



December 11, 2020

Mr. Christopher J. Kirkpatrick
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: ICE Clear Europe Self-Certification Pursuant to Commission Rule 40.6 –
Circular on Interpretation of References to EU Legislation in the Clearing
Rules at the end of the Brexit transition period

Dear Mr. Kirkpatrick:

ICE Clear Europe Limited (“ICE Clear Europe” or the “Clearing House”), a registered derivatives clearing organization under the Commodity Exchange Act, as amended (the “Act”), hereby submits to the Commodity Futures Trading Commission (the “Commission”), pursuant to Commission Rule 40.6 for self-certification, publish a Circular, titled Interpretation of References to EU Legislation in the Clearing Rules at the end of the Brexit transition period (the “Circular”), to provide guidance as to the interpretation of references to European Union (“EU”) directives and regulations in the ICE Clear Europe Clearing Rules and Procedures¹ as discussed herein. The amendments are to become effective on the first business day following the tenth business day after submission, or such later date as ICE Clear Europe may determine.

Concise Explanation and Analysis

The purpose of the Circular is to provide guidance with respect to the interpretation of certain provisions in the Rules and Procedures in the event that the United Kingdom (“UK”) exits the current transition period from being an EU member state ending December 31, 2020 (the “Transition Period”), in circumstances where no trade agreement has been agreed between the UK and the EU-27 stipulating that EU

¹ Capitalized terms used but not defined herein have the meanings specified in the ICE Clear Europe Clearing Rules (the “Rules”).

laws will continue to apply in the UK. In such circumstances, directly applicable EU directives and regulations will be incorporated into UK law with modifications at the end of the Transition Period pursuant to the European Union (Withdrawal) Act 2018 (the “EUWA”), which would result in there being two versions of a directly applicable EU legislative act which may be applicable to the Rules: (1) the version as enacted in the EU, directly applicable throughout the EU (and, in certain cases, the EEA); and (2) the version incorporated into UK law (referred to as “on-shored”).

There are various references to EU directives and regulations in the Rules and Procedures; others may arise by implication by virtue of definitions such as that of "Applicable Laws" or "Governmental Authority" (Rule 101). ICE Clear Europe is proposing to publish the Circular to provide guidance as to the proper interpretation of such references in the event of the end of the Transition Period without a trade agreement in place that provides for continued applicability of EU law in the UK. The guidance is intended to be consistent with the views of legal practitioners in the UK with respect to references to EU directives and regulations in English law contracts generally, but applied to the particular definitions and situations that arise under the Rules and Procedures.

The Circular sets out several principles that will be applied by ICE Clear Europe when interpreting references to an EU regulation or directive in its Rules:

1. Where the reference concerns an obligation on, or otherwise applies to, the Clearing House or a UK Clearing Member:
 - Where the reference is to an EU regulation, it should be interpreted as the regulation as it forms part of UK domestic law through section 3 of the EUWA, and as amended by UK law from time to time; and
 - Where the reference is to an EU directive, it should be interpreted as the UK domestic law corresponding to the directive or provision thereof.
2. Where the reference concerns an obligation on, or otherwise applies to, an EU Clearing Member:
 - Where the reference is to an EU regulation, it should be interpreted as the regulation as it applies in the EU, and as amended by EU law from time to time; and
 - Where the reference is to an EU directive, it should be interpreted as the EU directive, as amended by EU law from time to time and as implemented in the relevant member state of the EU Clearing Member.

The Circular also addresses situations where both sets of laws apply, for example for entities established in the UK with an EU branch (or vice versa) or which continue to be regulated in both systems under cross-border licenses, the UK temporary permissions regime or other grandfathering arrangements (via reverse solicitation or otherwise). By way of example, it explains how Rule requirements that Clearing Members maintain sufficient capital would require UK Clearing Members to comply with the on-shored version of the applicable regulatory requirements as well as applicable EU requirements for any EU branch or to the extent they are subject to EU consolidated supervision. EU Clearing Members with a UK branch or which are subject to UK consolidated supervision would be required to comply with UK capital rules equivalent to the EU rules, to the extent applicable (in addition to their applicable home country requirements). Rule requirements that Clearing Members maintain segregated accounts would require UK Clearing Members to comply with

the on-shored version of the applicable regulatory requirements, while EU Clearing Members would be required to comply with the existing EU regulations.

The Circular further sets out certain exceptions to these general principles relating to the following:

- A reference to an EU law relating to emission allowance units issued under the EU Emissions Trading Scheme should be interpreted, as regards EU emission allowances, to continue to refer to the EU law;
- References to an EU law, as it relates to UK emission allowances, will refer to the new UK Emissions Trading Scheme (UK ETS). The Circular also notes that UK emissions allowances, unlike the EU emissions allowances, have not been designated as investments under the UK Financial Service and Markets Act and therefore will not be covered as deliveries of financial instruments under the Rules or covered by the Part 12 settlement finality rules in the Rules, unless and until that law is changed;
- References to EU member state laws transposing or implementing an EU directive will be read to include UK laws corresponding to that EU directive;
- Certain references relating to the European Market Infrastructure Regulation (Regulation (EU) No 648/2012) and related EU authorities will be read to continue to refer to relevant EU law and authorities, for example in the context of ICE Clear Europe's status as a third country central counterparty thereunder;
- As the Clearing House has a designated or deemed national settlement finality directive status in certain EU member states, Part 12 of the Rules will be interpreted as constituting the settlement finality rules applicable to its designated system under the laws of those EU member states; and
- References relating to EU data protection legislation are excluded, since separate amendments will be proposed to the Clearing Rules to address Brexit-related data protection issues.

Compliance with the Act and CFTC Regulations

The rule amendments are potentially relevant to the following core principle: (R) Legal Risk, and the applicable regulations of the Commission thereunder.

- *Legal Risk.* As discussed herein, the interpretation is designed to ensure that references to EU legislation in the Rules and Procedures are properly interpreted should the Transition Period end with no trade agreement stipulating that EU laws will continue to apply in the UK. The guidance set out in the Circular would facilitate continued clearing in light of the requirements of UK and EU law in those circumstances and would minimize the potential for disputes and legal uncertainty. As a result, ICE Clear Europe believes the amendments are consistent with the requirements of Core Principle R and CFTC Rule 39.27.

As set forth herein, the amendments consist of changes to the Rules, a copy of which is attached hereto.

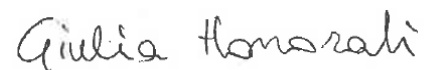
ICE Clear Europe hereby certifies that the amendments comply with the Act and the Commission's regulations thereunder.

ICE Clear Europe has received no substantive opposing views in relation to the proposed rule amendments.

ICE Clear Europe has posted a notice of pending certification and a copy of this submission on its website concurrent with the filing of this submission.

If you or your staff should have any questions or comments or require further information regarding this submission, please do not hesitate to contact the undersigned at giulia.honorati@theice.com or +44 20 7429 7127.

Very truly yours,

A handwritten signature in black ink that reads "Giulia Honorati". The script is cursive and fluid.

Giulia Honorati
Manager, Compliance and Regulation