

17 October 2016

Financial Stability Board  
Bank for International Settlements  
CH-4002 Basel, Switzerland

By E-mail (fsb@fsb.org)

RE: Discussion Note—Essential Aspects of CCP Resolution Planning

Ladies and Gentlemen:

Intercontinental Exchange, Inc. (together with its subsidiaries, “ICE”) appreciates the opportunity to comment on the Financial Stability Board’s 16 August 2016 Discussion Note concerning Essential Aspects of CCP Resolution Planning (the “Consultation”).

ICE is a leading global operator of regulated exchanges, clearing houses and listings venues, and a provider of data services for commodity and financial markets. ICE operates six central counterparty clearing houses serving the global derivatives markets in the U.S., U.K., continental Europe, Canada and Singapore.<sup>1</sup>

This letter contains ICE’s responses to the specific questions raised in the Consultation. ICE welcomes the ongoing involvement of the Financial Stability Board and its members in the important topics of clearing house recovery, resolution and resilience. ICE believes that the Consultation in particular raises significant questions concerning the operation of resolution proceedings in the context of a clearing house that warrant further consideration and discussion among clearing houses, their participants and users, regulators and other interested stakeholders.

As discussed herein, ICE believes that clearing houses themselves, and their rulebooks, should focus principally on establishing tools and procedures to provide for clearing house recovery—that is, the return to a matched book and full allocation of losses under a process run by the clearing house. To the fullest extent possible, resolution authorities should not seek to interfere with, or override, the clearing house’s recovery process. In those circumstances where it appears that recovery is not or will not be successful, such that a resolution proceeding may be appropriate, ICE believes that the procedures to be followed by the resolution authority should be well-defined in advance, transparent and established under relevant law or regulation. ICE does not believe that it is generally appropriate for a clearing house to develop, or specify in its rules, particular tools or procedures to be followed by a resolution authority.

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<sup>1</sup> The ICE clearing houses are ICE Clear Europe, ICE Clear US, ICE Clear Credit, ICE Clear Canada, ICE Clear Singapore and ICE Clear Netherlands.

## **ICE response to FSB consultation on resolution**

*Q1. Does this discussion note identify the relevant aspects of CCP resolution that are core to the design of effective resolution strategies? What other aspects, if any should authorities address?*

The Consultation assumes the intended role of resolution authorities in financial market infrastructures is well articulated and understood. This is not necessarily the case. Although the PFMI provides a high level objective for the recovery and resolution of financial market infrastructures, the delineation between “recovery” and “resolution” and the tests to satisfy the objectives of each are unclear and often unstated. Our answers to this Consultation are predicated on the basis that the objectives of “resolution” are narrowly defined to be focused on the individual infrastructure of a particular clearing house and its continuity of service. ICE further believes that resolution is to be invoked only in a situation where all efforts at recovery have been unsuccessful (whether taken by CCP itself, the resolution authority, or a combination of the two). The ‘other aspects’ mentioned in this question, such as the possible effects of recovery rules on financial stability, are considered by ICE to be outside of the scope of the Consultation.

### Incentive effects of resolution strategies

*Q2. What is the impact on incentives of the different aspects of resolution outlined in this note for CCP stakeholders to support recovery and resolution processes and participate in central clearing in general? Are there other potential effects that have not been considered?*

Consistent with the CPMI-IOSCO PFMI, ICE CCPs already have or are implementing recovery procedures that cover the steps that the CCP would take to return to a matched book and fully allocate losses where default overwhelms the guarantee fund and other resources such as assessment rights. A fundamental principle of the recovery procedures developed by ICE CCPs is that members and users have a strong incentive to commit to each stage of the recovery because if that stage fails, the next stage will be more unattractive. We view this and the market behavior that it creates as indispensable to driving an effective and robust recovery process. Furthermore, the recovery procedures have been: (1) developed in consultation with the CCPs’ clearing members and end-users; (2) formally agreed upon, by the clearing members pursuant to CCP rulebooks and member agreements and, where applicable, by customers pursuant to their clearing agreements; (3) reviewed and approved by the CCPs’ regulators; and, (4) codified in the CCP’s rulebooks for purposes of transparency and certainty.

Accordingly, we respectfully submit that the resolution authority should avoid intervening to the fullest extent possible and defer to the recovery process that has been defined and agreed upon ex ante. Otherwise, the resolution authority will risk potentially undermining the incentives that have been designed to effect recovery.

In addition, as we explore below, a pre-funded pool of resources for use solely in resolution, as suggested in the Consultation, runs the risk of unnecessarily increasing the costs of clearing further by adding to the increased cost associated with recent regulatory capital reforms.



Timing of entry into resolution

*Q3. What are the appropriate factors for determining timing of entry into resolution? How might a presumptive timing of entry (or range of timing), if any, be defined in light of the criteria set out in the FMI Annex to the Key Attributes? If defined, should the presumptive timing of entry be communicated to the CCP and its participants?*

If resolution of a CCP is necessary it is because recovery has failed, or it is presumed to be on a path to failure. In most cases, this likely implies that the market itself is no longer viable. This is why CCPs rightly place an emphasis on ensuring that their recovery processes are robust and credible, and capable of restoring the CCP to a balanced book. It is vitally important that the CCP be given every chance to execute its recovery plans as transparently described in its rule book. Uncertainty with regards to whether and to what extent these clearly defined plans will be executed will only inject additional uncertainty into an already complex situation. Thus, in a situation where the robust recovery plan has been deployed but has not stabilized the market and regulators are faced with a clearly evident systemic risk (such as an assessment call on a given clearing member from multiple CCPs is likely to cause that institution to fail), it may be appropriate for the regulator or resolution authority to step in. However, if such intervention is too prescriptively defined or too easily enacted, we feel that this may in fact constrain participation in recovery actions and could militate against an effective recovery. We think entry into resolution is most clearly defined as that point at which the recovery plan has been exhausted and has failed to achieve its objective of a balanced market.

Paragraph 3.3 states that "sufficient resources ... should as far as possible remain available [to a CCP] at the time of entry into resolution to absorb losses and to replenish the CCP's (or its successor's) financial resources". This proposition may discourage equity owners of a CCP from providing funded or non-funded resources (e.g. to draw down on liquidity facilities) to manage risks. It is key that management of the CCP have full control over how the CCP manages its risks and is able to use all of its rulebook tools and powers in respect of recovery, without disruption by regulatory or resolution authorities. An equity owner would be discouraged from providing liquidity, for example, if it is concerned that as a result of an early intervention by a resolution authority, it will no longer be an equity owner, or that it will have funded a different equity owner who may take a different approach to managing that risk, cause losses for the equity owner and/or change the risk waterfall. The approach must also be consistent with applicable legal standards on when a resolution authority is permitted to act, which may depend on whether the CCP is actually in default or in imminent danger of default (which may not be the case if the CCP retains sufficient resources to avoid losses).

Adequacy of financial resources in resolution

*Q4. Should CCPs be required to hold any additional pre-funded resources for resolution, or otherwise adopt measures to ensure that there are sufficient resources committed or reserved for resolution? If yes, what form should they take and how should they be funded?*

We do not agree with such a proposal, for several reasons. First, and most importantly, from the CCP perspective recovery (and not resolution) is the preferred approach to return the CCP to a matched



book. While it is absolutely necessary to contemplate what could occur if recovery were to fail, and what to do about it, the recovery tools that ICE has adopted, which are consistent with those which are set out by CPMI-IOSCO and applicable regulatory requirements, are designed to address any shortfall comprehensively and without reference to or reliance on actions by public authorities. So the emphasis must be on allowing a complete recovery by the CCP in combination with its members and the market, to the fullest extent possible. We believe that a resolution fund would upset this concept as it would act to encourage participants to look towards resolution (rather than recovery) as the preferred, or at least the likely, outcome - since that is where pre-funded assets already sit. We would, however, note that each CCP is required to hold a significant amount of regulatory capital which is not necessarily exposed to the default waterfall. We would support amending the CCP rules to provide that such regulatory capital could be made available as additional funds to support final recovery efforts or [at the resolution authority's discretion] to support ultimate resolution. If recovery is ultimately successful, the CCP's owners would then be expected to replenish such regulatory capital just as clearing members and the CCP would be expected to replenish their guaranty fund contributions. In these circumstances, it may be necessary to make provision for a CCP in resolution to operate for a period with reduced capital and technically out of compliance with its regulatory capital requirement.

Second, a CCP's default fund is calibrated to withstand the simultaneous default of, at a minimum, the two clearing members that create the largest uncollateralized losses. This approach already introduces a very strong layer of loss-absorbency that nonetheless allows business-as-usual clearing to take place economically. We are concerned that if a resolution fund is set up and must be paid for, this would act as a drag on the normal course of business, in order to cater for a hypothetical event that is very remote. It may or may not act as a further factor dissuading clearing members to remain in the market, but it would certainly increase the cost of clearing in a way that, in our view, would be disproportionate given the likelihood of it being used.

Third, the existing level of CCP contribution of prefunded resources ("skin in the game" or SIG") serves a very different purpose than the mutualized pool ("guaranty fund") funded by the clearing members. CCPs do not include the SIG as part of their Cover 2 default resources. Instead, CCP SIG is a commercially-determined amount (above any regulatory minimum, and as opposed to a risk-based amount) that supplements and stands behind the CCP's safe and sound risk management policies and procedures which are reviewed and approved by risk committees, independent boards of directors and regulators and that are designed to enhance confidence in the CCP's clearing services.

*Q5. How should the appropriate quantum of any additional CCP resources be determined? In sizing the appropriate quantum, what factors and considerations should be taken into account? Do your answers vary for default and non-default losses?*

For default losses we do not agree that extra CCP resources are justified, other than as explained above. Non-default losses are a different case. EMIR already provides for CCP capital which covers failures due to legal, operational and other risks and ICE is in the process of voluntarily adopting those aspects in all its CCPs. Further, while a "default loss" is easily understood, a non-default loss ("NDL") may mean many things. For example, a non-default loss may occur as the result of an operational failure by the

CCP. In this instance, the impact of that loss should be fully borne by the CCP. Another form of a NDL relates to the failure of a custodian or deposit bank at which the CCP deposits its members' cash balances. Any loss related to such an institution should accrue to the detriment of the firm whose money was deposited in it and recovery would appropriately be sought through the insolvency process for that institution. Investment losses are another form of NDL. CCP investment policies are subject to significant regulatory constraints, including with respect to liquidity and credit quality, and are developed and approved through the clearing house governance process. In some cases a CCP may be required to invest a specified portion of cash balances. As a result, ICE believes that investment losses are largely not within the control of the clearing house. Moreover, the clearing house generally does not have the benefit of the investments made. In ICE's view, investment losses should thus be shared between the CCP and clearing members, in a manner similar to losses in a default (subject to any limitations under applicable regulations if the investments have not been directed by the clearing members or their customers). Overall, we believe rules can be clearly established to reflect that with regards to NDLs, in some cases the burden appropriately falls to the CCP, in some cases to the members and, in some cases, to both.

*Q6. Should resolution funds external to the CCP be relied upon? If so, how should such funding arrangements be structured so as to minimise the risk of moral hazard, including for CCPs with significant cross-border participation? Where these are pre-funded, how should the target size be determined and which entities should be required to contribute?*

No, such a fund should not be relied upon. In contrast to Q4, we understand an external fund to be a pooled resource to cover the failure of several CCPs. If that is the case, we believe that this is not practical. In the event that CCP failure derives from a market problem affecting many clearing members, leading to their failure to perform towards several CCPs, it is clear that such a fund would primarily benefit those CCPs that are first to tap it. This would also cause a degree of interconnectedness in resolution that would likely exacerbate contagion at a time when markets are particularly fraught. We cannot see how such an external fund is a suitable or practical solution.

#### Tools to return to a matched book

*Q7. What factors should the resolution authority consider in choosing and exercising tools to return the CCP to a matched book? Is one (or more) of the tools for restoring a matched book preferable over others and if so, why?*

If a CCP is in resolution it is because recovery has failed or is presumed to have failed, or because the resolution authority has decided that it can discharge the recovery tools or variations of those tools in a way that better reflects the needs of the market and the public interest. This might be, for example, because of superior information that it has about contingent problems, or international efforts by similar authorities. In the latter case, we believe this is best understood as a continuation of the recovery process with the resolution authority working in concert with the CCP to leverage the tools available in the CCP's rulebook to restore a matched book. However it would be necessary in this case



for the resolution authority to justify why it could discharge those tools more effectively than the CCP and to ensure that there is no ambiguity regarding who has ultimate decision making authority. With respect to preference of tools, we submit that the resolution authority should attempt to follow the hierarchy prescribed by the CCP's rules. This would include on-going auction processes – where a viable market exists – gains haircutting, and partial tear-ups, if the market has demonstrated that sufficient liquidity does not exist in these products.

While it is not an ideal outcome, partial tear up is an appropriate tool as defined by CPMI-IOSCO and we believe provides the least intrusive result where an auction is not feasible or has failed. Ideally, the partial tear up tool should be implemented only after multiple auction cycles that allow participants with an interest in the market to bid on the defaulter's positions. The auctions should include appropriate client firms who express an interest in bidding on the portfolio, improving the auctions chance of success. Multiple unsuccessful auctions may indicate that there is no longer an appetite for the products in the market. Partial tear ups done in this way distribute losses only after reasonable effort has been made to dispose of the positions through a market mechanism.

*Q8. Should any tools for restoring a matched book only be exercisable by resolution authorities? If so, which tools and subject to what conditions?*

No tools considered as part of a recovery process should be exercisable only by the resolution authority. However, ICE acknowledges that a Resolution Authority may want to define additional tools for use at its sole discretion during the resolution period presumably to be executed in the context of any systemic impacts such tools may create. We believe such tools and conditions for their use should be clearly defined on an ex ante basis.

### Allocation of losses in resolution

*Q9. What are in your view effective tools for allocating default and non-default losses and what are the pros and cons of these tools? Should initial margin haircutting be considered as a tool for the allocation of losses in resolution? Is one or more of the tools preferable over others? What are your views on the use of tools to restore a matched book as a means of loss allocation?*

We believe the tools likely to be effective for use in recovery and resolution are well articulated by CPMI-IOSCO. A delineation should be drawn between tools that form a part of a viable recovery process (VM hair-cutting, partial tear up) and those more extreme tools that should be used only in final resolution or wind-down (full tear-up).

Auctions should serve as the primary recovery tool for restoring a matched book. Default auctions can be designed to incentivize participation and robust bidding, and in ICE's view provide the most efficient means for the CCP to return to a matched book and allocate losses based on actual bids made by market participants. Auctions also give members and end-users an opportunity to participate in default management and protect themselves against the use of recovery tools that they may view as unfavourable or undesirable, such as VM hair-cutting or tear-up.

VM hair-cutting should only be utilized as a last resort and at the end of the waterfall. VM hair-cutting should serve as a limited tool that allows the CCP to continue operations for a defined time. Recognizing the extreme nature of VM hair-cutting, CCPs should only utilize the tool after consultation with the regulators. If applied appropriately, VM hair-cutting could serve to avoid CCP insolvency and facilitate continuity of clearing service and operations. Under VM hair-cutting, losses are fully allocated across all market participant gainers to minimize the impact to any particular market participant.

As noted above, partial tear up should only be utilized after multiple failed auctions. Partial tear up is less intrusive tool than “full” tear up, because it enables the CCP to return to a matched book while protecting the balance of the cleared market.

We do not support original or initial margin write downs. This would represent a major loss of assets for users of financial markets and would risk major industry contagion. Any powers to take such steps would also have serious adverse effects on regulatory capital treatment of participants posting collateral.

As we have observed, non-default losses are of a different nature to default losses and may require different treatment.

*Q10. Which, if any, loss allocation tools should be reserved for use by the resolution authority (rather than for application by a CCP in recovery)?*

Please see our answer to Q.8

*Q11. How much flexibility regarding the allocation of losses is needed to enable resolution authorities to minimise risks to financial stability? For example, to what extent should a resolution authority be permitted to deviate from the principle of pari passu treatment of creditors within the same class, notably different clearing members in resolution? What would be the implications of a resolution strategy based primarily or solely on a fixed order of loss allocation in resolution set out in CCP rules vs. a resolution strategy that confers discretion to the resolution authority to allocate losses in resolution differently to CCP rules?*

CCP rules represent the contractual obligation that users of the CCP accept and are governed by when they clear with that CCP. Accordingly, the sequence of responsibility for default losses (the default loss waterfall)—typically, the defaulter’s resources, followed by SIG, followed by the mutualized guaranty fund, followed by assessments, followed by VM hair-cutting—should not be altered. The ex ante agreement of the default loss sequence is critical to the effective functioning of a clearing house and it would be fundamentally unfair to deviate from it. Moreover, deviation from the principle of pari passu treatment of creditors within the same class would be arbitrary and contrary to the design of the CCP and contractual agreements of the clearing participants. As previously noted, any uncertainty with respect to the functioning of the clearing model and the associated risk is likely to discourage the use of clearing.

We recognize that the actions of a Resolution Authority for a CCP may be governed by a wider set of objectives in the service of financial stability, which may result in a number of considerations that



potentially conflict with each other. We do not believe, however, that this would justify deviation from the default loss waterfall for a particular clearing house in resolution. To the extent a resolution authority is to have authority to deviate from the default loss waterfall, the appropriate terms of loss allocation should be set out ex ante in published legislation or regulations—like those governing bank resolution or a wide range of other public authority interventions.

*Q12. What are your views on the potential benefits or drawbacks of requiring CCPs to set out in their rules for both default and non-default losses: (i) The preferred approach of the resolution authority to allocating losses; (ii) An option for, or ways in which, the resolution authorities might vary the timing or order of application of the loss allocation tools set out in the rules?*

CCP rulebooks should govern the range of recovery situations in which the CCP is in charge of its clearing service (including loss allocation rules in a recovery for a default or non-default loss). To the extent a resolution authority may deviate from these rules, it is not for the CCP rulebook to set out procedures that might or might not be followed by a resolution authority. This should instead be set out in law or appropriate operating guidance published pre ante by the resolution authority.

### Non-default losses

*Q13. How should non-default losses be allocated in resolution, and should allocation of non-default losses be written into the rules of the CCP?*

The question of exactly which non-default losses (ranging from investment losses to losses from service provider failures) should be covered by a CCP equity owner versus clearing members or other participants needs further discussion. Several different scenarios need to be considered, as discussed in our response to Q5. Suggestions in the FSB paper that investment decisions are CCP-generated seem misplaced. A CCP's ability to invest may be significantly constrained under both applicable regulations and its own investment policy. In some cases a CCP may be required to invest a specified portion of cash balances. CCP's investment policies and counterparties should be transparent and subject to governance oversight and regulatory review. It is recognized that CCP owners should have financial incentives to ensure that investment policies required by regulation and approved through the CCP governance process are adhered to, but beyond that CCP owners should not be liable for investment losses that will typically be outside of their control.

Similarly, regulation also forces a CCP to diversify its custodians and repo counterparties; in many cases where there is a limited choice of provider or with prescription as to investment limits. Whilst ICE acknowledges that there should be incentives on CCP owners to manage the choice of providers carefully and to supervise them, it is impractical for CCP owners to be liable for third party failures that are outside of their control.

To the extent that liability for non-default losses is imposed on the CCP, questions arise as to whether regulators can under applicable law, and if so should be required to use their powers to, force service providers to CCPs to perform. These issues are further complicated in a cross-border context. For example, if a committed repo provider in one jurisdiction were to decline to lend because it had been



ordered by a regulator not to increase its exposure to CCPs outside of that jurisdiction, would the regulator of that CCP (1) be able to, or choose to, use any powers to seek to avoid any resulting non-default losses? Similarly, should a regulator be willing to step in and order essential service providers to provide services to a CCP even if doing so may expose that service provider to unsecured risk on the CCP?

ICE proposes that any cover for non-default losses contributed by CCP owners should not be pre-funded. One of the most likely sources of non-default loss would be the default of a bank, custodian, central securities depository or repo counterparty. If the assets are pre-funded, then they will likely be invested in the same accounts. Non-default loss funds should be covered on an on-going basis by assets which are not at risk from the same loss events, such as committed lending facilities.

If resolution is needed as a result of non-default losses, it must be due to a loss that the CCP has attempted and failed to address through recovery. It may be that the clearing service is still operational. It may also be that the clearing service is suspended but the default fund and assets are intact.

Logically if a CCP must be resolved in a non-default situation, the CCP has failed to solve the problem during recovery. Assuming that the public interest is in continued clearing services as opposed to wind-down and closure, it could be envisaged that the CCP is operated for a period of time by the resolution authority as a CCP (or as a bridge CCP), if the margin and default fund is intact, until an alternative owner can be found. This is because market conditions are more likely to permit such a possibility. Equally a non-default situation may be more likely to affect a single CCP if the source of the problem is specific to that CCP. This may offer the resolution authority more options than a member default situation caused by (or accompanied by) extreme market stress.

*Q14. Aside from loss allocation, are there other aspects in which resolution in non-default scenarios should differ from member default scenarios?*

See our answer to Q13 above.

Application of the “no creditor worse off” (NCWO) safeguard

*Q15. What is the appropriate NCWO counterfactual for a resolution scenario involving default losses? Is it the allocation of losses according to the CCP’s rules and tear-up of all the contracts in the affected clearing service(s) or liquidation in insolvency at the time of entry into resolution, or another counterfactual? What assumptions, for example as to timing and pricing or the re-establishment of the CCP’s matched book, will need to be made to determine the losses under the counterfactual?*

The pre-requisite for intervention by a resolution authority (and thus the appropriate NCWO counterfactual) that needs to be fulfilled is that resolution is preferable to the CCP discharging its recovery tools up to and including tear-up of all affected contracts. It is assumed, again, that the CCP has not yet become insolvent and that the public interest is in continuity.

*Q16. What is the appropriate NCWO counterfactual for a resolution scenario involving non- default losses? Is it the liquidation of the CCP under the applicable insolvency regime, assuming the prior*

*application of any relevant loss allocation arrangements for non-default losses that exist under the CCP's rules or another counterfactual?*

The appropriate NCWO counterfactual for a resolution scenario involving non-default losses would be liquidation under the applicable insolvency regime after implementation of any relevant loss allocation arrangements under the CCP's rulebook.

*Q17. How should the counterfactual be determined in cases that involve both default losses and non-default losses?*

If both a default loss and a non-default loss occur simultaneously, the tools to address them would remain independent, as currently defined in the CCP's rulebook. The default and non-default losses would be addressed individually with the NCWO counterfactuals described in Q15 and Q16, respectively.

### Equity exchange in resolution

*Q18. Should CCP owners' equity be written down fully beyond the committed layer of capital irrespective of whether caused by default or non-default events?*

This section is premised on the assumption that "CCP owners are insulated from significant losses". This is incorrect. CCP owners are liable for significant losses in addition to their equity on a CCP failure. These amounts are agreed and pre-funded in the default fund. The paper states that "imposing losses on existing owners would help create appropriate incentives to avoid resolution ... including robust risk-management arrangements". In ICE's view, CCP owners already have significant incentives to avoid resolution. The suggestion also fails to take into account the very high capitalisation and risk management requirements set out in applicable regulations for CCPs; and the fact that any large loss will most likely be caused by world events leading to major defaults, not through CCP actions (or lack thereof). This is why CCP owners contribute to default funds in a commercially appropriate amount which, at a minimum, meets any relevant regulatory requirements and enhances confidence in the CCP's provision of service. Any mechanism which allows the agreed waterfall to be altered in order to impose losses on equity holders instead of those liable under the CCP rules would create incentives on members not to participate in default management.

A new "second skin in the game" for equity holders is also proposed by FSB. However, in Europe, regulatory capital (funded by owners and capable of being written down under resolution frameworks already) is already present as a second level of "skin in the game", once dedicated financial resources made available in the default waterfall or to cover non-default losses have been depleted. Paragraph 9.5 suggests providing for equity exchange in the rules, but this would not work as a stand-alone proposal, as this is not a matter governed by contract law, but by the constitutional documents of the CCP legal entity, local corporate laws and applicable insolvency laws.

*Q19. Should new equity or other instruments of ownership be awarded to those clearing participants and other creditors who absorb losses in resolution?*



We believe that this option would subvert and substantially weaken clearing participants' incentives to commit to the recovery phase in a way that would lend unhelpful momentum towards resolution. As discussed in previous answers, the incentive structures designed to manage a default or CCP recovery depend on putting all participants (CCPs and clearing members) at risk of greater loss for lack of participation in the process. Any compensation at the end of the resolution process must be designed to preserve these crucial incentives.

Equity as a compensation tool will skew the incentive structure supporting the CCP's default management and recovery process. Allocating equity to the clearing members effectively creates an ownership opportunity for clearing members in a market stress event. If the CCP is approaching resolution, the clearing member will likely have suffered losses under the default management process. If bearing a relatively small amount of additional losses would result in an ownership stake in the CCP, there is a risk that clearing members would view it as more beneficial to artificially limit their participation in the default management process and encourage the resolution of the CCP to gain this ownership. Currently, CCPs are structured to ensure that independent owners, clearing participants (through the risk committee), and CCP senior management are all incentivized to manage overall risk effectively. The balance created by relying on three groups with independent perspectives ensures that no one voice can overpower the others, resulting in CCP policies that act in the best interest of the market, rather than any individual participant. If one member of that group gains additional power – through clearing members gaining a controlling ownership share of CCP equity – the commercial interests of the clearing members may become overly influential in the CCP risk management processes, resulting in less secure markets coming out of the resolution.

In the event that a CCP operates multiple asset classes with unique clearing memberships, providing an equity stake would at a minimum be extremely complicated and moreover could threaten the security of the other asset classes. In a situation where one asset class defaults, its clearing members could end up with ownership of the entire CCP. Allowing some clearing members ownership over the entire CCP structure would be an inappropriate result for members of the asset classes that did not suffer losses and may not have signed up to clear at a member-owned clearinghouse.

There is also a risk that this compensation structure favours some clearing members while disincentivizing others, who may not be permitted to take an ownership stake in the CCP. There are significant issues with using equity to reward clearing members for behaving in an appropriate manner during a default, recovery, or resolution.

### Cross-border cooperation

*Q20. What are your views on the suggested standing composition of CMGs? Should resolution authorities consider inviting additional authorities to the CMG on an ad-hoc basis where this may be appropriate?*

It is crucial that the home authority of the CCP play a leading role in the CMG to manage the CCP's resolution. This will ensure the idiosyncrasies of the CCP will be properly represented to the CMG. Resolution authorities must be mindful of the potential for inefficiencies should any relevant group grow

beyond a manageable size, as efficiency and quick responses to the circumstances will be crucial in a CCP resolution.

*Q21. What should be the nature of engagement with authorities in jurisdictions where the CCP is considered systemically important, for the purpose of resolution planning and during resolution implementation?*

European CCPs operate under regulatory arrangements e.g. colleges that offer the possibility for exchange of views, information and co-ordination. For other CCPs that act on a cross-border basis, *ad hoc* but effective cooperation and co-ordination among relevant national regulators are commonly observed. We would envisage that this could be the basis for co-ordination protocols or similar arrangements (whether formal or informal) in the event of resolution, though the exact scope of such protocols and arrangements is better designed by those involved.

*Q22. Should CCP resolution authorities be required to disclose basic information about their resolution strategies to enhance transparency and cross-border enforceability? If so, what types of information could be meaningfully disclosed without restricting the resolution authority's room for manoeuvre?*

In disclosing the plans of recovery or resolution strategies, all participants must be cognisant of the risk that providing such detail may skew the incentives for clearing members, jeopardizing the likelihood of a successful recovery and exacerbating losses and market stress. While it will likely be helpful for the market if authorities disclose the kinds of tools that they will have at their disposal, we believe that the exact order and implementation of the tools must be flexible enough to allow authorities to address the exact stress situation as it unfolds. In general, we believe the market will benefit from “constructive ambiguity”, allowing the authorities to respond to the market stress as appropriate given the facts and circumstances at the time, without being bound by a strict, pre-defined plan. As noted above, however, we believe that the relevant default loss waterfall should be defined and published *ex ante*, to provide legal certainty and maintain *pari passu* treatment of creditors in the same class.

### Cross-border effectiveness of resolution actions

*Q23. Does this section of the note identify the relevant CCP-specific aspects of cross-border effectiveness of resolution actions? Which other aspects, if any, should also be considered?*

ICE has no comment with respect to CCP-specific aspects of cross-border effectiveness of resolution actions.

In general, Paragraph 11.4 suggests making CCPs responsible for ensuring a workable resolution regime. We would instead argue for the onus to be placed on regulators and legislators, not CCPs, to ensure that resolution laws are enforceable on a cross-border basis. Even within the European Union, some major countries still only recognize national CCPs in their insolvency laws. It is critical that national insolvency laws recognize the primacy of CCP default and resolution steps. It should not be for CCPs to solve this issue but for governments and regulators.



*Q24. What should be the role, if any, of the suspension of clearing mandates in a CCP resolution and how should this be executed in a cross-border context?*

As with all resolution tools, a potential suspension of a clearing mandate could create the risk that clearing members would be encouraged to limit their participation in the processes necessary to ensure a successful CCP recovery. Any change to the mandates must balance this risk with the potential benefits of a suspension of the mandate.

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ICE greatly appreciates the opportunity to comment on the questions raised in the Consultation. ICE looks forward to continuing to work with the FSB, its members, and other interested market participants to develop and refine the approaches to be taken by national resolution authorities to the potential resolution of a CCP, as part of the broader regulatory and industry focus on CCP recovery and resilience.

If the FSB or its staff should have any questions concerning our responses, or wish to discuss them further, please do not hesitate to contact the undersigned at [     ].

Respectfully submitted,



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