7 August 2019

Andrew McPherson
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Market Infrastructure
Australian Securities and Investments Commission
Level 5, 100 Market Street, Sydney, NSW 2000

By email: rules.resilience@asic.gov.au

Dear Mr McPherson

Submission with respect to Consultation Paper 314: Proposed changes to market integrity rules for technological and operational resilience

We refer to the Consultation Paper 314 and the Draft Market Integrity Rules – Chapter 8B: Market Participants – Critical Systems and Business Continuity Plans ("**the Draft Rules**"). This letter sets out a submission by Euroz Securities Limited ("**Euroz**") with respect to the Draft Rules.

Overview of issues

Euroz entirely supports the intent that underlies the Draft Rules. However, it submits that the scope of the Draft Rules needs to be narrowed so that they can be complied with by all Participants in a manner that reflects the financial and other resources that are available to those Participants. In this general context, its specific comments are set out below.

The definition of Critical System

The definition of critical system should be narrowed in 2 ways.

First, the definition should be amended in such a way that it excludes externally supplied infrastructure such as electricity supply. The reason being that (1) it is not financially feasible to have alternative infrastructure in place (for example generators) and (2) the suppliers of this type of infrastructure have their own regulatory/risk management obligations in place such that it is reasonable to assume that there will not be a prolonged failure with respect this type of infrastructure.

Second, there should be a system whereby commonly used (by Participants) infrastructure would be certified (by ASIC and/or a Market Operator) as being suitable for use by Participants and the fact that a system was certified would exclude it from the definition of Critical System. For example, trading systems commonly used by Participants could be certified and having been certified, Participants would not have any obligations with respect to ensuring their reliability.

This approach would have the dual benefits of reducing costs but more importantly it would improve system security because commonly used systems would be reviewed (for their suitability) before they became part of market infrastructure (that is, a system used by multiple Participants). In terms of market stability, this is a better approach than each Participant having to take steps as to ensure that a system is reliable as it ensures that only those systems that are sufficiently reliable can be used by Participants.

A related issue arises with respect to Third Party Clearing Arrangements. A Third Party Clearer is itself a Participant. In this regard, Participants should be able to assume that a Third Party Clearer will provide a reliable service (that is, they should not have to attempt to plan for the contingency that a Third Party Clearer will fail to perform its obligations).

It is submitted that the definition of Critical System (that is, the ambit of the definition) is of fundamental importance because it is the concept about which all of the obligations created by the Draft Rules are organised. For example, if electricity supply is a Critical System then its provision would amount to an Outsourced Arrangement in circumstances where this type of arrangement is not an outsourced arrangement as that concept is usually understood. An outsourced arrangement is one where a Participant chooses to engage an external provider to perform a function that it could otherwise perform for itself, not one such as electricity supply that it cannot, as a practical matter, perform for itself. The significance of this issue being that a Participant should only have obligations with respect to Outsourced Arrangements as that concept is ordinarily understood rather than with respect to every function that it does not undertake itself (with the result, for example, being that a Participant would not have to undertake due diligence activities with respect to its electricity supplier).

With respect to the second issue referred to above (commonly used systems and Third Party Clearing), the removal of these types of functions from the definition of Critical System (on the basis of a certification system) would very significantly reduce the costs that would be incurred by Participants in circumstances where market reliability would not be compromised. Looking at this issue another way, if a Participant installs a widely used trading system (that would be certified for use under Euroz's proposal) it is not apparent why (for example) a Participant would need to conduct its own due diligence of the proposed provider.

This issue is much clearer with respect to Third Party Clearing arrangements. These arrangements are subject to a separate regulatory framework with the result being that the Draft Rules in some cases cut across the existing Rules (for example there are Rules relating to the terms of a contract entered into with a Third Party Clearer). It is submitted that with respect to the Third Party Clearing that the effect of current regulatory framework plus the effect Draft Rules (because a Third Party Clearer is a Participant) will be such that a Participant should not be required to undertake any further activities with respect to Third Party Clearing arrangements.

Outsourcing

In accordance with the matters set out above the Draft Rules regarding outsourcing (Rule 8B.2.3) should not operate with respect to:

- infrastructure such as electricity supply;

- *certified* systems – these being systems commonly used by Participants and which are certified as being suitable for use by Participants; and

- Third Party Clearing arrangements.

With respect to Rule 8B.2.3(b)(ii)(A), Euroz, of course, accepts that it is undesirable for an outsourced arrangement to be sub-contracted out. However, the ambit of this provision is not clear (that is, the types of arrangements to which it will apply should be specified). For example, there is a fault in a system provided to a Participant by a System Provider (for example an accounting system). The System Provider, rather than sending an employee to rectify the fault, engages a person by way of a contract to deal with the issue on the Provider's behalf (the Provider may have a panel of such persons who work when required). Such a person would be a sub-contractor for the purposes of this Rule but it is not apparent as to why the Participant's consent is required to such an arrangement.

With respect to Rule 8B.2.3(d) it is not apparent as to what conflicts of interest would arise between a Service Provider and a Participant (that is, conflicts of interest are usually an issue that arises with respect to the provision of advice to a client not with respect to the performance of obligations pursuant to a service agreement entered into between a Service Provider and a Participant).

Business continuity

Euroz, of course, accepts that business continuity is of fundamental importance. However, it is submitted that Part 8B.3 of the Draft Rules goes beyond what can reasonably be achieved by many Participants in that:

(1) it requires Participants to attempt to plan with respect to a very wide range of circumstances such as natural disasters in circumstances where such events may never occur and it is generally very difficult to predict what the nature of such an event might be. Even with respect to more common events such as a power failure it is very difficult to predict how severe such an event would be (for example whether such an event would last minutes, or hours or days);

(2) in many cases, it is beyond the capability of a Participant to put contingency plans in place – for example if there was a power failure a Participant would have to cease operating until the power was restored (it is not practical to have standby power generation arrangements in place).

More generally, it is beyond the financial capacity of Participants to put in place redundancy arrangements such as a second business site that would operate if the main business site became inoperable. In this regard, this type of planning may be able to be undertaken by large organisations that operate in multiple sites but for smaller Participants that operate from only one site or only have significant operations in one site, there are limited practical alternatives available;

(3) this matter highlights issues concerning *certification* of important systems – for example, if a Participant installs a trading system and that system fails – as a practical matter the Participant would have to cease trading until the system is reinstated by the Service Provider. It would not, as a practical matter, be possible for the Participant to have another trading system in place that could be used if its primary system failed; and

(4) with respect to Third Party Clearing, a Participant would have to cease operations should its Third Party Clearing arrangement cease to operate – as a practical matter it is not possible to put in contingency plans to deal with this eventuality.

Given these matters and in accordance with the items set out above, Euroz submits that:

- the definition of Critical System should be amended; and

- the obligation to conduct contingency planning should be limited to events (in relation to the amended definition of Critical System) where there is more than a 20% chance of an event happening in any one year (a good example of such an event being a cyber attack).

Thank you for providing the opportunity to make a submission with respect to this matter.

Yours faithfully

Anthony Brittain
Chief Operating Officer