

COMMISSION IMPLEMENTING DECISION (EU) 2015/2042**of 13 November 2015****on the equivalence of the regulatory framework of Switzerland for central counterparties to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ⁽¹⁾, and in particular Article 25(6) thereof,

Whereas:

- (1) The procedure for recognition of central counterparties ('CCPs') established in third countries set out in Article 25 of Regulation (EU) No 648/2012 aims to allow CCPs established and authorised in third countries whose regulatory standards are equivalent to those laid down in that Regulation to provide clearing services to clearing members or trading venues established in the Union. That recognition procedure and the equivalence decision provided for therein thus contribute to the achievement of the overarching aim of Regulation (EU) No 648/2012 to reduce systemic risk by extending the use of safe and sound CCPs to clear over-the-counter ('OTC') derivative contracts, including where those CCPs are established and authorised in a third country.
- (2) In order for a third country legal regime to be considered equivalent to the legal regime of the Union in respect of CCPs, the substantial outcome of the applicable legal and supervisory arrangements should be equivalent to Union requirements in respect of the regulatory objectives they achieve. The purpose of this equivalence assessment is therefore to verify that the legal and supervisory arrangements of Switzerland ensure that CCPs established and authorised therein do not expose clearing members and trading venues established in the Union to a higher level of risk than the latter could be exposed to by CCPs authorised in the Union and, consequently, do not pose unacceptable levels of systemic risk in the Union.
- (3) On 1 September 2013, the Commission received the technical advice of the European Securities and Markets Authority ('ESMA') on the legal and supervisory arrangements applicable to CCPs authorised in Switzerland. The technical advice concludes that the legal and supervisory arrangements applicable, at jurisdictional level, ensure that CCPs authorised in Switzerland comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012.
- (4) In accordance with Article 25(6) of Regulation (EU) No 648/2012, three conditions need to be fulfilled in order to determine that the legal and supervisory arrangements of a third country regarding CCPs authorised therein are equivalent to those laid down in that Regulation.
- (5) According to the first condition, CCPs authorised in a third country must comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012.
- (6) The legally binding requirements of Switzerland for central counterparties authorised therein consist of the National Bank Ordinance of 18 March 2004 ('the National Bank Ordinance') and the regulations adopted pursuant to it by the Swiss National Bank ('SNB'), together with the Federal Act on Banks and Saving Banks ('the Act on Banks') and the ordinances and circulars issued by the Swiss Financial Market Supervisory Authority ('FINMA'). The National Bank Ordinance was recently revised aiming at implementing the Principles for Financial Markets Infrastructures ('PFMIs') issued by CPSS-IOSCO and achieving equivalence with Regulation (EU) No 648/2012. The revised regulatory framework brings a number of differences between the legally binding requirements applicable, at a jurisdictional level, to CCPs in Switzerland and the legally binding requirements applicable to CCPs under Regulation (EU) No 648/2012. The SNB issued however an Explanatory Report on the partial revision of the National Bank Ordinance providing interpretative guidance on the National Bank

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

Ordinance in which it is explained, in particular, that the revised National Bank Ordinance implements the PFMIs and that the National Bank Ordinance should be interpreted taking into account the PFMIs and Titles IV and V of Regulation (EU) No 648/2012.

- (7) Moreover, CCPs authorised in Switzerland must adopt statutes, organisation regulations and regulation of competences and certain organisation policies (the organisation regulations and policies), which must provide prescriptive detail regarding the way in which those CCP will meet those standards in accordance with, as explained in the Explanatory Report on the partial revision of the National Bank Ordinance, the PFMIs and Regulation (EU) No 648/2012.
- (8) Both the SNB and FINMA share regulatory and supervisory functions regarding CCPs and cooperate in the exercise of those functions. CCPs established in Switzerland are authorised as banks by FINMA. FINMA can exempt CCPs from compliance with certain provisions of the Act on Banks and adapt its provisions to take into account the clearing activities and risk profile of CCPs. FINMA's circulars address, among other things, solvency, governance, risk management, audits and reporting.
- (9) The legally binding requirements in Switzerland therefore comprise a two-tiered structure. The core principles for CCPs laid down in the Act on Banks and the National Bank Ordinance and the regulations, orders and circulars issued pursuant to them (the 'primary rules') set out the high-level standards with which CCPs must comply in order to obtain a license to provide clearing services in Switzerland. Those primary rules comprise the first tier of the legally binding requirements in Switzerland. In order to prove compliance with the primary rules, the CCP authorised in Switzerland must submit its organisation regulations and policies to FINMA for approval. Those organisation regulations and policies comprise the second tier of the legally binding requirements in Switzerland. Once approved by FINMA, those organisation regulations and policies become legally binding upon the CCP. Those regulations and policies therefore form an integral part of the legal and supervisory arrangements that the CCP authorised in Switzerland must comply with. In the case of non-compliance with the primary rules or the CCP's organisation regulations and policies FINMA has the power to take administrative actions against the CCP, including revoking the banking licence of the CCP concerned.
- (10) The primary rules applicable to CCPs complemented by their organisation regulations and policies deliver substantial results equivalent to the effects of the rules contained in Title IV of Regulation (EU) No 648/2012. In particular, the legally binding requirements applicable to currently authorised CCPs in Switzerland regarding the number of defaults to be covered by total financial resources, liquidity risk, business continuity, collateral requirements, investment policy, settlement risk, segregation and portability, calculation of initial margins and governance, including organisational requirements, requirements relating to senior management, risk committee, record keeping, qualifying holdings, information transmitted to the competent authority, conflict of interests, outsourcing and conduct of business deliver substantial results equivalent to those laid down in Regulation (EU) No 648/2012 and therefore should be considered equivalent.
- (11) The Commission therefore concludes that the legal and supervisory arrangements of Switzerland ensure that CCPs authorised therein comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012.
- (12) According to the second condition under Article 25(6) of Regulation (EU) No 648/2012, the legal and supervisory arrangements of Switzerland in respect of CCPs authorised therein must provide for effective supervision and enforcement of those CCPs on an ongoing basis.
- (13) CCPs authorised in Switzerland are subject to ongoing supervision by FINMA and ongoing oversight by the SNB, aiming at monitoring continued compliance with the conditions of the authorisation and the other applicable regulatory requirements. CCPs authorised in Switzerland are subject to an annual audit. CCPs must provide the auditing entity with the information requested for carrying out the audit. If the auditing entity detects a violation of the supervisory provisions or other irregularities, it will give the CCP concerned a period to restore compliance and informs FINMA if compliance is not restored. In case of serious violations of supervisory provisions or serious irregularities, the auditing entity notifies FINMA directly. Moreover, both CCPs and auditing entities have to provide FINMA with all the necessary information for it to fulfil its tasks and must immediately report to it any incident that is of substantial importance for supervision. In addition, FINMA also carries out targeted on-site reviews, reviews periodic reports and meets regularly with CCP management and staff.

- (14) FINMA may adopt specific measures when it concludes an infringement of the legal and supervisory arrangements has taken place. In particular, FINMA can impose a prohibition on a person to act in a management position or confiscate the profits made as a result of an infringement. FINMA can also appoint an investigation agent to investigate specific circumstances regarding the infringement of the legal and supervisory arrangements or to implement supervisory measures that it has ordered. The CCP under investigation has to let the investigation agent access to its premises and provide all the information and documents the investigation officer requests to carry out the investigation. Finally, FINMA can also revoke the banking licence of a CCP or cancel its registration in case it no longer complies with the applicable legal and supervisory arrangements and can issue directives to the governing bodies of the CCP.
- (15) The SNB supervises CCPs in cooperation with FINMA. In particular, the SNB is responsible for assessing compliance by CCPs with the minimum requirements stipulated in the National Bank Ordinance. CCPs have to provide the SNB with the information necessary to assess compliance with those minimum requirements and submit to on-site inspections. In particular, CCPs have to submit periodic and ad hoc reports to the SNB and inform it in advance of specific issues or changes. The SNB can also impose penalties and other sanctions in case of information or evidence requested by the SNB not being provided, not respecting the formal requirements, being incomplete or inaccurate. For conducting its assessments, the SNB relies on a broad range of information, including a self-assessment and internal documentation of the CCP, audit reports, as well as regular reports and meetings held with the CCP management and staff. The SNB issues recommendations to CCPs which do not comply with the minimum requirements stipulated in the National Bank Ordinance. If the CCP concerned fails to comply with the recommendation, the SNB will issue an order. If the CCP does not comply with the order, the SNB can inform FINMA of its findings, which may take further supervisory and enforcement actions against the CCP.
- (16) The Commission therefore concludes that the legal and supervisory arrangements of Switzerland in respect of CCPs authorised therein provide for effective supervision and enforcement of CCPs on an ongoing basis.
- (17) According to the third condition under Article 25(6) of Regulation (EU) No 648/2012, the legal and supervisory arrangements of Switzerland must include an effective equivalent system for the recognition of CCPs authorised under third country legal regimes ('third country CCPs').
- (18) Third country CCPs may apply for recognition with FINMA enabling them to provide services in Switzerland. The recognition of third country CCPs in Switzerland is based on the existence in the third country concerned of an effective equivalent system for recognition of third country CCPs. The SNB may also designate a third country CCP as systemically important for the stability of the Swiss financial markets and can discharge it from compliance with the minimum requirements stipulated by the National Bank Ordinance provided the legal and supervisory regime of the third country is considered equivalent and cooperation arrangements with the competent authorities of the third country for the supervision of CCPs have been concluded. Recognised CCPs also have to report and inform FINMA of specific issues. However, the reporting and information requirements to be provided by recognised CCPs to FINMA do not affect the supervisory functions for which the competent authorities of the third country are responsible.
- (19) It should therefore be considered that the legal and supervisory arrangements of Switzerland provide for an effective equivalent system for the recognition of third country CCPs.
- (20) The conditions laid down in Article 25(6) of Regulation (EU) No 648/2012 can therefore be considered to be met by the legal and supervisory arrangements of Switzerland regarding CCPs authorised therein and those legal and supervisory arrangements should be considered to be equivalent to the requirements laid down in Regulation (EU) No 648/2012. The Commission should continue monitoring on a regular basis the evolution of the legal and supervisory framework for CCPs in Switzerland and the fulfilment of the conditions on the basis of which this decision has been taken.
- (21) The regular review of the legal and supervisory arrangements applicable in Switzerland to CCPs authorised therein should be without prejudice to the possibility of the Commission to undertake a specific review at any time outside the general review, where relevant developments make it necessary for the Commission to re-assess the equivalence granted by this decision. Such re-assessment could lead to the withdrawal of the recognition of equivalence.
- (22) The measures provided for in this Decision are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS DECISION:

Article 1

For the purposes of Article 25 of Regulation (EU) No 648/2012, the legal and supervisory arrangements of Switzerland consisting of the National Bank Ordinance and the regulations adopted pursuant to it, the Federal Act on Banks and Saving Banks and the ordinances and circulars issued pursuant to it, as complemented by the Explanatory Report on the partial revision of the National Bank Ordinance providing interpretative guidance on the National Bank Ordinance and applicable to CCPs authorised therein shall be considered to be equivalent to the requirements laid down in Regulation (EU) No 648/2012.

Article 2

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, 13 November 2015.

For the Commission
The President
Jean-Claude JUNCKER
