Parliamentary Joint Committee on Corporations and Financial Services - Oversight of ASIC, the Takeovers Panel and the Corporations Legislation - Response to Question on Notice

Hearing Date: 27 June 2023
Response Date: 28 July 2023
Question Reference: Page 54

Question:

Can you provide us with any insights you have as to other countries that have better regulations and arrangements for competition in clearing and settlement that you are aware of?

Response:

Cboe considers that the EU and Canada are both worthy examples for consideration in how they have supported competition or competitive outcomes.

EU - Government and Regulator Supported Competition

The European model developed because of considered and deliberate policy to increase the efficiency and access to the European market. Specifically, the EU sought to improve market access by enabling competing central counterparties (**CCPs**) to clear products on a competitive and interoperable basis. Market operators are required to offer fully interoperable clearing arrangements (see LSE, Nasdaq Nordics, Cboe Europe and SIX) or a less effective but still competitive 'preferred' clearing model (see Euronext, Cboe Europe and Deutsche Börse).

Regardless of the competition model for clearing, these structures are further supported by interoperable national Central Securities Depositories (**CSD**) that undertake settlement and safekeeping services for investors. These tend to be independent of exchanges and clearing houses and are maintained as national infrastructure. European regulators additionally support competition among these entities with fungibility of securities holdings between CSDs.

The European regulatory framework achieves this through detailed, prescriptive requirements, including:

EMIR open access provisions (in respect of OTC derivative contracts)	Level 1	Art. 7 (Access to a CCP) Art. 8 (Access to a trading venue)
	Level 2	RTS 149/2013 specifying the notion of liquidity fragmentation (see Art. 8 EMIR)
MiFID open access provisions	Level 1	Recital 14 Art. 37 (Access to CCP, clearing and settlement facilities and right to designate settlement system)

		Art. 38 (Provisions regarding CCPs, clearing and settlement arrangements in respect of MTFs)
MiFIR open access provisions (in respect of transferable securities and other financial instruments)	Level 1	Recitals 28, 37 to 40 Art. 35 (Non-discriminatory access to a CCP) Art. 36 (Non-discriminatory access to a trading venue) Art. 38 (Access for third-country CCPs and trading venues)
	Level 2	Commission Delegated Regulation (EU) 2017/581 (RTS 15) setting out regulatory technical standards on clearing access in respect of trading venues and central counterparties
CSDR open access provisions	Level 1	Recitals 58 and 59 Art. 33 (Requirements for participation) Art. 53 (Access between a CSD and another market infrastructure)

Cboe considers that similarly detailed rules will be needed in Australia in certain areas – particularly with respect to interoperability requirements.

Canada – Forcing the Monopoly to Act in the Public Interest

Canadian regulators were confronted with the prospect of an ASX-like integrated monopoly when the Maple Consortium sought to acquire the TSX group in 2012. Without regulatory intervention, the outcome of that transaction would have been a financial market infrastructure group (**TMX**) with a similar structure and incentives to the ASX Group. The Ontario Securities Commission (**OSC**) responded to this by imposing strict requirements[1] on the Canadian Depository for Securities (**CDS**) and the TMX Group to ensure there was appropriate governance, management of conflicts of interest, and independence of clearing and settlement within the group. The conditions essentially forced the monopoly or dominant clearing and settlement services to be provided in a way that advanced the public interest.

The regulator's order included:

1. *Public Interest* – CDS was required to act in the public interest. This included requiring that the that the stated responsibilities of the board of directors of CDS includes the fulfilment of the public interest responsibility of CDS and requiring the board to report at least annually to the regulator on how it has fulfilled its public interest responsibility.

2. *Governance and operational independence*: the TMX Group was required to maintain CDS as a separate business unit with its own management team and board of directors. The CDS

[1] See Ontario Securities Commission, Notice of Commission Approval: Maple Group Acquisition Corporation | OSC, July 2012, retrieved 9 May 2023.

board was required to be represented by 33% independent directors, and 33% participant representatives based on specific qualifying criteria to ensure the broadest coverage of perspectives. CDS was also required to maintain its own Risk Management and Audit Committee that carried a mandate to:

   a. advise the board of directors on the fairness, reasonableness and competitiveness of its pricing and fees in the context of the Canadian capital market and trends relating to comparable services offered by clearing houses worldwide; and
   b. ensure fair and equitable resources are dedicated to development projects for unaffiliated marketplaces.

3. *Fair and open access*: TMX was required to provide fair access to its markets for all participants, including services providers that compete with CDS. This means that TMX must not discriminate against or disadvantage other clearers that are competing with CDS for clearing and settlement services. TMX must provide these competitors with the same access to its markets and services as it provides to CDS. This includes access to trading platforms, any interface or connection to its services or systems, data services, and other market infrastructure. Additionally, as per the above, access to resources is overseen by a Risk Management and Audit Committee.

4. *Fee setting conditions*: TMX was prohibited from using its dominant market power to increase the fees it charges CDS for clearing and settlement services. In addition to the mandate of the Risk Management and Audit Committee of the board, OSC awarded itself the right to final approval of fee decisions. Policies and procedures were required to be implemented to ensure that fee decisions were merit based on objective criteria and are subject to appropriate oversight and review. These are transparent to the marketplace and published on the OSC website.

Some aspects of the Canadian settings are reflected in Australian regulatory expectations. However, unlike Canada, the Australian expectations are not enforceable against ASX. They are also narrower in scope and do not go to the same level of precision in establishing key requirements for a level playing field, such as open access to interfaces, fair pricing, and governance.