

Parliamentary Joint Committee on Corporations and Financial Services

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Inquiry into ASIC, the Takeovers Panel, and the corporations legislation

Cboe submission

2022 - 2023

Division: Financial System Division
Topic: Response to Cboe's Submission
Reference: Written
Senator: **Deborah O'Neill**

Question:

The Parliamentary Joint Committee on Corporations and Financial Services has asked if you would like to respond to the recommendations in Cboe's submission 12 and Answer to QoN 7 to the inquiry, including:

- your views on the recommendation; and
- whether the recommendation put forward by Cboe may be addressed by:
 - proposed reforms to competition in clearing and settlement in the Treasury Laws Amendment (2023 Measures No. 3) Bill 2023;
 - rules that may subsequently be developed by ASIC if the above bill is passed;
 - any other reforms; or
 - private sector developments.

Answer:

Cboe recommendation 1:

The regulators and Treasury review the allocation and role of the National Guarantee Fund contribution of \$71.5m, allocated to ASX Clear as "restricted capital reserve", having regard to the benefit of supporting resilience and competition across Australia's financial market. Given their origin, Cboe considers there is a strong argument these funds should be available for the benefit of all CCPs. (1.1)

Answer 1:

The funds making up ASX's restricted capital reserve are legally the property of ASX. While these funds originated in the National Guarantee Fund, they were transferred to ASX in March 2005. ASX's default management rules and procedures are a supervisory matter for the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA).

Cboe recommendation 2:

The regulators require ASX Clear and ASX Settlement to be structured in such a way that, at an operations, governance, and technology level, they are incentivised to, and rewarded for, servicing all their customers equally. ASX Group must not be able to continue to use its dominant position through its clearing and settlement functions to diminish competition in areas in which it competes with non-ASX businesses. (1.2 & 1.3)

Answer 2:

In June 2015, the Council of Financial Regulators (CFR) *Review of Competition in Clearing Australian Cash Equities: Conclusions paper* recommended that government pass legislation to implement an ASIC rule-making and an Australian Competition and Consumer Commission (ACCC) arbitration power to ensure that ASX's monopoly CS services are provided in a manner consistent with that which would be expected in a competitive environment for CS services, and to ensure that competition, if it emerges, is safe and effective.

Schedule 3 of the Treasury Laws Amendment (2023 Measures No. 3) Bill 2023 (the Bill) implements this recommendation by providing for an ASIC rule-making and an ACCC arbitration power. ASIC's rule-making power will allow ASIC to make rules for the governance of a CS facility licensee where there is at least an indirect connection between the rule and the provision of CS services. This will allow ASIC to ensure that a CS facility licensee's governance arrangements, including matters such as board composition, do not impede competition or the provision of CS services to users on terms consistent with the CFR's *Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia* (Regulatory Expectations).

Cboe recommendation 3:

The regulators consider the effects that the failed CHES Replacement program and the requirement for a complete restart of this project have on competition when exercising their supervision functions and any rulemaking powers, noting that these failures have resulted in industry stakeholders needing to commit resources to ASX until up to 2032. (1.4 & 3.1)

Answer 3:

The regulators' considerations in carrying out their supervisory responsibilities are ultimately a matter for them. ASIC and the RBA have taken a number of regulatory actions in relation to ASX's management of the CHES replacement project.

Cboe recommendation 4:

Following passing of the Bill, ASIC establishes firm rules in key areas that are needed for competition to emerge and be effective. Potential emerging competitors must be assured that:

- Competition will be on a fully interoperable basis. (2.1)
- Competing CCPs will be linked on a peers-to-peer basis. (2.2)
- Access to the CHES settlement batch and the Central Securities Depository will rank equally between CCPs. (2.3)
- Access to key competitor systems will be on an equal access basis. (1.2, 2.4 & 3.1)

Answer 4:

ASIC's use of its rule-making power is a matter for ASIC.

The CFRs *Minimum Conditions for Safe and Effective Competition in Cash Equity Clearing in Australia* (Minimum Conditions (Clearing)), and the *Minimum Conditions for Safe and Effective Competition in Cash Equity Settlement in Australia* (Minimum Conditions (Settlement)) (together, the Minimum Conditions) – clearly outline the CFR's policy position on interoperability (Minimum Condition (Clearing) 4) and access to securities settlement infrastructure (Minimum Conditions (Clearing) 3 and Minimum Condition (Settlement) 3).

Subject to passage of the Bill, ASIC will be empowered to make rules once the necessary Ministerial Determination is in place.

Cboe recommendation 5:

No Australian Market Operator, or its aligned Clearing and Settlement service, should be able to charge Market or Clearing Participants, investors, or competing Clearing and Settlement infrastructures for the routing of trade executions for clearing and settlement. (4.1)

Answer 5:

The CFR's Regulatory Expectations state that users' access to monopoly CS facility infrastructure should be granted on terms and conditions, including price, that are fair and reasonable (Regulatory Expectations 2 and 3). Subject to passage of the Bill, ASIC will have the power to make rules to enforce this expectation once the required Ministerial Determination is in place. The ACCC will have powers to arbitrate disputes about the terms of access to CS services, including price, once the Bill has become law and the required Ministerial Declaration is in place. The ACCC will be required to have regard to ASIC's rules when making arbitral determinations – see subsections 153ZER(1)(b) and (d) of the Bill.

Cboe recommendation 6:

Competing CCPs should transparently agree and maintain operational standards within core functions that deliver to the highest standards of performance and resilience within securities clearing for Australia's investors, Participants, and stakeholders. (4.2)

Answer 6:

CS facility licensees are subject to regulatory oversight by both ASIC and the RBA in relation to risk management. CS facilities must comply with their general licensee obligations under section 821A of the Corporations Act, as well as the Financial Stability Standards made by the RBA. ASIC enforces a general licensee obligation to have sufficient resources, including human, financial, and technological resources, to operate the facility properly. Several of the Financial Stability Standards for Central Counterparties deal with risk management; in particular, comprehensive frameworks for the management of risks, general business risk; and operational risk.

ASIC's rule-making power in Schedule 3 of the Bill has been designed to allow ASIC to ensure that, consistent with the CFR's Conclusions Report and the Minimum Conditions, competition, if it emerges, is safe and effective. The content of particular rules is a matter for ASIC.