

COMMISSION IMPLEMENTING DECISION (EU) 2016/2275**of 15 December 2016****on the equivalence of the regulatory framework for central counterparties in Japan in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council**

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 substantive 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 Japan 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. The significantly lower risks inherent in clearing activities carried out in financial markets that are smaller than the Union financial market should thereby, in particular, be taken into account.
- (3) 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.
- (4) 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.
- (5) The legally binding requirements of Japan for CCPs authorised therein consist of the Financial Instruments and Exchange Act 2006 ('FIEA'), which establishes the supervisory framework for organisations clearing securities and financial derivatives, and the Commodity Derivatives Act 2009 ('CDA'), which provides the supervisory framework for organisations clearing commodities. The present decision only covers the regime set out in the CDA for commodity transaction clearing organisations ('CTCOs'). The CDA sets out the requirements that CTCOs must comply with on an ongoing basis to be able to provide clearing services in Japan. CTCOs must be authorised by the competent minister. The competent minister may establish conditions for granting a CTCO license. The minister of the Ministry of Agriculture, Forestry and Fisheries ('MAFF') is the competent minister for CTCOs that perform clearing services only for commodity markets that concern MAFF. The minister of the Ministry of Economy, Trade and Industry ('METI') is the competent minister for CTCOs that perform clearing services only for commodity markets that concern METI. For other CTCOs, both the ministers of METI and MAFF are the competent ministers.
- (6) Moreover, in November 2014, METI and the MAFF published the 'Basic Guidelines on Supervision of Commodity Clearing Organisations' ('the Guidelines'), which detail the supervisory framework with regard to CTCOs in

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

consideration of the Principles for Financial Markets Infrastructures ('PFMIs') issued in April 2012 by the Committee on Payment and Settlement Systems ⁽¹⁾ and the International Organization of Securities Commissions, and in particular the way in which the CDA must be complied with by the CTCOs. The Guidelines are implemented in the internal rules and procedures of CTCOs.

- (7) Pursuant to the primary rules, CTCOs must adopt internal business rules — the internal rules and procedures of the CTCO — which conform to the applicable laws and regulations and allow the derivatives transactions to be performed properly and securely. Internal business rules also ensure that the financial standing of CTCOs is sufficient for undertaking the clearing of commodities; that the expected income and expenditure pertaining to the business of CTCOs are favorable; that the CTCOs' staff has sufficient knowledge and experience for conducting the clearing of commodities appropriately and with certainty; and that the structure and system of CTCOs are adequately developed so that settlement can function adequately. Those internal rules and procedures need to be approved by the competent minister and cannot be amended if the competent minister objects to them.
- (8) The legally binding requirements applicable to CTCOs authorised in Japan therefore comprise a two-tiered structure. The core principles for CTCOs contained in the primary rules lay down the high-level standards with which CTCOs must comply in order to obtain a license to provide clearing services in Japan (together, the 'primary rules'). Those primary rules comprise the first tier of the legally binding requirements in Japan applicable to CTCOs. In order to prove compliance with the primary rules, CTCOs must submit their internal rules and procedures to the competent minister for approval. Those internal rules and procedures comprise the second tier of the legally binding requirements in Japan applicable to CTCOs, which must provide prescriptive detail regarding the way in which the applicant CTCO will meet those standards in accordance with the Guidelines. Moreover, the internal rules and procedures of CTCOs contain additional provisions which complement the primary rules. METI and MAFF assess compliance by the CTCO with those standards and with the PFMIs. Once approved by competent minister, those internal rules and procedures become legally binding upon the CTCO.
- (9) The equivalence assessment of the legal and supervisory arrangements applicable to CTCOs established in Japan should also take into account the risk mitigation outcome that they ensure in terms of the level of risk to which clearing members and trading venues established in the Union are exposed when participating in those entities. The risk mitigation outcome is determined by both the level of risk inherent in the clearing activities carried out by the CCP concerned which depends on the size of the financial market in which it operates, and the appropriateness of the legal and supervisory arrangements applicable to CCPs to mitigate that level of risk. In order to achieve an equivalent risk mitigation outcome, more stringent risk mitigation requirements are necessary for CCPs carrying out their activities in larger financial markets whose inherent level of risk is higher than for CCPs carrying out their activities in smaller financial markets whose inherent level of risk is lower.
- (10) The financial market in which CTCOs authorised in Japan carry out their clearing activities is significantly smaller than that in which CCPs established in the Union are active. Over the past three years, the total value of derivative transactions cleared in Japan represented less than 2 % of the total value of derivative transactions cleared in the Union. Therefore, participation in CTCOs established in Japan exposes clearing members and trading venues established in the Union to significantly lower risks than their participation in CCPs authorised in the Union.
- (11) The legal and supervisory arrangements applicable to CTCOs established in Japan may therefore be considered as equivalent where they are appropriate to mitigate that lower level of risk. The primary rules applicable to CTCOs authorised in Japan, complemented by the internal rules and procedures, which implement the PFMIs, mitigate the lower level of risk existing in Japan and achieve a risk mitigation outcome equivalent to that pursued by Regulation (EU) No 648/2012.
- (12) It should therefore be concluded that the legal and supervisory arrangements of Japan ensure that CTCOs authorised therein comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012.

⁽¹⁾ As of 1 September 2014 the Committee on Payment and Settlement Systems has changed its name to Committee on Payment and Market Infrastructures.

- (13) According to the second condition under Article 25(6) of Regulation (EU) No 648/2012, the legal and supervisory arrangements of Japan in respect of CCPs authorised therein must provide for effective supervision and enforcement of those CCPs on an ongoing basis.
- (14) The supervision of CTCOs authorised in Japan is carried out by the METI and MAFF, within their respective competencies, within each Ministry's scope of powers. METI and MAFF may order CTCOs and their clearing members to submit reports or materials regarding their assets or business. METI and MAFF may also conduct inspections of CTCOs and their clearing members, including examining their books and documents or any other element related to their business. METI and MAFF may, where they consider it to be necessary and appropriate for the proper and reliable performance of clearing services, order CTCOs to amend their articles of incorporation, their business rules and other rules, to change their business methods or to take the necessary measures to improve their business operations or the state of their assets. METI and MAFF may also impose disciplinary actions, as well as fines, to CTCOs for failure to comply with the applicable provisions.
- (15) It should therefore be concluded that CTCOs authorised in Japan are subject to effective supervision and enforcement on an ongoing basis.
- (16) According to the third condition under Article 25(6) of Regulation (EU) No 648/2012, the legal and supervisory arrangements of Japan must include an effective equivalent system for the recognition of CCPs authorised under third country legal regimes ('third-country CCPs').
- (17) Third-country CCPs may apply for authorisation as a CTCO to provide the same services in Japan as they are authorised to provide in that third country. The Japan Financial Services Agency ('JFSA') has the power to designate commodities, through consultation with the minister which has jurisdiction over a commodity market, that can be traded on a Financial Instruments Market ('FIM') under Japan's Financial Instruments and Exchange Act ('FIEA'). Where third-country CCPs clear such designated contracts traded on a FIM, the CCP can apply for a 'Foreign CCP' license from the JFSA, enabling them to provide the same services in Japan as they are authorised to provide in the third country. The criteria applied to a third country CCP applying for a license are similar to the criteria applied to Japanese clearing organisations, but third country CCPs are exempted from certain requirements applicable to domestic CCPs authorised in Japan where they have been granted an equivalent license from the relevant third country authority with which the JFSA has concluded a cooperative arrangement. Third-country CCPs that clear contracts not designated to be traded on a FIM need to apply for a license from METI and MAFF under Japan's Commodity Derivative Act. In considering an application for a license, MET and MAFF would consider the CCP's authorisation status in the third country.
- (18) It should therefore be concluded that the legal and supervisory arrangements of Japan provide for an effective equivalent system for the recognition of third-country CCPs.
- (19) This Decision is based on the legally binding requirements relating to CTCOs applicable in Japan at the time of the adoption of this Decision. The Commission should continue monitoring the evolution of the Japanese legal and supervisory framework for CTCOs and the fulfilment of the conditions on the basis of which this decision has been taken.
- (20) The regular review of the legal and supervisory arrangements applicable in Japan to CCPs authorised therein should be without prejudice to the possibility of the Commission, in cooperation with the European Securities Markets Authority, 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 repeal of this Decision.
- (21) 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 paragraph 6 of Article 25 of Regulation (EU) No 648/2012, the legal and supervisory arrangements of Japan consisting of the Commodities Derivatives Act 2009 as complemented by the Basic Guidelines on Supervision of Commodity Clearing Organisations, and applicable to commodity transaction clearing organisations (CTCOs) 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, 15 December 2016.

For the Commission
The President
Jean-Claude JUNCKER
