

COMMISSION IMPLEMENTING DECISION (EU) 2016/2276**of 15 December 2016****on the equivalence of the regulatory framework for central counterparties in Brazil 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 decisions 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 Brazil 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 Brazil for CCPs authorised therein consist of Law 10214 of 27 March 2001 and Resolutions issued by the National Monetary Council (CMN), Circulars issued by the Central Bank of Brazil (BCB) and Instructions issued by the Brazilian Securities and Exchange Commission (CVM) adopted pursuant to it. In particular, Resolution 2882, as amended by Resolution 3081, regulates the activities of clearing houses and of clearing services providers, sets out the principles applicable to the functioning of clearing houses and clearing services providers and empower the BCB to regulate, authorise and supervise clearing houses and clearing services providers.
- (6) Clearing houses and clearing services providers established in Brazil have to be authorised by the BCB to provide clearing services. When considering authorisation as a clearing house or as a provider of clearing services, the BCB must take into account the soundness, the normal functioning and the improvement of the Brazilian payments system. The BCB may also specify 'such conditions as it considers appropriate' before granting such

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

authorisation or afterwards, based on financial system stability, risk and efficiency of clearing houses and clearing service providers. Clearing houses that operate a systemically important system creating risks to the strength and to the smooth functioning of the Brazilian financial system, which is to be determined by the BCB depending on the clearing systems' volume and nature, may be subject to different rules than the rest of clearing houses and clearing service providers.

- (7) The BCB has adopted different measures in order to implement Resolution 2882 and to ensure compliance by clearing houses and clearing services providers with the values, principles and rules applicable to the payment system. In particular, Circular 3057 contains the detailed regulation for the functioning of clearing houses and clearing service providers and sets out several requirements that they must comply with, including capital requirements, transparency standards, risk control measures and operational requirements. The BCB issued Policy Statement No 25097 on the adoption of the Principles for Financial Markets Infrastructures (PFMIs) issued in April 2012 by the Committee on Payment and Settlement Systems ⁽¹⁾ ('CPSS') and the International Organization of Securities Commissions ('IOSCO'), by which the BCB applies the PFMIs in its supervision and oversight of clearing houses and clearing services providers.
- (8) Pursuant to Circular 3057, clearing houses and clearing service providers must adopt internal rules and procedures ensuring compliance with all relevant requirements and containing all the relevant aspects related to its function, including the safeguards to manage credit, liquidity and operational risk. Those internal rules and procedures are submitted to, and firstly assessed by, the BCB in the authorisation procedure. In addition, material changes to the internal rules and procedures have to also be approved by the BCB. Any other non-material changes to internal rules and procedures must be communicated to the BCB before 30 days after the changes have been made, and the BCB can oppose them.
- (9) The legally binding requirements applicable to CCPs authorised in Brazil therefore comprise a two-tiered structure. The core principles contained in Law 10214, and the Resolutions, Circulars and Instructions adopted pursuant to it set out the high-level standards with which clearing houses and clearing service providers must comply in order to obtain authorisation to provide clearing services in Brazil (together, the 'primary rules'). Those primary rules comprise the first tier of the legally binding requirements in Brazil. In order to prove compliance with the primary rules, clearing houses and clearing service providers must submit their internal rules and procedures to BCB for approval or non-objection. Those internal rules and procedures comprise the second tier of the legally binding requirements in Brazil, which must provide prescriptive detail regarding the way in which the clearing houses and clearing service providers will meet those standards. BCB will assess compliance by clearing houses and clearing service providers with those standards and with the PFMIs. Once approved by BCB, the internal rules and procedures become legally binding upon the clearing houses and clearing service providers.
- (10) The equivalence assessment of the legal and supervisory arrangements applicable to clearing houses and clearing services providers in Brazil 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.
- (11) The financial market in which clearing houses and clearing services providers established in Brazil carry out their clearing activities is significantly smaller than that in which CCPs established in the Union are active. Over the past 3 years, the total value of derivative transactions cleared in Brazil represented less than 3 % of the total value of derivative transactions cleared in the Union. Therefore, participation in clearing houses and clearing services providers exposes clearing members and trading venues established in the Union to significantly lower risks than their participation in CCPs authorised in the Union.
- (12) The legal and supervisory arrangements applicable to clearing houses and clearing services providers established in Brazil may therefore be considered as equivalent where they are appropriate to mitigate that lower level of risk.

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

The primary rules applicable to clearing houses and clearing services providers complemented by their internal rules and procedures which require compliance with the PFMIs, mitigate the lower level of risk existing in Brazil and achieve a risk mitigation outcome equivalent to that pursued by Regulation (EU) No 648/2012.

- (13) It should therefore be concluded that the legal and supervisory arrangements of Brazil ensure that clearing houses and clearing service providers authorised therein comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012.
- (14) According to the second condition under Article 25(6) of Regulation (EU) No 648/2012, the legal and supervisory arrangements of Brazil in respect of CCPs authorised therein must provide for effective supervision and enforcement of those CCPs on an ongoing basis.
- (15) The BCB conducts ongoing monitoring of clearing houses' and clearing service providers' compliance with the legally binding requirements applicable to them. The BCB has, in addition, several means to ensure such compliance. In particular, BCB has the power to request information from clearing houses and clearing services providers, issue warning notices to them and request them to make certain amendments to their rules as deemed necessary. In addition, the BCB may also impose fines for any infringement by clearing houses or clearing services providers of the legally binding requirements applicable to them and has the power to even withdraw their authorisations.
- (16) It should therefore be concluded that clearing houses and clearing service providers authorised in Brazil are subject to effective supervision and enforcement 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 Brazil must include an effective equivalent system for the recognition of CCPs authorised under third-country legal regimes ('third-country CCPs').
- (18) CCPs authorised in a third country in which the legal and supervisory arrangements ensure similar outcomes to those ensured by the legal and supervisory arrangements applicable in Brazil and which comply with the PFMIs, which have equivalent regulation on anti-money laundering, and in which CCPs are subject to effective supervision may provide services in Brazil. The conclusion of cooperation arrangements between BCB and the competent third-country authority of the applicant CCP is also required for recognition to be granted.
- (19) It should therefore be concluded that the legal and supervisory arrangements of Brazil provide for an effective equivalent system for the recognition of third-country CCPs.
- (20) This Decision is based on the legally binding requirements relating to clearing houses and clearing services providers applicable in Brazil at the time of the adoption of this Decision. The Commission should continue monitoring on a regular basis the evolution of the legal and supervisory framework for clearing houses and clearing services providers 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 Brazil 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 repeal of this Decision.
- (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 paragraph 6 of Article 25 of Regulation (EU) No 648/2012, the legal and supervisory arrangements of Brazil consisting of Law 10214 and the Resolutions, Circulars and Instructions adopted pursuant to it, as complemented by the Policy Statement No 25097 on the adoption of the Principles for Financial Markets Infrastructures for the oversight of activities of central counterparties participating in the Brazilian Payments System, and applicable to clearing houses and clearing services providers 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 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
