|  |
| --- |
| Response Form to the Consultation Paper |
| Guidelines on Outsourcing to Cloud Service Providers |

**Responding to this paper**

ESMA invites comments on all matters in this consultation paper on guidelines on outsourcing to cloud service providers and in particular on the specific questions summarised in Appendix I. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **01 September 2020.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA\_QUESTION\_COGL\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_COGL\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_COGL\_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading “Your input – Open consultations” 🡪 “Consultation on Outsourcing to Cloud Service Providers”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

This paper is primarily of interest to national competent authorities and financial market participants. In particular, this paper is of interest to alternative investment fund managers, depositaries of alternative investment funds, undertakings for collective investment in transferable securities (UCITS) management companies, depositaries of UCITS, central counterparties, trade repositories, investment firms and credit institutions which carry out investment services and activities, data reporting services providers, market operators of trading venues, central securities depositories, credit rating agencies, securitisation repositories and administrators of benchmarks (“firms”), which use cloud services provided by third parties. This paper is also important for cloud service providers, because the draft guidelines seek to ensure that the risks that may arise for firms from the use of cloud services are properly addressed.

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | Intercontinental Exchange, Inc |
| Activity | Regulated markets/Exchanges/Trading Systems |
| Are you representing an association? |  |
| Country/Region | International |

**Introduction**

***Please make your introductory comments below, if any***

<ESMA\_COMMENT\_COGL\_1>

Intercontinental Exchange, Inc. (ICE) welcomes the opportunity to provide feedback to the ESMA draft guidelines on outsourcing to Cloud Service Providers (draft CSP guidelines).

ICE is a leading global operator of regulated exchanges, clearing houses and listings venues, and a provider of data services for commodity, financial, fixed income and equity markets. We operate regulated marketplaces for listing, trading and clearing a broad array of derivatives contracts and securities across major asset classes, including energy and agricultural commodities, metals, interest rates, equities, exchange traded funds, or ETFs, credit derivatives, digital assets, bonds and currencies, and also offer mortgage and technology services. In addition, we offer comprehensive data services to support the trading, investment, risk management and connectivity needs of customers around the world and across asset classes.

ICE understands and welcomes ESMA’s interest in the topic of outsourcing to cloud service providers (CSPs). Before responding to the specific questions in the consultation paper, ICE would like to make a few general remarks on outsourcings to CSPs and to the draft CSP guidelines.

ICE is of the opinion that it is contrary to good technology and outsourcing governance and oversight for the outsourcing to CSPs to have its own standalone strategy. For ICE, outsourcing to CSPs is part of its Technology Strategy because it ensures a holistic approach towards the use and oversight of technology. ICE’s outsourcing policy covers oversight, monitoring, pre-engagement due diligence and risk analysis of any outsourcing; that policy and the associated processes covers outsourcing to CSPs. The outsourcing policy aligns with ICE’s group processes for Vendor Management, Procurement and Information Security. ICE believes that a standalone cloud strategy or policy would impair the governance and oversight of the use of CSPs. Therefore, ICE would recommend that any **final ESMA Guidelines on CSP outsoursing allow it to be integrated into firms’ existing Technology Strategy,**

**Vendor Management, Procurement and Information Security processes to avoid the creation of a separate standalone structure for cloud services that could create a suboptimal governance and oversight structure.**

Additionally, ICE recommends that ESMA explicitly recognise the qualitative differences between a firm outsourcing tasks to an unaffiliated third party and tasks being performed in connection with shared services among affiliates. When tasks are performed as shared services, there is alignment of the interest in the firm in meeting its responsibilities and those performing tasks because the ultimate shareholders are the same. By contrast, when a third party performs tasks on behalf of a firm there is no such alignment of interests. Importantly, as ESMA notes, the firm retains full responsibility, legal liability and accountability to the regulator for all tasks. Therefore, ICE would recommend that any **final ESMA Guidelines on CSPs reflect the difference between a firm outsourcing tasks to an unaffiliated third party and tasks being performed in connection with shared services among affiliates.**

<ESMA\_COMMENT\_COGL\_1>

**Questions**

1. : Do you agree with the suggested approach regarding a firm’s governance and oversight in relation to its cloud outsourcing arrangements? Please explain.

<ESMA\_QUESTION\_COGL\_1>

Yes, ICE generally agrees with ESMA’s approach regarding a firm’s governance and oversight in relation to its cloud outsourcing arrangements. In this context, ICE strongly supports the differentiation in the draft guidelines between critical and non-critical functions, and suggests that the Guidelines might benefit from some guidance as to what constitutes “critical or important functions” and that such functions be limited to key aspects of regulated activity. On that basis, ESMA’s approach would allow for a proportional risk-based approach that takes into account a firm’s business models.

However, ICE has reservations about the potential creation of a standalone single register for outsourcing to CSPs or differing sets of guidelines for cloud outsourcing vs those for other types of outsourcing. ICE’s Vendor Management function assesses the vendor’s criticality and risk against ICE’s common enterprise risk policy. ICE maintains a common enterprise risk register and our outsourcing agreements to CSPs form part of this register. We believe that cloud services are just another technology service and the creation of a register or requirements for cloud outsourcing separate from those for other types of outsourcing would not improve the governance or oversight of this technology within firms. On the contrary, it would be likely to introduce additional and unnecessary complexity and risk. Therefore, ICE suggests that the **final Guideline 1 require firms to** **maintain the relevant information on outsourcing agreements with CSPs in registers, but not require the creation of a new**

**and separate, standalone register just for outsourcing to**

**CSPs.**

<ESMA\_QUESTION\_COGL\_1>

1. : Do you agree with the suggested documentation requirements? Please explain.

<ESMA\_QUESTION\_COGL\_2>

Yes, ICE generally agrees with ESMA’s approach regarding the suggested documentation requirements. We note the very prescriptive nature of Guideline 1, and the level of detail seems very extensive, but the information mentioned does already form part of ICE’s due diligence process.

**Regarding 29 a) (Reference Number)**: Based on ICE’s experience, we believe that the use of a reference number is limiting, as an alphanumeric code or another reference might be more appropriate. Therefore, in the case of reference numbers, ICE suggests that **the final Guideline 1 only require the use of a reference.**

**Regarding 29 d) (Category)**: ICE queries what value this requirement would bring and notes that it may add confusion where an outsourcee performs a service that does not fit into any pre-defined category or fits into multiple categories.

**Regarding 29 l) (Sub-outsourcer)**: ICE has concerns that some information from a suboutsourcer might not be reasonably available to us, especially in the case of indirect cloud outsourcing i.e. where 3rd parties sub-contract out to the cloud. ICE addresses this issue by defining the service levels with the service provider and expects those to be met regardless whether there is sub-outsourcing or not. Therefore, in the case of indirect cloud outsourcing, ICE suggests that **the final Guideline 1 only require the firm to hold all the relevant documentation as far as it is reasonably available.**

<ESMA\_QUESTION\_COGL\_2>

1. : Do you agree with the suggested approach regarding the pre-outsourcing analysis and due diligence to be undertaken by a firm on its CSP? Please explain.

<ESMA\_QUESTION\_COGL\_3>

Yes, ICE generally agrees with ESMA’s approach regarding the pre-outsourcing analysis and due diligence to be undertaken by a firm on its CSP.

However, ICE has concerns regarding **paragraph 33 a) vii) (Concentration risks)**. Based on its experience, ICE believes it will be difficult for a firm to assess the concentration risk within a sector. Firms do not have an overview of the outsourcing arrangements of competitors in the same sector. Therefore, ICE suggests that **the final Guideline 2 not require firms to assess the concentration risk within the sector.**

<ESMA\_QUESTION\_COGL\_3>

1. : Do you agree with the proposed contractual requirements? Please explain.

<ESMA\_QUESTION\_COGL\_4>

Yes, ICE generally agrees with ESMA’s approach regarding contractual requirements, which broadly corresponds to our current internal policies and procedures. ICE believes that

Guidelines 3 would benefit from two clarifications. First, ICE recommends that the

Guidelines explain that rights and obligations with respect to reporting, access, performance levels, inspection and auditing of any particular outsourced activity should be proportionate to the risk involved and the size and complexity of the outsourced activity. Second, ICE does not believe that “precise quantitative and qualitative performance targets” are practical in all circumstances, as the outsourced activity may simply not lend itself to such targets. Therefore, ICE suggests that **the final Guideline 3 be adjusted by the addition of ‘where practical and appropriate’ or an analogous qualification**

**thereto**

<ESMA\_QUESTION\_COGL\_4>

1. : Do you agree with the suggested approach regarding information security? Please explain.

<ESMA\_QUESTION\_COGL\_5>

ICE generally agrees with ESMA’s approach regarding information security and considers the list of requirements suggested in Guideline 4 as a solid basis of a good security implementation for cloud projects. However, we would caution against prescriptive language, as that could be perceived as being contrary to the stated risk-based approach. Therefore, ICE suggests that **the final Guideline 4 be adjusted by using** “**evaluate, assess, or consider” (suggesting best practice) instead of the current “ensure” (suggesting a prescriptive requirement),** as it would help clarify that the actual intent is to provide a roadmap of topics to consider following a risk-based

approach

<ESMA\_QUESTION\_COGL\_5>

1. : Do you agree with the suggested approach regarding exit strategies? Please explain.

<ESMA\_QUESTION\_COGL\_6>

ICE partially agrees with ESMA’s approach regarding exit strategies. ICE supports the idea of having exit provisions/strategies in place for critical and important functions. Our current written service provider agreements include provisions for exiting such agreements/services, e.g., provisions that contemplate a new service provider and continuation of service until the new service provider takes over the service.

By contrast, **paragraph 44 a) requires the development and implementation of exit plans and paragraph 44 b) requires the identification of alternative solutions and the development of transition plans.** Both requirementsraise significant practical issues and go beyond the current industry standard and practices.

As stated above, ICE sees cloud as simply another technology, and ICE’s Vendor Management function treats it accordingly. ICE questions how, in practice, an exit plan can be sufficiently tested and implemented on a contingency basis. Would that require the regular prearrangement of alternative CSPs and a test run of exit plans with alternative CSPs, while having no actual intention of using the new cloud services provider? It seems unlikely that this would be workable from a business and commercial perspective. Additionally, how often would such a test need to take place? Further, the use of the word ‘implement’ is confusing, as implementing a plan means putting it into effect, rather than just putting a plan in place (which we believe is what is intended).

Therefore, ICE suggests that **the final Guideline 5 require firms to have exit plans in place and to review them regularly, but not require firms to test and implement these**

**exit plans**

<ESMA\_QUESTION\_COGL\_6>

1. : Do you agree with the suggested approach regarding access and audit rights? Please explain.

<ESMA\_QUESTION\_COGL\_7>

Yes, ICE generally agrees with ESMA’s approach regarding access and audit rights, which broadly corresponds to our current internal policies and procedures.

<ESMA\_QUESTION\_COGL\_7>

1. : Do you agree with the suggested approach regarding sub-outsourcing? Please explain.

<ESMA\_QUESTION\_COGL\_8>

Yes, ICE generally agrees with ESMA’s approach regarding sub-outsourcing, which broadly corresponds to our current internal policies and procedures, but ICE would suggest **that the final Guideline 7 is refined such that the requirements only capture critical or important elements of critical or important functions** (i.e. if immaterial parts of critical or important functions are sub-sourced then those parts should not be subject to these more stringent requirements).

<ESMA\_QUESTION\_COGL\_8>

1. : Do you agree with the suggested notification requirements to competent authorities? Please explain.

<ESMA\_QUESTION\_COGL\_9>

No, ICE does not support ESMA’s approach regarding the notification requirements to competent authorities, as Guideline 8 does not take into account existing notification requirements to regulators on outsourcing arrangements in sector specific legislation.

We note that certain sector specific legislation (e.g. EMIR[[1]](#footnote-2) for clearing houses) already requires the regulated entity to obtain approval from their competent authority before outsourcing any major activity linked to risk management. That requirement may also encompass the situation where the outsourcing provider is a CSP. Therefore, we believe that having a separate notification requirement in respect of CSPs could lead to a duplication of requirements and to an unnecessary additional administrative burden for firms.

In other legislation, for example the EU Benchmarks Regulation,[[2]](#footnote-3) where administrators are required to make available to the relevant competent authorities the identity and the tasks of the service provider that participate in the benchmark determination process, having this separate requirement could lead to confusion, particularly for third country administrators.

The potential co-existence of the notification requirement in the draft CSP Guidelines with existing notification or approval requirements for outsourcing of functions could cause misunderstandings in the practical implementation of the requirement. We note that there is a partial overlap between the scope of the notification requirement proposed under Guideline 8, based on a specific definition of ‘critical or important function’, and the scope of other existing requirements and this could create conflicts across different, but similar/partially overlapping, requirements.

A)

Therefore, ICE suggests that **the final Guideline 8 not require firms to separately notify their regulators of CSP outsourcing, if that notification is already covered by other sector specific legislation.**

<ESMA\_QUESTION\_COGL\_9>

1. : Do you agree with the suggested approach regarding the supervision of cloud outsourcing arrangements by competent authorities? Please explain.

<ESMA\_QUESTION\_COGL\_10>

ICE recommends ESMA amend the Guidelines to clarify that Competent Authorities should be satisfied by supervision of the regulated firm, rather than the CSP. If a Competent Authority could directly supervise a CSP which had an outsourcing arrangement with a regulated firm it may impose unnecessary and complicated political concerns when a regulated firm selects a CSP. Competent Authorities should primarily consider a firm’s arrangements and management of risk when determining whether the outsourced CSP function is sufficiently managed.

ICE generally believes that a supervisory authority should first contact the regulated firm, and the regulated firm would then liaise with the CSP as necessary. This approach would reflect the fact that the regulated firm remains responsible for the outsourced

Function.

<ESMA\_QUESTION\_COGL\_10>

1. : Do you have any further comment or suggestion on the draft guidelines? Please explain.

<ESMA\_QUESTION\_COGL\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_COGL\_11>

1. : What level of resources (financial and other) would be required to implement and comply with the guidelines and for which related cost (please distinguish between one off and ongoing costs)? When responding to this question, please provide information on the size, internal set-up and the nature, scale and complexity of the activities of your organization, where relevant.

<ESMA\_QUESTION\_COGL\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_COGL\_12>

1. [EU Regulation No 2019/2099](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R2099&from=EN) Article 35

   [↑](#footnote-ref-2)
2. EU Regulation No 2016/1011 Article 10 [↑](#footnote-ref-3)