bankenverband

Comments

of the Association of German Banks on the FSB consultative document "Application of the Key Attributes of Effective Resolution Regimes to Non-Bank Financial Institutions"

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We welcome the opportunity to comment on this consultative document. As participants in, and users of, financial market infrastructures (FMIs), we strongly support measures and guidance aimed at preserving the critical services of ailing FMIs. It is therefore with great interest that we studied the guidance set out by FSB in the consultative document.

Unlike in the July 2012 consultation on this issue by CPSS and IOSCO covering both recovery and resolution, the guidance concerning resolution has evidently been incorporated into this consultation document while recovery is dealt with by CPSS and IOSCO in the consultative report entitled "Recovery of financial market infrastructures", which was also published on 12 August 2013. This approach makes excellent sense, in our view, since as an annex to the "Key Attributes of Effective Resolution Regimes for Financial Institutions" (Key Attributes) offering special guidance for FMIs, this document can be integrated into, and complement the already established and accepted principles for the resolution of banks. The inclusion in the Key Attributes reflects the close relationship between the two types of institution. It shows the interdependencies and the potential systemic importance of FMIs and their participants while respecting the special characteristics of FMIs compared to banks. We would nevertheless like to stress that recovery and resolution are issues which are closely linked to one another, so it is absolutely essential that the FSB and CPSS/IOSCO principles use the same terminology and ascribe the same meaning to the terms utilised, that processes are coordinated, that there is the same understanding of the triggers for the various stages and that the competent authorities consult and coordinate with each other.

The same applies to the guidance regarding client asset protection in resolution (Appendix III of the consultative document) and the Recommendations regarding the protection of client assets which are currently being discussed by IOSCO.

We would now like to answer specific questions on Appendix I and III:

Draft Implementation Guidance: Resolution of Financial Market Infrastructure (FMI) and Resolution of Systemically Important FMI Participants
Questions for consultation

Part I of the Draft Guidance: Resolution of Financial Market Infrastructure

1. *Does the draft guidance adequately cover the principal considerations that are relevant to the resolution of each class of FMI (CCPs, CSDs, SSS, PS and TRs)? Would it be helpful if the guidance distinguished more between different classes of FMI? If so, please explain.*

We warmly welcome the approach of tailoring the Key Attributes (KAs) to FMIs. We also believe it makes excellent sense to deal with all the considerations specific to FMIs in an annex of the existing Key Attributes. This makes it sufficiently clear that, since these institutions have totally different business models to those of banks and are of special systemic importance, not all the principles and resolution powers set out in the Key Attributes are suitable for FMIs "as is". We therefore support this fleshing out of KA 1.2.

As long as all FMIs are affected equally, the special features which are common to all FMIs when applying the KA can – as in the consultative document – be jointly dealt with. But where features specific only to certain FMIs are involved, it would make better sense to take account of these special feature and describe how to accommodate them in the application of the Key Attributes, and then to specify whether, and to what extent, these arrangements are relevant to the other types of FMI.

There would be no need to explicitly name the type of FMI in question using this approach. It would be sufficient to mention the characteristics that require special arrangements to be applied to certain types of FMI (by describing their typical services or risk situation, for instance). This would ensure that FMIs which perform several functions or services are always subject to the rules specially tailored to them.

A number of the proposals in the draft guidance relate primarily to CCPs and their special collateral and loss allocation mechanisms (e.g. paragraph 4.8 (iv) to (vi)). This is based on the assumption that the default of participants represents a risk intrinsic to this type of business and that the involvement of participants in resolution is consequently justified. But this assumption does necessarily not hold true for other types of FMI. If, for example, participants in a trade repository default and the FMI get into financial difficulties as a result, this is the materialisation not of a risk intrinsic to the business of a trade repository, but of a general risk. The major services performed by trade repositories consist of collecting, storing and updating data. These activities do not generally carry financial risk. Nor is the capital adequacy or financial situation of a trade repository's participants relevant to performing these services. The powers set out in paragraph 4.8 (iv) and (v) could not be applied to such FMIs anyway, while application of the measure described in 4.8 (vi) would probably be counterproductive.

There are similar difficulties with CSDs. These may operate as SSSs only. Alternatively, they may also offer services which involve assuming risk (e.g. securities lending or granting credit, especially for payments in foreign currencies). Depending on the CSD's business model and risk profile, the question arises as to whether and, if so, to what extent, the measures designed for CCPs should apply or whether special, dedicated measures should possibly be developed. It is probably not feasible to draw a neat dividing line between CSDs and SSSs. Another question needing to be answered is whether the services offered by an ailing CSD, particularly those carrying risk, are really "critical services" which should be maintained in the event of resolution. On top of that, there is the problem of where to draw a line between applying this guidance and applying the key attributes for banks if any affected CSD services are banking services. In each individual case, there will be a need to clarify, with the involvement of participants, which services should be deemed critical and thus primarily subject to the KAs for FMIs and which services – if any – should fall under the resolution regime for banks. In addition, the competent resolution authorities would need to coordinate in advance which measures each would apply to the affected FMI.

In summary, we believe that the general guidance in sections 2, 3, 6 and 8 to 12 basically cover all FMIs. In sections 4 (resolution powers), 5 (temporary stay on early termination rights) and 7 (resolution funding), by contrast, there needs to be greater differentiation between characteristics specific to certain FMIs. See also our reply to question 2.

2. *Should any further distinction be made in the draft guidance, for the purposes of applying the Key Attributes, between types of FMI that assume credit risk through exposures to participants and those that do not? If so, for which provisions is that distinction relevant?*

Yes, we believe further distinction needs to be made. First, a distinction should be made between FMIs that assume credit risk and FMIs that are not normally exposed to credit risk. We also think it would make good sense to differentiate between different types of credit risk and collateral arrangements.

Trade repositories, for example, will not normally take on credit risk from participants. Exposure to credit risk from day-to-day business operations or bad investments by management should probably be judged differently to the credit risk assumed by infrastructures whose critical services inevitably involve taking on risk and which would consequently be affected on an entirely different scale in the event of a crisis.

Payment systems, CSDs and SSSs are normally exposed to only a small amount of risk through participants. This is typically the risk of a participant defaulting on a delivery obligation. These FMIs may also be exposed to currency risk and credit risk, though these are normally likely to be short-term and covered in full by collateral. The question of whether there is exposure to further, possibly substantial risk, and of whether this is adequately covered by corresponding collateral will depend on specific aspects of the FMI's business model (e.g. whether guarantees or commitments are entered into for its participants, whether securities lending transactions are concluded as an agent or principal, whether these transactions are collateralised, whether settlement is in commercial bank money with associated currency risk, etc.). The determining factors are consequently the concrete circumstances in each individual case. One further distinction needs to be made when assessing whether, to what extent, and for how long the FMI is exposed to credit risk and whether this risk is covered by collateral – namely whether the services carrying credit risk can really be classified as critical.

The function and business model of a CCP, on the other hand, typically involve assuming counterparty credit risk. For this reason, CCPs have special collateral arrangements and contingency mechanisms, which will possibly include an explicit provision for the allocation of losses arising from this risk. Paragraph 4.4 is therefore quite correct to point out that rules and procedures for loss mutualisation or allocation "should generally be exhausted prior to the entry into resolution of the FMI." The qualification in brackets ("unless it is necessary…") should be deleted, however, in our view.

These special features should be taken into account, especially in the guidance on resolution powers and the extent of the involvement of the FMI's participants in resolution, i.e. in paragraphs 4.8 to 4.15, 5.1, 5.2 and 7.

In addition, an explicit recommendation should be included in the annex of the Key Attributes that, when drawing up an FMI's resolution plan in consultation with the FMI and its participants, the competent resolution authorities should specify or define what the FMI's critical services are. It must be absolutely clear in which cases it will be relevant to apply the tools in accordance with the annex of the Key Attributes. Furthermore, we consider it especially important if monopolistic structures or actual or de facto obligations exist to use FMIs' services (such as clearing).

3. *Are the additional statutory objectives for the resolution of FMI (paragraph 1.1) appropriate? What additional objectives (if any) should the draft guidance include, relating either to FMIs generally or specific classes of FMI?*

We consider the statutory objectives generally appropriate.

We believe it would be helpful, however, if it was also mentioned in paragraph 1.1 that the critical services of each individual FMI should be identified and specified by the competent authorities in consultation with the FMI in question and its participants.

5. *Should resolution authorities have a power to write down initial margin of direct or (where appropriate) indirect participants of an FMI in resolution (paragraph 4.8)? If so, should the power be restricted to initial margin that is not 'bankruptcy remote' and may be used to cover the obligations of participants other than the participant that posted it? What are the implications of such a power for FMIs and participants? Are any further conditions appropriate in addition to those specified in paragraph 4.9?*

We do not believe resolution authorities should have this power in the form currently envisaged.

As the footnote to paragraph 4.8 (v) makes clear, initial margin is a key element of the CCP's self-contained collateralisation system and protects not only the FMI itself, but also the other participants. It is understandable, with this in mind, that many jurisdictions prohibit interference in the use of initial margin and require the bankruptcy remoteness of initial margin to be guaranteed. This is because the risk of systemic contagion would escalate once the CCP's collateral mechanism failed to function reliably. If resolution authorities were able to write down initial margin with the result that participants were required to replenish it, the CCP would be under-protected against future participant defaults, which could cause it to fall deeper into crisis and drag further participants down with it. A chain reaction, posing a threat to financial stability, would be unavoidable. This cannot possibly be the objective of the Key Attributes.

The use of initial margin should therefore only be considered as a last resort and not applied to the margin itself, i.e. the collateral posted and serving as security, but only to the (possibly fictitious) repayment claims in relation to initial margin. It is self-evident,

moreover, that only non-bankruptcy-remote collateral could be used for this since participants should not be worse off in a resolution process than they would be in the event of an actual insolvency. In the interests of financial stability, however, the possibility of direct use of collateral by the FMI or resolution authority needs to be totally ruled out. In addition, the use of repayment claims relating to initial margin should only be permitted in combination with claims relating to variation margin.

This would ensure the availability for the CCP's resolution of all amounts which participants would register as insolvency claims after close-out netting in the event of the CCP's insolvency.

It should also be ensured that, if a participant is engaged in client rather than proprietary trading and therefore segregates the collateral held for these clients, it will **either** not be involved in the resolution **or** will be in a legal position to pass on to the clients the losses it is allocated by the resolution authority. Otherwise, the power of the resolution authority would lead to the participant being penalised for trading on behalf of clients since these transactions would be treated in the same way as transactions on the participant's own account and the participant would have no possibility of requesting compensation for its losses from the indirect participant.

We notice that a reference to paragraph 4.8 (iv) is currently missing from paragraph 4.9 and would recommend its inclusion in the interests of completeness.

6. *Should the Annex explicitly restrict resolution authorities from interfering with the netting rights of FMI participants (for example, by splitting a netting set through partial transfer of positions in a CCP or partial 'tear up' of contracts)? What is the possible impact on participants' risk management, accounting reporting or regulatory capital requirements if netting rights can be interfered with in resolution, and how might any such impact be mitigated?*

Yes, the annex should restrict authorities from interfering in netting rights.

In the event of insolvency, netting enables all outstanding liabilities between the FMI and participant to be set off against one another in a consistent and insolvency-remote manner. (Set-off on a net basis, thus preventing cherry-picking.) Netting is also the foundation on which the mechanism for posting collateral, the calculation of margin and the risk management of both the FMI and its participants are based. If resolution authorities were permitted to override netting rights in the resolution process, a key cornerstone of risk management would be removed and participants would be exposed to much higher, virtually incalculable risks. The end result would be to increase the danger of contagion for the market.

For this reason, it should also not be possible to interfere in the mechanism of close-out netting developed for the insolvency of FMIs or FMI participants in the event that the FMI enters resolution. Resolution and insolvency need to be treated equally in this respect. This must apply to the resolution of FMI participants as well.

Paragraph 4.6 (and paragraph 1.2 of Part II) should therefore only be understood to mean that, though participation in the sense of membership should not be considered terminated with the entry into resolution, this by no means precludes the termination of all agreements concluded during membership or the application of any close-out netting provision.

7. *Does the draft guidance (paragraphs 4.1 and 4.2) adequately address the specific considerations in the choice of the resolution powers set out in KA 3.2 to FMIs? What additional considerations (if any) regarding the choice of resolution powers set out in KA 3.2 should be addressed in this guidance?*

The considerations set out in KA 3.2 are generally adequately addressed. We would nevertheless welcome it if the guidance explicitly pointed out that resolution powers should always be applied with the principle of proportionality in mind and only with the objective of maintaining critical, as opposed to non-critical, services.

8. *Are the conditions for entry into resolution of FMI (paragraph 4.3) suitable for all classes of FMI? What additional conditions (if any) would be relevant for specific classes of FMI?*

The conditions for entry into resolution are well-balanced, in our view. They will give resolution authorities the latitude they require to accommodate national specificities when initiating resolution.

9. *Does the draft guidance (and paragraphs 4.4, 4.8 and 4.9 in particular) deal appropriately with the interaction between the contractual loss-allocation arrangements under the rules of certain classes of FMI and the exercise of statutory resolution powers?*

We support the view that any rules and procedures for loss mutualisation or allocation should be exhausted before resolution powers are applied. If indirect participants are also to be affected by the resolution powers, however, it must be ensured that it is legally feasible for a direct participant to pass on the consequences and results of these powers to the indirect participants. National law should not be allowed to prevent such (contractual) arrangements and should be taken in to account, especially when it comes to measures affecting general terms and conditions.

11. *Are there any other FMI-specific considerations regarding the application of any of the resolution powers set out KA 3.2 that should be covered in this guidance?*

12. *Does the draft guidance (paragraphs 5.1 and 5.2) deal appropriately with the considerations that are relevant to the decision whether to stay the exercise of early termination and set-off rights by FMI participants on the entry into resolution of the FMI? Should the guidance distinguish between different classes of FMI in this regard?*

13. *Are loss-allocation arrangements under FMI rules reflected appropriately in the application of the "no creditor worse off" safeguard in FMI resolution (paragraph 6.1)?*

We welcome the fact that all contributions made by participants under the FMI's rules and procedures for loss allocation are to be taken into account when determining compliance with the "no creditor worse off" safeguard. This could create an incentive for certain participants to contribute over and above what they are obliged to do in the recovery phase (i.e. before any entry into resolution) in the knowledge that they will not be disadvantaged compared to other participants if the rescue fails.

Paragraph 6.1 is therefore correct to take the view that the application of the "no worse off" safeguard should take account of any repayments made to participants in the recovery phase of the FMI, e.g. under some type of debtor warrant (this is our under-standing of "recovery made"). In the interests of completeness, we would suggest clarifying, that calculations should also take account of any payments made by parti-cipants not just to the FMI itself, but also to other legal entities (bridge institutions or alternative service providers) in the context of the FMI's recovery or resolution.

17. *Are there any other issues in relation to the application of the Key Attributes to FMIs or particular classes of FMI that it would be helpful for the FSB to clarify in this guidance? If yes, please elaborate.*

Part II of the Draft Guidance: Resolution of Systemically Important FMI participants

18. *Does the draft guidance achieve an appropriate balance between the orderly resolution of FMI participants and the FMI's ability to manage its risks effectively?*

The distinction between the application of the FMI resolution guidance and the application of the bank resolution guidance could be clearer. In particular, it is open to question how an FMI which is also undergoing resolution is to be involved in the resolution of one of its participants and vice versa. We would therefore be in favour of a mechanism to ensure coordination between the various resolution authorities (of the FMI and its participants), especially with regard to the choice and application of measures.

19. *What actions of the FMI in relation to failing participants could hamper its orderly resolution? How could the impact of such actions on orderly resolution be mitigated or managed?*

20. *Are the safeguards set out in the guidance (paragraph 1.3) adequate as regards the conditions and requirements for maintaining access of a firm in resolution or admitting as a new member an entity to which that firm's activities have been transferred? If not, what additional safeguards should be included in the guidance?*

21. Are there any other issues in relation to the handling of the failure of FMI participants that it would be helpful for the FSB to clarify in this guidance? If yes, please elaborate.

Like paragraph 4.6 of Part I, paragraph 1.2 should be understood only to mean that, though participation (in the sense of membership) is not terminated with the entry into resolution of a participant, this by no means precludes the termination of all agreements concluded during membership or the application of any close-out netting provision.

Draft Implementation Guidance: Client Asset Protection in Resolution
Questions for consultation

34. Are the distinct but complementary roles of the draft FSB guidance and the IOSCO Recommendations Regarding the Protection of Client Assets sufficiently clear?

Only in part. Our understanding is that the IOSCO Recommendations Regarding the Protection of Client Assets (IOSCO Recommendations) are supposed to lay down generally applicable supervisory principles for the protection of client assets in the safekeeping and custody of securities. In contrast, the draft FSB guidance deals with the question of how client assets are to be classified and treated in the event of resolution of the custodian/intermediary. Difficulties are, however, created by the fact that, while both sets of regulatory recommendations use the same terms, they attach different meaning to these. This applies to, among other things, the key term "client assets" (see in this connection Question 37). Also the different treatment of segregation, requirements for consent and information/reporting requirements creates uncertainty. Not least, what is to be understood by "client assets" appears to be influenced in the FSB guidance by US legal terminology. The final sentence of the introduction (and also paragraph 4.1) refers to "client's entitlement", a term which is likely to be alien to many other legal jurisdictions.

Furthermore, despite their apparently general regulatory content, the IOSCO Recommendations seem to focus specifically on problems resulting from the re-hypothecation of financial instruments especially in relation to prime brokers and hedge funds. The Recommendations are thus geared mainly to securities interest collateral agreements in particular. While many of the recommendations therefore make sense with regard to this special type of business, they are at odds with both currently, established and desirable as well as future practice in the regular safekeeping and custody of securities. Also, the securities interest collateral agreement is an instrument that is likely to be not only uncommon but actually completely unknown in many legal regimes.

In contrast, we feel that the draft FSB guidance tries to cover all cases in which client assets are affected by the resolution of the custodian/intermediary. However, paragraphs 4 and 8 should reflect this fact a little more clearly.

We would therefore welcome closer synchronisation of the terminology and scope of application of both regulatory initiatives. In particular, the definition of "client assets" and provisions regarding the segregation of financial instruments as well as information and reporting requirements in the IOSCO Recommendations should be aligned with the

definition and provisions in the draft FSB guidance. The IOSCO Recommendation should, moreover, not focus so much on aspects of re-hypothecation but also take into account regular safekeeping and custody of securities as well as common, established and desirable practice in this area.

35. Does the draft guidance deal adequately with the different types of firms and the range of their activities in the course of which they hold client assets, including investment business, prime brokerage and custody services? If not, what additional types of firms or activities should be covered?

We welcome FSB's efforts to highlight the different types of activities and tasks of custodians (referred to here as "firms") and to take these into account in the legal consequences. The three main types of activities are correctly designated as custody services, investment business and prime brokerage (this order would probably be more accurate). Where custody services are concerned, it would have to be borne in mind that the business of central securities depositories (CSDs) differs from that of commercial banks and custody banks, so that there are differences particularly when it comes to information requirements and responsibility for obtaining declarations of consent. This goes, accordingly, also for the IOSCO Recommendations – and should be taken into account when making recommendations on the clearing, settlement and safekeeping of financial instruments which will also affect the legal question of "who owns what", timing for the transfer of ownership and the influence on other aspects
of securities law.

36. Are the additional statutory objectives for the resolution of a firm with holdings of client assets (paragraph 1.1) appropriate? What additional objectives should be included?

It should be additionally mentioned in paragraph 1.1 that the resolution authority should always carry out a proportionality assessment. Furthermore, a rapid return (of client assets) to the client under point (i) should only be ensured if and to the extent that it is not disruptive or does not adversely affect financial stability.

Particularly important, in our view, is that paragraph 1.1 is qualified by paragraph 1.2, stating that objectives related to protection of client assets should be balanced with other objectives of the resolution authority in any given case.

37. Is the proposed definition of 'client assets' (paragraph 2.1) sufficiently comprehensive? Are there any other classes of assets (in addition to those specified in paragraph 2.2) that should be excluded from the scope of this guidance?

As already mentioned under Question 34, we welcome the definition of "client assets" in paragraphs 2.1 and 2.2., particularly the clarification as to how client money and client collateral held by means of a title transfer arrangement are to be excluded from such client assets.

We welcome the clarification by the FSB that "client assets" only cover client money if the latter is classified as such under applicable national law. In addition, it is extremely helpful that financial instruments transferred to the intermediary as collateral by means of a title transfer arrangement are not deemed to be "client assets" either. The overly broad definition in the IOSCO Recommendations would raise wide-ranging problems in practice. We are therefore expressly in favour of aligning the definition of "client assets" in the IOSCO Recommendations with the definition in paragraphs 2.1 and 2.2 of the present draft FSB guidance.

At the same time, we feel that further clarification provided in paragraphs 2.1 and 2.2 is important: apparently all collateral acquired by means of a title transfer arrangement is rightly not to be defined as "client assets". This is not, however, confined to the transfer of securities in the principle transaction under repurchase or reverse purchase agreements. In many jurisdictions, e.g. also in Germany (unlike the US), ownership of securities is also transferred to the intermediary (or a third party) in securities lending business by means of a title transfer arrangement. Whenever the intermediary acquires ownership, these securities should not qualify as "client assets" either.

Also, in numerous individual transactions under repurchase or reverse repurchase agreements, in securities lending and in derivative transactions, additional collateral in the form of securities is provided. In this way, the differences resulting from close-out netting are usually collateralised and likewise transferred to the counterparty by means of a title transfer arrangement. Such transfers are regulated by standardised collateral annexes (e.g. ISDA Credit Support Annex, Collateral Annex to the German Master Agreement for Financial Derivative Transactions). It should therefore be made clear in paragraphs 2.1 and 2.2 that these financial instruments transferred as collateral are not deemed to be "client assets" either. In addition, mention of the credit support annexes in footnote 9 to paragraph 2.2 would be desirable.

It should, however, be added that the definition in the IOSCO Recommendations would have to be aligned with paragraphs 2.1 and 2.2 in order to ensure coherence.

38. Does the draft guidance (paragraphs 3.1 to 3.5) cover all relevant issues concerning the exercise of transfer powers in relation to client assets? If not, please explain what additional issues should be covered.

39. Is the interaction between transfer powers and contractual porting arrangements or other arrangements under the rules of CCPs, exchanges or trading platforms (paragraph 3.3) sufficiently clear? If not, please explain what aspects might usefully be clarified.

40. Should the guidance be more prescriptive in relation to arrangements for the identification and safeguarding of client assets, including segregation, that are necessary to enable resolution authorities and administrators quickly to identify client assets and ascertain the nature of claims to those assets (paragraph 4.1)? If so, how?

In our view, the guidance should leave enough room for national specificities. Account holding models and the legal construction of holding chains, for instance, differ greatly from one jurisdiction to another. In particular, where established segregation already takes place, the FSB guidance should avoid introducing
a new practice that produces the opposite of the desired objective.

Our members are, for example, unsure whether paragraph 4 calls into question current German practice. Under German safe custody law and safe custody practice, it is automatically assumed that all securities held by an intermediary with a third-party custodian are client securities and not the intermediary's own securities, i.e. they are bankruptcy-remote. Only if the intermediary expressly states that certain securities are its own are these entered in a separate account with the third-party custodian as securities belonging to the intermediary and are then no longer bankruptcy-remote. The guidance should at any rate avoid the impression that paragraph 4 worsens or adversely affects any established protection of client assets or jeopardises the clear bankruptcy-remoteness of client securities.

41. Are there arrangements other than segregation that are capable of achieving the outcome described in paragraph 4.1? If so, please explain what other arrangements are currently used.

See our reply to Question 40.

42. Are the requirements for firms to maintain adequate records in relation to securities lending (paragraph 4.3(i)) and re-hypothecation (paragraph 4.3 (ii)) sufficiently clear and specific as to the standard that is required? Are they sufficient to enable a resolution authority or administrator to act swiftly and with certainty? If not, please elaborate.

Yes. We welcome in particular that, as regards the question of how the use of client assets is recorded, footnote 12 refers to several ways of recording and legally classifying this as long as it is ensured that the principal information is made outwardly visible.

We should like to point out, however, that securities lending in many countries presupposes transfer of legal title to financial instruments, so that the legal classification and treatment may differ from one jurisdiction to another. With respect to re-hypothecation, it should be noted that it, too, is unknown or at
any rate uncommon in many jurisdictions if executed by way of a pledge with permission for the pledgee to initiate the title transfer at any time at its own discretion. If certain information, accounting, form-related or other legal requirements are introduced in this connection, it should be ensured that these do not interfere with or adversely affect regular safekeeping and safe custody
of securities, which have nothing to do with re-hypothecation.

43. Is the requirement regarding adequate disclosure by firms to clients of the effects of asset lending, rights of use or re-hypothecation (where permitted) on the protection of client assets in resolution (paragraph 4.4) sufficiently clear and specific as to the standard that is required? What additional disclosure or information requirements relating to re-hypothecation (if any) should be included in the guidance?

We welcome the wording "adequate disclosure". This allows a differentiation between professional and retail investors. In addition, it means that desired transactions that are conducted quickly on a standardised basis are not obstructed by complicated and unnecessary form-related requirements.

However, we feel that Principle 6 of the IOSCO recommendations should be aligned to 4.3 and 4.4 of the FSB guidance.

44. Is the draft guidance regarding re-hypothecation consistent with the recom-mendations of other FSB work-streams, such as Recommendations 9 and 10 in the FSB, Consultative Document, Strengthening Oversight and Regulation of Shadow Banking, A Policy Framework for Addressing Shadow Banking Risks in Securities Lending and Repos (18 November 2012)? Please explain any inconsistencies.

45. Are there any other requirements in relation to securities lending and re-hypothecation that would support clarity as to clients' rights in resolution in relation to assets that have been lent or re-hypothecated? If yes, please elaborate.

46. Does the draft guidance (paragraphs 6.1 and 6.2) adequately cover the challenges for resolution authorities or administrators in dealing with client assets that held in a different jurisdiction to the firm in resolution? Please outline any additional aspects that might usefully be covered by the guidance in this regard.

47. Does the draft guidance (paragraph 7.1) set out the principal matters that should be considered and addressed in resolution planning for firms with holdings of client assets? What additional considerations (if any) are relevant for all such firms, or firms that carry out particular activities involving the holding of client assets?
48. Are the classes of information that firms should be able to provide promptly in order to facilitate the rapid transfer or return of client assets (paragraph 8.1) feasible? What additional classes of information (if any) should firms be capable of producing for those purposes?

The information requirements are basically very extensive. Particularly the requirement in paragraph 8.1 (vi) is open to misunderstanding. With regard to the custody situation in a foreign jurisdiction, German intermediaries are required to ensure by way of an expert assessment/legal opinion that the client asset protection in the foreign jurisdiction is equivalent to that in Germany. This should satisfy the requirements in paragraph 8.1 (vi). Should, however, a comprehensive description of the custody situation be additionally required for every single country of deposit, including specificities with respect to client asset protection and a description of resolution or insolvency law of the country concerned as well as the scope for any waiver, modification or opting out of the client asset protection regime, we would have serious doubts about the implementability of this in practice.

49. How far should information requirements also extend to CCPs, exchanges and trading platforms?

50. Are there any other issues in relation to protection of custody and client assets in resolution that it would be helpful for the FSB to clarify in this guidance?

With regard to paragraph 4.2, we wish to make the following remarks: we understand the recommendation to inform clients about the existence of any holding chain to mean that the standard practice of indicating the central depository in the country of the intermediary or, where securities are held abroad, the country of deposit is adequate. This would provide clients with sufficient information on whether their assets are held via a holding chain and on what kind of segregation or client asset protection this involves. We should, however, like to point out that any requirement to also disclose details of the holding chain to clients would not lead to more client asset protection but would instead be more likely to confuse clients and, not least, to cause organisational difficulties and complicate processes.

May we also point out that, while informing clients about any shortfall in pooled assets is possible for the country of the intermediary, this would be extremely difficult with respect to all third countries and be asking too much in practice. The administrative workload that would be associated with such an information requirement, including monitoring whether the information is up-to-date, would unquestionably be out of all proportion to the benefit, as this requirement fails to deliver any added value to clients in terms of existing protection of investments already made.