

COMMISSION IMPLEMENTING DECISION (EU) 2015/2039**of 13 November 2015****on the equivalence of the regulatory framework of South Africa 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 South Africa 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) This Decision is based on the outcome of the legal and supervisory arrangements applicable in South Africa 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 Africa for CCPs authorised therein consist of the Financial Markets Act, Act No 19 of 2012 ('FMA'). The Registrar of Securities Services ('the Registrar') has a comprehensive set of powers to oversee, monitor and investigate clearing houses authorised to operate in South Africa ('licensed clearing houses').
- (7) The FMA sets out the duties and requirements with which clearing houses must comply. In particular, under the FMA, the Registrar grants the authorisation to operate as a licensed clearing house, provided that the applicant complies with those requirements and contributes to the achievement of the objectives set out in the FMA, including systemic risk mitigation and ensuring that the South African financial markets are fair, efficient and transparent. In order to ensure those requirements are met, the Registrar may impose the conditions it considers appropriate when granting an authorisation. Licensed clearing houses must conduct their business in a fair and transparent manner and with due regard to the rights of clearing members and their clients. Moreover, pursuant

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

to the FMA, licensed clearing houses must comply with international supervisory standards, including 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 ('IOSCO').

- (8) The FMA empowers the Minister of Finance to make regulations regarding any matter required or permitted to be prescribed by the FMA or any other matter necessary for the better administration and implementation of the FMA. Moreover, the Registrar is empowered under the FMA to issue guidelines on the application and interpretation of the FMA and take any measures it considers necessary for the proper performance and exercise of its functions or duties or for the implementation of the FMA.
- (9) The equivalence assessment of the legal and supervisory arrangements applicable to licensed clearing houses 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 licensed clearing houses. 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 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.
- (10) The size of the financial market in which licensed clearing houses 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 Africa represented less than 1 % of the total value of derivative transactions cleared in the Union. Therefore, participation in licensed clearing houses 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 licensed clearing houses may therefore be considered as equivalent where they are appropriate to mitigate that lower level of risk. The primary rules applicable to licensed clearing houses, which require compliance with the PFMIs, mitigate the lower level of risk existing in South Africa and achieve a risk mitigation outcome equivalent to that pursued by Regulation (EU) No 648/2012.
- (12) The Commission therefore concludes that the legal and supervisory arrangements of South Africa ensure that licensed clearing houses authorised therein comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of Regulation (EU) No 648/2012.
- (13) According to the second condition under Article 25(6) of Regulation (EU) No 648/2012, the legal and supervisory arrangements of South Africa in respect of CCPs authorised therein must provide for effective supervision and enforcement of those CCPs on an ongoing basis.
- (14) The Registrar supervises and enforces compliance with the FMA. In particular, the Registrar annually assesses whether licensed clearing houses comply with the FMA and their internal rules and procedures, as well as with directives, requests, conditions or requirements of the Registrar made pursuant to the FMA. The Registrar is also empowered to revoke or suspend the authorisation of a licensed clearing house if the latter fails to comply with the FMA, its internal rules and procedures or with a directive, request, condition or requirement made by the Registrar pursuant to the FMA, among others.
- (15) The Registrar has the power to request information or documents from licensed clearing houses and to conduct on-site inspections. After an on-site inspection has taken place, the Registrar can, among other things, request a licensed clearing house to take any steps or to refrain from performing any act in order to terminate or remedy an irregularity. Penalties may be imposed by the Registrar in case of failure by a licensed clearing house to submit any information pursuant to the FMA. Moreover, in order to ensure the implementation and administration of the FMA, the Registrar may issue general directives or directives addressed to a specific entity.
- (16) The Commission therefore concludes that the legal and supervisory arrangements of South Africa in respect of CCPs authorised therein provide for effective supervision and enforcement on an ongoing basis.

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

- (17) According to the third condition under Article 25(6) of Regulation (EU) No 648/2012, the legal and supervisory arrangements of South Africa 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 are equivalent to those of the South African regulatory framework, which have equivalent regulation on anti-money laundering and combating financial terrorism, and in which CCPs are subject to effective supervision may provide services in South Africa provided they are authorised by the Registrar. For granting an authorisation, the Registrar will assess the application for authorisation taking into consideration the regulatory framework of the third country and may take into account information provided by any other supervisory authority, including third-country supervisory authorities. Moreover, the Registrar may exempt the third country CCPs from some or all of the requirements required under the FMA. The Registrar may enter into cooperation arrangements with third-country regulatory or supervisory authorities with the purpose of coordinating the supervision on an ongoing basis and exchanging information regarding third-country CCPs authorised in a third-country in which the legal and supervisory arrangements are equivalent to those of the South African regulatory framework and which are subject to effective supervision in the third-country in which they are authorised.
- (19) While noting that the structure of the recognition procedure of the legal regime of South Africa applicable to third-country CCPs differs from the procedure laid down in Regulation (EU) No 648/2012, it should nonetheless be considered as providing for an effective equivalent system for the recognition of third-country CCPs.
- (20) 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 Africa regarding licensed clearing houses, 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 Africa 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 South Africa 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.
- (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 Article 25 of Regulation (EU) No 648/2012, the legal and supervisory arrangements of South Africa consisting of the Financial Markets Act and applicable to licensed clearing houses 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