

Preliminary comments

AFTI “Association Française des Professionnels des Titres”, is the French leading Association of Securities Services Providers representing the post-trade businesses in France and Europe. AFTI represents through its 99 members a wide range of activities: market infrastructures, custodians, account-keepers and depositaries, issuer services, reporting and data management services which employ about 28,000 people in Europe of which 16,000 in France. Our members acting as financial intermediaries represent 26 % of the European custody activity with 55,600 billion € in safekeeping and 25 to 30% of the European fund asset servicing sector (namely depositaries and fund administrators services). In addition, the French market infrastructures have managed respectively 29 millions of settlements (CSD) and 186 millions of operations cleared in 2014 (CCP) .

Question 1: Does the consultative document appropriately address the tensions that may arise between the various financial stability objectives, with regard to the safety and soundness of providers of critical FMI services on the one hand and to the orderly resolution of the recipients of such services on the other?

The draft guidance does appropriately address such tensions. We consider that striking the right balance between these various potentially conflicting objectives will depend mainly on the attitude of public authorities, in the light of the crucial role of the resolution authority in the process, and in the light of the fact that it will engage with the providers of critical services and with their supervisory authorities.

We support the principle expressed throughout the guidance that providers of critical FMI services should take appropriate steps, in a clear and transparent manner, to consider and plan for the interaction between the resolution regimes of the FMI participants and their own risk management, and clarify the actions that they may take in a resolution scenario. This will assist firms and resolution authorities with recovery and resolution planning to ensure that they are prepared to take steps to maintain continuity of access. With this in mind we nevertheless consider that the principal responsibility for this process should be on the firm and on its competent authority, and not on the service provider. Firms should take the initiative to engage with their providers of critical FMI services and assist them in defining the scope of the arrangements to make and the nature of the measures to implement.

Question 2: Do you agree with the overall scope of the guidance and the proposed definitions, in particular the services and functions captured in the definition of ‘critical FMI services’? Should any of the definitions be amended? If so, please explain.

We agree with the overall scope of the guidance including FMIs, FMI intermediaries, recipients of FMI services, and the relevant resolution and supervisory authorities. However, a number of definitions is not clear or they are not used consistently throughout the guidance.

We note that custodians have been singled out alongside the FMIs as direct providers of critical FMI services. This is a misconception, as custodians are intermediaries and do not fulfil utility functions towards the marketplace, contrary to the CSDs. The guidance should therefore distinguish appropriately between FMIs and intermediaries without confounding their respective functions, and ensure that these two categories are not subject to the same set of requirements and safeguards.

Also, the guidance should make it clear that the critical services should be defined from the point of view of each individual firm, and not from the point of view of the marketplace, as the latter would in most cases correspond to the stability of the FMI itself. Firms and their resolution authorities should anticipate and define the critical services, and the geographical and product scope of these critical services, and guide the providers of these services towards finding appropriate solutions for the event of resolution.

Question 3: What are your views on the proposal in sub-section 1.1 of the consultative document that providers of critical FMI services clearly set out in their rulebooks or contractual arrangements the rights, obligations and applicable procedures in the event of an FMI participant entering into resolution?

We agree with the principle that FMIs should have provisions in their rulebooks or contractual arrangements to ensure that FMI participants can participate during resolution. Such arrangements should nevertheless be subject to appropriate safeguards to protect the continued safe and orderly operations of the FMI.

These provisions and arrangements should be guided by an obligation of means and provide with sufficient clarity so that minimum conditions must be fulfilled for the access to the critical services to continue and which specific procedures, if any, would be activated (automatically or discretionally) upon entry into resolution of the firm.

From the point of view of an intermediary, such as a custodian, any commercial arrangement with the clients will be subjected to the safeguards applying to the intermediary's relation with the FMI. In this sense, the condition sine qua non for the critical service to continue, whether in resolution or any other circumstance, is the conformity with the rules of the FMI itself. No intermediary will be able to provide FMI services to its clients if their continuity is not ensured by the FMI.

In general, guidance should more clearly distinguish between FMIs and FMI intermediaries and their respective obligations. While we agree that the over-arching objective of ensuring continuity of access to Critical FMI services should apply to both direct and indirect access, there are a number of important differences which need to be considered and reflected in the guidance. Making the distinction in the guidance between direct FMI access and access via an intermediary is vital insofar their behavior towards an entity in resolution will be motivated by different objectives. FMIs fulfil a utility function towards the marketplace as a whole, whereas intermediaries are pure commercial service providers. This is already reflected in PFMI Principle 2, mentioned in the draft guidance. What's more, the FMIs are often natural monopolies (or flagship incumbents), while service providers are competing among many. In contrast to FMIs, the relationship between FMI intermediaries and firms is based on bespoke bilateral contractual arrangements which cannot be amended unilaterally.

Question 4: Sub-section 1.1 of the consultative document proposes that the exercise by the provider of critical FMI services of any right of termination or suspension of continued access to critical FMI services arising during resolution of an FMI participant be subject to appropriate procedures and adequate safeguards. What are your views on those procedures and safeguards? In your answer, distinguish where relevant depending on whether the firm that enters resolution continues or fails to meet its payment, delivery and collateral provision obligations to the FMI or FMI intermediary.

We support the need for appropriate safeguards and procedures that prevent unnecessary, automatic cliff effects while a firm entering resolution continues to meet payment and delivery obligations. Entry into resolution should not be synonymous with default. Suspension or termination events should be clearly distinct from any other legal events.

On the other hand, whether in resolution or not, rights to access critical services should be suspended or terminated whenever the basic conditions of access are not respected. We therefore fully support the guidance proposal that, regardless of the status of an entity, suspension and termination rights should be exercisable whenever the entity fails to meet its payment and/or delivery obligations, or other obligations that could compromise the ability of the FMI to provide its services in a safe and orderly manner.

More importantly, we would like the guidance to confirm that contractual rights of all parties to terminate contracts according to the agreed and applicable provisions remain untouched and they remain exercisable at any time at the discretion of any of the parties, according to the termination conditions agreed upon and stipulated by the parties in the contract.

Question 5: Sub-section 1.2 of the consultative document proposes that the general rights, arrangements and applicable procedures of a provider of critical FMI services that would be triggered by entry into resolution of an FMI participant, its parent or affiliate, should be the same irrespective of whether the firm entering into resolution is a domestic or foreign FMI participant. What safeguards should be considered and what measures are needed to ensure a consistent approach is taken across providers of critical FMI services to these safeguards?

We agree with this principle. We note, however, that the coordination between authorities is essential for these arrangements to work, as the authorities are expected to be directly involved in the process and may have the interest to modify, override or disapply the relevant contractual agreements. Private contract cannot and should not substitute nor contradict the applicable statute and supervisory practice. Therefore the authorities should be more proactive in determining the conditions upon which they would support and enforce the resolution plans and their continuity arrangements.

It is essential to avoid supervisory arbitrage on a cross-border basis. The authorities of the different stakeholders act with different objectives in mind and may wish to enforce diverging legislations. They should ensure that they strike an appropriate balance between their respective objectives. It should be noted that private entities will take into consideration the law of their own jurisdiction while making their arrangements.

As for the common set of expectations, we agree that the providers of critical FMI services should engage with the FMI participants to discuss and communicate the range of risk management actions and requirements that they may take in response to an FMI participant, its parent or affiliate entering resolution. Any additional requirements imposed by a provider of critical FMI services on an FMI participant to maintain adequate risk management should be fully evidenced and proportionate to the nature and extent of risk linked to the FMI participant, and be properly overseen by the competent authorities.

The exact form of such arrangements must closely correspond to the nature of service, and we do not deem appropriate that guidance should include detailed provisions. Rather, the guidance should establish high-level principles that would guarantee that the arrangements are made in the interest of overall financial

stability and orderly resolution. Also, every crisis is different and the most appropriate solutions may prove to be very idiosyncratic. Therefore, firms and their providers should engage together with their authorities for establishing detailed procedures and arrangements and achieving a supervisory approval.

We note that due to conflict of laws it may be impossible for an FMI or an intermediary to continue providing the service. Guidance should provide for such cases.

Question 6: What are your views on the proposal in sub-section 1.4 of the consultative document that providers of critical FMI services should engage with their participants regarding the range of risk management actions and requirements they would anticipate taking in response to the resolution of an FMI participant? Does this strike the right balance between the objectives of orderly resolution and the FMI or FMI intermediary's prudent risk management?

We support the proposal to perform regular tests of the pre-established procedures and arrangements.

Section 2 – Continuity of access expectations and requirements applicable to firms

Question 7: Do you agree with the proposal in section 2 of the consultative document that firms should be required to develop contingency plans to facilitate continuity of access in both the lead-up to, and upon entry into, resolution? Does the consultative document address all aspects of the information and analysis that may be required for such contingency plans?

We support the need for firms to develop contingency plans focused on facilitating continuity of access in the lead up to and upon entry into resolution. Firms will need to engage with the FMIs or with their intermediaries and establish which risk management procedures will be activated by them upon entry into resolution and plan appropriately. We suggest that the guidance should set out what is deemed to be appropriate as a form of engagement.

We point out that for the EU banks, detailed recovery and resolution planning requirements apply. With specific regard to liquidity, liquidity contingency plans and recovery plans are already in place and provide a first level of contingency planning to facilitate continuity of access in both the lead-up to, and upon entry into, resolution. Detailed contingency plans applicable to each FMI do not appear as the most efficient approach. It appears far more practical to address the use of credit facilities as part of overall liquidity planning rather than a standalone information requirement. Even so, it can be reasonably expected that liquidity needs during resolution may arise, and therefore there should not be any excessive reliance only on the historical liquidity data.

Considering that each crisis is likely to be idiosyncratic and its precise course is nearly impossible to anticipate, contingency planning should not be expected to provide precise solutions, nor to be followed in an orthodox manner once activated.

Question 8: Are there any aspects of the proposed guidance that should apply differently according to whether access to a critical FMI service is provided directly by an FMI or custodian, or indirectly by an

FMI intermediary? If so, please describe with reference to the particular section(s) of the proposed guidance, and include your views on how that section(s) should differ.

As discussed above, we believe that the guidance should make a general distinction between direct and intermediated access to critical services. We agree that the over-arching objective of ensuring continuity of access to critical FMI services should apply to both direct and indirect access, however, there are a number of important differences which need to be considered and reflected in the guidance and its application. Commercial service providers are fundamentally distinct from the FMIs and should not be submitted to the same obligations.

FMIs fulfil a utility function towards the marketplace as a whole, whereas intermediaries are pure commercial service providers for its particular client base. Further, FMIs are often natural monopolies (or flagship incumbents), while intermediaries are usually competing among many. The availability of alternatives will be a crucial aspect for a firm to take into consideration for while making any continuity and contingency planning. The FMIs are usually required to have transparent, non-discriminatory access conditions and would be less able to impose special, individually tailored conditions of access onto its direct participants. An intermediary would have a broader margin for negotiation of its commercial terms with its clients on the one hand, but will be bound by rather strict membership conditions imposed by the FMI on the other.

Since the relationship between FMI intermediaries and firms is based on bespoke bilateral contractual arrangements which cannot be amended unilaterally, amending a large number of bilateral contracts would take time and would not be under the control of the FMI intermediary so proportionality needs to be considered. As discussed above it is important that the determination of Critical FMI services is clarified as being the responsibility of the resolution authority of the firm and for the firm to communicate to FMI intermediaries, as FMI intermediaries are unable to determine which services are critical to a particular firm. The onus should be on the firm to seek any changes or clarification of contractual arrangements. The FMI intermediary should have a responsibility to negotiate the contract in good faith to balance the objective of continued access for the participant while avoiding to negatively impact the intermediary.

Question 9: Does the consultative document identify all relevant requirements and pre-conditions that a firm may need to meet to support continuity of access in both the lead-up to, and upon, resolution? What other conditions or requirements, if any, should be addressed?

Section 3 – Co-operation among authorities regarding continuity of access to critical FMI services

Question 10: Does the consultative document identify appropriate methods for providing the information and communication necessary for key decision making during the resolution of an FMI participant? Are there additional safeguards that could be put in place that would ensure adequate levels of transparency in the lead-up to, and upon resolution?

We are of the opinion that appropriate cooperation and information sharing between all authorities in relation to the continuity of access to critical FMI services is absolutely essential. Authorities should engage into permanent consultations with FMIs and their participants for "business as usual" conditions and stress

scenarios alike. When the FMIs and the participant's supervisors are not identical, appropriate coordination protocols and mechanisms should be in place.

Guidance should aim to bring increased transparency to the relationship between authorities, including decisions making process and procures for dissemination of information. The guidance should also clarify that sharing of information should be on a confidential basis.

It would also be helpful for the FSB to instruct the FMIs to establish and communicate a standard set of contacts, escalation points for use prior and/or in resolution.