



John Whittaker
Managing Director
Group Operational Risk

Barclays Bank PLC
1 Churchill Place
London
E14 5HP

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Tel: +44(0) 207 116 2666 (Direct)
john.whittaker@barclays.com

Interest Representative Register ID:
72390466359-39

European Commission
Internal Market and Services Directorate General
Unit H.4 – Financial Stability
1049 Brussels, Belgium

To The Internal Market and Services Directorate General,

RESPONSE TO CONSULTATIVE REPORT ON A POSSIBLE RECOVERY AND RESOLUTION FRAMEWORK FOR
FINANCIAL INSTITUTIONS OTHER THAN BANKS

Barclays Bank PLC (“Barclays”) welcomes the European Commission “Consultation on a possible recovery and resolution framework for financial institutions other than banks” consultative report and we acknowledge the critically important issues that it raises.

Barclays is, and has been, actively engaged in the wider debate around the resolvability of financial institutions and has made, and contributed to, extensive submissions in response to consultation papers from a range of bodies including the Financial Stability Board (“FSB”), European Commission (“EC”), the Committee on Payment and Settlement Systems (“CPSS”), the International Organization of Securities Commissions (“IOSCO”), HM Treasury, Federal Deposit Insurance Corporation (“FDIC”), Federal Reserve Board (“FRB”), FSA and the UK’s Independent Commission on Banking (“ICB”).

We have consulted with AFME to provide detailed responses to the questions raised in the consultative report and our views have been incorporated into their submission. Barclays’ views are essentially aligned with those expressed in the AFME response. However, due to the significance of this issue, we feel it important to emphasise a number of important themes.

Through the course of our work on RRP’s and related matters, Barclays has come to the view that while much has already been achieved to improve the resilience of banks and the global financial system, there are persuasive arguments to extend the powers of resolution authorities to be applicable in respect of critical financial market infrastructures (FMIs). This would be on the condition that the terms of any resolution regime reflect clear policy discussions, there are appropriate safeguards in place and any requirements to produce recovery and resolution plans are proportionate to the systemic significance of the FMI involved.

Consistency of approach

The nature of the globalised economy has two important implications for the resolvability of FMIs. Firstly, the FMIs and their members are active in multiple jurisdictions. There is likely to be increased globalisation of FMIs as legislation across the EU and US requires more products to be traded on exchange and cleared through central counterparties (CCPs). This, in turn, is likely to necessitate critical FMIs to be effectively resolvable on a global basis.

Secondly, the interconnected nature of the global economy means the failure of an FMI (or part thereof) in one jurisdiction could have significant repercussions in multiple jurisdictions. Indeed, such a failure would have the potential to affect adversely all members and participants of the FMI, including members without a presence in the jurisdiction where the failure occurred. The potential for foreign members to be affected must be borne in mind in the context of a resolution of the relevant FMI: while an FMI may be governed by a particular regulatory authority, certain of its members may be solely under the jurisdiction of a different regulator.

A globally consistent approach to resolution, with harmonised regulations and tools, will provide the optimal platform for effectively resolving an FMI while preserving the services required by the global economy.

Loss allocation

FMIs generally have in place detailed rules and financial provisions to protect themselves against the financial risks to which they may be subjected, particularly upon the default of a member. FMIs will typically have the ability to restrict, suspend or remove a members' access upon reasonably suspecting the member might default, and indeed will hold (and have the right, where appropriate to apply against losses) liquid financial collateral against members' positions. These provisions have been developed by FMIs, and reflect their expertise in mitigating risk within the financial markets.

We believe that these provisions have, to date, proved to be sufficient for their current particular purposes, and any requirement for FMIs to change their loss allocation methods should not be taken lightly and should only be based on firm evidence of likely benefit in the context of clear policy discussions. Similarly, resolution authorities should take into account the ability of FMIs to protect themselves against financial loss arising from member default, particularly when assessing whether the relevant FMI is sufficiently likely to fail for the use of resolution powers to be appropriate.

We note that we believe there are a number of concerns in the market about the use of "tear-up" measures as a loss allocation measure. Such measures have the potential to cause FMI members to lose large hedging positions which, in turn, would result in a significant increase in members' market risk and, accordingly, increase capital and liquidity stresses on banks and investment firms. This could result in further systemic issues.

Compression of contracts

A potential material risk mitigant could be the enhancement of capacity to compress trades in cleared trading environments in the ordinary course of business and the subsequent tear up of offsetting contracts. This would only be effective for eligible (standardised) contracts and in situations where there is no insolvency look back risk. Standardisation of contracts and the move of volumes to clearing on CCPs has increased the ability to compress and subsequently tear up contracts which would reduce the number of open contracts and enhance the ability of failing participants, resolution authorities and the FMIs to manage exposures and risks more effectively.

Types of FMI

While it is important to maintain a consistency of approach across jurisdictions when developing a resolution regime for FMIs, this must be balanced by a consideration of the needs of different types of FMI. The various services delivered by different FMIs carry in themselves different types and levels of risk, with implications for the loss-sharing agreements in place.

Confidentiality

Given the sensitive nature of the information contained in RRP, very careful consideration needs to be given to confidentiality and the mechanism by which these plans are shared amongst regulators and communicated to the wider market. Strong safeguards need to be put in place to restrict access to these plans. However given the nature of the ownership structure and control regime of many FMIs, consideration should also be given as to how these plans would be shared with the members of the FMI in question.

Continuity of service

It is key that any resolution regime for FMIs preserves the continuity of services as essential market infrastructure, so as to limit the risk of contagion to other areas of the market. There must be provision to continue the services of the FMI through either sale, merger or change of structure of the FMI or processes to transfer services to alternative institutions without any significant suspension or other disruption to the services provided.

Member default

The report raises the important issue of stays on exercising termination rights and discusses the value of requiring that an FMI's entry into resolution should not act as an event of default under its governing rules.

Conversely, this same principle could also be applied to the same extent in the case of a member entering into resolution. It is important for a member going through resolution to have continued access to critical FMIs in order to be able to complete transactions, make payments, close out client positions, etc. and in doing so be able to limit contagion to the rest of the market.

In this context, it is clear however that market participants and the FMIs as a whole need to be protected from the consequences of a default by any specific member and therefore the FMIs need to be able to use the risk management measures that are available to them.

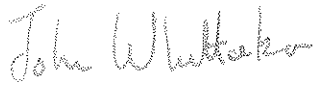
To address these competing priorities, we would suggest there be frameworks in place at all critical FMIs to set out clear procedures for how the FMI would deal with a member default. A key part of this framework could be a more formalised process of interaction with the regulatory authorities where an FMI is considering calling an event of default, so that the authorities can judge the potential impact of a member being closed out and – if appropriate – protect the market from such impacts. We believe it is important that the final decision continues to remain with the FMIs but if the home regulatory authority of the market participant defaulting is made aware, they can take necessary actions. In the UK, some critical FMIs are required to notify the regulator of their intention to call an event of default against a member before taking such protective action. In certain circumstances, and subject to safeguards, the UK regulator has the power to prevent FMIs from putting a member into default.

These are helpful powers where they are subject to appropriate safeguards and are used proportionately to protect market stability and the proper functioning of the financial markets. There would be merit in considering whether similar formal requirements should be reflected, either through formal legislative requirements or (in a more limited form) through changes to the Principles for Financial Market Infrastructure ("FMI Principles").

We trust the comments provided are helpful and I and the team remain available to discuss these with you. If you have any questions please do not hesitate to contact me.

We submit this as a confidential response.

Yours faithfully,

A handwritten signature in cursive script that reads "John Whittaker".

John Whittaker
Managing Director, Group Operational Risk

Barclays is a UK-based financial services group, with a very large international presence in Europe, the USA, Africa and Asia. It is engaged primarily in banking, investment banking and investment management. In terms of market capitalisation, Barclays is one of the largest financial services companies in the world. Barclays has been involved in banking for over 300 years and operates in over 50 countries with close to 150,000 employees.