

Annex 5

Report of the Infrastructures Working Group

31 October 2003

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Executive summary

The Infrastructures Working Group (the Group) proposes that any recommendations made by the Task Force are applied to all bodies undertaking systemically important functions. The Group has not defined the boundaries of this category nor which infrastructures and quasi-infrastructures might fall within it, recognising there are difficult issues to be considered at the boundary (although similar issues are presently being considered by the European Central Bank (ECB) and the Committee of European Securities Regulators (CESR) as part of their Consultative Report issued in July 2003 on “Standards for Securities Clearing and Settlement Systems in the European Union”). We recommend that the authorities undertake this boundary definition work as soon as possible. The Group also acknowledges that many of the infrastructures used by UK financial participants are not UK-based and that there is a need for closer integration of the approaches to major operational disruption (MOD) by European and other international regulators and legislators, which the Group recommends the UK authorities should pursue as a long-term goal.

The Financial Markets Law Committee’s (FMLC) work to tabulate existing rules and provisions is drawn upon, and the Group notes that the surveyed infrastructures already have powers to enable them to act as required during MOD. The Group recommends that those infrastructures that lack an **express** power to deal with MOD in their rules or regulations might act to ensure clarity and reassure participants by introducing such powers. The Group also supports the business continuity planning undertaken by infrastructures both independently and in partnership with each other, and takes this opportunity to highlight some of the steps that have been taken. The Group does not support the introduction of best practice standards or guidelines for UK-based infrastructures’ business continuity plans.

The Group believes there is a need to further enhance this co-ordination between business contingency arrangements at different infrastructures and recommends that one of the financial authorities be nominated to take the role of the central co-ordinator for MOD preparation and management. It would be desirable for this central co-ordinator to facilitate a consistent approach by the Bank and FSA to the oversight of contingency arrangements for infrastructures. The nominated co-ordinating authority’s oversight remit might also be extended so that it

performs an oversight and Business Continuity Planning (BCP) co-ordination role for that infrastructure which is identified as undertaking a systemically important function but which is not currently either a Recognised Body, or overseen by the Bank of England as a payment system, or designated under the Financial Markets and Insolvency (Settlement Finality) Regulations 1999. The central co-ordinator would act to ensure that the business continuity plans of these infrastructures were of an acceptable standard and were properly tested, and would facilitate the co-ordination between different infrastructures. It should also ensure co-ordination between the plans of Recognised Bodies, payment system operators and other infrastructures, and in addition any overseas-based infrastructures which might agree to be included in the UK process on a voluntary basis.

At the very least, the Group recommends that work is undertaken to compare the standards expected of “infrastructure” and “quasi-infrastructure” within the UK. Furthermore, the work that has already been carried out by infrastructures to plan for MOD should be publicised more widely and encouraged.

The Group strongly opposes the introduction of any legislative powers which close infrastructure with **retroactive** effect, either as an express new power or (perhaps inadvertently) in other new legislation or the revision of existing legislation. Furthermore, the Group has found no reason from an infrastructure perspective to support the introduction of an additional power to close infrastructures intra-day: the consensus of the Group is that such a power would cause confusion and uncertainty as to its possible use and ramifications.

The Group notes, however, that powers reserved to Recognised Bodies to respond to MOD under contractual rules and provisions might be susceptible to challenge under certain mandatory laws. Accordingly, the Group strongly recommends the provision of statutory immunity for actions taken, or not taken, in good faith to limit systemic and other risks arising as a result of the occurrence, or threatened occurrence, of MOD. This immunity could be extended to the non-Recognised payment system operators and any identified quasi-infrastructure. Furthermore, should the Task Force consensus be that an intra-day prospective closure power is necessary, then provisions to incorporate this immunity should be included within it.

The Group has considered non-legislative responses and recommends the creation of a single point of contact to co-ordinate preparations for MOD *ex ante* and to act as a central co-ordinator and communications hub in a post-MOD situation. Again, the Group recognises that much useful work has already occurred in this sphere and this could be usefully publicised by the Task Force Report.

Scope of the work

Terms of reference

1 The Infrastructures Working Group was asked:

*To advise the Task Force on the **adequacy of market infrastructures' rules and market conventions (including those of payment systems, exchanges, clearing houses and securities settlement systems)** in minimising the impact of major operational disruption in the UK financial services sector and the need for and possible form of a legislative response.*

2 This report sets out the Group's views to be fed into the Task Force's Report to HM Treasury. The Group is indebted to the Financial Markets Law Committee for its work establishing the current levels of preparedness of business continuity planning at infrastructures both in the UK and overseas.

Background

3 The Task Force was set up following the responses to the HM Treasury Green Paper¹ issued in February 2003. While respondents to the Green Paper agreed with the Paper's view that the main responsibility for civil contingency planning in the financial services industry rests with the private sector, concerns were raised that the legislative powers proposed in the Green Paper would be an inappropriate response to the risks posed by major operational disruption (MOD). In particular, there were concerns over the unforeseen nature of the problems that would arise after MOD; a possible lack of clarity over what circumstances would trigger the powers, and their extent and scope once they had been triggered; and possible inconsistency with approaches to MOD being adopted in other jurisdictions — particularly relevant given the international nature of the UK's financial system.

4 More specifically, concerns were raised regarding the possible impact on market infrastructure of some of the Green Paper's proposals:

- Most respondents to the Green Paper preferred a co-ordinated, voluntary approach to dealing with MOD by private sector and market infrastructure providers. There was concern that a "silo" approach to business continuity planning might be developing, with different market liaison groups and organisations failing to consult with each other, and possibly replicating each other's work.
- However, there was recognition that much work had already occurred through these market liaison groups and organisations — such as the Foreign Exchange Joint Standing Committee and the Markets and Exchanges Regulatory Liaison Network (MERLIN) contingency sub-group — and legislation should only be introduced when this is likely to be necessary and helpful in addressing issues that cannot be solved by the ongoing output of these groups.
- The need for international co-ordination was highlighted: for example the UK is home to Euronext.liffe (whose CONNECT system is used in more sites than any other electronic trading platform in the world), and to a sizable minority of business transacted on overseas exchanges (eg 45.4% of Eurex volume in the first nine months of 2003).
- Respondents noted that any legislation that might affect pan-European payment systems (eg TARGET) would have to take into account supra-national laws and agreements. Furthermore, concerns were expressed over the possible adverse effect on the global settlement of foreign exchange transactions: the Rules and Member Handbook of CLS Bank, which settles upwards of the equivalent of US\$1 trillion on higher value days, are governed by the laws of England.
- Respondents also requested further guidance as to whether the Green Paper's proposals for direction and suspension powers should also apply to quasi-infrastructure (eg should a functional approach be adopted?), and whether the precise

¹ The Financial System and Major Operational Disruption, Cm 5751, February 2003.

scope of any direction order should be defined ex ante.

- Green Paper respondents also expressed concern about the need for infrastructures to change their rules to reflect any new legislation; while this should not create any difficulty, it underscored the need to work closely with the infrastructure providers.

5 The Group has kept these considerations in mind when considering this report to the Task Force.

6 This report focuses on financial infrastructure (eg payment systems) rather than physical infrastructure (eg telecommunications suppliers). However, some of the recommendations might usefully also be applied to these service providers and this is an area in which we suggest the Task Force recommends further work should be undertaken.

Gap analysis

Overview of infrastructure

7 It is logical to begin this report by considering the term “market infrastructures” contained within the Terms of Reference. Should any proposed powers be implemented, there would be a need to ensure that every provider of a systemically important infrastructure used within or by the UK financial system is covered, but this would create two major problems.

8 First, not all of the operators of systemically important infrastructures are covered by English law — many exchanges, clearing houses, settlement systems and payments systems used by UK-based market participants are incorporated and/or operate overseas, and are regulated in their home country. While it is desirable to ensure that infrastructures based in the UK operate under best practice and so highlight London’s preparedness for MOD, powers that leave some market participants unable to function because of contrary decisions being taken in other financial centres will be worthless if they still lead to a “gumming up” of the UK financial system. Furthermore, some infrastructures — such as the TARGET system — operate under supra-national law. Closer integration of the approach adopted by European regulators and of European law might help to reduce this problem to an extent, given London’s position as a major hub for Euro trading, the proliferation of pan-European infrastructures and the

trend towards consolidation. However, this integration would not be achievable in the short run, although the Task Force might wish to recommend it as a long-term goal. Equally, active co-ordination of the approach to MOD on the wider international front would be desirable and the Group encourages the Task Force to recommend this in its report.

9 Second, there would be a need to minimise the risk that in providing legislative protection to all systemically important functions performed by a body in connection with MOD, measures were being taken which might be seen to be being used for the protection or support of individual firms in relation to circumstances unrelated to MOD. One example of a situation that might be sensitive would be the case of a bank that operates systemically important clearing and settlement functions as part of its custody service. Should the organisation fail owing to activities unrelated to the custody service and MOD powers be used, there might be concerns that the Government was acting to support the bank’s other operations, rather than ensuring that the bank’s custodian service would continue to operate (or ensuring that markets remain closed until a work-round was in place) to minimise the systemic and other risks created by MOD. It is the Group’s view that this concern would be minimised by a closely-defined statutory immunity, under which there is a clear and direct nexus between such immunity and actions taken in good faith to manage the systemic or other risks created by an actual or threatened MOD, in the performance of systemically important functions.

10 The Group concluded that it was crucial to ensure that operators of all systems that are, or may be, systemically important to the UK financial system are covered by any new powers or other proposals that the Task Force puts forward. The universe of systemically important infrastructure has not been conclusively discussed by the Group but would be likely to include: most infrastructure examined by the FMLC in its work on emergency powers; systemically important custodians; Alternative Trading Systems (ATS); trade confirmation and messaging services, and network providers; and any other infrastructures that further work suggests should be included in this list. In particular, it might be desirable to consider further the extent to which infrastructure servicing the retail financial services market (eg BACS) should be covered. On the other hand, this might be considered an unnecessary

refinement if the Task Force did not wish to consider retail market infrastructure. The Group has noted, but has not considered in detail, the work being undertaken in this area in relation to “systemically important systems” by the ECB and CESR. The Group recommends that the Task Force recommends timely further work to ensure that systemically important systems are identified and covered by any new powers or other proposals that the Task Force proposes.

Current market practices, conventions, standards, rules

11 The FMLC has been able to consider the current market practices and rules at CHAPS, BACS, EBA Euro 1, SWIFT, CLS Bank International, London Stock Exchange, Euronext.liffe, International Petroleum Exchange, London Metal Exchange, LCH, CREST, Euroclear and Clearstream. It is worth noting once again that this is not a comprehensive list of providers of systemically important infrastructure for the UK. The table in Annex 5A, taken from the FMLC’s Report on Emergency Powers Legislation, highlights the relevant provisions within infrastructures’ rules, regulations and membership agreements to deal with MOD, and the powers that they have under these arrangements. The table highlights some differences in approach to dealing with MOD.

12 There are several categories of powers that infrastructure providers retain through their rules. These are generally triggered by broadly drafted force majeure clauses or similar clauses that invoke the powers under any unusual circumstance. These powers include: the power to keep systems operational; the power to amend contracts or rules immediately; the power to suspend trading, clearing or settlement systems (as appropriate) or operate standby procedures and systems; the power to close the institution; the power to vary the daily timetable; the power to suspend participants; and “catch all” powers to take any action at all.

13 On the whole, the infrastructures identified by the FMLC report take all of these powers as applicable, although some — CHAPS, SWIFT, CLS Bank and CREST — have not reserved for themselves the broad power to “take any action at all” in a MOD situation. Although SWIFT appears to be particularly lacking both express and “catch all” powers, the messaging service it provides does not involve the provision of clearing, settlement or market services.

14 The Group’s conclusions with regard to infrastructure rules are largely in line with those of the FMLC in Section 6 of its report into existing Emergency Powers legislation. These note:

- The interdependency of infrastructures and the need for co-ordination of business continuity arrangements between infrastructures (eg Euronext.liffe cannot remain open for any period of time without LCH).
- That, in general, most infrastructures have express powers to allow them to deal with MOD. However, this provision is not universal and some rely instead on the “catch all” powers within their rules or regulations. Some of these infrastructures require decisions by the board of directors for these powers to be invoked, which may create difficulties if a quorum is unobtainable in a MOD situation. While the presence of the “catch all” powers in their rules is undoubtedly reassuring for the infrastructure bodies, the existence of clear, express powers would surely be more reassuring and would remove the possibility of unnecessary and costly litigation resulting from a body’s decisions. The Group therefore recommends that infrastructure bodies review their rules with a view to the inclusion of specific powers to take action to deal with MOD and to ensure that the mechanism to exercise those powers will be practicable to operate in a MOD situation.

Business continuity planning

15 The Group has also considered the management of the practicalities of MOD — ie the provisions Group members themselves have in place to cope with the immediate aftermath of MOD. All members appear to have well-developed and rehearsed plans for the management of their business after MOD. Best practice for business management and disaster recovery would appear to include:

- a clear decision-making structure regarding eg market closure or transfer to a contingency site;
- nominated deputies (and deputies’ alternates) should key personnel be unavailable, with no single point of dependency in any function or team;
- cascade lists for dissemination of decisions to staff;

- specific plans for dealing with the media;
- “decision trees” to help decide what actions need to be taken;
- regular testing of plans; and
- disaster recovery sites located in distant locations.

16 However, it is important to note here that no work has been undertaken by the Group to consider:

- co-ordination of infrastructures’ contingency arrangements;
- the standard of provision for business management after MOD for those infrastructures and quasi-infrastructures that are not members of the Group;
- the performance of individual Group members compared with the practices outlined above — although reviews of the infrastructures’ plans are of course undertaken by their overseer or regulator; and
- whether the reviews by those overseers or regulators are adequate and consistent in their approach.

17 The Group has considered whether there should be best practice standards or guidelines issued to infrastructure providers operating within the UK. The consensus of the Group is that these are not desirable for a number of reasons. First, standards would be hard to keep up to date and it would be prohibitively difficult to strike the balance between being either too prescriptive, or so vague that they are not worthwhile. The individual circumstances of each infrastructure provider necessitate a flexible, bespoke approach from each, in dialogue with the regulator or overseer. Second, the scope of the standards would have to be extremely wide-reaching in order to be effective, covering not only physical MODs but also other disruption including software failures. This would be very difficult to achieve.

18 Finally, payment systems, systems designated under the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, and Recognised Bodies will already have their contingency plans overseen by either the Bank of England (payment systems overseer) or the

FSA (Recognised Body overseer). The Group felt that the fact that this is already done — while taken for granted by the infrastructure providers — should be highlighted in the Task Force Report as an example of the work that is already being undertaken to prepare for MOD, and of the authorities and infrastructures working together.

19 However, it was also noted that there might be systemically important quasi-infrastructure that is operating in the UK but is not regulated or overseen by any UK authority. Once all the operators of systemically important systems have been identified as proposed in paragraph 10, there will be a need to consider whether their contingency plans are externally reviewed by relevant authorities. Similarly, it might be desirable to consider the status of overseas-based infrastructure and whether their contingency plans are externally reviewed, although the UK authorities would understandably have less leverage in these cases.

20 At the very least, further work is required to consider the standards currently adopted by UK quasi-infrastructure and how these compare with the standards required of infrastructure by the Bank and the FSA. This work should be undertaken at the same time as the stock-take of the universe of infrastructure providers outlined in paragraph 10 above.

21 The Group welcomes the work already carried out by the financial authorities in the past two years to strengthen further the UK financial system’s preparedness for MOD. In particular, work has been undertaken by the Tripartite Standing Committee to bring together major financial institutions to discuss business continuity plans in harmony. This work has been both aided and promoted to the public by the creation of the financial sector telephone conference facilities and web site. The Group recommends below that this work be strengthened and deepened by the appointment of one of the authorities as the nominated central point of contact and co-ordination for “post-MOD” and that business continuity plans should be updated to reflect this appointment.

22 The Group does, however, have some concern as to whether the existing oversight arrangements provide demonstrably consistent and comprehensive coverage. Given the division of oversight responsibilities between the Bank and the FSA, the nominated authority for “post-MOD” might also be able to promote consistency in the approaches to contingency planning (ie

“ante-MOD”) being taken by Recognised Bodies and payment systems overseen by the Bank and the FSA, as well as having its remit extended to the oversight of contingency arrangements of any UK-based infrastructures that are not currently overseen by these authorities. The nominated authority would act to ensure not only that the business continuity plans of the relevant infrastructures were of an acceptable standard and were properly tested, but would also further ensure co-ordinated planning between infrastructures. It would be hoped that overseas-based infrastructures would submit their contingency plans to the nominated co-ordinating authority to ensure financial system-wide co-ordination, but any such arrangements would no doubt have to be on a voluntary basis so as to avoid damage to London’s competitive position as an international financial centre. The Group recognises that it would only be worth taking this approach if the benefits in terms of consistency and co-ordination outweigh the possible additional bureaucracy that might be created. It also recognises that it is not obvious which authority would perform such a function, but that it should logically be the one that performs the post-MOD co-ordination role.

International comparisons

23 The Group has not considered in depth the practices in overseas markets that might be usefully implemented in the United Kingdom; in the short time available, the Group has only been able to scratch the surface of the worldwide multitude of infrastructures and the legal systems under which they operate. The Group believes that, while the UK can and would benefit in the short run by learning from overseas markets when considering how to implement the Task Force’s suggestions, international co-ordination of infrastructures’ responses to MOD will be a time-consuming process but nevertheless one that the Task Force should recommend.

24 Lessons have been learnt from the experiences in New York following 11 September 2001². For example, during the period immediately following the MOD, the Federal Reserve and other major payment systems remained open past their normal closing times to accommodate institutions that were attempting to send funds or waiting to receive funds from other institutions. UK-based infrastructures have also taken into account the lessons learnt on 11 September 2001 in

preparation for a similar wide-scale attack in London. However, these have not always been publicised and the Group recommends that the final Task Force Report should usefully highlight London’s preparedness for MOD to a wider audience.

25 The work undertaken in the past two years has strengthened the contingency arrangements of infrastructures in the shadow of a possible widespread terrorist attack. This work has also enhanced the preparedness of the financial sector for any event including day-to-day minor matters. Measures undertaken include:

- Key infrastructure providers have re-considered the locations of their back-up facilities, and in many cases these are now offshore. Recovery positions have been more than doubled at one key custodian, and procedures put in place to allow business to run entirely offshore. Another infrastructure provider regularly tests its Executive Team with theoretical Crisis Management Exercises, and has put in place provisions to allow its systems to be operated by senior management at their homes across south-east England.
- CLS Bank, provider of the continuous linked settlement service to participants in the foreign exchange market, is establishing a permanent operations teams and data centres overseas to deal with a regional disaster in the UK.
- In common with other exchanges, Euronext.liffe has introduced a more rigorous regime of business continuity exercises and tests.
- Investment banks set up the Securities Industry Business Continuity Management Group (SIBCMG), a “self-help” group which includes many significant market users. The Group has: created contact lists with its members and with key outside infrastructure; investigated resilience of the utility suppliers using its experts to undertake evaluations; questioned the exchanges and settlement service suppliers about their continuity plans; run benchmarking exercises amongst its members; and recently it has begun to put together a plan with other City sectors to ensure a single approach to business continuity planning and

² *Continuity of operations for the financial services industry: discussion of lessons learned from events of September 11*. Federal Reserve Board. Available at <http://www.federalreserve.gov/boarddocs/staffreports/>

disaster recovery. A bridge call facility has been put in place for SIBCMG members.

- The London Investment Banking Association (LIBA) is a member of the International Council of Securities Associations (ICSA) which proposed that a Business Continuity Planning guideline be prepared for promotion amongst ICSA members. It is part of the ICSA 2003–04 plan and is seen as an important initiative to publicise and promote business continuity planning in all financial centres, and thereby raise international awareness and co-operation.
- The Recognised Bodies have worked together to develop a telephone conference facility. This would be regularly used after MOD to allow timely exchange of information between Recognised Bodies and to facilitate a co-ordinated response.

Potential options for appropriate *ex ante* and *ex post* measures

26 The Group has considered two legislative responses that might be suitable for dealing with MOD: the power to declare a retroactive “non-business day” ie to close markets after they have opened and treat all transactions that day as null and void; and the power to direct closures of infrastructures within a business day prospectively — ie to force infrastructures to close although business transacted up to the point of closure would stand. The power to declare a bank holiday on future business days already exists in statute. The Group has only considered short-term and intra-day MODs; in the event of longer-term crisis it is likely that there will be more pressing issues to be addressed than the financial system. In the event of long-lasting physical disruption in the UK, many operators of systemically important financial systems should be able to operate from overseas or other recovery positions.

Non business day declaration

27 The Group noted that, once activity had begun, it would be time consuming and difficult for most infrastructures to unwind business that had already been processed (particularly as resources would be stretched during MOD). In any event, unwinding of business

would often be inconsistent with the finality provisions applicable under the EU Settlement Finality Directive. The extent of infrastructures’ opening hours should also not be underestimated: CREST opens on a Monday at 0130 UK time, and CLS Bank is open from around 2200 Sunday UK time to 0200 the following Saturday, with critical processing activities running through each weeknight from 2300 UK time until 1100 the following day.

28 Furthermore, the Group noted that participants in some markets (eg the Sterling Money Markets Liaison Group³) have agreed *ex ante* the compensation arrangements in the event of MOD leading to the closure of a payment or settlement system; the Group considers this to be best practice and recommends that the Task Force encourages participants in all markets to include this in their *ex-ante* preparations for MOD.

29 While the Group has also noted that some OTC contracts define a business day as a day on which a particular system opens, the issues arising from such contracts are beyond the preserve of this Group. Consequently, from an infrastructure provider perspective, the Group does not support the power to designate a compulsory “non-business day” once that day has begun.

30 The Group considers that allowing parties arbitrarily to decide whether to operate on a holiday or not at a time of MOD, when communications are likely to be difficult, would create additional unnecessary confusion. This could lead to settlement uncertainty and also to payment system providers not knowing whether to settle on behalf of their clients. There is therefore a reluctance to accept the creation of a power to declare “permissive non-business days” unless a clear need is demonstrated for such a power by another Working Group.

31 Furthermore, should there be any revisions to the 1971 Banking and Financial Dealings Act to allow the intraday designation of bank holidays, the Group considers it crucial that they do not include any provisions to allow or require unwinding of already transacted business.

³ The Money Markets Liaison Group (MMLG) was established in the summer of 1999 following a series of reforms in the sterling money markets. It comprises representatives from market participants, trade associations and the authorities. It provides a forum for discussion of structural issues concerning money markets. The MMLG has made a non-binding recommendation that the MPC’s official repo rate should be paid and charged on unintended bank balances and overdrafts following any event that led to market-wide disruption to trading and settlement in sterling money markets.

Intra-day closure of markets

32 The Group also considered whether an additional explicit power to direct the closure of infrastructures would be desirable. The Group noted that any such power would have to be narrowly focused in its execution: a blanket closure order would be too blunt; it would not differentiate between the impacts of MOD on different infrastructures; and it would probably not be necessary, as a disruption event that required its use would probably either have been cataclysmic or would result in infrastructures closing of their own accord.

33 The Group also considered who might exercise this additional power to direct the closure of infrastructures: the infrastructure itself, or a “higher body”. The Group concluded that there were only a handful of reasons why the “higher body” might be in a better position to make a decision than the infrastructure provider, given the intricacies of some markets and systems; “London confidence” issues or a government desire to prevent flows of sterling out of the country might qualify as reasons. The Group also noted that the FSA tends to work in dialogue with the Recognised Bodies rather than by express reference to its existing power of direction. This would be unlikely to change with the introduction of any new, additional power of direction.

34 The Group has also considered infrastructures’ desire to have protection from liability in relation to action taken in good faith to manage systemic or other risks created by actual or threatened MOD. The Group is of the firm view that an infrastructure body’s rules, terms and conditions generally form a robust basis for the reservation of powers to take such action, and in many circumstances will be supported by statutory protection under section 291 of FSMA and the *Shearson Lehman v Maclaine Watson* case. However, there is a residual concern that possible liability issues remain. The Group notes the FMLC’s conclusions that standard-form contracts (rules) governing the relationship between an infrastructure provider and members may be liable to challenge under section 3 of the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contracts Regulations 1999. Furthermore, the protection afforded by s291 of FSMA extends only to actions taken (or not taken) by a Recognised Body and so may not cover all systemically important infrastructure providers. Commercial developments, including the consolidation

of operators since FSMA, have also placed infrastructure operators in a position whereby some actions they take may not be protected by the immunity granted under s291.

35 While it is the Group’s view that the risk of existing statutory immunity being insufficient is not high, in the light of the FMLC conclusions referred to in the preceding paragraph the Group does not regard it as satisfactory if the supremacy of certain mandatory laws over contract may make relevant contractual provisions susceptible to challenge in the event that action taken, or omitted to be taken in MOD or threatened MOD, causes loss to a participant (or a third party). The uncertainty that may thus be created may leave infrastructure operators open to the risk of litigation, a costly and undesirable outcome even if that litigation were ultimately to be unsuccessful. This risk might also delay or prevent infrastructure from making decisions in an actual or threatened MOD situation. The Group therefore recommends that Recognised Bodies (and other institutions which perform systemically important functions) should have more extensive statutory immunity in relation to action taken to manage systemic and other types of risk arising from MOD, or threatened MOD.

36 In conclusion, the Group believes that there are no substantial arguments to support the recommendation of a new power to direct intraday “early closure” of markets or systems from an infrastructure perspective. While such a power — if narrowly focused — would not hinder the market’s response to MOD if it were to be implemented because of a need identified by another Working Group, it would not be of assistance to infrastructures. Furthermore the Group believes that the implementation of such a power might create confusion and uncertainty in the financial system. There would also be a need to ensure that infrastructures’ rules were updated to reflect the possibility that there could be business half-days.

Other legislation

37 The Group considers that it is crucial for the Task Force Report to note that provisions to unwind already transacted business must not be created in other legislation not under consideration by this Group (such as the Civil Contingencies Bill). At the same time, it is important that statutory immunity similar to that within s291 of FSMA is included in any Emergency Powers legislation and that FSMA and subsequent regulations

should be adapted to give precedence to the Emergency Powers regulation should any conflict of laws arise.

Predictability and flexibility

38 The Terms of Reference of the Infrastructures Working Group ask it to consider the need for, and the form of, a legislative response for dealing with MOD. However, the Group has considered it necessary to go beyond this boundary and consider some of the wider issues related to business continuity planning. As already noted, UK-based infrastructure has undertaken considerable amounts of work — both in the past two years and before — to prepare for and mitigate the possible impacts of MOD. There is a risk that this work is beginning to overlap in some areas, and become divergent in others.

39 In the interests of market certainty, it is the Group's considered view that it is desirable for a single authority to become the focal point for both *ex ante* preparations for MOD and *ex post* responses. It has already been noted that the Bank of England and the FSA have jurisdiction over different elements of infrastructure and while there is no doubt within the Infrastructures Working Group that communication between the two authorities already takes place — both at a formal Tripartite Standing Committee level (with HMT also) and at a working level — a single point of contact for financial sector MOD and business continuity planning would be welcomed by the Group and might ensure consistency in the approaches taken to dealing with the oversight of infrastructures' contingency plans.

40 Much work has already been done to improve communication channels between the authorities and the private sector for use in the event of MOD, including, for example, the Financial Sector Continuity web site and the recently initiated conference call facility between the authorities and financial sector participants. The Group knows that there is much more to do in this area. There remains some confusion amongst market participants over which authority should be the first point of contact in MOD. The *ex ante* nomination of one authority as a "post-MOD ringmaster", and the highlighting in the Task Force Report of the work already undertaken would also be a public demonstration of London's commitment to planning for MOD. The nominated authority could also be

responsible for co-ordinating internationally and disseminating to UK infrastructure information about the approach to MOD that is being taken in other jurisdictions, and for co-ordination with business recovery work being undertaken by utility suppliers.

41 Thus as well as becoming a proactive co-ordinator of business continuity planning, the central co-ordinator would become a lead organiser who could be turned to by financial sector participants during MOD, therefore ensuring that actions taken by different infrastructures were clearly co-ordinated and communicated. To help ensure this, the nominated co-ordinating authority would, for example, publish a communication roadmap and a public call tree.

42 It is for the Task Force and not the Group to nominate the co-ordinating authority; nevertheless, while the members of the Tripartite Standing Committee already perform a similar role between them, it is the belief of the Group that a single body — with a single point of contact and telephone number — is needed to improve market clarity. It is only this confusion that the Group seeks to address: this is not a proposal that the "ringmaster" should be responsible for executing any powers that the Task Force might propose. The Group notes that the personnel within the nominated authority must be in regular contact with operators of financial infrastructure to ensure that they are aware of their business continuity plans, and the linkages between different providers of financial infrastructure.

43 The UK financial system is well-prepared for MOD, but there remains much co-ordination work to be done. While significant advances in contingency planning, preparation and testing have already been achieved at the firm level, the far harder task of ensuring co-ordination and consistency of approach within the UK and internationally is seemingly only now beginning.

Impact of proposed measures

44 The Group considers that the limited recommendations in this report will not have any undesirable consequences. In particular, there will be no uncertainty created for market participants as the Group proposes no powers that might have wide-ranging or unpredictable impacts.

Financial markets law committee: Issue 56 — Emergency powers legislation

UK/Europe infrastructure summary table

Institution	Relevant actor	Triggering event/circumstances	Power to take any action	Power to keep system operational	Power to amend contracts immediately	Power to amend rules immediately	Power to suspend trading, settlement, or clearing	Power to close institution	Other powers
CHAPS*	CHAPS Company Board and the Bank of England jointly.	“In the event that the Bank of England is, for any reason, unable to receive or process settlement requests.” (emphasis added) (NewCHAPS 6.1.1) No general force majeure events clause.	No.	Yes. Power to operate the systems in “RTGS By-Pass Mode” if the Triggering event occurs. Also operates a back-up site or could operate from a Bank of England site using Bank of England personnel. Note: CHAPS also relies on the SWIFT messaging system.	Not applicable.	No such express power.	No such express power.	No such express power.	Power to suspend or exclude members if there is a “threat to the security, integrity or reputation” of the system. (NewCHAPS 7.2)

* indicates throughout that primarily UK regulated.

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BACS* (electronic clearings for credit and direct debit schemes), Cheque and Credit Clearings* (clearings for cheque and paper credits schemes).	BACS Ltd, Cheque & Credit Clearings Company Ltd.	A very broadly drafted force majeure events clause (includes sabotage, terrorist acts etc). (Settlement Agreement 10.1)	Yes. On occurrence of any force majeure event, system operator has power to take <i>any</i> reasonable action to manage the <i>continued</i> operation of the system. (Settlement Agreement 10.2)	Yes. "Any reasonable action", specifically including power to issue instructions to members or their indirect clearers. Also operates back-up systems.	Not applicable.	Yes. "Any reasonable action."	Yes, although power is to take "any reasonable action to manage the <i>continued</i> operation of the system."	No such express power.	Power to suspend members if direct they threaten the orderly operation and integrity of the system.

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EBA Euro I	ABE Clearing S.A.S. (System Operator)	Force majeure clause covering, inter alia, events that in the reasonable opinion of the System Operator are likely to significantly affect the operation or integrity of the system, except for an Exclusion Event or a Suspension Event.	Yes. System Operator can issue instructions and take actions as necessary to manage the continued operation of the system.	Yes. EBA Clearing operates a permanently manned “hot” back-up site in Brussels. It is designed to function even in the event of the total destruction of the main Paris site and its personnel.	Not applicable.	Yes, broad powers.	Yes, broad powers.	Yes, broad powers.	Power to declare an individual banking holiday for a participant.

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SWIFT	Board of Directors	“...in an emergency” — for purposes of suspension power (General Terms and Conditions Article 4.42). SWIFT under no obligation to perform any obligation or incur any liability resulting from a force majeure event (Articles 8.6 and 8.8).	No. No such power to take any affirmative action.	Yes. Two operating centres (one in the Netherlands, one in the US) both capable of managing the entire network should the other be unavailable. Advanced business continuity plan.	No such express power.	No such express power.	Yes. SWIFT may suspend the provision of its services (for as long as reasonably necessary) for purposes of security or proper performance or in an emergency after giving notice to its customers (General Terms and Conditions Article 4.4.2).	No such express power.	SWIFT need only use “all commercially reasonable efforts” to provide its services (General Terms and Conditions Article 4.5).

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CLS Bank International	Board of Directors or management of CLS Bank (unless expressly stated to be Board).	Force majeure clause relieves CLS from obligation to perform its obligations (Rule 1.17). Does not grant it any affirmative powers. Separate provisions where a "Settlement Disruption Event" occurs (defined in Rule 1.1.95 as making it "impossible, impracticable or inadvisable" to settle) (Rule 5.4).	No.	Yes. CLS Bank has dual data centres and dual operating sites, and undertakes regular contingency testing and trials.	Yes. CLS Bank has specific power, if a "Settlement Disruption Event" occurs, to suspend settling or change the "value date" of the affected instructions (Rule 5.4).	Yes. Board or President of CLS Bank may amend Rules by notice if in its reasonable discretion exigent circumstances exist for the protection of CLS Bank or its members or to comply with law (Rule 1.2).	Yes. If CLS is, by reason of a force majeure event, prevented from performing its obligations, then CLS is relieved of its obligation to perform until the impediment is removed (Rule 1.17).	No such express power.	

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London Stock Exchange*	Executive Director of LSE Board of Directors.	Very broad discretion under various different rules eg "...if the LSE considers it appropriate to do so" (Rule 4145.4 — suspending the automatic execution of orders; Rule 3040 — power to prohibit any transaction for any reason). Separate force majeure clause in Trading Services Agreement exempts the LSE from any liability (Clause 12.1).	Yes. The LSE has the power to suspend trading in a security, to stop certain execution methods or to close all markets (Rules 3040 and 4145). Following this, "the Exchange may impose such conditions as it considers appropriate prior to resumption of trading" (Admission and Disclosure Standards Clause 3.16).	Yes. Comprehensive back-up IT systems and sites, tested regularly. LSE also undertakes regular recovery scenario testing.	No such express power.	No such express power to amend the Exchange's Rules themselves <i>but</i> general discretion to waive enforcement of the rules (Rule 2001).	Yes. If the FSA suspends a security's listing, the LSE will suspend its admission and trading (Cl. 3.13 A&DS). LSE may suspend trading of securities where the orderly operation of the markets is jeopardised (Cl. 3.14 A&DS and Rules 3040 & 4145). May also postpone settlement indefinitely or for a specified period (Rule 3705). LSE may, at its discretion, suspend, postpone (either for a defined period or indefinitely) or cancel the buying-in of securities at any time, either generally or in relation to a particular member firm or a particular security (Rule s810).	No such express power <i>but</i> practical effect of powers to suspend/postpone trading.	

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Euronext.Liffe*	Generally the Board of Euronext.Liffe. Designated officials also have certain powers.	<p>"In its opinion, any circumstances calling for emergency action" (Rule 4.16.1). In addition, broad discretion under various express powers. Note: there are also separate emergency provisions contained within the Contract Terms of Liffe's contract itself.</p>	<p>Yes. The Board may take "any steps whatsoever" to enable the orderly conduct of business where, in its opinion, there are circumstances calling for emergency action (Rule 4.16.1). The LCH shall be invited to attend the Board meeting.</p>	<p>Yes. "Any steps". Also has back-up systems and sites, which are regularly tested.</p>	<p>Yes. "Any steps". Expressly includes "the modification of contracts already in being" (Rule 4.16.5).</p>	<p>Yes. In addition to the Board's power to take "any steps", two designated Euronext.Liffe officials have the express power to suspend summarily business on the market in any Exchange Contract at any time if, in their opinion, it is necessary in the interests of the Exchange, or its members, or to ensure an orderly market (Rules 4.15.1</p>	<p>Yes. In addition to its power to take "any steps", the Board has the express power to determine that the LIFFE market shall close on any day (Rule 4.2).</p>	<p>General non-emergency power of the Board to implement such procedures as it deems fit, including in relation to any aspect of business conducted on the market (Rule 4.14.7).</p>	

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International Petroleum Exchange*	Directors or "designated Exchange officials" depending on the particular power being exercised.	Suspension of trading upon a fire alert, bomb scare or other alarm or any event which makes a suspension necessary (Regulation G.14). No general events clause granting affirmative powers. However, broad non-emergency powers which require no trigger.	No. However, a general IPE regulation gives the Directors the power, where there is no express provision in the IPE Regulations, to implement such procedures as they think fit in relation to any aspect of the conduct of business on the Exchange (Regulation A.2.5). In addition, the Trade Emergency Panel may take any steps whatsoever in relation to "an excessive position or unwarranted speculation or any other undesirable situation or practice affecting the Market"	Yes. Detailed operational recovery plans including a "warm" disaster recovery site.	Yes. Broad catch-all regulation.	Yes. Broad catch-all regulation.	Yes. In the event of a bomb scare etc, trading may be temporarily suspended by an IPE official if, in his opinion, it is necessary in the interests of the IPE, its members or to maintain a fair and orderly market (Regulation G.14a).	Yes. The Directors have a general non-emergency power to declare a non-business day after giving notice to members (Regulation A.5.1). The Directors also have a broad non-emergency power to close the market temporarily if they decide it is appropriate in the circumstances (Regulation A.8b).	In the event of a temporary emergency suspension, the "Senior Exchange Official" shall determine the settlement prices (Regulation G.14(b)(ii)).

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London Metal Exchange*	Directors/ Special Committee	At any time as the Directors think fit (Articles of Association, Art. 48). Special committee or directors suspect an undesirable situation or an undesirable or improper trading practice which has affected or is likely to affect the market (Part 3, Rule 15.1).	Yes. No such express power but Directors can amend Rules at any time (Art. 48). Special committee or Directors may take steps they deem necessary in their discretion (Part 3, Rule 15.1).	Yes. Recovery procedures including fully-equipped off-site facilities.	Yes. Directors can amend Rules at any time (Art. 48) so as to amend contracts (Part 4, Rule 1). Plus specific power of Directors to determine settlement prices of contracts affected (so as to prevent delivery, settlement or closing an open position) by an emergency cessation of trading (Part 3, Rule 15.6).	Yes, at any time (Art. 48).	Yes. Directors can amend rules at any time (Art. 48). Plus express powers to suspend trading in any Contract upon the occurrence of any event outside the Exchange which may prevent free trading in any Contract. But the Directors must consult the London Clearing House first (Part 3, Rule 15.5).	Yes. The Directors have a general non-emergency power to declare a non-business day (LME Definition of a "Business Day").	Power of Special Committee to suspend a participant.

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London Clearing House*	Board with delegation to Executive.	The occurrence of a broad force majeure event.	Yes. LCH has the power to require members to deal with affected contracts as it directs or take such action as LCH may direct in respect of the same (Regulation 27(b)(i)).	Yes. Fully-tested remote data centre and two back-up sites.	Yes. Upon the occurrence of a force majeure event, the LCH may require members to take such action as it directs in respect of contracts (ie effectively amending those contracts) (Regulation 27(b)(i)). Additional regulation relating to “invoicing back” (closing out) contracts in event of war or government intervention (Regulation 26).	No such express power but powers with respect to affected contracts (see left) have similar effect.	No such express power but powers with respect to affected contracts (see left) have similar effect.	No such express power.	Where contracts cannot be transferred to or from the LCH for any reason (eg system failure), they shall be transferred on the next day it is possible to do so (Regulation 44).

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CREST*	Chief Executive or Deputy Chief Executive.	Circumstances beyond CRESTCo's reasonable control — gives CRESTCo the power to suspend operation of its systems or services or vary its timetable (Terms and Conditions clause 5.2.8).	No.	Yes. If there is a system failure, CRESTCo is under a <i>duty</i> to take reasonable care to minimise the disruption and to operate its stand-by procedures (Terms and Conditions clause 17.5). As part of its contingency plans, CRESTCo has geographically separate "hot" back-up processing and operations sites. Also contingency arrangements between CRESTCo and the Bank of England in the event that there is any operational disruption to the link between CREST and the RTGS processor.	No. Changes to the <i>Terms and Conditions</i> generally only take effect 40 days after notice has been served on the Member (see further "Other powers"). However, changes to the <i>Rules</i> can be made urgently without consultation (see further "Power to amend rules").	Yes. Where an urgent change is required to the CREST Rules to deal with "an unforeseen situation", changes may be made on a temporary "as necessary" basis until a consultation process has been followed. (CREST Reference Manual, Chapter 1, Section 1).	Yes. Force majeure clause gives CRESTCo the right to suspend operation of its systems or services in whole or in part if, in its discretion, it considers it appropriate to do so by reason of circumstances beyond its reasonable control. (Terms and Conditions clause 5.2.8). CRESTCo can also vary the "daily timetable" or extend a settlement day if it would mitigate the effects of operational disruption (also under 5.2.8).	No.	"...the provisions of the CREST Manual, the CREST Rules and these Terms and Conditions may be changed from time to time... Such changes will be made in the manner described, and subject, where relevant, to the applicable prior consultation procedure set out in the CREST Manual." (Terms and Conditions clause 19.1). Changes which restrict or exclude CRESTCo's liability or which impose additional obligations or liabilities on the participant must be subject to prior consultation (Terms and Conditions clause 19.2). "No change to the Terms and Conditions shall take effect until the earlier of 40 days after service of notice on the Member", or, in the case of an optional

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Euroclear	Euroclear Bank.	Force majeure clause does not give affirmative powers to address disruptive events (instead excluding liability) (Terms and Conditions Article 12). However, other non-emergency clauses give Euroclear Bank the discretion to refrain from acting/delay processing in certain situations.	No.	Yes.	No.	Yes. In "exceptional or contingency situations", Euroclear may adjust the rules that govern its processing services (Operating Procedures, Part I, Article 12.1(h)).	No such express emergency power but non-emergency powers to refuse to accept any securities for deposit, and to refuse to deliver to any participant securities where it is necessary in the best interests of participants generally or of the Euroclear system (Operating Procedures, Part I, Article 4.2). Also, if Euroclear Bank is unable, for any reason, to perform overnight settlement or real-time processing, it may perform such settlement/processing at such time as it in its sole discretion determines (Operating Procedures, Part I, Article 12.1(f))	No.	If an account holder suffers loss as a result of any act of any other depository, clearance system etc, then Euroclear shall take steps to effect a recovery as it deems reasonably appropriate (and will charge the holder for any cost incurred in so doing) (Terms and Conditions Article 12(c)).

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Clearstream	Clearstream Banking Luxembourg ("CBL").	Broad force majeure clause lists events beyond CBL's reasonable control (and excludes CBL from liability) (General Terms and Conditions, Article 48).	Yes. If, in CBL's judgement, a force majeure event occurs, CBL reserves the right, exercisable in its sole discretion (Art. 65), to undertake such measures as it may deem necessary to protect the interests of CBL and/or its customers (General Terms and Conditions, Article 48).	Yes. "Such measures as it may deem necessary."	Yes. "Such measures as it may deem necessary."	Yes. "Such measures as it may deem necessary."	Yes. "Such measures as it may deem necessary."	Yes. "Such measures as it may deem necessary."	If a customer suffers loss as a result of any act of any of CBL's depositories, custodians etc, then CBL shall take steps to effect a recovery as it deems reasonably appropriate (and will charge the holder for any cost incurred in so doing) (General Terms and Conditions and Article 48).

ANNEX 5B

Membership of the Infrastructures Working Group

Mark Harding (Chairman), Barclays
Ian Annetts, Allen and Overy
Megan Butler, FSA
Mark Evans, Travers Smith Braithwaite
Hugh Gibson, HSBC
Adrian Gray, Citigroup
John Hagon, CLS
Andrew Lamb, LCH
Marc Leppard, IPE
Paul Martin, LIBA
Diarmuid O'Hegarty, LME
Dianne O'Moore, London Stock Exchange
Stephen Priddle, Bank of England
Derek Radley, CRESTCo
Scott Rankin, TBMA
Paul Rider, APACS
Fabian Sweeney, Bank of New York
Emma Vick, virt-X
Nick Weinreb, Euronext.liffe

Simon Blackburn (Secretary), Bank of England