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| Response Form to the Consultation Paper |
| Draft technical advice on criteria for tiering under Article 25(2a) of EMIR2.2 |

**Responding to this paper**

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex III. 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 **29 July 2019.**

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\_TATC\_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\_TATC\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_TATC\_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 Position limits and position management in commodities derivatives”).

**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 publically 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**

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from central counterparties (CCPs), clearing members and clients of clearing members.

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | Intercontinental Exchange, Inc. |
| Activity | Central Counterparty |
| Are you representing an association? |  |
| Country/Region | International |

**Introduction**

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

<ESMA\_COMMENT\_TATC\_1>

Intercontinental Exchange Inc., on behalf of itself and its subsidiaries (ICE), appreciates the opportunity to provide its comments to the European Securities and Markets Authority (ESMA) consultation paper on draft technical advice on criteria for tiering under Article 25 (2a) of EMIR 2.2 (Consultation Paper). ICE looks forward to constructively working with ESMA during this process.

As background, ICE owns and operates six geographically diverse clearing houses that serve global markets and customers across North America, Europe and Asia. Each of these clearing houses is subject to direct oversight by local national regulators, often in close coordination and communication with other regulatory authorities with important interests, and subject to regulations reflective of the G-20 reforms and IOSCO principles. Specifically:

1. ICE Clear US clears a variety of agricultural and financial derivatives and is primarily regulated by the U.S. Commodity Futures Trading Commission (CFTC). ICE Clear US is also recognized by ESMA as a third-country CCP (TC-CCP);
2. ICE Clear Europe is ICE’s London-based clearing house that clears derivatives in several asset classes, including energy, interest rates, equity derivatives and credit default swaps. ICE Clear Europe obtained its EMIR authorization in 2016 and is primarily supervised by the Bank of England, in close cooperation with the CFTC and Securities and Exchange Commission (SEC);
3. ICE Clear Credit clears a global set of credit default swaps on indices, single names and sovereigns and is primarily regulated by the CFTC and SEC. ICE Clear Credit is also recognized by ESMA as a TC-CCP;
4. ICE Clear Netherlands clears European equity derivatives. ICE Clear Netherlands obtained its EMIR authorization in 2014 and is supervised by De Nederlandsche Bank and the Autoriteit Financiële Markten;
5. ICE Clear Singapore clears Asian derivatives and is overseen by the Monetary Authority of Singapore. ICE Clear Singapore is also recognized by ESMA as a TC-CCP; and
6. ICE NGX Canada clears North American natural gas and electricity derivatives and is regulated by the Alberta Securities Commission and the CFTC. ICE NGX Canada is also recognized by ESMA as a TC-CCP.

The European Union’s (EU) policy goals to ensure appropriate supervision of TC-CCPs that are deemed systemically important to the EU are understandable. ICE believes that these goals can be best achieved by ESMA employing mechanisms based on international standards such as CPMI-IOSCO, together with continued cooperation and information-sharing agreements among CCP supervisory authorities. These mechanisms can provide ESMA with the information and oversight it requires, while leaving the final decision-making in the hands of national regulators to prevent overlapping or conflicting requirements, which is particularly critical in a time of crisis. ESMA, in an effort to enhance oversight of TC-CCPs, should consider strong and effective supervisory cooperation between the relevant global authorities. This approach will enable EU supervisors to exercise appropriate and proportionate oversight of TC-CCPs.

*CCPs’ Role with Respect to Risk*

Central clearing has long been recognized by policy makers and regulators globally as a means to centralize and reduce risk.[[1]](#footnote-2) A clearing house, by acting as a central counterparty, to clearing members’ transactions, eliminates the bilateral counterparty credit risk that would otherwise exist and imposes on clearing members a transparent set of rules and prudent risk management practices, such as margin requirements, to minimize risks managed by the clearing house. Accordingly, European CCPs and TC-CCPs contribute to reduce overall systemic risk in the financial system including within the European Union and its Member States. ICE therefore does not believe it is accurate that clearing houses contribute risk to the financial system nor, as the consultation suggests, do CCPs “concentrate” risk. Instead, clearing houses reduce risk by “centralizing” and *managing* risk that would otherwise exist between market participants in the over-the-counter (OTC) bilateral marketplace. For example, since it commenced clearing credit default swaps, ICE has eliminated trillions of dollars’ worth of open interest from markets that were previously not subjected to multilateral netting cycles, vastly reducing concentrations of risk and systemic risk generally. The recent introduction of mandated clearing obligations for certain OTC derivatives has sensibly extended the significant benefits of clearing to a broader array of financial instruments. The benefits offered by clearing houses, as compared the alternative bilateral counterparty credit risk, should be taken into account by ESMA when assessing the degree of systemic risk of a TC-CCP to the European Union or one of its Member States.

*Legal Uncertainty*

ESMA’s proposed tiering indicators give rise to legal uncertainty and a lack of clarity for TC-CCPs. First, the proposed indicators would confer on ESMA overly broad discretion when making its assessments as to whether a TC-CCP is systemically important to the EU or one of its Member States, which could lead to inconsistent assessments across TC-CCPs applicants. Second, due to the lack of specificity in the draft technical advice, it is difficult for a TC-CCP to assess its risk of being placed in a certain category. The draft technical advice also fails to set out the relative context for assessing the systemic risk posed by a TC-CCP, including the absence of clear guidance on how ESMA intends to apply each indicator to evaluate the metric in the context of its potential impact to overall EU financial stability. Additionally, in order estimate a CCP’s tiering, both the National Competent Authority (NCA) and market participants will need further clarification on the proposed criteria. Third, the lack of detail may lead to unnecessary delays in the determination of the tiering of an applicant TC-CCP, which will be unduly burdensome and costly and may hinder or even disincentivize TC-CCPs from submitting an application. And fourth, the lack of detail on ESMA’s use of the indicators appears problematic as it does not support the stated objective in Recital 31 of EMIR 2.2 for the “creation of objective and transparent criteria that contribute to the overall assessment.”

Therefore, ICE supports ESMA further refining and amending the technical advice to provide additional detail and clarification on the criteria ESMA will take into account as part of its assessment of each factor and to ensure a fair, suitable, and consistent application of the criteria for tiering under Article 25(2a). In particular, ESMA should develop objective, *de minimis* quantitative criteria that would at least provide clarity that a CCP with only small amounts of business with EU clients or clearing members would not be determined to be systemically important to the EU or one of its Member States. While we understand the premise underlying ESMA's paper that the development of hard thresholds as a universal cut-off for all CCPs would be challenging to develop and could give rise to arbitrary risks, ICE believes a clearly *de minimis* threshold would avoid those risks and provide certainty to a subset of TC-CCPs that are clearly not systemically important to the EU or its Member States. By contrast, the lack of any quantitative thresholds means that tiering would be an unnecessarily cost-intensive process for the TC-CCPs that are patently non-systemically risky for Europe.

In addition, the broad discretion by ESMA under the technical advice is also reflected in the proposed delegated act. ESMA is required to consider “*at least*” the proposed indicators,[[2]](#footnote-3) implying that the proposed indicators are non-exhaustive and that ESMA could, at its sole discretion, consider further indicators outside those specified in the technical advice and proposed delegated act. The unspecified breadth of criteria that ESMA could potentially take into account is concerning. Accordingly, as proposed, it is difficult for a TC-CCP to obtain any legal certainty due to the broad considerations that ESMA can take into account when assessing systemic risk.

*Indicators*

ICE welcomes ESMA’s clear statement and commitment to Recital 31 that “[t]hese criteria [indicators] should contribute to the overall assessment. Individually, none of these criteria should be considered determinative on its own.” ICE agrees that a single indicator in itself cannot and should not be the sole determining factor for the degree of systemic risk of TC-CCP to the EU or one of its Member States.

As detailed below, a number of the indicators identified by ESMA in the proposed technical advice are not themselves indicative of systemic financial risk. In particular and as discussed below, ICE believes that certain indicators are relevant only if assessing the operational resiliency of a TC-CCP, which would be important only after ESMA has determined the systemic importance of a TC-CCP to the EU or one of its Member States.

<ESMA\_COMMENT\_TATC\_1>

**Questions**

1. : Do you generally agree with the proposed indicators (Indicators 1, 2, 3, 4 and 5) to further assess the nature, size and complexity of the CCP's business? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA\_QUESTION\_TATC\_1>

Article 25(2a) specifies the first criterion to be considered by ESMA in assessing the systemic nature of TC-CCPs: the nature, size and complexity of a CCP’s business in the EU, and outside the EU to the extent its business may have a systemic impact on the EU or one of its Member States. Recital 31 states that this criterion, like the other criteria, “should contribute to the overall assessment” of the degree of systemic risk that the CCP presents to the financial stability of the EU or one of its Member States. ICE’s comments below on each of the indicators is with regard to whether the indicator would contribute to the overall assessment of a TC-CCP’s systemic risk.

*Indicator 1:*

As mentioned above, ICE owns and operates six clearing houses which are separately regulated and capitalized. ICE is happy to share information about its corporate structure and this is already made available to regulators. However, ICE believes that an indicator assessing the corporate structure of an organisation is not likely to be a relevant or appropriate factor for determining the degree of systemic risk the TC-CCP poses to the EU or one of its Member States. Therefore, ICE does not believe that the business and corporate structure of a CCP, including its ownership structure and the other financial market infrastructures within the group, are relevant to “nature, size and complexity” of the CCP. If a CCP is determined to be a Tier 2 CCP, such information may be relevant to ESMA’s supervision, but not to the assessment under the tiering criteria.

*Indicator 2:*

ICE agrees that Indicator 2 may contribute to the assessment of a CCP’s systemic risk to the EU or one of its Member States. To improve the transparency of this indicator, ICE suggests that ESMA clarify how its review of the financial instruments cleared by a CCP will be assessed within the context of the EU economy to determine the degree of systemic risk. Specifically, ICE suggests that a clear distinction be made “to what extent [financial instruments cleared by the CCP] are traded on a [trading venue] or traded OTC.”[[3]](#footnote-4) i.e. between exchange-traded-derivatives (ETDs)[[4]](#footnote-5) and OTC derivatives cleared by a TC-CCP. ETDs are standardized products designed and traded on an exchange while OTC derivatives tend to be less standardized and are typically bilaterally agreed between market participants.  Further, due to standardization and trading on an exchange, the liquidity of ETD instruments tends to be significantly greater compared to OTC instruments. Therefore, clearing of ETDs poses less risk to the EU or one of its Member States.

It should also be noted that it is unclear how or why a CCP's clearing activities supporting the clearing mandate may have an impact on the EU’s financial stability, except insofar as it relates to the distinction between OTC derivatives and ETDs. The clearing mandate is one discrete goal under EMIR, and the assessment of a TC-CCP’s systemic importance to the EU is another discrete consideration altogether. Moreover, in terms of the information ESMA may consider for Indicator 2, “the annualised price volatility and the average maturity for each financial instrument,” further clarification would be needed indicating the level of data at which ESMA would be looking (for example, at a market, contract or strip level).

For legal certainty reasons, the term Trading Venue (TV) should be more specifically defined to ensure that it includes all global markets and not only those regulated markets within the meaning of Article 4(1) (14) of MIFID or a third country market considered equivalent to a regulated market in accordance with Article 19(6) of MIFID or an equivalent third country trading venue.

As discussed in the introduction, quantitative criteria should be developed in relation to Indicator 2 (ii) (financial instruments in Union currencies) to ensure that *de minimis* clearing of EU denominated currencies will not trigger Tier 2 categorisation.

*Indicator 3:*

ICE agrees that ESMA’s approach for Indicator 3, which would assess the value and volume cleared by the CCP at the level of the CCP and at the level of each EU and non-EU clearing member, could enable ESMA to assess the degree of systemic risk of the CCP to the EU or one of its Member States.

ICE believes that ESMA should clarify how the value and volume cleared by the CCP will be assessed within the context of the EU economy to determine its systemic risk. In this regard, ICE suggests that ESMA develop objective *de minimis* quantitative criteria that would at least ensure that TC-CCPs with only small amounts of business with EU clients or clearing members would clearly not be systemically important to the EU or its Member States and thus should not be subject to an onerous assessment process. We agree with the premise underlying ESMA's paper that the development of hard thresholds as a universal cut-off for all CCPs would be challenging to develop and could give rise to arbitrary risks. However, the lack of any quantitative *de minimis* threshold means that a tiering assessment could become a costly and time-intensive process for an entity that is patently non-systemically risky for Europe.

Furthermore, ICE encourages ESMA to utilize the [quarterly IOSCO quantitative information publication](https://www.theice.com/publicdocs/iosco_reporting/quantitative_disclosures/icc/ICC_QuantitativeDisclosures_2019Q1.zip),[[5]](#footnote-6) as well as the information provided to ESMA by TC-CCPs as a result of the cooperation agreements ESMA has established with the relevant third country competent authority, for ease of reference and comparability purposes. Additionally, for open interest data, ICE suggests that ESMA further specify the information it would like to obtain by each market type on an individual contract and strip basis.

Lastly, ICE welcomes ESMA’s limitation for the information request for Indicator 3 “to the extent the information is available” on EU clients and/or EU indirect clients through non-EU CMs. As a CCP contracts with clearing members directly and not the clearing members’ clients, the CCP may not always be able to identify the identity of a client or an indirect clients. Additionally, there may be legal restrictions on the ability for a CCP to transmit client data. Therefore, we suggest that the final technical advice reflect these limitations.

*Indicator 4:*

ICE agrees that Indicator 4 may enable the assessment of systemic risk to the EU or one of its Member States. However, it is unclear how the information will be assessed within the context of the EU economy to determine the *degree* of systemic risk. Further, it is not specified if ESMA would rely on publicly available data or on information provided by the TC-CCP. ICE encourages ESMA to utilize the [quarterly IOSCO quantitative information publication](https://www.theice.com/publicdocs/iosco_reporting/quantitative_disclosures/icc/ICC_QuantitativeDisclosures_2019Q1.zip), as well as the information provided to ESMA by TC-CCPs as a result of the cooperation agreements ESMA has established with the relevant third country competent authorities, for ease of reference and comparability purposes.

*Indicator 5:*

ESMA seeks to assess the general business operating risk profile of the TC-CCP in Indicator 5. ICE welcomes ESMA’s reference to the international PFMI standards in this context. However, ESMA has not provided any guidance on how legal, credit, liquidity, general business, custody, investment and operational risk are to be reviewed interpreted or weighted in the context of ESMA’s tiering analysis. ICE would welcome further ESMA guidance on how it thinks general business operating risk of a TC-CCP presents a unique risk or how it increases or introduces a systemic risk to the EU or one of its Member States.

<ESMA\_QUESTION\_TATC\_1>

1. : How would you envisage ESMA to consider risks and in particular cyber-risks in relation to the evaluation of systemic importance?

<ESMA\_QUESTION\_TATC\_2>

ICE recognizes the importance of cyber security and welcomes industry and regulator initiatives to reduce and manage cyber risk appropriately. In this context, ICE welcomes ESMA’s reference to the international CPMI-IOSCO standards. However, ICE would argue that operating a TC-CCP does not increase or introduce unique cyber-risk to the EU or one of its Member States (and is not a risk which would appear to be unique to TC-CCPs) provided that the TC-CCP has appropriate policies and procedures in place to mitigate such risks. In ICE’s view, ESMA should reach a determination of systemic importance before assessing the cyber risk of any particular TC-CCP. ICE would welcome further ESMA guidance on how it thinks that cyber-risk of a TC-CCP presents a unique risk or how it increases or introduces systemic risk to the EU or one of its Member States.

<ESMA\_QUESTION\_TATC\_2>

1. : Do you generally agree with the proposed indicators (Indicators 6, 7, 8 and 9) to further assess the effect of a failure or disruption of the CCP? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA\_QUESTION\_TATC\_3>

Article 25(2a) specifies that the second criterion to be considered by ESMA in assessing the systemic nature of TC-CCPs is the effect that the failure of or disruption to the CCP would have on financial markets, financial institutions, the broader financial system, or on the financial stability of the EU or one of its Member States. Recital 31 states that this criterion, like the other criteria, “should contribute to the overall assessment” of the degree of systemic risk that the CCP presents to the financial stability of the EU or one of its Member States. ICE’s comments below on each of the indicators is with regard to whether the indicator would contribute to the overall assessment of systemic risk.

Given the different nature of the indicators as well as the transparency and objectivity of the indicators, ICE recommends that ESMA further clarify the indicators’ relevance with respect to the degree of, or impact to, systemic risk of a TC-CCP to the EU or one of its Member States. As you will see below, ICE believes that the proposed technical guidance for Indicators 6, 7 and 8 is unclear as to how the information will be assessed within the context of the EU economy to determine the degreeof systemic risk. ICE recommends that any quantitative indicators be contextualized and assessed not as absolute values, but on a relative basis in order to determine whether they indicate that the TC-CCP is in fact of system importance to the EU.

*Indicator 6:*

ICE agrees that Indicator 6 may enable the assessment of systemic risk to the EU or one of its Member States. However, it is unclear how the information will be assessed within the context of the EU economy to determine the degree of systemic risk. A CCP’s amount of collateral, margin or guaranty fund denominated in EU and non-EU currencies would not by itself provide an absolute assessment of the degree of risk to the EU or one of its Member states.  For example, the total amount of initial margin denominated in EUR across all ICE CCPs is € 19,166 million[[6]](#footnote-7) which is about 0.12%[[7]](#footnote-8) of the total EU economy.[[8]](#footnote-9) Further, across the ICE CCPs we hold collateral in the form of French and German debt securities that total €1,777 million and € 1,172 million respectively which represent 0.0525%[[9]](#footnote-10) and 0.0498%[[10]](#footnote-11) of those respective economies. Thus, it is important to look at this indicator on a relative, not absolute, basis to determine the systemic relevance to the EU or one of its Member States.

In addition, the amount of collateral, initial margin, variation margin and the size of the guaranty fund does not provide sufficient information around the risk management standards of a TC-CCP.  For example, the total amount of initial margin held by ICE Clear US is US $ 18,669 million [[11]](#footnote-12) which is about 0.09% of the total EU economy.[[12]](#footnote-13)

*Indicator 7:*

ICE agrees that Indicator 7 may enable the assessment of systemic financial risk to the EU or one of its Member States. However, it is unclear how the information will be assessed within the context of the EU economy to determine the degree of systemic risk of a CCP. For example, the total amount of EUR liquidity required by ICE Clear Europe in its most extreme liquidity stress period[[13]](#footnote-14) was the USD equivalent of EUR 4,407 million which is only 0.0235% of the total EU economy. More importantly, ICE Clear Europe must demonstrate every day that it has readily available access to necessary EUR liquidity. As such, ICE instead proposes that ESMA utilize the test of EUR liquidity required beyond that which a CCP has on hand (based upon approved liquidity stress tests) and only as compared to the overall daily EUR flows.

*Indicator 8:*

ICE agrees that Indicator 8 may enable the assessment of systemic risk to the EU or one of its Member States. However, it is unclear how the information will be assessed within the context of the EU economy to determine the degree of systemic risk. For example, the average net daily EUR settlements and payments at ICE Clear Europe in 2018 was EUR 17.2 million which is only .0001% of the total EU economy (see table below). Further, ICE is a strong supporter of central bank provision of liquidity and deposit services, but has taken steps not to rely on such access.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Average daily euro settlements and  payments at ICE Clear Europe in 2018 | | EU28 GDP in € from Eurostate 2018 |  |
| EUR\_Ins | | 654,643,468.29 | 15,884,001,000,000 | 0.0041% |
| EUR\_Outs | | -637,362,112.94 | 15,884,001,000,000 | -0.0040% |
| EUR\_Nets | | 17,281,355.34 | 15,884,001,000,000 | 0.0001% |

*Indicator 9:*

ICE has been a long supporter of the international work of the FSB and CPMI-IOSCO on CCP recovery and resolution. It is reasonable that the relevant NCA assesses the framework for a CCP’s recovery and resolution. However, ICE believes that a TC-CCP’s recovery and resolution plan itself does not seem a relevant indicator to assess the degree of systemic risk of a TC-CCP to the EU or one of its Member States. The potential financial exposure to the EU or one of its Member States is more relevant than the plan itself.

ICE would argue that the default recovery obligations of an individual EU CM or all EU CMs of a TC-CCP are not significant enough to stress an EU CM to the point that it would have a systemic impact on the EU or one of its Member States.

In addition, ICE notes that the global standards on recovery and resolution planning is ongoing and not all jurisdictions, including the EU, have a finalized framework in place. However, ESMA proposes to assess TC-CCPs in terms of the TC-CCP being able to meet a number of standards in this area. It is unclear how an EU CCP would meet the standards that ESMA expects of a TC-CCPs since the former are not "*subject to a framework or regulation on recovery and resolution*". In this area, ESMA is therefore effectively pre-emptively applying EU policy on TC-CCPs internationally when no EU legislation on the same topic exists for EU CCPs.

<ESMA\_QUESTION\_TATC\_3>

1. : Do you generally agree with the proposed indicators (Indicators 10 and 11) to further assess the CCP’s clearing membership structure? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA\_QUESTION\_TATC\_4>

Article 25(2a) specifies the third criterion to be considered by ESMA in assessing the systemic nature of TC-CCPs is the CCP’s clearing membership structure. Recital 31 states that this criterion, like the other criteria, “should contribute to the overall assessment” of the degree of systemic risk that the CCP presents to the financial stability of the EU or one of its Member States. ICE’s comments below on each of the indicators is with regard to whether the indicator would contribute to the overall assessment of systemic risk.

*Indicator 10:*

ICE does not agree that Indicator 10 is relevant to the assessment of systemic risk to the EU or one of its Member States. Indicator 10 suggests that “*ESMA may consider the identities and memberships of the CMs of the CCP.”* ICE believes that ESMA should provide further detail about the required information the TC-CCP may have to provide about its clearing members. For example, ESMA should make clear whether information should be provided on every jurisdiction in which the particular clearing member operates, or whether a more restricted interpretation was intended.

However, ICE welcomes EMSA’s limitation for the information request for Indicator 10 to “the extent to which the CCP has any EU CM, and to the extent the information is available, EU Clients or EU indirect clients.” As a CCP contracts with clearing members directly and not the clearing members’ clients, the CCP would not always be able to identify the identity of a client or an indirect clients. Therefore, we suggest that the final technical advice should reflect these limitations.

*Indicator 11*:

ICE does not agree that Indicator 11 is relevant to the assessment of systemic financial risk to the EU or one of its Member States. Access to a TC-CCP cannot be an indicator of the systemic relevance unique to the EU or one of its Member States.

<ESMA\_QUESTION\_TATC\_4>

1. : Do you generally agree with the proposed indicator (Indicator 12) to further assess alternative clearing services? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA\_QUESTION\_TATC\_5>

*Indicator 12*:

As mandated by the EMIR 2.2 Article 25 (2a)(d), ESMA seeks to assess substitutes to the CCP clearing service for Indicator 12. As it is unclear how ESMA will use the information to assess the degree of systemic risk that the TC-CCP poses to the EU or one of its Member States, ICE would suggest that a clear distinctions be made between products; OTC derivatives versus ETD. For OTC derivatives it might be warranted to assess substitutes to clearing services. However, assessment for substitutes for ETDs will be impossible and should therefore be excluded. ETDs are unique products designed by exchanges and only traded on that exchange and cleared by the clearing house selected by the exchange. Hence there are no substitutes available for ETD clearing.

Further, Article 25 (2a)(d) also limits the scope to “financial instruments denominated in Union currencies,” hence ICE suggests that ESMA’s final advice should reflect this limitation.

<ESMA\_QUESTION\_TATC\_5>

1. : Do you generally agree with the proposed indicators (Indicators 13 and 14) to further assess relationships, interdependencies, or other interactions? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA\_QUESTION\_TATC\_6>

Article 25(2a) specifies that the fourth criterion to be considered by ESMA in assessing the systemic nature of TC-CCPs is the CCP’s relationship, interdependencies, or other interactions with other financial market infrastructures, other financial institutions and the broader financial system to the extent that this is likely to impact on the financial stability of the EU or one of its Member States. Recital 31 states that this criterion, like the other criteria, “should contribute to the overall assessment” of the degree of systemic risk that the CCP presents to the financial stability of the EU or one of its Member States. ICE’s comments below on each of the indicators is with regard to whether the indicator would contribute to the overall assessment of systemic risk.

*Indicator 13:*

ICE does not agree that Indicator 13 is relevant to the assessment of systemic risk to the EU or one of its Member States in that ESMA has not explained how such arrangements impact systemic risk.

*Indicator 14:*

ICE agrees that Indicator 14 is relevant to assess the degree of systemic risk of TC-CCP to the EU or one of its Member States. The EU’s approach echoes the CFTC’s approach. Currently within the ICE Group, ICE Future US products are cleared by ICE Clear Europe in the UK (i.e. a TC-CCP from the view point of the CFTC.)

While ICE thinks that Indicator 14 should be taken into account for the assessment of the degree of systemic risk of TC-CCP to the EU or one of its Member States, it should not lead to automaticity i.e. for a TC-CCP to be classified into a higher tier. Otherwise, EMIR 2.2 would incentivize market infrastructure to move trading and/or clearing business out of the EU into jurisdictions other than the EU.

In this context, ICE welcomes ESMA’s clear statement and commitment to Recital 31 that “[t]hese criteria [indicators] should contribute to the overall assessment. Individually, none of these criteria should be considered determinative on its own.” A single indicator in itself cannot be a determining factor for the degree of systemic risk of TC-CCP to the EU or one of its Member States.

<ESMA\_QUESTION\_TATC\_6>

1. : Do you identify other benefits and costs not mentioned above associated to the proposed approach (option 3)? If you advocated for a different approach, how would it impact this section on the impact assessment? Please provide details.

<ESMA\_QUESTION\_TATC\_7>

ICE is supportive of policy option 3 *“*complete set of principle based” indicators and ICE fully agrees with the application of the “principle of proportionality.” ESMA should only exert extraterritorial oversight in a situation where it determines a clear and well defined systemic financial risk to the EU or one of its Member States. In all other instances, ESMA should continue to utilize the existing global practice of deference, coordination and communication among CCP supervisory authorities in line with the international agreed CPMI-IOSCO standards.

In this context, ICE welcomes ESMA’s clear statement and commitment to Recital 31 that “These criteria [indicators] should contribute to the overall assessment. Individually, none of these criteria should be considered determinative on its own.” A single indicator in itself cannot be a determining factor for the degree of systemic risk of TC-CCP to the EU or one of its Member States.

<ESMA\_QUESTION\_TATC\_7>

1. G20 Leaders Statement, Pittsburgh 2009 (<http://www.g20.utoronto.ca/2009/2009communique0925.html>.) [↑](#footnote-ref-2)
2. (Annex IV, ps. 30 – 35, technical advice). [↑](#footnote-ref-3)
3. ESMA: Draft Technical Advice on Criteria for tiering under Article 25 (2A) of EMIR 2.2. [↑](#footnote-ref-4)
4. Non-OTC derivatives as defined in EMIR - Regulation (EU No 648/2012). [↑](#footnote-ref-5)
5. ***ICE Clear Credit***

   <https://www.theice.com/clear-credit/regulation#quantitative-disclosures>

   ***ICE Clear Europe***

   <https://www.theice.com/clear-europe/regulation#quantitative-disclosures>

   ***ICE Clear U.S.***

   <https://www.theice.com/clear-us/regulation>

   ***ICE Clear Singapore***

   <https://www.theice.com/clear-singapore/regulation#quantitative-disclosures>

   ***ICE Clear Netherlands***

   <https://www.theice.com/clear-netherlands/regulation#quantitative-disclosures>

   ***ICE NGX***

   <https://www.theice.com/ngx/documents> [↑](#footnote-ref-6)
6. As of 31 December 2018. [↑](#footnote-ref-7)
7. Eurostate EU28 GDP 2018 (<http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nama_10_gdp&lang=en>.) [↑](#footnote-ref-8)
8. [↑](#footnote-ref-9)
9. As of 31 December 2018.

   Eurostate France GDP 2018 (<http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nama_10_gdp&lang=en>.) [↑](#footnote-ref-10)
10. As of 31 December 2018.

    Eurostate Germany GDP 2018 (<http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nama_10_gdp&lang=en>.) [↑](#footnote-ref-11)
11. <https://www.theice.com/clear-us/regulation> [↑](#footnote-ref-12)
12. <https://www.imf.org/external/pubs/ft/weo/2019/01/weodata/weorept.aspx?sy=2018&ey=2020&scsm=1&ssd=1&sort=country&ds=.&br=1&c=998&s=NGDPD%2CPPPGDP%2CPPPPC&grp=1&a=1&pr.x=43&pr.y=10> [↑](#footnote-ref-13)
13. 01 Jan 2019 to 29 March 2019. [↑](#footnote-ref-14)