



34th Floor
One Canada Square
London E14 5AA

T+44(0)20 7074 4444
F+44(0)20 7074 4433

www.virt-x.com

Response of virt-x Exchange Limited (“virt-x”) to Consultation on the Financial System and Major Operational Disruption

Question 4a. In principle, would it be useful to have new legislation to help promote order in the financial system in the face of major operational disruption?

With respect to Recognised Bodies, the question as stated in the Consultation appears to be whether the Recognised Body can meet its recognition requirements. While one of these requirements is the maintenance of orderly and proper market, we recognise that a major operational disruption would likely require action to be decided and taken swiftly. We therefore support the introduction of new legislation.

Question 4b. Have you any comments on: how new legislation might address risks; the possible disadvantages and limitations of new legislation; and the general constraints on the use of new legislation?

Many of the regulatory requirements in operation in the UK implement EU Directives (e.g. Investment Services Directive) or other international codes (Basle Accord, etc.). It is possible that suspension of obligations in the UK could, at least technically, cause a violation of international regulations of this nature.

Question 4c. If new legislation were to be sought, are the suspension and direction powers the right choices? Are there any other types of legislation that might be useful to help promote order in the financial system?

We feel that the prohibition powers should not be excluded from the range of powers in the primary legislation. For example, if it were to be necessary to direct the Recognised Investment Exchanges to close without prohibiting securities transactions, these transactions would be driven to the less visible, unregulated over-the-counter markets. We believe this would not be desirable. While we recognise the fact that prohibitions in many cases would be unwise, we nonetheless

feel that they should be among the tools available for situations in which it is appropriate.

Question 5a. Have you any comments on the possible approaches to making secondary legislation/administrative directions, including who should exercise this function, the attractiveness of potential fallback routes for making the secondary legislation/administrative directions, accountability to Parliament and modification of secondary legislation/administrative directions?

We agree with the approaches outlined in the consultation document.

Question 5b. Should primary legislation include further conditions for use of its powers (beyond the basis for use being major operational disruption and not a purely financial crisis)? If so, what?

The consultation document mentions in several places that action will only be taken with the agreement of the industry, subject to the practical constraints likely to arise during a major operational disruption. We would recommend that emergency contact procedures be developed with the aim of ensuring contact with as many key industry representatives as is possible.

Question 5c. Would you support specification in the primary legislation of a maximum time period for the duration of powers? If so, how and for what period?

We believe that maximum time periods are useful, though they should be open to renewal or extension in order to provide necessary flexibility. As the time period would be dictated by the circumstances at hand, we believe that the primary legislation should only require that a time period be specified in the implementing secondary legislation/administrative direction, rather than specifying a time frame in the primary legislation itself.

Question 5d. If the powers were adopted, do you agree they should affect action in the UK (rather than actions governed by UK law)?

While we see the difficulty in applying the powers broadly to actions governed by UK law, we believe that the term "in the UK" needs to be more explicitly described in order to avoid causing additional confusion and uncertainty in a time of disruption..

Question 5e. If the government seeks new legislation, should it allow the use of powers following a major operational disruption affecting a non-UK major financial centre?

We agree that a major operational disruption in a non-UK centre can adversely affect markets in the UK. For example, a disruption of this nature could have serious consequences for non-UK firms operating in our markets, raising questions as to their ability to meet market obligations. We therefore support the use of powers following a major disruption in a non-UK financial centre.

Question 6b. Should retail obligations be included in a suspension power's maximum scope?

It cannot be said that it would *never* be appropriate to suspend retail activity or obligations, and it is therefore important to include retail obligations within the maximum scope. Of course, we would stress that in any given emergency it may well be the case that retail transactions should be permitted to continue even if wholesale transactions are suspended.

Question 6c. If a distinction should be made between retail and wholesale obligations, how should the line be drawn?

This question would likely benefit from further, specific discussion and agreement with specific industry sectors. If it is decided to proceed with drafting new legislation, we recommend that the appropriate regulatory authorities determine the guidelines for the various sectors, in consultation with industry and consumer representatives.

Question 6f. Should obligations governed by foreign law, but falling to be performed in the UK, be subject to the suspension power? How important is this? How might such an effect be achieved?

It would be difficult to envision a way in which obligations of this nature can be suspended, and we do not see this as a practical option.

Question 6g. Should a suspension order only be able to apply to all the obligations arising from a contract? Or are there cases for which it could be preferable to suspend some obligations arising from a contract, but not others?

The focus of the suspension powers should be on types of actions and obligations which cannot or should not continue as normal. These actions and obligations would generally form *part* of a contract, but contracts by their nature would tend to encompass a broad range of actions and obligations. It does not seem necessary or desirable in all cases to suspend the operation of entire contracts when the aim is really only to suspend certain clauses.

Question 6h. Should a suspension power only be able to affect obligations which could not be fulfilled as a result of the disruption?

In order to avoid problems arising from unforeseen knock-on effects, we believe that the primary legislation should allow sufficient latitude to suspend obligations not directly affected by the disruption.

Question 6i. Are there any other restrictions that should apply to how a suspension power could be used?

When a major operational disruption occurs, it will be important to determine specifically who is affected and who is not. That is, it may be that one or several institutions in a given sector are affected while others are able to operate as normal. We would emphasise that, in such circumstances, we believe that it may not be

necessary, fair or advisable to apply emergency measures to all institutions in the affected sector.

Question 6j. Have you any comments about consequential effects of a suspension power?

Please see our response to Question 7e, below.

Question 6k. After a suspension period, should obligations return immediately, as soon as practically possible, or is some other approach preferable?

We believe the best approach is “as soon as practically possible, in consultation with representatives of the affected sectors”.

Question 6l. Do you support the idea of a suspension power, subject to the constraints of paragraph 6.28?

We do.

Question 7a. Should recognised bodies be within the maximum scope of a direction power?

We believe that this would be appropriate, subject to our comments in our response to Question 4a.

Question 7b. Should payment systems be within the maximum scope of the direction power? If so, which?

It makes sense that emergency powers be extended to the payment system, given its central role to the industry and its vulnerability to disruption. We believe that the maximum scope should include all payment systems used by financial firms for wholesale or retail transfers.

Question 7c. Should functions of institutions that are similar to the functions of recognised bodies and payment systems be within the maximum scope of a direction power?

A functional approach seems most appropriate. If an emergency arises, all institutions performing like functions should be within the scope of the legislation.

Question 7d. What actions should directions to infrastructure be able to order? Should directions themselves effect changes, where appropriate, or only be able to require infrastructure to take actions?

We believe the main requirements would be to open or close, and to suspend operation of certain rules. However, the legislation should be written broadly enough to accommodate requirements not currently foreseen.

Question 7e. Have you any comments about consequential effects of a direction power?

We would stress the importance of consultation and communication with each Regulated Body to determine whether a particular direction is appropriate for that body. For example, the decision to close one RIE should not be applied to other RIE's which are not affected to the same degree and which are capable of operating a proper and orderly market.

Question 7f. Do you support the idea of a direction power, subject to the constraints of paragraph 7.29?

We do, as well as prohibitive powers (please see our response to Question 4c).