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I. EXPLANATORY FOREWORD.

Santander welcomes the *FSB Consultative Document on the Application of the Key Attributes to Non-Bank Financial Institutions*. Guidelines on effective continuity and resolution procedures for FMIs are crucial to maintain financial stability and to mitigate systemic risk globally.

Our considerations in our response have important implications when resolving participant entities in FMIs and for the protection of their client assets. Hence, in our view it is essential to draw the link between Part I and Part III of the Consultative Document. To the extent that significant gaps prevail on the regulatory treatment of CSDs and ICSDs, effective client asset protection in resolution cannot be achieved.

Our contribution thereby mainly focuses on CSDs and ICSDs given the current debate in the European Union (EU) on forthcoming regulation (i.e. CSDR). In light of this, it is necessary to draw an accurate distinction between specific types of FMIs and, in particular, regarding ICSDs as they are likely to be authorized to provide some ancillary banking services within the same legal entity as well.

II. GENERAL COMMENTS ON PART I OF THE DRAFT GUIDANCE ON RESOLUTION OF FMI.

1º) CSDs acting as custodians.

In our view, it is necessary to conduct a comprehensive and complete analysis of the implications of custody services provided by a CSD (this is already within the EU CSDR scope, though very limited). This analysis should include: (i) a description of a CSDs' core functions such as the provision and maintenance of securities accounts at the top tier level, including the definition and application of the KAs to this type of FMI, and (ii) the development of a more detailed regulation on the core functions of CSDs due to their potential implications in resolving their participant entities and for the protection of their client assets.

Moreover, a clear definition of a CSD's custody services is not provided. Though the last available version of the EU CSDR future regulation includes in its definition of a CSD's core functions the service of "central maintenance" (i.e. providing and maintenance of securities accounts at the top tier level), it lacks sufficient degree of detail on these functions. Also, it avoids the use of terms such as custody or custodian in the definition of both core and non-banking ancillary services.

This lack of precision is even more overt in the case of International Central Securities Depositories (ICSDs) which can operate in the post-trade market both as (i) a CSD, providing "notary" functions (initial recording of securities in a book entry system through crediting and subsequent crediting and debiting of securities accounts) and "central maintenance" core services at the top tier level for those securities initially included in its book-entry system, but also as (ii) a mere custodian or sub-custodian when they provide the maintenance of securities accounts services in the downstream tier level as one of the links of a custody chain for securities initially included in the book-entry system of a different CSD.

In view of the aforementioned considerations, we would suggest the following:

- (i) Application of the KAs and rules referred to protection and segregation of participants' client assets to proprietary positions of CSDs' participants registered at a securities account opened with them and (ii) inclusion within the general concept of client assets both CSD's participants and their proprietary assets.

- Strengthening oversight and monitoring measures to ensure due compliance by CSDs of their functions related to the control of the integrity of the issuance in case of insolvency/resolution when the account provider is a CSD. This is

necessary to avoid damaging consequences to the protection of assets in the downstream tier through custody chains.

The future EU CSDR regulation includes an appropriate approach and solutions on this regard, thus its approval and the enhancement of the laws and regulation that rule over CSDs within the EU need to be accelerated. Moreover, a broader harmonization of these elements beyond EU jurisdictions remains a critical task to be achieved due to the potential cross-border effects that a CSD resolution could entail.

2º) ICSDs as a specific category of FMIs, with their idiosyncratic resolution regime.

As mentioned earlier on, ICSDs should be considered as a separate category within FMIs (as they are not completely comparable to a CSD) for the purpose of the implementation of the KAs due to the special features of their activities.

In particular, they may operate in more than one jurisdiction and subject to the same/unique contractual framework with their participants/clients (terms and conditions of the “settlement system” to which these are to adhere).

Furthermore, ICSDs operate as “pure” CSDs (notary function for book-entry securities for which the ICSD is the CSD of initial inclusion) and/or as a settlement system of a trading market or infrastructure and/or as custodians/sub-custodians for clients assets (when they act as account providers for book-entry securities for which notary functions are run by another CSD).

Despite the aforementioned, the EU CSDR is expected to include a special ad hoc derogation regime regarding the general prohibition that will apply to CSDs to provide banking ancillary services.

The special features regarding the status and range of functions and services that ICSDs are allowed (and which will still be allowed under the envisaged derogation regime included in the EU CSDR) to provide under an insufficiently defined legal and contractual regime could represent a main obstacle for the application of the KAs.

In other words, ICSDs acting simultaneously as a pure CSD (running core and/or ancillary functions for their participants) and as financial institutions (providing banking services to their participants/clients), should be subject to the KAs for both Bank Financial Institutions and FMIs.

A good example of this misleading approach would be EMIR Art 47.3, according to which: *“Financial instruments posted as margins or as default fund contributions shall, where available, be deposited with operators of securities settlement systems [according to CSDR, this is to say CSDs] that ensure the full protection of those financial instruments. Alternatively, other highly secure arrangements with authorized financial institutions may be used”*.

This rule is based on two (wrong, in our opinion) assumptions: (i) deposit of collaterals in a CSD is more secure (in terms of recovery, assets protection and resolution) than doing so with an authorized financial institution providing custody services subject to a strict legal and oversight regime for client assets protection. This is even more misleading in the case of an ICSD acting as a custodian; (ii) the general adherence terms and conditions of a settlement system are more suitable and secure for this purpose than custody arrangements duly constructed, signed and monitored with custodian banks that are subject to strict rules and oversight regime on authorization requirements, protection, segregation and use or re-hypothecation of clients' assets, ad hoc external and periodical audit requirements of this activity, severe liability rules in case of assets loss, very demanding due diligence requirements for the selection, appointment and monitoring of sub-custodians, etc.

It is insufficiently clear whether under the current CSD regulatory framework, this type of FMI (specially ICSDs) is subject to a comparable regime for their custody activity. This is a concern that requires clarification, as explained above.

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3º) Transfer powers for CSD resolution.

As noticed by the FSB, the full effectiveness of these powers is at present largely conditioned by technical, operational and legal boundaries.

Regarding the technical and operational matters, at least at the European Union, important progress and harmonization tasks are being achieved.

For instance, the reform of the Spanish clearing, settlement and book-entry securities registration system and the definition of the European standards on corporate actions are expected to conclude with the launch of Target 2 Securities sometime within 2016-2017. Nonetheless, it is of some concern the lack of clarity yet on the Target 2 Securities governance rules and clauses limiting the operational risk financial liability derived from malfunctioning of the platform that the ECB established for adhered CSDs. These considerations ought to be assessed in the application of the KAs.

Concerning legal boundaries, little or no progress has been obtained. Some examples of the persisting lack of harmonization and variety of legal and regulatory frameworks on essential matters are:

- Legal regulation on book-entry securities and payment systems.
- Legal framework regarding the holding of securities at an account open with a financial intermediary; explicit recognition in all jurisdictions and by all regulations of the fiduciary holding of securities on behalf and for the benefit of a third party.
- Insolvency laws.
- Company laws and regulations regarding matters referred to the relationship between the issuer and the investor/holder of the issued securities, etc.

Furthermore, this would require ending the current de facto monopoly of one single “local” CSD in each EU country. Also, an analysis is needed with an appropriate degree of detail, for direct links between CSDs and/or regarding the initial registration of book-entry securities at a CSD located at a jurisdiction other than the one governing their issuance and legal incorporation.

Therefore, we stress the need to quickly reactivate harmonization initiatives such as UNIDROIT, Securities Law Directive, CSDR, etc.

Finally, it is important to thoroughly assess the fact that the transfer of registrar duties from one CSD to another with cross-border effects could have a downstream impact along the custody chain and on the rights of the account/shareholders when it implies changes on the legal securities registration and/or holding systems.

4^o) Key FMI's service providers.

The application of the KAs regarding the resolution of FMIs such as key providers are not considered nor even mentioned in the Consultative Document.

This would be the case of (i) T2S as a settlement platform owned by the ECB/Eurosystem (ii) of technological or operational outsourcing entities (iii) electronic communications service providers (iv) payment processing service providers, etc.

5^o) Operational risk and resolution of FMIs.

In our view it is of utmost importance to provide a greater focus on record-keeping. This would facilitate complex recovery and resolution processes. Being a pre-requisite for recovery plans, the report should stress the need for on-going good record-keeping even during times of stress in order to ensure effective reconciliation in case of recovery and resolution.

III. GENERAL COMMENTS ON PART III OF THE DRAFT GUIDANCE ON CLIENT ASSET PROTECTION IN RESOLUTION.

Santander is of the view that this section of the Consultative Document correctly identifies the outcomes to be pursued for the aims of client asset protection in resolution, but is not ambitious enough when defining the requirement to meet those outcome or in describing any binding rules.

We encourage the FSB to go one step further in the final version of the Document and to endorse the need for a minimum degree of harmonization across jurisdictions with strong recommendations that have a broad backing in the outcomes of the consultative process.

IV. ANSWERS TO QUESTIONS ON PART III OF THE DRAFT GUIDANCE ON CLIENT ASSET PROTECTION IN RESOLUTION.

Question 35

See comments in Part I on CSD custody activities and ICSDs as specific types of FMIs with their own implications regarding resolution regimes.

Also, we would suggest the inclusion of a specific item to address investment funds since this vehicle implies a total segregation of assets from their custodian manager. Clear information should be provided to the customers.

Question 36

See comments in Part I on key FMI service providers and on operational risk and resolution of FMIs.

In addition to this, we reiterate here our previous comments on the need for harmonizing key matters such as the legal framework regarding the holding of securities at accounts opened with financial intermediaries and/or, if the case might be, for a detailed analysis on the convenience and implications of any type regarding the unification of book-entry securities registration models across EU territories.

Question 37

The definition of client asset should be extended to include CSD and ICSD participants' own assets held in custody in accounts opened in these FMIs.

Question 38

See comments in Part I of this contribution about transfer powers for CSD resolution.

In addition, we believe it is necessary to provide a clear definition of those cases in which the custodian can use the client's assets as well and whether there is a need for prior customer authorization.

Question 39

See Part I on ICSDs as a specific type of FMI with its own implications for their resolution regime and the lack of legal harmonization on the cross-border chains of securities accounts opened in different account providers.

Question 40

We fully agree, especially regarding assets in custody with CSDs and ICSDs. See related comments in Part I.

Question 41

In relation to the deposit or custody of book-entry securities matters, investor protection and deposit guarantee schemes should be harmonized or, at least, effectively coordinated.

The due and fully effective segregation of assets should be guaranteed along custody chains using sub-custodians. For this purpose, the same approach as that undertaken at the AIFD and its Regulation regarding Depositories of AIF due diligence duties for the appointment and maintenances of sub-custodians shall be adopted regarding "ordinary" custody of client assets.

Questions 42 and 43

We reiterate our previous comments on the lack of legal harmonization on cross-border assets held in chains of securities accounts opened in different account providers.

Question 46

Possible practical solutions that might be developed during the resolution process shall observe the applicable principal ruling in each relevant registration system, regarding the legal nature, entitlement and full recognitions and exercise of rights granted to registered holders and/or final beneficial owners.

Faculties granted to authorities that would allow them to request an entity change regarding their business practices, relevant information management systems and contractual agreements shall be further detailed. This would be necessary to adequately understand whether they could become a requirement to segregate business lines. If that were the case, the bank holds an aligned position with the one it follows on structural reform matters.