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Brussels, 11 October 2013

Subject: Consultative Report - Recovery of Financial Market infrastructures (August 2013)

The TARGET Working Group (TWG) would like to thank CPSS and IOSCO for the opportunity to comment on the above report. The TWG represents the European payments industry in discussions with the ECB/Eurosystem on issues relating to the TARGET 2 payment system. Consequently, remarks in this note are restricted to payment systems and no comment is made in relation to other types of FMIs

With one important exception, the TWG supports the main recommendations in this report so far as payment systems are concerned.

The exception relates to section 3.7.2 Cash calls on participants (“assessment power”) which appears to relate to all types of FMIs including payment systems. If so, the TWG has a major concern with the reference to “contract tear-ups “. Since this term is not defined in the document, interpretation would presumably fall to the courts which of itself creates uncertainty. However, on its face, it would appear to imply that CPSS – IOSCO may be suggesting that FMIs should create ex-anti powers to tear-up legally binding contracts. In like vein, the TWG believes that “forced allocations“ should only be permitted when allowed for in ex-anti documentation.

The TWG members not only regard this as being highly undesirable in relation to payment systems but fear that it could have unforeseen implications in relation to legal enforceability and potentially infringe mandatory provisions of law, particularly in jurisdictions with strong “unfair contract terms “legislation. Another concern is whether it may affect finality.

We have two other more minor comments and a request for clarification.

- In section 2.3.3, we would suggest adding “or equivalent governing body “at the end of the second sentence after “FMI’s board of directors “.
- We think it would be helpful to readers for any parts of the report restricted to particular types of FMIs, such as CCPs, to be segregated and identified more clearly.
- Some TWG members have requested clarification of the sentence in section 2.1.3 reading “At the same time, FMIs should not expect public funds to be made available to maintain their viability. “and sought an assurance that this will apply to both central bank and private systems.

Having queried with the European Central Bank, we understand that this requirement is indeed intended to apply to all FMIs and is intended to ensure that FMIs have sufficiently strong recovery plans to avoid any possibility of public funds being needed to achieve any resolution or equivalent process. We shall be grateful if you will therefore clarify the meaning of this sentence in your final guidance.

We hope you will find these remarks useful and look forward to seeing the final version of this document. Please address any queries to Denisa Mularova e-mail d.mularova@ebf-fbe.eu.

Yours sincerely,

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