ICMA EUROPEAN REPO COUNCIL

CPSS Secretariat
Bank for International Settlements
Centralbahnplatz 2
CH-4002 Basel
Switzerland

IOSCO Secretariat
International Organization of Securities Commissions
Calle Oquendo 12
28006 Madrid
Spain

24 September 2012

Dear Sirs,

Response submission from the ICMA European Repo Council

Re: Joint CPSS and IOSCO Public Consultative Report - "Recovery and resolution of financial market infrastructures"

Introduction:

The purpose of this letter is to provide feedback on behalf of the International Capital Market Association's ("ICMA's") European Repo Council ("ERC"), concerning certain repo oriented aspects of the joint Committee on Payment and Settlement Systems ("CPSS") and Board of the International Organization of Securities Commissions ("IOSCO") public consultative report "Recovery and resolution of financial market infrastructures", as published on 31 July.

The repo market is one of the largest and most active sectors in today's money markets. It provides an efficient source of money market funding for financial intermediaries while providing a secure home for liquid investments. Repo is also used by central banks as their principal tool in open market operations to control short-term interest rates. Repos are attractive as a monetary policy instrument because they carry a low credit risk while serving as a flexible instrument for liquidity management, which benefits the functioning of financial markets. Central banks are also able to act swiftly as lenders of last resort (and have done) during periods of market turbulence by way of the repo market.[1] In a repo transaction securities are exchanged for cash with an agreement to repurchase the securities at a future date. The transaction is collateralised, with the cash securing the seller's securities and the securities securing the buyer's cash. Collateral and netting are key to the proper functioning of repo markets. In the event of default, the collateral can be sold and exposure to the defaulting party can be netted off.

[1] The ERC has published a White Paper on the operation of the European repo market, the role of short-selling, the problem of settlement failures and the need for reform of the market infrastructure. This paper sets out in greater detail what the repo market is and its benefits and is available, together with two subsequent published update papers, via the ICMA website at http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Repo-Markets/European-repo-market-white-paper.aspx.

Over the years the ERC has contributed to the establishment of a robust infrastructure to underpin the European repo market, including through the development of the Global Master Repurchase Agreement ("GMRA")[2]. These efforts continue unabated, current initiatives including projects to enhance the availability of high quality collateral and to boost collateral efficiency. Many current regulatory initiatives are of significance to the repo market and the ERC is actively participating in efforts to ensure that applicable regulatory objectives can be realised, whilst at the same time ensuring the continued efficacy of the repo market.

Commentary:

The ERC notes that this joint consultative paper considers a wide range of potential measures intended to ensure that authorities across the globe have the powers and tools necessary to achieve effective resolution of systemically important financial market infrastructures ("FMIs"). Whilst many of these important proposals are of significant interest, this response nevertheless just focuses on those specific elements of the proposals which are of particular interest from the repo market perspective. These elements are "moratorium preventing outgoing payments from an FMI (Key Attribute 3.2 (xi))", as described on page 11 of the joint CPSS and IOSCO public consultation report; "Setoff, netting, collateralisation, segregation of client assets (Key Attribute 4)", as described on page 13; and "Stays on early termination rights based upon entry into resolution (Key Attributes 4.3 and 4.4)", as described on page 14.

The ERC also notes that on 19 July 2011 the Financial Stability Board ("FSB") issued a consultative document[3] – "Effective Resolution of Systemically Important Financial Institutions", which led to the FSB's final report[4] "Key Attributes of Effective Resolution Regimes for Financial Institutions". The current CPSS and IOSCO consultative report seeks to apply these FSB Key Attributes in a manner appropriate for FMIs and consequently covers many similar points to those raised in the FSB's July 2011 public consultation. Under date of 18 August 2011 the ERC responded to this earlier FSB consultation on the specific topic of its bail-in proposals. Given the degree of overlap between these two consultations, we respectfully request that you carefully review and fully consider this earlier ICMA response letter (a copy of which is attached for ease of reference) in the context of the current joint CPSS and IOSCO public consultation process.

Consistent with this overall outline approach, the ERC has the following brief observations:

Introductory observation regarding the use of CCPs

The introduction to the joint consultative paper notes the G20 commitment that all standardised over-the-counter (OTC) derivatives should be cleared through CCPs (paragraphs 1.2 and 1.3). Recent developments in the repo market serve to illustrate that, notwithstanding the attractions of CCP clearing, the adoption of too aggressive an attitude to risk may very well serve to drive trades out of the CCP. The example seen in the repo market involves certain parts of the user community being allocated substantially higher haircuts/initial margin, often due to wrong way risk. This leaves these institutions having no choice other than to look for counterparties willing to trade bilaterally. Particularly in fixed income repo markets where collateral equates to cash – and where there is a squeeze on available collateral for different market requirements – this can prove counterproductive.

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[2] The GMRA is the most extensively used cross border repo master agreement and has reduced the risks associated with previously poorly documented repo transactions.

[3] http://www.financialstabilityboard.org/publications/r_110719.pdf

[4] http://www.financialstabilityboard.org/publications/r_111104cc.pdf

FMIs that take on credit risk

The joint consultative paper notes that certain types of FMI take on credit risk as part of their services (paragraph 3.8) and that these FMIs are particularly exposed to risks from default by their participants, and perhaps also to losses on investments that the FMI holds on its own balance sheet as part of providing its services and for the return of which it is liable to participants (for example, investment of cash margin).

The ERC observes that the risk of loss on investment of cash margin should be mitigated by a requirement that any such investment be made on a secured basis. The ERC highlights that in such situations there should not then also be a restriction on the receiving party's re-use of the invested assets. Any such restriction of re-use would be duplicative of the safety achieved through the use of a secured investment strategy and would have a directly detrimental impact on future liquidity distribution in the system.

Moratorium preventing outgoing payments from an FMI (Key Attribute 3.2 (xi))

The ERC strongly supports the analysis of this point as described in paragraph 4.7 of the joint consultative report. Indeed, the "ability to continue to make payments is a fundamental part of the service" provided by FMIs; and a "resolution authority's decision to impose a moratorium to prevent outgoing payments by the FMI even for a short period is therefore likely to carry the risk of continuing or even amplifying systemic disruption." Accordingly the ERC concurs with the conclusion that "a moratorium on payments in a CCP, a payment system or an SSS would mean a full or partial stoppage of the system, probably defeating the objective of continuity of critical operations and services", as stated in paragraph 4.8 of the joint consultative report.

Setoff, netting, collateralisation, segregation of client assets (Key Attribute 4)

The ERC fully supports that the "Key Attributes require that the legal framework governing setoff rights, contractual netting and collateralisation agreements, and the segregation of client assets should be clear, transparent, understandable and enforceable"; and that "an FMI's legal basis should provide a high degree of certainty for each material aspect of an FMI's activities in all relevant jurisdictions", both as stated in paragraph 4.15 of the joint consultative report.

The importance of these points resonates with the ERC since, as already noted in the introduction to this response, collateral and netting are key to the proper functioning of repo markets. In the international market, the GMRA provides a robust legal framework for documenting repo transactions. Supervisory authorities recognise the effect of the GMRA netting provisions for regulatory capital and large exposure requirements provided, inter alia, that a reasoned legal opinion has been obtained to the effect that, in the event of a legal challenge, the relevant courts and administrative authorities would find that, where a counterparty fails owing to default, bankruptcy, liquidation or any other similar circumstance, the regulated firm's claims and obligations pursuant to the GMRA would be limited to a net sum under the law of the relevant jurisdiction(s), and meets certain other requirements. Against this background, ICMA obtains and annually updates legal opinions[5] on the GMRA, currently from over 60 jurisdictions worldwide, for the benefit of its members. These opinions cover both the enforceability of the netting provisions of the GMRA as well as the validity of the GMRA as a whole.

[5] http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/short-term-markets/Repo-Markets/GMRA-Legal-opinions (for further details, please contact the ICMA Legal helpdesk: +44 20 7213 0330 / legalhelpdesk@icmagroup.org)

Stays on early termination rights based upon entry into resolution (Key Attributes 4.3 and 4.4)

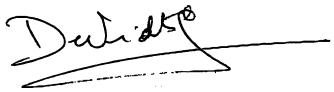
Paragraph 4.16 of the joint consultative report states that "Another power available to resolution authorities is the power to stay temporarily the exercise of early termination rights that may otherwise be triggered upon entry of a firm into resolution or otherwise in connection with the use of resolution powers." As previously stated in its 2011 response (referenced above) to the FSB, "Any suspension of close out netting rights alters the measure of risk to which a party is exposed. In a repo context, this would result in a requirement for increased collateral to account for market movement during/post the period of suspension and thus has clear consequences on the cost and therefore the attractiveness of this essential form of short financing. Furthermore costs may also arise in case new measures adversely impact the efficacy or enforceability of netting, with consequent impacts on regulatory requirements and/or legal certainty. For these reasons the ERC regards the imposition of a temporary suspension of close out netting as undesirable. If there is, nevertheless, to be any form of suspension of rights it is essential that this should be both clearly defined and as limited as possible in terms of time frame." The ERC's views on these matters are further elaborated in its earlier response.

Consistent with its previously documented views, the ERC is pleased to note that paragraph 4.18 of the joint consultative report states that "The Key Attributes require, however, that this stay be strictly limited in time"; and that this paragraph also generally clarifies that any close out rights arising by reason of other termination triggers should not be impeded.

Concluding remarks:

The ERC appreciates the valuable contribution made by the CPSS and IOSCO through their joint examination of the issues articulated in this public consultative paper and would like to thank them for their careful consideration of the points made in this response. The ERC remains at your disposal to discuss any of the above points.

Yours faithfully,



Godfried De Vidts
Chairman
ICMA European Repo Council

cc : ICMA European Repo Committee

ATTACHMENT

Reference copy of the ICMA ERC's 18 August 2011 response submission regarding the FSB's Consultation Paper "Effective Resolution of Systemically Important Financial Institutions"

ICMA EUROPEAN REPO COUNCIL

Financial Stability Board
Centralbahnplatz 2
CH-4002 Basel
Switzerland

18 August 2011

Dear Sirs,

Response submission from the ICMA European Repo Council

Re: FSB Consultation Paper – "Effective Resolution of Systemically Important Financial Institutions"

Introduction:

The purpose of this letter is to provide feedback on behalf of the International Capital Market Association's ("ICMA's") European Repo Council ("ERC"), concerning the repo oriented aspects of the FSB Consultation Paper "Effective Resolution of Systemically Important Financial Institutions", published on 19 July.

The ERC was established by ICMA in December 1999, to represent the cross-border repo market in Europe. It is composed of practitioners in this market, who meet regularly to discuss market developments in order to ensure that practical day-to-day issues are fully understood and dealt with adequately.

The repo market is one of the largest and most active sectors in today's money markets. It provides an efficient source of money market funding for financial intermediaries while providing a secure home for liquid investments. Repo is also used by central banks as their principal tool in open market operations to control short-term interest rates. Repos are attractive as a monetary policy instrument because they carry a low credit risk while serving as a flexible instrument for liquidity management, which benefits the functioning of financial markets. Central banks are also able to act swiftly as lenders of last resort during periods of market turbulence by way of the repo market.[1]

[1] The ERC has published a White Paper on the operation of the European repo market, the role of short-selling, the problem of settlement failures and the need for reform of the market infrastructure. This paper sets out in greater detail what the repo market is and its benefits and is available via the ICMA website at http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Repo-Markets/European-repo-market-white-paper.aspx.

In a repo transaction securities are exchanged for cash with an agreement to repurchase the securities at a future date. The transaction is collateralised, with the cash securing the seller's securities and the securities securing the buyer's cash. Collateral and netting are key to the proper functioning of repo markets. In the event of default, the collateral can be sold and exposure to the defaulting party can be netted off.

In the international market, the Global Master Repurchase Agreement (GMRA or Agreement)[2] provides a robust legal framework for documenting repo transactions. Supervisory authorities recognise the effect of the GMRA netting provisions for regulatory capital and large exposure requirements provided, inter alia, that a reasoned legal opinion has been obtained to the effect that, in the event of a legal challenge, the relevant courts and administrative authorities would find that, where a counterparty fails owing to default, bankruptcy, liquidation or any other similar circumstance, the regulated firm's claims and obligations pursuant to the GMRA would be limited to a net sum under the law of the relevant jurisdiction(s), and meets certain other requirements. Against this background, ICMA obtains and annually updates legal opinions on the GMRA, currently from 62 jurisdictions worldwide, for the benefit of its members. These opinions cover both the enforceability of the netting provisions of the GMRA as well as the validity of the GMRA as a whole.

The ERC notes that on 20 October 2010, the European Commission announced its plans for an EU framework for crisis management in the financial sector. Further to this, DG Internal Market and Services then consulted on the technical details of such a framework in order to inform the preparation of a formal Commission legislative proposal scheduled for adoption in 2011.

Commentary:

Whilst there are many interesting issues discussed in this consultation paper, the ERC is going to restrict its focus to those aspects that bear most directly on repo. As the ERC sees it, the particularly pertinent matters are those relating to the temporary suspension of rights – as described on pages 21 – 22 of the consultation paper and in its Annex 8 "Discussion note on conditions for a temporary stay on early termination rights".

This topical focus was equally so in context of the Commission Services' consultation referenced above and accordingly we respectfully request that you carefully review and take full consideration of the ERC's 3 March response thereupon (a copy of which is appended hereto for ease of reference) in the context of this FSB consultation process. Annexed to this response there are some short, specific comments regarding questions 26 – 31 of this FSB consultation, together with some cross-references to the commentary which the ERC previously provided to the European Commission. At this stage, we do not have specific comments in respect of questions 32 – 34 of this FSB consultation.

Concluding remarks:

The ERC notes that the arrangements under consideration in the consultation proposals need to be carefully developed to take account of repo (and other types of financing) transactions, in addition to underlying cash securities transactions. The ERC considers that whilst it is right to seek the orderly resolution of a failing institution, this objective must be balanced against the market need for prompt closeout so as to mitigate the risk of adverse market movement during the period of suspension. The imposition of rigid or ill defined constraints could serve to impede established market practise for the efficient (repo) financing of securities positions.

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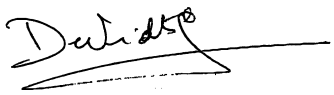
[2] The GMRA is the most extensively used cross border repo master Agreement and has reduced the risks associated with previously poorly documented repo transactions.

The ERC appreciate the valuable contribution made by the FSB's examination of the issues articulated in this consultation paper and would like to thank the FSB for its careful consideration of the repo oriented points made in this response. The ERC remains at your disposal to discuss any of the above points.

Yours faithfully,



Godfried De Vidts
Chairman
ICMA European Repo Council

cc : *ICMA European Repo Committee*
ICMA European Repo Operations Group

Annex 1

Specific comments regarding FSB consultation questions and cross-references to the ERC's earlier European Commission consultation response

The questions in the FSB's consultation which pertain to Annex 8 are laid out on pages 22 – 23.

FSB Questions for public consultation:

26. Please give your views on the suggested stay on early termination rights. What could be the potential adverse outcomes on the failing firm and its counterparties of such a short stay? What measures could be implemented to mitigate these adverse outcomes? How is this affected by the length of the stay?

A. Any suspension of close out netting rights alters the measure of risk to which a party is exposed. In a repo context, this would result in a requirement for increased collateral to account for market movement during/post the period of suspension and thus has clear consequences on the cost and therefore the attractiveness of this essential form of short financing. Furthermore costs may also arise in case new measures adversely impact the efficacy or enforceability of netting, with consequent impacts on regulatory requirements and/or legal certainty. For these reasons the ERC regards the imposition of a temporary suspension of close out netting as undesirable. If there is, nevertheless, to be any form of suspension of rights it is essential that this should be both clearly defined and as limited as possible in terms of time frame.

Our views on these matters are further elaborated in the first four bullet points under section A of the commentary in the ERC's appended response to the European Commission consultation.

27. What specific event would be an appropriate starting point for the period of suspension? Should the stay apply automatically upon entry into resolution? Or should resolution authorities have the discretionary right to impose a stay?

A. It is important to identify a clear point from which the suspension would take effect and that the market is able to clearly understand exactly what is meant by this. In addition, the methods of notification of any suspension must be accessible and clear.

Our views on this are also reflected in the 4th bullet point under section A of the commentary in the ERC's appended response to the European Commission consultation.

28. What specific provisions in financial contracts should the suspension apply to? Are there any early terminations rights that the suspension should not apply to?

A. Understanding that the purpose of the suspension is to provide the resolution authorities with the time to select and transfer assets and liabilities, any suspension should be limited to those close out rights arising solely by virtue of the use of the transfer powers of the resolution authority. Any close out rights arising by reason of other termination triggers should not be not impeded.

Our views on this are also reflected in the 5th bullet point under section A of the commentary in the ERC's appended response to the European Commission consultation.

29. *What should be an appropriate period of time during which the authorities could delay the immediate operation of contractual early termination rights?*

A. Any form of suspension of rights should be both clearly defined and as limited as possible in terms of time frame.

Our views on this are also reflected in the 4th bullet point under section A of the commentary in the ERC's appended response to the European Commission consultation.

30. *What should be the scope of the temporary stay? Should it apply to all counterparties or should certain counterparties, e.g., Central Counterparties (CCPs) and FMIs, be exempted?*

A. The exclusion of some counterparty types from the suspension would create competitive distortions; present arbitrage opportunities; and result in a misalignment with the rest of the market, which would undermine its stable functioning.

Our views on this are also reflected in the 6th bullet point under section A of the commentary in the ERC's appended response to the European Commission consultation.

31. *Do you agree with the proposed conditions for a stay on early termination rights? What additional safeguards or assurances would be necessary, if any?*

A. The ERC supports those safeguards which aim to prevent resolution authorities from 'cherry picking' rights and liabilities under protected market arrangements, including title transfer financial collateral arrangements, set off arrangements, netting arrangements and structured finance arrangements.

During the period of suspension, the resolution authorities may transfer covered rights and liabilities to a private sector purchaser or another entity; or decide that such rights and liabilities will remain with the residual, 'failed' bank. If the former is the case, the ERC is concerned that there are robust and transparent criteria which such transferee must meet, at the very least in terms of its solvency. The ERC is also keen to ensure that any hardening periods (in which transactions are vulnerable to being challenged) with respect to relevant insolvency procedures are not 'reset' as a consequence of any transfer.

Our views on this are as reflected section B; and also in the 7th bullet point under section A of the commentary in the ERC's appended response to the European Commission consultation.

32. *With respect to the cross-border issues for the stay and transfer, what are the most appropriate mechanisms for ensuring cross-border effectiveness?*

A. At this stage, we do not have specific comments in respect of this question.

33. *In relation to the contractual approach to cross-border issues, are there additional or alternative considerations other than those described above that should be covered by the contractual provision in order to ensure its effectiveness?*

A. At this stage, we do not have specific comments in respect of this question.

34. *Where there is no physical presence of a financial institution in question in a jurisdiction but there are contracts that are subject to the law of that jurisdiction as the governing law, what kind of mechanism could be considered to give effect to the stay?*

A. At this stage, we do not have specific comments in respect of this question.

APPENDIX

ICMA EUROPEAN REPO COUNCIL

DG Internal Market and Services
Directorate H – Financial Institutions
Unit H1 – Banking and Financial conglomerates
European Commission
SPA2, 1049 Brussels

3 March 2011

Dear Sirs,

Response submission from the ICMA European Repo Council

Re: Technical details of a possible EU framework for bank recovery and resolution

Introduction:

On behalf of the European Repo Council ("ERC") of the International Capital Market Association ("ICMA"), the purpose of this letter is to provide feedback primarily concerning the repo oriented aspects of the DG Internal Market and Services working document on the technical details of a possible EU framework for bank recovery and resolution, published on 6 January.

The ERC was established by ICMA in December 1999, to represent the repo community in Europe. It is composed of practitioners in the repo field, who meet regularly to discuss market developments in order to ensure that practical day-to-day issues are fully understood and dealt with adequately.

The repo market is one of the largest and most active sectors in today's money markets. It provides an efficient source of money market funding for financial intermediaries while providing a secure home for liquid investments. Repo is also used by central banks as their principal tool in open market operations to control short-term interest rates. Repos are attractive as a monetary policy instrument because they carry a low credit risk while serving as a flexible instrument for liquidity management, which benefits the functioning of financial markets. Central banks are also able to act swiftly as lenders of last resort during periods of market turbulence by way of the repo market.[1]

In a repo transaction securities are exchanged for cash with an Agreement to repurchase the securities at a future date. The transaction is collateralised, with the cash securing the seller's

[1] The ERC has published a White Paper on the operation of the European repo market, the role of short-selling, the problem of settlement failures and the need for reform of the market infrastructure. This paper sets out in greater detail what the repo market is and its benefits and is available via the ICMA website.

securities and the securities securing the buyer's cash. Collateral and netting are key to the proper functioning of repo markets. In the event of default, the collateral can be sold and exposure to the defaulting party can be netted off.

In the international market, the ICMA Global Master Repurchase Agreement (GMRA or Agreement)[2] provides a robust legal framework for documenting repo transactions. Supervisory authorities recognise the effect of the GMRA netting provisions for regulatory capital and large exposure requirements provided, inter alia, that a reasoned legal opinion has been obtained to the effect that, in the event of a legal challenge, the relevant courts and administrative authorities would find that, where a counterparty fails owing to default, bankruptcy, liquidation or any other similar circumstance, the regulated firm's claims and obligations pursuant to the GMRA would be limited to a net sum under the law of the relevant jurisdiction(s), and which meets certain other requirements. Accordingly, ICMA obtains and annually updates legal opinions on the GMRA from 62 jurisdictions worldwide. These opinions cover both the enforceability of the netting provisions of the GMRA as well as the validity of the GMRA as a whole.

The ERC notes that on 20 October, 2010, the Commission announced its plans for an EU framework for crisis management in the financial sector. Further to this, DG Internal Market and Services are now consulting on the technical details of such a framework. The ERC further notes that the objective of this consultation is to inform the preparation of a formal Commission legislative proposal scheduled for adoption in June 2011.

Commentary:

Whilst there are many interesting issues discussed in this consultation paper, the ERC is for now going to primarily restrict its focus to those aspects that bear most directly on repo. As the ERC sees it, the particularly pertinent matters are those relating to the temporary suspension of rights.

A. Temporary suspension of rights:

Section G12 of this consultation proposes a suspension of "... payment or delivery obligations pursuant to any contract". The ERC notes that it is important to clarify that such a suspension would have to operate on a reciprocal basis in order to be equitable.

At G13 this consultation proposes a "…temporary suspension of all close out rights of any party under a netting arrangement with a failing credit institution that arise solely by reason of an action or anticipated action by the resolution authority…". Whilst the ERC understands that the purpose of such suspension would be to give resolution authorities the benefit of a short time to decide which assets and liabilities should be transferred and to effect the transfers, it considers that the following observations merit detailed and careful consideration as this proposal is progressed:

- Close out netting is an important legal mechanism through which exposures (and therefore risks) may be reduced between counterparties. The importance of such a risk mitigation tool in supporting the stability and efficiency of the financial system has been consistently recognised and supported by policy makers. Any suspension of close out netting rights alters the measure of risk to which a party is exposed. In a repo context, this would result in a requirement for increased collateral to account for market movement during/post the period of suspension and thus has clear consequences on the cost and therefore the attractiveness of this essential form of short financing. In considering the implication of this, it is important to note that this extra

[2] The GMRA is the most extensively used cross border repo master Agreement and has reduced the risks associated with previously poorly documented repo transactions.

collateral cost will be borne throughout the life of all repo transactions subject to the possible application of suspension constraints, notwithstanding that the incidence of any actual exercise of the suspension power may prove to be an extremely rare occurrence.

- Furthermore, if there was any disruption to the efficacy or enforceability of netting such that institutions would be unable to reduce their regulatory capital requirement under the Basel capital regime by relying on close out netting under a master agreement such as the GMRA, the burden of finding additional collateral would be exacerbated by a need to raise additional capital. The ERC is keen to ensure that the legal certainty of such netting arrangements is protected and that there are no unintended consequences in this regard. In case it arises, this would again be an ongoing cost, regardless of the contingent nature of the legal uncertainty occasioned by the creation of a suspension power.

- For the reasons set out above, the ERC regards the imposition of a temporary suspension of close out netting as undesirable. Once a termination event occurs, a party should be able to manage its credit and market risk in relation to its positions with the relevant failing counterparty, based on its assessment of market conditions and the situation of the counterparty. It must be able to take action to mitigate market risk by closing out such positions, without delay. The risk of market movement is very real, as the suspension would act in relation to just those contracts concerned, whilst the market as a whole would remain open – and be cognisant of the imposition of the suspension.

- If there is, nevertheless, to be any form of suspension of rights it is essential that this should be both clearly defined and as limited as possible in terms of time frame. Any such suspension should not be capable of extension by the resolution authorities or otherwise. The consultation suggests that any suspension should last no longer than forty-eight hours after the time the suspension is notified; or 5pm on the business day following the day of notification (whichever period is longer). The ERC is pleased to note that the consultation recognises the importance of identifying a clear point from which the suspension would take effect. It is important for the market to understand what is meant by 'the time the suspension is notified'. In addition, the methods of notification set out in G10 of this consultation must be accessible and clear.

- Central to the GMRA's netting provisions are the Events of Default which trigger the termination and closing out of the Agreement. The consultation proposes a suspension of all close out rights that "arise *solely* by reason of an action or anticipated action by the resolution authority". The ERC is keen to ensure that this does not impede close out rights arising by reason of other termination triggers. Any disruption to such rights would further undermine the legal certainty and risk mitigation capabilities of the Agreement. It is therefore important to clarify what form of resolution action is included within this condition. If the purpose of the suspension is indeed to provide the resolution authorities with the time to select and transfer assets and liabilities then the suspension should be limited to a suspension of close out rights arising by virtue of the use of the transfer powers of the resolution authority.

- This consultation asks whether any classes of counterparty should be excluded from the scope of the suspension of close out netting. Examples given include CCPs and payment and securities settlement systems that fall within the scope of the Settlement Finality Directive. The ERC is concerned that the exclusion of some counterparty types from the suspension would create competitive distortions; present arbitrage opportunities; and result in a misalignment with the rest of the market, which would undermine its stable functioning.

- During the period of suspension, the resolution authorities may transfer covered rights and liabilities to a private sector purchaser or another entity; or decide that such rights and liabilities will remain with the residual, 'failed' bank. If the former is the case, the ERC is concerned that there are robust and transparent criteria which such transferee must meet, at the very least in terms of its solvency. The ERC is also keen to ensure that any hardening periods (in which transactions are vulnerable to being challenged) with respect to relevant insolvency procedures are not 'reset' as a consequence of any transfer.

- This consultation notes that "If the rights and liabilities covered by a netting arrangement remain with the relevant credit institution, a person may exercise all rights under that agreement". This applies on the expiry of the suspension or prior to such expiry if the resolution authority so notifies the counterparty. It is not clear whether close out netting may be enforced at this point by reason of the resolution action, or not. Further detail is again also required in respect of the method of notification.

B. Partial transfers: safeguards for counterparties

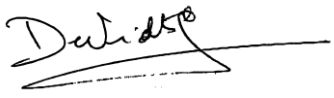
The ERC is pleased to note the safeguards proposed within this consultation paper which aim to prevent resolution authorities from 'cherry picking' rights and liabilities under protected market arrangements, including title transfer financial collateral arrangements, set off arrangements, netting arrangements and structured finance arrangements.

Concluding remarks:

The ERC notes that the arrangements under consideration in the consultation proposals need to be carefully developed to take account of repo (and other types of financing) trades, in addition to underlying cash securities trades. The ERC considers that whilst it is right to seek the orderly resolution of a failing institution, this must be balanced with the market need for prompt close out so as to mitigate the risk of adverse market movement during the period of suspension. The imposition of rigid or ill defined constraints could serve to impede established market practise for the efficient (repo) financing of securities positions.

The ERC appreciate the valuable contribution made by the European Commission's examination of the issues articulated in this consultation paper and would like to thank the European Commission for its careful consideration of the repo oriented points made in this response. The ERC remains at your disposal to discuss any of the above points.

Yours faithfully,



Godfried De Vidts
Chairman
ICMA European Repo Council