

**COMMISSION IMPLEMENTING DECISION (EU) 2021/1104****of 5 July 2021****on the recognition of the legal, supervisory and enforcement arrangements of Canada for derivatives transactions supervised by the Office of the Superintendent of Financial Institutions as equivalent to certain requirements of Article 11 of Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories****(Text with EEA relevance)**

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 <sup>(1)</sup>, and in particular Article 13(2) thereof,

Whereas:

- (1) Article 13 of Regulation (EU) No 648/2012 provides for a mechanism under which the Commission is empowered to adopt equivalence decisions whereby the legal, supervisory and enforcement arrangements of a third country are declared equivalent to the requirements laid down in Articles 4, 9, 10 and 11 of Regulation (EU) No 648/2012 so that counterparties which enter into a transaction within the scope of that Regulation, where at least one of the counterparties is established in that third country, are deemed to have fulfilled those requirements by complying with the requirements set out in that third country's legal regime. The declaration of equivalence contributes to the achievement of the overarching aim of Regulation (EU) No 648/2012 namely to reduce systemic risk and increase the transparency of derivatives markets by ensuring an internationally consistent application of the principles agreed with third countries and laid down in that Regulation.
- (2) Article 11(1), (2) and (3) of Regulation (EU) No 648/2012 which is supplemented by Commission Delegated Regulation (EU) No 149/2013 <sup>(2)</sup> and Commission Delegated Regulation (EU) 2016/2251 <sup>(3)</sup>, establish the Union's legal requirements concerning the timely confirmation of the terms of an OTC derivative contract, the conduct of a portfolio compression exercise and the arrangements under which portfolios are reconciled in relation to OTC derivative contracts not cleared by a central counterparty ('CCP'); in addition, those provisions lay down the valuation and dispute resolution obligations applicable to those contracts ('operational risk mitigation techniques') as well as the obligations on the exchange of collateral ('margins') between counterparties.
- (3) In order for a third country's legal, supervisory and enforcement regime to be considered equivalent to the regime of the Union in respect of operational risk mitigation techniques and margins requirements, the substantive outcome of the applicable legal, supervisory and enforcement arrangements should be equivalent to Union requirements under Article 11 of Regulation (EU) No 648/2012, ensure protection of professional secrecy that is equivalent to the protection provided for in Article 83 of that Regulation. Furthermore, equivalent legal, supervisory and enforcement arrangements must be effectively applied in an equitable and non-distortive manner in that third country. The assessment of equivalence therefore encompasses a verification whether the legal, supervisory and enforcement arrangements of a third country ensure that OTC derivative contracts not cleared by a CCP and entered into by at least one counterparty established in that third country do not expose financial markets in the Union to a higher level of risk and consequently do not pose unacceptable levels of systemic risk in the Union.

<sup>(1)</sup> OJ L 201, 27.7.2012, p. 1.

<sup>(2)</sup> Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (OJ L 52, 23.2.2013, p. 11).

<sup>(3)</sup> Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (OJ L 340, 15.12.2016, p. 9).

- (4) On 1 October 2013, the Commission received the technical advice of the European Securities and Markets Authority ('ESMA') on the legal, supervisory and enforcement arrangements in Canada <sup>(\*)</sup> including, inter alia, the operational risk mitigation techniques applicable to OTC derivative contracts not cleared by a CCP. In its technical advice, ESMA concluded that given that Canada was still in the process of finalising its regulatory regime for the clearing obligation, non-financial counterparties and risk mitigation techniques for uncleared trades, it was not in a position to perform a conclusive analysis and deliver a technical advice on this topic.
- (5) The Commission has taken note of ESMA's technical advice and has taken into account the regulatory developments that have taken place since then. This Decision is not only based on a comparative analysis of the legal, supervisory and enforcement requirements applicable in Canada, but also on an assessment of the outcome of those requirements and their adequacy in order to mitigate the risks arising from OTC derivative contracts not cleared by a CCP in a manner considered equivalent to the outcome of the requirements laid down in Regulation (EU) No 648/2012.
- (6) The legal, supervisory and enforcement arrangements applicable in Canada for OTC derivative contracts are laid down in Guideline E-22 on Margin Requirements for Non-Centrally Cleared Derivatives and in Guideline B-7 on Derivatives Sound Practices (together 'the Guidelines') of the Office of the Superintendent of Financial Institutions ('OSFI'). Non-compliance with the Guidelines may trigger a review of the authorisation under which entities subject to the Guidelines operate. OSFI exercises prudential regulation and supervision of Federally-Regulated Financial Institutions (FRFIs) in Canada and is responsible for monitoring and enforcement of compliance with all OSFI guidelines. FRFIs refer to banks, foreign bank branches, bank holding companies, trust and loans companies, cooperative credit associations, cooperative retail associations, life insurance companies, property and casualty insurance companies and insurance holding companies. The Guidelines establish minimum standards for margin and other risk mitigation techniques requirements for non-centrally cleared derivatives transactions undertaken by FRFIs. Guideline B-7 entered into force in November 2014 while Guideline E-22 entered into force in June 2017 and some of its requirements are subject to a phase-in in accordance with the international framework and aligned with the existing phase-in in Delegated Regulation (EU) 2016/2251.
- (7) The operational risk mitigation techniques for OTC derivative contracts not cleared by a CCP, as laid down in Guideline B-7, are still insufficient when compared to the obligations provided for in Article 11(1) and 11(2) of Regulation (EU) No 648/2012 and Delegated Regulation (EU) No 149/2013 with regard to timely confirmation, portfolio compression and reconciliation, and transaction valuation. This Decision should therefore only cover the legal, supervisory and enforcement arrangements concerning dispute resolution obligations as provided for in Article 11(1) of Regulation (EU) No 648/2012 and Delegated Regulation (EU) No 149/2013 as well as those concerning margin requirements as provided for in Article 11(3) of Regulation (EU) No 648/2012 and Delegated Regulation (EU) 2016/2251.
- (8) With regard to the requirements for the resolution of disputes applicable to OTC derivatives not cleared by a CCP, the OTC derivatives provisions of Canada included in Guideline B-7 applicable to Covered FRFIs contain similar obligations to those provided for in Article 11(1) of Regulation (EU) No 648/2012. In particular, Guideline B-7 contains specific provisions regarding dispute resolution applicable to OTC derivative contracts not cleared by a CCP.
- (9) Concerning the margins for OTC derivative contracts not cleared by a CCP, the provisions laid out in Guideline E-22 apply to OTC derivative contracts defined as in point (7) of Article 2 of Regulation (EU) No 648/2012, with the exception of physically settled FX forwards and FX swaps, which are not subject to the margin requirements provided for under Guideline E-22, and the fixed physically settled FX transactions associated with the exchange of principal of cross-currency swaps, which are exempted from initial margin requirements under Guideline E-22, as well as of physically settled commodity transactions which are not included in the definition of a derivative under Guideline E-22. In accordance with Articles 27, 30, 30a, 31 and 38 of Delegated Regulation (EU) 2016/2251, FX swaps and FX

(\*) ESMA/2013/1375, Technical advice on third country regulatory equivalence under EMIR – Canada, Final report, European Securities and Markets Authority, 1 October 2013.

forwards, as well as the exchange of principal of currency swaps, are exempted from the initial margin requirements, whereas derivatives associated with covered bonds for hedging purposes, some derivatives connected with securitisation, derivatives with counterparties in third countries where legal enforceability of netting agreements or collateral protection cannot be ensured as well as single-stock equity options and index options benefit from exemptions from initial and variation margin requirements. This Decision should therefore not apply to physically settled commodity derivatives.

- (10) Under Guideline E-22 all FRFIs belonging to a consolidated group whose aggregate month-end average notional amount of non-centrally cleared derivatives for March, April, and May of 2016 and any year thereafter exceeds CAD 12 billion ("Covered Entities") must exchange initial and variation margin. Under Guideline E-22 Canada has adopted the internationally agreed schedule for the phase-in of initial margin requirements. Sovereigns, central banks, public sector entities, eligible multilateral development banks, the Bank for International Settlements and central counterparties are excluded from the definition of a Covered Entity. Treasury subsidiaries that undertake risk management activities on behalf of subsidiaries within a corporate group and some special purpose entities (SPEs) are excluded from the definition of Covered Entities. This Decision should therefore cover the legal, supervisory and enforcement arrangements regarding dispute resolution and exchange of collateral obligations applicable to FRFIs that are Covered Entities ("Covered FRFIs"). Article 11 of Regulation (EU) No 648/2012 require all counterparties to an OTC derivative transaction not cleared by a CCP to exchange variation margins on a daily basis. This Decision should therefore be conditional on the exchange of variation margin for transactions conducted with Covered FRFIs.
- (11) According to Guideline E-22, initial and variation margin must be calculated and called within two business days of the execution of a transaction on a non-centrally cleared derivative between a Covered FRFI and a Covered Entity. Thereafter, margins must be calculated and called on a daily basis. Margins must be posted or received at the latest on the second business day following each call for margins. Article 12 of Delegated Regulation (EU) 2016/2251 requires all counterparties to an OTC derivative contract not cleared by a CCP to exchange variation margin on daily basis, or adjust the margin period of risk used to calculate the initial margin accordingly. Therefore, conditions should be laid down with regard to variation margin.
- (12) Guideline E-22 also provides for a combined minimum transfer amount of initial and variation margins of CAD 750 000. This amount is set at EUR 500 000 in Article 25 of Delegated Regulation (EU) 2016/2251. Taking into account the marginal difference in the value of those currencies and the common objective, those amounts should be considered equivalent.
- (13) As for the calculation of initial margin, in a similar manner to the standardised method for the calculation of the initial margin set out in Annex IV to Delegated Regulation (EU) 2016/2251, Guideline E-22 allows for the use of a standardised model equivalent to the one laid out in the aforementioned Annex. Alternatively, internal or third-party models may be used to calculate the initial margin where those models meet certain requirements which are equivalent to those set in Delegated Regulation (EU) 2016/2251. Internal and third-party models are subject to review by OSFI against the criteria established for compliance.
- (14) The requirements in Guideline E-22 on eligible collateral and on how that collateral is held and segregated are similar to those set out in Delegated Regulation (EU) 2016/2251. Guideline E-22 contains an equivalent list of eligible collateral and, similarly to Delegated Regulation (EU) 2016/2251, it establishes that collateral must be valued daily. Furthermore, it establishes that initial margin exchanged must be held in such a way as to ensure that it is immediately available to the collecting party in the event of the counterparty's default and is subject to arrangements which protect the posting party to the extent possible in case of bankruptcy of the collecting counterparty.

- (15) With regard to the protection of professional secrecy, information held by OSFI is subject to the provisions set out in section 22 of the Office of the Superintendent of Financial Institutions Act ('OSFI Act'), which ensures that any information regarding the business or affairs of a financial institution, or regarding persons dealing with them, that is obtained by OSFI or by any person acting under the direction of OSFI is confidential and shall be treated accordingly. OSFI and persons acting under its directions are also subject to the Privacy Act, which protects personal information that is under the control of a federal government institution, as well as the Access to Information Act which provides a right to access to information in records under the control of federal government institutions. Therefore section 22 of OSFI Act, together with the Privacy Act and the Access to Information Act, provide guarantees of professional secrecy, including the protection of business secrets, equivalent to those set out in Title VIII of Regulation (EU) No 648/2012.
- (16) Finally, as regards effective federal supervision and enforcement of the legal arrangements in Canada, OSFI has primary responsibility for monitoring and enforcement of compliance with the Guidelines. OSFI can take a wide range of supervisory measures to address any breach of the applicable requirements. Those measures should therefore be considered to provide for the effective application of the relevant legal, regulatory and enforcement arrangements under the Guidelines in an equitable and non-distortive manner so as to ensure effective supervision and enforcement equivalent to the supervisory and enforcement arrangements available under the Union legal framework.
- (17) This Decision recognises equivalence of binding requirements set out in Canadian law relating to OTC derivative contracts applicable at the time of adoption of this Decision. The Commission, in cooperation with ESMA, will monitor on a regular basis the evolution of the legal, supervisory and enforcement arrangements for these OTC derivative contracts and their consistent and effective implementation, regarding the timely confirmation, portfolio compression and reconciliation, valuation, dispute resolution and margin requirements applicable to OTC derivative contracts, not cleared by a CCP with respect to which this Decision has been taken. As part of its monitoring efforts the Commission may request OSFI to provide information on regulatory and supervisory developments. The Commission may undertake a specific review at any time, where relevant developments make it necessary for the Commission to reassess the declaration of equivalence granted by this Decision. Such reassessment may lead to the repeal of this Decision, which would as a consequence make counterparties automatically subject again to all requirements laid down in Regulation (EU) No 648/2012.
- (18) 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 13(3) of Regulation (EU) No 648/2012, the legal, supervisory and enforcement arrangements of Canada for dispute resolution obligations set out in Guideline B-7 that are applied to non-centrally cleared derivative transactions regulated by the Office of the Superintendent of Financial Institutions ('OSFI') shall be considered as equivalent to the requirements set out in Article 11(1) of Regulation (EU) No 648/2012, where at least one of the counterparties to those transactions is established in Canada and is a Covered Federally Regulated Financial Institution ('Covered FRFIs') as defined under Guideline E-22.

#### *Article 2*

For the purposes of Article 13(3) of Regulation (EU) No 648/2012, the legal, supervisory and enforcement arrangements of Canada for the exchange of collateral that are applied to non-centrally cleared derivative transactions regulated by OSFI, with the exception of physically settled commodity derivatives, shall be considered as equivalent to the requirements set out in Article 11(3) of Regulation (EU) No 648/2012 as further specified in Delegated Regulation (EU) 2016/2251, where the following conditions are satisfied:

- (a) at least one of the counterparties to those transactions is established in Canada and is subject to the margin requirements of Canada;

(b) transactions are marked-to-market and, where variation margin is required to be provided under Regulation (EU) No 648/2012, variation margin is exchanged on the same day on which it is calculated;

By way of derogation from point (b), where it is established between the counterparties that variation margin cannot consistently be provided on the same day in which it is calculated, the legal, supervisory and enforcement arrangements of Canada shall also be considered as equivalent to the requirements of Article 11(3) of Regulation (EU) No 648/2012 where variation margin is provided within two business days of its calculation and the margin period of risk used to calculate initial margin is adjusted accordingly.

#### *Article 3*

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, 5 July 2021.

*For the Commission*  
*The President*  
Ursula VON DER LEYEN

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