrastructure".

133 *The financial stability review* (November 2019) https://www.resbank.co.za/en/home/ publications/publication-detail-pages/reviews/finstab-review/2019/9606 (accessed 18-03-2024).

134 The Governor of the SARB notified the FSOC of the proposed designation and invited the financial institutions concerned to make submissions in line with the requirements of the FSR Act. These banks, which were designated as SIFIs, accepted their designation without contesting the decision of the Governor.

approach methodology, which is complemented by supervisory judgement.[135] This methodology has been modified to reflect the idiosyncrasies of the South African financial system and banking sector.[136] According to the SARB, the Basel *G-SIB framework* provides a solid basis for identifying D-SIBs, and as such, it has been adjusted to account for the structural characteristics of the South African financial system.[137] The SARB further notes that the Basel Committee recommended using the indicator-based measurement approach to reflect the various dimensions of negative externalities and contributions to systemic risk.[138]

The SARB *D-SIB framework* assesses the systemic importance of D-SIBs using the indicator-based measurement assessment approach, which comprises the categories of size, interconnectedness and substitutability (combined), complexity, and global activity.[139] However, the BSD's original framework differed from the updated version of the SARB *D-SIB framework* in that it did not combine the categories of interconnectedness and substitutability. Furthermore, the original BSD framework included an additional category that does not appear in the current SARB framework – "the impact on confidence within the financial sector/social impact", relating to the potential impact of a bank's failure on public confidence, financial inclusion, and the socio-economic consequences arising from the negative externalities on other banking institutions.[140] The SARB has not provided a reason for subsequently excluding this indicator from its D-SIB framework.

Consistent with the Basel Committee's approach, the systemic score for each South African D-SIB would be equal to the weighted average of 21 indicators of the indicator-based measurement approach (although the exact weighted average would differ from the Basel *D-SIB framework*, it would still total 100) under the following categories: size (40 per cent risk weight), the combination of interconnectedness and substitutability (40 per cent risk weight), complexity (10 per cent risk weight). and cross-jurisdictional activity (10 per cent risk weight).[141] The SARB stated that it would update the calculations of banks' systemic importance quarterly.[142]

5.1 Size

In the South African context, the category of size relates to the negative externalities that the distress or failure of a large bank would generate relative to a small bank. It is indicative of the greater losses inflicted on a bank's financial customers and

135 The data that are used to derive the indicators for each of these categories are obtained from a variety of sources. These include the banks' returns in terms of s 75 of the Banks Act; data from the South African Multiple Option Settlement (SAMOS) system; data about participation in the domestic foreign currency market; data about participation in the primary bond and money market; and data about security settlement and custodian services in the secondary market. The SARB has indicated that it will review its assessment methodology annually or at any time when there are relevant developments internationally or when information justifying a review is available (paras 4 and 8 of the SARB *D-SIB framework*).

136 Para 5 of the SARB *D-SIB framework*.

137 *Idem* para 3.

138 *Ibid*.

139 *Ibid*.

140 *The financial Stability Review* (September 2013) https://www.resbank.co.za/en/home/-publications/publication-detail-pages/reviews/finstab-review/2013/5961 (accessed 18-03-2024).

141 Para 5 of the SARB *D-SIB framework*.

142 *Idem* para 8.

employees, as well as the difficulty in replacing its financial services and activities.[143] The indicators of size are the total assets and off-balance sheet items, short-term contractual claims, the number of customers, the number of branches, and the number of employees.[144] Similar to the Basel Committee's approach, the SARB *D-SIB framework* measures the size of a bank by the total exposure of a bank, including both on-balance and off-balance sheet items. However, the SARB *D-SIB framework* also incorporates specified additional indicators that reflect the size of South African banks, but does not provide definitions for these indicators. The SARB noted that the category of size is relevant in the assessment of the South African banking sector, given its dominance by large banks and its high level of concentration.[145] The distress or failure of one bank could potentially endanger the financial system and cause adverse effects to the economy.[146] Therefore, unlike the 20 per cent risk weight assigned to the size category in the Basel *G-SIB framework*, a risk weight of 40 per cent is assigned to the South African size category to recognise the significantly concentrated nature of the South African banking sector.[147]

5.2 Interconnectedness and substitutability

The SARB approach also differs from the Basel Committee approach in that the SARB combines the categories of interconnectedness and substitutability to measure the systemic importance of D-SIBs under the SARB *D-SIB framework*.[148] The SARB justifies this combination on the grounds that these indicators overlap, although it does not explain the extent of such overlap. However, the SARB maintains that this combination does not deviate from the Basel *G-SIB framework*, given that the combined category receives a weight of 40 per cent, whereas under the Basel *G-SIB framework*, interconnectedness and substitutability each receive a weight of 20 per cent, which also add up to 40 per cent.[149] The category of interconnectedness indicates the extent to which South African financial institutions are intertwined with banks, particularly because of financial conglomerates, raising concerns about contagion risk.[150] Consistent with the Basel Committee's definition, "substitutability" in the South African context demonstrates the extent to which the

143 *Idem* para 5.1.
144 *Idem* para 7.
145 *Ibid*. The existence of large banks in the South African financial system was also acknowledged in the IMF *South Africa financial sector assessment program – financial system stability assessment* (2022) https://www.treasury.gov.za/comm_media/press/2022/2022021701%20FSAP%20Financial%20System%20Stability%20Assessment%20Feb%202022.pdf (accessed 18-03-2024).
146 Para 7 of the SARB *D-SIB framework*.
147 *Idem* para 5.1.
148 *Idem* para 5.2.
149 *Ibid*.
150 See para 5.2 of the SARB *D-SIB framework*. S 160 of the FSR Act stipulates that the PA may designate a financial institution as a financial conglomerate. The IMF *South Africa financial system stability assessment* (December 2014) recognised the existence of financial conglomerates in the South African financial landscape https://www.imf.org/external/-pubs/ft/scr/2014/cr14340.pdf (accessed 18-03-2024); *FSB Peer review of South Africa – review report* (February 2013) http://www.fsb.org/wp-content/uploads/r_130205.pdf (accessed 18-03-2023); Barth *et al* "Breaking (banks) up is hard to do: New perspective on Too Big to Fail" in Acharya *et al* (eds) *The social value of the financial sector – Too Big to Fail or just big*? (2014) 377 define contagion as "a risk that the financial distress in a particular financial institution could propagate to other financial institutions, potentially destabilising the entire financial system".

activities of a bank could be replaced by, or transferred to, other financial market participants should such a bank collapse.[151]

The category of interconnectedness and substitutability is divided into three indicators: interconnectedness through exposure to other financial institutions, interconnectedness through market infrastructure, and interconnectedness through financial market participation. The indicator of interconnectedness through exposure to other financial institutions is assessed based on the following sub-indicators: interbank liabilities; interbank assets; cross-holdings; funding of non-bank financial institutions; loans to non-bank financial institutions; and wholesale funding.[152] Except for the wholesale funding indicator, these indicators largely mirror the indicators of intra-financial system assets and liabilities found in the interconnectedness category of the Basel Committee's approach. The indicator of interconnectedness through market infrastructure comprises the following sub-indicators: the share in value settled in the SAMOS system,[153] the value in money market settlement, the share in equity settlement, the value in bond settlement, and participation in Strate,[154] custodian services for equity, bonds, and the money market.[155] These indicators are, generally, similar to those of the total payment activity, underwritten equity and bond transactions, and assets under custody, which are incorporated under the substitutability category of the Basel Committee's approach. Finally, the indicator of interconnectedness through financial market participation consists of the following sub-indicators: the take-up ratio in the primary bond auction, Treasury bills[156] and the SARB debenture auction participation,[157] foreign exchange market activity, and derivatives activities.[158] Similar to the indicators of size, the SARB does not provide detailed definitions of the indicators in the category of interconnectedness and substitutability.

5.3 Complexity

The third category establishes the systemic impact of the distress or failure of a bank, considering its business model, operational model, and organisational structure, how these factors would complicate a bank's resolution process[159]

151 Para 5.2 of the SARB *D-SIB framework*.

152 *Idem* para 7.

153 SAMOS is the South African Real Time Gross Settlement system, an automated interbank settlement system provided by the SARB, which settles large-value and retail payments on a real-time basis: https://www.resbank.co.za/en/home/what-we-do/payments-and-settlements/settlement-services (accessed 26-03-2024).

154 Strate is a South African central securities depository providing electronic settlement of equities, bonds and money market securities, and collateral management services: https://www.strate.co.za/ (accessed 26-03-2024).

155 Para 7 of the SARB *D-SIB framework*.

156 Treasury bills are defined as "short-term debt instruments denominated in South African Rands (ZAR), which are sold at a discount to par and carry no coupon": see *Treasury bill information memorandum of the Republic of South Africa* (October 2008) http://www.treasury.gov.za/divisions/alm/Treasury%20Bills%20Information%20Memorandum.pdf (accessed 26-03-2024).

157 The SARB issues debentures to the market through auctions to receive liquidity: see Operational Notice – Financial Markets Department *Money markets operations* (June 2022) https://www.resbank.co.za/content/dam/sarb/publications/financial-markets/notices/operational-notices/Operational-notice-Money-Market-Operations-June-2022.pdf (accessed 26-03-2024).

158 Para 7 of the SARB *D-SIB framework*.

159 For a discussion of resolution regimes, see para 2 above.

(should it encounter failure), and the assessment of its systemic contribution.[160] The notional value of OTC derivatives is the indicator of complexity,[161] and, as with the other indicators, it is not defined in the SARB *D-SIB framework*. Notably, the SARB also includes derivatives activities under the indicator of interconnectedness through financial market participation, as discussed above. The SARB *D-SIB framework* further does not include other indicators that the Basel *G-SIB framework* approach incorporates in this category – level 3 assets, and trading and available-for-sale securities. However, the SARB acknowledges the limited engagement of South African banking institutions in complex financial markets, such as derivatives markets, which justifies the reduced risk weight of ten per cent assigned to this indicator.[162]

5.4 Global activity

The category of global activity indicates the systemic impact of a bank's failure, which correlates to the global market share of its cross-jurisdictional assets and liabilities, also causing spill-over effects and complicating resolution.[163] The SARB justified the inclusion of the global activity category in its *D-SIB framework* based on the substantial presence of South African banks in other jurisdictions, especially in Africa, conducting cross-border activities, and with a systemic footprint that may have negative spill-over effects on the South African financial system.[164] This approach aligns with the Basel Committee's view that the global cross-jurisdictional activity may be relevant to assessing the systemic importance of banks by capturing the regional perspective of systemic risk for jurisdictions that are home to internationally active banks with subsidiaries in other jurisdictions.[165] However, the SARB has assigned this category a risk weight of 10 per cent because of the minimal cross-jurisdictional activity of South African banks, which are primarily located across Africa.[166] Notably, the indicators falling under this category are also not defined in the SARB *D-SIB framework*.

6 SUPERVISORY JUDGEMENT

As permitted by the Basel *G-SIB framework*, the SARB enhances its indicator-based measurement methodology with a supervisory judgement overlay. The supervisory judgement approach allows the SARB to exercise its discretion in identifying banks as D-SIBs whose systemic importance might otherwise be overlooked by the scoring methodology of the indicator-based measurement approach.[167] The SARB incorporates the following indicators to identify systemically important banks under the supervisory judgement approach, which supplements the indicator-based measurement approach. These are the reaction of investors, depositors, and the broader financial markets in the event of a bank

160 Para 5.4 of the SARB *D-SIB framework*.
161 *Idem* para 7.
162 *Idem* para 5.4; the *Financial Stability Review* (September 2013) https://www.resbank.co.za/en/home/publications/publication-detail-pages/reviews/finstab-review/2013/5961 (accessed 26-03-2024).
163 Para 5.3 of the SARB *D-SIB framework*.
164 *Ibid*; IMF *South Africa financial sector assessment program – detailed assessment of compliance on the Basel Core principles for effective banking supervision* (March 2015) https://www.imf.org/external/pubs/ft/scr/2015/cr1555.pdf (accessed 26-03-2024).
165 See para 3 above.
166 Para 5.3 of the SARB *D-SIB framework*.
167 *Idem* para 6.

failure; the geographical area serviced and the possibility of a suitable substitute; the products provided and the possibility of a suitable substitute; the services provided and the possibility of a suitable substitute; the number of clients and employees of an institution; and the possible negative perception from an international market perspective.[168]

The indicator of "the number of clients and employees of an institution" appears to complement the category of the size of the indicator-based measurement approach in the SARB *D-SIB framework*. This is because these indicators are similar to those in the category of size under the SARB indicator-based measurement approach.[169] Seemingly, the following indicators supplement the category of substitutability of the SARB *D-SIB framework*'s indicator-based measurement approach: the geographical area serviced and the possibility of a suitable substitute, products provided and the possibility of a suitable substitute, and services provided and the possibility of a suitable substitute.[170] This is because they pertain to the substitutability of services and products, as well as to the possibility of a substitute in a particular geographical area. These considerations resemble factors that are taken into account in the indicator-based measurement approach when assessing the degree of a bank's substitutability, should it fail. The indicators of "the reaction of investors, depositors, and broader financial markets if a bank fails" and the "possible negative perception from an international market perspective" seemingly signal the potential loss of public confidence in the financial system resulting from the distress or failure of a bank. However, this indicator does not appear to complement any of the indicators of the SARB indicator-based measurement approach.[171] That said, this SARB supervisory overlay indicator appears to resemble, partly, the indicator of "the impact on confidence within the financial sector or social impact", relating to the potential impact of a bank's failure on public confidence, financial inclusion, and the socio-economic consequences arising from the negative externalities to other banking institutions", which featured in the original *BSD D-SIB framework* released in 2013.[172]

7 CONCLUSION

The implementation of the Basel *D-SIB framework* in South Africa, as a G-20-member country, gives effect to the G-20 financial regulation reforms, which incorporate the *FSB SIFI framework*[173] measures aimed at eliminating the TBTF conundrum that SIFIs posed. The original *BSD framework* was implemented in 2013 within the context of the South African banking sector, consistent with the Regulations relating to Banks, and was subsequently modified by the SARB *D-SIB framework* in 2019. This modification was part of the SARB's express financial stability mandate set out in section 11 of the FSR Act, which later introduced the new South African Twin Peaks model in 2017. It is commendable that the SARB *D-SIB framework* is, generally, aligned with the Basel Committee approach, as set out in the Basel *G-SIB framework*, consisting of the indicator-based measurement approach supplemented by a supervisory overlay. Additionally, some necessary modifications have been made to the indicators and risk weights

168 *Ibid*.
169 See para 5 above.
170 *Ibid*.
171 *Ibid*.
172 *Ibid*.
173 See para 1 above.

to reflect the idiosyncrasies of the South African domestic financial system and banking sector.

However, we submit that the South African D-SIB regime could be suitably enhanced by introducing pertinent changes. We recommend that the SARB set an annual timeframe for identifying banks as SIFIs in order to regularly review the systemic footprint of those banks previously designated as SIFIs, as well as any changes that may affect the systemic profile of banks and to maintain a current list of D-SIBs/SIFI-banks.

Further, we are of the opinion that the PA is not the competent authority to identify D-SIBs, because its task is focused solely on the prudential regulation of financial institutions within the Twin Peaks model. Thus, we propose that the Regulations relating to Banks be amended to remove the PA's role in identifying D-SIBs and instead reference the designation power of the Governor in terms of section 29 of the FSR Act. This is because, before the introduction of the South African Twin Peaks model, the Office of the Registrar of Banks under the then D-SIB carried out the identification under the Regulations relating to Banks. The purpose of this identification was to implement the D-SIB buffer regime because the BSD was also responsible for the prudential regulation of banks under the former South African micro-prudential regulatory approach, in terms of the Banks Act, and was thus equipped with the necessary prudential toolkit for regulating banks in the pre-Twin Peaks regime. As noted, when the Regulations relating to Banks were amended to incorporate the changes that the South African Twin Peaks model introduced under the FSR Act, the PA assumed the tasks of the BSD. However, we submit that a clear distinction now exists between the SARB's and the PA's respective roles concerning financial stability and prudential regulation under the new Twin Peaks model. Notably, the SARB is the systemic regulator mandated with the promotion and maintenance of financial stability, whereas the PA is now the prudential regulator of financial institutions, including SIFIs. The Twin Peaks model introduced a major regulatory shift, as the PA is now assigned only the prudential regulatory task, and not the systemic supervisory role that the SARB previously, albeit implicitly, performed. However, through the execution of its prudential regulation mandate, the FSR Act also requires the PA (with the FSCA) to assist the SARB in maintaining financial stability. This is distinguishable from the (then) micro-prudential regime in terms of which the BSD was conferred with systemic supervisory powers (including the macro-prudential analysis part of which entailed the identification of banks as D-SIBs) as well as being the prudential regulatory authority. Thus, we submit that the legislature could not have intentionally charged the PA with the authority to identify D-SIBs, while the PA itself is not vested with systemic supervisory authority, which, we submit, would, generally, constitute the required competence for assessing systemic risks emanating from financial institutions, including banks. Based on this analysis, we conclude that the legislature inadvertently authorised the PA to identify D-SIBs when the Regulations relating to Banks were amended. This is because it was necessary to replace the Office of the Registrar under the then BSD with the PA wherever the Office of the Registrar appeared in the regulations, to give effect to the newly established Twin Peaks model that the FSR Act introduced. We further submit that it is redundant to authorise the PA to identify banks as D-SIBs when, in practice, the task of the PA involves only the classification of banks as D-SIBs, being the same banks that the Governor of the

SARB had already identified as SIFIs in 2019, following the introduction of the Twin Peaks model in 2017.

Therefore, we recommend that the authority for D-SIB identification in the Regulations relating to Banks should also, in accordance with section 29(1)(*a*) of the FSR Act, be vested in the SARB, in consultation with the FSOC. This is because, as the central bank and macroprudential supervisor, and as the apex committee responsible for decisions on financial stability, the SARB and the FSOC are appropriately knowledgeable regarding the systemic dynamics of financial institutions. This submission is also based on the fact that the SARB initially developed the D-SIB identification methodology – correctly, we submit – because part of its duties assigned to the (then) BSD included the assessment of system-wide risks, including risks posed by financial institutions. This duty remains with the SARB.

For the purpose of fostering transparency, facilitating a deeper understanding of how the assessment of the systemic importance of banks is conducted, and ensuring public confidence in the integrity of the process, we recommend that the SARB annually publish the following information on its website and in the *Financial Stability Review* regarding the identification of banks as D-SIBs or SIFI-banks: the assessment methodology used for the identification of each bank as a D-SIB or SIFI-bank; detailed definitions of the indicators used in the indicator-based measurement approach and the systemic score obtained by each D-SIB/SIFI-bank, as well as the applicable D-SIB buffer; the rationale for the use of a supervisory judgement overlay in establishing a bank's systemic importance; and, where applicable, a description of the systemic event that occurred or was imminent, justifying emergency designation of a bank as a SIFI, were section 14 of the FSR Act to be invoked.

We also recommend that the SARB provide further clarity as to the degree of concentration and dominance of South African banks that justifies assigning a risk weight of 40 per cent to the category of size alone, which is equivalent to the combined risk weight of the categories of interconnectedness and substitutability. Furthermore, we submit that the SARB should elaborate on the extent of overlap between the indicators of interconnectedness and substitutability, and how such overlap justifies the combination of these two categories of systemic importance. Additionally, we recommend that the indicator of derivatives, which falls into the combined categories of interconnectedness and substitutability (resorting under the indicator of interconnectedness through financial market participation), be eliminated, because it is already captured in the category of complexity. The SARB should also justify including OTC derivatives as the sole indicator of complexity, and excluding the indicators of level 3 assets and trading and available-for-sale securities, which appear in the Basel *G-SIB framework*.

TYDSKRIF VIR HEDENDAAGSE
ROMEINS-HOLLANDSE REG

Journal of Contemporary Roman-Dutch Law

Posbus 792 Durban 4001 PO Box 792 Durban 4001

10 February 2025

TO WHOM IT MAY CONCERN

I hereby confirm that the *Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law* is a fully accredited law journal on the IBSS list.

According to the requirements of this journal, a manuscript is considered for publication only if it meets the following requirements:

- it has been recommended for publication following a double, blind peer review process;
- it is the author's own work and does not constitute plagiarism; and
- it has not been submitted for publication elsewhere.

The following contribution met these requirements and was published in 2025:

- M Lichaba & C van Heerden "The implementation of the Basel D-SIB Framework assessment methodology for systemically important banks in South Africa" (2025) 88(1) THRHR 82–105

Professor Coenraad Visser
EDITOR