

COMMISSION IMPLEMENTING DECISION (EU) 2015/2038**of 13 November 2015****on the equivalence of the regulatory framework of the Republic of Korea 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 the Republic of Korea (hereafter 'South Korea') 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 October 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 South Korea. The technical advice identified a number of differences between the legally binding requirements applicable, at a jurisdictional level, to CCPs in South Korea and the legally binding requirements applicable to CCPs under Regulation (EU) No 648/2012. This Decision is not only based, however, on a comparative analysis of the legally binding requirements applicable to CCPs in South Korea, but also on an assessment of the outcome of those requirements, and their adequacy to mitigate the risks that clearing members and trading venues established in the Union may be exposed to in a manner considered equivalent to the outcome of the requirements laid down in Regulation (EU) No 648/2012. 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.
- (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 South Korea for CCPs authorised therein consist of the Financial Investment Services and Capital Markets Act 2013 ('FSCMA'), including a number of subordinated regulations implementing the FSCMA.

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

- (7) CCPs are authorised by the Financial Services Commission ('FSC'). To grant an authorisation for clearing, the FSC must be satisfied, among other things, that the CCP has equity capital equivalent to the established regulatory minimum, has a proper and sound business plan, has human resources, data-processing equipment and other physical facilities sufficient to protect investors and to conduct clearing business, does not have any officer who is disqualified under the FSCMA, has in place a system for preventing conflicts of interest and its shareholders have adequate financial capabilities, are of good financial standing and social credibility. The FSC may, when granting authorisation, attach conditions as may be necessary for ensuring soundness in management of the CCP and maintaining sound market order. Authorised CCPs are then subject to ongoing supervision by the FSC, as well as oversight by the Bank of Korea under the Bank of Korea Act.
- (8) The FSC has stated its intention to assess its Financial Market infrastructures ('FMIs') against the international standards set out under the Principles for Financial Market Infrastructures ('PFMIs') issued in April 2012 by the Committee on Payment and Settlement Systems⁽¹⁾ ('CPSS') and the International Organization of Securities Commissions ('IOSCO'). In March 2015 the FSC released the Business Guideline for Financial Market Infrastructures, which provides specific standards that FMIs should comply with in conducting business pursuant to the FSCMA and its subordinate regulations. The Guideline has reorganised the 24 key principles of the PFMIs into 14 principles in accordance with domestic circumstances, and provides detailed standards for their implementation. In December 2012, the Bank of Korea amended its 'Regulation on the Operation and Management of Payment and Settlement Systems' to adopt the PFMIs as its oversight standards.
- (9) The FSCMA and its subordinated regulations also require CCPs to adopt internal rules and procedures as are necessary for the proper regulation of its clearing and settlement facilities. The requirements of the FSCMA, its subordinated regulations, the Guideline and the Regulation on the Operation and Management of Payment and Settlement Systems are thus implemented in the internal rules and procedures of the clearing houses. Under the FSCMA, any revision to the articles of incorporation or internal rules and procedures of CCPs must be approved by the FSC.
- (10) The legally binding requirements in South Korea therefore comprise a two-tiered structure. The FSCMA and its subordinated regulations set out the high-level standards which CCPs must comply with in order to obtain authorisation to provide clearing services in South Korea. Those primary rules comprise the first tier of the legally binding requirements in South Korea. In order to prove compliance with the primary rules, CCPs must submit their internal rules and procedures to the FSC for approval in accordance with the Business Guideline for Financial Market Infrastructures. Those internal rules and procedures comprise the second tier of requirements in South Korea.
- (11) The equivalence assessment of the legal and supervisory arrangements applicable to CCPs in South Korea should also take account of 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 to due to their participation 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 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 the same risk mitigation outcome, more stringent risk mitigation requirements are needed for CCPs carrying out their activities in bigger 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.
- (12) The size of the financial market in which CCPs authorised in South Korea carry out their clearing activities is significantly smaller than that in which CCPs established in the Union carry out theirs. In particular, over the past three years, the total value of derivative transactions cleared in South Korea represented less than 1 % of the total value of derivative transactions cleared in the Union. Therefore, participation in CCPs authorised in South Korea exposes clearing members and trading venues established in the Union to significantly lower risks than their participation in CCPs authorised in the Union.
- (13) The legal and supervisory arrangements applicable to CCPs authorised in South Korea may therefore be considered as equivalent where they are appropriate to mitigate that lower level of risk. The primary rules

⁽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'.

applicable to those CCPs, complemented by their internal rules and procedures which implement the PFMI, mitigate the lower level of risk existing in South Korea and achieve a risk mitigation outcome equivalent to that pursued by Regulation (EU) No 648/2012.

- (14) The Commission therefore concludes that the legal and supervisory arrangements of South Korea 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.
- (15) According to the second condition under Article 25(6) of Regulation (EU) No 648/2012, the legal and supervisory arrangements of South Korea in respect of CCPs authorised therein must provide for effective supervision and enforcement of those CCPs on an ongoing basis.
- (16) The FSC is responsible for establishing and implementing supervisory rules and for the inspection and examination of financial institutions. The FSC, as the primary supervisor of CCPs, has the comprehensive power to control and penalise them including, among other things, the power to cancel the license of CCPs, the power to suspend and transfer the business of CCPs, and the power to impose sanctions on the CCPs. Day-to-day supervision is conducted by the Financial Supervisory Service ('FSS') which acts under the oversight of the FSC. CCPs are subject to biannual inspection, each of four weeks duration, and non-periodic inspection on the supervisor's demand. The FSS conducts ongoing monitoring of CCPs' compliance with risk management requirements through surveillance and risk-based examination procedures including testing of prudential requirements. Additionally, one of the main objectives of the Bank of Korea's oversight of CCPs authorised in South Korea is to secure their safety and efficiency. It carries out oversight by assessing information on CCPs, conducting biennial assessments of them against the PFMI, and requesting improvements if necessary. The Bank of Korea has the authority to require these improvements to be made, with the agreement of the Monetary Policy Committee if it is a major improvement.
- (17) The Commission therefore concludes that the legal and supervisory arrangements of South Korea in respect of CCPs authorised therein provide for effective supervision and enforcement on an ongoing basis.
- (18) According to the third condition under Article 25(6) of Regulation (EU) No 648/2012, the legal and supervisory arrangements of South Korea must include an effective equivalent system for the recognition of CCPs authorised under third country legal regimes ('third-country CCPs').
- (19) Third country CCPs which want to clear OTC derivatives in South Korea have to apply to the FSC for approval.
- (20) In order for approval to be granted, the jurisdiction in which the CCP is established must have a sufficiently robust regulatory regime similar to the legal and supervisory arrangements applicable in South Korea. The conclusion of cooperative arrangements between South Korean and competent third-country authorities is also required before the third country CCP application is approved.
- (21) The recognition procedure of the legal regime of South Korea applicable to third country CCPs that want to clear OTC derivatives therein should therefore be considered as providing for an effective equivalent system for the recognition of third country CCPs.
- (22) 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 South Korea 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 South Korea and the fulfilment of the conditions on the basis of which this decision has been taken.
- (23) The regular review of the legal and supervisory arrangements applicable in South Korea 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 reassess the equivalence granted by this decision. Such reassessment could lead to the withdrawal of the recognition of equivalence.
- (24) 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 South Korea consisting of the Financial Investment Services and Capital Markets Act 2013 and its subordinated regulations as complemented by the Business Guideline for Financial Market Infrastructures and the Regulation on the Operation and Management of Payment and Settlement Systems, 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
