

COMMISSION IMPLEMENTING DECISION (EU) 2016/1073**of 1 July 2016****on the equivalence of designated contract markets in the United States of America in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council****(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 ⁽¹⁾, and in particular Article 2a(2) thereof,

Whereas:

- (1) Regulation (EU) No 648/2012 lays down clearing and bilateral risk-management requirements for over-the-counter ("OTC") derivative contracts as well as reporting requirements for such contracts. Point (7) of Article 2 of Regulation (EU) No 648/2012 defines OTC derivatives as derivative contracts the execution of which does not take place on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council ⁽²⁾ or on a third country market considered as equivalent to a regulated market in accordance with Article 2a of Regulation (EU) No 648/2012. Therefore, any derivative contract the execution of which takes place on a third country market not deemed equivalent to regulated markets are classified as OTC for the purposes of Regulation (EU) No 648/2012.
- (2) In accordance with Article 2a of Regulation (EU) No 648/2012, a third-country market is considered equivalent to a regulated market where it complies with legally binding requirements which are equivalent to the requirements laid down in Title III of Directive 2004/39/EC and is subject to effective supervision and enforcement in that third country on an ongoing basis.
- (3) In order for a third country market to be considered equivalent to a regulated market within the meaning of Directive 2004/39/EC, the substantive outcome of the applicable legally binding requirements and supervisory and enforcement 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 legally binding requirements which apply to designated contract markets (DCMs) in the United States of America (USA) are equivalent to the requirements laid down in Title III of Directive 2004/39/EC, and that those markets are subject to effective supervision and enforcement on an ongoing basis. Markets which are authorised as DCMs on the date of adoption of this Decision should be therefore identified as markets considered equivalent to a regulated market within the meaning of Directive 2004/39/EC.
- (4) DCMs are boards of trade that operate under the regulatory oversight of the Commodity Futures Trading Commission (the CFTC) pursuant to Section 5 of the Commodity Exchange Act (CEA), 7 USC 7. The legally binding requirements for DCMs authorised in the USA consist of the CEA, which together with the Commodity Futures Trading Commission's regulations (CFTC regulations) establish the legal framework for the operation of the DCM. Part 38 of the CFTC's regulations specifies the requirements for operating as a board of trade and sets out 23 core principles that DCMs must comply with on an initial and ongoing basis. The CFTC regulations require DCMs to operate a trading facility which generally, under the CEA, means a multilateral system in which participants have the ability to execute transactions in accordance with non-discretionary rules. DCMs must provide members with impartial access to their markets and services. The access criteria must be impartial, transparent, and applied in a non-discriminatory manner. In addition, CFTC regulations subject DCMs to organisational requirements with regards to conflicts of interest policy, risk management, trading and clearing and

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

⁽²⁾ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

settlement arrangements, listing rules as well as monitoring of compliance. Under Core Principle 2 (17 CFR §38.150 (2015)) the board of trade must establish, monitor and enforce compliance with the internal rules of the DCM, including rules prohibiting abusive trade practices on it. To this end, it must have the capacity to detect, investigate and apply appropriate sanctions to any person that violates any internal rule of the DCM.

- (5) The legally binding requirements applicable to DCMs authorised in the USA which are set out in the legal framework for the operation of DCMs deliver substantial results equivalent to those of the requirements laid down in Title III of Directive 2004/39/EC in the following areas: authorisation process, definitional requirements, access to the DCM, organisational requirements, requirements for senior management, admission of derivatives to trading, suspension and removal of derivatives from trading, monitoring of compliance and access to clearing and settlement arrangements.
- (6) Under Directive 2004/39/EC, pre- and post-trade transparency requirements apply only to shares admitted to trading on regulated markets. As shares are neither traded nor admitted to trading on DCMs, the Commission considers that the assessment of those requirements is not relevant for the purposes of this Decision
- (7) It should therefore be concluded that the legally binding requirements for DCMs established in the USA deliver results equivalent to those of the requirements laid down in Title III of Directive 2004/39/EC.
- (8) The DCMs operate under the supervision of the CFTC. The primary objective of the CFTC's compliance programme is to evaluate DCM compliance with applicable provisions of the CEA, including the 23 core principles with which DCMs must comply, and CFTC regulations implementing those core principles. To this end, the CFTC conducts examinations of a DCM's compliance with core principles and regulations relating to trade surveillance, market surveillance, audit trail, and DCM disciplinary programmes. Under the market surveillance programme, the CFTC monitors traders to ensure that they comply with provisions in the CEA and CFTC regulations. To this end, the surveillance programme monitors trading activity on DCMs, futures positions, swap transactions and swap positions in order to detect and prevent market abusive practices and to ensure compliance with the CEA and CFTC regulations. In addition, the market review programme reviews all DCM rule filings and the product review programme reviews DCM product terms and conditions filings; both programmes review the filings to ensure consistency with the CEA and the CFTC's regulations.
- (9) The CFTC also has enforcement responsibilities. Under CEA Section 6b, the CFTC may issue an order directing the cessation of specified activities and impose civil or criminal penalties if a DCM is found to violate the CEA or the CFTC's regulations. Pursuant to CEA Section 6c(a) the CFTC may also bring an action in US federal court against any registered entity or other person that violates provisions of the CEA as well as relevant CFTC rules, regulations and orders. DCMs assume certain supervisory responsibilities and are required to monitor and enforce compliance with the internal rules of each DCM. Under 'emergency powers' (CEA § 8a(9)) the CFTC is authorised to direct a DCM to take such action as, in the CFTC's judgment, is necessary to maintain or restore orderly trading in or liquidation of a given derivative contract. The DCMs are also required to have arrangements and resources for effective enforcement of its internal rules.
- (10) It should therefore be concluded that DCMs are subject to effective supervision and enforcement in the USA on an ongoing basis.
- (11) The conditions laid down in Article 2a of Regulation (EU) No 648/2012 should therefore be considered to be satisfied with respect to DCMs authorised in the USA.
- (12) This Decision is based on the legally binding requirements relating to DCMs applicable in the USA 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 arrangements for DCMs and the fulfilment of the conditions on the basis of which this Decision has been taken. In particular, the Commission should review this Decision in light of the entry into application of Regulation (EU) No 600/2014 of the European Parliament and of the Council ⁽¹⁾ and Directive 2014/65/EU of the European Parliament and of the Council ⁽²⁾.

⁽¹⁾ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

⁽²⁾ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

- (13) The regular review of the legal and supervisory arrangements applicable to DCMs in the USA is without prejudice to the possibility of the Commission to undertake a specific review at any time where relevant developments make it necessary for the Commission to reassess the equivalence granted by this Decision. Such re-assessment could lead to the repeal of this Decision.
- (14) 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 point 7 of Article 2 of Regulation (EU) No 648/2012, the boards of trade designated by the Commodity Futures Trading Commission as contract markets in the United States of America and set out in the Annex shall be considered as equivalent to regulated markets as defined in point 14 of Article 4(1) of Directive 2004/39/EC.

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, 1 July 2016.

For the Commission
The President
Jean-Claude JUNCKER

ANNEX

Designated contract markets in the United States of America referred to in Article 1:

- (a) Cantor Futures Exchange, L.P.
 - (b) CBOE Futures Exchange, LLC
 - (c) Chicago Board of Trade (Board of Trade of the City of Chicago, Inc.)
 - (d) Chicago Mercantile Exchange, Inc.
 - (e) Commodity Exchange, Inc.
 - (f) ELX Futures, L.P.
 - (g) Eris Exchange, LLC
 - (h) ICE Futures U.S., Inc.
 - (i) Minneapolis Grain Exchange, Inc.
 - (j) New York Mercantile Exchange, Inc.
 - (k) Nodal Exchange, LLC
 - (l) North American Derivatives Exchange, Inc.
 - (m) OneChicago LLC
 - (n) TrueEX LLC
 - (o) Nasdaq Futures, Inc.
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