Committee on Payment and Settlement Systems (CPSS)
Bank for International Settlements
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International Organization of Securities Commissions (IOSCO)
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28 September 2012

RE: Recovery and resolution of financial market infrastructures

Thank you for the opportunity to provide comments on the above referenced consultation. We have set out below our views and are happy to discuss our response in more detail with CPSS and IOSCO or provide such data as may be required.

By way of background BATS Chi-X Europe is the largest European equities exchange by market share and value traded and represents the combination in 2011 of the two leading pan-European multilateral trading facilities (MTFs), BATS Europe and Chi-X Europe.

Based in London, BATS Chi-X Europe supports competition and drives innovation in the European equities markets. BATS Chi-X Europe offers trading in more than 1,800 of the most liquid equities across 25 indices and 15 major European markets, as well as ETFs, ETCs and international depositary receipts. In addition, BATS Chi-X Europe's innovative smart order routing service allows cost-effective access to other MTFs and 13 primary exchanges. BATS Chi-X Europe trading participants receive world-class support including sophisticated technical port services with real-time monitoring of latency, trading activity, network connectivity and risk management.

BATS Chi-X Europe is the brand name of BATS Trading Limited, a subsidiary of BATS Global Markets Inc., a leading operator of stock and options markets in the U.S. and Europe. BATS Chi-X Europe is authorised and regulated by the FSA.

BATS Chi-X Europe offers responses to the following questions.

- **In what circumstances and for what types of FMI can a statutory management, administration or conservatorship offer an appropriate process within which to ensure a continuity of critical services?**

Generally, existing insolvency processes do not have preservation of financial stability as an objective and that could lead to systemic disruptions through delays or cessation of a FMI's critical functions. Due to this, it is necessary to have a specific resolution regime that creates specific powers for institutions charged with managing resolution, to manage the orderly wind down of a failing FMI and, where appropriate, the transfer of its critical functions and customer assets/positions to an alternative FMI. Such a regime should focus on systemically important FMIs.

- **Are there powers beyond those of a standard insolvency practitioner that a statutory manager, administrator or conservator would require in these circumstances?**

Over and above the standard insolvency process, the regulator, central bank or other authority would require sufficient powers to be able to continue to operate the core functions of the FMI, while managing an orderly wind down/handover of those functions and assets to another entity. The management of any duties to creditors should be considered subservient to that objective.

- **Is tear-up an appropriate loss allocation arrangement prior to resolution of a CCP? If so, in what circumstances?**

Appropriate segregation of margin and collateral should protect users of FMIs from most losses. Where an FMI is likely to fail with significant creditors, tear up would appear to be a mechanism for resolving open market positions, allowing for a more straightforward transfer of functions to another entity.

- **To what extent should the possibility of a tear-up in recovery be articulated in ex ante rules?**

The terms of any resolution measure likely to be used, including tear up, should be clearly articulated to users in ex ante rules.

- **Should there be a limit to the number of contracts that are eligible for tear-up?**

The resolution authority should have discretion to determine the degree of tear up that provides for the optimal outcome for users, while facilitating an orderly transfer of functions.

- **How should the appropriate haircuts be determined?**

See previous answer.

- **What qualitative or quantitative indicators of non-viability should be used in determining the trigger for resolution for different types of FMI?**

The trigger for intervention ought to be when a FMI shows early signs that it may not be a viable business in the short to medium term, taking into account the nature of the business and the stage in its development (e.g. start-ups may need more leeway). The approach could be analogous to that used in the UK Banking Act. According to the UK Banking Act the FSA decides about interventions in

consultation with BoE and HMT when a bank fails to meet threshold conditions and the bank is unlikely in the near future to be able to meet threshold conditions. Generally, national authorities could use failure to meet the minimum requirements set for the operation of that type of business in that jurisdiction, with particular weight given to capital adequacy or financial resource requirements.

- **What loss allocation methods must be available to a resolution authority, and for which types of FMI? Could or should these resolution powers include tear-up, cash calls or a mandatory replenishment of default fund contributions by an FMI's direct participants? Does it make a difference if the losses are from a defaulting member or are made up of other losses (eg losses in investments made by the FMI)? In what circumstances, and by what methods, should losses be passed on beyond the direct participants – eg to the clients or FMI shareholders – in resolution?**

When a CCP does not have enough capital and a CCP has used its waterfall provision, the shareholders ought to bear losses before losses are passed to the clients of a CCP. For a corporate entity, mandatory cash calls from shareholders would run contrary to the concept of limited liability so an orderly wind down of the business would be appropriate. For a CCP, the rules governing participation could require mandatory replenishment of a default fund but this would need to be capped in order to avoid the potential insolvency of the FMI's participants.

- **How should equity in FMIs be treated in resolution scenarios: should it be written down in all circumstances?**

Yes, equity should it be written down in all circumstances. In particular, where market infrastructure providers have structured their businesses to restrict competition e.g. through the vertical integration of trading and clearing, they should be subject to a rigorous resolution regime that ensures that the cost of managing additional systemic risk that they pose to the wider market is always borne by that group's ultimate shareholders, rather than the public purse or other market participants.

- **Are there circumstances in which loss allocation in resolution should result in a different distribution of losses to losses borne in insolvency? Does it make a difference if the losses stem from a defaulting member or are made up of other losses (eg losses in investments made by the FMI or resulting from operational risks)?**

In general, the guiding principle should be to avoid loss to the public purse. Subject to this principle, general insolvency law should be followed as regards losses and the ranking of creditors. Accordingly, shareholders should bear the majority of all risks run by the enterprise, though the rules of a CCP might put additional responsibilities and liabilities on its participants.

- **Should an FMI's rules for addressing uncovered losses be taken into account when calculating whether creditors are no worse off in resolution than in liquidation?**

Yes they should be taken into account.

- **Are there any circumstances in which the ability to exercise termination rights as a result of the use of resolution powers should outweigh the objective of ensuring continuity?**

and

- **Are there any circumstances in which a temporary stay on exercising termination rights should apply for any event of default and not just where triggered by the resolution measures?**

The objective of ensuring continuity to allow for an orderly wind down/transfer of the FMI's business is crucial for those entities that pose systemic risk to the markets. This may also be the case for companies providing critical services to systemically important FMIs since their failure could cause a material impact to FMIs and eventually lead to materialisation of systemic risk. For example, one of the critical services for FMIs is technology. Accordingly, granting the resolution authority the right to impose a temporary stay on exercising termination rights should be considered.

- **Are there any circumstances in which a moratorium with a suspension of payments to unsecured creditors may be appropriate when resolving an FMI? Should this be limited to certain types of FMI and/or certain types of payment?**

It may be that certain types of payment should be suspended to ensure that the FMIs' relevant function can be performed. The resolution authority should consider carefully which payments can be suspended temporarily without damaging creditors. An example of when withholding payments might be justified could be the payment of rebates to participants.

- **If so, should resolution authorities retain the discretion to apply a moratorium and, if so, what restrictions (if any) on its use would be appropriate (eg scope, duration or purpose)?**

Yes, resolution authorities should retain the discretion to apply a moratorium. However, the moratorium ought to last for a limited period of time and it should be used for a specific purpose, which is measurable. Since flexibility is important, authorities should have discretion in making the decision of using a moratorium.

- **Should the bail-in tool be available to collateral, margin (including initial margin) and other sources of funds if they would bear losses in insolvency?**

The priority should be to return margin and collateral to users that are not responsible for the losses. In the first instance this should be ensured by proper segregation. Where return is not possible because the assets are no longer available then bail in must be preferable to loss.

- **In what circumstances and for what types of FMI should wider loss recovery arrangements exist beyond the FMI's own rules and the resolution powers of the resolution authority?**

Recovery costs should be recovered from the FMI's equity and/or through the sale of its functions and assets to another entity or entities. As stated above, most FMIs are no longer mutual. Capital requirements, particularly for CCPs, should be reassessed to ensure that they are adequate.

- **In conducting a resolvability assessment of an FMI, what factors should authorities pay particular attention to?**

Authorities should pay attention to the size, scale and systemic position of a FMI in the markets. It is important to assess the degree to which disruptions to the markets can be prevented and whether alternative service providers exist to whom an orderly transfer of functions can be made quickly. In assessing resolution plans, authorities should assess whether the interests of users of the services are protected rather than the interests of shareholders.