

## Public statement

### **On the derivative trading obligation in the context of the migration of credit default swap contracts out of ICE Clear Europe**

The European Securities and Markets Authority (ESMA) has been made aware that in consequence of the CCP ICE Clear Europe's (ICEU) decision to stop clearing Credit Default Swap (CDS) contracts as of end-October 2023, market participants are required to move their positions at ICEU to other CCPs clearing those contracts.

Such migration would consist in closing positions at ICEU and opening a new position at another CCP offering clearing in CDSs. Since some CDS contracts are subject to the derivative trading obligation (DTO) as per Commission Delegated Regulation (EU) 2017/2417<sup>1</sup>, stakeholders have expressed concerns that executing such technical and non-price forming trades on trading venues would expose them to operational and execution risks, thereby creating an obstacle to an orderly migration.

From a legal perspective and unlike other supervisory authorities, neither ESMA nor the national competent authorities possess any formal power to dis-apply a directly applicable EU legal text in exceptional circumstances. ESMA also does not currently possess any appropriate tools or powers to grant forbearance to deal with such exceptional circumstances that warrant a temporary dis-application of requirements under EU Law. Therefore, any change to the application of the EU rules, such as the creation of an exemption or granting specific suspension powers, would need to be implemented through EU legislation.

However, in this specific case, ESMA shares the concern that applying the DTO to such replacement trades would create significant operational and execution risks by not allowing to lock in the price for such trades. As a consequence, the enforcement of the DTO for those trades could lead to a disorderly migration, thereby potentially introducing market, execution and operational risks, as well as replacement cost risks to participants. In addition, ESMA notes that those trades are non-price forming, administrative in nature and their sole objective is to move risk from one CCP to another.

Therefore, in order to support the orderly migration of positions and mitigate the materialisation of the abovementioned risks, and for the sole purpose of migrating pre-existing positions in

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<sup>1</sup> Commission Delegated Regulation (EU) 2017/2417 of 17 November 2017 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on the trading obligation for certain derivatives, OJ L 343, 22.12.2017, p. 48.

ICE Clear Europe until 31 October 2023 to another CCP, ESMA expects national competent authorities not to prioritise their supervisory actions in relation to the DTO for transactions in certain index CDSs<sup>2</sup>, and to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.

Considering that migrating positions has a global dimension, both in terms of CCPs as well as clearing members and clients involved, stakeholders have reached out to the UK Financial Conduct Authority (FCA) and the US Commodity Futures Trading Commission (CFTC) with similar requests and ESMA has coordinated its approach closely with both authorities.

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<sup>2</sup> Those are: untranched Index CDS referencing the index iTraxx Europe Main, settlement currency EUR, on-the-run and first off-the-run series with tenor of 5Y; and untranched Index CDS referencing the index iTraxx Europe Crossover, settlement currency EUR, on-the-run and first off-the-run series with tenor of 5Y.